Connecticut Council for Non-Adversarial Divorce (CCND)
Standards on Mediation and the Unauthorized Practice of Law

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These standards grew out of concerns regarding Mediation and the Unauthorized Practice of Law in Connecticut. The underlying history and legal issues surrounding those concerns are the subject of a thoughtful treatise which served as the Preamble for the Standards when the Standards were originally adopted by CCDM in 2001. In the 2018 Revision, Commentary continues to include legal precedent and analysis, and the complete Preamble and treatise appear as Appendix A.

Mediation and the Practice of Law: Recommended Standards and Practices

1. The Core Activities of Mediation

Standard: *The core activities of mediation - helping people communicate, problem-solve and negotiate effectively in order to resolve their disputes - do not, in and of themselves, constitute the "practice of law."*

Commentary: Effective mediators employ a broad range of skills and engage in a wide variety of activities in assisting parties to a dispute. Effective mediators have good communication skills and are effective listeners, questioners, explainers and translators. They have good psychological skills and are able to interpret non-verbal signals accurately, manage their own emotions in the face of strong feelings, manage the emotional climate of a mediation, and help disputants understand their own and each other's perspective and build more productive relationships. Effective mediators have good analytical skills, including the ability to diagnose the substantive and relational dimensions of a dispute, identify issues that are amenable to mediation and help the parties organize the issues into a workable agenda.

Effective mediators also have good problem-solving skills, including the ability to help disputants identify their interests and priorities, generate options, and evaluate their options in light of their shared and differing interests and priorities. Effective mediators are good facilitators, who understand the dynamics of competitive bargaining and can help disputants understand how to bargain more effectively, help them obtain needed information where appropriate, and assist them in reaching their own agreements Effective mediators are good diagnosticians, able to discern the various emotional, cognitive and strategic barriers to communication and settlement and to plan and time their interventions to meet the unique needs of the disputants in light of what is occurring in the dispute.

These core activities comprise the vast bulk of mediation. Competence in these activities requires education and training in the skills and processes of mediation. None of these activities constitutes the "practice of law." Persons with widely differing professional backgrounds can be highly effective family mediators.

Connecticut case law supports the conclusion that assisting disputants in their negotiations is not the practice of law, even if the negotiations involve legal issues. See *State Bar Association* v. *Connecticut Bank and Trust*, 146 Conn. 560 at n.2. In the CBT case, the trial court had enjoined the defendants, who were bank trust officers, from "appearing in any proceeding, conference or negotiation wherein the legal rights, liabilities or interests of any estate or trust or of any parties... are defined... compromised or settled...." 146 Conn. at 560, n.2. The Connecticut Supreme Court set this injunction aside as too broad, substituting a prohibition against non-lawyers appearing on behalf of clients in "hearings." 146 Conn. at 563, at n.3, Thus it appears clear that non- lawyers who help their clients resolve their disputes through negotiation are not "practicing !aw," even if the negotiations affect the parties' legal rights and responsibilities,

Three decisions by the Connecticut Statewide Grievance Committee have reached the same conclusion in the specific context of divorce mediation. UPL#98-021 (Jan. 11, 2001); UPL#99-008 (Jan. 11, 2001); UPL #99-015 (Jan.11, 2001). UPL#98-021 is particularly instructive. In that case, the original reviewing committee concluded that even where a non-attorney mediator does not hold herself out as an attorney, refrains from giving answers to legal questions and always suggests that the parties consult lawyers, merely identifying issues to negotiate, such as alimony, pensions and child custody and visitation, is the practice of law. The full Statewide Grievance Committee reviewed this proposed finding and expressly declined to adopt it, concluding that "divorce mediation does not, per se, constitute the unauthorized practice of law,"

2. **Drafting Agreements**

Standard: ***Mediators who are not attorneys admitted to practice before the Connecticut courts may not draft separation or divorce agreements to be filed in court. They may, however, draft letters or memoranda describing their clients' proposed agreements for the benefit of the clients or their lawyers. Mediators who are attorneys admitted to practice before the Connecticut courts may draft separation and divorce agreements so long as they are knowledgeable about Connecticut family law and procedure.***

Commentary: Separation and divorce agreements are legally binding contracts. The Connecticut case law makes clear that non-attorneys may not draft legally binding contracts, including separation and divorce agreements, for third parties. See *Monroe* v. *Horwich*, 820 F.Supp. 682 (D. Conn.1993) (paralegal advertises offer to prepare papers for parties representing themselves in uncontested divorce; Statewide Grievance Committee finds this to constitute the unauthorized practice of law; Section 1983 challenge dismissed.) See also *Statewide Grievance Committee* v. *Patton* 239 Conn. 251 (1996) ("Docu-Prep of

New England " offers to prepare simple legal documents, including documents in uncontested divorces, for clients to file on their own, where the Court held that this is the unauthorized practice of law) Cf. also *State* v. *Thiede*, 4 Conn. Sup. 438 (1937) (the drafting by non-lawyers of wills is the unauthorized practice of law); *Statewide Grievance Committee* v. *Patton*, 239 Conn 251 (1996) (the drafting by non-lawyers of franchise agreements is the unauthorized practice of law.)

Non-attorney mediators, however, can perform a valuable service for their clients by describing their proposed agreements by means of letters, outlines, or memoranda, sent to the clients themselves or to their lawyers. For example, a couple might agree in principle to a specific amount of alimony for a spouse for a fixed term of years. A non-attorney mediator could properly summarize this understanding in a letter to the clients. It would then be up to the clients to take the mediator's letter to a licensed attorney. The licensed attorney would then draft a final divorce agreement for submission to the court, making certain that legal terms of art, such as "duration" and "modification" of alimony, are used properly, in a way that effectuates the parties' intent.

We have attached as Appendix A, a sample letter describing a series of client agreements, to help non-lawyer mediators avoid inadvertently drafting documents that could be construed as legal contracts. CCND recommended "best practices" for non-attorney mediators include the following:

- Do not ask clients to sign any letter or memo provided by the non-attorney mediator, other than the respective retainer agreement. (See Standard Seven, below). If you do and they do, the document they sign will more likely be viewed as a contract.
- As much as possible, use your clients' own language in describing their agreements.
- Avoid using "legal boilerplate" such as "This agreement shall be construed in accordance with the laws of Connecticut" or "This agreement may only be modified in writing,"
- Use clear and discernible disclaimers such as "This Document Is Not A Legal Or Binding Contract And Is Not Intended For Filing In Court.
- At the outset of your relationship with your clients, disclose the limits of your competence the fact that you are not a lawyer, and that consultation with a lawyer is highly recommended before any agreements are finalized. See Standards 4 and 7 below.

3. Providing Legal Information, Evaluation and Advice

Standard: ***Mediators who are not attorneys admitted to practice before the Connecticut courts may provide their clients written and oral information about Connecticut divorce law and procedure, so long as thev are competent to do so. Mediators who are not attorneys admitted to practice before the Connecticut courts may not evaluate the strengths and weaknesses of the parties' legal positions or make predictions of how a court or judge might decide a particular***

disputed issue or issues. Mediators who are admitted to practice before the Connecticut courts may evaluate the strengths and weaknesses of the parties' legal positions and make legal predictions, so long as they are competent to do so.

Commentary: Under established Connecticut law, when a non-lawyer applies legal principles to the facts of a particular case, by assessing the strengths and weaknesses of a party's legal position or making predictions of what a court might do, he or she is engaged in the practice of law. See *Grievance Committee* v. *Dacey*, 154 Conn. 144. On the other hand, providing general information about the law is not the practice of law, if coupled with the advice to consult a lawyer. See *State Bar Association* v. *Connecticut Bank and Trust*, supra, 146 Conn.556, 563 at n.3.

Whether it is appropriate for lawyer-mediators to provide clients with legal evaluations and predictions ('evaluative mediation') is a disputed norm among mediation scholars and practitioners, for reasons having nothing to do with the unauthorized practice of law. Some lawyer-mediators believe that to do so necessarily compromises their impartiality and neutrality. Other lawyer-mediators believe that they can maintain their neutrality and impartiality, while providing a service that they are competent to provide and that their clients often find helpful. CBA Formal 35, above, expressly authorizes a lawyer to provide legal predictions and evaluations in the context of divorce mediation.

Private divorce mediation is fundamentally contractual in nature and CCND believes that mediation clients should be able to contract for evaluative divorce mediation services so long as a mediator is competent to provide such services and the clients, properly advised of their mediation options, so desire. By the same token, if the mediator and the parties choose to limit the mediator's role to pure facilitation (asking questions, helping the parties make the their own decisions, recommending independent counsel to answer legal questions) the mediator should refrain from a directive or evaluative approach. The objectives of the agreement, the scope and nature of the mediator's role, and the nature of the process to be undertaken should be discussed and understood by the parties and their mediator at the outset of the relationship. See Standard 7, below.

4. Recommending Independent Legal Advice

Standard: ***Both non-lawyer mediators and lawyer mediators should recommend that clients obtain independent legal advice before concluding agreements.***

Commentary: In evaluating whether a non-lawyer's conduct constitutes the unauthorized practice of law, the courts pay close attention to whether clients are advised to consult an attorney for independent legal advice. Compare *Grievance Comm*. v. *Dacey,* supra, 154 Conn. at 134, with *State Bar Association* v. *CST,* supra, 146 Conn. at 563-4, n.3. This theme is also emphasized in the three recent Statewide Grievance Committee decisions involving non-lawyer divorce mediators. See, e.g., UPL #99-008 ("The Committee cautions you to take steps to ... inform your customers [sic] that they should seek the assistance of an

attorney.") In order to promote informed decision-making by clients, it is important that non-lawyer mediators encourage their clients to obtain independent legal assistance, both during the mediation process and in drawing up and finalizing an agreement.

It is also important that lawyer mediators - even evaluative lawyer mediators - recommend that their clients obtain independent legal advice. As discussed in the commentary to Standard 3, some lawyer mediators try to help both of their clients evaluate options by explaining the legal ramifications of those options and by describing how a court might handle an issue if the parties cannot resolve it themselves, As useful as this advice may be, it is different from the kind of advice that a representational advocate provides an individual client. An advocate focuses exclusively on an individual client's best interests, whereas a lawyer mediator tries to work out balanced agreements that work for both parties. Recommending independent legal counsel is both a means of maintaining a separation in the mind of clients between the role of the mediator and the role of representative counsel and of ensuring that client decisions are fully informed.

Some non-attorney mediators work directly with attorney mediators to provide interdisciplinary mediation services, a practice that was expressly approved by the Connecticut Bar Association in Formal Opinion 35, supra. Oplnion 35 makes clear, however, that these sorts of arrangements are not a substitute for independent legal advice.

There are a variety of ways to help divorcing couples obtain independent legal advice. Some mediation clients may be encouraged to hire separate lawyers throughout the mediation process, for ongoing advice and counsel. Other mediation clients may prefer to hire attorneys at the conclusion of the mediation process to discuss their proposed agreements and/or prepare a final document for filing in court. Each of these is an acceptable way of ensuring that mediation clients make informed decisions.

Finally, some mediators require clients to agree in advance to consult with independent counsel as a condition of accepting employment. If such an agreement is required by the mediator, it should be fully explained to the clients at the outset of the relationship and incorporated into any written agreement to mediate. See Standard 7, below. CCND notes, however, that a high percentage of divorcing couples in Connecticut do not use lawyers to obtain a divorce. Ultimately, the decision whether or not to seek independent legal advice and/or retain counsel is up to each client.

5. Preparing Court Forms

Standard: ***Mediators who are attorneys admitted to practice before the Connecticut courts may assist clients in completing court forms. Mediators who are not attorneys admitted to practice before the Connecticut courts may give clients blank forms to complete, provide clients with written materials on pro se divorce, and record information onto court forms based on verbatim information provided by clients orally or in writing. However, non-lawyer mediators should exercise great caution in advising or assisting clients in completing court forms,***

because doing so may involve the exercise of legal judgment and may be held to constitute the unauthorized practice of law.

Commentary: All persons seeking a divorce in Connecticut, including mediation participants, must complete certain court-sanctioned forms, such as Summonses, Complaints, Financial Affidavits, and Affidavits Concerning Children. Mediation clients often request their mediators to provide assistance in completing these forms as a service incidental to the mediation.

Under CBA Formal Opinion 35, supra, there is no question that attorney mediators admitted to practice in Connecticut may provide legal information and advice to their clients in completing these forms, so long as they are competent to do so and there is no advocacy on behalf of either client. Nevertheless, some attorney mediators prefer not to do so, for reasons previously suggested in the commentary to Standard 3.

Whether and to what extent non-lawyer mediators may assist their clients in completing court forms is a complex question, both because the governing legal standards are in doubt and because some court forms require no legal judgment to complete, while others require some, or considerable, legal judgment. This is therefore an area in which non-attorney mediators must proceed with great caution.

Although there is considerable ambiguity in this area, one could argue that non-lawyers may assist clients in completing court forms and other routine legal documents, so long as they are not legally complex. Here again, the leading case is comprised of the two decisions involving bank trust officers in *State Bar Association* v. *Connecticut Bank and Trust (CBT),* supra. Acting in response to the Connecticut Supreme Court's mandate in the first decision to enjoin the defendant's trust officers from engaging in acts "commonly understood to be the practice of law," 145 Conn. at 236-7, the trial court issued an injunction, enjoining the defendants from engaging in fourteen listed practices, including:

- The preparation of documents involving the admission of a will to probate;
- The preparation of documents involving widow's allowances;
- The preparation of applications to sell the assets of fiduciary estates; and
- The preparation and filing of preliminary and final accounts.

On appeal, the Supreme Court held that this injunction was too broad, stating “In our (earlier) opinion, we said: '... a great many legal problems of a complex nature arise in the fiduciary administration of decedents' estates.'... We did not state that legal problems of a complex nature arise in the administration of every decedent's estate."

The Supreme Court set aside the trial court's injunction and modified it (rather unhelpfully) as follows:

"In preparing and filing in the probate courts the various applications, petitions, accounts, inventories and distributions pertaining to estates and trusts... the defendant is performing the ordinary and incidental services relative to trusts and estates... and is not engaged in the illegal practice of law unless the problems involved in the particular case are commonly understood to be the practice of law. 146 Conn. at 564.

Thus, the leading Connecticut Supreme Court UPL decision appears to hold that non-attorney bank trust officers may assist clients in completing a variety of probate court forms, as "incidental services relative to trusts and estates" so long as the forms do not involve "legal problems of a complex nature." Id, at 564.

In 1998, however, in two related cases, Connecticut Superior Court judges broadly enjoined non-lawyers, doing business as "Divorce Documentation Service of Connecticut", from exercising any judgment in assisting litigants to complete Connecticut Court forms. *Statewide Grievance Comm*. v. *Zadora*, 23 Conn. L Rptr. No 2, 59 (November 30, 1998) [*Zadora* I]; *Statewide Grievance Comm*. v. *Zadora*, 5 Conn. Ops. 1314 (November 15, 1999) [Zadora II]. In *Zadora* I, the court approved only the providing of blank forms, the sale of pro se divorce pamphlets and the "provision of typing services for customer-completed forms." In *Zadora* II, the court approved only providing blank forms and "typing consumer-generated responses," holding that even the use of the word "consultation" in the respondents' advertisements implied the "giving of advice" and that any such advice would constitute the unauthorized practice of law.

On Appeal, the Court, in *Statewide Grievance Committee* v. *Zadora,* 62 Conn. App. 828, 833, 772 A.2d 681 (2001), focused on the advertisements disseminated by the defendant divorce documentation providers, holding that "boast[ing] of the extensive research conducted by the respondents with attorneys and court personnel as background to perform document preparation...implies that the respondents are qualified to provide more than a collection of blank forms to be sifted through and responded to by the consumer alone. The repeated use of the word 'consultation' implies that the service involves the giving of advice as opposed to the mere recording of responses." The court found that such statements implied that the company was engaged in the unauthorized practice of law even where the statements included disclaimers that the company was not staffed by lawyers, nor engaged in providing legal advice. Id.

The Superior Court case of *Statewide Grievance Committee* v. *Irizarry*, Superior Court, judicial district Stamford at Norwalk, Docket No. CV 03 0194210 S (December 8, 2003, Lewis, J.), is inconsistent with the Connecticut Supreme Court's decision in the *CBT* case. In Irizarry, the defendant, an accountant and notary public, engaged in translation services for clients seeking a divorce who could not fill out the forms, then typed the completed forms using his client's answers for a nominal fee. The Court found that

these services amounted to giving legal advice, singling out the completion of financial affidavits in its determination. The Court made no finding that such affidavits involved 'legal problems of a complex nature."

It is unclear the extent to which these decisions alter the existing decision of the Supreme Court in the *CBT* case. While the facts of *Zadora* include the individuals providing divorce documentation services as their only business, the *Irizarry* defendant engaged in aiding divorce clients as an ancillary matter to his primary business as an accountant and notary.

There are certain court forms that, by any reasonable standard, seem ministerial in nature. For example, a Dissolution of Marriage Report, which is no longer required by the Connecticut system, calls for no judgment but merely the insertion of factual data. And many non-lawyer mediators have sufficient knowledge of the court system to help their clients complete at least some court forms in a highly competent manner. Cf. *Auerbacher* v. *Wood*, 39 N.J. Eq. 599; 53 A.2d 800 (N.J. Super.1947,)

On the other hand, filling out other kinds of court forms, such as Complaints and Financial Affidavits, often involves complex legal judgments potentially affecting the rights of the parties. Even under the relaxed legal standard of the *CBT* case, non-!awyer mediators should avoid helping their clients complete such documents. Where, for example, financial information such as seasonal or overtime income, daycare expenses, medical insurance premiums and retirement plan values could reasonably be presented on a Financial Affidavit in more than one manner with differing legal consequences, a non-lawyer mediator should suggest that the clients consult with attorneys to obtain advice as to how to complete this form.

Persons seeking a divorce often need assistance in navigating the court system, because the system and its forms are confusing. CCND believes that non-attorney mediators ought to be permitted to determine their competence to assist clients in completing court forms on a case-by-case basis taking into account their background, knowledge and the nature and complexity of the particular form in question. With the case law as restrictive and uncertain as it is, however, non-attorney mediators are well advised to avoid completing any court documents for their clients, except for providing typing and transcription services.

6. Finalizing Agreements, Accompanying Clients to Court

Standard: ***In order to help clients finalize their agreements, mediators may accompany clients to court, and upon request by the judge, assist the court in understanding the parties' agreements. Mediators should avoid undertaking any role that could be confused with the role of a party representative and should refer to the parties any court questions about the fairness of the parties' agreements.***

Commentary: For some divorcing couples, the prospect of going to court to finalize their agreements is frightening. Some mediators agree, as an ancillary service, to accompany their clients to court, while others view this service as inconsistent with their conception of the mediator's role. Mediators should discuss with their clients at the outset of the relationship whether or not accompanying their clients to court is a service they will provide. See Standard 7 below. Accompanying clients to court, helping them find the right courtroom and helping them answer court questions about their agreements do not by themselves constitute the practice of law.

Mediators who accompany their clients to court should make it clear to the court that they are not appearing in a representative capacity and should avoid any conduct that creates confusion between the role of representative counsel and the role of a mediator. For example, some judges routinely ask lawyer mediators to "canvas" the parties in court, taking them through a series of questions about the details of their agreements. CCND is concerned that such practices may blur the line between mediation and representation.

In addition, it is inappropriate for mediators to be placed in the position of passing judgment on the fairness of the parties' agreements. The role of a mediator is to help clients reach resolutions that the clients themselves think are fair, in light of their own values and priorities.

7. Written Agreements: Specifying the Services that the Mediator Will Provide

Standard: ***In order to promote informed decision-making, mediators should prepare written agreements for the signature of their clients, specifying in each case the services that the mediator will and will not provide.***

Commentary: As the examples in these standards suggest, the hallmark of the mediation process is its flexibility. Different mediators provide different services, depending on their background, expertise, preferred mediation style, billing structure

and the expressed preferences of their clients. In order to promote informed decisions by clients, both as to the choice of mediation as a process and the choice of the particular mediator, it is highly desirable that mediators discuss with their clients at the outset of the relationship the services they will and will not provide. Memorializing such discussions in written agreements is a way to protect both mediators and clients from future misunderstandings. A service provider may prepare a written agreement for a client's signature specifying the contractual relationship between the service provider and the client, without engaging in the unauthorized practice of law. See, e.g., *State Bar Association* v. *CBT*, 20 Conn. Sup. 248, 260-262 (1957) (Contracts prepared by building contractors for the benefit of themselves and their own customers do not constitute the unauthorized practice of law.)

APPENDIX A

NOTE: This analysis was authored in 2014. Readers are encouraged to independently conduct their own legal research to determine the status of the caselaw and rules discussed below.

Preamble

The Connecticut Council for Non-Adversarial Divorce (CCND), formerly known as the Connecticut Council for Divorce Mediation (CCDM), is the leading statewide professional organization for divorce mediation professionals. In the Fall of 1999, in response to several recent cases alleging unauthorized practice of law (UPL) by non-lawyer mediators, and at the request of Appellate Judge Anne Dranginis, then Chief Administrative Judge of the Connecticut Superior Court, Family Division, CCDM established a Standards of Practice Committee to address the concerns raised. Defining the unauthorized practice of law in the mediation context has been the subject of vigorous debate by mediation practitioners, regulators and scholars in a number of states. CCND believes that both the public interest and the practice of family mediation in Connecticut benefit from greater clarity regarding this important public policy issue.

The Standards of Practice Committee met monthly over a period of a year and a half in an effort to draft standards and propose "best practices" pertaining to the work of its members. In undertaking its work, the Committee surveyed a wide variety of materials from around the country. The Committee was comprised of both lawyer and non-lawyer mediators, the two current co-presidents and four past presidents of CCDM, and representatives of the Family Law and ADR Sections of the Connecticut Bar Association, as well as CBA's Standing Committee on Dispute Resolution in the Courts. The members of the Committee were Michael Becker, Fran Calafiore, Roberta Friedman, Kate Haakonsen, Robert Horwitz, Mary Marcus, Susanne Snearly, Barbara Kahn Stark and Carolyn Swiggart. Professor James Stark, Director of the Mediation Clinic at the University of Connecticut Law School, served as Reporter to the Committee. Attorney Walter Marcus served as Chair.

In proposing standards and best practices for its members, the Committee's primary goals have been:

1. To protect the public by insuring that divorcing couples have access to the legal information and advice they need to make fully informed decisions, and that divorce mediators practice properly within the limits of their expertise and competence;

2. To help judges, lawyers and others who may be called upon to evaluate the fairness of divorce settlements to better understand the processes by which mediated agreements

are reached;

3. To preserve and enhance the growth of divorce mediation as a less adversarial and less expensive alternative to litigated divorce, and a process that often produces more satisfactory and durable agreements; and

4. To preserve and enhance the right of all couples facing divorce to choose a process for dissolving their marriage that best meets both their individual needs and the needs of their family.

CCND believes that unauthorized practice of law rules serve important consumer interests by protecting consumers from incompetent and unethical practices. By the same token, CCND notes (in common with most academic commentators) that overly broad enforcement of UPL laws is not in the public interest if it serves mainly to protect lawyers from unwanted competition.[i] CCND believes that mediation's strength lies in its flexibility; that mediators from differing professional disciplines and backgrounds can provide clients highly competent service; and that standards in this area can be interpreted in a balanced manner that both protects the public and ensures consumer access to a broad variety of divorce resolution processes.

Legal Background

In General

All states prohibit the unauthorized practice of law by lay persons, but comparatively few states have addressed the question whether and under what circumstances mediation constitutes “the practice of law." Certainly the core activity of the mediation process - impartially facilitating discussions and negotiations by two or more parties in a dispute - is not, in and of itself, the practice of law. But there are certain activities that may or may not be considered the practice of law when undertaken in the context of mediation. These include: providing legal information or advice about the various issues and potential resolutions under discussion; predicting how certain issues might be decided by a court if not resolved voluntarily by the parties; helping litigants complete court forms; and drafting documents and agreements, either for submission to the court or for the parties themselves.

It ls worth emphasizing at the outset that whether any of these activities should be considered "the practice of law" is the subject of controversy around the country, and different jurisdictions have reached widely differing conclusions. The UPL Rules of the District of Columbia Court of Appeals expressly provide, for example, that they "are not intended to cover the provision of mediation or alternative dispute resolution (ADR) services."[ii] In 2001, Washington adopted Rule 24 which explicitly excludes Mediation Services from being considered the unlicensed practice of law. [iii]. In April of 2000, the Florida Legislature passed a body of laws collectively entitled “Standards of Professional Conduct for Mediators", Rule 10.200 et.seq. Under the Florida

approach, the question of what specific tasks a mediator may or may not ethically undertake is treated conceptually as a question of training, experience and competence rather than what is, or is not, the practice of law. For example, under 10.370, a mediator may explicitly provide information that the mediator is qualified by training or experience to provide. The rules apply to lawyer and non-lawyer mediators alike. [iv]

But other states have taken the opposite view. For example, the New Jersey Supreme Court Advisory Committee on Professional Ethics issued an Ethics Opinion in 1994, holding that when a lawyer serves as a third party neutral, he or she "is acting as a lawyer."[v] Two Bar Association ethics opinions from Massachusetts conclude that when lawyer-mediators draft settlement agreements, they are engaging in the practice of law, and suggest guidelines for the drafting of such agreements.[vi] And both Virginia[vii] and North Carolina[viii] have developed UPL standards specifically applicable to mediation and specifying what sorts of mediator activities should and should not be considered the practice of law.

One of the main reasons different states have reached different conclusions on mediation as the practice of law is because the controlling legal standards are highly indefinite, and different states utilize different legal tests to distinguish the "practice of law" from other activities. Courts around the country have developed five different tests to determine what is the practice of law[ix]:

1. The "*Commonly Understood*" Test. This broad (and circular) test asks whether the activity in question is commonly understood to be part of the practice of law in the community. Factors would include whether lawyers in the community routinely provide the particular service, rather than non-lawyers.

2. The "*Client Reliance*" Test. This test asks whether the parties who receive a particular service subjectively believe, in fact, that they are receiving "legal" services. Evidence of party reliance may be established by examining advertisements or written materials received by the client pertaining to the services in question.

3. The *"Applying Law to Facts*" Test. This test asks whether the service involves relating the law to specific facts, as for example when a mediator evaluates the strengths and weaknesses of the parties' legal claims by applying legal principles to the fact situation.

4. The "*Affecting Legal Rights*" Test. This test subsumes within "the practice of law" all activities that may affect a person's legal rights - an extremely broad test. Mediations involving litigation matters, including divorce mediation, by definition involve parties' legal rights.

5. The "*Attorney-Client Relationship*" Test. This (much narrower) test asks whether the relationship between the person providing services and the person receiving them is tantamount to an attorney-client relationship. Applying this test in the context of mediation, one might ask whether the party to the mediation reasonably views him or herself as a "client and the mediator as his or her "lawyer". One factor affecting this determination might be whether the parties in the

mediation are represented individually by their own counsel. If so, there is less risk of role confusion[x]

Whether a specific mediation practice is considered the practice of law often turns on the legal test or tests adopted in the particular jurisdiction. For example, the Virginia UPL Committee had little choice but to conclude that a mediator's predictions about the potential resolution of legal issues would constitute the practice of law because Supreme Court of Virginia rules expressly defined the practice of law as advising another, for compensation, "in any matter involving the application of legal principles to facts."[xi]

On the other hand, the District of Columbia Court of Appeals appears to have adopted the narrower "attorney-client relationship" test in concluding that mediation is not the practice of law because "ADR services are not given in circumstances where there is a client relationship of trust and reliance; and it is common practice for providers of ADR services explicitly to advise participants that they are not providing the services of legal counsel."[xii]

One must therefore carefully examine the state of UPL law and practice in Connecticut to determine what UPL risks exist for mediators and what standards and practices to recommend to our members.

Connecticut Law

Statutes and Rules

Section 51-88 of the Connecticut General Statutes prohibits "the practice of law" by persons who are not attorneys admitted to practice in the state of Connecticut. The statute is a criminal statute; persons who violate it are subject to a maximum fine of $250, two months imprisonment or both, as well as to restraining orders and criminal contempt sanctions.

Rule 5.5(b) of the Connecticut Rules of Professional Conduct states that a lawyer shall not "assist a person who is not a member of the [Connecticut] bar in the performance of an activity that constitutes the unauthorized practice of law." Attorneys who violate the Connecticut Rules of Professional Conduct are subject to grievance procedures and sanctions pursuant to CGS Sections 51-90 et seq.

Neither the statute nor the rule provides any definition of "the practice of law." Nor has any Connecticut court decision expressly dealt with the question of mediation as the practice of law. But there are some general court decisions on the unauthorized practice of law in other contexts and a CBA Ethics Opinion on mediation as the practice of law which provide somewhat useful guideposts for mediation practitioners.

Connecticut Court Decisions: Practice of Law Tests

The Connecticut courts appear to have adopted the "commonly understood" and "applying law to facts" tests to determine what is the practice of law, and have generally held that a non-lawyer may not prepare legally binding documents or give legal advice (as opposed to information) to clients.

A. The "Commonly Understood" Test. In *State Bar Association of Connecticut* v. *Connecticut Bank and Trust*, 145 Conn. 222 (1958), the Connecticut Supreme Court held that bank trust officers working for the defendant bank (a corporation prohibited from practicing law) engaged in the unauthorized practice of law when they drafted various documents and engaged in a wide variety of other activities associated with the administration of estates. The court held that the Connecticut unauthorized practice of law statute was not limited to prohibiting appearances in court by persons not admitted to the Bar. The purpose of the statute, the court stated, is to "forbid the performance of any acts by persons not admitted as attorneys, in or out of court, commonly understood to be the practice of law." 145 Conn. 222, at 233-4, citing *Grievance Committee* v. *Painer*,128 Conn. 325 (1941), The Supreme Court directed the lower court to issue a mandate enjoining the bank officers from engaging in a broad range of activities.

In a subsequent decision involving the same parties, the court substantially modified its mandate, but reiterated this standard, holding that "the decisive question is whether the acts performed were such as 'commonly understood to be the practice of !aw.'" *State Bar Association of Conn.* v. *The Connecticut Bank and Trust Co*., 146 Conn. 556, 558 (1959). See also *Statewide Grievance Committee* v. *Patton*, 239 Conn, 251, 254 (1996).

B. The "Applying Law to Facts" (Information vs. Advice) Test. The leading Connecticut case here is *Grievance Committee* v. Dacey, 154 Conn 129 (1996.) In *Dacey*, a mutual fund salesman who was not an attorney helped his clients create trust agreements, utilizing general trust forms, but with deviations filled in to help meet the particular circumstances of each client. Charged with the unauthorized practice of law, he argued that he was only giving his clients "information," not "advice." The Connecticut Supreme Court rejected this argument, holding that "when the information given is directed toward a particular person and his needs... it is no longer general information but advice, embraced within the practice of law," 154 Conn. at 144. The court further stated that "determining that a model form should be used without change is as much as an exercise of legal judgment as a decision that it should be changed in certain particulars. In either case, legal judgment is needed in adapting the form to the particular needs of the client." 154 Conn. at 141. See also, *Grievance Committee v. Payne*, 128 Conn. 325, supra. (Town clerk, a non-lawyer, provides opinions as to the validity of land title; held: the unauthorized practice of law; case subsequently overruled by statute.) On the other hand, the Connecticut Supreme Court has held that providing general information on federal and state tax and probate laws, coupled with the advice to consult a lawyer concerning particulars, is not the unauthorized practice of law. *State Bar Association* v. *Connecticut Bank and Trust*, supra, 146 Conn. 556, 563 at n.3.

Other Themes from the Connecticut Case Law

Although CGS Section 51-88 is vague, and "attempts to define the practice of law have not been particularly successful because of the wide field covered," the statute is not unconstitutional. *Grievance Comm*. v. *Payne*, supra, 128 Conn. at 329.

Because Section 51-88 is a penal statute, it must be strictly construed. Id.

Assisting disputants in their negotiations is not, by itself, the practice of law, even if the negotiations involve legal issues. *State Bar Association* v. *Connecticut Bank and Trust*, supra, 146 Conn. 560, n.2,

Connecticut Bar Association Ethics Opinion

Ethics opinions issued by state or local bar associations are not binding on the courts and are seldom relied on in judicial decisions. One CBA Ethics Opinion is nonetheless worthy of mention insofar as it expressly deals with mediation as the unauthorized practice of law, and has been relied on by Connecticut divorce mediators in establishing their practices.

In Formal Opinion No. 35 (1988), the CBA Committee on Professional Ethics approved an interdisciplinary mediation practice in which a firm of Connecticut attorneys worked with mental health professionals and accountants to provide integrated mediation services to clients. Under the model proposed by the law firm and approved by the CBA committee, the mental health professional would screen cases and conduct the mediations, calling lawyers in as needed to "provide legal information, describe options, and draft an agreement between the parties on such matters as property division, child custody, and any additional financial obligations of either party to the other." In addition, the model required the parties to "take the agreement to independent legal counsel for review... to ensure that each party has made informed choices." The CSA committee approved this arrangement, conditioned on the understanding that the non- lawyer mediator would both call in an attorney if the parties' legal rights or options became relevant considerations during the mediation, and not give the parties legal advice at any time.

The State of Connecticut UPL Law: Summary and Comment

Although there are no Connecticut case decisions expressly dealing with mediation as the unauthorized practice of law, the cases are, as a whole, quite strict in enforcing the Connecticut UPL statute. This strictness of enforcement - especially when coupled with the vagueness and circularity of the "commonly understood test (the practice of law is what is commonly understood to be the practice of law) - creates significant risks for all non-lawyers who practice mediation. These risks potentially affect not only private divorce mediators, but also non-lawyer mediators working privately in other practice areas, as well as non-lawyers working as staff mediators in the Connecticut courts.

In the long term, CCND urges the Connecticut judiciary to revisit its standards for UPL enforcement, to adopt standards that provide clearer and fairer guidance, and perhaps to consider at least some of these matters under the rubric of competence, rather than what is or is not "the practice of law."

In the short term, our charge is to recommend standards and practices to our members, to help them determine, in the light of *existing* Connecticut case law, what mediation practices are clearly not the practice of law, what mediation practices are certain or highly likely to be considered the practice of law, and what mediation practices pose close and difficult questions, suggesting a need for caution and restraint. Where we can,we suggest "best practices" and provide illustrative examples to help mediators navigate the more ambiguous areas9 of UPL interpretation and enforcement.

Endnotes

[i] The leading text on lawyers' ethics contains a useful summary and critique of the anti-competitive and monopolistic effects of broad unauthorized practice of law enforcement. See, Charles W. Wolfram, Modern Legal Ethics 824-49 (West 1986).

[ii] D.C Ct. App, Rule 49(b) (2) (1995).

[iii] Washington, General Rule 24 (2001).

[iv] In Re: Standards of Professional Conduct for Mediators, Rule 20.220, et.seq.

[v] New Jersey Sup,.Ct. Advisory Comm. on Professional Ethics Op. No. 676 (1994).

[vi] Massachusetts Bar Association Ethics Op. 85-3 (1985); Boston Bar Association Ethics Op. 78-1 (1978).

[vii] Virginia Guidelines on Mediation and the Unauthorized Practice of Law (Dep't. of Dispute Resolution Services of the Supreme Ct. of Virginia(1999).

[viii] Guidelines for the Ethical Practice of Mediation and To Prevent the Unauthorized Practice of Law (North Carolina Bar Association Dispute Resolution Section Task Force on Mediation and The Practice of Law, Adopted by the North Carolina Board of Governors, (June 1999).

[ix] The following discussion is taken from David Hoffman and Natasha Affolder, Mediation and UPL: Do Mediators Have a Well-Founded Fear of Prosecution? Dispute Resolution Magazine 162-165 (Winter 2000), as well as the Virginia Guidelines, supra n.7, at pp.2-4.

[x] Several commentators, adopting this standard, have argued that mediation should not be considered the practice of law. See, e.g., Bruce E. Meyerson, Mediation Should Not Be Considered the Practice of Law, 18 Alternatives 122-123 (CPR Institute for Dispute Resolution, June 2000).

[xi] Virginia Guidelines, supra n. 7 at 6 {quoting statute).

[xii] D.C. Ct. App. R. 49, comment.