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Do I Have to Say More? When Mediation Confidentiality Clashes with the Duty to Report*

I. BEGINNINGS

Joe Smith is an experienced mediator and well-respected attorney in his county. He usually mediates divorce settlements, priding himself on a nearly eighty percent settlement rate. Smith was recently hired to mediate a settlement between a couple that was heading for an ugly court battle. The attorney for the husband, a younger attorney who clearly looked up to Smith, confided in Smith that he had advised the husband to conceal from the wife the existence of a mutual fund account that was performing extremely well. The attorney joked with Smith about how he was “putting one over on” the wife, and that the mutual fund had been transferred into the name of a paralegal in order to avoid detection by the wife or her attorney.

Smith was concerned about whether the husband was mediating in good faith and counseled the husband and his attorney on the importance of open dialogue and of behaving with integrity toward the wife. Eventually, however, Smith, unable to persuade the husband or his attorney to be open about the mutual fund, withdrew from the mediation, citing to the wife an unspecified conflict of interest. With a second mediator, a settlement was eventually reached without the existence of the mutual fund ever coming to light. Some months later, the wife’s attorney, by chance, overheard the husband’s attorney talking about the settlement and did some investigative

* This Comment would not have been written without the insights provided by Professor Mark Morris of the North Carolina Central University School of Law. The Author is indebted to him and to Mr. Frank Laney, Chief Mediator for the 4th Circuit Court of Appeals, for their help and generosity. Any and all errors are the Author’s alone.

1. This is an entirely hypothetical fact situation, although some general details were taken from N.C. DISPUTE RESOL. COMM’N, ADVISORY OP. 10-16 (2010), available at http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/compliedaoor_10-16.pdf; OR. STATE BAR BD. OF GOVERNORS, FORMAL OP. NO. 2005-167 (2005); and FLA. MEDIATOR QUALIFICATIONS ADVISORY PANEL, ADVISORY OP. 95-005 (1995).


3. Withdrawal is what the ethics opinions cited supra note 1 would tell Smith to do.
work, uncovering the mutual fund and the plot to keep it secret. The wife filed an action with the court to have the settlement set aside, a complaint against the husband’s attorney for fraud, and a separate complaint against Smith under Rule 8.3 of the state’s Code of Professional Responsibility (the Code).4 This Comment will explore the mediation rules and Codes of the various states.

Without mediation—and other forms of alternative dispute resolution—the civil justice system in this country would surely collapse under its own weight.5 Legal scholars from Chief Justice Warren Burger down have noted that the adversarial process should not be the only way to resolve disputes, and indeed, it is not suitable for many people.6 Recognizing this, many states have made attempts at alternate dispute resolution (ADR) necessary to continuation of lawsuits.7

The demand, therefore, for trained ADR professionals is high. The American Arbitration Association lists approximately 8,000 arbitrators and mediators in its network;8 there are over 1,200 certified Superior Court me-

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4. See Model Rules of Prof’l Conduct R. 8.3 (2010) (“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.”). This rule is referred to in several amusing ways by practicing attorneys, one of the best being the “duty to squeal.” Pamela A. Kentra, Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct, 1997 BYU L. REV. 715, 741 (1997).
5. For the period July 1, 2009–June 30, 2010, a total of 5,319 of the 8,691 cases filed in North Carolina Superior Court were sent to mediation—of which, 2,772 (43%) settled. 2009–2010 N.C. Dispute Resol. Comm’n Rep. 10 (2010). Since 2007, the U.S. Department of Justice has saved 2,869 months (or over 239 years) of litigation time by using some form of alternate dispute resolution. Alternative Dispute. Resolution at the Department of Justice, U.S. Dep’t of Justice, http://www.justice.gov/odr/odj-statistics.htm (last updated Dec. 2010). In 2010 alone the Department saved more than $11 million in litigation and discovery expenses. Id.
6. Burger noted that:

[W]e must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, trials will be the only means, but for many, trials by the adversary contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversary process as the principal means of resolving conflicting claims is a mistake that must be corrected.

7. For example, all civil actions filed in North Carolina Superior Court must be mediated before a court date will be calendared. N.C. Gen Stat. § 7A-38.1(a) (2009).
mediators in North Carolina. Most states allow both attorney and nonattorney mediators, requiring only that certified mediators have professional qualifications and complete mediation training.

Problems arise when the attorneys for the parties in the mediation behave in ways that would, in a litigation setting, lead to professional sanctions. How the states should handle this situation is the subject of quite heated debate.

One side of the debate holds that attorney–mediators are attorneys first. They are still bound by the same Code that they abide by as attorneys, and these responsibilities cannot be put on hold. Those who adhere to this side believe that the Code protects the integrity of the profession, because violations harm the profession as a whole. As another part of their argument, the attorney–mediator would note that reporting attorney misbehavior under Rule 8.3 is (generally) mandatory; if a mediator, such as Smith, does not report infractions that he has knowledge of, he opens himself up to sanctions.

The other side of the debate holds that attorney–mediators are, at that moment, mediators, not attorneys. The mediator is not at the mediation as a referee, but as a facilitator who is working to get the best resolution for the parties. Forcing mediators to wear two hats is unfair, they argue, to both the mediator and the participants. Forcing attorney–mediators to be on the alert for every infraction the parties may have committed in order to protect themselves from liability is not conducive to a good process or result. It also means that attorney–mediators have additional responsibilities that nonattorney–mediators do not, leading to discrepancies in how these two groups of identically trained mediators operate.

This Comment surveys the conflict at the state level and proposes a solution. In the first section, there will be a short discussion of mediation

11. In some states, reporting is not mandatory. See infra Part III.C.2.
12. See MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. 1 (2010) (“Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct . . . .”).
13. My focus here is primarily on mediation in civil litigation (civil mediation). Mediation occurs in many other settings (criminal law, family law, worker’s compensation, employment disputes, to name but a few), and the issues discussed here are no less relevant in those areas than they are here. However, in the interests of brevity and clarity, I have chosen to discuss only the civil arena.
and the clash between the mediation rules and the Code. In the second section, the Comment will discuss the choices that are available to the states in designing mediation and professional conduct rules. This section will explore the interplay between the two sets of rules in more detail, paying close attention to what the rules allow and what they forbid. Finally, a concluding section will discuss the competing, important interests and a proposed path forward.

II. SOME BACKGROUND

A. An Introduction to Mediation

Mediation is defined by Black’s Law Dictionary as “[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.”

Mediation can be defined broadly—as allowing for neutral evaluation of claims and reasonableness of settlement offers—or narrowly—as only allowing the neutral to facilitate the parties’ negotiations. However mediation is defined, each state determines the qualifications, standards, and sanctions applicable to mediators.


15. “Neutral,” for the purposes of this Comment, is used interchangeably with “mediator.”

16. See Douglas H. Yarn, Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application, 54 ARK. L. REV. 207, 216 (2001). Note that nonattorney–mediators will almost necessarily be confined to a more narrow version of mediation, while attorney–mediators, because of their legal knowledge, may choose either style.

Parties to mediation and their attorneys will have certain expectations of both the mediator and the mediation process. They expect that the mediation will be conducted according to the conventions of the state, that the mediator will make some evaluation of the chances of success of the claims, and that the mediator will keep their discussions confidential. Confidentiality is perhaps the most important factor in the success of mediation as a form of dispute resolution. Parties expect that what they say will go no further and so are more willing to admit fault or regret than they would be if their statements could be repeated in court.

Pursuant to the Federal Rules of Evidence, “conduct or statements made in compromise negotiations” are inadmissible as evidence to prove “liability for, invalidity of, or amount of a claim . . . or to impeach through a prior inconsistent statement or contradiction[.]” FED R. EVID. 408(a).

One place where apologies have been found to be extremely useful tools in reducing litigation is in medical-malpractice suits. A study by Johns Hopkins found that apologies reduced malpractice settlement amounts by thirty percent. Rachel Zimmerman, *Doc-
B. Attorney Ethics Rules

While confidentiality is important, parties to mediation also expect that the mediator will behave according to the standards of his profession. If mediators are presumed to adhere to mediation ethical standards, then in most states, they would be expected to keep everything said and done in mediation confidential. However, if the mediator is an attorney, then the question becomes: is he or she expected to adhere to the attorney ethics standards also? The American Bar Association has attempted to solve

20. “Everything” is slightly misleading. However, it is much simpler than “everything except child and elder abuse, threats or actual violence, and in some states, statements covered by open meetings legislation.”

21. Each state also retains its own Code. See Ala. Rules of Prof’l Conduct R. 8.3 (Alabama); Alaska Rules of Prof’l Conduct R. 8.3 (Alaska); Ariz. Rules of Prof’l Conduct R. 8.3 (Arizona); Ark. Rules of Prof’l Conduct R. 8.3 (Arkansas); Cal. Rules of Prof’l Conduct R. 1-100 (California); Colo. Rules of Prof’l Conduct R. 8.3 (Colorado); Conn. Rules of Prof’l Conduct R. 8.3 (Connecticut); Del. Rules of Prof’l Conduct R. 8.3 (Delaware); D.C. Rules of Prof’l Conduct R. 8.3 (District of Columbia); Fla. Bar Reg. R. 4-8.3 (Florida); Ga. Rules of Prof’l Conduct R. 8.3 (Georgia); Haw. Rules of Prof’l Conduct R. 8.3 (Hawaii); Idaho Rules of Prof’l Conduct R. 8.3 (Idaho); Ill. Sup. Ct. Rules of Prof’l Conduct R. 8.3 (Illinois); Ind. Rules of Prof’l Conduct R. 8.3 (Indiana); Iowa Rules of Prof’l Conduct R. 32:8.3 (Iowa); Kan. Rules of Prof’l Conduct R. 8.3 (Kansas); Ky. Sup. Ct. R. 8.3 (Kentucky); La. State Bar Ass’n. Art. XVI § 8.3 (Louisiana); Me. Rules of Prof’l Conduct R. 8.3 (Maine); Md. Lawyer’s Rules of Prof’l Conduct R. 8.3 (Maryland); Mass. R. Sup. Jud. Ct. 3.07 at R. 8.3, available at http://www.lawlib.state.ma.us/source/mass/rules/sjc/sjc307/rule8-3.html (Massachusetts); Mich. Rules of Prof’l Conduct R. 8.3 (Michigan); Minn. Rules of Prof’l Conduct R. 8.3 (Minnesota); Miss. Rules of Prof’l Conduct R. 8.3 (Mississippi); Mo. Sup. Ct. R. 4-8.3 (Missouri); Mont Rules of Prof’l Conduct R. 8.3 (Montana); Neb. Ct. Rules of Prof’l Conduct § 3-508.3 (Nebraska); Nev. Rules of Prof’l Conduct R. 8.3 (Nevada); N.H. Rules of Prof’l Conduct R. 8.3 (New Hampshire); N.J. Rules of Prof’l Conduct R. 8.3 (New Jersey); N.M. Rules of Prof’l Conduct R. 16-803 (New Mexico); N.Y. Rules of Prof’l Conduct R. 8.3 (New York); N.C. Rules of Prof’l Conduct R. 8.3 (North Carolina); N.D. Rules of Prof’l Conduct R. 8.3 (North Dakota); Ohio Rules of Prof’l Conduct R. 8.3 (Ohio); 5 Okla. State Ch. 1, App. 3-A R. 8.3 (Oklahoma); Or. Rules of Prof’l Conduct R. 8.3 (Oregon); Pa. Rules of Prof’l Conduct R. 8.3 (Pennsylvania); R.I. Sup. Ct V at R. 8.3 (Rhode Island); S.C. Rules of Prof’l Conduct R. 8.3 (South Carolina); S.D. Codified Laws § 16-18-APPX-8.3 (Westlaw through 2011 Reg. Sess.) (South Dakota); Tenn. Sup. Ct. R. 8 at R. 8.3 (Tennessee); Tex. Rules Prof’l Conduct R. 8.03 (Texas); Utah Rules of Prof’l Conduct R. 8.3 (Utah); Vt. Rules of Prof’l Conduct R. 8.3 (Vermont); Va. Sup. Ct. R. pt. 6, § II, para. 8.3 (Virginia); Wash. Rules of Prof’l Conduct R. 8.3 (Washington); W. Va. Rules of Prof’l Conduct R. 8.3 (West Virginia); Wis. Sup. Ct. R 20:8.3 (Wisconsin); Wyo. Rules of Prof’l Conduct R. 8.3 (Wyoming).
this issue by providing, in the words of one author, “an ‘exit door’ from the lawyers’ ethical rules. The ‘key’ to this ‘door’ is advising the ADR disputants that the lawyer/neutral is not acting as an attorney for any or all of the disputants with the attendant attorney-client ethical rules, but is instead acting as a neutral.” To be sure, this so-called exit door may not be perfect because the lawyer qua neutral may still be subject to some other provisions of the Model Rules.

While this exit strategy sounds great in theory, it works only when all parties to the mediation behave according to the highest ethical standards. In cases such as the hypothetical described supra, where a party actively tries to defraud the other party, the attorney–mediator’s “exit” begins to look like complicity. Attorney–mediators are, if not formally then at least perceptually, bound by both the mediator ethics rules and the Code.

As one might expect, there is very little case law in this area. The American Bar Association did not adopt a modern version of Rule 8.3 until 1969, and the first major case involving the Rule was not until 1988. That first major case was In re Himmel. Himmel, a solo practitioner, was suspended from practicing law for a year by the Illinois Supreme Court because he failed to report the misconduct of another attorney. Himmel came as a “dramatic surprise to the bar.” To that point, Professor Rotunda notes:

[w]hile there [were] lawyers who [took] seriously their ethical obligations to report the violations of other lawyers, it [was] unusual to find the bar authorities enforcing this rule. . . . [Until Himmel, it was] virtually unheard of to find a case where a lawyer [was] disciplined merely for refusing to report another lawyer.

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23. Ronald D. Rotunda, The Lawyer’s Duty to Report Another Lawyer’s Unethical Violations in the Wake of Himmel, 1988 U. ILL. L. REV. 977, 979–80 (1988). Rotunda notes that the Rules contained a “vague” provision for whistleblowing in their original form, written in 1908. Id. The Rules were significantly amended in the 1980s; however, Rule 8.3 was in place in the 1969 revisions. Id. at 980.
24. In re Himmel, 533 N.E.2d 790 (Ill. 1988). The actual details of Himmel, while fascinating, are not as relevant here as the fact that the case happened at all.
26. Himmel, 533 N.E.2d at 796. The attorney whose misconduct led to the charges against Himmel was disbarred. Id. at 790.
27. Rotunda, supra note 23, at 991. The case was described to the author by a member of the North Carolina Dispute Resolution Commission as the seed that grew into the recent changes in the North Carolina Code.
28. Id. at 982.
The dearth of case law noted by Professor Rotunda has not changed. One case that is frequently cited in discussions of mediation confidentiality is In re Waller.29 Waller represented the plaintiff in a medical malpractice case that was sent to mediation.30 As there was no mediation confidentiality statute in D.C. at the time, the trial court made an order regarding the mediation.31 The order indicated that “no statements of any party or counsel shall be disclosed to the court or admissible as evidence for any purpose at the trial of this case.”32 The mediator realized that the surgeon who operated on the plaintiff was not named as a defendant, and asked Waller why not.33 Waller told the mediator that he had not named the surgeon because he “was the surgeon’s attorney.”34 The mediator encouraged Waller to tell the trial court about this, and when he did not, the mediator himself did so.35 Waller made some excuses,36 but was eventually disciplined by the D.C. Board of Professional Responsibility, an action confirmed by the D.C. Court of Appeals.37

The mediator, whose actions were technically in contempt of the court order, was not disciplined. Professor Irvine cautions that in the Waller case, “the attorney–mediator made a judgment call that was supported by the court. Not every attorney–mediator should expect to be so fortunate.”38 That mediators are rarely the subject of such disciplinary actions has several causes. Firstly, if we use the Smith hypothetical above as our example, the actual infraction was not committed by Smith—his liability is secondary and mainly to the profession, rather than to the wife. Secondly, there is usually a hold harmless clause in any mediation contract, so that the wronged party is contractually bound to overlook any primary liability of the mediator. A more persuasive reason is that the goal of mediation is a confidential settlement—parties are therefore reluctant to air their dirty

30. Id. at 781.
32. Waller, 573 A.2d at 781 n.4.
33. Id.
34. Id.
35. Id.
36. Id. at 782 (“What really happened is that I said I represented Dr. Jackson [the surgeon] but I really meant that I didn’t represent Dr. Jackson. Dr. Jackson wasn’t a party so I didn’t think it was important.”).
37. Id. at 780 (“suspended from the practice of law in the District of Columbia for a period of sixty days”).
laundry in the courts where everything is public record. Infractions of the Code or the mediation ethics rules by an attorney–mediator are not often adjudicated by the courts, but rather by ethics committees that publish decisions only when they would be helpful to future attorneys or mediators. A final reason is that some courts believe that the clash between the two sets of rules is a question for the legislature.39

Because the courts have been unhelpful in this area, attorneys and dispute resolution professionals have turned to the rules that govern attorneys and mediators in order to bring some order and guidance to the situation.

III. THREE APPROACHES TO THE PROBLEM

The current Model Rules do not recognize the role of neutral for lawyers, and the prevailing paradigm of lawyering under the Model Rules is the lawyer functioning as a representative of a client. Arguably, the legal and ADR professional regimes are distinct, and lawyers acting as neutrals should be governed by ADR professional standards like any non-lawyer acting as a neutral. An analogous distinction is between lawyers and lawyers acting as judges, wherein the former are subject to the Model Rules and the latter are subject to the Judicial Code of Conduct.40

While some commentators may claim that the two standards are not in tension,41 they are, and in fact cause problems in certain, easily repeatable situations.

In order to get an idea as to how the states have approached the conflict between mediation confidentiality and reporting requirements, this Comment looked at the Code and the mediation rules for each state and the District of Colombia.42 The states fall into three basic categories: (1) those

39. See, e.g., Foxgate Homeowners’ Ass’n v. Bramalea Cal., Inc., 25 P.3d 1117, 1128 (Cal. 2001) (“Whether a mediator in addition to participants should be allowed to report conduct during mediation that the mediator believes is taken in bad faith and therefore might be sanctionable under [the] Code of Civil Procedure [or the Code] . . . is a policy question to be resolved by the Legislature.”).

40. Yarn, supra note 16, at 220.

41. See id. at 216 (stating that the two standards “neither overlap nor conflict significantly”). Also note that the ADR rules generally provide for reporting of any matter “required by law or rule.” Several mediators have commented to the Author that they are not willing to risk their professional reputations and mediation certifications on such vague language, especially since the Codes have not been enacted by the legislature.

42. In the analysis that follows, three states are not included: California, Michigan, and New York. The California Ethics Rules have no provision analogous to Rule 8.3. See CAL. RULES OF PROF’L CONDUCT R. 1-100 to 5-320. If there were an equivalent provision, California would fall into the second category of states, those where mediators are allowed to testify. See CAL. EVID. CODE § 703.5 (2011) (“[N]o arbitrator or mediator, shall be compe-
with direct tension between the mediation confidentiality requirements and the Code’s reporting requirements under Rule 8.3,\textsuperscript{43} (2) those with an “out” for the mediator if the misconduct has already been reported, and (3) those that have made an attempt to harmonize the two. A breakdown of the states by category is represented below.

![Map of United States with states color-coded based on mediation rules]

States in black are those with harmonious rules. States in gray have rules that allow mediators to talk about misconduct, but not to report it. States in white have clashing rules.

**A. Wishin’ and Hopin’**

Thirty-six states and the District of Colombia have mediation rules that clash with their Code of Professional Responsibility.\textsuperscript{44} This means that
in over seventy percent of jurisdictions, the highest court has adopted two sets of rules that are in direct conflict. An example of the clashing rules is provided by the District of Colombia. Pursuant to the D.C. Rules of Professional Conduct, “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”

The operative words in this rule, of course, are “knows” and “shall.” If the hypothetical involving Mediator Smith was in D.C. and he knew that the husband’s lawyer was perpetrating a fraud, he would be required to report said behavior to the State Bar. However, pursuant to section 16-4207 of the D.C. Code, “[u]nless subject to [open meetings requirements], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of the District of Columbia.”

Mediators are trained to report child or elder abuse, threats of violence, or actual violence, but they are extremely hesitant to make a call where the issue is professional malpractice. Many interpret the conflicting rules as requiring them only to confirm whether a mediation session did or did not take place and whether a settlement was reached.

There are a couple of explanations as to why so many states have clashing rules. Firstly, mediation is relatively new, and the rules are generally on their first or second iteration—all the kinks have not been noticed or ironed out. Secondly, attorneys generally abide by their Codes—it is rare that a mediator would have cause to report an attorney because of something that attorney did in a mediation session. Also, as noted above, the liability of the mediator is usually secondary to that of the attorney involved. Any aggrieved party would need to take a lot of time and energy to bring charges under the Code against the mediator—time and energy that probably would be better spent pursuing the other party or his attorney.


45. D.C. RULES OF PROF’L CONDUCT R. 8.3(a) (emphasis added).
47. These reporting requirements are explicitly required in some states and implicitly required in others. Compare, Me. R. Civ. P. 16B(k)(ii) (“A neutral does not breach confidentiality by making such a disclosure if the disclosure is . . . information concerning the abuse or neglect of any protected person.”), with MASS. R. SUP. JUD. CT. 1:18 at R. 9(h)(i) (“[I]nformation disclosed in dispute resolution proceedings . . . shall be kept confidential by the neutral . . . unless disclosure is required by law or court rule.”).
48. A cynic might note that this is because attorneys are smart enough to keep their misdeeds hidden and their clients quiet enough that a mediator would never notice the misconduct.
The Ability to Testify Only

Five states (Maryland, New Mexico, Pennsylvania, Virginia, and Wisconsin) have mediation rules that allow the mediators some kind of “out” when allegations of misconduct are made. These states do not allow the mediator to report misconduct, but will allow him or her to either testify or to disclose information that may be relevant after an accusation of misconduct is made or proven.

In New Mexico, the mediator can be compelled to testify in cases where his or her testimony is needed to “disprove a claim or complaint of professional misconduct or malpractice based on conduct during a mediation and filed against a mediation party or nonparty participant.” There is no provision for reporting misconduct by the mediator. Virginia’s rule is substantially the same.

The rules in Maryland, Pennsylvania and Wisconsin are vaguer. Pursuant to section 904.085 of Wisconsin’s General Statutes, [in an action or proceeding distinct from the dispute whose settlement is at-
tempted through mediation, the court may admit evidence otherwise barred by this section if, after an in camera hearing, it determines that admission is necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.\(^{54}\)

Wisconsin attorney–mediators, therefore, cannot report misconduct that they become privy to via mediation. However, if there is an accusation in a hearing distinct from the dispute that led to the mediation—e.g., a grievance hearing or a hearing to set aside the settlement—and the court decides that the mediator’s testimony would be in the interests of justice, then the mediator may be ordered to testify. The rules in Maryland and Pennsylvania are, though not as detailed, substantially the same.\(^{55}\)

While the five states discussed here have rules that acknowledge that things occasionally go wrong in mediation and that parties do not always bargain in good faith, no state recognizes the requirement of reporting in its own version of Rule 8.3.\(^{56}\) If there is a hearing and the mediator is called to testify, it may become obvious that the mediator has not reported misconduct that he had knowledge of, opening the mediator to professional sanctions.

It is worth noting that the Uniform Mediation Act states that where there has been “a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation[,]” the strict confidentiality requirements are relaxed.\(^{57}\) However, they are only relaxed for the parties involved and their attorneys, for the Act goes on to state that “[a] mediator may not be compelled to provide evidence of a mediation communication” in order to substantiate such a claim.\(^{58}\)

C. A Clear Harmonization

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\(^{55}\) MD. R. OF ALT. DISP. RESOL. 17-109(d)(3) (indicating confidentiality may be waived to “assert or defend against a claim or defense that because of fraud, duress, or misrepresentation a contract arising out of a mediation should be rescinded.”); 42 PA. CONS. STAT. § 5949(b)(3) (Westlaw through 2011 Act 81) (“The privilege and limitation [to confidentiality] does not apply to a fraudulent communication during mediation that is relevant evidence in an action to enforce or set aside a mediated agreement reached as a result of that fraudulent communication.”).

\(^{56}\) See supra, notes 17, 21 and accompanying text.

\(^{57}\) UNIF. MEDIATION ACT § 6(a)(6) (2001).

\(^{58}\) Id. § 6(c).
Six states (Georgia, Florida, North Carolina, South Carolina, Tennessee, and Washington) have harmonious mediation and ethics rules. These states are concentrated geographically in the southeast, which is an unexpected but explainable result. If states are a laboratory for experimentation, then it stands to reason that nearby states will copy a state that has sensible and logical rules. The six states fall into two categories: those that use the mediation rules as the (to borrow a metaphor) exit door and those that use the Code as the exit. The same number of states fall into the former category (Florida, South Carolina, and Tennessee) as the latter, but North Carolina, as discussed below, is the latest state to harmonize its rules, and it chose to amend the Code. It remains to be seen whether more states will follow the lead of these six states and which approach they will choose.

1. Reporting Permitted by Mediation Rules

Florida, South Carolina, and Tennessee all make provision in their mediation ethics rules for reporting of professional malpractice as required by the respective state Codes. The malpractice must be professional to be

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60. Gonzales v. Raich, 545 U.S. 1, 42 (2005) (quoting New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

61. See Fla. Stat. § 44.405 (“[T]here is no confidentiality or privilege attached to . . . any mediation communication . . . [o]ffered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding.”); S.C. App. Ct. R. 407 (“This rule [guaranteeing mediation confidentiality] does not prohibit . . . [a]ny disclosures required by law or a professional code of ethics.”); Tenn. Sup. Ct. R. 31 (“Nothing herein shall replace, eliminate, or render inapplicable relevant ethical standards.”).

62. See Ga. Rules of Prof’l Conduct R 8.3 (“There is no disciplinary penalty for a violation of this Rule.”); N.C. Rules of Prof’l Conduct R. 8.3(e) (“A lawyer who is serving as a mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators . . . is not required to disclose information learned during a mediation if the Standards do not allow disclosure. If disclosure is allowed by the Standards, the lawyer is required to report professional misconduct consistent with the duty to report.”); Wash. Rules of Prof’l Conduct R. 8.3(a) (“(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct . . . should inform the appropriate professional authority.” (emphasis added)).

63. N.C. Rules of Prof’l Conduct R. 8.3(e).

64. See supra note 61.
reportable—simple bad behavior or bad faith is not enough. Pursuant to the Florida mediation rules, “there is no confidentiality or privilege attached to . . . any mediation communication . . . [o]ffered to report, prove, or disprove professional malpractice . . . [or] professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.” Pursuant to the South Carolina rules, one of the limited exceptions to confidentiality is “[a]ny disclosure[] required by law or a professional code of ethics.” Pursuant to the Tennessee mediation rules, “[a] Neutral shall preserve and maintain the confidentiality of all dispute resolution proceedings except where required by law to disclose information.” However, “[n]othing herein shall replace, eliminate, or render inapplicable relevant ethical standards not in conflict with these rules which may be imposed by the Code of Responsibility with respect to lawyers, or similar sets of standards imposed upon any Neutral by virtue of the Neutral’s professional calling.

Each of the three states, then, permits the disclosures required by the mediator’s professional Code. The flaw in the design is clear. Some mediators will be bound by professional codes, and some will not. This will have two distinct impacts on mediations. Firstly, the mediator who is bound by the code will be forced to keep an eye out for infractions that he is bound to report—Smith, in the hypothetical above, would have had to report (under the attorney Code of ethics) what the husband’s lawyer was doing. Secondly, parties to the mediation will (or should) be aware that their actions will be subject to an extra layer of scrutiny by the mediator.

If the mediator is required to abide by the reporting requirements of his professional Code, then he cannot give his full attention to the mediation; he must necessarily give some of his attention to possible reportable infractions. A nonattorney—mediator, when confronted with a situation like the one described above, would work to encourage disclosure, urge the husband to recognize the problem with failing to disclose the asset, and the discuss issues with negotiating in bad faith. In other words, the nonattorney—mediator would be focused on the mediation and on getting both parties to a successful and fair resolution. An attorney—mediator, on the other hand, would be focused on the mediation, but a small voice in the back of his or her head would be calculating the risks and rewards of reporting the

65. See supra note 61.
66. FLA. STAT. § 44.405(4)(a)(4), (4)(a)(6).
67. S.C. ALT. DISP. RESOL. R. 8(b)(5).
68. TENN. SUP. CT. R. 31, at app. A § 7(a).
69. Id. § 2(b).
70. See supra note 61 and accompanying text.
conduct of the husband’s lawyer. If the attorney–mediator reports the lawyer and the complaint is without foundation, the mediator has broken confidentiality as a mediator and will be subject to sanctions by the board that oversees mediators.\footnote{71. See Irvine, \textit{supra} note 31, at 180.}

Reporting—even if the report is substantiated—will give the mediator a reputation in the community as a reporter. This reputation should not scare attorneys who negotiate in good faith and ethically, but may well cause a drop in the reporter’s mediation business because attorneys may worry that the mediator will report first and think later.\footnote{72. Mediation is, after all, a place where lying is accepted—the dance of negotiation requires that both sides conceal their bottom line, at least in the beginning.} Even if parties continue to use the mediator, there is a chance that they will be less forthcoming than they would be with a nonattorney–mediator or with an attorney–mediator who has no history of reporting, out of concern that their legitimate actions could be misconstrued and lead to an investigation by the state bar.

The solution to Smith’s dilemma used by Florida, South Carolina, and Tennessee is, therefore, not without complication. While the method used by these states is infinitely preferable to simply ignoring the problem, it has flaws that may negatively impact the mediation process.

2. \textit{Harmonization Through the Ethics Code}

Three states with harmonious rules (Georgia, North Carolina, and Washington) use their Codes to provide the harmony. The differences between the three are interesting and instructive. Georgia’s mediation rules are substantially the same as those in the states with clashing rules—mediators are required to report child abuse and may break confidentiality to defend against claims of mediator misconduct. However, Georgia has no provision for testimony where misconduct has already been reported (as in the states like Maryland with some kind of exit for testimony) and no harmonization as in Florida, South Carolina, or Tennessee.\footnote{73. See discussion \textit{supra} Part III.C.1.} In Georgia, the exit is in the Code: “[a] lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, \textit{should} inform the appropriate professional authority.”\footnote{74. \textsc{Ga. Rules of Prof’l Conduct} R. 8.3 (emphasis added).} The rule continues: “[t]here is no disciplinary penalty for a violation of this Rule.”\footnote{75. \textit{Id.}} In every other state with an equiva-
lent to Rule 8.3, the lawyer who knows of the misconduct is required to inform the appropriate authority. The Georgia Code was amended in 2001 to its current form. Before 2001, the pertinent rule read:

(A) A lawyer possessing unprivileged knowledge of [misconduct] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

The mediation rules were enacted in 1993 and require complete confidentiality except in four situations: (1) confirming appearance (or not) at a scheduled mediation, (2) reporting child abuse or threats, (3) documents or communications needed to prove or disprove misconduct on the part of the mediator, and (4) statutory duties. The rules have been amended but not substantially altered since their enactment. Perhaps concluding that the

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76. See, e.g., Ala. Rules of Prof’l Conduct R. 8.3 (“A lawyer possessing unprivileged knowledge of a violation of Rule 8.4 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.” (emphasis added)); Ind. Rules of Prof’l Conduct R. 8.3 (“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”) (emphasis added)).

Interestingly, the official comment to the Georgia Rule reads: “Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigations when they know of a violation of the Georgia Rules of Professional Conduct[,]” even though the language of the rule makes it clear that reporting is not required. Ga. Rules of Prof’l Conduct R. 8.3 cmt. 1 (emphasis added).


78. Ga. Alt. Disp. Resol. VII. In many states, “statutory duties” refer to open meeting requirements. See 710 Ill. Comp. Stat. 35/8 (Westlaw through P.A. 97-342 of 2011 Reg. Sess., with exception of P.A. 97-333 to -334) (“Unless subject to the Open Meetings Act or the Freedom of Information Act, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.”).

79. There have been multiple amendments: removing protections of confidentiality where there have been threats or reports of child abuse (February 1995); making intake sessions confidential (November 1996); making notes and records of a court ADR program immune from discovery to the extent that such notes or records pertain to cases and parties ordered or referred by a court to the program (November 1996); removing confidentiality where there has been a complaint against the mediator (November 1996); and limiting discovery to written and executed agreements only (May 1999). See Ga. Alt. Disp. Resol.
rules were intentionally harmonized with the Code is a charitable interpretation, but it does explain why Georgia’s Code is different from that in almost every other state.

Washington State adopted new ethics rules in 2006. The state bar debated modifying Washington’s permissive reporting requirement to make Rule 8.3 reporting mandatory. The committee charged with determining whether to amend the rule (the WSBA Ethics 2003 Committee) debated for over two months whether to require mandatory reporting under Rule 8.3, and eventually decided against such a move. The debate over whether to move to mandatory reporting is fascinating, but nowhere in the minutes of the meetings is mediation mentioned.

North Carolina has recently amended its Code in order to exempt attorney–mediators from the reporting requirements imposed by Rule 8.3. Pursuant to North Carolina’s new Rule 8.3,

[a] lawyer who is serving as a mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators (the Standards) is not required to disclose information learned during a mediation if the Standards do not allow disclosure. If disclosure is allowed by the Standards, the lawyer is required to report professional misconduct consistent with the duty to report . . . .

In North Carolina, attorney–mediators are mediators first and attorneys second. North Carolina is the only state in the union to have rules that are written in this manner. The amendment to Rule 8.3 was recommended by the Standards, Discipline and Advisory Opinions Committee of the Dispute Resolution Commission. The Commission had been asked by the State Bar to examine the conflict between the Code and the mediation rules, and, after “wrest[ling] with the Rule 8.3 scenario as well as with the larger issue of what happens when a mediator’s ethical obligations conflict with the standards of conduct of another profession to which he or she belongs,” the Commission decided to recommend amending the Rule to make the media-


81. Id.
82. Id.
83. Id.
84. N.C. RULES OF PROF’L CONDUCT R. 8.3(e).
85. Id.
86. See supra, notes 17, 21 and accompanying text.
The difficulty with using the Code to ease the tension between the mediation ethics and the Code is that the Code only applies to attorneys. Attorneys, therefore, will know that they should keep misconduct of other attorneys, revealed in mediation, confidential. Nonattorney—mediators may, however, be bound by a Code applicable to their own profession—for example, the mediator may be a Doctor of Medicine (MD). Nonattorney—mediators may see misconduct like that described above, know that it is ethically bad, but not know to whom they should report the misconduct. The body that oversees mediation ethics would advise nondisclosure. If the misconduct is especially egregious, it is easy to imagine that a mediator frustrated by this answer would look around for someone to whom he or she could to report the attorney’s conduct.

IV. WHERE DO WE GO FROM HERE?

There are four issues that are important to consider when examining the tensions that have been identified here. These are (1) whose interests would (and would not) be served by reporting attorney misconduct; (2) whether confidentiality can ever be absolutely guaranteed; (3) whether keeping misconduct confidential is within the reasonable expectations of the parties to the mediation; [and] (4) whether it is possible to provide clear guidance for all parties involved.

A. Whose Interest Are Best Served by the Confidentiality Rules?

Public confidence in lawyers and the legal profession is undermined when stories of misconduct come to light. This is doubly so if the misconduct was ignored by other lawyers. In ruling on Himmel, the Illinois Supreme Court held that the “underlying purposes” of the disciplinary rules were to “maintain the integrity of the legal profession, to protect the administration of justice from reproach, and to safeguard the public.” Each of

88. Id.
90. The four have their genesis in the minority report from a committee of the N.C. Dispute Resolution Commission. See N.C. DISP. RESOL. COMM’N, STANDARDS AND DISCIPLINE COMM., MINORITY REPORT TO THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION 2–4 (November 3, 2006) [hereinafter Minority Report].
91. In re Himmel, 533 N.E.2d 790, 795 (Ill. 1988) (quoting In re LaPinska, 381 N.E.2d 700, 705 (Ill. 1978)).
the three purposes identified in *Himmel* is impaired when attorneys fail to abide by the requirements of Rule 8.3. Notwithstanding the damage external to the mediation, the confidence of parties to the mediation in the fairness of the settlement would be undermined if one party learned of misconduct serious enough to have been subject to reporting requirements that was not reported.

If stories of misconduct come to light, they also erode the confidence of the parties to mediation. No matter if one’s mediation was conducted according to the highest ethical standards and the resultant settlement was fair to all parties, if one of the parties hears about some misconduct that occurred in his mediation, he is going to reexamine his settlement. If the misconduct becomes known before the mediation is scheduled, both parties may be on the defensive from the start, expecting that the other party may be acting unethically and that the mediator is acting as an accomplice.

B. Are Guarantees of Confidentiality Disingenuous?

Very few states have mediation rules that demand absolute confidentiality. In most of the other states, there are four common exceptions that either require or allow mediators to disclose information they learned in the mediation: (1) child or elder abuse; (2) threats to people or property; (3) to defend against allegations of mediator misconduct, and (4) to train or consult with other mediators. In three states (Mississippi, Louisiana, and Arkansas) a court may examine the mediator’s testimony in camera in order to make a determination as to whether “the facts, circumstances and context of the communications or materials sought to be disclosed warrant


93. *See, e.g.*, Me. R. Civ. P. 16B(k) (“[I]nformation concerning the abuse or neglect of any protected person” is not confidential).

94. *See, e.g.*, Or. Rev. Stat. § 36.220(6) (“A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a specific person.”).

95. *See, e.g.*, Okla. Stat. tit. 12, § 1805(f) (“If a party who has participated in mediation brings an action for damages against a mediator arising out of mediation . . . [confidentiality] shall be deemed to be waived as to the party bringing the action.”).

96. *See, e.g.*, Utah Code Ann. § 78B-6-208(5) (Westlaw through 2011 2nd Special Sess.) (“An ADR provider or an ADR organization may communicate information about an ADR proceeding with the director for the purposes of training, program management, or program evaluation and when consulting with a peer. In making those communications, the ADR provider or ADR organization shall render anonymous all identifying information.”).
a protective order of the court or whether the communications or materials are subject to disclosure.”

Are absolute guarantees of confidentiality, especially in court-ordered mediation, a good idea? Would they simply mean that parties have an incentive to hide assets or material facts? With lowered guarantees of confidentiality, the parties and their attorneys know where the line is and what behavior will put them over that line, making the chances of a fair and honest negotiation that much higher.

C. **What Are the Reasonable Expectations of Parties to a Mediation?**

It is unlikely that a person can become an attorney without having some working knowledge of the Code in his or her state. As a member of North Carolina’s Dispute Resolution Commission Standards and Discipline Committee put it, “[t]he unethical attorney should have no reasonable expectation that an attorney-mediator will keep his professional misconduct in confidence.” Attorneys know that professional misconduct will be reported by other attorneys with knowledge. Attorneys who know about misconduct value their law license too highly not to report such behavior.

It is harder to argue that parties to mediation will reasonably expect that misconduct will be kept confidential. If a lawyer tells his client that there is a way to hide assets and that he or she will not tell the mediator about those assets, the client would reasonably assume that the lawyer has a legal, ethical way to hide the assets.

D. **Can We Provide Clear Guidance?**

The need for a firm, simple, clear rule is obvious. As things stand in the overwhelming majority of states, attorney-mediators must make very tough choices when confronted with clear misconduct. They know that state Bar Associations are willing and able to sanction attorneys who do not report misconduct, that mediation ethics bodies zealously guard the integri-
ty of the process, and that those bodies are willing to suspend the attorney–mediator if he or she breaches their rules. They also know that nonattorney–mediators do not face the same high-stakes choices that they do. While there is pressure on attorney mediators to decide which side their bread is buttered on,\(^{101}\) there is also increasing demand for attorney–mediators.\(^{102}\) After all, an attorney–mediator knows the lay of the land, so to speak, and can give the parties informed guidance on chances of litigation success or failure.

Clear guidance will help all of the parties prepare for the mediation. The parties will know what they should disclose and that the other side will be held to the same standard; the attorneys will know the consequences of unethical behavior, and the mediator will have no discretion about reporting misconduct.

E. The Way Forward

So where does this leave us? We need a way to harmonize the Code and the mediation rules that takes into account the interests of both the parties and the wider community, that recognizes that confidentiality is not always absolute, that conforms to the reasonable expectations of all involved, and that is clear and simple to apply. This Comment argues that the best rule is that used by Tennessee. Pursuant to the Tennessee mediation rules: “[a] Neutral shall preserve and maintain the confidentiality of all dispute resolution proceedings except where required by law to disclose information.”\(^{103}\) However, the general standards of the mediation rules provide that: “[n]othing herein shall replace, eliminate, or render inapplicable relevant ethical standards not in conflict with these rules which may be imposed by the Code of Responsibility with respect to lawyers, or similar sets of standards imposed upon any Neutral by virtue of the Neutral’s professional calling.”\(^{104}\)

These rules allow the attorney–mediator to be bound by both sets of rules at the same time.\(^{105}\) As noted supra, there is the problem that nonat-

\(^{101}\) That is, whether they would rather lose their law license or their mediation certification.

\(^{102}\) See Urska Velikonja, Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice, 72 ALB. L. REV. 257, 263 (2009) (arguing that there is “attorney domination of the mediator selection process” because “most of the private mediators’ caseload is disputes already in litigation or about to be litigated.”).

\(^{103}\) TENN. SUP. CT. R. 31 at app. A § 7(a).

\(^{104}\) Id. § 2(b).

\(^{105}\) The problem with this whole system, of course, is that nonattorney–mediators are not bound by the Code as attorney mediators are, raising the inference that there are two
attorney–mediators will not be beholden to the Code, but they are not bound by it in any other situation, so it is unfair to complain that they are not bound in this situation. This rule allows the attorney–mediator to create a mediation that is fair to all involved and to report misconduct when necessary. The rule also formalizes the expectations of all parties that a mediator who is also an attorney will not completely shed that persona when he acts as a neutral. It is also clear; the rule itself says that confidentiality is not absolute where it conflicts with the professional code of the mediator.

This rule does, however, require the mediator to wear two hats—that is, to focus both on the mediation at hand and on any potential ethical violations that may be revealed. However, as noted supra, ethical violations are rare. The author could not find any published mediation ethics opinions that dealt with the subject, and the first court case that dealt with Rule 8.3 was not until 1988 (almost twenty years after the modern Code was written).

If we return to the hypothetical, Smith would be required to report the misconduct of the attorney for the husband if he cannot persuade him to reveal the asset. In this way, Smith can protect the wife and his own law license and the interests of the wider community.

Rosemary J. Matthews

separate standards. In the regular case, however, where attorneys for the parties behave ethically, there will be no difference between the two mediators. The issues discussed here will only have an effect where one attorney behaves unethically. Deciding how to resolve this distinction is, thankfully, beyond the scope of this Comment.