

# MEDIATORS AS MANDATORY REPORTERS OF CHILD ABUSE: PRESERVING MEDIATION'S CORE VALUES

ART HINSHAW\*

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## I. INTRODUCTION

Consider the following: During a joint session of a child custody mediation one parent says to the other, "The children are afraid of spending time with you. Let's just put it on the table, your disciplining of the children is nothing short of abuse!" Following a predictable response that the discipline situation is being blown out of proportion, the accusing parent describes three episodes of apparently abu-

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\* Director of the Lodestar Dispute Resolution Program and Associate Clinical Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University. I would like to thank Benjamin A. Johnston for his research assistance and Alison Ewing for her librarianship. Also deserving of my thanks are Hilary Barnes, Kelly Browe-Olson, Bob Dauber, C.J. Larkin, Bobbi McAdoo, Jennifer Robbennolt, and Roselle Wissler for providing helpful comments on early drafts of this Article. I would also like to thank the Maricopa County Association of Family Mediators and the participants in the ASU College of Law Faculty Colloquium Series for allowing me to present earlier drafts of this Article. Also, I would like to thank Art Thompson, Dispute Resolution Coordinator, Office of Judicial Administration at the Kansas Supreme Court, and the Kansas mediators who responded to a survey Mr. Thompson distributed on my behalf. Finally, this Article is dedicated to the memory of departed friends and colleagues Timothy J. Heinsz and Thomas S. Davis.

sive behavior. What responsibilities does the mediator have once the information is divulged? Should the mediator immediately contact the state Child Protection Services and report the alleged abuse? What happens if the mediator does not make a report? The answers to these questions depend on several factors, but should they?

Scenarios like the one described above are not far-fetched because mediation<sup>1</sup> has become a vital component of the litigation process for divorce and child custody matters.<sup>2</sup> In fact, it is difficult to proceed to a hearing on the merits of a child custody case without being required to attend at least one mediation session.<sup>3</sup> With mandatory mediation so prevalent in child custody cases, it stands to reason that mediators may be the first to hear allegations of child abuse.<sup>4</sup> Surprisingly, however, child abuse issues are rarely discussed in the mediation literature.<sup>5</sup>

1. Mediation can be simply defined as a facilitated negotiation process in which an impartial third party assists disputing parties in their attempt to resolve a dispute. *See, e.g.*, SARA R. COLE ET AL., 1 MEDIATION: LAW, POLICY, AND PRACTICE ch. 1:1-1:2 (2005); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 18 (2003); AMERICAN ARBITRATION ASSOCIATION ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Preamble (2005), available at <http://www.abanet.org/dispute/news/ModelStandardsOfConductForMediatorsfinal05.pdf> hereinafter 2005 MODEL STANDARDS]; THE SYMPOSIUM ON MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Overview and Definitions (2000), available at <http://www.afcnet.org/pdfs/modelstandards.pdf> [hereinafter MODEL FAMILY STANDARDS].

2. Ann L. Milne et al., *The Evolution of Divorce and Family Mediation: An Overview*, in DIVORCE AND FAMILY MEDIATION 3, 10-12 (Jay Folberg et al. eds., 2004) (discussing court-connected mediation in family matters).

3. *See, e.g., id.*; Mary Kay Kisthardt & Barabara Handschu, *Tips on Mediation*, NAT'L L.J., Dec. 5, 2005, at A15.

4. Most mediators in child custody cases routinely screen cases for signs of child abuse and exclude those cases from their mediation practice. ALISON TAYLOR, THE HANDBOOK OF FAMILY DISPUTE RESOLUTION 200-02 (2002). *But see* Robert D. Benjamin, *Mediative Strategies in the Management of Child Sexual Abuse Matters*, 29 FAM. & CONCILIATION CTS. REV. 221 (1991). However, not all cases involving abuse can be screened out of divorce and custody mediations because the issue may have yet to come to the fore. Thus, because mediators may be the first to hear reports of child abuse, they must be prepared to address the issue should it surface.

5. The topic is virtually untouched in the scholarly literature, other than as a side issue to another topic, such as mediation confidentiality or mediation where domestic violence is present. *See, e.g.*, Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 247-48 (2002); Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25, 51-53; Michael Moffit, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81, 114 (2003); Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 200 (2003). The only scholarly piece discussing the issue in depth is a student comment discussing lawyer-mediators and mandatory reporting requirements. Heather Rushing Potter, Comment, *Confidentiality in Mediation and the Duty to Report Child Abuse*, 29 J. LEGAL PROF. 269 (2005). Practitioner guidebooks are the only other place the issue gets any serious attention, but even then the topic gets only a couple of pages at most. *See, e.g.*, DONALD T. SAPOSNEK, MEDIATING CHILD CUSTODY DISPUTES 294 (1998); TAYLOR, *supra* note 4, at 200-05.

Currently the states disagree as to whether mediators should or should not be mandatory reporters of child abuse. To confuse matters further, some states split their mediator ranks into groups of mandatory reporters and permissive reporters based on professional training in fields other than mediation. Because failing to make a report when one is required to do so may lead to both criminal and civil liability, mediators must be well versed in their responsibilities with regard to reporting suspected child abuse and neglect to state Child Protection Services (CPS).

This lack of consensus brings a larger and more important question into focus: Does having mediators act as mandatory reporters of child abuse constitute wise public policy? A reasoned look at the various policies behind mandatory reporting and mediation reveals that child protection already is enmeshed in mediation's primary goal—improving outcomes for all parties affected by the mediation process, including children. Neither a child's best interests nor society's best interests are served if mediators, through inaction, are permitted to allow possible abuse to continue without further investigation. As a result, mandatory reporting will improve mediation outcomes when child abuse issues arise. Additionally, making mediators mandatory reporters of abuse furthers strong child protection policies by filling a small hole in the reporting network. Thus, this Article concludes that all mediators in divorce and child custody cases should be mandatory reporters for child abuse.

Based on this conclusion, this Article makes several recommendations. The first is statutory: State legislatures should revise their mandatory reporting laws to include mediators among the professions identified as mandatory reporters of child abuse and neglect. This change, however, will have consequences for mediation. In a mandatory reporting environment, preserving mediation's core values is essential for its continuing vitality as a dispute resolution mechanism in family matters. Thus, the remaining recommendations constitute practice pointers designed to manage the negative impact reporting requirements may have on mediation's core values of party self-determination, mediator neutrality, and confidentiality.

Part II of this Article gives a brief overview of mediation in divorce and child custody matters—describing the rise of mediation in these cases, discussing the various benefits the process provides for families, and detailing how mediation's core values empower individuals to resolve complex and highly emotional family disputes. Part III is a discussion of the mandatory reporting laws, examining what conduct is to be reported and when it is to be reported. Although this section does not analyze each state's reporting statute, it provides the basis for which mediators can examine and better understand their own state's reporting law. Part IV identifies which

mediators are currently mandatory reporters of abuse, focusing attention on whether one's reporting requirements are a function of either a reporter's professional role or the fact that one is designated as a mandatory reporter. Part V focuses on the arguments in favor of and against requiring mediators to be mandatory reporters of abuse.

Part VI asserts that all family mediators should be mandatory reporters of abuse and addresses concerns that mediation will become a vehicle for fraudulent claims of abuse, simply putting more strain on an already overburdened child protection system. Furthermore, this section provides advice for mediators who are mandatory reporters to minimize reporting's negative impact on mediation's core values. To conclude, Part VII calls for mediator education to ensure that the mediators handle their reporting responsibilities professionally while maintaining the integrity of the mediation process.

## II. MEDIATION IN FAMILY MATTERS

Mediation has been an effective method of conflict resolution for centuries, but only in the last thirty years has it become a generally accepted method of resolving civil cases in the United States.<sup>6</sup> During this period mediation has become widely used in divorce and child custody matters.

### A. *History of Mediation in Family Matters*

In the 1970s, as divorce became more socially acceptable in the United States and states began to replace traditional fault-finding divorce with no-fault divorce statutes, a small number of lawyers began offering "non-adversarial legal services" to divorcing couples.<sup>7</sup> Because these lawyers counseled both spouses to help them settle financial, property, and child custody issues, they were heavily criticized within the legal profession and threatened with ethical sanctions by the bar.<sup>8</sup> Despite such pressures, these lawyers began developing the divorce mediation concept and marketing it through books and professional mediation associations.<sup>9</sup>

Around the same time, mental health professionals began directing their services to the emotional and mental health concerns sur-

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6. For detailed discussions of the history of mediation and its growth in the United States, see generally JEROME T. BARRETT WITH JOSEPH P. BARRETT, *A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT* (2004); COLE, ET AL, *supra* note 1, at ch. 5.

7. Milne et al., *supra* note 2, at 4-5.

8. See, e.g., *id.*; Or. State Bar Ethics Op. 488 (1983); Linda J. Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107 (1982).

9. Milne et al., *supra* note 2, at 5. See generally O.J. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT* (1978).

rounding divorce.<sup>10</sup> Divorce counseling and the study of divorcing couples in the mental health realm soon lead to the understanding that divorce is a multidimensional process involving both legal and psychological matters.<sup>11</sup> As a result, some of these mental health professionals joined the professional mediation associations and also began offering mediation services to their divorcing clients.<sup>12</sup>

Despite the bar's early hostility to mediation, judges welcomed the resulting reduction of cases from their dockets and encouraged its use.<sup>13</sup> Before long, court administrators were suggesting more widespread use of mediation.<sup>14</sup> In 1980, California passed the first statute requiring all parents with custody or visitation disputes to participate in mediation either prior to or concurrent with court proceedings.<sup>15</sup> Such statutes quickly spread across the country,<sup>16</sup> and today a divorce or child custody matter not going to mediation is the exception to the rule.<sup>17</sup>

### B. *Benefits of Mediation in Family Matters*

Empirical research on mediation in divorce and child custody matters supports the conclusion that mediation offers various benefits when compared to the traditional adversarial system: more settle-

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10. Milne et al., *supra* note 2, at 5.

11. *Id.*

12. *Id.* Mental health providers were also subject to criticism from bar associations and were subjected to unauthorized practice of law claims. Linda Silberman, *Ethical Constraints: A Legal Perspective*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 359, 371, 374 (Jay Folberg & Ann Milne eds., 1988).

13. Milne et al., *supra* note 2, at 6; Isolina Ricci, *Court-Based Mandatory Mediation: Special Considerations*, in *DIVORCE AND FAMILY MEDIATION* 397, 398 (Jay Folberg et al. eds., 2004); Andrew Shepard, *The Model Standards of Practice for Family and Divorce Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 516, 526 (Jay Folberg et al. eds., 2004).

14. Milne et al., *supra* note 2, at 6.

15. Ricci, *supra* note 13, at 399 (giving a brief historical background of court-connected family mediation programs).

16. Mandatory mediation's quick growth brought forth a flood of criticism and debate about the fairness of mediation for women, especially for victims of domestic violence. *See, e.g.*, Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *BUFF. L. REV.* 441 (1992) (arguing that mediation only empowers the already more powerful party in the relationship); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545 (1991) (arguing that mandatory mediation is harmful to those who are already subordinated by the legal system); Joshua D. Rosenberg, *In Defense of Mediation*, 33 *ARIZ. L. REV.* 467 (1991) (arguing that mediation leads to better outcomes and less emotional harm than does traditional litigation). The issue of mediation's impact on divorcing women is still a hot topic today. *See, e.g.*, Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 *FAM. L.Q.* 53 (2005); Ver Steegh, *supra* note 5, at 180-88. However, it is accepted that one-size-fits-all solutions regarding divorce and mediation are inadequate, especially for couples with a history of domestic violence. *Id.* at 159; Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 *J. DISP. RESOL.* 253.

17. Kisthardt & Handschu, *supra* note 3; Ver Steegh, *supra* note 5, at 170, 193.

ments,<sup>18</sup> time savings,<sup>19</sup> cost efficiency for the litigants,<sup>20</sup> higher compliance with agreements,<sup>21</sup> higher participant satisfaction,<sup>22</sup> and less subsequent litigation or relitigation of issues.<sup>23</sup> But the greatest benefit of using mediation in divorce and child custody cases is its ability to increase the quality of the parties' communication to address emotionally charged issues.<sup>24</sup>

In custody cases, the heightened degree of communication is particularly important because parents are likely to have future interactions with each other related to the children. Recent empirical research indicates that divorcing spouses who go through child custody mediation have improved relationships with each other compared to divorcing spouses who did not go through mediation, even twelve years after the mediated settlement.<sup>25</sup> The research also indicates that nonresident parents have "remarkably" improved relationships with their children.<sup>26</sup> Ultimately, divorce and child custody mediation

18. See, e.g., Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 26 (2005) (reporting that in divorce and custody cases 11% of mediated cases "appeared in front of a judge" compared to 72% of cases involved in traditional adversarial settlement negotiations); see also Connie J.A. Beck et al., *Research on the Impact of Family Mediation*, in DIVORCE AND FAMILY MEDIATION 447, 452 (Jay Folberg et al. eds., 2004).

19. See, e.g., Beck et al., *supra* note 18, at 451 (concluding that time savings for litigants is a "compelling" reason for advocating mediation over litigation in divorce actions).

20. See, e.g., Joan B. Kelly, *Is Mediation Less Expensive?: Comparison of Mediated and Adversarial Divorce Costs*, 8 MEDIATION Q. 15, 23 (1990) (finding that mediating divorce couples incurred 50% of the costs of litigating divorce couples); Jessica A. Pearson, *Family Mediation in A REPORT ON CURRENT RESEARCH FINDINGS—IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS* 53 (S. Keilitz ed., 1994) (finding a substantial financial benefit when mediation resulted in an agreement and finding no financial benefit when mediation was unsuccessful in reaching a settlement). *But see* Beck et al., *supra* note 18, at 449 (describing studies showing mixed results on the question of whether mediation participants save money as a result of mediation).

21. See Beck et al., *supra* note 18, at 453 (discussing studies that show "modest" support for the proposition that mediated agreements are complied with more often than negotiated settlements); Emery et al., *supra* note 18, at 28; Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RES. Q. 3, 29 (2004) (summarizing several empirical studies of mediation participants).

22. See, e.g., Emery et al., *supra* note 18, at 28 (reporting higher participant satisfaction with mediation than traditional adversarial settlement negotiations six weeks, a year and a half, and twelve years after settlement) (citations omitted).

23. Beck et al., *supra* note 18, at 452.

24. See Emery et al., *supra* note 18, at 30-32 (reporting findings from a twelve-year study comparing divorced couples who went through mediation to divorced couples that reached a settlement through traditional adversarial negotiation); see also Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them*, 14 J. AM. ACAD. MATRIMONIAL L. 353 (1997) (indicating that attorneys believe that mediation improves the parties' dealing in child custody issues).

25. Emery et al., *supra* note 18, at 31. Specifically, Emery and his colleagues found that "when parents mediated rather than continuing with the legal action over their children, twelve years later the residential parent reported that the nonresidential parent was . . . significantly more likely to discuss problems with the residential parent." *Id.*

26. *Id.* at 22. Emery and his colleagues reported:

provides a forum for renegotiating relationships as well as negotiating settlement agreements.<sup>27</sup>

### C. Mediation's Core Values

The ability to settle complex and highly emotional disputes by recognizing both the emotional and legal dimensions of family matters makes mediation a unique and valuable dispute resolution process.<sup>28</sup> Mediation addresses these issues through three interdependent core values: party self-determination, mediator neutrality, and confidentiality of mediation communications.<sup>29</sup> These three values are intricately tied to mediation's purposes as a conflict-resolution device: settling disputes; defining, clarifying, and narrowing the issues in dispute; understanding differing perspectives; identifying interests; and empowering individuals to manage their conflicts.<sup>30</sup> A basic theme running through these purposes is to provide a personalized approach to resolving disputes free of the constraints of the adversarial legal process.<sup>31</sup> In divorce and child custody disputes this translates into developing workable options that best meet the needs of the participants, improving their decision making and producing better outcomes than they may otherwise achieve.<sup>32</sup> Underlying media-

Thirty percent of nonresidential parents who mediated saw their children once a week or more twelve years after the initial dispute in comparison to only 9% of parents in the [traditional adversarial negotiation settlement] group. At the opposite extreme, 39% of nonresidential parents in the [traditional adversarial negotiation settlement] group had seen their children only once or not at all in the last year compared to 15% in the mediation group. . . .

. . . In the mediation group, 54% of nonresidential parents spoke to their children on the telephone once a week or more often in contrast to 13% in the [traditional adversarial negotiation settlement] group. Once again at the opposite extreme, 54% of nonresidential parents in the [traditional adversarial negotiation settlement] group had not spoken with their children on the telephone in the last year, or had done so only once, in comparison to 12% in the mediation group.

*Id.* at 30-31.

27. ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION* 175 (1994).

28. Kelly, *supra* note 21, at 28; Milne et al., *supra* note 2, at 3.

29. Carol L. Izumi & Homer C. La Rue, *Prohibiting "Good Faith" Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J. DISP. RES. 67, 86; John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 U.C.L.A. L. Rev. 69, 70 n.1 (2002); see also 2005 MODEL STANDARDS, *supra* note 1, §§ I, II, V; MODEL FAMILY STANDARDS, *supra* note 1, §§ I, IV, VII.

30. See, e.g., 2005 MODEL STANDARDS, *supra* note 1, Preamble; MODEL FAMILY STANDARDS, *supra* note 1, Overview and Definitions; ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (1994) (arguing that the primary purposes of mediation are empowerment of individuals and recognition of the concerns of others involved in the conflict).

31. Milne et al., *supra* note 2, at 8.

32. See *id.*; CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL*, 270-71 (2005) (describing the ability to create outcomes that can

tion's core values and purposes is the need for the sharing of information in order to enable better decision making.

### 1. Party Self-Determination

Party self-determination is often described as the fundamental principle that differentiates mediation from other third-party dispute resolution processes.<sup>33</sup> Mediation ethics codes describe self-determination in terms of voluntary decision making,<sup>34</sup> but the essence of self-determination is party empowerment.<sup>35</sup> As one author has noted, self-determination promises disputants "the opportunity to participate actively and directly in the process of resolving their dispute, control the substantive norms guiding their discussion and decision-making, create the options for settlement, and control the final outcome of the dispute resolution process."<sup>36</sup> In other words, the parties are at the center of the mediation process, acting as its principal actors and creators.<sup>37</sup>

However, there are several restraints to self-determination in mediation. In particular, mediators exert a high degree of influence on deciding which procedures will be used to address the mediation's substantive issues.<sup>38</sup> Mediators also often make decisions for the parties relating to (a) how proposed settlements are developed and presented and (b) the conditions under which the mediator should evaluate or arrange for an evaluation of the parties' respective positions.<sup>39</sup> By making these decisions, mediators encroach on the parties' self-determination as it relates to procedural decision making.<sup>40</sup>

Mediators also assert their influence when it comes to substantive decision making in mediation.<sup>41</sup> In the attempt to resolve a dispute, mediators may urge parties to settle or accept a particular settle-

maximize benefits for all sides when compared to litigation alternatives); CHRISTOPHER MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 297-98 (3d ed. 2003) (discussing how mediators assist parties assess how well their interests are satisfied by various settlement options and determining the costs and benefits of their acceptance or rejection).

33. See, e.g., Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 3 (2001); MODEL FAMILY STANDARDS, *supra* note 1, § I.

34. 2005 MODEL STANDARDS, *supra* note 1, § I; MODEL FAMILY STANDARDS, *supra* note 1, § I.

35. Welsh, *supra* note 33, at 18; see also Milne et al., *supra* note 2, at 8 (describing how an agreement reached between the participants is more likely to be supported than an imposed order).

36. Welsh, *supra* note 33, at 17-18.

37. *Id.* at 4.

38. Riskin, *supra* note 1, at 35, 44.

39. *Id.* at 35. For a long list of procedural issues in mediation, see *id.* at 35-36.

40. *Id.* at 28.

41. Substantive decisions in mediation include determining what gave rise to the dispute and trying to make decisions to resolve the dispute. *Id.* at 34.

ment proposal or range, propose position-based compromises, predict court outcomes, and assess the strengths and weaknesses of each side's legal case.<sup>42</sup> These practices have been roundly criticized for impairing the parties' self-determination.<sup>43</sup> Many in the mediation field, however, argue that mediators should be able to use their expertise to assist mediating parties to evaluate their legal claims,<sup>44</sup> maintaining that this enhances the parties' self-determination by contributing to more informed decision making.<sup>45</sup> Further, they recognize that most mediated disputes call for some combination of mediation styles, including the evaluation of legal claims.<sup>46</sup>

This discussion reflects, in part, a disagreement over the significance that social norms, such as the law, play in mediation participants' negotiations and mediators' uses of those norms.<sup>47</sup> Although in mediation practice the concept of self-determination may not meet the vision of party empowerment reflected in mediation ethics rules, mediation remains a process that can allow parties to control their fate and reach a voluntary agreement tailored to their specific needs.<sup>48</sup>

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42. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13 (1996); see also Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 523 (2002) (reporting that attorneys found mediators evaluate legal claims and push parties toward settlement); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 805-09 (2001) (discussing the preference for the evaluation of legal claims in court-connected mediation).

43. See, e.g., Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997).

44. See, e.g., John Lande, *Toward a More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 330; Jeffery W. Stempel, *The Inevitability of the Ecclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 269.

45. See Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 777 (1999) (arguing that self-determination is undermined without informed consent); Riskin, *supra* note 1, at 19-20; see also Welsh, *supra* note 42, at 805-09 (discussing various reasons for mediators to evaluate legal claims).

46. See, e.g., MOORE, *supra* note 32, at 56; Margaret L. Shaw, *Style Schmyle: What's Evaluation Got to Do with It?*, 11 DISP. RESOL. MAG. 17, 19-20 (2005); Stempel, *supra* note 44, at 252-53.

47. Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 707-09 (1997). Waldman discusses three different models for incorporating norms into the mediation process. In the norm-generating model, party discussions do not include social norms and the only relevant norms are those the parties create for themselves in the mediation. *Id.* at 718. In the norm-educating model, mediators inform disputant negotiators of the relevant legal and social norms that impact their dispute in an attempt to enhance party autonomy by allowing parties to make the most informed settlement decisions possible. *Id.* at 731-32. In the norm-advocating model, the mediator acts as the guardian or enforcer of social norms to make sure the parties follow them. *Id.* at 745.

48. See Barbara Filner & Michael Jenkins, *Performance-Based Evaluation of Mediators: The San Diego Mediation Center's Experience*, 30 U.S.F. L. REV. 647, 650 (1996); Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Be-*

## 2. Mediator Neutrality

The idea of mediator neutrality is deeply embedded in the ethos of mediation and has been called the “*sine qua non* of mediation.”<sup>49</sup> The parties must perceive the mediator and the mediation process to be fair and even-handed in order to develop trust in the mediator to create an effective working relationship.<sup>50</sup>

Mediator neutrality embraces two ideas of how the mediator should relate to the parties and their dispute in mediation.<sup>51</sup> The more straightforward aspect of mediator neutrality involves disclosing and resolving actual and potential conflicts of interest with the parties and with the subject matter of their dispute.<sup>52</sup> Like a judge adjudicating a case, a mediator must have minimal prior relationships with the parties and must have no other conflicts of interest, because these factors may be perceived to indicate favoritism, even when none exists.<sup>53</sup>

The more difficult concept of mediator neutrality is impartiality.<sup>54</sup> Most mediation authorities describe impartiality as being free from favoritism, bias, or prejudice.<sup>55</sup> In other words, the mediator should not favor one party over another, one party’s interests over another’s, or a specific solution one party advocates.<sup>56</sup> This aspect of impartiality helps build the parties’ trust in the mediator, which makes them

*tween the Aspirations of a Private Facilitated Process and the Reality of Public Adversarial Justice*, 19 OH. ST. J. ON DISP. RESOL. 509, 556 (2004). *But see* James R. Coben, *Gollum, Meet Sméagol: A Schizophrenic Ruminaton on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFL. RESOL. 65, 77 (2004) (worrying that unsophisticated mediation consumers are taken advantage of by repeat mediation players).

49. Filner & Jenkins, *supra* note 48, at 649; *see also* Riskin, *supra* note 42, at 47.

50. MOORE, *supra* note 32, at 54; *see also* Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 923 (1997) (reporting that the mediator’s perceived neutral role enhances participant perceptions of the legitimacy of the mediation process); Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 82 (2001).

51. Orna Cohen et al., *The Limits of the Mediator’s Neutrality*, 16 MEDIATION Q. 341, 341-42 (1999); Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227, 256 (2003).

52. 2005 MODEL STANDARDS, *supra* note 1, § III; Cohen et al., *supra* note 51, at 341-42.

53. 2005 MODEL STANDARDS, *supra* note 1, § III; MOORE, *supra* note 32, at 53. Mediation parties do have the ability to waive these kinds of conflicts of interest if they so desire and the mediator agrees to do so as well. 2005 MODEL STANDARDS, *supra* note 1, § III(C). Additionally, the way mediator fees are paid should not affect the mediator’s relationship to the parties and their dispute. *Id.* § VIII; MODEL FAMILY STANDARDS, *supra* note 1, § IV.

54. Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 L. & SOC. INQUIRY 35, 43 (1991). Mediation practitioners often use the terms neutrality and impartiality interchangeably. *Id.* at 42.

55. 2005 MODEL STANDARDS, *supra* note 1, § II; MODEL FAMILY STANDARDS, *supra* note 1, § IV. Furthermore, the 2005 Model Standards require mediators to refrain from conduct that merely gives the appearance of partiality. 2005 MODEL STANDARDS, *supra* note 1, § II.

56. MOORE, *supra* note 32, at 53.

more likely to share information with the mediator.<sup>57</sup> In addition, freedom from bias adds value to the negotiation by allowing the mediator to recognize various options and potential solutions that the parties cannot see because of their cognitive and psychological biases.<sup>58</sup> Moreover, it keeps the mediator from undermining the parties' ability to craft their own solution to the problem, thereby supporting the parties' self-determination.<sup>59</sup>

Practically speaking, however, once a mediator makes it past the mechanical conflicts check and the mediation begins, it is often difficult for the mediator to be completely impartial due to the relational nature of the mediator's task. To assist both parties in understanding and expressing their interests and determining whether settlement offers embody those interests, mediators need to develop trusting relationships with the parties.<sup>60</sup> During this process, the mediator may engage in what are considered legitimate mediator moves<sup>61</sup> that may favor one side over the other at any given moment as the mediator spends time focusing on each party's interests and aspirations.<sup>62</sup> The challenge is to cultivate the relationships necessary for a successful mediation without compromising the mediator's professional distance from the parties.<sup>63</sup> This limited bias phenomenon is known as equidistance because the mediator will do this with both parties, even though one party may need more mediator attention and assistance than the other.<sup>64</sup>

Some argue that impartiality and equidistance are inherently inconsistent, which leads to paradoxical dilemmas for mediators who try to equate the two.<sup>65</sup> Others argue that they are consistent because the limited bias is used to create symmetry between the parties by engaging in the same behaviors with each and impartiality is gauged by the process as a whole, not through moment-by-moment calcula-

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57. Peppet, *supra* note 51, at 255.

58. *Id.*; Robert A. Baruch Bush, "What Do We Need a Mediator For?": *Mediation's "Value Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 9-14 (1996).

59. Peppet, *supra* note 51, at 256.

60. *See, e.g.*, Gary Friedman & Jack Himmelstein, *Resolving Conflict Together: The Understanding-Based Model of Mediation*, 4 J. AM. ARB. 225, 234, 236-37 (2005).

61. Such moves include breaking into caucus, playing the role of devil's advocate, or engaging in negotiation coaching.

62. Cobb & Rifkin, *supra* note 54, at 43; Cohen et al., *supra* note 51, at 343; Peppet, *supra* note 51, at 256; *see also* MODEL FAMILY STANDARDS, *supra* note 1, § VI (requiring mediators to structure the process "so that the participants make decisions based on sufficient information and knowledge").

63. Cobb & Rifkin, *supra* note 54, at 45; *see also* Friedman & Himmelstein, *supra* note 60, at 243. This balancing act is demanding and highly dependent on the chemistry between the parties, their representatives, and the mediator.

64. Cobb & Rifkin, *supra* note 54, at 44-45; *see also* Friedman & Himmelstein, *supra* note 60, at 234 (calling this phenomenon "positive neutrality").

65. Cobb & Rifkin, *supra* note 54, at 45.

tions.<sup>66</sup> Thus, true neutrality requires mediators to be successful in somewhat contradictory tasks—to actively participate in the process yet remain detached from the parties, their positions, and the outcome.<sup>67</sup>

### 3. Confidentiality

With the promulgation of numerous state and federal laws regarding mediation confidentiality, including the recent Uniform Mediation Act,<sup>68</sup> there is a consensus that some degree of confidentiality protection for mediation communications is critical to the success of mediation.<sup>69</sup> This lack of controversy is due in part to the fact that the same presumption underlies the rules of evidence making settlement negotiations generally inadmissible in court proceedings.<sup>70</sup> Although encompassed by settlement-related evidentiary rules, mediation confidentiality benefits from stronger protections than typical bilateral settlement negotiations.<sup>71</sup>

One reason for this heightened degree of confidentiality protection is that mediation is a more formalized method of negotiation, designed to nurture candor and effective communications between adverse parties and the mediator.<sup>72</sup> Typically the premediation level of

66. *Id.* at 44.

67. See Beck et al., *supra* note 18, at 471-73; Cobb & Rifkin, *supra* note 54, at 48-49; Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 93 (1996) (describing the mediator as either a “disinterested referee” or an “empowerment specialist”).

68. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM MEDIATION ACT (2001), available at <http://www.pon.harvard.edu/guests/uma> [hereinafter UMA]. Currently eight states (Illinois, Iowa, Nebraska, New Jersey, Ohio, Utah, Vermont, and Washington) and the District of Columbia have adopted the UMA. Chip Stewart, *ADR News*, DISP. RES. MAG., Summer 2006, at 29, 29.

69. See Deason, *supra* note 5, at 243-44 (discussing the lack of controversy related to the need for confidentiality in mediation); Maureen A. Weston, *Confidentiality's Constitutional: The IncurSION on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 32-33 (2003) (discussing the popular belief that confidentiality is vital to mediation). *Contra* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986).

70. See FED. R. EVID. 408 (rendering settlement offers, settlements, and statements arising from settlement negotiations inadmissible in court to prove the validity or invalidity of a claim).

71. Compare *id.* (allowing the introduction of settlement offers and settlements into evidence for purposes other than proving the validity or invalidity of a claim), with UMA, *supra* note 68, § 4, 7 (creating a privilege against disclosure of mediation communications, excluding their subject to discovery, and prohibiting their disclosure to tribunals in reports), and *Rojas v. Superior Court*, 93 P.3d 260 (Cal. 2004) (affirming the denial of motion to compel production of materials produced in connection to mediation between co-defendants in prior litigation because the materials were prepared specifically for use in that mediation). See also Weston, *supra* note 69, at 48-49 (explaining that the limits associated with settlement-related confidentiality protection prompted statutory confidentiality protection for mediation communications).

72. See, e.g., *In re County of Los Angeles*, 223 F.3d 990, 993 (9th Cir. 2000) (quoting *Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487, 1494 (D. Utah 1995)); *In re Sargeant Farms, Inc.*, 224 B.R. 842, 848 (Bankr. M.D. Fla. 1998) (“[n]othing should prevent full dis-

communication between litigating parties is low because their relationship has devolved into one of animosity and distrust.<sup>73</sup> But for cases to settle in mediation, the parties must be willing to have frank discussions about their positions, intentions, and desires with the mediator and, either directly or indirectly through the mediator, with the opposing party.<sup>74</sup> While confidentiality is not a surrogate for trust in the other party, it does create a trust in the mediation process that such statements will not resurface as admissions against interest in later court proceedings.<sup>75</sup> Thus, confidentiality creates an environment in which disputing parties and their lawyers can feel relatively safe making statements that may otherwise belie their efforts outside of mediation.<sup>76</sup>

Besides encouraging candor in communications, confidentiality also helps ensure that the perception of mediator neutrality extends beyond the mediation session. Most, if not all, mediation confidentiality statutes and rules explicitly bar mediators from being called as witnesses in court proceedings.<sup>77</sup> If mediators could be called as witnesses in either the underlying case or in subsequent litigation, their testimony, even if purely factual, could be perceived to favor one party over another, bringing the integrity of the entire mediation process into question.<sup>78</sup>

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cussion and absolute candor with the mediator"); UMA, *supra* note 68, Prefatory Note 1; *see also* Deason, *supra* note 50, at 80.

73. Deason, *supra* note 50, at 80-81.

74. *See, e.g., County of Los Angeles*, 223 F.3d at 993 (quoting *Poly Software Int'l.*, 880 F. Supp. at 1494); *Sargeant Farms*, 224 B.R. at 848; *see also* Deason, *supra* note 5, at 245.

75. Deason, *supra* note 50, at 80-81.

76. *See, e.g., In re Lake Utopia Paper Ltd.*, 608 F.2d 928, 930 (2d Cir. 1979). As that court stated,

If [mediation] participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute.

*Id.* *See also* *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003); UMA, *supra* note 68, Prefatory Note 1; Deason, *supra* note 5, at 247.

77. *See, e.g., ARIZ. REV. STAT. § 12-2238(c)* (2004 & Supp. 2005); *MO. REV. STAT. § 435.014* (1994); UMA, *supra* note 68, § IV(b)(2). The inability to call mediators as witnesses in subsequent court proceedings also serves to separate mediation functions from the judicial function of the courts. Deason, *supra* note 50, at 83.

78. *See, e.g., In re Anonymous*, 283 F.3d 627, 639 (4th Cir. 2002) (quoting *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 55 (9th Cir. 1980)).

This point is illustrated well in congressional testimony regarding the Railroad Labor Board's duties in the 1920s and 30s. After its creation by the 1920 Transportation Act, railroads and their unions lost confidence in the Railroad Labor Board's ability to settle their labor disputes because the Board had both mediatory and adjudicatory functions. *See Chicago & Nw. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 580-81 (1971). To correct this problem, Congress passed the Railway Labor Act in 1926. In support of the act, Mr. Donald R. Richberg, an attorney for the railroad unions, testified before Congress:

The board of mediation, to preserve its ability to mediate year after year between the parties, must not be given any duties to make public reports con-

Although the confidentiality protections in mediation are among the most powerful in litigation, in some situations public policy favors disclosing statements made in mediation to satisfy values deemed more important than confidentiality. For example, in some states, judges have statutory authority to balance these values with mediation confidentiality on a case-by-case basis to avoid manifest injustice or to enforce court orders.<sup>79</sup> Some state legislatures have decided that certain mediation communications should not be confidential, such as threats of violence or harm,<sup>80</sup> disclosures of ongoing criminal activity,<sup>81</sup> or communications evidencing professional misconduct or malpractice by mediators or lawyers.<sup>82</sup> Furthermore, some confidentiality statutes give deference to mandatory reporting statutes by excluding from confidentiality protection communications that would lead to a report of suspected child abuse.<sup>83</sup> Despite these contours, mediation confidentiality is among the most powerful confidentiality protections available in litigation.

### III. MANDATORY REPORTING LAWS

In a number of arenas, strong public policies supporting family privacy and integrity<sup>84</sup> are balanced against a countervailing societal

demning one party or the other, even though the board may think one party is wrong. . . . That is the reason why the Labor Board Machinery never would work, because a board was constituted to sit and deliver opinions which must be opinions for or against one party, and as soon as that board began delivering opinions publicly against a party, that party was sure the board was unfair to it. . . . The board, in other words, was created in a manner to destroy any confidence in itself.

*Id.* at 580 n.13.

79. *See, e.g.*, LA. REV. STAT. § 9:4112(B)(1)(c) (Supp. 2006); Wis. Stat. § 904.085(4)(e) (2000); *see also* *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1133-34 (N.D. Cal. 1999) (requiring mediator testimony under California law to determine whether one party to a mediated settlement agreement suffered from either a lack of mental capacity or duress). *But see* *Rojas v. Superior Court*, 93 P.3d 260, 270 (Cal. 2004) (rejecting a “good cause” exception to California’s mediation privilege because such an exception was not expressly provided for by the privilege statute).

80. *See, e.g.*, ARIZ. REV. STAT. § 12-2238(D) (2004 & Supp. 2005); UMA, *supra* note 68, § 6(a)(3).

81. *See, e.g.*, CALIF. EVID. CODE § 1119 (1995 & Supp. 2005); UMA, *supra* note 68, § 6(a)(4).

82. *See, e.g.*, ARIZ. REV. STAT. § 12-2238(B)(2) (2004 & Supp. 2005); UMA, *supra* note 68, § 6(a)(5).

83. *See, e.g.*, COLO. REV. STAT. § 13-22-307(b) (2004); OR. REV. STAT. §§ 36.220(5), 36.222(6) (2005); TEX. CIV. PRAC. & REM. CODE § 154.073(f) (2002); UMA, *supra* note 68, § 7(b)(3). The Reporter for the UMA specifically contemplated mediators acting as mandatory reporters. “An exception [to mediation confidentiality exists] for child abuse and neglect is common in domestic mediation confidentiality statutes, and the [UMA] reaffirms these important policy choices States have made to protect their citizens.” *Id.* § 6, Reporter’s Notes 8, §§ 6(a)(7) and 7.

84. As the Supreme Court stated,

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one’s children have been deemed essential, basic

interest in child welfare and protection.<sup>85</sup> One of those areas is parental authority over their children.<sup>86</sup> When parental authority is misused to an extent where children are endangered because of abuse or neglect, public policy favors state-sponsored child protection over family unity.<sup>87</sup> One important means for the state to gather information to determine whether parents are abusing or neglecting their children is mandatory reporting: requiring certain individuals to report reasonable suspicions of abuse to state authorities.<sup>88</sup>

Mandatory reporting laws are the product of the medical community's recognition of child abuse as a social problem in the early 1960s.<sup>89</sup> In response to this "discovery" and the urging of a group of influential physician organizations, state legislatures across the

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civil rights of man, and [r]ights far more precious . . . than property rights. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.

Stanley v. Illinois, 405 U.S. 645, 651 (1972) (quotations and citations omitted).

85. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (holding that the state has "a *parens patriae* interest in preserving and promoting the welfare of the child"). See also Robert F. Kelly, *Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice and Public Policy*, 34 FAM. L.Q. 359, 363-64 (2000) (discussing the ebb and flow between policies supporting family integrity and state intervention in the parent-child relationship).

86. *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (stating that the government has a "traditional and 'transcendent interest'" in protecting children within its jurisdiction from child abuse); *Santosky*, 455 U.S. at 745.

87. See, e.g., *Ex parte G.C., Jr.*, 924 So. 2d 651 (Ala. 2005) (terminating father's parental rights after finding that he had abandoned his parental responsibilities); *In re Christina M.*, 887 A.2d 941 (Conn. App. Ct. 2005) (terminating parental rights when parents failed to meet reasonable expectations of appropriate parental behavior after taking advantage of state rehabilitative services); *In re J.G.*, 705 N.W.2d 108 (Iowa Ct. App. 2005) (terminating mother's parental rights after finding that mother's violent proclivities and alcoholism would result in daughter being placed in harm's way if reunited with mother).

88. Mandatory reporting laws do not violate constitutional rights to family integrity. *Kottmyer v. Maas*, 436 F.3d 684, 691 (6th Cir. 2006); *Doe v. Heck*, 327 F.3d 492, 520-21 (7th Cir. 2003); *Watterson v. Page*, 987 F.2d 1, 8 (1st Cir. 1993) ("The right to family integrity clearly does not include a constitutional right to be free from child abuse investigations.")

89. Despite some efforts in the late 1800s, child abuse came to the fore of public attention in 1962 with the publication of an article entitled *The Battered-Child Syndrome*. C. Henry Kampe et al., *The Battered-Child Syndrome*, 181 JAMA 17 (1962). While several articles had previously been written either discussing or alluding to child abuse, it is clear that until this article was published, child abuse was considered a minor aberration of parenting that was rarely seen and that was likely to be found in children of disadvantaged families. See Marilyn Heins, *The "Battered Child" Revisited*, 251 JAMA 3295, 3296 (1984) (identifying seven precursor articles discussing child abuse); Gertrude J. Williams, *Cruelty and Kindness to Children: Documentary of a Century, 1874-1974*, in TRAUMATIC ABUSE AND NEGLECT OF CHILDREN AT HOME 63, 76-77 (Gertrude J. Williams & John Money eds., abr. ed. 1982) (documenting the "discovery" of child abuse by the medical world).

country quickly passed mandatory reporting laws.<sup>90</sup> Today, mandatory reporting laws are widely accepted as an integral component in the fight against child abuse.<sup>91</sup>

To be responsible reporters of abuse, mandatory reporters must be familiar with the elements of their state reporting statute. The two critical elements for accurate reporting are the definition of abuse and the reporting standard.

### A. *The Definition of Abuse*

Although definitions of child abuse vary considerably from state to state,<sup>92</sup> most state reporting statutes describe four different types of abuse: physical abuse, neglect, emotional/mental injury, and sexual molestation/abuse.<sup>93</sup> Physical abuse is generally defined as nonaccidental physical injury;<sup>94</sup> some states limit the category to “serious” injuries,<sup>95</sup> and others give a specific list of items that constitute physical injury.<sup>96</sup> Definitions of “neglect” rely on descriptions of circumstances and situations where adults fail to meet a basic standard

90. By 1967, five years after the publication of *The Battered-Child Syndrome*, every state in the country but one had adopted a child abuse reporting statute. Heins, *supra* note 89, at 3295; Monrad G. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 1 (1967). According to one commentator, very few legislative concepts have met with such universal acceptance as mandatory reporting laws. Brian G. Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.-KENT L. REV. 641, 649-50 (1978).

91. See, e.g., Seth C. Kalichman & Mary E. Craig, *Professional Psychologists' Decisions to Report Suspected Child Abuse: Clinician and Situation Influences*, 22 PROF. PSYCHOL. RES. & PRAC. 84, 88 (1991) (reporting that 94% of survey respondents believed that mandatory reporting laws are necessary); Seth C. Kalichman et al., *Factors Influencing the Reporting of Father-Child Sexual Abuse: Study of Licensed Practicing Psychologists*, 20 PROF. PSYCHOL. RES. & PRAC. 84, 87 (1989) (reporting that 85% of survey respondents believed that mandatory reporting laws are necessary). See also Salina M. Renninger et al., *Psychologists' Knowledge, Opinions, and Decision-Making Processes Regarding Child Abuse and Neglect Reporting Laws*, 33 PROF. PSYCHOL. RES. & PRAC. 19, 22 (2002) (reporting respondents being fairly satisfied with mandatory reporting laws).

92. An in-depth analysis of the various definitions of child abuse across the states is beyond the scope of this Article. For more information see generally NAT'L CTR. ON CHILD ABUSE & NEGLECT, U.S. DEPT OF HEALTH, EDUC., & WELFARE, CHILD ABUSE AND NEGLECT: STATE REPORTING LAWS (1979); SETH C. KALICHMAN, MANDATED REPORTING OF SUSPECTED CHILD ABUSE: ETHICS, LAW, AND POLICY 20-26 (2d ed. 1999); Fraser, *supra* note 90, at 651-56. For problems with definitions of abuse see Margaret H. Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 20 FAM. L.Q. 141, 153-61 (1986).

93. See generally KALICHMAN, *supra* note 92, at 20-26; Fraser, *supra* note 90, at 651.

94. See, e.g., IOWA CODE § 232.68(2)(a) (2000 & Supp. 2004); OKLA. STAT. tit. 10 § 7102(B)(2)(a) (1998); OR. REV. STAT. § 419B.005(1)(a)(A) (2003); UTAH CODE ANN. § 62A-4a-401 (2004).

95. See, e.g., N.J. STAT. ANN. § 9:6-8.9(a), -(b) (West 2002); N.D. CENT. CODE § 50-25.1-02(3) (1999).

96. See, e.g., COLO. REV. STAT. § 19-3-102 (2004); MINN. STAT. § 626.556(g)(1)-(10) (2003).

of child care.<sup>97</sup> “Emotional or mental injury,” when defined at all,<sup>98</sup> is usually described as an impairment of a child’s ability to function in his or her normal range of performance or behavior.<sup>99</sup> Likewise, “sexual abuse” often is not defined,<sup>100</sup> but several states simply reference criminal acts such as rape and sexual assault.<sup>101</sup>

### B. The Reporting Standard

One of the most confusing facets of mandatory reporting for all reporters is the reporting standard itself. Mandatory reporters are required to report when they have a “reason to believe”<sup>102</sup> or when they have a “reasonable cause to suspect or believe”<sup>103</sup> child abuse has occurred or is occurring. In addition, a small number of states look to the potential of abuse, requiring a report of observed conditions or circumstances that “would reasonably result” in abuse.<sup>104</sup>

The impact of the two primary standards appears to be negligible when it comes to practitioners’ reporting practices, but the difference arises when determining civil or criminal liability for failing to report.<sup>105</sup> Under the “reasonable cause to believe” standard the reporter need only have a subjective belief regarding abuse to trigger the reporting requirement.<sup>106</sup> Thus, if the reporter does not believe a report

97. See, e.g., KAN. STAT. ANN. § 38-2202(s) (2006); OHIO REV. CODE ANN. § 2151.03(A) (West 2005); WIS. STAT. § 48.981(1)(d) (2005). Kansas lists “failure to use resources available to treat a diagnosed medical condition if such treatment will make a child substantially more comfortable, reduce pain and suffering, or correct or substantially diminish a crippling condition from worsening.” KAN. STAT. ANN. § 38-2202(s)(3) (2006). In its definition of “neglected child,” Ohio includes parents or guardians not providing care for their child’s mental condition. OHIO REV. CODE ANN. § 2151.03(A)(4) (West 2005).

98. Some states, while using the terms “emotional abuse” or “mental injury,” do not define the terms. See, e.g., MISS. CODE ANN. § 43-21-105(m) (2002 & Supp. 2004); MO. REV. STAT. § 210.110(1) (2004 & Supp. 2006); W. VA. CODE § 49-6A-1 (2004).

99. See, e.g., IOWA CODE § 232.68(2)(b) (2000 & Supp. 2004); S.C. CODE ANN. § 20-7-490(5) (Supp. 2005); S.D. CODIFIED LAWS § 26-8A-2(7) (1999).

100. See, e.g., MO. REV. STAT. § 210.110(1) (2004 & Supp. 2006); NEB. REV. STAT. § 28-710(2)(a)(v) (Supp. 2004); N.J. STAT. ANN. § 9:6-8.9(c) (2002); N.H. REV. STAT. ANN. § 169-C:3(II)(a) (2001).

101. See, e.g., MD. CODE ANN. FAM. LAW § 5-701(x)(2)(i) (Supp. 2006) (including “sexual offense in any degree”); MICH. COMP. LAWS § 722.622(w), -(x) (2005) (referring to the penal code); S.C. CODE ANN. § 20-7-490(2)(b) (Supp. 2005) (referring to illegal sexual offenses as defined by law).

102. See, e.g., ARIZ. REV. STAT. § 13-3620 (2004 and Supp. 2005); GA. CODE ANN. § 19-7-5 (2004); HAW. REV. STAT. § 350-1.1 (2004); MD. CODE ANN. FAM. LAW §§ 5-705, -706 (2004 & Supp. 2006); NEB. REV. ST. § 28-711 (Supp. 2004); S.C. CODE ANN. § 20-7-510 (Supp. 2004).

103. ALASKA STAT. § 47.17.020 (2004 & Supp. 2005); CONN. GEN. STAT. § 17a-101a (1998 & Supp. 2005); ME. REV. STAT. ANN. tit. 22 § 4012 (2004); MONT. CODE ANN. § 41-3-201 (2005); S.D. CODIFIED LAWS §§ 26-8A-6-8 (1999 & Supp. 2003); VA. CODE ANN. § 63.2-1509 (2002); VT. STAT. ANN. tit. 33, § 4913 (2005); WIS. STAT. § 48.981 (2005).

104. See, e.g., MICH. COMP. LAWS § 722.623(1) (2005); TEX. FAM. CODE ANN. § 34.02 (Vernon 2005).

105. Meriwether, *supra* note 92, at 146; KALICHMAN, *supra* note 92, at 27.

106. When interpreting the phrase “reasonable cause to believe” in other criminal law contexts, courts conclude that it is a subjective standard. See *United States v. Truong*, 425

was required, there is no criminal liability for failing to make a report. In upholding the conviction of a mandatory reporter for failing to report under this standard, the Texas Court of Appeals found that the defendant had “‘sufficient reason’ to believe” abuse was occurring when she told the child’s caretakers that she had reported the child’s bruises to CPS when, in fact, she had not.<sup>107</sup>

Unlike the “reason to suspect standard,” the “reasonable cause to suspect” standard is an objective one: Would a reasonable person in similar circumstances believe abuse has occurred or is occurring?<sup>108</sup> In other words, the reasonable cause standard is a totality of the circumstances test.<sup>109</sup> Reporters have violated this standard when failing to report abuse after observing a child’s physical injuries,<sup>110</sup> hearing first person accounts of abuse,<sup>111</sup> or having witnesses provide accounts of another’s abusive conduct.<sup>112</sup>

Because of the wide range of information that may prompt the need for a report, the “reasonable cause” standard has been criticized for being “subjective and undefined”<sup>113</sup> and for providing little guidance to practitioners as to when a report should be made.<sup>114</sup> These criticisms have constituted several constitutional challenges against the reporting standard; however, each state appellate court examining the standard’s constitutionality has upheld the standard, specifically finding that it is readily understandable and gives fair notice of the criminalized conduct.<sup>115</sup> One court explained the standard as one

F.3d 1282, 1289 (10th Cir. 2005) (finding “reasonable cause to believe” to be a subjective determination in a drug statute, 21 U.S.C. § 843(6)). *Cf.* Colautti v. Franklin, 439 U.S. 379, 395 n.12 (1979) (discussing the “reason to believe” standard in a statute criminalizing certain abortion procedures). *See also* Fraser, *supra* note 90, at 659; Meriwether, *supra* note 92, at 146.

107. *White v. State*, 50 S.W.3d 31, 47-48 (Tex. Ct. App. 2001).

108. *See, e.g.*, Fraser, *supra* note 90, at 659; Meriwether, *supra* note 92, at 146; Marjorie R. Freiman, Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 258-59 (1982).

109. *State v. Hurd*, 400 N.W.2d 42, 45 (Wis. Ct. App. 1986) (cited favorably in *State v. Denis L.R.*, 699 N.W.2d 154, 164-65 (Wis. 2005)); *see* *People v. Cavaiani*, 432 N.W.2d 409, 412-13 (Mich. Ct. App. 1988); *State v. Brown*, 140 S.W.3d 51, 55 (Mo. 2004).

110. *Brown*, 140 S.W.3d at 52 (observing bruises along the spine and under the eye).

111. *Cavaiani*, 432 N.W.2d at 410-11 (victim told psychologist of sexual abuse).

112. *State v. Grover*, 437 N.W.2d 60, 61 (Minn. 1989) (multiple parents informing principal of teacher’s choking and pinching children); *Hurd*, 400 N.W.2d at 44 (camp counselor informing educator of another camp counselor’s sexual conduct with child campers).

113. *See Brown*, 140 S.W.3d at 57 (White, C.J., dissenting).

114. *See, e.g., id.* at 56 (noting that all of the expert witnesses who discussed the standard at the trial court testified that the standard is difficult to apply in practice); KALICHMAN, *supra* note 92, at 26 (“[W]hat constitutes reasonable suspicion as it may be differentiated from clinical hunches, professional impressions, and intuition, remains fuzzy.”); Douglas J. Besharov, *Child Abuse Realities: Over-Reporting and Poverty*, 8 VA. J. SOC. POL’Y & L. 165, 196-98 (2000). Gail L. Zellman & Stephen Antler, *Mandated Reporters and CPS: A Study in Frustration*, PUB. WELFARE, Winter 1990, at 30, 37.

115. *See, e.g., Brown*, 140 S.W.3d at 54 (holding the “reasonable cause to suspect” standard constitutional under void for vagueness challenge); *Grover*, 437 N.W.2d at 63-65

that “involves a belief, based on evidence but short of proof . . . as to the existence of child abuse.”<sup>116</sup> Requiring reports based on information that simply indicates or suggests child abuse constitutes a low standard indeed. However, it is not an invitation to report whenever one has a vague, amorphous, or unspecified concern for a child’s welfare.<sup>117</sup>

#### IV. WHICH MEDIATORS ARE MANDATORY REPORTERS?

The initial reporting statutes from the mid-1960s required only medical professionals to be reporters, but before long reporting requirements extended to a broad range of professionals who regularly came into contact with children, such as social workers, teachers, and day care operators.<sup>118</sup> Today, up to forty different professions are identified as mandatory reporters,<sup>119</sup> and in some states “any person” who has knowledge of abuse or suspects abuse is a mandatory reporter.<sup>120</sup>

Mandatory reporting laws vary by state; thus, the status of mediators as mandatory reporters for child abuse also varies by state. In twenty-two states, mediators are mandatory reporters. Of those states, only four expressly include mediators in the class of profes-

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(holding phrase “knows or has reason to believe” standard constitutional in face of void for vagueness and overbreadth challenges); *Cavaiani*, 432 N.W.2d at 413 (finding “reasonable cause to suspect” standard constitutional in response to void for vagueness and overbreadth challenges); *Hurd*, 400 N.W.2d at 45-46 (upholding “reasonable cause to suspect” standard in face of void for vagueness challenge); *see also* *White v. State*, 50 S.W.3d 31, 43 (Tex. Ct. App. 2001) (holding the subjective standard to be constitutional).

116. *Hurd*, 400 N.W.2d at 46.

117. DOUGLAS J. BESHAROV, CHILD ABUSE AND NEGLECT REPORTING AND INVESTIGATION: POLICY GUIDELINES FOR DECISION MAKING 9 (1988). While the reporting standard may be low, it is not low enough to reach the ridiculous result where the mere existence of a physical injury should result in a report of child abuse. *Contra Brown*, 140 S.W.3d at 57 n.8 (Mo. 2004) (White, C.J., dissenting) (arguing that mere physical injury is *ipso facto* evidence of abuse because an abuse scenario can be imagined for any childhood injury).

118. Medical professionals spearheaded the expansion of mandatory reporters, in part because they feared that if medical professionals were the only mandatory reporters, parents may refuse to seek medical care for their children. KALICHMAN, *supra* note 92, at 18; *see also* Editorial, *Battered Child Legislation*, 188 JAMA 136 (1964); John B. Reinhart & Elizabeth Elmer, *The Abused Child*, 188 JAMA 108 (1964).

119. KALICHMAN, *supra* note 92, at 19 (citing SANDY K. WURTELE & CINDY L. MILLER-PERRIN, PREVENTING CHILD SEXUAL ABUSE: SHARING THE RESPONSIBILITY (1992)). The list of professions outside the mental health and medical professions is diverse and includes clergy, attorneys, film processors, police officers, and professionals who care for or supervise children (such as teachers and daycare providers).

120. DEL. CODE ANN. tit. 16, § 904 (2004); FLA. STAT. § 39.201(1)(a) (Supp. 2006); IDAHO CODE ANN. § 16-1605 (2001); IND. CODE § 31-33-5 (2005); KY. REV. STAT. ANN. §620.030 (West 2005); LA. REV. STAT. ANN. art. 610 (Supp. 2004); MD. CODE ANN. FAM. LAW §§ 5-705, -706 (LexisNexis 2005); MISS. CODE ANN. § 43-21-353 (2006); NEB. REV. STAT. § 28-711 (Supp. 2002); N.H. REV. STAT. ANN. § 169-C:30 (2001); N.J. STAT. ANN. § 9:6-8.10, -8.10a (West 2002); N.M. STAT. § 32A-4-3 (2003); N.C. GEN. STAT. § 7B-301 (2003); OKLA. STAT. tit. 10, § 7103 (Supp. 2006); R.I. GEN. LAWS § 40-11-3 (Supp. 2004); TENN. CODE ANN. § 37-1-403 (2001); TEX. FAM. CODE ANN. § 261.103 (Vernon Supp. 2005); UTAH CODE ANN. 1953 § 62A-4a-403 (2004); WYO. STAT. ANN. § 14-3-206 (2005).

sions identified as mandatory reporters.<sup>121</sup> The remaining eighteen states indirectly require mediators to be mandatory reporters because “any person” who reasonably suspects abuse is designated a mandatory reporter.<sup>122</sup>

In the remaining twenty-eight states, the inquiry goes a step further. Because mediation is a secondary profession for most mediators,<sup>123</sup> one must first determine the reporting status of the mediator’s other profession.<sup>124</sup> Indeed, mediators in family matters are drawn from a variety of primary professions, including social work, psychology, counseling, and law, and many of these professions are classified as mandatory reporters.<sup>125</sup> This raises an issue: are reporting responsibilities a function of the reporter’s professional role or do they follow a reporter from one professional role to another?

Logically one would expect reporting requirements to attach only to one’s professional role. The first reporting statutes singled out physicians because, while providing medical treatment, they presumably would recognize signs of abuse that otherwise would be unrecognizable to nonmedical observers.<sup>126</sup> Reporting outside of the

121. KAN. STAT. ANN. § 38-2223(a)(1)(D) (2006); LA. REV. STAT. ANN. art. 610 (Supp. 2005); VA. CODE ANN. § 63.2-1509(a)(10) (2002); WIS. STAT. § 48.981 (2005).

122. See *supra* note 120.

123. See Edward Kruk, *Practice Issues, Strategies, and Models: The Current State of the Art of Family Mediation*, 36 FAM. & CONCILIATION CTS. REV. 195, 197 (1998) (finding that, among a survey of Canadian family mediators, the respondents devoted on average 34% of their professional practice to mediation and only 7% practiced mediation full-time).

124. One may argue that a permissive reporter mediator does, in fact, have a duty to report child abuse based on standards outside of the statutory reporting system. For example, the Model Family Standards advise mediators to “disclose a participant’s threat of . . . violence against any person to . . . the appropriate authorities if the mediator believes such threat is likely to be acted upon.” MODEL FAMILY STANDARDS, *supra* note 1, § VII, cmt. C. However, the Model Family Standards specifically state that they “are not intended to create legal rules” and are “*aspirational in character*” describing only “*good practices* for family mediators.” *Id.*, Overview and Definitions (emphasis added). One could also argue that a *Tarasoff*-like duty requires mediators to report suspected child abuse to the authorities. See *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334, 340 (Cal. 1976) (creating therapist duty to protect an intended victim of threats of serious violence). However, a *Tarasoff*-like duty does not require that the state be notified of the potential danger; the duty to notify is to the potential victim. See *id.* at 340. In fact, the defendant in *Tarasoff* did report the victim’s danger to the police, but that report did not protect the therapist from civil liability to the victim’s family. See *id.* at 339-40. Further, unlike mandatory reporting laws, which are enforced through criminal sanctions, a *Tarasoff*-like duty is enforced through remedies based on civil tort negligence remedies. See *id.* at 345. *Tarasoff*-like requirements do not act as *de facto* mandatory reporting requirements.

125. While lawyers usually are not mandatory reporters, they are listed as mandatory reporters in four states. MISS. CODE ANN. § 43-21-353 (2006); NEV. REV. STAT. § 432B.220(4)(i) (Supp. 2005); OHIO REV. CODE ANN. § 2151.421 (West 2005); OR. REV. STAT. § 419B.010 (2003). For a discussion of the ramifications of lawyers acting as mandatory reporters of child abuse, see generally Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203 (1992).

126. See, e.g., CHILDREN’S BUREAU, U.S. DEPT OF HEALTH, EDUC. & WELFARE, THE ABUSED CHILD (1963); KALICHMAN, *supra* note 92, at 15.

medical provider role was not contemplated.<sup>127</sup> Today, a few reporting statutes now specifically tie the duty to report to one's occupational duties,<sup>128</sup> and much of the discussion of mandatory reporting focuses on the effect that reporting requirements have on various professional occupations.<sup>129</sup>

If one's professional role and the duties associated with that role determine whether a mediator is a mandatory reporter, determining which mediators should be mandatory reporters can be answered by comparing the roles associated with mediation and the legal and mental health professions in which most mediators are trained.<sup>130</sup> Mediators attempt to resolve disputes by assisting communication, encouraging understanding, and promoting voluntary decision making.<sup>131</sup> "Medical and mental health care professionals evaluate clients to diagnose clinical conditions and to determine an appropriate course of treatment" for any diagnosed conditions.<sup>132</sup> Lawyers represent clients, providing them with advice on their legal rights and asserting those rights in courts of law.<sup>133</sup> The mediation community has highlighted these basic differences in its attempts to assert independence from those professions. For example, the Model Standards of Conduct for Mediators specifically state that the mediator role differs from other professional roles,<sup>134</sup> and the Reporter's Notes expressly distinguish "a mediator's role and such other roles as being a

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127. Editorial, *supra* note 118 (arguing that other professions should be mandatory reporters when acting in their professional capacity); CHILDREN'S BUREAU, *supra* note 126, at 4-8 (discussing reporting in context of medical treatment and diagnosis); KALICHMAN, *supra* note 92, at 15.

128. HAW. REV. STAT. § 350-1.1 (1993 & Supp. 2004); N.Y. SOC. SERV. LAW § 411 (Supp. 2005). See also Op. Att'y Gen. Alaska No. 663-91-0286 (Feb. 21, 1991) (discussing Alaska Stat. § 47.17.020(a), which has since been repealed), available at 1991 WL 541971. In that opinion, the Alaska Attorney General concluded that mediators were mandatory reporters when acting as mediators if mediation was a task that was part of the performance of their professional duties. *Id.*

129. See generally KALICHMAN, *supra* note 92, at 18-20 (clinical professions); MURRAY LEVINE & HOWARD J. DOUECK, THE IMPACT OF MANDATED REPORTING ON THE THERAPEUTIC PROCESS: PICKING UP THE PIECES (1995); Norman Abrams, *Addressing the Tension Between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes*, 44 B.C. L. REV. 1127 (2003); Mosteller, *supra* note 125 (discussing mandatory reporting and attorneys); Jane Rosien et al., *Intent v. Practice: Incentives and Disincentives for Child Abuse Reporting by School Personnel*, 1993 BYU EDUC. & L.J. 102.

130. The vast majority of family mediators are mental health care providers or lawyers.

131. 2005 MODEL STANDARDS, *supra* note 1, Preamble; MODEL FAMILY STANDARDS, *supra* note 1, Overview and Definitions.

132. KALICHMAN, *supra* note 92, at 51; see also AM. PSYCHOL. ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, Introduction and Applicability (2002) (stating that the rules apply to all aspects of clinical, counseling, and research psychology), available at <http://www.apa.org/ethics/code2002.pdf>.

133. MODEL RULES OF PROF'L CONDUCT, Preamble §2; *id.* R. 2.4(b) & cmt. 3 (distinguishing the roles of mediator and lawyer).

134. 2005 MODEL STANDARDS, *supra* note 1, § VI(A)(5).

. . . mental health counselor, and the like.”<sup>135</sup> But this dissociation is a struggle.

The Model Standards of Conduct also acknowledge that the mixing of professional roles occurs,<sup>136</sup> and the Reporter’s Notes specifically recognize that mediators necessarily draw upon the training and insights from their other professions when conducting mediations.<sup>137</sup> Furthermore, like lawyers, mental health care professionals offer family mediation services under the umbrella of their professional practices.<sup>138</sup> Because of the variability of commingling of professional roles by individual mediators, disentangling the role of mediator from mental health professional or lawyer in any manner that can be applied as an industry standard may be impossible.

The commingling of professional roles into that of mediator suggests that mental health care professionals and lawyers who have mandatory reporting requirements would be considered mandatory reporters when acting as mediators. Thus, a conservative approach is to conclude that mandatory reporting requirements follow a reporter from one professional role to that of a mediator. This is the approach taken in the Model Standards of Conduct for Family Mediators,<sup>139</sup> in the Uniform Mediation Act,<sup>140</sup> and by most authors advising mediation practitioners.<sup>141</sup> While this works for some reporters, it does not make sense for reporters whose primary professions do not include mediation under the umbrella of their services. The more sound approach is to determine if mediation services are within the realm of services provided in a particular profession.<sup>142</sup> If they are, then the

135. 2005 MODEL STANDARDS, *supra* note 1, Reporter’s Notes § V(H)(4) (discussing *id.* § VI(A)(5)), available at <http://moritzlaw.osu.edu/programs/adr/msoc/pdf/reportersnotes-092005final.pdf>.

136. *Id.* at Reporter’s Notes § VI(A)(5) (calling the practice of mixing the role of a mediator and the role of another profession problematic).

137. *Id.* at Reporter’s Notes § V(H)(4) (stating that the sharing of information from a mediator’s other profession should be done in a manner consistent with the other Standards, specifically those relating to party self-determination and mediator impartiality).

138. See *supra* notes 10-12 and accompanying text (discussing mediation services in conjunction with family counseling services).

139. The Model Family Standards advise mediators to “comply with applicable child protection laws” if a mediator has reasonable grounds for suspecting child abuse. MODEL FAMILY STANDARDS, *supra* note 1, § IX(C).

140. The UMA specifically contemplates that mediators will be mandatory reporters of abuse. “An exception [to mediation confidentiality] for child abuse and neglect is common in domestic mediation confidentiality statutes, and the [UMA] reaffirms these important policy choices states have made to protect their citizens.” UMA, *supra* note 68, § 6 cmt. 8.

141. See, e.g., TAYLOR, *supra* note 4, at 200; Schepard, *supra* note 13, at 532-33; see also Gibson, *supra* note 5, at 51-52; Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81, 114-16 (2003).

142. See Op. Att’y Gen. Alaska No. 663-91-0286 (Feb. 21, 1991) (concluding that practitioners of the healing arts are mandatory reporters if they believe that mediation services constitute performance of their occupational duties), available at 1991 WL 541971.

reporting requirements from that profession would follow the professional into her work as a mediator.<sup>143</sup>

In states where mediators are not mandatory reporters by statute, mediators must look closely to the reporting statutes to determine if their primary or secondary profession is listed among those professions mandated to be reporters. If that profession is listed as a mandatory reporter, the mediator should determine whether role and services that mediators provide are subsumed into the reporting profession's role and services. If that is the case, the individual should be considered a mandatory reporter when acting as a mediator. If that is not the case, the person should not be a mandatory reporter when acting as a mediator.

## V. ARGUMENTS FOR AND AGAINST MEDIATORS ACTING AS MANDATORY REPORTERS

Even though every state has at least some mediators who are mandatory reporters, the question remains whether having mediators serve as mandatory reporters makes sense from a policy perspective. Persuasive arguments exist on both sides of the issue.

### A. *Arguments in Favor of Mandatory Reporting*

The complementary policy goals of family mediation and mandatory reporting are synergized when mediators are mandatory reporters. Mandatory reporting laws "expedite the identification of abused children . . . to prevent further abuse,"<sup>144</sup> and mediation strives to produce better results for children than those provided through the adversarial process when the family structure is being reorganized through judicial proceedings.<sup>145</sup> Improved outcomes for children who are victims of abuse are encompassed in both of these goals. Because mediators may be the first to hear reports of child abuse, getting such cases into the child protection system more quickly should result in the earlier provision of needed social or therapeutic services and thus provide better results for children in need of such services.<sup>146</sup>

Currently, family mediators are advised to take the "best interests of the child"<sup>147</sup> into account in their mediations and thus would be

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143. See *id.* But see *White v. State*, 50 S.W.3d 31, 47-48 (Tex. Ct. App. 2001) (affirming conviction of mandatory reporter for failing to report when information indicating need for report came to her outside of her professional work).

144. KALICHMAN, *supra* note 92, at 17.

145. See MODEL FAMILY STANDARDS, *supra* note 1, Overview and Definitions.

146. TAYLOR, *supra* note 4, at 200.

147. The standard "best interests of the child" has been criticized for many years. Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 302-04 (1988); James A. Cosby, *How Parents and Children 'Disappear' In Our Courts—And Why It Need Not Ever Happen Again*, 53 CLEV. ST. L. REV. 285, 289 (2005) (arguing that this approach is

expected to ensure a child's safety in abusive situations. The Model Family Standards specifically advise mediators to "assist participants in determining how to promote the best interests of children."<sup>148</sup> Also, some state custody mediation statutes require mediators to act in the child's best interests.<sup>149</sup>

Mandatory reporting requirements also prevent the possibility of mediators failing to act. Currently, mediators who are not mandatory reporters have no obligations to bring revelations of abuse made during the course of mediation—even if horrific—to anyone's attention.<sup>150</sup> Despite the fact that inaction defeats mediation's goal of achieving a better outcome for the abused child, mediator behavior along these lines is a distinct possibility. Absent a statutory duty to report, some mediators may believe that their commitment to general notions of mediation confidentiality and promises of confidentiality to mediating parties is more important than reporting a reasonable suspicion or even a strong intuition of abuse.<sup>151</sup>

Mandatory reporting also furthers the goal of consistency in mediation. The lack of consensus regarding whether mediators should be mandatory reporters divides the mediation profession into groups of mandatory reporters and permissive reporters.<sup>152</sup> At a minimum this makes the mediation profession appear to be confused and to lack consistent standards.<sup>153</sup> As the mediation community continues

"overly broad and overly rigid"); Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203, 203 (2004) (arguing that the phrase is overly legalized and ignores real human problems). One particularly stinging criticism is that it is "ill defined, broadly encompassing, highly reactive to social trends and fads, and [is] systematically changing in response to the continually emerging research findings on children of divorce." SAPOSNEK, *supra* note 5, at 7.

148. MODEL FAMILY STANDARDS, *supra* note 1, § VIII. The Model Family Standards give suggestions for how mediators should help parents best utilize mediation to promote the best interests of children, from suggesting that the mediator refer parents to a specialist in child development to help children cope with the consequences of family reorganization to discussing the level of detail that should be in parenting plans. *Id.* at § VIII(A)(1)-(5).

149. CAL. FAM. CODE §§ 3011, 3020, 3161 (West 2005). *See also* Ricci, *supra* note 13, at 402-03.

150. *See infra* notes 156-59 and accompanying text (discussing the permissive reporting of suspected child abuse).

151. Confidentiality protection is central to the mediation process, and its importance is reflected in statutes and case law. *See supra* notes 68-83 and accompanying text.

152. This problem exists in the twenty-eight states where mediators are not already subject to mandatory reporting requirements. *See supra* notes 123-25 and accompanying text (discussing states using the primary profession method of identifying mandatory reporters). Despite the fact that this problem does not exist in the twenty-two states where mediators are explicitly or implicitly required to be mandatory reporters, this dichotomy affects the perception of the mediation profession nationwide.

153. This inconsistency comes into play when comediators with different reporting responsibilities hear revelations of abuse. The mediator who is a reporter has a duty to report the abuse to the authorities and is subject to criminal and professional sanction if she does not do so. The nonreporter mediator, on the other hand, *who hears the very same admission of abuse in the same mediation*, has no reporting responsibilities whatsoever.

its march toward professionalization, this level of inconsistency will become untenable.<sup>154</sup> Furthermore, inconsistent reporting requirements may be confusing to family mediation participants when they try to understand the process, select mediators, and use different mediators at various times in the family dispute.<sup>155</sup> Indeed, it could potentially lead to a situation where mediating parties may refuse to accept mediators who are mandatory reporters in favor of mediators who are not mandatory reporters.

### B. Arguments Against Mandatory Reporting

In the absence of mandatory reporting requirements, other avenues are available for mediators to report child abuse. For instance, people who are not mandatory reporters are encouraged to report abuse as permissive reporters.<sup>156</sup> Permissive reporting is not inconsistent with mediation confidentiality because threats of harm and ongoing criminal conduct have no confidentiality protection and may

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Thus, inaction for one may result in professional and criminal sanction, but for the other, inaction has no consequences.

154. See generally Craig McEwen, *Giving Meaning to Mediator Professionalism*, DISP. RES. MAG. Spring 2005, at 3; Nancy A. Welsh & Bobbi McAadoo, *Eyes on the Prize: The Struggle for Professionalism*, DISP. RES. MAG., Spring 2005, at 13.

155. Mediation in child custody disputes may occur at any time between the initial dispute over custody until the child turns eighteen years old. See SAPOSNEK, *supra* note 5, at 148-49 (discussing future modifications of child custody arrangements and seeking mediation before court action in such cases).

156. Every state except Oregon statutorily allows permissive reporting. ALA. CODE § 26-14-4 (1992 & Supp. 2004); ALASKA STAT. § 47.17.020(b) (2004 & Supp. 2005); ARIZ. REV. STAT. § 13-3620(F) (2004 & Supp. 2005); ARK. CODE ANN. §12-12-507(a) (2003 & Supp. 2005); CAL. PENAL CODE § 11165.7(b), -(f) (West 2005); COLO. REV. STAT. § 19-3-304(3) (2004); CONN. GEN. STAT. §17a-103(a) (2006); DEL. CODE ANN. tit. 16, § 903 (2006); D.C. CODE § 4-1321.03(c) (2001); FLA. STAT. § 39.201(1)(a) (Supp. 2006); GA. CODE ANN. § 19-7-5(d) (2004); HAW. REV. STAT. § 350-1.3 (1993); IDAHO CODE ANN. § S16-1605 (2001); 325 ILL. COMP. STAT. 5/4 (2001 & Supp. 2005); IND. CODE § 31-33-5 (2003 & Supp. 2005); IOWA CODE § 232.69(2) (2006); KAN. STAT. ANN. §38-2223(a)(2) (2006); KY. REV. STAT. ANN. § 620.030(1) (West 2004); LA. CHILD CODE ANN. art. 609(B) (2004); ME. REV. STAT. ANN. tit. 22, § 4011-A(3) (2004); MD. CODE ANN. FAM. LAW §§5-705(a)(1) (2005); MASS. GEN. LAWS. ch. 119, § 51A (2003); MICH. COMP. LAWS § 722.624 (2005); MINN. STAT. § 626.556(3)(b) (2003); MISS. CODE ANN. §43-21-353(1) (2004 & Supp. 2005); MO. REV. STAT. § 210.110(4) (2004); MONT. CODE ANN. § 41-3-201(3) (2005); NEB. REV. ST. §28-711 (1995 & Supp. 2002); NEV. REV. STAT. § 432B.220(5) (2002 & Supp. 2005); N.H. REV. STAT. ANN. § 169-C:29 (2006); N.J. STAT. ANN. § 9:6-8.10 (West 2002); N.M. STAT. 1978 § 32A-4-3(A) (2003); N.Y. SOC. SERV. LAW § 414 (Supp. 2005); N.C. GEN. STAT. §7B-301 (2003); N.D. CENT. CODE § 50-25.1-10 (1999); OHIO REV. CODE ANN. § 2151.421(B) (West 2005); OKLA. STAT. tit. 10, § 7103(A)(1)(d) (1998 & Supp. 2006); 23 PA. CONS. STAT. § 6312 (2001); R.I. GEN. LAWS § 40-11-3 (2004); S.C. CODE ANN. § 20-7-510(C) (Supp. 2004); S.D. CODIFIED LAWS § 26-8A-3 (1998 & Supp. 2004); TENN. CODE ANN. § 37-1-403 (2001); TEX. FAM. CODE ANN. § 261.101(a) (2002); UTAH CODE ANN. § 62A-4a-403(1) (2004); VT. STAT. ANN. tit. 33, § 4913(b) (2001 & Supp. 2004); VA. CODE ANN. § 63.2-1509(A)(10) (2002); WASH. REV. CODE 26.44.030(3) (2004); W. VA. CODE § 49-6A-1 (2004); WIS. STAT. 48.981(2)(c)(d) (2005); WYO. STAT. ANN. § 14-3-205 (2005).

be reported to the authorities.<sup>157</sup> Permissive reporters, by definition, have the discretion to decide whether to make a report to the authorities; in some cases, the mediator may decide that the benefit of a report is outweighed by a more effective resolution through mediation.<sup>158</sup> In those cases where reporting would do more harm to the child and the family, allowing mediators the discretion to refrain from reporting is consistent with mediation's policy of arriving at outcomes that serve mediation parties better than court adjudication.<sup>159</sup> However, it is unclear whether mediators who are permissive reporters are qualified to make this decision.

Mandatory reporting may also have the unintended consequence of inviting abuse of the mediation process. Because legal standards for awarding child custody take into account and penalize poor parenting, parents often compete with each other as to who is the "better" parent,<sup>160</sup> which can generate claims that the other parent is less qualified to care for the children.<sup>161</sup> In an environment of pervasive competition and distrust, certain incidents may be misconstrued or exaggerated, resulting in unwarranted reports from mediators who misunderstand the reporting standard. Because the subsequent investigation can be quite stressful and unpleasant,<sup>162</sup> such improper

157. See *supra* notes 80-81 and accompanying text. Additionally, admissions of prior abuse may be considered threats of future abuse and thereby lose their confidentiality protection. Recurrence rates of abuse for families receiving treatment for child abuse have been reported to be around 33%. DEBORAH DARO, CONFRONTING CHILD ABUSE 81, 121 (1988); David J. Kolko, *Child Physical Abuse*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT, 21, 41 (John E.B. Meyers et al. eds., 2d ed. 2002) (citing R. MALINOSKY-RUMMEL ET AL., INDIVIDUALIZED BEHAVIORAL INTERVENTION FOR PHYSICALLY ABUSIVE AND NEGLECTFUL FAMILIES: AN EVALUATION OF THE FAMILY INTERACTION SKILLS PROJECT (1991) (paper presented at the 25th Annual Conference of the Association for the Advancement of Behavior Therapy)).

158. Many mandatory reporters refuse to report abuse because of a belief that reporting causes more problems for families and children than it solves. See *infra* notes 174-78 and accompanying text.

159. See MODEL FAMILY STANDARDS, *supra* note 1, Overview and Definitions.

160. Marilyn S. McKnight & Stephen K. Erickson, *The Plan to Separately Parent Children After Divorce*, in DIVORCE AND FAMILY MEDIATION 129, 130 (Jay Folberg et al. eds., 2004); JANET R. JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD 242 (1997). Although legal standards may play a minimal role in mediation, parties nonetheless "bargain in the shadow of the law" and can be influenced by legal precedent. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

161. McKnight & Erickson, *supra* note 160, at 130-31.

162. Even when reports of abuse are determined to be unfounded or unsubstantiated, investigations into whether abuse has occurred have been described as "at best, intrusive, and at worst, coercive." KALICHMAN, *supra* note 92, at 32. Furthermore, the social stigma of a report is compounded if caseworkers find it necessary to interview friends, relatives, and others who know the family. See, e.g., Douglas J. Besharov, *Unfounded Allegations—A New Child Abuse Problem*, 83 PUB. INT. 18, 23 (1986); Zellman & Antler, *supra* note 114, at 36 (1990) (calling such investigations "unavoidable trauma"). Cf. David Finkelhour, *Is Child Abuse Overreported?*, PUB. WELFARE, Winter 1990, at 22, 26-27

reports constitute objectionable infringements on party self-determination. Furthermore, the competitive environment may also result in dubious abuse allegations where a malicious or desperate parent may make a deliberately false accusation of abuse against the other parent simply to invoke the mediator's reporting requirement.<sup>163</sup> Thus, mediators may become unwitting conduits for dubious or fraudulent allegations of abuse.

Dubious or fraudulent abuse allegations present a problem for mediators, as they do with other mandatory reporters, because reporters are routinely advised to refrain from conducting in-depth investigations into allegations of abuse and to simply report reasonable suspicions of abuse.<sup>164</sup> Mediators may probe an allegation or a revelation to confirm a reasonable suspicion,<sup>165</sup> yet a malicious but credible allegation must be reported.<sup>166</sup> In such instances the false allegation destroys the integrity of the mediation process.<sup>167</sup>

Mandatory reporting also has a negative impact on mediation's core values. Of course, the most dramatic impacts occur when a report is made. Expectations of mediation confidentiality are dashed, an accused party is likely to believe the mediator is biased, and the parties are at the mercy of what CPS determines should happen next. But even when reporting is not necessary, mediation's core values can be affected. For example, what are mediators to do when they have a sneaking suspicion of abuse? If mediators are to take the best interests of the child into account, they should follow up on the issue to determine whether there is reasonable suspicion or not. No

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(arguing that there is no evidence to Besharov's claims that child protection investigations entail "unavoidable trauma").

163. See Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 565, 573 n.27 (2000) (stating that parents making false allegations may try to "gild the accusation with a professional aura" by discussing the false accusation with a mandatory reporter knowing the reporter must report abuse to the authorities); see also Corey L. Gordon, *False Allegations of Abuse in Child Custody Disputes*, 135 NEW L.J. 687, 687 (1985) (noting the strategic use of abuse allegations in divorce and custody proceedings); Paula D. Salinger, *True or False Accusations?: Protecting Victims of Child Sexual Abuse During Custody Disputes*, 32 MCGEORGE L. REV. 693, 700-01 (2001) (calling false accusations of child abuse a "reality of child custody disputes"). One empirical study found that 8% of all contested custody cases involve allegations of abuse. See Julia A. McIntosh & Ronald J. Prinz, *The Incidence of Alleged Sexual Abuse in 603 Family Court Cases*, 17 L. & HUM. BEHAV. 95, 96 (1993) (discussing instances of sexual abuse allegations in custody disputes).

164. *People v. Cavaiani*, 432 N.W.2d 409, 413 (Mich. Ct. App. 1988); TAYLOR, *supra* note 4, at 202-03; Renninger et al., *supra* note 91, at 22.

165. See *supra* notes 215-18 and accompanying text.

166. SAPOSNEK, *supra* note 147, at 294. See also *supra* notes 106-12 and accompanying text.

167. Mediators have an ethical duty to maintain the quality of the mediation process. 2005 MODEL STANDARDS, *supra* note 1, § VI. Cf. MODEL FAMILY STANDARDS, *supra* note 1, Overview and Definitions (stating that one of the major functions of the Model Family Standards is to "promote public confidence in mediation as a process for resolving family disputes").

matter whether that sneaking suspicion turns into something more, the parties' self-determination has been compromised to some extent because the mediator has moved from discussion facilitator to discussion leader.<sup>168</sup>

Even routine mediator behavior may result in unintended consequences during mediation. Standard mediation protocol dictates that mediators disclose their status as mandatory reporters of child abuse in their opening remarks in the mediation.<sup>169</sup> Although this disclosure serves many important purposes;<sup>170</sup> it may prevent discussion of issues needed to maximize the parties' self-determination. One purpose of disclosure is an implicit warning that disclosure may lead to the loss of custody of the children and/or criminal penalties against one or both of the parties.<sup>171</sup> Thus, fearing the consequences of speaking freely, some parties may entirely avoid speaking of legitimate child abuse issues.<sup>172</sup> Parties may withhold information for a variety of reasons, but the fact that self-censorship may occur as a result of requiring mediators to be mandatory reporters is troubling because it compromises one of mediation's primary benefits—increasing the quality of the parties' communication to address emotionally charged issues.<sup>173</sup>

168. See *supra* notes 38-39 and accompanying text.

169. 2005 MODEL STANDARDS, *supra* note 1, § V(C), (D); MODEL FAMILY STANDARDS, *supra* note 1, § VII(A), -(B). In practice, this disclosure is also made in premediation confirmation letters and in the contractual agreement to mediate that mediators ask parties to sign. MODEL FAMILY STANDARDS, *supra* note 1, § VII(A), (B).

170. The disclosure of one's reporting requirements helps establish the parties' understanding of mediation's confidentiality limits, creates a safe and trusting environment for the ensuing discussion, and serves as a means for obtaining the parties' informed consent that reporting is a possible consequence of mediation. See, e.g., KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 263 (3d ed. 2004); MOORE, *supra* note 32, at 160-61, 211-12. See also Karen L. Steingberg et al., *Effects of Legally Mandated Child-Abuse Reports on the Therapeutic Relationship: A Survey of Psychotherapists*, 67 AM. J. ORTHOPSYCHIATRY 112, 119-20 (discussing the need for psychotherapists to disclose their reporting requirements to their clients to obtain their informed consent to making a report). One commentator questions whether a mere disclosure of one's status as a mandatory reporter can truly act as informed consent. Randall A. Butz, *Reporting Child Abuse and Confidentiality in Counseling*, 1985 SOC. CASEWORK J. CONTEMP. SOC. WORK 83, 88-89 (discussing the paradox of disclosing one's status as a mandatory reporter to seek informed consent when the impact of the disclosure is not understood until it is too late).

171. Criminal charges may be brought against a parent who has failed to report an abusive coparent or spouse. See, e.g., Scott A. Davidson, *When Is Parental Discipline Child Abuse? The Vagueness of Child Abuse Laws*, 34 U. LOUISVILLE J. FAM. L. 403, 414-15 (1995); Mary Kate Kearney, *Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse*, 42 BUFF. L. REV. 405, 450 (1994).

172. This is the case in psychiatry cases. Fred S. Berlin et al., *Effects of Statutes Requiring Psychiatrists to Report Suspected Sexual Abuse of Children*, 148 AM. J. PSYCHIATRY 449, 450-51 (1991) (reporting that mandatory reporting deterred psychiatry patients' disclosures about child abuse).

173. Some parties do not heed this warning and do discuss child abuse issues. See *infra* notes 190-93 and accompanying text. In these cases, the mediator's reporting status may act as a means of encouraging a revelation of abuse.

## VI. MEDIATORS SHOULD BE MANDATORY REPORTERS OF ABUSE

Determining if mediators should be mandatory reporters begs the question of whether we should have mandatory reporting requirements at all. Despite legitimate criticisms of mandatory reporting,<sup>174</sup> the desire to protect abused children through mandatory reporting is perceived to be as much of a moral and ethical duty as it is a legal duty.<sup>175</sup> Consequently, mandatory reporting laws are widely accepted as an integral component in the fight against child abuse,<sup>176</sup> even by their strongest critics.<sup>177</sup>

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174. Critics present four arguments against mandatory reporting requirements: the number of reports funneled into the system interferes with child protection, reporting is harmful to children and families, reporting is destructive to helping relationships, and the reporting standard is overly vague. They argue that mandatory reporting interferes with child protection by pointing out that high numbers of reports turn out to be “unsubstantiated.” See U.S. DEPT OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 5, 7 (2003) [hereinafter CHILD MALTREATMENT] (reporting that nearly 57.7% of an estimated number of 2.9 million referrals to state CPS agencies were determined to be unfounded or unsubstantiated). The high number of reports falling into these classifications present serious institutional burdens, as valuable resources are allocated to investigate nonprioritized reports, thereby reducing the availability of services for those most in need. See, e.g., KALICHMAN, *supra* note 92, at 31; Besharov, *supra* note 162, at 19. Noting an overly clogged and ineffective child protection system, many mandated reporters refuse to report suspected child abuse because they see no benefit of such a report. See, e.g., GAIL L. ZELLMAN & ROBERT M. BELL, THE ROLE OF PROFESSIONAL BACKGROUND, CASE CHARACTERISTICS, AND PROTECTIVE AGENCY RESPONSE IN MANDATED CHILD ABUSE REPORTING 88-90 (1990) (discussing the effect concerns of CPS efficacy has on reporting decisions); Krisann M. Alvarez et al., *Why Are Professionals Failing to Initiate Mandated Reports of Child Maltreatment, and Are There Any Empirically Based Training Programs to Assist Professionals in the Reporting Process?* 9 AGGRESSION & VIOLENT BEHAV. 563, 564 (2004) (noting that a negative view of child protection agencies is a hindrance to reporting). Furthermore, many mental health providers believe that reporting can interfere with opportunities for effective intervention by straining the therapist-patient relationship, even resulting in an end of therapy. Kalichman & Craig, *supra* note 91, at 88 (reporting that 31% of psychologists indicated reporting has had either harmful or very harmful effects on therapy); Renninger et al., *supra* note 91, at 22 (reporting that one in six psychologists expressed concern about a report’s impact on therapy). As a result, the relationship that actually may offer the greatest hope of preventing further abuse may be irreparably damaged. KALICHMAN, *supra* note 92, at 31-32. Finally, several studies indicate that many mandatory reporters refuse to report suspected abuse for fear of causing further harm to the child or to the family by upsetting an already delicate family situation and through the trauma associated with being investigated. See, e.g., Alvarez et al., *supra* note 174, at 566 (citing seven studies with such findings); Besharov, *supra* note 162, at 23 (calling such investigations “unavoidably traumatic”); Kalichman et al., *supra* note 91, at 86 (reporting that 37% of survey respondents indicated that reporting would have a negative effect on the family); Zellman & Antler, *supra* note 114, at 36. Cf. Finkelhour, *supra* note 162, at 26-27 (arguing that there is no evidence supporting claims that child protection investigations involve gross violations of parental and family privacy or entail “unavoidable trauma”).

175. See, e.g., SAPOSNEK, *supra* note 147, at 298; Stephen K. Benekhe & Robert Kinschreff, *Ethics Rounds: Must a Psychologist Report Past Abuse?* MONITOR ON PSYCHOL., May 2002, at 56-57; Kevin O’Connor, *Professional Conflicts and Issues in Child Abuse Reporting and Treatment*, CAL. PSYCHOL., July 1, 1989, at 22-23.

176. See, e.g., Kalichman & Craig, *supra* note 91, at 88 (reporting that 94% of survey respondents believed that mandatory reporting laws are necessary); Kalichman et al., *supra* note 91, at 87 (reporting that 85% of survey respondents believed that mandatory re-

The ultimate question to ask when determining whether mediators should be mandatory reporters is: Are the benefits from mandatory reporting worth the burdens it places on mediating parties and the mediation process? Because child protection is such a compelling state interest,<sup>178</sup> the need for “private” conversations in mediation must be quite high to overcome that state interest. Reporting statutes override policies of confidentiality in myriad professional settings where the professional relationship is much closer than that of mediator-mediating party.<sup>179</sup> Furthermore, use of mandatory reporting laws to promote the state’s interest in child protection has long taken precedence over the burdens associated with being subject to a child abuse investigation.<sup>180</sup> More importantly, however, the goals of reporting and of mediation are already complimentary, and disentangling the two is virtually impossible.<sup>181</sup> When child abuse comes to light in mediation, it is neither in the child’s best interests nor in society’s best interests to allow the abuse to continue. Forbidding mediators from refusing to act when told of horrific acts of abuse is a hole in the reporting system.<sup>182</sup> Requiring mediators to act as mandatory reporters of abuse is sound public policy.

Adopting this policy would also provide other benefits to the mediation profession. In this era when the mediation community is focused on issues of professionalization,<sup>183</sup> mandatory reporting would clear up inconsistent reporting requirements that make the mediation community look unprofessional. Finally, even the possibility of enacting a reporting requirement for mediators would bring the reporting requirement to the forefront of discussions about mediation—even in those states where mediators are mandatory reporters.<sup>184</sup>

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porting laws are necessary). *See also* Salina M. Renninger et al., *Psychologists’ Knowledge, Opinions, and Decision-Making Processes Regarding Child Abuse and Neglect Reporting Laws*, 33 PROF. PSYCH. RES. & PRAC. 19, 22 (2002) (reporting respondents being fairly satisfied with mandatory reporting laws).

177. *See, e.g.*, Douglas J. Besharov, *Responding to Child Sexual Abuse: The Need for a Balanced Approach*, 4 SEXUAL ABUSE CHILD. 135, 144 (1994).

178. “[The state’s] sovereignty is offended by child abuse.” *People v. Cavaiani*, 432 N.W.2d 409, 413 (Mich. Ct. App. 1988). *See also supra* notes 84-87 and accompanying text.

179. *See supra* notes 118-19 and accompanying text. *See also* Randall A. Butz, *Reporting Child Abuse and Confidentiality in Counseling*, 1985 SOC. CASEWORK J. CONTEMP. SOC. WORK 83, 88 (“The need to protect defenseless children outweighs the need to preserve absolute confidentiality during [medical] treatment.”).

180. *See, e.g.*, *Kottmeyer v. Maas*, 436 F.3d 684, 691 (6th Cir. 2006); *Doe v. Heck*, 327 F.3d 492, 520-21 (7th Cir. 2003); *Watterson v. Page*, 987 F.2d 1, 8 (1st Cir. 1993); *see also* BESHAROV, *supra* note 117, at 12 (stating that unsubstantiated reports are a necessary evil to ensure the safety of abused children and in some cases can result in referrals to social service agencies).

181. *See supra* notes 144-49 and accompanying text.

182. *See supra* notes 150-51 and accompanying text.

183. *See supra* note 154 and accompanying text.

184. Currently, only four of the twenty-two states where mediators are mandatory reporters explicitly require mediators to act as mandatory reporters by identifying mediators

For these reasons, states should revise their reporting laws to include mediators among the professionals who are mandatory reporters.

A. *Fraudulent Abuse Claims and an Overburdened System*

As mentioned earlier, having mediators act as mandatory reporters raises a number of legitimate concerns. One prevalent worry about mandatory reporting is addressing fraudulent or malicious claims of child abuse. Another important concern is increasing the number of reports to an already overburdened child protection system.

Since some parties may take advantage of a mediator's reporting requirements, mediators could become conduits for specious abuse allegations.<sup>185</sup> To protect themselves and the process from being taken advantage of in that way, some permissive reporter mediators would prefer to rely on their discretion when faced with reporting decisions.<sup>186</sup> As most mandatory reporters know, rather than destroying mediator discretion, mandatory reporting simply redirects where that discretion is exercised. When making a report of specific circumstances of suspected abuse, the reporter may disclose his or her personal belief that the child has not been abused.<sup>187</sup> If mediators disclose their personal beliefs in their reports to CPS, CPS investigators will take the reporter's subjective beliefs about accusations of abuse into account during their investigation processes.

Another potential drawback is that reports from mediators may exacerbate the systemic problems already present in the child protection system.<sup>188</sup> It is unclear, however, how many additional reports of suspected abuse CPS agencies would actually receive if all mediators were mandatory reporters. A recent survey of Kansas mediators' experience as mandatory reporters may shed some light on the answer. Kansas is one of four states that includes mediators among the professions that are mandatory reporters for suspected child abuse.<sup>189</sup>

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among the professions that are mandatory reporters. *See supra* notes 121-22 and accompanying text. The remaining eighteen states only implicitly require mediators to be mandatory reporters by virtue of the fact that anyone who suspects child abuse is a mandatory reporter. *See supra* note 122 and accompanying text.

185. *See supra* notes 160-63 and accompanying text.

186. *See supra* notes 158-59 and accompanying text.

187. *State v. Grover*, 437 N.W.2d 60, 64 (Minn. 1989). *Cf. People v. Cavaiani*, 432 N.W.2d 409, 413 (Mich. Ct. App. 1988) (dismissing the reporter's conclusion that his suspicions of abuse were unfounded because it usurped the state's right to determine whether abuse had occurred).

188. *See supra* note 174.

189. KAN. STAT. ANN. § 38-2223(a)(1)(D) (2006). Art Thompson, now the Dispute Resolution Coordinator of the Kansas Office of Judicial Administration, testified in support of making mediators mandatory reporters in Kansas' Dispute Resolution Act of 1986. Mr. Thompson recalls no opposition to the proposition of mediators acting as mandatory reporters for child abuse. E-mail from Art Thompson, Dispute Resolution Coordinator, Kan. Office of Judicial Admin., to author (July 26, 2005, 06:24 CST) (on file with author).

To determine how many mediators had reported abuse to the CPS authorities, the Dispute Resolution Coordinator of the Kansas Office of Judicial Administration distributed an informal questionnaire to all court-approved family mediators in Kansas<sup>190</sup> asking whether they had reported child abuse to the authorities.<sup>191</sup> Only 24% of respondents (six of twenty-five)<sup>192</sup> indicated that they had reported suspected abuse to CPS during the previous five years.<sup>193</sup> For this sample of twenty-five, the total number of reports per mediator per year was less than one.<sup>194</sup> Kansas has a total of 256 court-approved family mediators.<sup>195</sup>

If one assumes the rate of reporting is the same for the family mediators who did not respond to this survey, that calculation would translate into thirty-one reports of potential abuse per year. Comparing the high number of CPS reports to the number of mediators' estimated reports reveals that mediators apparently accounted for only a tiny fraction of the 27,304 reports filed with Kansas CPS authorities in 2003, the most recent year for which statistics are available.<sup>196</sup> Assuming that these numbers are representative of the number of reports mediators will add to the system, the impact on the child protection system will be negligible.

### *B. Minimizing Reporting's Impact on Mediation's Core Values*

While the policy goals of mandatory reporting and mediation are complementary, once a report is required, mediation's core values succumb to the reporting requirement: certain mediation communications are not confidential, parties lose their self-determination, and mediators are likely to

190. Art Thompson, Dispute Resolution Coordinator of the Kansas Office of Judicial Administration, sent the questionnaire to the office's e-mail listserv for family court approved mediators, which at the time totaled approximately 256 mediators. Of that number, 100 conduct most of the court-ordered family mediations. E-mail from Art Thompson, Dispute Resolution Coordinator, Kan. Office of Judicial Admin., to author (Nov. 3, 2005, 09:42 CST) (on file with author).

191. The survey's first question asked if respondents had reported child abuse to CPS in their capacity as a "mediator/mandatory reporter" in the last five years. A copy of the questionnaire is on file with the author. Even though the survey is draped in mediation issues, it is possible that respondents may have answered "yes" due to reports of abuse roles other than as mediator. Nevertheless, the survey responses do provide insight into questions related to the experience of Kansas mediators and is used for those indicative purposes.

192. Based on the limited number of responses, the ability to draw conclusions from the data is limited.

193. These six mediators estimated they made anywhere from 1 to 8 reports per mediator over the five-year period, with the majority listing 1 or 2 reports during the time frame. The total number of estimated reports over the five-year period was 13 to 15.

194. The number of reports per mediator per year was 0.12.

195. See *supra* note 190.

196. CHILD MALTREATMENT, *supra* note 174, at 10 tbl. 2-1. Although not the product of rigorous statistical analysis, the basic numerical analysis supporting this conclusion merely illustrates that requiring mediators to be mandatory reporters of child abuse may not significantly compound the systemic problems with the child abuse investigatory process.

be seen by one party as biased. While reconciliation is impossible, protecting and supporting mediation's core values as much as possible in a mandatory reporting environment is essential for mediation's continued vitality in family matters. This section is intended to assist mediators with reporting requirements to minimize the impact of mandatory reporting on mediation's core values.

### 1. *Party Self-Determination*

Party self-determination is the most vulnerable mediation core value when mediators are mandatory reporters. This is because once a report is made to CPS, the mediation parties cannot control the outcome of the upcoming CPS investigation.<sup>197</sup> While the loss of self-determination is socially acceptable when reporting is warranted,<sup>198</sup> it is an objectionable infringement when reporting is unwarranted.

Minimizing mandatory reporting's effect on party self-determination is largely an educational task—making sure mediators understand what mandatory reporting requires of them.<sup>199</sup> For example, some mediators may become overzealous in their capacity as mandatory reporters, inquiring about or steering the parties' conversation to issues of potential child abuse, even in cases where there are no indications that abuse is an issue. Other than disclosing their status as mandatory reporters, mediators should not inject the issue of child abuse into mediation without a party somehow leading the discussion to the topic. While it may seem obvious, mediators should remember that their primary role, facilitating the parties' resolution of their dispute, should not take a back seat to abstract worries of potential child abuse.<sup>200</sup>

Mediators must also have a good understanding of when reporting is necessary so they can preserve the parties' self-determination by refusing to report when reporting is not required. No matter which

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197. *People v. Cavaiani*, 432 N.W.2d 409, 413 (Mich. Ct. App. 1988); TAYLOR, *supra* note 4, at 204. *See also supra* note 162 and accompanying text.

198. *See supra* note 87.

199. 2005 MODEL STANDARDS, *supra* note 1, § IV (discussing competence); MODEL FAMILY STANDARDS, *supra* note 1, § XIII (discussing competence). *See also supra* notes 102-12 and accompanying text and *infra* notes 246-51 and accompanying text.

200. This recommendation is consistent with the facilitative or elicitive model of mediation that is prevalent in divorce and child custody mediation. In this model of mediation, mediators let the parties determine the issues that are to be discussed. *See generally* Riskin, *supra* note 42, at 45 (discussing facilitative mediation); Riskin, *supra* note 1, at 24, 30-31 (opining that the term elicitive is more descriptive of what actually happens in mediation compared to the term facilitative). Putting abstract worries of abuse behind other professional concerns is also important for other mandatory reporters. *See, e.g.*, Renninger et al., *supra* note 91, at 22-23 (discussing psychologists); Steingberg et al., *supra* note 170, at 120 (discussing therapists); *see also* 2005 MODEL STANDARDS, *supra* note 1, Preamble; MODEL FAMILY STANDARDS, *supra* note 1, Overview and Definitions.

reporting standard a mediator is operating under,<sup>201</sup> the mediator should report when she feels there is enough evidence to support a belief of abuse regardless of whether there is proof of abuse.<sup>202</sup> To help mediators conceptualize the reporting standard, some general guidelines are in order.<sup>203</sup> When mediators hear remarks that rise only to the level of innuendo, allusions, hints, or other indirect references to potential child abuse, the reporting obligation has not been triggered.<sup>204</sup> By definition, remarks of this type are indeterminate and are not capable of clear interpretation. Similarly, patently false accusations of child abuse should not be reported.

The situation becomes more complex as the mediator's beliefs about abuse develop into a reasonable suspicion. If the mediator's beliefs fall into the gray area of a hunch or sneaking suspicion of abuse, the mediator's reporting requirement is not directly affected.<sup>205</sup> However, the mediator's focus must become the best interests of the child.<sup>206</sup> Thus, the stronger the suspicion, the greater the mediator's need to probe the issue of abuse. A fleeting suspicion need not be pursued.

If these suspicions do not go away, mediators should remind the parties of their status as mandatory reporters of abuse. While a gentle warning may suppress party self-determination in certain ways,<sup>207</sup> it can also be reasonably expected to enhance party self-determination. In response to the reminder, the parties may choose to address the mediator's sneaking suspicions, confirm the suspicions, or even decide to terminate the mediation, the ultimate act of party self-determination.

Once the reporting standard is met and a report must be made,<sup>208</sup> it is inappropriate to continue the mediation. Doing so would lead the parties to believe that their self-determination remains intact, when, in fact, it is extremely limited.<sup>209</sup> Thus, the mediator should begin

201. See *supra* notes 102-12 and accompanying text.

202. See *supra* note 164 and accompanying text.

203. Because each reporting situation has its own idiosyncrasies, these guidelines are meant to be just that: general guidelines to assist mediators with understanding their reporting requirements.

204. See BESHAROV, *supra* note 117, at 9.

205. See *id.*

206. See *supra* notes 147-49 and accompanying text.

207. See *supra* notes 169-73 and accompanying text.

208. For further discussions regarding what kinds of revelations meet the standard for making a report, see *supra* Part III.B and see *infra* notes 249-50 and accompanying text.

209. Failing to inform the parties of an imminent report contravenes the open and honest conversation that the mediation process is designed to promote. 2005 MODEL STANDARDS, *supra* note 1, § VI(A)(4) ("A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation."). Cf. Maureen C. Kenny, *Child Abuse Reporting: The Clinician's Dilemma*, 13 J. PROF. COUNSELOR 7, 13 (1998) (noting that failing to inform counseling clients of an upcoming report is dishonest); Robert J. Ra-

terminating the mediation session.<sup>210</sup> However, before terminating the mediation, mediators can encourage limited instances of party self-determination. For example, if allegations of child abuse are made in caucus, the mediator may have a conversation with the accuser about the best way to disclose the information to the accused.<sup>211</sup> The mediator may also encourage the parties to visit family service agencies and help the parties understand how to pursue their legal rights and responsibilities in light of the report.<sup>212</sup> In some cases, mediators may ask the parties if there is any information that they would like to have included in the report, such as a rebuttal to an accusation of abuse.

Understanding when reporting is required is one of the most difficult aspects of being a mandatory reporter.<sup>213</sup> Because reporting abuse has such a devastating effect on the parties' self-determination, having a good understanding of the reporting standard should result in more accurate reports of abuse. Ensuring accurate reports of abuse is the best way to minimize reporting's effect on the parties' self-determination.

## 2. Mediator Neutrality

The true test of a mediator's neutrality in a mandatory reporting environment comes when the issue of abuse unexpectedly surfaces. These situations are among the most difficult professional and ethical circumstances mediators face.<sup>214</sup> A mediator's initial act of either minimizing or legitimizing allegations of abuse may appear hostile to either or both parties and may compromise the mediator's appearance of neutrality.<sup>215</sup> Recognizing that an initial allegation or admission standing alone may not necessarily meet the reporting standard, mediators should first attempt to confirm or deny a reasonable suspi-

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cusin & J. Kirk Felsman, *Reporting Child Abuse: The Ethical Obligation to Inform Parents*, 25 J. AM. ACAD. CHILD PSYCHIATRY 485, 485 (1986) (calling a psychiatrist's failure to inform parents of a report "a deceptive act that violates a moral rule" absent compelling circumstances).

210. It is inappropriate to mediate terms and conditions of parenting when there are safety concerns for children and other institutions will decide who gets to make parenting decisions. TAYLOR, *supra* note 4, at 204. See also MODEL FAMILY STANDARDS, *supra* note 1, § IX(C)(2). See *infra* notes 230-35 and accompanying text (discussing the strategies for terminating a mediation session due to making a report).

211. See Brad Donohue et al., *A Standardized Method of Diplomatically and Effectively Reporting Child Abuse to State Authorities: A Controlled Evaluation*, 26 BEHAV. MODIFICATION 684, 697-98 (2002) (suggesting that clinician reporters ask nonperpetrating caregivers how to disclose the need for a report to the perpetrator).

212. MODEL FAMILY STANDARDS, *supra* note 1, § IX(C)(1); TAYLOR, *supra* note 4, at 203-04.

213. Besharov, *supra* note 177, at 143-44.

214. See TAYLOR, *supra* note 4, at 201. With apologies to Thomas Paine, these are the times that try mediators' souls.

215. See *id.* at 174, 203; Love, *supra* note 43, at 945.

cion of abuse by gaining a better understanding of the revelation.<sup>216</sup> For example, statements that could lead to an unreasonable suspicion of abuse may be based on a mistaken idea of what constitutes child abuse,<sup>217</sup> an attempt to find out additional information to either confirm or deny a suspicion,<sup>218</sup> or part of a strategy of bad-faith bargaining to gain negotiation leverage.<sup>219</sup>

To determine if any of these possibilities apply, mediators should focus the conversation on specific acts and actions instead of conclusory statements.<sup>220</sup> Mediators should remember that trying to confirm a reasonable suspicion to determine whether to make a report is not the same as investigating whether or not abuse occurred.<sup>221</sup> In the appropriate situation, mediators may act as educators on the law and facts, clarifying mistaken terms.<sup>222</sup>

Once the mediator confirms a reasonable suspicion of child abuse, the mediator's utmost task is to safely terminate the mediation session.<sup>223</sup> Rather than abruptly calling the mediation to a halt, mediators should do their best to maintain the integrity of the process, primarily by maintaining their neutrality.<sup>224</sup> This can be difficult and may seem counterintuitive, but it is the best mediator strategy for managing the difficult emotions associated with being accused of abuse.<sup>225</sup> Maintaining mediator neutrality is also important because, due to the low the reporting standard, it is possible that the subsequent investigation may come back as inconclusive or unfounded.<sup>226</sup> Thus, it is possible, albeit unlikely, that the parties may work with the mediator again once the investigation is completed.<sup>227</sup> Maintaining mediator neutrality keeps that possibility open.

216. TAYLOR, *supra* note 4, at 203.

217. *Id.*

218. *Id.*

219. *See supra* note 163 and accompanying text.

220. *See* SAPOSNEK, *supra* note 147, at 294; TAYLOR, *supra* note 4, at 203.

221. *See* People v. Cavaiani, 432 N.W.2d 409, 413 (Mich. Ct. App. 1988); State v. Grover, 437 N.W.2d 60, 64 (Minn. 1989). *See also supra* Part III.B (discussing the reasonable suspicion standard).

222. TAYLOR, *supra* note 4, at 203. This can be part of the mediator's norm-educating responsibilities in family mediation. *See* Waldman, *supra* note 47, at 727-32 (using a family mediation as an example of the norm-educating model of mediation).

223. *See* TAYLOR, *supra* note 4, at 204-05.

224. *Id.* at 203. *See also* MODEL FAMILY STANDARDS, *supra* note 1, §§ IV, IX (stating that mediators should "shape the mediation process," including terminating the session accordingly when mediators recognize the family situation involves abuse or neglect and it affects their impartiality).

225. TAYLOR, *supra* note 4, at 200, 205.

226. For example, in 2003, 57.7% of all reports of child abuse from professionals were determined to be unsubstantiated. CHILD MALTREATMENT, *supra* note 174, at 7.

227. TAYLOR, *supra* note 4, at 205.

Part of terminating the session, barring compelling circumstances,<sup>228</sup> is informing the parties of the need for a report.<sup>229</sup> There is no one correct method for doing so.<sup>230</sup> The task is difficult enough if both parties are aware of the accusation or revelation, but it is that much more difficult for the mediator when one party is accused of abuse and is unaware of the accusation. Informing the party without sounding accusatory is no simple task.

One method is to use the need for a report as a measured conversation winding down the mediation. For example, after reminding the parties of the mediator's status as a mandatory reporter of child abuse and acknowledging that he or she is required by law to make the report, a mediator should disclose the accusation or other information without being accusatory.<sup>231</sup> At this point, the mediator has the opportunity to let the parties know that no one has been convicted of any crime, because no proof of the alleged abuse has yet been established.<sup>232</sup> Alternatively, the mediator may educate the parties about the institutions that will become involved once the report is made and what actions they are likely to take as part of the investigation.<sup>233</sup>

Even if a mediator follows the suggestions for terminating the process, an accused party may believe the mediator is biased. However, following these guidelines should help a mediator maintain both the quality of the process and a fundamental sense of treating both parties fairly in light of having to make a report.<sup>234</sup>

### 3. Confidentiality

The pressures mandatory reporting places on confidentiality arise once a mediator's reporting requirement is triggered, because at that point there is no choice but to disclose mediation communications.<sup>235</sup> Some of the communications to be disclosed, such as a description of the suspected abuse, can constitute threats of harm or ongoing

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228. Compelling circumstances are those situations where the personal safety of the child, the accusing party, or the mediator is at risk. KALICHMAN, *supra* note 92, at 145; TAYLOR, *supra* note 4, at 205; Racusin & Felsman, *supra* note 209, at 486.

229. See SAPOSNEK, *supra* note 147, at 294; TAYLOR, *supra* note 4, at 204; see also Kenny, *supra* note 209, at 1.

230. See TAYLOR, *supra* note 4, at 205 (advising mediators to seek guidance from others in the field to determine how to have this conversation in specific situations).

231. TAYLOR, *supra* note 4, at 204.

232. See Racusin & Felsman, *supra* note 209, at 487.

233. KALICHMAN, *supra* note 92, at 145; TAYLOR, *supra* note 4, at 204; see Donohue et al., *supra* note 211, at 696-98 (listing several skills associated with informing nonperpetrating caregivers of abuse).

234. See 2005 MODEL STANDARDS, *supra* note 1, §§ II, VI; MODEL FAMILY STANDARDS, *supra* note 1, §§ IV, VI.

235. See *People v. Cavaiani*, 432 N.W.2d 409, 413 (Mich. Ct. App. 1988) (stating that once a reporter has a reasonable suspicion of child abuse, the reporter cannot make a determination of whether abuse occurred on behalf of the state).

criminal conduct and, as a result, have no confidentiality protection regardless of whether a mediator is a reporter.<sup>236</sup> However, a lack of confidentiality protection is not the same as a compelling mediator disclosure of mediation communications.

In making a report, a mediator's difficulty lies with knowing the contours of what is confidential and what is not. A mediator's goal in complying with the reporting requirement and mediation confidentiality statutes should be to provide enough information to maximize the possibility of child protection while minimizing the breach of confidentiality.<sup>237</sup> Since the purpose of the disclosure is to protect children, only information that assists CPS in making its determination of whether the child needs state protection should be disclosed.<sup>238</sup> Appropriate disclosures include:

- the identity of the child,
- the identity of the child's parents or persons responsible for the child's care,
- the suspected perpetrator's name and relationship to the child (if any),
- a description of the abuse or neglect, and
- the identity of other people who have knowledge of the abuse.<sup>239</sup>

Thus, when describing the circumstances of suspected abuse, mediators should limit their disclosures to the parties' disclosures that support the suspicion of abuse and subsequently led to the reporting decision.<sup>240</sup> If confronted with well-intentioned requests for information outside of these parameters, mediators should communicate their concerns about reporting more information than required by law and ask how that information furthers the child's protection.<sup>241</sup>

236. See *supra* note 157 and accompanying text.

237. See KALICHMAN, *supra* note 92, at 148 (providing advice for health care providers who make reports).

238. See *id.*

239. This information is typical of the types of disclosures CPS agencies seek when a report of abuse is made. See, e.g., U.S. DEP'T OF HEALTH & HUM. SERVS., NATIONAL STUDY OF CHILD PROTECTIVE SERVICES SYSTEMS AND REFORM EFFORTS (2003), available at [http://aspe.hhs.gov/hsp/CPS-status03/state-policy\\_03/chapter3.htm#](http://aspe.hhs.gov/hsp/CPS-status03/state-policy_03/chapter3.htm#); U.S. DEP'T OF HEALTH & HUM. SERVS., A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: THE FOUNDATION FOR PRACTICE (2003), available at <http://childwelfare.gov/pubs/usermanuals/foundation/foundationi.cfm>.

240. See KALICHMAN, *supra* note 92, at 149 (describing the contents of reports of suspected abuse from psychologists). Additionally, mediators may include their subjective belief of whether the child was abused. See *supra* note 187 and accompanying text.

241. *Id.* See also Mary Ann Bromley & John A. Riolo, *Complying with Mandated Child Protective Reporting: A Challenge for Treatment Professionals*, 5 ALCOHOLISM TREATMENT Q. 83, 92 (1988) (stating that reports should be limited to only the essential information which is necessary for the child protective authorities to initiate their investigation).

Information not germane to child protection maintains its mediation confidentiality protection and should not be disclosed.<sup>242</sup>

## VII. CONCLUSION

In the mediation of family matters, mediators may be presented with previously unmentioned allegations and revelations of child abuse, or may learn information that leads to a suspicion of child abuse. In such situations, mediators are under tremendous pressure to address the issue of abuse professionally without causing unnecessary harm to everyone the mediation process touches. At the same time, mediators must fulfill any legal responsibilities to report suspected child abuse.

Mediators' responsibilities to report suspected abuse vary by state. Some states explicitly identify mediators as mandatory reporters, others implicitly require mediators to report abuse by requiring all persons suspecting abuse to report their suspicions, and others split their mediators into ranks of mandatory reporters and permissive reporters by virtue of their professional training and practice in fields outside of mediation.<sup>243</sup> This difference of opinion as to whether mediators should be mandatory reporters begs the question: Should mediators be mandatory reporters of abuse?

The primary policy goal in family mediation is to improve outcomes for all parties affected by the mediation, which includes improving outcomes for children. In fact, the importance of mediation outcomes as they affect children manifests in legal and ethical directives requiring mediators to take the best interests of children into account when mediating family disputes.<sup>244</sup> If mediators have reasonable suspicions of child abuse, it is all but impossible to follow those directives without reporting suspected abuse. A mandatory reporting requirement for mediators simply closes the loop for taking the best interests of children into consideration in family mediation, as mediators will not be allowed to permit suspected child abuse to continue unabated. Furthermore, since mediators may be the first to hear reports of child abuse, mandatory reporting ensures that cases that belong in the child protection system get there more quickly, which should result in the earlier provision of needed social or therapeutic services. Finally, adopting such a requirement also furthers the goal of establishing consistency in mediation. The current state of varied child abuse reporting requirements will become less acceptable as consistency and standards become more important in media-

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242. See KALICHMAN, *supra* note 92, at 148-49 (discussing the limits of information psychologists are required to report).

243. See *supra* Part III.

244. See *supra* notes 147-49 and accompanying text.

tion's continued march toward professionalization. For these reasons, sound public policy indicates that mediators should be included as mandatory reporters under states' child abuse reporting laws.

Many mediators are already mandatory reporters for child abuse,<sup>245</sup> but those who are not frequently express trepidation at the responsibility of being mandatory reporters, particularly when it comes to knowing when to make a report of abuse.<sup>246</sup> With the requirement to be mandatory reporters comes the need for professional education to ensure that mediators understand their reporting responsibilities.<sup>247</sup> Training programs should spend significant amounts of time explaining the reporting standard, using clear and practical examples.<sup>248</sup>

Besides educating mediators about the standards, training programs need to make sure mediators are familiar with both the statutory definition of "abuse" and typical indicia of abuse that may be revealed in mediation.<sup>249</sup> A nonexhaustive list of such examples includes: committing physical or sexual abuse or expressing desires to commit future physical or sexual abuse; witnessing a spouse engage in physically or sexually abusive conduct; denying nutrition or life-sustaining care and medical treatment; leaving physical injuries, illnesses, or impairments untreated; displaying an apparent indifference to a child's severe psychological or developmental problems; and exhibiting parental disabilities (for example, mental illness or drug or alcohol addiction) severe enough to make child abuse likely.<sup>250</sup>

Furthermore, training programs should prepare mediators to address issues of abuse with the parties during the mediation, such as informing participants when a report is legally required, and how to

245. See *supra* Part IV.

246. This was the primary reaction from a family mediation practitioners group to whom this author presented an earlier version of this Article. Such concerns are typical of those who are not familiar with the mandatory reporting system. See, e.g., Donohue et al., *supra* note 211, at 685; Anne Reiniger et al., *Mandated Training of Professionals: A Means for Improving Reporting of Suspected Child Abuse*, 19 CHILD ABUSE & NEGLECT 63, 68 (1995).

247. See Besharov, *supra* note 177, at 143.

248. *Id.* at 144; BESHAROV, *supra* note 117, at 9.

Rather than taking the time to discuss the standard in detail, some professional education programs simply tell mandatory reporters to report any child for whom they have the slightest concern. Besharov, *supra* note 162, at 27. This is poor advice, as it gives mediators permission to report parents based solely on irrational concerns and worries. See BESHAROV, *supra* note 117, at 9. Naturally such spurious reports lead to problems associated with overreporting, including harm to children and families who are erroneously identified to authorities as abusers. See *supra* note 174. Such advice should not be surprising, because reporters often face no liability for an erroneous report made in good faith, but careful decisions not to report may result in criminal penalties, civil liability, or professional sanction. Besharov, *supra* note 177, at 145; Steven J. Singley, Comment, *Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters*, 19 J. JUV. L. 236, 247 (1998).

249. BESHAROV, *supra* note 117, at 9.

250. Besharov, *supra* note 114, at 197.

effectively terminate a mediation session due to child abuse concerns.<sup>251</sup> Other important areas for education include the mechanics of making a report; the legal protections for reporters; the penalties for failing to report; and the interrelated responsibilities of CPS, law enforcement, courts, and community service agencies.<sup>252</sup> A constant theme running through these training programs should be managing the tensions mandatory reporting places on mediation's core values.

While adopting mandatory reporting requirements for mediators is sound public policy, it is not a panacea for all the difficulties child abuse issues cause in mediation. For example, mandatory reporting may make mediators unwitting conduits for dubious or fraudulent allegations of abuse and could add to the structural problems inherent in the child protection system. Experience from current practice, however, suggests that these potential problems would be minimal. To further control these potential problems and to ensure better reporting in general, professional mediation organizations and court officials should regularly consult with child protection agencies and staff. Similar feedback loops have been successful in other mandatory reporting contexts<sup>253</sup> and should give mediators more confidence in the reporting system.<sup>254</sup>

Whether or not states adopt the recommendation of this Article and include mediators among the professionals identified as mandatory reporters of abuse, family mediators must take the responsibility to learn more about competently managing child abuse issues in mediation.<sup>255</sup> In addition to participating in education programs, mediators should read the professional literature on the topic, review their ethical responsibilities with respect to child abuse issues, and discuss child abuse issues with others in the field.<sup>256</sup> Only with more attention devoted to addressing child abuse issues can the mediation community be confident that its practitioners are fully prepared to address the sensitive issue of child abuse should it emerge.

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251. See KALICHMAN, *supra* note 92, at 145-46 (discussing methods for psychologists to inform parents and guardians about the necessity to make a report); TAYLOR, *supra* note 4, at 204-05 (discussing the need to terminate a mediation session once a mediator's reporting requirements are triggered); Donohue et al., *supra* note 211, at 696-97 (listing twenty-nine different skills potentially involved in discussing the necessity of a report to a non-perpetrating parent or caregiver).

252. BESHAROV, *supra* note 117, at 9-10; KALICHMAN, *supra* note 92, at 143-44, 168-74; Besharov, *supra* note 177, at 143-45.

253. See, e.g., Zellman & Antler, *supra* note 162, at 37 (reporting that the best relationship between mandatory reporters and child protection agencies occur when there is regular consultative interaction).

254. See *id.*; see also Alvarez et al., *supra* note 174, at 574.

255. MODEL FAMILY STANDARDS, *supra* note 1, §§ IX, XIII.

256. TAYLOR, *supra* note 4, at 207. See also KALICHMAN, *supra* note 92, at 174; Besharov, *supra* note 177, at 144.