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## The Writing on the Wall: The Potential Liability of Mediators as Fiduciaries

### I. INTRODUCTION

The number of potential fiduciary relationships is continuously evolving to adjust to changing economic and social conditions.<sup>1</sup> As one scholar noted, “The twentieth century is witnessing an unprecedented expansion and development of the fiduciary law.”<sup>2</sup> Historically, courts have intentionally refrained from specifically defining the scope of fiduciary duties in an effort to keep the definition of a fiduciary open to new possibilities and situations. Indeed, in 1924 the Oklahoma Supreme Court observed, “Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded.”<sup>3</sup> As the Oklahoma Supreme Court further explained, “The expression ‘fiduciary relation’ is one of broad meaning, including both technical fiduciary relations and those informal relations which exist when one man trusts and relies upon another.”<sup>4</sup> Over the past few decades in particular, courts have increasingly extended the designation of “informal fiduciary” under certain factual circumstances to individuals—including some clergy,<sup>5</sup> educators,<sup>6</sup> travel agents,<sup>7</sup> and even parents<sup>8</sup>—who have not

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1. See GEORGE GLEASON BOGERT, *THE LAW OF TRUSTS & TRUSTEES* § 7, at 29 (2d ed. 1984) (“Since 1800 there has been a great expansion and development in the law of trusts in order to adapt it to changing economic and social conditions.”).

2. Tamara Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 796 (1983).

3. *Reeves v. Crum*, 225 P. 177, 179 (Okla. 1924) (citation omitted); see also *Konover Dev. Corp. v. Zeller*, 635 A.2d 798, 806 (Conn. 1994) (“The Connecticut Supreme Court has purposefully refrained from defining ‘a fiduciary relationship in precise detail and in such a manner as to exclude new situations.’” (quoting *Harper v. Ademetz*, 113 A.2d 136, 139 (Conn. 1955))).

4. *Reeves*, 225 P. at 179.

5. *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988); *Erickson v. Christenson*, 781 P.2d 383, 386 (Or. 1989).

6. *Chou v. Univ. of Chi.*, 254 F.3d 1347, 1362 (Fed. Cir. 2001); *Johnson v. Schmitz*, 119 F. Supp. 2d 90, 98 (D. Conn. 2000).

7. *Maurer v. Cerkenik-Anderson Travel, Inc.*, 890 P.2d 69, 71 (Ariz. Ct. App. 1994); *Rodriguez v. Cardona Travel Bureau*, 523 A.2d 281, 284 (N.J. Super. Ct. Law Div. 1986).

traditionally been considered inherent fiduciaries. Although courts, and most scholars, have not yet recognized fiduciary liability for mediators, this paper suggests that certain legal mediation relationships are a likely future addition to this list. This paper further argues that, applied correctly, the law of fiduciary duties can provide an appropriate, effective, and predictable means of defining and regulating obligations owed by mediators to their clients in certain mediation relationships.

Part II provides background information on the law of fiduciary duties, particularly the characteristics of both formal and informal fiduciary relationships, and on the characteristics and regulation of the growing mediation profession. Part III details the current trends that will likely lead to a future increase in claims against mediators based on breaches of fiduciary duties. Part IV discusses the consequent likelihood that courts will eventually hold some mediators liable for fiduciary duties. This section includes the academic debate throughout the past two decades and discusses why most scholars and mediators, along with the courts, have dismissed the idea that mediators owe clients fiduciary duties and thus can be held liable for breaches of those duties.

Part V discusses the unpredictability of the traditional approach to determining fiduciary liability and describes a new fact-based analytical framework, developed by Professors Brett G. Scharffs and John W. Welch,<sup>9</sup> to both identify the factors which likely heighten a mediator's duty and to provide a guide for mediators on how to prevent the attachment of fiduciary duties. This section provides a discussion of recent cases in which courts have declined to hold a mediator to the enhanced duties of a fiduciary. When analyzed under the Scharffs-Welch framework, the language of these rulings indicates the strong possibility of holding mediators liable as fiduciaries under specific factual circumstances when the magnitude of the breach is particularly extreme. Part VI confronts and attempts to overcome, through the use of the Scharffs-Welch framework, several of the concerns voiced by opponents of extending fiduciary duties to mediators. Part VII provides a brief conclusion.

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8. *Hieble v. Heible*, 316 A.2d 777, 780 (Conn. 1972); *Swift v. Ball*, No. CV010344047S, 2005 WL 648145, at \*8 (Conn. Super. Ct. Feb. 22, 2005).

9. Brett G. Scharffs & John W. Welch, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duties of Educators*, 2005 BYU EDUC. & L.J. 159.

It should be emphasized at the outset that the purpose of this paper is not to encourage litigation against a group of professionals who offer society an important alternative to litigation.<sup>10</sup> Rather, this paper attempts to consider the potential fiduciary liability of mediators in order to improve the quality of mediation service. Analyzing the nature of mediation relationships under an analytic framework of fiduciary duty can help practitioners not only identify the existence or lack of fiduciary relationships more effectively but also assess individual circumstances to prevent, or at least predict, the attachment of fiduciary liability. This paper demonstrates that in at least some mediation proceedings a strong argument can be made that mediators owe some degree of fiduciary obligations to the parties—primarily confidentiality, disclosure of conflicts of interest, and good faith. While all mediation relationships will probably not rise to this higher level of duty, the analytical factors discussed provide a guide for determining the likelihood, in particular factual circumstances, that a court might find a mediator liable for fiduciary obligations in the future.

## II. BACKGROUND

### *A. Fiduciary Duty*

The law of fiduciaries provides an equitable doctrine exception to the normal expectations of conduct in a laissez-faire society by legally punishing the pursuit of one's self interest at the expense of another in certain relationships where protecting a high level of trust is essential. Courts have found that while a fiduciary relationship "may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence."<sup>11</sup> Thus, while no definition has been derived that is flexible enough to specifically cover all fiduciary situations,<sup>12</sup> a fiduciary relationship typically exists

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10. See Arthur A. Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731, 733 (1984).

11. *Stone v. McClam*, 257 S.E.2d 78, 83 (N.C. Ct. App. 1979), *quoted in* *HAJMM Co. v. House of Raeford Farms, Inc.*, 403 S.E.2d 483, 489 (N.C. 1991).

12. See Gregory B. Westfall, *"But I Know It When I See It": A Practical Framework for Analysis and Argument of Informal Fiduciary Relationships*, 23 TEX. TECH L. REV. 835, 836

when there is a special relationship of confidence and trust imposed and a position of superiority or influence results by virtue of this special trust.<sup>13</sup>

Once a court establishes that a fiduciary relationship exists between two or more parties, the fiduciary (the party in a position of influence) is liable to the beneficiaries (the parties who trust and rely on the fidelity of the fiduciary) for certain duties. The complexity of fiduciary law lies in the vast number of statutes and court opinions, arising in almost all areas of law, that deal with defining and applying these fiduciary duties. Justice Cardozo, while sitting for the New York Court of Appeals in *Meinhard v. Salmon*, provided the most famous explanation of the high standard of duty that should apply to fiduciaries:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.<sup>14</sup>

The Supreme Court acknowledged the lack of any comprehensive list of fiduciary duties when it explained, "rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."<sup>15</sup> Such duties could include the duty to not commit fraud, gross negligence, or intentional wrongdoing; to act with care and prudence; to obey pertinent instructions; to be loyal, diligent, and exercise good faith; to voluntarily disclose material information; to avoid self-dealing or self-interested conduct; and to take the initiative in behalf of

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(1992) (stating that finding an exact definition of "fiduciary" reminds one of Justice Stewart's predicament in deriving a workable definition for "pornography," when he stated, "I know it when I see it . . . ." (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring))).

13. See, e.g., *Anchor v. O'Toole*, 94 F.3d 1014, 1023 (6th Cir. 1996) ("[A] fiduciary relation is one in which a 'special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.'" (quoting *Craggett v. Adell Ins. Agency*, 635 N.E.2d 1326, 1331 (Ohio Ct. App. 1993))).

14. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

15. *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000).

beneficiaries.<sup>16</sup> Once a court establishes the existence of a fiduciary relationship, any or all of these duties may be applied depending on the factual circumstances and the degree of formality of the relationship under which the fiduciary duties occur.

Courts have identified two basic types of fiduciary relationships: formal and informal.<sup>17</sup> As one commentator explained, “Formal fiduciary relationships arise as a matter of law based on the status of the parties. Conversely, informal confidential relationships, and the accompanying fiduciary obligations, are determined from the unique facts pertaining to the parties’ particular relationship.”<sup>18</sup> Some legal relationships are so typically imbued with inherent qualities of trust, confidence, and good faith that courts have been able to comfortably assume that, in the absence of evidence to the contrary, a formal fiduciary relationship must exist. For example, the Fifth Circuit Court of Appeals has noted that “certain formal fiduciary relationships, such as principal/agent, attorney/client, partnership and trustee-cestui que trust, give rise to fiduciary duties as a matter of law.”<sup>19</sup> Based on the inherent trust and reliance associated with their positions, the list of commonly accepted formal fiduciaries includes corporate officers, agents, partners, lawyers, guardians, employers, and trustees.<sup>20</sup> Much of the well-established law of fiduciaries deals with these formal relationships, and fiduciaries in these relationships are generally held to the highest levels of fiduciary duties.

Courts have additionally found that informal confidential relationships may also give rise to some fiduciary duties in certain factual circumstances when a special relationship of trust is

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16. See BLACK’S LAW DICTIONARY 658 (8th ed. 2004); RESTATEMENT (SECOND) OF TRUSTS § 170 (1992).

17. See, e.g., *Lee v. LPP Mortg. Ltd.*, 74 P.3d 152, 160 (Wyo. 2003) (quoting *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1998)).

18. Roy Ryden Anderson, *The Wolf at the Campfire: Understanding Confidential Relationships*, 53 SMU L. REV. 315, 325 (2000).

19. *Imperial Premium Fin., Inc. v. Khoury*, 129 F.3d 347, 353 (5th Cir. 1997) (citing *ARA Auto. Group v. Cent. Garage, Inc.*, 124 F.3d 720, 723 (5th Cir. 1997)).

20. See, e.g., *City of Aurora v. Colo. State Eng’r*, 105 P.3d 595, 622 (Colo. 2005) (citing RESTATEMENT (SECOND) OF AGENCY § 1(1) (1957) (defining agency as a fiduciary relation)); *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988) (“A fiduciary relationship exists between attorney and client.”).

established.<sup>21</sup> This second type of fiduciary relationship is not based on the trust and reliance inherent to the type of relationship itself but is instead “implied in law due to the factual situation surrounding the involved transaction, and the relationship of the parties to each other and to the transaction.”<sup>22</sup> Courts have explained that a “fiduciary relationship need not be created by contract,” and certain types of fiduciary duties can occasionally arise in select non-contractual relationships.<sup>23</sup> Particularly in these informal relationships, courts have found that the attachment of fiduciary obligations is not driven by title or status alone, but rather by varying factual circumstances determined through a fact-specific analysis. For example, the Ninth Circuit Court of Appeals has held that “the existence of a fiduciary relation is a question of fact which properly should be resolved by looking to the particular facts and circumstances of the relationship at issue.”<sup>24</sup>

Courts have found that such informal relationships may establish certain fiduciary duties when the facts indicate a “confidential relationship”<sup>25</sup> in which “one person trusts in and relies upon another, whether the relation is a moral, social, domestic or merely personal one.”<sup>26</sup> For example, fiduciary liability has been applied to clergy members when the “plaintiff’s claim . . . is not premised on the mere fact that [the defendant] is a pastor, but on the fact that, because he was *plaintiff’s* pastor and counselor, a special relationship of trust and confidence developed.”<sup>27</sup> Similarly, certain university

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21. See, e.g., *Stone v. Davis*, 419 N.E.2d 1094, 1098 (Ohio 1981) (“[A] fiduciary relationship . . . may arise out of an informal relationship where both parties understand that a special trust or confidence has been reposed.”).

22. *Lee*, 74 P.3d at 160.

23. *Stone*, 419 N.E.2d at 1098.

24. *In re Daisy Sys. Corp.*, 97 F.3d 1171, 1178 (9th Cir. 1996); see also *Crim Truck & Tractor Co. v. Navistar Int’l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992) (holding that the existence of an informal fiduciary relationship is a question of fact unless the “issue is one of no evidence”); Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 167 (2003) (stating that the attachment of fiduciary obligations is driven by circumstances and thus “the inquiry about the existence of fiduciary duties is fact specific”).

25. *Lee*, 74 P.3d at 160.

26. *Crim Truck*, 823 S.W.2d at 594 (quoting *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 261 (Tex. 1951)).

27. *Erickson v. Christenson*, 781 P.2d 383, 386 (Or. 1989); see also *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988) (finding that a priest who “holds himself out to the community as a professional or trained marriage counselor” had a fiduciary duty to counseled members); Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789; Brett G. Scharffs & Cheryl Preston, *The Religious*

educators have been found liable for breaches of their fiduciary duty of loyalty based not on their status as professors but rather on their blatant pursuit of self-interest at the great expense of trusting students.<sup>28</sup> Courts have also extended fiduciary duties of care to travel agents for failing to disclose known dangers of travel.<sup>29</sup> Courts have even acknowledged that while “the bond between parent and child is not *per se* a fiduciary one; it does generate, however, a natural inclination to repose great confidence and trust.”<sup>30</sup> Thus, while the category of formal fiduciaries seems to be fairly established and limited, the emergence of informal fiduciary relationships is more fluid and open to new factual circumstances that satisfy the need to protect trusting parties from certain breaches of that trust.

This flexibility allows for the possibility of expanding the definition of fiduciary relationships to include circumstances such as mediation, and it ensures that the designation of fiduciary duties is not limited to only formal fiduciary relationships. Such fluidity can also lead to uncertainty about when and to what degree fiduciary duties apply in informal relationships of trust, and thus, under the traditional doctrinal approach to fiduciary analysis, potential informal fiduciaries cannot adequately predict if they must act with a higher duty than normally required for their type of relationship status. A more structured analytical framework, such as that described in Part V, is thus needed to ensure a greater degree of predictability in determining both the existence of an informal fiduciary relationship and the extent to which fiduciary duties apply in that relationship.

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Judgment Rule and the Fiduciary Duties of Clergy (Feb. 2005) (unpublished article, on file with author).

28. See *Chou v. Univ. of Chi.*, 254 F.3d 1347, 1362 (Fed. Cir. 2001); *Johnson v. Schmitz*, 119 F. Supp. 2d 90, 98 (D. Conn. 2000); see also Scharffs & Welch, *supra* note 9, at 160; Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 552 (1987) (describing faculty-student relationships as fiduciary relationships).

29. See *Maurer v. Cerkenvenik-Anderson Travel, Inc.*, 890 P.2d 69, 71 (Ariz. Ct. App. 1994) (holding the travel agent potentially violated fiduciary duty of care by failing to warn customer of the train’s known history of drunken college student fatalities); *Rodriguez v. Cardona Travel Bureau*, 523 A.2d 281, 284 (N.J. Super. Ct. Law Div. 1986) (finding that travel agent violated fiduciary duty in failing to explain risks of travel with charter carrier that later went bankrupt).

30. *Hieble v. Heible*, 316 A.2d 777, 780 (Conn. 1972); see also *Swift v. Ball*, No. CV010344047S, 2005 WL 648145, at \*8 (Conn. Super. Ct. Feb. 22, 2005) (“[R]elationships that generate a natural inclination to trust, such as brother-brother or parent-child . . . also supply a strong indicium of a fiduciary relationship.” (quoting *Martinelli v. Bridgeport Roman Catholic Diocesan*, 10 F. Supp. 2d 138, 154 (D. Conn. 1998))).



*B. Mediation*

In essence, mediation is a voluntary legal process engaged in by disputing parties who choose to decide the resolution of their dispute themselves, under the direction of an impartial third party mediator, rather than submitting to the imposition of a judicial ruling through traditional litigation. The mediator facilitates negotiation “to assist disputing parties in voluntarily reaching their own mutually acceptable” compromises tailored to the needs and interests of both parties without the relatively higher costs associated with a more formal legal proceeding or even an arbitration.<sup>31</sup> The Model Standards of Conduct recently adopted by the American Bar Association, American Arbitration Association, and the Association for Conflict Resolution set forth the following five specific objectives of mediation: “Providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.”<sup>32</sup>

In an age of increasing legal conflicts, the benefits of mediation have drawn many who want to avoid the complexity and adversarial nature of litigation to resolve their disputes through alternative methods such as mediation. Mediation offers expedited resolutions, cost savings, confidentiality, privacy, self-determination of the resolution by the parties, the opportunity for preserving relationships between parties, informality, flexibility, and mutually agreeable resolutions. The informality of the mediation process also allows almost anyone to serve in the role of mediator as long as the mediator fulfills any relevant state requirements for mediation certification or training. All states acknowledge that both lawyers and non-lawyers can serve as professional mediators, although wide national disparity persists concerning the proper standards and requirements for mediator certification.<sup>33</sup> Additionally, at least one study has provided statistically significant data that alternative dispute

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31. Ronald J. Hedges, *Mediation Developments & Trends*, SK042 A.L.I.-A.B.A. 1485, 1487 (2005) (quoting *Saeta v. Superior Ct.*, 11 Cal. Rptr. 3d 610, 616 (Ct. App. 2004)).

32. AM. BAR ASS'N ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2 (2005), <http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf>.

33. See Richard Birke & Louise Ellen Teitz, *U.S. Mediation in 2001: The Path That Brought America to Uniform Laws and Mediation in Cyberspace*, 50 AM. J. COMP. L. 181, 191-92 (2002).

resolution programs increase the likelihood of a monetary settlement.<sup>34</sup> Other sources indicate that participation in the mediation process generally contributes to greater satisfaction for both parties involved.<sup>35</sup> For these reasons, the presence of the mediation profession has grown substantially in the last few decades.<sup>36</sup>

Throughout its short history, the use of mediation as a method of alternative dispute resolution has developed without the guidance of a consistent or comprehensive regulatory system. Starting in the 1960s, mediation emerged as a viable alternative to litigation in non-mainstream areas of law such as labor management, and neighborhood and domestic relations disputes.<sup>37</sup> While mediation remained circumscribed within these limited areas, the need for regulation never arose as a prominent issue.<sup>38</sup> Throughout the 1970s and 1980s, mediation expanded into an industry impacting nearly all aspects of law. At the illustrious Pound Conference in 1976, Professor Frank Sander described his vision of a future “multi-door courthouse” that would divert a substantial amount of cases to non-litigation processes.<sup>39</sup> By prominently including the use of mediation in his model, Sander’s call for reform marks the critical moment when the legal community first officially acknowledged the potential of mediation to play an influential role in the future of dispute resolution.<sup>40</sup>

Since that time, mediation has rapidly become more and more institutionalized in society with the dramatic escalation of the use of alternative dispute resolution in recent years. Indeed, over the past few decades, the mediation profession has “grown in epic

34. See Hedges, *supra* note 31, at 1489.

35. See, e.g., Chris Guthrie & James Levin, *A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 887 n.7 (1998).

36. See Charles Pou, Jr., *Assuring Excellence, or Merely Reassuring? Policy and Practice In Promoting Mediator Quality*, 2004 J. DISP. RESOL. 303, 303 (“Mediation practice has grown substantially over the last two decades . . . .”); Evan Spelfogel, *New Trends in the Arbitration of Employment Disputes*, ARB. J., Mar. 1993, at 6.

37. See Birke & Teitz, *supra* note 33, at 182–83.

38. See *id.* at 186.

39. Frank E. A. Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65 (A. Leo Levin & Russell R. Wheeler eds., 1979).

40. See Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: The ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators*, 5 APPALACHIAN J.L. 195, 200 (2006).

proportions.”<sup>41</sup> The Prefatory Note to the proposed Uniform Mediation Act explains that

[d]uring the last thirty years the use of mediation has expanded beyond its century-long home in collective bargaining to become an integral and growing part of the processes of dispute resolution in the courts, public agencies, community dispute resolution programs, and the commercial and business communities, as well as among private parties engaged in conflict.<sup>42</sup>

One commentator observed this growth and warned, “The practice of mediation, like computerized electronic transfers, is growing so rapidly and in such unpredictable ways that it may be folly to presently attempt to capture the future in binding legislation.”<sup>43</sup> This concern for preserving the flexibility of mediation has not hindered the passage of numerous statutes relating to mediation, but may have restrained many lawmakers from entering into a nationally standardized approach to mediation and from engaging in a significant degree of formal regulation of the profession.

The significant and recent growth in this area has left many courts, lawmakers, and scholars unsure about how to approach mediation from a legal perspective.<sup>44</sup> A Harvard Law Review article in 1986 observed, “The recent spread of informal methods of dispute resolution into new areas has galvanized a debate regarding the legal character of one of the most popular informal specialists, the mediator.”<sup>45</sup> This debate continues today. Mediation is still a fairly unregulated service, and few formal quality control mechanisms exist. Currently, the legal rules affecting mediation are complex,

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41. Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty To Maintain Mediation Confidentiality and the Duty To Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 719; see also Birke & Teitz, *supra* note 33 at 182–83.

42. NATIONAL CONFERENCE OF COMISSIONERS ON UNIFORM STATE LAWS, UNIFORM MEDIATION ACT, Prefatory Note (2003), <http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.pdf>.

43. Hedges, *supra* note 31, at 1500.

44. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 15 (1994) (“While the growth of mediation in the past two decades is remarkable, what is even more striking is the extraordinary divergence of opinion about how to understand that growth and how to characterize the mediation movement itself.”).

45. Note, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 HARV. L. REV. 1876, 1876 (1986) [hereinafter *Sultans of Swap*].

scattered, and inconsistent.<sup>46</sup> The widespread success of mediation as an alternative form of dispute resolution has now engendered more than 2500 state and federal statutes attempting to institutionalize mediation.<sup>47</sup> These statutes establish mediation programs in a wide variety of contexts and encourage or even mandate their use.<sup>48</sup> Many states have also created offices to encourage greater use of mediation.<sup>49</sup> However, such a plethora of regulations leads to complexity in the law and a lack of uniformity, which result in uncertainty over how and when to apply the statutes, especially in a multi-state context.<sup>50</sup> Furthermore, these numerous statutes contain almost no standardization for such important issues as mediation certification requirements, ethical standards, confidentiality requirements, evidentiary privileges against disclosure in legal proceedings, immunity from litigation for mediators, and quality control.

Many scholars have expressed concern about the effect that inconsistencies in confidentiality protections, the lingering application to mediators of traditional immunity or quasi-immunity from litigation, few statutory or regulatory restrictions, and a lack of required credentialing have had, and will likely have in the future, on the quality of mediation.<sup>51</sup> Commentators have regarded openness and confidentiality of disclosures as “pillars of mediation,” yet these commentators have also observed that

the development of institutional protection for mediation confidentiality has been anything but uniform. Some states offer a mediation privilege that is held by the parties, and other jurisdictions vest a separate right in the mediator. Some states have

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46. See Hedges, *supra* note 31, at 1498.

47. See Uniform Law Commissioners, *Why States Should Adopt the Uniform Mediation Act* (2001), [http://www.nccusl.org/Update/uniformact\\_why/uniformacts-why-uma.asp](http://www.nccusl.org/Update/uniformact_why/uniformacts-why-uma.asp) (last visited Oct. 3, 2006).

48. See SARAH R. COLE, CRAIG A. McEWEN & NANCY H. ROGERS, *MEDIATION: LAW, POLICY, PRACTICE* app. B (2d ed. 2001 & 2001 Supp.).

49. See, e.g., ARK. CODE ANN. § 16-7-102 (1995); HAW. REV. STAT. § 613-2 (1989); KAN. STAT. ANN. § 5-501 (1996); MASS. GEN. LAWS ch. 7, § 51 (1998); NEB. REV. STAT. § 25-2904 (1991); N.J. STAT. ANN. § 52:27E-73 (West 1994); OHIO REV. CODE ANN. § 179.02 (West 1995); OKLA. STAT. tit. 12, § 1803.1 (1983); OR. REV. STAT. § 36.105 (1997); W. VA. CODE § 55-15-2 (1990).

50. See Uniform Law Commissioners, *supra* note 47.

51. See, e.g., Moffitt, *supra* note 24.

clear rules about ‘mandatory reporting’ (of various offenses, like child abuse) while others have more opaque rules or none at all.<sup>52</sup>

And some scholars call for full immunity for mediators based on their quasi-judicial role,<sup>53</sup> whereas others argue that “[m]ediator immunity represents the inequitable shifting of risk of mediator misconduct from the mediators and the courts to those mediation participants least able to protect themselves from or shoulder the burden of such negative behavior.”<sup>54</sup> These inconsistencies hinder any comprehensive regulation of mediation. Commentator Michael Moffitt has consequently observed, “As the use of mediation explodes in popularity, assuring the quality of mediation services has become an increasingly visible challenge.”<sup>55</sup> Moffitt explains that “[m]ost occupations and professions have credentialing or other barriers to entry into practice, statutory or regulatory restrictions on practice methods, and oversight of some sort. . . . In contrast, mediation operates with few, if any, formal structures for assuring the quality of mediation services.”<sup>56</sup>

Recent efforts have been made to pass more standardized regulations and ethical codes for mediation, including a proposed Uniform Mediation Act (“UMA”) and Model Standards of Conduct for Mediators.<sup>57</sup> Referring to the multitude of inconsistent statutes currently affecting mediation, one commentator remarked, “Many of those statutes can be replaced by the [UMA], which applies a generic approach to topics that are covered in varying ways by a number of specific statutes currently scattered within substantive provisions.”<sup>58</sup>

The preface to the proposed UMA states, “In particular, the law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process

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52. Birke & Tietz, *supra* note 33, at 195–96; *see also* Owen V. Gray, *Protecting the Confidentiality of Communications in Mediation*, 36 OSGOODE HALL L.J. 667 (1998).

53. Joseph B. Stulberg, *Mediator Immunity*, 2 OHIO ST. J. ON DISP. RESOL. 85, 85 (1986).

54. Scott H. Hughes, *Mediator Immunity: The Misguided and Inequitable Shifting of Risk*, 83 OR. L. REV. 107, 111 (2004).

55. Moffitt, *supra* note 24, at 148.

56. *Id.*

57. The text of the UMA and the accompanying reporters’ notes are available at <http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm> (last visited Oct. 3, 2006). The 2005 Model Standards of Conduct for Mediators are available at <http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf>.

58. *See* Hedges, *supra* note 31, at 1498.

are met, rather than frustrated. For this reason, a central thrust of the Act is to provide a privilege that assures confidentiality in legal proceedings.”<sup>59</sup> The National Conference of Commissioners on Uniform State Law adopted the UMA in 2001, and the American Bar Association approved it in 2002 primarily to provide uniform mediation standards and procedures to protect the confidentiality of mediations in subsequent litigation.<sup>60</sup> The American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution also recently adopted Model Standards of Conduct for Mediators, which provide uniform ethical and conduct standards to better protect the quality of mediation for clients.<sup>61</sup> While the UMA and the Model Standards of Conduct have not yet been adopted by many states and thus do not have the force of law, they indicate a trend toward increased regulation of mediation to address the need for quality control and accountability of mediators for misconduct.

The probable future standardization of mediation rules and conduct standards will likely increase the potential for litigation based on mediator misconduct. The current lack of such standards, and thus of any clearly discernable duty of care upon which a court could base a ruling, has been cited as a leading obstacle to currently holding mediators liable for misconduct.<sup>62</sup> But as standards of conduct for mediators become more institutionalized through the passage of more standardized regulations, the duties for which courts can hold mediators accountable for misconduct and ethical violations will become more clear, and it will become easier to establish liability.

The UMA acknowledges the potential for litigation against mediators by permitting disclosure of a mediation communication (as an exception to the mediation privilege of confidentiality established in the UMA) if the communication is sought or offered to prove or disprove a claim or complaint “of professional misconduct or malpractice” against a mediator.<sup>63</sup> The New Jersey State Bar Association has acknowledged this proposed provision and

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59. See UNIFORM MEDIATION ACT, *supra* note 42, at Prefatory Note.

60. See Uniform Law Commissioners, *supra* note 47.

61. See *supra* note 57.

62. Moffitt, *supra* note 24, at 168.

63. UNIFORM MEDIATION ACT, *supra* note 42, at § 6(5).

noted that if the UMA is adopted by the states, “[I]t might be possible to argue that the legislature has indirectly created a new cause of action of professional misconduct or professional malpractice for mediators, where one did not exist before.”<sup>64</sup>

Another commentator has also warned mediators that ethics codes, even aspirational codes such as the 2005 Model Standards of Conduct, “can establish a standard of care for mediators that tort lawyers will reference when attempting to prove mediator malpractice.”<sup>65</sup> The note on construction for the Model Standards of Conduct also explicitly acknowledges this risk, stating,

These standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.<sup>66</sup>

As discussed below, this increased litigation against mediators resulting from more standardized regulations could effectively include the possibility of claims for fiduciary liability when a mediator severely breaches his duties.

### III. CURRENT TRENDS LEADING TO THE LIKELIHOOD OF FUTURE MEDIATOR FIDUCIARY DUTY CLAIMS

As described above, recent decades have witnessed both the expanding category of informal fiduciaries to whom fiduciary liability may be applied in certain factual circumstances as well as the increasing popularity of mediation as an alternative to litigation.<sup>67</sup> Against the backdrop of today’s increasingly litigious society, these concurrent trends lead to a resulting increase in the concern of mediators about liability insurance to protect against litigation. The trends also lead to the likelihood of an increase in fiduciary duty claims against mediators in the future. This section explores the intersection of these trends and concludes that not only will lawsuits against mediators continue to generally increase, but also, more

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64. New Jersey State Bar Association, *Report Regarding the Uniform Mediation Act* (on file with author), *quoted in* Hedges, *supra* note 31, at 1563.

65. Young, *supra* note 40, at 208.

66. AMERICAN BAR ASSOCIATION ET AL., *supra* note 32, at 3.

67. *See supra* Part II.B.

specifically, mediators will increasingly face lawsuits based on claims of breach of the mediators' fiduciary duties. These trends in current society thus provide the basis for the argument in Part IV that future courts will likely expand the category of informal fiduciary to include mediators who substantially violate their ethical duties. If courts apply the analytical framework discussed in Part V, this eventual application of fiduciary law to certain mediators could provide a more effective, appropriate, and predictable means of defining and regulating the obligations of mediation relationships.

American society has become increasingly litigious as more people turn to attorneys and the courts to resolve disputes. Consequently, tort reform has become a major national issue at the forefront of public policy discussions.<sup>68</sup> Many commentators have expressed concern about this trend of seeking legal solutions to every type of problem in every type of relationship.<sup>69</sup> As one commentator observed, "Litigation has become our national pastime."<sup>70</sup> In spite of efforts to reform the legal process, litigation remains a significant threat to those who provide a variety of services. Professionals such as physicians, attorneys, and even teachers have been forced to take steps to protect themselves against liability.<sup>71</sup> Although litigation against mediators remains as yet minimal compared to other professions, as mediation continues to become more institutionalized it is likely that the trend of litigiousness will increasingly affect

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68. See, e.g., George W. Bush, *Legal Reform: The High Costs of Lawsuit Abuse*, <http://www.whitehouse.gov/infocus/medicalliability> (last visited Mar. 21, 2006) ("The costs of litigation per person in the United States are far higher than in any other major industrialized nation in the world. Lawsuit costs have risen substantially over the past several decades. . . . This explosion in litigation is creating a logjam in America's civil courts and threatening jobs across America.").

69. See PHILIP K. HOWARD, *THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA'S LAWSUIT CULTURE UNDERMINES OUR FREEDOM* (2002); PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1996); Mortimer B. Zuckerman, *Welcome To Sue City, U.S.A.*, U.S. NEWS & WORLD REP., June 16, 2003, at 64.

70. Zuckerman, *supra* note 69, at 64.

71. See Mark Carpenter, *Education Not Litigation: The Paul D. Coverdell Teacher Liability Protection Act of 2001*, CITIZENS FOR A SOUND ECON., Mar. 21, 2001, available at [http://www.cse.org/informed/pdf\\_files/cc293\\_Teacher\\_Protection\\_Act.pdf](http://www.cse.org/informed/pdf_files/cc293_Teacher_Protection_Act.pdf) ("[T]eachers are becoming more and more concerned each school year with the threat of lawsuits. In fact, a survey by the American Federation of Teachers shows that liability protection ranks among the top three concerns teachers want their unions to address."); Jessica Portner, *Fearful Teachers Buy Insurance Against Liability*, EDUC. WK., Mar. 29, 2000 (showing that the number of teachers purchasing liability insurance increased 25 percent between 1995 and 2000).



mediators.<sup>72</sup> More specifically, as statutory restrictions and regulations provide more formal parameters and more established duties for mediators, mediator liability and exposure to litigation is also likely to increase. The histories of both medical and attorney malpractice suits indicate that as mediation becomes more established professionally and economically, malpractice suits will likely follow.<sup>73</sup>

Already, increasing litigation against service providers and professionals and the growth of a largely unregulated mediation profession, as described in Part II, have combined to produce a new trend—a burgeoning sense of apprehension about liability and potential litigation among mediators. At a 2004 symposium on mediator accountability, Alvin L. Zimmerman, a former Texas district court judge and current mediator, voiced his concerns about the future of the mediation profession and the threat that “malpractice will become a more oppressive industry” to mediators as the mediation profession becomes more established in society.<sup>74</sup> Zimmerman is not alone in these concerns. Michael Moffitt has also observed, “Despite the historical rarity of suits against mediators, many within the mediation community are demonstrating concern about the prospect of mediators being sued. An increasing number of jurisdictions and programs require mediators to carry liability

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72. The trend of mediators’ relative freedom from lawsuits likely is not a result of mediators not making mistakes, but rather the result of several contributing factors, including the difficulty of succeeding on such claims, the immunity which sometimes extends to mediators, and the disputant’s disposition toward settlement and other non-adjudicative means, which would likely create a desire to resolve a dispute with the mediator without resorting to litigation. See Moffitt, *supra* note 24, at 150–53.

73. David I. Bristow & Jesmond Parke, *The Gathering Storm of Mediator & Arbitrator Liability*, 55 DISP. RESOL. J. 14, 16 (2000); see also Alvin L. Zimmerman et al., *Mediator Accountability: Ethical and Legal Standards of the Profession*, 28 AM. J. TRIAL ADVOC. 47, 61 (2004) (“I almost parallel where we are today to an infant or burgeoning profession, almost like doctors in the early days. As long as doctors charged very little, made house calls, were courteous, and listened to the complaint of their patients, there were not malpractice claims to speak of. . . . I submit to you that, while we are infants, the public is putting up with us. As our fees increase, however, and as our obnoxiousness and independence grow more important, I believe that malpractice will become a more oppressive industry to those of us sitting in this room.”).

74. See Zimmerman et al., *supra* note 73, at 61. The very nature of this symposium indicates the increasing concern of mediators about the degree of their accountability and the potential threat of future malpractice litigation.

insurance.”<sup>75</sup> Although mediators have traditionally been considered fairly protected from lawsuits,<sup>76</sup> and although few claims have been filed against mediators and even fewer claims have succeeded,<sup>77</sup> mediators increasingly buy liability insurance; many jurisdictions and programs require mediators to carry such insurance.<sup>78</sup> One scholar and mediator observed that, in his own experience, “the percentage of training time mediators spend asking about the prospect of liability has increased over the past decade.”<sup>79</sup> Adding to this apprehension, a journal article in 2000 warned of a “gathering storm” of liability on the horizon about to strike mediators: “As lawyers, doctors, and indeed all professionals stood for so long seemingly immune from blame and liability, before the harsh winds of change struck them, so now our arbitrators and mediators carry on from day to day while the barometer is falling.”<sup>80</sup>

No court has yet recognized mediation as a fiduciary relationship, but the issue of mediator liability is increasingly being discussed by the judiciary. While claims filed against mediators are still fairly uncommon, they have increased in recent years.<sup>81</sup> Courts

75. Michael Moffitt, *Ten Ways To Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81, 83 (2003).

76. See, e.g., Moffitt, *supra* note 24, at 150–52 (“[I]t is extraordinarily difficult to sue a mediator successfully.”); see also Zimmerman et al., *supra* note 73, at 59–61.

77. See Moffitt, *supra* note 24, at 150–51; see also L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY’S L.J. 325, 414–15 (2006) (“There are few reported Texas cases where actions have been filed against mediators, and none where a mediator has been held liable for any act or omission connected with the conduct of a mediation. It is unlikely that there will be many such cases, because any plaintiff will have to show that an act or omission of the mediator caused some legal injury.”).

78. See, e.g., Cuyahoga County, Ohio, Domestic Relations Rule 32(E)(4), <http://domestic.cuyahogacounty.us/Rules/Rule32.htm> (requiring mediators to have liability insurance) (last visited Oct. 3, 2006); *Gotcha Covered: Your Professional Liability Insurance Coverage*, AAM NEWSL., Feb. 2001, <http://www.attorney-mediators.org/news200102.html> (setting minimum liability insurance policy limits); West Virginia State Web Portal, *Family Court-Ordered Mediation in West Virginia*, <http://www.state.wv.us/wvsca/familyct/cover.htm> (requiring mediators to have liability insurance) (last visited Oct. 3, 2006).

79. Moffitt, *supra* note 75, at 83.

80. Bristow & Parke, *supra* note 73, at 16.

81. See James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 47–49, 95, 98 (2006) (Analyzing all 1223 state and federal court mediation decisions available on the Westlaw databases “allstates” and “allfeds” for the years 1999 through 2003, and finding that in this five-year span when general civil case loads were relatively steady or declining nationwide, mediation litigation increased 95 percent, from 172 decisions in 1999 to 335 in 2003. Litigation concerning mediator misconduct as a contract defense was much more infrequent—only

largely dismiss these claims; there was only one reported case from all federal and state courts that found a mediator liable to a party for mediation misconduct, and in that case the defendant successfully appealed the jury award.<sup>82</sup> The defendant asserted that his actions did not constitute negligence because, as a mediator rather than as an attorney, he owed no duty to perform the tasks the plaintiff claimed he had negligently failed to perform.<sup>83</sup> The Court of Appeals specifically declined to resolve the precise nature of the defendant's duties, resolving the matter on the issue of proximate causation instead and reversing the judgment.<sup>84</sup> One commentator has noted that "[a]s a result, no cases exist in the official reporters in which a mediator ultimately paid a former client for injuries the mediator caused during mediation."<sup>85</sup>

Although lawsuits against mediators are minimal and suits where mediators lose are even more scarce, the number of lawsuits against mediators are increasing.<sup>86</sup> As such litigation against mediators increases generally, fiduciary liability is one potential form that lawsuits may take.<sup>87</sup> Such actions are still a novel concept. The few courts that have considered the idea of mediator liability, and specifically fiduciary liability, have rejected the idea. Yet there are indications that not only will such fiduciary claims eventually be brought against mediators, but also courts will likely find fiduciary duties to exist in certain situations. Indeed, although no court has yet clearly found such an existence of a fiduciary mediation relationship, the federal reporters record that in recent years at least one breach of fiduciary duty claim has in fact been filed against a

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seventeen cases in the five-year span—and the study revealed only four claims filed specifically naming mediators as defendants for misconduct.); *see also* Zimmerman et al., *supra* note 73, at 57 (stating that only twenty-one claims have been made against mediators for misconduct and that those have occurred mainly since 2001 (citing statistics provided by Complete Equity Markets (on file with the authors of the article))).

82. *See* Lange v. Marshall, 622 S.W.2d 237, 238 (Mo. Ct. App. 1981) (holding that the party suing her attorney-mediator failed to establish that she suffered any damages proximately caused by the attorney-mediator's misconduct); *see also* Coben & Thompson, *supra* note 81, at 98 (citing a search of Westlaw and Lexis-Nexis databases on May 15, 2006 that yielded no reported cases in which the mediator was held liable for misconduct in his role as a mediator).

83. *Lange*, 622 S.W.2d at 238.

84. *Id.* at 238–39.

85. Moffitt, *supra* note 24, at 150–51.

86. *See* Zimmerman et al., *supra* note 73, at 56–57.

87. *See* Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45, 63 (2005).

1033]

*The Potential Liability of Mediators as Fiduciaries*

mediator for misconduct.<sup>88</sup> This claim indicates the potential for dissatisfied mediation clients to bring breach of fiduciary duty actions when seeking remedies for mediator misconduct. As discussed below in Part V, while the factual circumstances of this and other relevant cases did not rise to the level of breaches of duty serious enough to warrant the extension of fiduciary liability, these cases leave open the possibility that such liability may be found in certain other mediation situations.

The expanding definition of informal fiduciaries, coupled with fiduciary-like duties such as confidentiality and good faith already inherent to mediation, make the mediation profession a viable candidate for courts to apply fiduciary liability in certain circumstances of extreme breaches of those duties. Although, as discussed in Part IV below, historically most commentators have argued that mediation and fiduciary law are incompatible, commentators Lela P. Love and John W. Cooley have recently explained:

Mediators may violate the duty of trustworthiness by deceiving parties as to their credentials or by misinforming parties as to the kind of service that will be provided. Consequently, the failure to obtain the parties' consent to the mediator's provision of an evaluation may give rise to a cause of action for breach of fiduciary duty. Where a court finds the existence of a fiduciary relationship between a mediator and a party, the fiduciary will be under a special duty of full disclosure.<sup>89</sup>

Although there is currently a lack of lawsuits brought against mediators under fiduciary law, the current trend appears to be heading in that direction. This possibility leads to the issue of whether, when confronting future lawsuits brought against mediators under fiduciary law, courts will find the existence of a fiduciary relationship and apply fiduciary liability.

#### IV. EXTENDING FIDUCIARY DUTIES TO MEDIATORS

Although the courts have thus far consistently refused to attach fiduciary duties to mediators, for the past couple of decades scholars have debated the extent of mediators' duties to their clients,

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88. *Lehrer v. Zwernemann*, 14 S.W.3d 775, 776 (Tex. App. 2000).

89. Love & Cooley, *supra* note 87, at 63.

including the possibility of holding those who practice mediation liable for breaches of fiduciary duties. As recently noted, “[c]urrently, the question of the legal nature and scope of the professional duties of mediators is an open one, as is the question of what the remedies might be if a mediator violates such unspecified duties.”<sup>90</sup>

In 1984, Professor Arthur Chaykin first hypothesized that mediators could be, and in fact should be, considered to owe fiduciary duties.<sup>91</sup> He argued that the essence of fiduciary duties can be discoverable in the principle of “justifiable trust.”<sup>92</sup> He asserted that the concept of justifiable trust is “readily adaptable to the mediation context” because the “mediator actively seeks to gain the trust of the [parties] in order to maximize effectiveness,” the “parties rely on the mediator” to be honest and fair to both parties, and the “mediator has superior skill, experience, and information,” giving him a “powerful political position between the [two] parties.”<sup>93</sup> He further argued that “[t]rust is such an essential element of the mediator’s work . . . that mediators generally should be held to the virtually per se rule applied to trustees and attorneys.”<sup>94</sup> Thus, Chaykin’s arguments sought to attach the highest level of fiduciary duties to most, if not all, mediators and to include mediators in the category of the formal fiduciary.

Chaykin’s arguments to extend fiduciary liability to mediators were immediately and justifiably met with criticism by mediators and mediation scholars, including those who wanted to protect the freedom from liability that mediators traditionally enjoyed. A *Harvard Law Review* article in 1986 accurately criticized Chaykin’s approach as an “overbroad formulation of mediators’ legal duties and liabilities.”<sup>95</sup> It argued that “[t]he main shortcoming of the fiduciary model lies in its insistence on holding all mediators—regardless of their compensation arrangements, institutional

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90. Hedges, *supra* note 31, at 1563.

91. Chaykin, *supra* note 10, at 732.

92. *Id.* (“[T]he essential consideration in determining if a fiduciary duty exists is whether, under the circumstances of the case, the injured party justifiably trusted the defendant. If he did, the courts generally will find a fiduciary duty and subject the fiduciary to high standards of fairness and significant procedural burdens.”). *Id.* at 744.

93. *Id.* at 744–45.

94. *Id.* at 745.

95. *Sultans of Swap*, *supra* note 45, at 1877.

incentives, and professional expertise—liable in damages for defects in the contractarian process.”<sup>96</sup> By ignoring the great differences among mediators who function in different institutional settings, Chaykin’s argument “failed to account for the qualitative differences between the contractarian processes that mediators facilitate.”<sup>97</sup>

Another article, written in the same year by Joseph Stulberg, explicitly disagreed with Chaykin’s assumptions regarding the mediator’s role.<sup>98</sup> Stulberg instead advocated that legislation be drafted holding a mediator “completely immune from legal liability for all actions undertaken in his role as a mediator.”<sup>99</sup> Yet in spite of his direct and complete dismissal of Chaykin’s thesis that mediators might be liable for fiduciary duties, Stulberg conceded that when a mediator deliberately provides incorrect information in order to improve one party’s position at the expense of the other, a compelling argument might be made that such conduct violates a mediator’s duty to the parties.<sup>100</sup> As such, it is not a “mediating act” warranting immunity.<sup>101</sup> However, while Stulberg agreed with Chaykin that liability might attach as an analytical matter in such circumstances, he argued it would be too difficult to prove in reality.<sup>102</sup>

Thus, while these articles, written soon after Chaykin’s article, adamantly criticized his argument that mediators should be held to formal fiduciary duties, they either directly or implicitly accepted at least the premise that mediators might be held liable in some circumstances for misconduct relating to duties typically owed by fiduciaries. However, both of these authors ultimately dismissed Chaykin’s general idea of holding mediators liable as fiduciaries. This dismissal set the tone for subsequent decades of academic discussion of mediator liability. Later commentators generally continued to

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96. *Id.* at 1883.

97. *Id.* at 1877.

98. Stulberg, *supra* note 53, at 85 (“I disagree with Professor Chaykin’s assumptions regarding the mediator’s role, and consequently, find his conclusions regarding mediator liability unpersuasive.”).

99. *Id.* *But see* Hughes, *supra* note 54, at 111 (“Mediator immunity represents the inequitable shifting of risk of mediator misconduct from the mediators and the courts to those mediation participants least able to protect themselves from or shoulder the burden of such negative behavior.”).

100. Stulberg, *supra* note 53, at 87.

101. *Id.*

102. *Id.*

argue that mediation did not qualify as even an informal fiduciary relationship.

Writing several years after Chaykin's article, Michael Moffitt also admitted that "[a]s a *theoretical* matter, an injured mediation party could assert that the mediator's behavior constituted a breach of fiduciary obligations."<sup>103</sup> Yet he argues that "[a]t best, fiduciary obligations involve highly flexible standards that would produce relatively uncertain—even perhaps chaotic or 'idiosyncratic'—treatment."<sup>104</sup> Thus, he concludes that fiduciary obligations could extend into the realm of mediation "only with a degree of judicial adaptation," which he claims is "unlikely to be forthcoming."<sup>105</sup> In addition to his concern over the "chaotic" nature of fiduciary law, Moffitt echoes concerns of other critics in identifying obstacles to applying fiduciary law to mediators, such as the lack of a fixed standard by which to judge mediator obligations, the lack of a position of superiority sufficient to warrant fiduciary status, and the structural difficulty of asserting simultaneous fiduciary duties to parties with opposing interests. Moffitt warns that "[f]iduciary obligations cannot be structured responsibly in a way that would damn the mediator no matter what she did, yet holding a fiduciary obligation simultaneously to opposing parties risks exactly that."<sup>106</sup> Similarly, other critics have argued that the nature of the fiduciary obligation fits uneasily with the mediator's dual obligations to adverse parties.

In spite of the skepticism of most scholars since Chaykin, a few scholars and mediators have recently indicated that fiduciary duties might be a strong possibility in the future of mediation. For example, in 2000 David Bristow and Jesmond Parke warned of the "gathering storm" of mediator liability and argued that rather than immunity from liability, the nature of alternative dispute resolution professions indicates that mediators "expose themselves to great risk of liability."<sup>107</sup> Bristow and Parke argue that breach of fiduciary duty is among the potential claims "just over the horizon" for

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103. Moffitt, *supra* note 24, at 167 (emphasis added).

104. *Id.* at 168 (quoting Chaykin, *supra* note 10, at 748).

105. *Id.*

106. *Id.*; see also LAURENCE BOULLE & MIRYANA NESIC, *MEDIATION: PRINCIPLES PROCESS PRACTICE* 519 (2001).

107. Bristow & Parke, *supra* note 73, at 19.

mediators.<sup>108</sup> They conclude that “[i]n the context of mediation, the concept of fiduciary duties is ideal for the assessment of liability” because the mediator acts for the benefit of the clients, and a relationship implying and necessitating great trust, reliance, and confidence exists.<sup>109</sup> In particular, they explain that

[m]ediators are often called upon not only for their expertise in a particular field but also for their ability to mediate or guide a process of negotiation. Expectations are high in their performance of these duties. They are required to be neutral, objective, well-versed in the field they mediate or arbitrate, and to be sensitive to confidential information.<sup>110</sup>

In 2004, Alvin Zimmerman similarly stated to a symposium on mediator accountability, “I suggest to you that each of us serves in a fiduciary capacity. . . . I think the moment we step into a mediation role—the moment we enter the room as a neutral and it is found that we are not neutral—we have misrepresented ourselves.”<sup>111</sup> He claims it is too “myopic” to think that one must have a single client to be a fiduciary.<sup>112</sup> He argues that “[w]hether misrepresentation comes in the form of negligence or in the form of actual misrepresentation or fraud, it constitutes a breach of fiduciary duty,” and he warns that for an “inventive plaintiff lawyer, any of those concepts can be seized upon for liability.”<sup>113</sup> With the theoretical basis of fiduciary liability for mediators accepted by some and the practical application of the theory increasingly being promoted by others in recent years, it is important for mediators as well as plaintiff attorneys to be aware of the concerns and the strengths relating to the argument that mediators are at least potential fiduciaries.

Almost assuredly, mediation will never reach the formal degree of fiduciary duty that attorneys, trustees, and corporate officers possess—and that Chaykin argued for in his 1984 article<sup>114</sup>—because of the lower degrees of power, control, discretion, and dominance entrusted to mediators. But certain qualities inherent, or at least

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108. *Id.*

109. *Id.* at 20.

110. *Id.* at 19.

111. Zimmerman et al., *supra* note 73, at 62.

112. *Id.*

113. *Id.*

114. Chaykin, *supra* note 10, at 745.



common, in mediation relationships serve to establish the potential, and even likelihood, that future courts might extend informal fiduciary duties to mediators under certain factual circumstances.

Trust is arguably an essential element of mediation, for there exists a relationship implying and necessitating a great deal of reliance, confidence, and trust in the mediator on the part of the client in order to make the process run effectively. One scholar noted, “[t]he development of trust is a crucial aspect of both the dispute resolution and education functions of mediation.”<sup>115</sup> Such a high degree of trust and reliance helps to establish a relationship of confidence and thus facilitates the creation of an informal fiduciary relationship. The confidentiality requirements of a mediation relationship also increase the probability that a fiduciary relationship will exist, especially in a jurisdiction that allows mediators an evidentiary privilege to protect mediation confidentiality. The increasing professionalism of mediation also lends itself well to a fiduciary analysis, and if a mediator is licensed or credentialed, it will likely increase the chances of being a fiduciary.<sup>116</sup> Additionally, as more standardized regulations for mediation are adopted, it will become easier to establish a standard by which to judge liability for violation of any duties owed by mediators.<sup>117</sup>

Other fact-specific qualities in each mediation relationship may also contribute to the finding of fiduciary liability. For example, if a mediator is a professional, full-time problem solver hired by the disputant for a substantial fee, a higher level of legal accountability may be appropriate due to the heightened formality of the relationship, the mediator’s level of expertise, the degree of compensation, and the reliance of the client upon the skills and experience of the mediator.<sup>118</sup> This would especially be true if the

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115. Peter A. Veglahn, *Education by Third Party Neutrals: Functions, Methods, and Extent*, 28 LAB. L.J. 20, 24 (1977).

116. See *Alexander v. Culp*, 705 N.E.2d 378, 382 (Ohio Ct. App. 1997) (stating that any professional—not exclusively licensed professionals—can be sued for professional negligence);

Moffitt, *supra* note 24, at 154 n.23 (“Regardless of whether mediation is considered a profession, a mediator will likely be held to owe a heightened duty of care toward her clients. The fact that a mediator may not be considered a ‘professional’ will not generally protect her from liability for professional negligence.”).

117. See *supra* note 62 and accompanying text.

118. See Scharffs & Welch, *supra* note 9, at 169–74, 178–79 (discussing the characteristics of a fiduciary and a fiduciary relationship that tend to heighten the magnitude of the fiduciary’s duty to the beneficiary).

breach was more than just negligence and in fact constituted a clear and intentional failure to fully disclose conflicts of interest, a breach of the confidentiality agreement, or a material misrepresentation regarding the mediator's qualifications or impartiality.<sup>119</sup> On the other hand, if the mediator is a neighborhood volunteer, uncompensated or minimally compensated, whose only claims to expertise are short training sessions, it is less likely that a court would apply the law of fiduciary duty, which would impose risks that would significantly deter volunteer entry into the mediation field or induce mediators to only accept paying clients. The degree of vulnerability and reliance, rather than the sophistication of the mediating clients, would also be a likely factor in establishing a fiduciary relationship, as would the existence of specificity in the promises involved in the contractual agreement.<sup>120</sup>

All or some of these factors, as well as other relevant factors, would work to increase the clients' expectations for the quality of work and duty from the mediator and would thus lead toward the finding of a fiduciary relationship. These factual characteristics of the circumstances surrounding mediation relationships and transactions are key examples of the factors included in the analytical framework described below. While the traditional approach to fiduciary law, as described below, results in little direction for when to apply fiduciary liability to informal relationships of trust, these factors, when analyzed under the framework below, help provide greater predictability.

#### V. FINDING PREDICTABILITY IN FIDUCIARY LAW: THE SCHARFFS-WELCH FRAMEWORK

In the face of the future likelihood of increasing lawsuits against mediators based on their quasi-fiduciary duties and the probable qualification of certain mediations as informal fiduciary relationships in the future, courts and mediators need to find a more predictable method than the complex and unwieldy traditional doctrinal approach to fiduciary law. Traditionally, courts have approached

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119. *See id.* at 209 (discussing a hierarchy of alleged breaches of fiduciary duty and noting that "a court is more likely to find liability for fiduciary conduct that can fairly be characterized as malfeasance as opposed to nonfeasance").

120. *See id.* at 176-77, 185 (demonstrating that vulnerability and reliance of a beneficiary upon a fiduciary tend to increase the magnitude of duty owed by the fiduciary to the beneficiary).

fiduciary liability questions by applying established statutes or common law precedents to determine (1) whether a formal or informal fiduciary relationship exists between the two parties and (2) what duties the fiduciary owes to the beneficiaries and whether the fiduciary breached at least one of those duties.<sup>121</sup> Because this traditional approach takes into account thousands of court rulings and statutes, the law of fiduciaries is not only a complex area of law but is also unpredictable and even inconsistent in determinations about when fiduciary relationships exist and which duties are owed in the context of that relationship. As one court has acknowledged, “[c]ourts have historically declined to offer a rigid definition of a fiduciary relationship in order to allow imposition of fiduciary duties where justified. Thus, the relationship can arise in a variety of circumstances, and may stem from varied and unpredictable factors.”<sup>122</sup> This leads to various courts coming to different and conflicting conclusions about whether similar types of relationships constitute fiduciary relationships and whether similar types of behavior constitute breaches of duties. Focusing solely on the traditional case by case questions of whether a fiduciary relationship exists and whether any duty has been breached provides no predictability for a mediator or other potential informal fiduciary to determine when a court is likely to apply fiduciary duties or to attach fiduciary liability for alleged breaches of duties.

While the multitude of relevant fiduciary cases and statutes provide no comprehensive or systematic approach to this complex area of the law, Professors Brett G. Scharffs and John W. Welch recently developed a fact-intensive analytical framework that provides an organizing principle to the different ways courts have dealt with fiduciary law.<sup>123</sup> Professors Scharffs and Welch developed this framework (the “Scharffs-Welch framework”) in response to the inadequacy of traditional approaches to fiduciary law, observing, “The formulaic application of doctrinal categories often does as much to obfuscate as it does to illuminate the likely outcome of a particular case.”<sup>124</sup> Particularly, they claim that “[f]ocusing exclusively upon whether a fiduciary relationship exists, and whether

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121. *See id.* at 164–65 (describing the traditional “doctrinal approach” to fiduciary law).

122. *HAJMM Co. v. House of Raeford Farms, Inc.*, 403 S.E.2d 483, 489 (N.C. 1991) (citations omitted).

123. *See* Scharffs & Welch, *supra* note 9.

124. *Id.* at 165.

a particular duty has been breached is often not particularly helpful in trying to determine whether a court is likely to find that there has been an actionable breach of fiduciary duty.”<sup>125</sup> In light of the unpredictability and inconsistencies inherent in this traditional approach, the Scharffs-Welch framework is designed to provide guidance for practitioners as well as courts through the maze of fiduciary law.

In developing this new guide to approaching fiduciary law, Professors Scharffs and Welch analyzed a myriad of cases involving alleged breaches of fiduciary duty in a broad array of relationships. Their research collectively revealed as many as thirty factors routinely considered by courts when determining whether to apply fiduciary duties to a relationship and whether to hold a fiduciary liable for breach of those duties.<sup>126</sup> Scharffs and Welch then analyzed the applicable factors tending to either heighten or lower the likelihood of a court holding a fiduciary liable for breach of duty. This analysis revealed several underlying principles that effectively illuminate and organize the often conflicting and seemingly irreconcilable decisions in fiduciary duty case law.<sup>127</sup> By basing their analytical framework on these organizing principles, Scharffs and Welch provide a new approach to fiduciary law that reveals a greater degree of predictability and consistency in fiduciary law than traditional approaches have revealed.

The Scharffs-Welch framework compiles the key factors that courts have regularly considered in approaching fiduciary law and breaks these characteristics down into three related inquiries to assess the magnitude of both duties and breaches on a sliding scale.<sup>128</sup> First, the framework goes beyond the question of whether a fiduciary relationship exists and instead focuses on the *magnitude* of duty arising within a particular relationship of trust. This determination of how high of a duty is owed by a fiduciary is based on several factual characteristics, including the fiduciary’s position, expertise, dominance, amount of control and discretion entrusted, amount of compensation, and whether the fiduciary serves in a full-time or part-time capacity; the beneficiary’s vulnerability or sophistication; the

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125. *Id.* at 166.

126. *See id.*

127. *See id.*

128. *See id.* at 166–67.

formality, expectations, specificity of promises, voluntariness, relative power, reliance, divergence of interests, and negotiation involved in the relationship; and the significance of the subject matter involved.<sup>129</sup> Second, the framework evaluates the magnitude of the alleged breach of that duty, based on factors such as the following: the magnitude, frequency, and duration of the harm; the character of the fiduciary's deliberative process; the character of the fiduciary's motives, presence of greed, or conflicts of interest; and the classification, such as disclosure or fraud, of the alleged breach.<sup>130</sup> Third, the framework looks to the context of the breach to determine the appropriate degree of damages required.<sup>131</sup>

By evaluating both the magnitude of the fiduciary duty in a relationship of trust as well as the magnitude of the breach of that duty, the Scharffs-Welch framework provides an effective tool to predict the likelihood for liability. It allows a practitioner, legal counsel, or judge to analyze the situation under the factors and then to determine whether the specific characteristics of the mediation relationship in question are of a high enough magnitude in the duty and the breach to warrant liability. In their article introducing their new approach to fiduciary law, Professors Scharffs and Welch apply the framework to educators and demonstrate that the framework provides an effective model to accurately predict when courts will apply fiduciary duties to educators.<sup>132</sup> They explain that the framework "is useful in evaluating a broad array of fiduciary relationships and is particularly helpful in the complex and multifaceted area of evaluating alleged breaches of duty by teachers and educators."<sup>133</sup> Specifically, Scharffs and Welch demonstrate that under the traditional approach, an "overly simplistic application of doctrines such as 'duty of care' and 'duty of loyalty' may result in outcomes that are difficult to explain or reconcile with other decisions."<sup>134</sup> With consideration of magnitude of both duty and breach under the Scharffs-Welch framework, however, "an underlying consistency and coherence in the decisions begins to

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129. *Id.* at Part III.A.

130. *Id.* at Part III.B.

131. *Id.* at Part III.C.

132. *Id.* at Part IV.

133. *Id.* at 168.

134. *Id.*

1033] *The Potential Liability of Mediators as Fiduciaries*

come into focus, albeit of an imperfect and sometimes contestable nature.”<sup>135</sup>

This consistency and predictability results from the underlying trends revealed by the analysis of Professors Scharffs and Welch.<sup>136</sup> Their research revealed that when a fiduciary owes a high magnitude of duty and then also breaches that duty in a way that constitutes a high magnitude under the Scharffs-Welch framework, courts have been most likely to attach fiduciary liability and apply an available and appropriate remedy. But if the duty owed is of a low magnitude and the breach of that duty is also of a low degree of seriousness, courts are least likely to attach fiduciary liability to a particular person in a relationship of trust. For all other cases that fall somewhere in the middle of the two sliding scales of magnitude of duty and breach, the likelihood that a court will attach fiduciary liability increases as the magnitude of either the duty or breach increases. Thus, since formal fiduciaries such as attorneys, corporate officers, and trustees are held to a high magnitude of duty, they are often found liable for breaches of those duties even when the breaches are of a relatively low degree of seriousness. Conversely, fiduciaries with a relatively lower degree of fiduciary duty, such as teachers, parents, coaches, or travel agents, are rarely held liable under fiduciary law unless their misconduct qualifies as an egregious breach.

When applied to mediation relationships, the Scharffs-Welch framework provides much-needed predictability for mediators to determine which, if any, fiduciary duties apply to them and whether they will likely be found liable for certain alleged breaches of those duties. Yet the framework also maintains the necessary flexibility to not stifle or overly regulate the varied mediation profession.<sup>137</sup> While all mediation relationships will probably not rise to a relationship of fiduciary duty, the factors laid out in the Scharffs-Welch framework provide a guide for determining the likelihood, in particular factual circumstances, that a court might find a mediator liable for fiduciary obligations in the future. By considering both the magnitude of the duty and the magnitude of the breach, the framework provides a way to determine whether a particular breach in a mediation relationship

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135. *Id.*

136. *See id.* at 167–68.

137. *See id.* at 167 (claiming that the Scharffs-Welch framework “inherently recognizes that fiduciary duties are not created equal, and all breaches will not be regarded as equally harmful”).

warrants liability. Although courts have not yet subjected any mediators to fiduciary liability and have continued to apply only the traditional doctrinal approach to analyzing fiduciary relationships, this framework helps predict the potential for future litigation against mediators as more claims are brought and as views about mediation become more formalized. When applied to the existing handful of cases against mediators brought under claims of misconduct, as discussed below, the framework illuminates the reasoning behind the rulings and clearly places the seemingly disconnected and even arbitrary decisions into a pattern that will allow for future findings of fiduciary liability against mediators.

The only case recorded in the federal reporters involving a claim of fiduciary duty against a mediator provides a noteworthy example of the potential for a court to eventually attach fiduciary liability to certain mediators if the circumstances amount to a high enough magnitude of breach. In *Lehrer v. Zwernemann*, the plaintiff sought to hold his two attorneys, opposing counsel, and the mediator liable for “negligence or legal malpractice, breach of contract, breach of fiduciary duty, Texas Deceptive Trade Practices Act violations, fraud, and conspiracy to commit fraud” based on several alleged grounds, including the failure of the mediator to disclose prior relationships with the opposing attorney.<sup>138</sup> The trial court sustained a no evidence motion for summary judgment for the mediator, and the appellate court affirmed, finding that the plaintiff had failed to produce evidence that he had suffered legal injury as a result of the mediator’s actions at the mediation.<sup>139</sup> The plaintiff argued that while the mediator represented himself as a third party neutral, he in fact had a conflict of interest which he did not disclose to the plaintiff.<sup>140</sup> Rather than focus on particular duties or standards required of a mediator, the court took a functional approach. The court concluded that the “primary obligation” of a mediator is “to facilitate a settlement,” which the defendant accomplished.<sup>141</sup> Summary judgment in favor of the mediator was ultimately affirmed because the plaintiff could not demonstrate evidence of any injury caused by the mediator’s misconduct and the plaintiff had at least

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138. *Lehrer v. Zwernemann*, 14 S.W.3d 775, 776 (Tex. App. 2000).

139. *Id.* at 776–78.

140. *Id.* at 777.

141. *Id.*

constructive knowledge of the prior professional relationship with the opposing attorney.<sup>142</sup> Since the court did not specifically address the validity of applying fiduciary duties to a mediator, this opinion leaves the possibility open. The opinion also implies that such a claim for breach of fiduciary duty might be successful if the plaintiff could present additional evidence of a more substantial legal injury. In the terms of the Scharffs-Welch framework, *Lehrer* represents a low magnitude of fiduciary duty (since mediators owe lower duties than formal fiduciaries) coupled with a low magnitude of breach (since the breach resulted in no discernable legal injury); thus, fiduciary duties would not attach under the Scharffs-Welch framework.

Courts have also addressed a handful of other cases brought against mediators for misconduct in which fiduciary duty claims were not raised but in which the court rulings, when analyzed under the Scharffs-Welch framework, include rationales relevant to the future application of fiduciary duties to mediators. While these cases have little precedential value since they come from lower courts and only tangentially consider issues of fiduciary duties, they are nevertheless instructive of how courts might consider future claims based on fiduciary law.

In 2003, a California court found that mediators do owe certain duties of care and loyalty to parties of the mediation and that mediators are in a position of potentially significant influence over parties to a mediation. In *Furia v. Helm*, the court held that although the defendant was an attorney, he was acting in the capacity of a mediator and had fully disclosed his role as a mediator and not an attorney in the proceedings.<sup>143</sup> Thus, the court held that no attorney-client relationship arose, so the attorney-mediator did not owe fiduciary obligations to the plaintiff.<sup>144</sup> The court went on, however, to emphasize that in spite of the lack of an attorney-client relationship, “an attorney agreeing to act as a neutral mediator for the conflicting parties” did in fact assume duties to both parties involved in the mediation.<sup>145</sup>

While the *Furia* court chose not to “explore the full dimensions of that duty,” it found that such a duty owed by a mediator

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142. *Id.* at 778.

143. *Furia v. Helm*, 4 Cal. Rptr. 3d 357, 363–64 (Ct. App. 2003).

144. *Id.* at 364.

145. *Id.*



“certainly” included the duty of full disclosure to the parties about the mediator’s potential conflicts of interest or lack of impartiality.<sup>146</sup> Specifically, the court stated, “we have no doubt that an attorney accepting the role of mediator has the same duty of full disclosure as an attorney accepting the representation of clients with actual or potentially conflicting interests.”<sup>147</sup> The court also stated that an attorney-mediator assumes the duty of performing as a mediator with the skill and prudence ordinarily to be expected of one performing that role.<sup>148</sup> Thus, when considering this case under the Scharffs-Welch framework, the factual analysis indicates that the defendant’s expertise and title of attorney heightened the magnitude of his duty, although his status as a mediator kept that duty lower than it would have been if he had been acting in the capacity of an attorney rather than a mediator.<sup>149</sup>

Finally, the *Furia* court made the crucial finding that while “[m]ediators may not provide legal advice . . . they are in a position to influence the positions taken by the conflicting parties whose dispute they are mediating.”<sup>150</sup> This suggests that the element of influence, which is necessary in order to find a fiduciary relationship, exists in a mediation relationship in spite of the court’s assertion that fiduciary duties only apply to attorneys. The court further demonstrated the special influence of a mediator, and thus the vulnerability of the clients, by stating, “A party to mediation may well give more weight to the suggestions of the mediator if under the belief that the mediator is neutral than if that party regards the mediator as aligned with the interests of the adversary.”<sup>151</sup> For these reasons, the court concluded that “before an attorney agrees to serve for compensation as a mediator, there must be ‘complete disclosure of all facts and circumstances which, in the attorney’s honest judgment, may influence the party’s choice, holding the attorney civilly liable for loss caused by lack of disclosure.’”<sup>152</sup> Thus, the court

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146. *Id.*

147. *Id.* at 365.

148. *Id.*

149. *See* Scharffs & Welch, *supra* note 9, at 179.

150. *Furia*, 4 Cal. Rptr. at 365 (“The mediator’s role is simply to *facilitate* the parties’ direct negotiations,’ but ‘this is not a hard and fast rule. Many mediators do in fact offer their opinions.’” (quoting KNIGHT ET AL., CAL. PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION ¶¶ 3:120, 3:121(1992))).

151. *Id.*

152. *Id.* (quoting *Ishmael v. Millington*, 50 Cal. Rptr. 592, 596 (Ct. App. 1966)).

in *Furia* explicitly stated that a mediator-attorney might be found civilly liable in his role as a mediator for breaching the duty of full-disclosure of conflicts and for misrepresenting his lack of impartiality. The court's reasoning and the outcome of *Furia* are thus consistent with the Scharffs-Welch framework in that the vulnerability of the clients as well as the influence and expertise of the mediator heightens the magnitude of duty that mediators owe.

Additionally, a district court in New York has attempted to establish a general standard of care for mediators, indicating that if the facts had involved a higher magnitude of breach, the court would have attached liability. In the 2002 case *Chang's Imports v. Srader*, a trademark licensor brought a negligence action against an attorney who mediated a settlement agreement between the licensor and its licensee.<sup>153</sup> On the defendant's motion for summary judgment, the court dismissed the negligence claim and held that the defendant was not acting as an attorney for either party but rather was acting as a neutral mediator and thus was not negligent.<sup>154</sup> Although the court found that as a mediator the defendant lacked the higher duty necessary to establish a negligence claim,<sup>155</sup> a deeper analysis of this case indicates that given different factual circumstances, the attorney-mediator might have been found liable under the court's reasoning. The negligence alleged in the claim was based largely on the accusation that the attorney-mediator was providing legal representation to two clients with adverse interests.<sup>156</sup> Thus, the negligence claim was fundamentally based on the status of the mediator as an attorney, since such dual representation is prohibited when providing legal representation but is inherent when providing mediation. The court stated that "a mediator cannot be held to a higher degree of skill and care than that commonly exercised by ordinary members of the relevant mediation community."<sup>157</sup> Therefore, if the alleged negligence had instead been based on a violation connected with his role of mediator, and if his skill and care were significantly below the typical standard for mediators, then the

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153. *Chang's Imports, Inc. v. Srader*, 216 F. Supp. 2d 325, 327 (S.D.N.Y. 2002).

154. *Id.* at 334.

155. *Id.* at 330.

156. *See id.*

157. *Id.* at 332-33.

attorney-mediator might have been held liable.<sup>158</sup> Additionally, the court emphasized the fact that the defendant adequately and accurately defined his role and fully disclosed his conflicting interests in the waiver signed by both parties before the mediation began.<sup>159</sup>

Like *Furia*, the ruling in *Chang's Imports* is also consistent with factors indicating a lower magnitude of breach under the Scharffs-Welch framework. The framework helps explain the outcome of this case. As a mediator the defendant had a lower level of duty, which was heightened to a certain degree by his status and sophistication as an attorney, but which was lessened by his disclosure to both parties that he represented both their interests. Thus, the parties could not reasonably rely on him to solely promote their individual interests and so no fiduciary duty was found. Also, since the court found that he did not fail to disclose his conflicts, nor did he misrepresent his impartiality, any negligence which he may have committed would not be a serious enough magnitude of breach to warrant holding him liable for a breach of a minimal duty. Although the court does not specifically mention fiduciary liability in this case, it leaves open the possibility that under different circumstances, such as a failure to fully disclose a conflict of interest or a material misrepresentation of qualifications or ability to be impartial, the court might have found differently and held him to a higher magnitude of duty and breach.

The reasoning behind the rulings in *Lehrer*, *Furia*, and *Chang's Imports*, when considered in the context of the Scharffs-Welch framework, indicates that mediators may be held civilly liable in the future if they violate important duties owed to clients, such as impartiality and full disclosure of conflicts of interest. This liability would likely extend to fiduciary duties for mediators in cases where the clients can show a special reliance by the clients on the

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158. Currently, a finding for mediator negligence liability would be problematic because, as the court in *Chang's Imports* noted, "[t]here is almost no law on what the appropriate standard of care is, if any, for a mediator who helps negotiate a settlement between parties." *Id.* at 332. However, as the UMA and other legislation and regulations are passed which provide comprehensive standards for mediators, this requirement will be more easily met and mediators' exposure to negligence liability, or malpractice, will likely increase. See Hedges, *supra* note 31, at 1563 ("The UMA permits disclosure of a mediation communication, as an exception to the mediation privilege, if the communication is sought or offered to prove or disprove a claim or complaint 'of professional misconduct or malpractice' against a mediator. . . . If New Jersey passes the UMA with that language, it might be possible to argue that the legislature has indirectly created a new cause of action of professional misconduct or professional malpractice for mediators, where one did not exist before.").

159. *Chang's Imports*, 216 F. Supp. 2d at 331.

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1033] *The Potential Liability of Mediators as Fiduciaries*

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mediator's impartiality and neutral status as well as the influence of the mediator over the parties, as described in *Furia v. Helm*.

VI. APPLYING THE SCHARFFS-WELCH FRAMEWORK TO ADDRESS  
CONCERNS OF CRITICS

As shown in the sections above, not only is it likely that fiduciary duty claims will be increasingly filed against mediators, it is also likely that future courts will apply fiduciary liability to mediators for serious misconduct. When courts apply fiduciary law to these future claims with a more consistent and predictable approach, such as the Scharffs-Welch framework described above, the law of fiduciary duties will be able to provide an effective and appropriate tool to define and regulate the obligations of mediators to their clients. While there are several concerns voiced by critics regarding the extension, or potential extension, of fiduciary liability to mediators, this section will focus on three major arguments which have been raised regarding (1) the unwieldiness of fiduciary law, (2) the lack of superiority of mediators resulting from their inability to pass judgment, and (3) the dual obligations to parties with conflicting interests. While these fears have been obstacles to extending fiduciary liability to mediators for the past two decades, the strength of these concerns dissolves upon closer analysis.

*A. Fiduciary Law: Unwieldy or Flexible?*

First, several critics warn that fiduciary law is too chaotic, unpredictable, and varied to provide a comprehensive standard with which to judge the fiduciary status and liability of mediators.<sup>160</sup> Michael Moffitt, for example, argues that because of this uncertain and even chaotic system of standards used by courts to determine the existence of fiduciary relationships, “[f]iduciary obligations constitute a sloppy mechanism for creating mediator obligations—one that is very unlikely to be available to prospective litigants.”<sup>161</sup> Another article critical of the fiduciary model endorses a more flexible model for analyzing fiduciary relationships in order to take into account the wide range of types of mediation and types of

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160. See, e.g., Moffitt, *supra* note 24, at 168–69.

161. *Id.* at 169.

fiduciaries.<sup>162</sup> Specifically, it voices concern that fiduciary law cannot encompass all types of mediators and thus is not appropriate as a standard by which to judge mediator liability.<sup>163</sup>

The Scharffs-Welch framework provides just such a flexible model and is particularly useful in determining the potential existence of fiduciary duties in informal fiduciary relationships where the determination is entirely fact-specific. Professors Scharffs and Welch describe their framework as helpful because it “inherently recognizes that all fiduciary duties are not created equal, and that all breaches will not be regarded as equally harmful.”<sup>164</sup> This framework organizes the chaos of fiduciary law by providing a compilation of the factors and categories of factors used most often by courts to determine fiduciary status. This approach leads to flexible analysis because it allows courts to choose the most relevant factors applicable to the case at hand. The framework overcomes the apparent unpredictability of fiduciary law by clarifying the implicit balancing test between magnitude of duty and magnitude of breach used by courts to determine whether fiduciary liability applies.

The Scharffs-Welch framework shows that not all mediation relationships would be potentially held to the higher level of fiduciary duty but rather that certain factors provide reasonable grounds for certain types of mediation—those with high levels of expertise, reliance, trust, and compensation, for example—to be held to this higher standard. In this respect, although Chaykin’s premise of holding mediators liable under fiduciary law was valid, the criticisms were correct that his absolute, even per se, categorization of mediators as fiduciaries was too expansive and ignored the wide variations among mediators.<sup>165</sup> But critics should not dismiss the fiduciary approach simply because it does not apply to all mediators, or rather because mediators cannot be categorized as formal fiduciaries. Such variance is an integral part of the designation of informal fiduciaries as opposed to formal fiduciaries, and it is this flexibility, in fact, which makes a fiduciary analysis ideal for determining the liability of members of a profession as varied as mediation.<sup>166</sup>

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162. *Sultans of Swap*, *supra* note 45, at 1883.

163. *Id.*

164. Scharffs & Welch, *supra* note 9, at 167.

165. *See, e.g., Sultans of Swap*, *supra* note 45, at 1883.

166. *See supra* notes 38–42 and accompanying text.

*B. Lack of Superiority*

Opponents of the theory of finding fiduciary duties in mediation relationships argue that a plaintiff seeking to establish a mediator's fiduciary obligation would be challenged to demonstrate that the mediator occupied a position of superiority and influence sufficient to warrant fiduciary status.<sup>167</sup> The court in *Furia v. Helm* held that while "mediators may not provide legal advice . . . they are in a position to influence the positions taken by the conflicting parties whose dispute they are mediating."<sup>168</sup> Further, "[a] party to mediation may well give more weight to the suggestions of the mediator if under the belief that the mediator is neutral than if that party regards the mediator as aligned with the interests of the adversary."<sup>169</sup> Moffitt points out that, unlike an agent, attorney, officer, or trustee, "a mediator is not empowered by the party to make decisions on behalf of the party."<sup>170</sup>

This is true when a mediator strictly limits his actions to facilitating the negotiation; however, it has been observed that many mediators now engage in evaluative mediation in which the mediator steps beyond the traditional role of facilitator and engages in determining the outcome of the mediation.<sup>171</sup> Such evaluative mediating would likely heighten the magnitude of duty of a mediator because it would constitute greater influence and even superiority in some circumstances. Moffitt even acknowledges that a "mediator who engages in case evaluation increases her exposure to liability because the process of evaluation almost certainly falls within the parameters of the practice of law."<sup>172</sup>

167. See Moffitt, *supra* note 24, at 168; 36A C.J.S. FIDUCIARY 383 (1961) (noting that influence and superiority are necessary factors in declaring fiduciary status).

168. *Furia v. Helm*, 4 Cal. Rptr. 3d 357, 365 (Ct. App. 2003).

169. *Id.*

170. See Moffitt, *supra* note 24, at 168–69.

171. *Furia*, 4 Cal. Rptr. 3d at 363–64 ("The mediator's role is simply to *facilitate* the parties' direct negotiations,' but 'this is not a hard and fast rule. Many mediators do in fact offer their opinions.'" (quoting KNIGHT ET AL., CAL. PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION ¶¶ 3:120, 3:121(1992))); AM. BAR ASS'N ET AL., *supra* note 32, at 7 (limiting a mediator's ability to shift to a more evaluative or adjudicatory role without notice to and consent of the parties). However, these standards have not yet been adopted by most states and thus have no legally binding value.

172. Moffitt, *supra* note 24, at 170 n.83; see, e.g., Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 938–39 (1997) (arguing that evaluative mediators combine roles that are incompatible).

Additionally, a highly qualified mediator can arguably have enough experience to establish a fiduciary relationship by producing an imbalance of position sufficient to constitute mediator superiority and client reliance and vulnerability. Thus, under situations in which the mediator takes the affirmative step to increase his level of superiority and influence, the mediator draws closer to incurring fiduciary liabilities. The Scharffs-Welch framework identifies the most relevant factors for a court to consider in making this determination of whether a mediator has reached a level of sufficient superiority, influence, and control to impose fiduciary duties.<sup>173</sup> This identification of specific and quantifiable factors allows “lawyers, judges, and litigants to identify and produce all the evidence systematically relevant to a sound resolution of the case.”<sup>174</sup>

### *C. Dual Obligations*

Critics have also maintained that mediators cannot be vested with fiduciary duties because, unlike traditional fiduciaries such as trustees and attorneys, mediators owe a duty to multiple parties with conflicting interests.<sup>175</sup> This has elicited skepticism about the validity of applying fiduciary liability to mediators and statements that “[n]o courts . . . have accepted the underlying proposition that mediators somehow owe fiduciary duties simultaneously to two or more mediation parties.”<sup>176</sup> Yet, as one scholar has observed, “the legal concept of fiduciary duty does not apply in the same way in mediation as it does in the traditional litigation model. . . . Indeed, fiduciary duty and confidentiality are relevant to mediation, but do not take the same meaning as in litigation.”<sup>177</sup> Just as there are varying levels of fiduciary duties between those owed by business

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173. Scharffs & Welch, *supra* note 9, at 171–73 (describing how factors increasing a fiduciary’s expertise, control, and discretion tend to heighten the level of the fiduciary’s duty).

174. *Id.* at 168.

175. BOULLE & NESIC, *supra* note 106, at 519 (arguing that the nature of the fiduciary obligation fits uneasily with the mediator’s dual obligations to adverse parties); Moffitt, *supra* note 24, at 168 (“[P]rospective plaintiff would need to overcome the structural difficulty of asserting that the mediator owes simultaneous fiduciary obligations to parties with opposing interests in the matter at hand. Fiduciary obligations cannot be structured responsibly in a way that would damn the mediator no matter what she did, yet holding a fiduciary obligation simultaneously to opposing parties risks exactly that.”).

176. See Moffitt, *supra* note 75, at 128.

177. Tad Kojima, *Keeping Mediation an Alternative Dispute Resolution Process* (2001), [http://www.cfcj-fcjc.org/full-text/2001\\_dra/tad\\_kojima.html](http://www.cfcj-fcjc.org/full-text/2001_dra/tad_kojima.html) (last visited Oct. 3, 2005).

partners, attorneys, and trustees and those owed by informal fiduciaries like teachers, clergy, and parents, so is there a distinction in the height of duty of an attorney versus the type of duty of a mediator.

The Scharffs-Welch framework acknowledges this spectrum of duties among fiduciaries and provides a way to apply fiduciary law appropriately to account for differing levels of duties and breaches.<sup>178</sup> Among the factors listed regarding the characteristics and history of a potential fiduciary relationship, the Scharffs-Welch framework includes the element of exclusivity as an important characteristic to consider when determining the magnitude of fiduciary duties.<sup>179</sup> Professors Scharffs and Welch explain, “if a fiduciary represents multiple beneficiaries, we would expect that this would sometimes result in a somewhat lower magnitude of duty.”<sup>180</sup> Although a lack of exclusivity in the relationship might lower the magnitude of a fiduciary’s duty to a beneficiary, under the Scharffs-Welch framework it does not necessarily preclude the attachment of some fiduciary duties. The framework demonstrates that a high magnitude of breach can offset a relatively low magnitude of duty.<sup>181</sup> Professors Scharffs and Welch, in applying their analytical framework to educators, demonstrate case law in which fiduciary duties have been extended to professors for serious breaches of trust.<sup>182</sup> In these examples, the fact that the relevant educators simultaneously owed potentially conflicting duties to other students did not shield the professors from fiduciary liability for extreme breaches of certain fiduciary duties.

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178. Scharffs & Welch, *supra* note 9, at 167.

179. *Id.* at 182–83.

180. *Id.* (“For example, a manager for an artist or athlete who works exclusively for that individual is likely to be held to a relatively higher magnitude of duty than an agent who represents multiple artists or athletes.”).

181. *Id.* at 167–68.

182. *Id.* at 219–29; *see* Chou v. Univ. of Chi., 254 F.3d 1347, 1362–63 (Fed. Cir. 2001) (holding a supervising professor liable for breach of fiduciary duty for telling the inventor-student that his ideas could not be patented and then filing a patent application listing the professor as the sole inventor); Johnson v. Schmitz, 119 F. Supp. 2d 90, 97 (D. Conn. 2000) (denying Yale University’s motion to dismiss a claim for breach of fiduciary duty against a dissertation committee for discouraging a student’s use of his ideas and then misappropriating the ideas for the professors’ own use); Schneider v. Plymouth State Coll., 744 A.2d 101, 104 (N.H. 1999) (“[I]n the context of sexual harassment by faculty members, the relationship between a post-secondary institution and its students is a fiduciary one.”).



Professor Nolan-Haley similarly described a mediator's dual obligations as consistent, arguing that "the mediator is said to represent the integrity of the mediation process and it is in this sense then that the mediator has a special fiduciary relationship with both parties to a dispute."<sup>183</sup> Further, as Chaykin argued, "[i]n both trustee and corporate situations, it is not uncommon for the parties to whom fiduciary duties are owed to assert conflicting, adverse interests."<sup>184</sup> He points to the examples of corporate actors who must balance between the potentially conflicting interests of shareholders, directors, officers, and employees, all to whom he owes fiduciary duties.<sup>185</sup> Likewise, Chaykin argues, "[t]he existence of adverse interests among beneficiaries in no way alters the trustee's responsibility. His duty remains one of fairness and impartiality, and he must act in the best interest of the entire trust."<sup>186</sup>

Thus, certain duties do not necessarily change just because the two parties to whom a fiduciary owes the duties have adverse interests in the transaction. In order to preserve fairness, openness, and impartiality in the mediation process, mediators should be obligated to maintain confidentiality, to fully disclose conflicts of interest, to act in good faith, and to make no false misrepresentations. These duties constitute non-conflicting interests of all parties involved and thus the mediator can fulfill his duty to work for the benefit of both parties within this context.

## VII. CONCLUSION

Although most scholars and courts have not yet recognized fiduciary liability for mediators, recent trends indicate that at least some legal mediation relationships will likely be future additions to the expanding list of informal fiduciaries. While courts themselves will likely continue to apply the traditional doctrinal approach to fiduciary law when analyzing duties of mediators, the Scharffs-Welch framework helps mediators to more accurately predict when and to what extent such fiduciary duties will apply to particular factual

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183. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 826 (1999).

184. Chaykin, *supra* note 10, at 739 n.40.

185. *Id.* (citing *Broad v. Rockwell Int'l Corp.*, 614 F.2d 418, 430-32 (5th Cir. 1980)).

186. *Id.* (citing *First Nat'l Bank of Birmingham v. Ingalls*, 59 So. 2d 914, 921-23 (Ala. 1952)).

circumstances of each mediation relationship. The framework is thus a useful tool for clarifying the complex and varied standards used in fiduciary law and for illuminating current case law that thus far has avoided extending fiduciary liability to mediators, demonstrating that the door is still open for courts to find some mediators to be fiduciaries in the future.

Using this framework and analyzing the future of the mediation profession in the context of recent trends also helps confront and overcome several of the concerns which have been voiced by opponents throughout the two decades of debate over extending fiduciary duties to mediators. This analysis demonstrates that in the future, mediators may likely owe some level of fiduciary obligations to the parties in certain mediation proceedings—primarily fairness, impartiality, confidentiality, disclosure of conflicts of interest, good faith, and no false misrepresentation. This knowledge allows mediators to prepare for the trends of the near future, when mediation will likely take an established place among the professions, with the accompanying benefits and liabilities of such a position.

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