

The Four Ways to Assure Mediator Quality (and why none of them work)

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What, if anything, reasonably provides mediation consumers with confidence about the quality of mediators' services?

The expansion and maturation of mediation as a practice has understandably (and laudably) led many to begin to focus attention on questions of quality assurance.¹ Assuring high-quality practice has been no easy undertaking for *any* set of practitioners. As evidence of this proposition, consider that even the professions that have been recognized for centuries (doctors and lawyers, for example) still continually modify their approaches to quality assurance. Although no practice group can claim to have "solved" the difficult question, many have been at it for far longer than mediation. So, those who care about mediation might wisely look to other practices or professions for indicators of what mechanisms are most effective.

This article begins, therefore, with an exploration of how consumers derive confidence in the services of practitioners outside of mediation. Why are we confident that the doctor we have chosen will not be lousy? The lawyer? The plumber? The tattoo artist? It turns out that, regardless of the context, whatever confidence we have in the quality of these practitioners' services derives from one of four sources, each of which I describe in Section I.

A careful look at these available mechanisms, however, reveals that none of them currently operates as effectively for mediation as they do for other practices and professions. In Section II, I explain the current failures of these mechanisms in the context of mediation. Some mechanisms fail because of the nature of mediation practice. Some fail because of the nature of current regulation or common law doctrines related to mediation. Some fail because

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¹ Perhaps the most recent illustration of this increased interest in quality control is the 2008 release of the report of the American Bar Association Section on Dispute Resolution's Task Force on Improving the Quality of Mediation. See Task Force on Improving the Quality of Mediation, *Final Report*, 2008 A.B.A. SEC. DISP. RESOL., available at http://www.abanet.org/dispute/documents/Final_Report_TaskForce_Mediation_Quality.pdf.

of the current shape of the market for mediators. None of these failures, taken independently, would be all that troublesome. After all, most practices and professions rely on a patchwork of different mechanisms for guarding against incompetence. Only the fact that *all four* of the mechanisms fail in the context of mediation makes this a remarkable and unsustainable condition.

To be clear, this is not an anti-mediation manifesto—quite the contrary. I write this as one who has staked his professional career on the fundamental integrity and importance of mediation. I am certainly not making an empirical claim that the quality of mediation services is inferior in some way to other kinds of services. In fact, I firmly believe that many mediators do an outstanding job, and that, in many cases, mediation consumers will be delighted with their mediation choices.

This is, however, a cautionary article. Many of the practices and professions I have studied went through a period of similar insulation from quality assurance mechanisms. As more and more people become consumers of mediation services—and all indications are that this trend will continue—the demand for some kinds of assurance of quality will also increase. The practice of medicine looks quite different than it did seventy-five years ago. The practice of law looks quite different than it did fifty years ago. The practice of body artistry looks quite different than it did twenty-five years ago. The practice of mediation will look different, too.

In Section III of this article, I hypothesize about the changes that would have to take place in order for one or more of the four basic quality assurance mechanisms to be effective in the context of mediation. Although the article does not descend fully into the academic parlor game of predicting the precise nature of the future, I also point to some trends in mediation and in other professions that may cast light on the possible future shape(s) of mediation.

By understanding how quality assurance works in other practices, and by understanding how those mechanisms have evolved over time, we gain an important set of insights about the possible future(s) of mediation. Building on the descriptive and predictive components of this inquiry, we can then responsibly engage in a conversation about what that future *ought* to look like.

Mediators today operate with few market restrictions, few controls on their conduct, and few consequences for misbehavior. This condition will not persist.

I. THE FOUR MECHANISMS FOR ASSURING THE QUALITY OF SERVICES

Each profession or practice² has a set of mechanisms which, in

² I am aware that some within the mediation community are engaged in a robust

combination, serve to provide some assurance about the quality of its practitioners' services. Some of these mechanisms are formal, the products of conscious design by members of the practice or by regulators. Other mechanisms are less formal, relying on voluntary participation or individual decisions. The precise nature of these mechanisms varies, of course, with each practice. What causes us to have confidence in doctors is not the same set of mechanisms that causes us to have confidence in accountants, much less those that justify confidence in truck drivers.

All of these context-specific mechanisms for assuring quality services, however, are variations on one of four themes. Put differently, there are only four basic approaches to assuring quality in a particular practice. To highlight the connections and distinctions between these mechanisms, I offer the following two-by-two grid, illustrating the four ways to assure quality.

Table 1: The Four Ways to Assure Quality Services

	Front-End (steps aimed at assuring quality by limiting the initial pool to those practitioners deemed competent or qualified)	Back-End (steps aimed at assuring quality by punishing or removing from practice those whose conduct is deemed unacceptable)
Public (steps taken by the state)	1	2
Private (steps taken by private parties or organizations)	3	4

public debate about whether mediation is, or should be, viewed as a profession. For example, the ABA's Dispute Resolution Magazine featured a series of viewpoints on the issue in its Spring 2005 issue. Compare Craig McEwen, *Giving Meaning to Mediator Professionalism*, DISP. RESOL. MAG., Spring 2005, at 3 and Sarah Rudolph Cole, *Mediator Certification: Has the Time Come?*, DISP. RESOL. MAG., Spring 2005, at 7, with Margret L. Shaw, *Style Schmyle! What's Evaluation Got to Do With It?*, DISP. RESOL. MAG., Spring 2005, at 17. See also Forrest S. Mosten, *Institutionalization of Mediation*, 42 FAM. CT. REV. 292, 293 (2004); Nancy A. Welsh & Bobbi McAdoo, *Eyes on the Prize: The Struggle for Professionalism*, DISP. RESOL. MAG., Spring 2005, at 13; Juliana Birkoff et. al, *Points of View: Is Mediation Really a Profession?*, DISP. RESOL. MAG., Fall 2001, at 10. My intention is not to join that debate with this article, although I recognize that some will read it in that light. In this article, I will speak, whenever possible, about "practice areas," an umbrella term that will encompass both recognized professions and practices that do not meet one or more of the competing definitions of a profession. Whether mediation is a "profession" should not affect the degree to which the mediation community cares about the quality of mediation services.

In the sections below, I outline the operation of each of these four mechanisms in practices other than mediation, for the purpose of clarifying the framework. In Section II, I then apply the framework and the mechanisms it suggests to the context of mediation.

A. *Public-Front-End Mechanisms*

The public, through the vehicle of a government entity, takes an active role in assuring the quality of many different kinds of services. One of the most visible public mechanisms involves using the machinery of the government to exclude certain categories of people from providing the services in question. These are, in terms of the framework I have presented, “public-front-end mechanisms.” Licensure regimes, in all of their various forms, are the most prominent example of public-front-end mechanisms.

Different governmental bodies are responsible for creating and maintaining the integrity of a licensure regime, depending on the practice in question. In a small number of cases, the license comes from the federal government. For example, gun brokers, radioactive waste haulers, and certain meat inspectors require federal licenses.³ In many of the most prominently recognized professions, the license comes from the state. For example, doctors must have a state-issued license to practice medicine legally.⁴ Similarly, lawyers must be licensed by the specific jurisdiction(s) in which they want to practice. In some cases, the licensing is done at a more local level. For example, tattoo artists are sometimes regulated at the municipal level, rather than at the state level.⁵

One aspect of a licensed practice is that the licensure requirements typically erect a barrier to entry into the practice. A doctor must pass a set of Board exams.⁶ A lawyer must pass the Bar exam. A psychologist must

³ See 18 U.S.C. § 922(a)(1)(A) (2000) (federal firearm licensure); 10 C.F.R. § 71 (2008) (nuclear material transportation); 7 C.F.R. § 868.80 (2008) (meat inspectors).

⁴ See, e.g., AM. MED. ASS’N, STATE LICENSURE AND STATISTICS 2007 (Fred Donini-Lenhoff ed., Am. Educ. Prod. 2007); see also Federation of State Medical Boards, State-specific Requirements for Initial Medical Licensure, *available at* http://www.fsmb.org/usmle_eliinitial.html.

⁵ See, e.g., Cambridge Public Health Department, Body Art Regulations (Jan. 31, 2001), *available at* <http://www.cambridgepublichealth.org/services/regulatory-activities/body-art/body-art-regulations.php>. However, in other jurisdictions, tattoo artists are regulated by state agencies, rather than at the municipal level. See, e.g., Advisory Council for Electrologists, Permanent Color Technicians and Tattoo Artists, <http://egov.oregon.gov/OHLA/EPT/index.shtml> (last visited April 28, 2009).

⁶ See, e.g., U.S. Med. Licensing Examination, 2008 Bulletin of Information, http://www.usmle.org/General_Information/bulletin/2008.html (last visited April 28, 2009).

satisfactorily complete a period of supervised employment.⁷ A cosmetologist must complete a specified course of education.⁸ In theory, by creating this barrier to entry into the practice, the state is taking steps that will improve the quality of services—by keeping out those whom the state believes will not perform satisfactorily.⁹

Just as the state may exclude certain people from the practice by erecting an initial barrier, it may also impose ongoing obligations on those who wish to perform the services in question. For example, virtually every state has a continuing education requirement for physicians and for attorneys.¹⁰ And these kinds of requirements extend beyond the traditionally recognized professions to include practices like those of accountants and school counselors, both of which require a state license in order to practice in certain contexts, and both of which also require continuing education.¹¹

⁷ See CAL. BUS. & PROF. CODE § 2914 (West 2003) (applicants must engage in at least two years of supervised professional experience under the direction of a licensed psychologist, with at least one year being completed after receiving their doctorate in psychology); MASS. GEN. LAWS ANN. ch. 112, § 119 (West 2004) (applicants must fulfill at least two years full time work, with at least one year that is subsequent to receiving their doctoral degree, in psychology employment, teaching, research, or professional practice under the supervision of a licensed psychologist, or a person that is clearly eligible for licensure in the opinion of the state licensing board); OR. REV. STAT. § 675.030 (2005) (a license will only be issued if an applicant can demonstrate two years of supervised employment under an Oregon licensed psychologist, or another person considered by the licensing board to have supervisory competence).

⁸ See CAL. BUS. & PROF. CODE § 7321 (West 1995) (applicants must complete a course in cosmetology from a school approved by the Board of Barbering and Cosmetology; this course of study must include 1,600 course hours); MASS. GEN. LAWS ANN. ch. 112, § 87V (West 2004) (to be registered as a student operator, an applicant must complete at least six months of course work that includes at least 1,000 hours of professional training for a hairdresser and 300 hours of professional training for an aesthetician); OR. ADMIN. R. 817-030-0005 (2008) (applicants for certification must complete specified course hours within their field of specialty: hair design—1,450 hour course; barbering—1,100 hour course; esthetics—250 hour course; and nail technology—350 hour course).

⁹ To be sure, consumer protection is only one of the motives one might reasonably attribute for establishing barriers to entry into the market. Many have accused professionals of making it difficult to enter the profession as a means of limiting competitors, for example. Nevertheless, even if the motives for entrance restrictions are mixed, one of the motives almost certainly has something to do with consumer protection.

¹⁰ See, e.g., AM. MED. ASS'N, *supra* note 4; see also Fed'n of State Med. Bds., *supra* note 4; American Bar Association, Mandatory Continuing Legal Education, <http://www.abanet.org/cle/mandatory.html> (last visited April 28, 2009).

¹¹ See, e.g., American School Counselor Association, Continuing Education Requirements, <http://www.schoolcounselor.org/content.asp?contentid=243> (last visited April 28, 2009); WASH. ADMIN. CODE 4-25-830 (2005); GA. COMP. R. & REGS. 20-11-.02 (2005); see also Georgia Secretary of State, Continuing Professional Education

All public-front-end mechanisms share a fundamental goal—to exclude those who have not met whatever prima facie evidence of competence the state has established. Some mechanisms exclude those who cannot demonstrate initial competence. Some exclude those who do not have an educational or experience background the state believes necessary for the practice in question. Some exclude those who have not fulfilled continuing education or other requirements for maintaining the state’s license to practice. To the extent that these mechanisms assure the quality of services, they do so by excluding some of the putative practitioners about whom we might have concerns. In essence, they restrict the pool of people available to provide the service.

B. Public-Back-End Mechanisms

In addition to restricting access to a license to practice, the state sometimes takes steps to punish those practitioners whose conduct falls below a state-established minimum level of competence. These measures, which I label “public-back-end mechanisms,” also have the effect of improving the quality of services. Instead of initially excluding from practice people that the state believes to be suspect, the state uses these mechanisms to target those who have actually acted in a demonstrably troublesome way.

Perhaps the easiest example of a public-back-end mechanism is the procedure every state Bar maintains for dealing with after-the-fact complaints against attorneys. A relatively minor infraction of the relevant legal ethics principles exposes an attorney to a relatively minor punishment. But as the seriousness of the infraction increases, so do the sanctions. For the worst offenses, attorneys who commit malpractice are at risk of having her or his license suspended or revoked.¹²

The same basic mechanism—revocation of a license—looms as a threat over essentially all licensed practices. A stock broker’s licenses can be revoked if the broker is convicted of embezzlement.¹³ A real estate agent who is convicted of forgery or extortion risks losing his or her license.¹⁴ If a

Requirements for CPAs, RPAs, and Foreign Accountants, http://sos.georgia.gov/plb/accountancy/cont_ed.htm (last visited April 28, 2009).

¹² See Survey on Lawyer Discipline Systems, 2006 A.B.A. CTR PROF’L RESP., Chart II (2006), available at <http://www.abanet.org/cpr/discipline/sold/06-ch2.pdf> (In 2006 a total of 1,903 lawyers were privately sanctioned and 4,309 lawyers were publicly sanctioned. Of the lawyers publicly sanctioned 551 were involuntarily disbarred, 342 were disbarred on consent, 1,361 were suspended, and 451 were temporarily suspended for risk of harm or criminal conviction).

¹³ See, e.g., Financial Industry Regulatory Authority, NASD By-Laws of the Corporation, art. 3, § 4 (2007), available at http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4598.

¹⁴ See, e.g., OHIO REV. CODE ANN. § 4735.13 (West 2004); Dougherty v.

funeral director commits a certain class of felony, he or she risks losing his or her license.¹⁵ And the licenses for a host of different kinds of practitioners are at risk if the practitioner is convicted of a crime “involving moral turpitude.”¹⁶ In short, what the state gives (a license), the state can take away (under certain conditions, like misconduct). As a result, this public-back-end mechanism improves the quality of services by removing from practice those people it deems lousy.

Not all public-back-end mechanisms result in revocation of a state license to practice, however. Indeed, not all public-back-end mechanisms require the existence of any licensure regime whatsoever. For example, no license is required to serve as the officer of a public company.¹⁷ And yet, when the Securities and Exchange Commission (SEC) resolves enforcement actions against such professionals, it is common for the SEC to seek to bar the party from subsequently serving as an officer or director of a public company.¹⁸ Similarly, although no license is required to act as a securities analyst or mutual fund portfolio manager, SEC enforcement actions’ resolution often includes bans against associating with brokers, dealers, investment advisers, and mutual fund administrators.¹⁹ One of the most publicly visible examples of such an action came against Henry Blodget, the Merrill Lynch financial analyst most heavily associated with some of the most notorious Enron trading, who was eventually fined \$4 million and banned from the securities industry for life.²⁰ Because participation in a

Commonwealth of Pennsylvania State Real Estate Comm’n., 513 A.2d 555 (Pa. 1986); Kelley v. Real Estate Comm’n., 172 A.2d 415 (D.C. 1961).

¹⁵ See, e.g., ARIZ. REV. STAT. ANN. § 32-1301(54) (2008); Sweeny v. State Bd. of Funeral Dirs., 666 A.2d 1137 (Pa. Commw. Ct. 1995); N.Y. PUB. HEALTH LAW §3450(1)(b) (West 2002).

¹⁶ See, e.g., N.J. STAT. ANN. § 45:5-2 (West 2004) (podiatrists); OKLA. STAT. ANN. tit. 59, § 532 (West 2000) (athletic trainers); W.VA. CODE ANN. § 30-36-18 (LexisNexis 2007) (acupuncturists); R.I. GEN. LAWS § 23-13-9 (LexisNexis 2001) (midwives); HAW. CT. REP. R. 10.2(b)(i) (West 2008) (court reporters).

¹⁷ See 15 U.S.C. § 78u-3(f) (2006) (noting conditions of when a person is ineligible to serve as a director).

¹⁸ See Securities Exchange Act of 1934 § 21, 15 U.S.C. § 78u (2000). For examples of such regulatory actions, see S.E.C., Other Commission Orders, Notices, and Information, *available at* <http://www.sec.gov/rules/other.shtml>.

¹⁹ Securities Exchange Act of 1934 § 21, 15 U.S.C. § 78f (2000). The precise mechanism for this bar is not the revocation of a license, because no license exists. Instead, it is technically an agreement in the negotiated plea, which is then entered as an order of the court.

²⁰ See Press Release, S.E.C., Securities and Exchange Commission, NASD and the New York Stock Exchange Permanently Bar Henry Blodget From the Securities Industry and Require \$4 Million Payment (Apr. 28, 2003), *available at* <http://www.sec.gov/news/press/2003-56.htm>.

particular market space (for example, the securities industry)²¹ often represents the targeted practitioner’s primary source of income, defendants are often willing to accept fines and other sanctions in exchange for not being barred from future practice. The state, therefore, can exert influence on the quality of certain practices through back-end mechanisms, even if no licensure system exists.²²

At their core, public-back-end mechanisms aim to punish unacceptable behavior in ways that make such behavior less likely in the future. These mechanisms, therefore, are often part of the patchwork of approaches that assure the quality of services.

C. Private-Front-End Mechanisms

In many practices and professions—even those operating with a licensing requirement—the government plays a relatively minor role in assuring consumers of the quality of services. Instead, private or nongovernmental forces exert an enormous front-end influence on the quality of the pool of those who provide services.

The most prominent example of these private-front-end mechanisms is the reputation each service provider holds within the market. If you ask colleagues how they chose a doctor, odds are good that they will respond with some variation of, “Other people told me that doctor was good, and I trusted their judgment.” As a quality assurance mechanism, reputations form an important disincentive for misbehavior. If I am a conspicuously simple-minded attorney, a shaky-handed tattoo artist, or an innumerate accountant, I will probably have a hard time attracting future clients. And as a result, I will eventually leave the field—and in doing so, I will improve the quality of the pool of people providing services.

Of course, individual practitioners are not always well enough known to have reputations that would influence consumers’ decisions. But, in many

²¹ This mechanism is not unique to financial analysts. For example, the SEC also fairly routinely seeks to bar certain people from serving on the boards of directors of publicly traded companies as a punishment for certain misconduct. *See* 15 U. S. C. § 78u-3(f) (2000). Service as a director can be enormously financially lucrative, and the threat is therefore substantial. Internationally, regulatory bodies have even greater statutory authority to restrict practices that require no license. For example, under the British Companies Act, a director of a company that declares bankruptcy is ineligible from serving on a subsequent board of directors of a publicly traded company for a period of years. *See* BRUCE G. CARRUTHERS & TERRANCE C. HALLIDAY, *RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES* 276–83 (1998).

²² A second example of a public-back-end mechanism, in the absence of a licensure regime, would be the myriad of fines the state can impose for conduct that does not merit complete removal from practice.

practice areas, reputations attach to firms or collections of practitioners. For example, it is unlikely that a specific accountant has much of an individual reputation. Indeed, individual accountants are more likely to gain wide recognition because of malfeasance than because of reliable, high-quality services. Accounting firms, by contrast, have market reputations for which some consumers are willing to pay a premium.²³ The same dynamic is also likely at play in the market for some kinds of legal services.²⁴

Collective reputations can stem from voluntary associations as well. For example, no licensure requirement exists for people who want to sell their services as financial planners. The market, however, sometimes makes considerable meaning out of the organizations to which a service provider does or does not belong. Near the beginning of the most recent downturn in the real estate market, for example, the National Association of Realtors launched a broad advertising campaign, urging consumers to “ask if your agent is a realtor, a member of the National Association of Realtors.”²⁵ The idea embedded in the remainder of the advertisements suggested that members of this organization are of a different (higher) quality than nonmembers—even if those nonmembers are legally able to provide the same range of services as members. Similarly, a Certified Financial Planner is considered different from a CPA-Personal Financial Specialist, who is in turn considered different from a Chartered Financial Consultant.²⁶ The group to which one belongs, therefore, can serve as something of a proxy for one’s own competence—a reputational consideration.

Private-front-end mechanisms are not always about reputations. In some cases, private actors other than consumers can influence the people who provide services. Insurance companies are, perhaps, the clearest example of this dynamic. Insurers are by no means governmental actors, but if an insurer tells a medical group that it must adopt a certain practice or exclude a certain practitioner, that medical group is quite likely to comply. Even though the insurer has no regulatory power over the practitioners, their influence can serve to improve the quality of the services being provided.

What private-front-end mechanisms have in common is that they are

²³ For example, publicly traded companies routinely seek out highly reputable (and high-priced) accounting firms as a means of reassuring the markets about the reliability of the company’s numbers. The accounting firm’s client, in that case, is capitalizing on the accounting firm’s reputation.

²⁴ See generally Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994) (discussing reputation-based cooperation within the practice of law).

²⁵ *Code of Ethics* (National Association of Realtors television advertisement 2008), available at <http://www.realtor.org/pac.nsf/pages/television>.

²⁶ For the Securities and Exchange Commission’s perspective on the differences among these service providers, see S.E.C., *Financial Planners*, <http://www.sec.gov/answers/finplan.htm> (last visited April 28, 2009).

nongovernmental influences on who winds up getting work and how practitioners do their work. As such, they are important mechanisms for assuring the quality of services.

D. *Private-Back-End Mechanisms*

The fourth mechanism for assuring the quality of services involves after-the-fact actions by unhappy consumers against practitioners who have engaged in allegedly improper behavior. These are actions pursued by private actors, rather than by government regulators, and they target only those whom the private actors perceive to be “bad apples.”

Malpractice lawsuits are perhaps the most obvious example of a private-back-end mechanism. Medical professionals once operated with virtually no risk of liability for their practices. As recently as the 1950s, medical malpractice insurance was an afterthought, an add-on to doctors’ homeowners and automobile insurance, with the malpractice premiums never constituting more than 1% of the costs of the policies.²⁷ Today, the costs of medical malpractice insurance (a reasonable proxy for the prominence of medical malpractice lawsuits) have skyrocketed.²⁸ The historical trajectory is similar for attorneys. The first evidence of a legal malpractice insurance policy being issued was only in 1945, and it was not routine until at least the 1960s. Only since the late 1970s has legal malpractice insurance become commonplace (and expensive).²⁹

Even among practices that fall outside of the traditional professions, malpractice actions loom as a deterrent against incompetent practices. For example, there has been a surprisingly robust series of lawsuits against cosmetologists for malpractice ranging from miscolored hair to the improper

²⁷ See Reed Olsen, *The Reform of Medical Malpractice Law: Historical Perspectives*, 55 AM. J. OF ECON. & SOC. 257, 259 (1996).

²⁸ The Government Accounting Office provided an analysis of medical malpractice insurance rates in 2003, noting a “dramatic” increase in recent years. See G.A.O. Highlights, *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates* (2003), available at <http://www.gao.gov/highlights/d03702high.pdf>. These increases have, for some time, been central to the claims of many supporters of “tort reform” in the medical malpractice arena. Not all scholars agree that any causal relationship exists between medical malpractice insurance rates and medical malpractice litigation. See, e.g., Anthony J. Sebok, *Dispatches from the Tort Wars*, 85 TEX. L. REV. 1465 (2007); TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* (2005).

²⁹ See George Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 307–08 (1997). Oregon is the only state that requires all practicing lawyers to maintain malpractice insurance. However, most states require businesses organized as limited liability partnerships to carry liability insurance, which covers most law firms. *Id.* at 323 n.65.

use of certain chemicals.³⁰ Snow removal services have found themselves on the wrong end of negligence-based lawsuits with some regularity.³¹ Those who operate wedding reception venues have been frequent targets of lawsuits alleging a range of different celebratory inadequacies.³²

Lawsuits are not the only form that private-back-end mechanisms can take. In many circumstances, unhappy consumers have one or more avenues for filing complaints or registering their unhappiness. In some circumstances, the complaints may go to the organization to which the service provider belongs, creating the risk that the practitioner will be sanctioned by that organization. In other cases, the complaint may be to a more general source, with more limited opportunities for direct sanction, but of course with the possibility of creating an impact on consumers' decisions. For example, the Better Business Bureau (BBB) tracks complaints against an enormous number of different service providers. A prospective consumer can learn a great deal from the BBB, including whether the plumber, roofer, or electrician under consideration has been the target of an abnormal number of complaints recently. The BBB also maintains a list of "accredited" organizations, which requires a business to meet a set of BBB standards, including responsiveness to customer concerns.³³

Internet-based businesses provide diverse examples of rating systems, many of which are popular, even if the users recognize the limits on the quality of the information they provide.³⁴ Even though the threat of direct

³⁰ The history of litigation against cosmetologists is, if the reader will forgive me, colorful. *See, e.g.*, *Baker v. Stewart's Inc.*, 433 N.W.2d 706, 707 (Iowa 1988) (injuries from application of a chemical hair straightening product); *Coons v. Farrell*, 437 S.W.2d 674, 675 (Mo. Ct. App. 1969) (negligent application of a cold wave permanent); *Smith v. Kennedy*, 195 So. 2d 820, 824–25 (Ala. Ct. App. 1966) (waving solution causing second-degree chemical burns.); *Wall v. Gill*, 225 S.W.2d 670, 671 (Ky. 1949) (permanent wave resulting in burns).

³¹ *See, e.g.*, *Abbattista v. Kings' Grant Master Ass'n*, 833 N.Y.S.2d 592 (N.Y. App. Div. 2007); *Castro v. Maple Run Condominium Ass'n*, 837 N.Y.S.2d 729 (N.Y. App. Div. 2007).

³² *See, e.g.*, *Newberg v. Next Level Events, Inc.*, 110 S.W.3d 332 (Ark. Ct. App. 2003) (overly slippery waxed floors); *Roman v. Queen Mary*, 2002 WL 787769 (Cal. App.2d 2002) (failure to provide "once in a lifetime" professional quality photographs); *Griffin-Amiel v. Frank Terris Orchestras*, 677 N.Y.S.2d 908 (N.Y. City Ct. 1998) (failure to provide wedding singer); *Murphy v. Lord Thompson Manor*, 938 A.2d 1269 (Conn. App. Ct. 2008) (canceled reservation date).

³³ For more on the BBB's accreditation program, see BETTER BUSINESS BUREAU, ACCREDITATION STANDARDS (2008), available at <http://www.bbb.org/us/bbb-accreditation-standards/>.

³⁴ *See, e.g.*, eBay, Feedback Forum, <http://pages.ebay.com/services/forum/feedback.html> (last visited April 28, 2009) (affording eBay buyers the opportunity to rate sellers by leaving "Feedback" in the form of a positive, negative, or neutral rating, and a short comment); Rate My Teachers, K-12

sanction is low, practitioners in many fields would fear a decrease in their ability to attract clients if former clients pursue these avenues. And therefore, these after-the-fact complaint mechanisms may create an incentive for careful practice, thus improving the quality of services.

The basic idea behind private-back-end mechanisms is typically twofold. First, and most relevant to the unhappy consumers who are typically the people who initiate these mechanisms, they often offer the promise of some form of compensation or remediation for the injuries allegedly suffered at the hands of the service provider. Second, and more relevant to this article's inquiry, these mechanisms theoretically influence practitioners' actions as they provide their services. ("If I mess this procedure up, my client can file a complaint, a lawsuit, or both, so I had better exercise care. . .") As such, these private-back-end mechanisms are an important component to quality assurance in most circumstances.

The combination of these four mechanisms might be summarized with the following grid:

Table 2: Examples of the Four Ways to Assure Quality Services

	Front-End (steps aimed at assuring quality by limiting the initial pool to those practitioners deemed competent or qualified)	Back-End (steps aimed at assuring quality by punishing or removing from practice those whose conduct is deemed unacceptable)
Public (steps taken by the state)	1. For example, requiring a license in order to join the practice.	2. For example, upon finding of misconduct, revoking a license or otherwise banning a practitioner from future practice.
Private (steps taken by private parties or organizations)	3. For example, consumers using reputations to make hiring decisions.	4. For example, unhappy consumers filing a complaint or suing bad practitioners for malpractice.

E. The Grid's Omissions and Simplifications

Like any good framework, this one aims to suggest categories that are mutually exclusive and collectively exhaustive. That is, the framework aims

Teacher Ratings by Students and Parents, <http://www.ratemyteachers.com/> (last visited April 28, 2009) (providing a forum for rating and commenting on teachers, administrators, counselors, and other school professionals who affect students' education); RateItAll, Consumer Reviews, <http://www.rateitall.com/> (last visited April 28, 2009) (providing consumers with an opportunity to leave ratings and reviews for most products).

to cover every possible mechanism, and each possible mechanism should fit in only one of the categories it offers.

If something challenges this framework, it would be the prospect that some mechanism might fall somewhere arguably in between the two ends of one of these axes. For example, what about something that is neither wholly public nor wholly private, but rather is a combination of the two? Or what about something that involves monitoring during the service itself, so that it is neither wholly front-end nor wholly back-end? It is possible that the framework would be more complete if I included an in-between row and an in-between column. But that would also produce *nine* mechanisms to consider—far more than I think would be useful in an analysis such as this one.

Furthermore, it is clear that mechanisms from each of these quadrants interact with mechanisms in other quadrants. For example, public-back-end mechanisms often work in tandem with the other mechanisms described in this framework. A practitioner who loses a license has been removed from the pool of future practitioners—resembling a public-front-end mechanism.³⁵ Many state entities that sanction a practitioner do so publicly, and the result may be that the practitioner will attract fewer clients in the future.³⁶ This parallels the functioning of private-front-end mechanisms.³⁷ Finally, in at least some circumstances, evidence that the state has sanctioned a practitioner may pave the road to private liability, an example of private-back-end mechanisms.³⁸ Still, these are conceptually separate (if interconnected in practice) mechanisms. If this framework presents something of a simplification or distortion, therefore, I believe it to be a useful simplification or distortion.

II. WHY NONE OF THE FOUR MECHANISMS WORKS WITH MEDIATION

The collection of mechanisms, private and public, front-end and back-end, which serve to assure quality in other practice areas should, theoretically, also assure the quality of mediation services. For the reasons I describe in this section, however, none of the four quality assurance

³⁵ See *supra* Section I.A.

³⁶ State Bar journals routinely publish, for example, notices of Bar members who have been sanctioned or suspended, along with information about their misconduct. Whether readers of the Bar journal ignore this information, use it in selecting attorneys, or merely look at them in a form of collegial rubber-necking, is an empirical question on which I hesitate to hazard a guess.

³⁷ See *supra* Section I.C.

³⁸ See *supra* Section I.D.

mechanisms is as effective in the context of mediation as they are for other practice areas.

A. *Why Public-Front-End Mechanisms Do Not Work*

Public-front-end mechanisms fail to form a significant mechanism for assuring mediator quality for the simple reason that the government has no ability to exclude anyone from the general practice of mediation.

For public-front-end mechanisms to work, the government must have some control over who can appear in the pool of people offering services to the public. In some circumstances, such state control is clear and longstanding. For example, the government has exclusive control over who can provide medical services or engage in the practice of medicine. Those who fail to meet the government's standards cannot practice medicine without risk of significant state sanction. The same is true of the practice of law, where the state can influence the quality of lawyering because it can exclude prospective practitioners from the marketplace. Where the state has established this exclusive barrier to joining a practice, it can then erect and enforce all kinds of barriers to entry into the market and requirements for maintaining a license. Education requirements, entrance exams, continuing education requirements, and the like are all possible products of a regime in which the state can say who is in, and who is out, of the pool of providers.

However, the government has no ability to exclude anyone from the general practice of mediation, and therefore, no licensure system can exist. Unless the state can draw an exclusive boundary around a practice area, no license can be required. And unless a license is required, the state has few front-end options for quality control.

Part of the reason no state has exclusive control over entry into the mediation marketplace relates to a dynamic I described as the "schmediation problem" in the Harvard Negotiation Law Review some years ago.³⁹ In short, mediation presents a definitional problem. Unless the state can say with precision what a practice entails, it cannot draw boundaries around a practice. Without boundaries, there is no way to establish exclusive control.⁴⁰

³⁹ Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69 (2005).

⁴⁰ The challenge associated with defining the boundaries of practice is certainly not unique to mediation. We continue to see evolving understandings of what constitutes the practice of law, for example. See, e.g., Linda Galler, *Problems in Defining and Controlling the Unauthorized Practice of Law*, 44 ARIZ. L. REV. 773, 778–79 (2002); see also Margaret Rentz, Note, *Laying Down the Law: Bringing Down the Legal Cartel in Real Estate Settlement Services and Beyond*, 40 GA. L. REV. 293, 299–302 (2005) (real estate agents); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235 (2002) (mediators). The medical profession has developed sub-

Although the enterprise of defining what “mediation” is sounds like a hollow philosophical exercise, it is so challenging that no sufficient definition has gained any significant acceptance. Some definitions of mediation are so narrow that they fail to include many of the things that people commonly consider as examples of mediation. As a descriptive matter, therefore, these definitions are unacceptable. For example, many definitions describe the mediator as a “neutral,”⁴¹ and yet some of the most prominent examples of third-parties who intervene in disputes (think, for example, of Jimmy Carter) bring with them a conspicuously non-neutral set of interests and agendas. Similarly, the very notion that the mediator must be a third-party, rather than one of the affected disputing parties, is often open to challenge.⁴² Other definitions of mediation are so broad that they unworkably tread on the turf of other practices. If, for example, mediation is defined as assisting disputing parties, does anything distinguish mediation from therapy? Even defining mediation in terms of specific practices does not cure the problem. I cannot imagine, for example, that we will ever see the day that a private citizen will face state sanction for the Unauthorized Asking of an Open-Ended Question.

Even if the state were to adopt a (troublesome) definition of mediation for purposes of establishing exclusive control over entry into the marketplace, a second “schmediation” problem arises. The government might be able to restrict the use of the word “mediation,” but there are few reasons why consumers care what the process or the practitioner is called. Nothing would stop me from printing up business cards the next day declaring myself to be a facilitator, consultant, convener, or “schmediator.” Indeed, with the exception of this final example, I have signed contracts and provided services very much in the nature of mediation under each of these names. And I am confident my experience in the market is common. Practitioners and disputing parties sometimes have very good reasons to avoid categorizing an intervention as a mediation. As a result, even if the label “mediator” were unavailable, many of the same practices would continue.

practices or designations (homeopaths, specialists, alternative practitioners, etc.) to distinguish among kinds of service providers, but line-drawing challenges persist. See, e.g., Lori B. Andrews, *The Shadow Health Care System: Regulation of Alternative Health Care Providers*, 32 HOUS. L. REV. 1273 (1996); Michael H. Cohen, *A Fixed Star in Health Care Reform: The Emerging Paradigm of Holistic Healing*, 27 ARIZ. ST. L.J. 79 (1995).

⁴¹ For a discussion of some of the implications of imposing neutrality requirements on mediation, see Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227, 253–58 (2003).

⁴² See, e.g., Hannah Riley Bowles, *What Can a Leader Learn from a Mediator?*, in THE HANDBOOK OF DISPUTE RESOLUTION 409 (Michael Moffitt & Robert Bordone, eds., 2005).

In short, public-front-end quality assurance mechanisms work for many practices and professions in which the government can limit the pool of people who are permitted to engage in the practice. Because the government requires all lawyers to pass the Bar exam, and to swear to uphold certain ethical principles, the quality of lawyering is improved. Because the state requires doctors to pass medical Boards, the quality of medical care is improved. However, because the state cannot prohibit *anyone* from engaging in mediation, this category of mechanisms has little effect on the quality of mediation services.

B. *Why Public-Back-End Mechanisms Do Not Work*

If a service provider acts in some obviously unacceptable practice, public-back-end mechanisms provide for at least a risk that the state will swoop in and sanction the lousy practitioner in a way that will both remedy the immediate wrong and serve as a deterrent for other bad actors. The bad lawyer may be disbarred; the untrustworthy stockbroker may be stripped of his ability to serve on boards or trade stocks; and the lousy plumber may be fined. But there is relatively little risk of such state sanctions attaching to even horrible mediators.

Two dynamics present in mediation make the application of public-back-end mechanisms problematic. The first reason is an extension of the implications of mediation having no license (a dynamic I describe in Section II.A above). Put most simply, because mediators need no license in order to practice, there is very little the state can threaten to take away from a bad mediator. In the absence of licensure sanctions, the most the state could do is threaten mediators with a fine of some sort, a circumstance with few precedents.

The second, and by far the more significant, obstacle to the effective operation of public-back-end mechanisms in the context of mediation stems from mediation's diverse and sometimes ambiguous set of commonly accepted practices. Before the state can declare someone to have engaged in punishment-worthy practices, it must have articulated where the boundaries of acceptable practice are. But no such articulation exists for mediation today in a way that makes them workable.

Virtually all of the variations among mediators are explained as variations in practice, style, orientation, or model. Keep the parties together or apart? There is a theory of mediation to support each decision.⁴³ Give the parties suggestions or not? Control the process or hand over the reins? Assess

⁴³ See, e.g., CARRIE MENKEL-MEADOW ET AL., *MEDIATION: PRACTICE, POLICY, AND ETHICS* 245–48 (2006); Lela P. Love & Stewart E. Sterk, *Leaving More Than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH. & LEE L. REV. 539, 574–75 (2008).

the parties' litigation alternatives? Expand the number of issues? Expand the number of parties? Push the parties toward settlement? Involve the media? Set deadlines? And so on. Most of the important decisions a mediator makes are explainable by one theory or another, and I see no evidence that the mediation community has concluded that a single answer to these questions is appropriate.⁴⁴

It is not that no one has tried to articulate any of the boundaries of appropriate mediator conduct. Many different organizations have offered ethical codes or standards of conduct in one form or another. The most prominent example of these is the Model Standards of Conduct for Mediators, a collection of mandates promulgated by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution. The Model Standards are, in many ways, modeled after lawyers' ethical codes, which have been used reasonably effectively in public-back-end efforts at quality control for attorneys. The Model Standards of Conduct for Mediators, however, are structured in a way that frequently makes their implementation virtually impossible.⁴⁵ They provide no hierarchy of duties; instead, piling dozens of "shalls" and "wills" on mediators, as though these ideals or principles never come into conflict with each other in practice. And they provide no interpretive mechanism akin to Bar Opinions for clarifying the operation of the Standards in real practice. As a result, the Model Standards, like their cousins in other voluntary mediation organizations, have little opportunity to provide the kind of clarity that would permit one to say that a mediator has stepped over the line.

Even if a mediator did violate one of the articulations of an ethical code like the Model Standards, it is not clear that the government would be able to swoop in and somehow sanction the mediator. The Model Standards are not governmental regulations. To the extent they are binding, they are binding only on those practitioners who are members of the organizations that created this articulation of ethics, and even then, it is not clear that they are actually binding.⁴⁶

⁴⁴ This diversity of accepted approaches is one of the significant obstacles to establishing a commonly accepted standard of practice, which in turn makes it difficult for an unhappy mediation consumer to sue a mediator successfully. See Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 153–59 (2003).

⁴⁵ For a more thorough critique of the Model Standards, see Michael Moffitt, *The Wrong Model, Again: Why the Devil is Not in the Details of the New Model Standards*, DISP. RESOL. MAG., Spring 2006, at 31. But see Joseph B. Stulberg, *The Model Standards of Conduct: A Reply to Professor Moffitt*, DISP. RESOL. MAG., Spring 2006, at 34.

⁴⁶ I am not aware of any instances in which organizations sponsoring the Model Standards have revoked the membership of a mediator for failing to adhere to the Standards. I am not aware of any state action against a mediator for failing to adhere to a voluntary organization's standards. And I am not aware of any private lawsuits in which a plaintiff successfully argued that a mediator's failure to adhere to a voluntary

Public-back-end mechanisms fail in mediation, therefore, for two reasons. First, because mediation is an unlicensed practice, the government has little to take away from lousy mediators. Second, no clear standards exist for determining which mediator practices are sufficiently lousy to warrant any state sanctions that may be available.

C. Why Private-Front-End Mechanisms Do Not Work

The fact that the government has only limited opportunities for assuring the quality of mediation services does not mean that *nothing* could possibly assure the quality of mediation services. After all, private actors' influences hold the key in many practice areas or professions. For several reasons, however, private-front-end mechanisms are not as functional in the context of mediation as they may be in other areas.

The most prominent example of a private-front-end quality control mechanism is the reputational market that drives (or at least influences) consumers' choices of mediators. I do not suggest that the market for mediators is entirely broken. After all, as I tell my students, because no licensure regime exists for mediators, everyone could go out and print business cards declaring themselves to be mediators. I caution them, however, that few are likely to make a living at it right away. And I have yet to learn that my cautionary words were unfounded.

In this sense, perhaps, the market for mediators is functional. This is the most common conclusion offered to me when I have spoken with groups of practicing mediators on the topic. In my experience, mediators who have successful, full-time practices have an almost unquestioning confidence in the marketplace and in reputations.

I am at least somewhat more skeptical about the degree to which the reputational market functions for mediators. It is not that I believe all of the successful mediators with whom I have spoken are deluding themselves ("The market has rewarded me, and I'm great. The market must work."). And it is not that I am engaging in a version of academic sour grapes (I turn down the vast majority of requests I receive to mediate cases these days.). What gives me pause, personally, is that some of the calls I receive from disputants wanting to hire me as a mediator describe mediations for which I personally believe I *cannot* be the most appropriate mediator. "Surely there are others in the marketplace who would be better equipped to mediate that particular case," I think to myself, "and yet I am the one getting the call." Something is not quite right with the market.

organization's standards constituted a compensable breach of duty. Absent any of these, I am comfortable concluding that the Standards are not binding, in at least the legal sense. I acknowledge, nevertheless, that standards such as these may serve other functions.

I do not claim, therefore, that the reputational market is entirely dysfunctional, nor do I proclaim complete confidence in its functioning. I know of no empirical research on the mediator selection process in the general marketplace.⁴⁷ What I am left with, therefore, is an analysis of the character of the market, based on what we do know about the context(s) in which mediators practice. Several aspects of that analysis suggest caution in equating mediators' success in the marketplace with the quality of their services.

First, the indicators of quality for mediators are not nearly as conspicuous as they may be for other practitioners. If I am to choose a hair stylist, I can get some idea about his or her skill by looking at the coiffures of the stylists' other clients. If I am to choose a landscaper, I can look at the jobs he or she has done in my neighborhood. How is a consumer to know whether a mediator delivers high-quality services? Settlement rates?⁴⁸ Experience as a mediator?⁴⁹ Experience as something other than a mediator?⁵⁰ Age?⁵¹ Education?⁵² Each of these proxies for quality may have some legitimacy. A mediator who has never settled a case, who has never

⁴⁷ Such research, if done well, would be an enormous contribution to the field.

⁴⁸ Settlement rates are a misleading figure for a variety of reasons. They fail to capture information about whether the mediator was skilled in crafting an efficient, value-laden deal. They fail to capture information about whether the kinds of cases the mediator has been settling are structurally similar to the specific case for which the consumer wants to hire a mediator. They are prone to selection bias—if I know I am to be evaluated on the basis of settlement rates, I am less likely to accept the hard cases.

⁴⁹ Experience alone is, at best, circular as a proxy for quality. "This mediator is skilled because she has experience, which she must have gotten because she's skilled."

⁵⁰ I have heard no shortage of practitioners and commentators describe what one "must" have in order to be a good mediator, and often, I am told that one "must" have experience as a non-mediator: "Only an experienced litigator can settle big-money lawsuits"; "Only someone steeped in public finance could resolve this kind of dispute"; "A mediator must have training in psychology in order to settle these emotionally-charged cases effectively." And so on. These assertions are problematic, at least, because there are many skilled mediators *without* these credentials settling precisely these kinds of cases. I am positive that there is no particular training or experience that is necessary to mediate effectively. Furthermore, I am positive that training or experience in something *other than mediation* does not necessarily make one an effective mediator.

⁵¹ Longevity suggests genetic good fortune, but it is not clear that it is a reliable proxy for skill as a mediator. I know some skilled and highly successful full-time mediators in their 30s; I know some skilled and highly successful full-time mediators in their 60s; and I know examples of unskilled and unsuccessful mediators of all ages.

⁵² A mediator's educational background, whether an indication of mediation-specific training or education in some other discipline, may present some useful information. Education may be a proxy for certain information that would be relevant to a consumer—for example, knowledge, intelligence, or persistence. But proxies based on education almost certainly exclude some of the most highly skilled and valuable mediators, and probably do so in a way that is socio-economically skewed.

held a professional position, who is twelve years old, and in middle school would be a terrible choice to mediate a complex commercial dispute. But beyond screening the most conspicuously inappropriate practitioners, the available proxies for an individual mediator's quality are severely limited.

A second reason for caution about the functionality of the reputational markets for mediators stems from the often stringent confidentiality that attaches to mediation processes. In most contexts, mediations take place under contractual and statutory confidentiality regimes. The precise nature of the confidentiality that attaches to a given mediation is highly jurisdiction-specific and is beyond the scope of this article. But it is fair to say that mediation differs from many practices or professions in that very little information is available about what mediators have done in previous cases. If I seek to hire a contractor for a large job, I might go and look at previous jobs he or she has done. If I seek to choose an appellate attorney, I might go and look at previous cases he or she has argued. But a mediator's record will often be very limited because of confidentiality rules. And the information that *is* available (things like number of cases and whether they settled) is limited in its utility for the reasons described immediately above.

Third, mediators' reputations are largely limited to individual (rather than collective) reputations because most mediators operate as solo practitioners or as members of very small firms. Multiple factors offer explanations of this dynamic. Mediation is not as obviously scalable as legal work or accounting work. It is difficult to imagine a senior partner mediator, a junior partner mediator, and multiple associate mediators working on most of the kinds of cases mediators handle. Mediators who are attorneys also face considerable conflict-of-interest ethical rules that make association with law firms a challenging business model.⁵³ As a result of the prominence of solo practice or small firms, mediation consumers cannot reliably use the quality of a mediator's firm, in most cases, as a proxy for the quality of the individual mediator.

Fourth, reputational markets tend to work best when they involve repeat players and multiple iterations, neither of which is necessarily present in the market for mediators. Without repeat players, the only way that reputations matter is if there is considerable publicity about reputations. In the case of some mediations, the lawyers can play this role because even if the named

⁵³ For illustrations of cases in which a mediator's service resulted in conflicts imputations, see *McKenzie Construction v. St. Croix Storage Corp.*, 961 F. Supp. 857, 862 (V.I. 1997) (held that a mediator who was later hired by the plaintiff's firm, imputed the firm and could not be insulated by a "cone of silence"); *Matluck v. Matluck*, 825 So. 2d 1071, 1073 (Fla. Dist. Ct. App. 2002) (disqualifying ex-mediator's law firm from representing a husband in post-dissolution proceedings). *See also* John G. Bickerman, *Leaving the Firm*, DISP. RESOL. MAG., Winter 1998, at 24, 24–25; John R. Van Winkle, *Excerpt from Mediation: A Path Back for the Lost Lawyer*, EXPERIENCE, Winter 2002, at 34, 34–37.

disputants are not repeat players, their attorneys may be.⁵⁴ But it would be a mistake to imagine that all mediations take place in a context in which both parties are represented, much less represented by counsel who are repeat consumers of mediation. Furthermore, unless a consumer has multiple experiences with mediation, it is even more challenging for that consumer to make a judgment about the quality of the mediation services he or she has received. If a consumer has only ever hired one mediator, and that mediator settled the case, how is the consumer to judge whether the mediator is skilled? Only with comparative information is reputational information robust.

Again, my thesis is not that mediation consumers have no bases for distinguishing one mediator from another. But there are enough flaws in the reputational market that we should be reluctant to trust that the market will simply reward those mediators who are skilled and filter out those who are not.

D. *Why Private-Back-End Mechanisms Do Not Work*

The final of the four mechanisms involves private-back-end actions, and the most prominent example of these is the opportunity that unhappy consumers have to file malpractice actions against mediators. The theory behind this mechanism is that private lawsuits both provide compensation to the immediate victims and deter future malpractice by mediators because of the publicity associated with the successful malpractice action. For a variety of reasons, mediators operate with virtual immunity from liability, and as a result, this mechanism has little effect on the quality of mediator services.

Mediators enjoy *de jure* immunity from liability in many jurisdictions and enjoy *de facto* immunity in virtually all contexts. Examples of successful lawsuits against mediators are extraordinarily rare, particularly in light of the number of cases going through mediation each year. To be clear, I do not believe the rarity of lawsuits against mediators is evidence that mediators never commit errors. Instead, after several years of research on the topic, I concluded that the rarity of lawsuits against mediators is evidence that lawsuits against mediators virtually never present attractive prospects for recovery.⁵⁵

As I explain in a pair of articles entitled *Suing Mediators*, and *Ten Ways to Get Sued: A Guide for Mediators*, mediators present unattractive

⁵⁴ See Jeffrey H. Goldfien & Jennifer K. Robbennolt, *What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles*, 22 OHIO ST. J. ON DISP. RESOL. 277, 285–86 (2007) (examining attorneys' roles in mediator selection).

⁵⁵ See generally Moffitt, *supra* note 44.

malpractice-lawsuit targets for at least four reasons.⁵⁶ First, it is difficult for an unhappy mediation consumer to demonstrate that a mediator has breached a particular duty.⁵⁷ Absent a breach of duty, no liability will attach. Second, an unhappy mediation customer has a hard time demonstrating the mediator's actions caused any particular harm.⁵⁸ Third, mediation parties have a real challenge demonstrating injury substantial enough to warrant the costs involved in seeking to recover damages through a malpractice action.⁵⁹ Fourth, even if a plaintiff overcame all of the above obstacles, many mediators enjoy a form of immunity: whether contractual, statutory qualified immunity, or common law quasi-judicial immunity.⁶⁰ The combination of these factors explains the virtual absence of malpractice suits against mediators, even though mediation practice involves hundreds of thousands of cases per year by the most conservative estimates.

No fully reliable mechanisms exist for quantifying the number of lawsuits filed against mediators on an annual basis. Available information, however, strongly suggests that the theoretical difficulty I describe above is borne out in practice. State and federal reporters are virtually bare of malpractice complaints against mediators.⁶¹ Furthermore, mediation malpractice insurance remains available to practitioners for a tiny fraction of

⁵⁶ *Id.*; Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003).

⁵⁷ Theoretically, a mediator's duty may be established through common law tort principles, through contractual undertakings, or even through statutory mandates on the mediator. In most instances, however, even an unfortunate set of mediator actions is unlikely to constitute a clear violation of any of these. *See* Moffitt, *supra* note 44, at 153–67.

⁵⁸ Causation is difficult in the context of mediator misconduct because either (1) the case did not result in a settlement, in which case the aggrieved party would have enormous challenges proving that but for the mediator's actions, the case would have settled, or (2) the case settled, in which case the complaining party would have enormous difficulties in establishing that but for the mediator's actions, the case would have settled on terms more favorable to the complaining party. *See id.* at 175–82.

⁵⁹ An unhappy party might be able to establish that a mediator wasted the parties' time, making the mediator's fee at risk. But the real money—the kind of money that would make a malpractice lawsuit attractive to a plaintiff's attorney for example—would be available only if the plaintiff could demonstrate some larger injury. Thus, absent the most egregious conduct, any damages would likely be limited to the time wasted.

⁶⁰ For more on mediator immunity, see Scott H. Hughes, *Mediator Immunity: The Misguided and Inequitable Shifting of Risk*, 83 OR. L. REV. 107 (2004); Moffitt, *supra* note 44, at 173–75.

⁶¹ Of course, reported cases form only a small percentage of cases filed. Still, a review of secondary and associational sources confirms the same basic understanding; malpractice lawsuits against mediators are extraordinarily rare. *See also* Jim Coben, Mediation Case Law Project, <http://law.hamline.edu/adr/mediation-case-law-project.html> (last visited April 28, 2009) (a treasure-trove cataloguing litigation involving mediators over the recent years).

the cost of malpractice insurance in other practice areas or professions. This suggests that actions against mediators are rare or that actions against mediators produce little exposure to significant liability. I strongly suspect that the reality is both of these conditions are true.

Even if malpractice actions serve to deter bad behavior in those who fear that they might be the targets of future malpractice actions, the fact that such cases are extremely rare in the context of mediation suggests that this mechanism does not serve as much of a mediation quality-assurance mechanism.

III. WHAT WOULD HAVE TO CHANGE FOR THE FOUR MECHANISMS TO BE EFFECTIVE WITH MEDIATION

The original draft of this article had only the two sections above, and its title was “The Four Ways to Assure Mediation Quality (and why none of them will work).” In essence, without realizing it, I was suggesting that mediation would remain forever beyond the reach of quality assurance mechanisms.

After re-examining the evolution of other practice areas and professions, however, I arrive at a different conclusion: Mediation is not permanently beyond the reach of formal and informal quality assurance mechanisms. It is merely beyond their effective reach *right now*.

Something will change. One or more of the current dynamics I describe above, which renders these mechanisms ineffective, will change. The interesting question is what that change may look like.

In the four sections below, I describe the conditions that would need to exist for each of the four quality assurance mechanisms to function more fully. I am not predicting that all of these changes will occur. Indeed, I think that some of these changes are mutually exclusive. What I describe, therefore, is more in the nature of a smorgasbord, an array of different possible future conditions—one or more of which is likely to emerge as mediation evolves and matures.

A. *Making Public-Front-End Mechanisms Work*

Two different possible dynamics could cause public-front-end mechanisms to work more robustly in the context of mediation. First, if mediation ever became a licensed practice, the state would have the opportunities for front-end screening it currently enjoys in other licensed practices. Second, if mediators’ work depended more thoroughly on referrals from a government entity, then even in the absence of a generalized license, the state could establish standards and barriers to market entry akin to those it imposes on other licensed practices.

1. *Mediation Licenses*

For all the reasons I describe above in section II.A., I am deeply skeptical that the government could establish or enforce any barrier to entry into the marketplace for the general practice of mediation. Too many varied practices, in too many contexts, are commonly considered “mediation” today. The diplomat, the retired judge, the schoolyard peacekeeper, the volunteer in small claims court, and the disinterested expert hired by both disputants can all reasonably claim to be “mediators.”⁶² I doubt any legislative effort would change this parlance, and I doubt the political incentives would be sufficient to try to establish a wholesale prohibition against the Unlicensed Practice of Mediation.

But what if the government took the back door—seeking many of the same effects as licensure, but without an official license? What if the state did not try to establish a licensure regime, but instead afforded certain benefits or protections only to those mediators who satisfy a set of government-established standards? That would accomplish many, though not all, of the same quality assurance aims as licensure.

The most conspicuous possible vehicle for such a public-front-end mechanism would be the state-created and state-enforced system of confidentiality protections. *If* mediation consumers cared so much about confidentiality protections that they sought services on the basis of which providers could assure confidentiality, *and if* the only reliable mechanism for assuring confidentiality was through statutory means, *then* the state might enjoy control akin to a license. The only way mediators could practice (which requires getting clients) would be to adhere to whatever conditions the state establishes.

This is not entirely far-fetched. It is not difficult to imagine that more states might move away from enforcing common law and contractual mediation confidentiality protections, in favor of statutory protections like those in the Uniform Mediation Act.⁶³ And if they do so, and if the marketplace demands that mediators provide confidentiality assurances, then states could insert additional requirements for the purpose of limiting the pool of people who would enjoy the protections.⁶⁴

⁶² See Moffitt, *supra* note 39 (distinguishing between prescriptive and descriptive definitional patterns with respect to mediation).

⁶³ To date, ten states have adopted some version of the UMA. See Uniform Law Commissioners, *A Few Facts About The Uniform Mediation Act*, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp (last visited April 28, 2009).

⁶⁴ For example, states might include a different, more limited definition of who constitutes a “mediator” under UMA § 2 for purposes of limiting the availability of confidentiality protections. Or states might revise UMA § 3 for purposes of carving out additional exceptions to the scope of coverage. Although the UMA is a product of the

2. Source-Point Restrictions

A second public-front-end measure, shy of full licensure, would be a condition in which the government itself was the source of mediators' work, and therefore, the government could establish conditions for receiving that mediation work. I label these "source-point restrictions." It stands to reason that if the government is referring work to non-governmental actors, the government can restrict who receives the work. Indeed, the government probably *has* to set standards, since there must be some basis on which the government allocates the work. And so, although the government cannot require that every mediator meet a set of standards in order to practice, it can require that every mediator *who wants work from the government* meet that set of standards. In this way, the government accomplishes at least part of what it might with a licensure regime.

Examples of source-point restrictions already exist. Some mediation programs achieve *de facto* source-point restrictions by using only their own employees. For example, the Ninth Circuit Appellate Mediation Program staffs all of its mediations with mediators employed by the appellate mediation program itself.⁶⁵ It is common, however, for mediation programs to use outside mediators, either volunteers or paid roster mediators. In those circumstances, the program establishing or maintaining the roster has every opportunity to establish membership qualifications. For example, even in the federal appellate system, the D.C. Circuit Appellate Mediation Program uses only volunteer mediators, and requires that they all be members of the Bar with experience litigating.⁶⁶ Presumably, the Ninth Circuit's hiring decisions and the D.C. Circuit's restrictions on eligibility stem from a desire to assure the quality of the services their mediators provide.

To be clear, the trend is not uniformly toward more restrictive governmental standards for court-affiliated mediation programs. For example, Florida maintained rules for almost twenty years that limited the pool of Circuit Court Mediators to members in good standing of the Florida Bar with at least five years of Florida practice, and to retired trial judges who

National Conference of Commissioners on Uniform State Laws, it is common for an individual state to tailor some aspects of the proposed uniform law to the specific needs of that state. *See, e.g.*, Gary Provencher, *The Uniform Mediation Act: An Analysis of Current State Acts*, <http://moritzlaw.osu.edu/jdr/mayhew-hite/vol5iss1/student.html> (last visited April 28, 2009) (reporting on state variations in their adoption of the UMA).

⁶⁵ *See* Gilbert J. Ginsburg, *The Case for a Mediation Program in the Federal Circuit*, 50 AM. U. L. REV. 1379, 1382–89 (2001) (discussing the appellate mediation programs in several different circuits).

⁶⁶ *See id.* at 1382–86; U.S. Court of Appeals for the D.C. Circuit, Appellate Mediation Program, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/Stub+-+Appellate+Mediation+Program> (last visited April 28, 2009).

had presided for at least five years.⁶⁷ The Florida Supreme Court recently dropped the requirement that these mediators be attorneys, in favor of a multi-factored point-based system, in which educational background is only one of several basic considerations.⁶⁸

Nevertheless, the basic idea that the state might be an important source of cases for mediators is entirely conceivable. And the idea that the state, as the source of work for mediators, might set some quality-driven eligibility standards for receiving cases is also entirely predictable. Therefore, even though no state is likely to establish a complete licensure regime for mediation generally, it may accomplish many of the goals of a public-front-end mechanism through other means.

B. *Making Public-Back-End Mechanisms Work*

Two different possible circumstances *could* develop that would increase the effectiveness of public-back-end mechanisms in the context of mediation.

The first possibility involves the government developing a license or a set of source-point restrictions that have the equivalent function. As I discuss above, I think that full licensure across all contexts is extremely unlikely. But the government is already moving toward establishing limits on the pool of potential mediators in specific contexts. It would not be difficult at all for source-point restrictions to include barriers to entry into the marketplace *and* conditions in which otherwise eligible mediators would be excluded (for example, for bad practices).⁶⁹ For example, North Carolina's district courts have established minimum education and experience requirements for all of its certified mediators, *and* it has established a procedure for filing complaints against court-certified mediators, with one possible sanction being de-certification.⁷⁰ Such complaint mechanisms might have an effect on

⁶⁷ It was the original adoption of this rule that prompted Jim Alfini to write his widely-recognized "Is This the End of 'Good Mediation'" article. See James J. Alfini, *Trashing, Bashing, and Hashing it Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 56 (1991).

⁶⁸ See Fla. R. for Certified and Court-Appointed Mediators R. 10.100 (amended 2007), available at http://www.flcourts.org/gen_public/adr/certrules.shtml (listing training, education, experience through supervised employment or mentorship, and a set of miscellaneous considerations); see also *In re* Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators, 969 So. 2d 1003, 1006–10 (Fla. 2007).

⁶⁹ The most extensive current research on mediator complaint mechanisms comes from Paula Young. See Paula Young, *Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 OHIO ST. J. DISP. RESOL. 721 (2006); see also Charles Pou, Jr., *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, 2004 J. DISP. RESOL. 303 (2005).

⁷⁰ For more on the North Carolina district court mediation program, see North

mediator quality even in the absence of any licensure or quasi-licensure regime. For example, if a state were to get into the business of certifying (and decertifying) mediators generally, then in theory, the state could threaten to withdraw its certification in the event a mediator engaged in misbehavior.⁷¹

The second possible condition would be one in which the state began to extract binding commitments from mediators who were being prosecuted for some form of misconduct that they would no longer engage in the practice of mediation. The parallel here would be with the SEC's plea agreements with financial analysts or people who wish to serve as directors of public companies. I have a hard time envisioning what mediators might do that would cause the kind of government attention required to cause this to occur, and I have a hard time envisioning how the agreement never to mediate again would be drafted or enforced. Still, in the same way that the government can exercise public-back-end controls on even those practitioners who do not work in licensed practices, such a mechanism is at least theoretically possible for mediators.

C. Making Private-Front-End Mechanisms Work

Two different developments *could* result in an increase in the extent to which private-front-end mechanisms would effectively assure mediator quality. Consumers would need to have access to greater information about individual mediators, or mediators would need to be grouped in a way that consumers could use their organizational affiliations as reliable proxies for quality.⁷²

Carolina Dispute Resolution Commission,
<http://www.nccourts.org/Courts/CRS/Councils/DRC/Default.asp> (last visited April 28, 2009).

⁷¹ There have also been a number of private, non-state entities that have at least begun the process of certifying mediators. For example, the International Mediation Institute has recently begun a campaign to certify mediators around the world according to a single standard. *See* International Mediation Institute Mediator Competency Certification, http://www.imimediation.org/?cID=standards_main (last April 28, 2009). Note that both state-created and privately-issued certifications rely on the market's perception of their value in order to function. If the market is indifferent to whether a mediator holds a particular certificate, the certificate does little to affect the quality of mediation services.

⁷² A third possibility is at least theoretically possible, although I treat its likelihood as significantly more remote. It is possible that, just as with doctors, insurance companies or other private organizations might increase their influence over the pools of potential mediators and over their practices. This condition would develop only if mediators had reason to fear increases in mediation premiums or the revocation of malpractice insurance altogether, and I have seen no evidence of the kind of variability in issuing or pricing mediation malpractice insurance to support the idea that any such development is imminent.

It is possible that mediation consumers will begin to have access to greater information about individual mediators' performances. The Better Business Bureau and its equivalents have long served something of a clearinghouse function, and perhaps it will become more active in monitoring mediators' services. But the highly decentralized internet has transformed consumers' expectations in many sectors. Today, through voluntary rating systems involving stars, smiley-faces, and the like, consumers have at least rough information about many previous consumers' experiences. If I am purchasing a used book through amazon.com, I am presented with information about a number of different sellers, including the price they will charge me for the book, their shipping policies, and a breakdown of the ratings each vendor's former customers have assigned to it. Even more decentralized are the highly-publicized "consumer vigilante" videos disgruntled former customers may post on the internet, showing a company in an embarrassingly negative light.⁷³ Confidentiality may limit some of what mediation clients can convey about their experiences, but I am reasonably sure that enterprising and unhappy consumers might find a way to convey information that would affect future consumers' choices in mediators.

A second possibility is that the market of mediation providers will consolidate itself in ways that would see the development of more robust branding. As I explain above in section II.C, I do not currently see a business model that would make such market consolidation viable.⁷⁴ Still, the fact that mediation is not currently organized into large firms is no evidence that it will not be. Two decades ago, the largest 250 law firms employed just fewer than 45,000 attorneys, and today the largest 250 law firms employ more than 125,000 attorneys, often in branch offices spread around the country and around the world.⁷⁵

If mediators were to cluster into fewer, larger firms, we would almost certainly begin to see the market differentiating among the firms. The firms' reputations would then serve as proxies for the quality of its mediators, and

⁷³ For a fascinating discussion of the increased power of disgruntled, individual consumers who are willing to invest time in taking their complaints public, see Jena McGregor, *Consumer Vigilantes: Memo to Corporate America: Hell Now Hath No Fury like a Customer Scorned*, BUS. WK., Mar. 3, 2008, at 38.

⁷⁴ Judicial Arbitration and Mediation Services, Inc. (JAMS) may represent a current exception to this observation. Their business focuses almost exclusively on one specific type of mediation. And at least partially as a result, in that narrowed market space, the consumers and providers are almost all multiple-iteration repeat players. As a result of this narrowly defined universe of actors, JAMS may already demonstrate the functionality of private-front-end mechanisms. I would have even greater confidence in the functionality of the reputational market in this sector if there were multiple, similarly-sized and situated competitors to JAMS.

⁷⁵ See Leigh Jones, *Another Growth Spurt for Firms*, THE NAT'L L.J., Nov. 12, 2007; Samuel Miller et al., *Conflicts of Interest in Corporate Litigation*, 48 BUS. LAW. 141 (1992).

the firms would then have strong incentives to make quality-assurance an internal priority. Consider, for example, the evolution of the market for management consulting. An unlicensed practice, like mediation, management consulting services comes in a virtually infinite range of approaches, quality, and pricing. The corporate executive who decides to spend more than a million dollars a month to hire a team of McKinsey consultants does not do so because he or she knows all of the team members individually. Instead, he or she relies on McKinsey's reputation and trusts that McKinsey will have done the work internally to assure that their consultants will meet client expectations. Might the day come when a disputant (or a disputant's attorney) would know that a mediator who works with X firm represents a lower-priced option, that a mediator who works with Y firm reliably has the greatest responsiveness to customer idiosyncrasies, and that a mediator from firm Z will have the highest public profile?

Short of actual market consolidation, a final possibility is that voluntary associations will come to provide consumers with information about the quality of mediators. Might one of the major dispute resolution associations get into the business of certifying mediators?⁷⁶ Might it monitor members' behavior or otherwise take steps to assure the quality of the services of its certified members? For this to come about, the organization would need to go through the difficult process of deciding on criteria for certification. Of course, certification from a voluntary association matters only if consumers believe that certification from the organization means something beyond, "Your annual dues check didn't bounce." In fact, certification would need to mean something more than merely satisfying eligibility criteria that would be evident to any consumer even in the absence of a certificate. It would not have much effect on consumers, for example, if all one needed to qualify for a certificate was to be a member in good standing of the Bar, since any consumer would have ready access to that information anyway. But it is conceivable that a prominent voluntary association might establish, enforce, and publicize certification criteria—and that the market would care. If this happened, it would be an example of a private-front-end mechanism contributing to assuring mediator quality.

A variant on this possibility might present a hybrid public-private mechanism. Courts increasingly order parties to mediation—for example through consensual orders crafted in conjunction with Rule 16 conferences or their state equivalents. What if the mutually agreed upon mediator named in

⁷⁶ For an example of what the evolution of such a conversation might look like, consider the work of the Task Force on Mediation Certification from the Association for Conflict Resolution. That Task Force, formed in 2002, finalized its report and recommendations in 2004, and the association undertook a feasibility study in 2005. *See* ACR Mediator Certification Task Force, Report and Recommendations to the ACR Board of Directors (2004), available at <http://www.acrnet.org/about/taskforces/certification.htm>.

one of these orders is a member of one of these voluntary associations that promulgates a set of standards of conduct? What if the mediator specifically promises to adhere to those standards? What if the standards were incorporated into the court's order? It would be reasonably easy to foresee a situation in which the state would then find itself at least potentially in the business of enforcing privately-developed standards of conduct, creating something of a public-private hybrid mechanism for quality assurance.⁷⁷

D. *Making Private-Back-End Mechanisms Work*

In order for private-back-end mechanisms to play a stronger role in the assurance of mediator quality, we would probably have to see a truly creative, almost impossibly bad set of facts emerge from at least one mediation gone awry. We would not, however, necessarily need to see such facts frequently. Even one case could have significant effects on mediators' practices.

Consistent with the analysis I presented in Section II.D, above, a path-breaking mediator liability case would almost certainly involve:

1. A mediator who engages in conduct that conspicuously and unquestionably violates one or more of the duties the mediator owes to someone. The duty might appear specifically in the mediator's poorly-drafted mediation agreement, or it might stem from some widely-recognized standard of practice in the community.

2. A mediator whose conduct is the direct cause of injury—most likely injury to one of the parties, though it could be that the mediator's conduct injures a non-party. This would have to be something more than just a mediator asking bad questions or steering the conversation in an unfortunate way. Instead, the mediator would probably have to take some terrible action that caused immediate injury.

3. At least one of those injured by the mediator sustains injuries serious enough to make the injured party willing to pursue a malpractice action against the mediator. This could happen because the injury was severe enough that the disputant's financial incentive (or that of its insurance company) supports a litigation strategy. Or it could be that the injured party was both sufficiently wealthy and sufficiently outraged to pursue litigation even without independent economic incentive.

4. The events take place in a context and in a jurisdiction in which the mediator does not enjoy any form of immunity. The state would have to

⁷⁷ I have heard at least anecdotally of courts considering enforcing standards of conduct on mediations that take place *outside* of the context of a court order, merely on the basis that the litigated case rests within the jurisdiction of the court. I am at a loss to explain, procedurally, how the court's authority would extend in this way. But if such a development were to occur, it would still further expand the prospect of a public-private blurring.

refuse to enforce contractual waivers, if any were present. And the mediation would have to have taken place outside of the protections of statutory or common-law immunity.

5. The litigated mediator malpractice case must be resolved in a way that is open to publicity. Early disposition on a procedural matter would not serve a quality-assurance function. Nor would settlement serve a quality-assurance function, if the settlement and the facts underlying the agreement were not available for full public consideration. The case would have to be settled with full disclosure or resolved on its merits, with the latter having the greatest impact if the party complaining of mediator misconduct prevails.

This combination of developments is, understandably, quite unlikely in any given mediation. But hundreds of thousands, if not millions, of mediations take place every year—enough that it would be dangerous to imagine that such a combination could never occur. And, from a quality-assurance perspective, the mediation community's behavior would very likely be affected even if this combination only happened once.⁷⁸ Partially out of an interest in risk-management, and probably partially as a form of professional voyeurism, I am confident that mediators would pay careful attention to the fates of those who are sued successfully for malpractice. This private-back-end mechanism for mediator quality assurance could, therefore, work.

IV. CONCLUSION

Over time, every practice or profession falls under the influence of one or more of four possible quality control mechanisms. Some become subject to licensure regimes—a public-front-end mechanism that seeks to assure quality by restricting the pool of service providers. Some practitioners become subject to state sanctions for misbehavior—a public-back-end mechanism that seeks to assure quality by removing the worst offenders from practice. Some practitioners become influenced heavily by consumers' reputation-driven choices in markets—a private-front-end mechanism that seeks to assure quality by relying on the availability of accurate information

⁷⁸ It might be unfortunate to imagine that one case against one mediator might have an impact on an entire field's practice. After all, if the idea that "bad cases make bad law" holds true, and if it is only a truly bad case that would result in mediator liability, then that might suggest caution in making too much meaning out of a single case. But right now, the slate is essentially clean. And it seems at least likely to me that we would see considerable anchoring around whatever principles are articulated in the first case. Perhaps at some point, we will see so many cases alleging mediator malpractice that a single successful case will attract no attention. We are not currently in that condition. Mediators, insurers, program administrators, and probably even consumers would pay attention today.

about practices of service providers. And some practitioners restructure their practices in ways that minimize their exposure to liability for malpractice—a private-back-end mechanism that seeks to assure quality by creating disincentives for misbehavior.

Today, most mediators operate without significant influence from any of these quality-assurance mechanisms. But something will change.

No significant practice or profession operates so thoroughly outside of all four of these quality-assurance mechanisms as mediation currently does. Some practices operate under the influence of all four mechanisms. For example, physicians operate under the conspicuous influence of all four: they have to pass entrance examinations in order to secure a license; they are at risk of losing their licenses if they engage in misconduct; their prospective clients have access to considerable information about their practices and reputations; and they are exposed to private liability for malpractice. Other practices may rely more heavily on only one or a few of these mechanisms. But they all have something promoting, if not assuring, quality.

The fact that mediation operates without any of these mechanisms, and therefore, the fact that something will change with respect to mediation, is no indictment of mediation. I certainly do not intend to suggest that mediators operate as a band of rogues, committing malpractice with indifference. Many mediators are outstanding. Still more are at least well-intentioned. Mediation is merely undergoing a process of speciation and maturation at this moment. That developmental process is occurring under the influence of complex market forces, periodic government attention, and the self-interested attentions of many different established professions and practices. It is no wonder that something is going to change. In fact, many aspects of mediation are likely to change in the coming years.

This analysis suggests at least two follow-up questions:

One is a predictive question: What aspects of mediation or the context in which mediation takes place are *most likely* to change? I am reluctant to suggest that my crystal ball functions better than any other observer's. Based on my research into other fields' developments, however, my best guess is that some changes (like increased source-point restrictions and increased reputational information) are more likely than others (like licensure or market consolidation).

The second is a normative question: What aspects of mediation or the context(s) in which mediation takes place *should* change? On this, I remain almost as conflicted as I was when I began this inquiry several years ago. Given the complexities of mediation practice and the importance of maintaining diversity among those practices, I cannot bring myself to hope for an increased quality-assurance role for the state, with the possible exception of governmental source-point restrictions. I think we too often conflate the concepts of "progress" and "regulation." And I am virtually certain that regulation would diminish innovation and diversity in approaches

to mediation. Reluctantly, therefore, and with a robust appreciation for the flaws present in the market, I think the private side of the equation offers more potential.

Conversations about quality assurance and mediation have only just begun. Those conversations will improve with an understanding of the four basic mechanisms potentially available for assuring the quality of mediators' services.