1

Purpose Of This Lesson

THE PURPOSE OF THIS LESSON IS TO HELP YOU UNDERSTAND LEGAL LIABILITIES INVOLVED WITH MEDIATION AND HOW TO AVOID THEM.

2

Objectives

AFTER COMPLETING THIS LESSON, YOU SHOULD BE ABLE TO:

1. Define the unauthorized practice of law.
2. Give examples that demonstrate the unauthorized practice of law.
3. Identify ways to prevent the unauthorized practice of law.
4. Locate available error and omissions insurance for mediators.

3

Legal complaints against mediators are extraordinarily rare, despite the thousands of disputants that have participated in this conflict resolution process.

There have been no momentous amounts of exposure to the legal arena even though formal mediation has now been around more than thirty years.

4

In spite of the limited number of lawsuits against mediators, the judicious, professional mediator would be wise to have precautions in place.

5

This lesson will focus on the unauthorized practice of law (UPL) and preventative measures.

In addition, resources will be provided to assist prospective mediators to secure the appropriate insurance.

6

During the United States' first 100 years of existence as an independent nation, the legal profession was largely unregulated.

Coinciding with the organization of professional bar associations at the state and local levels following the Civil War, states began to pass UPL legislation restricting the law-related activities of non-lawyers.

Most of these early statutes were limited in scope and merely prohibited court appearances by persons who had not been admitted to the bar.

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The Depression era of the 1930s saw a significant increase in the enforcement of UPL statutes and in the passage of new, more expansive prohibitions against UPL.

The new laws in many jurisdictions were, by today's standards, broadly worded and prohibited the unauthorized practice of law without defining precisely what was meant by that phrase.

8

The public policy rationale for more expansive UPL enforcement was the protection of the public and the preservation of the lawyers' professional independence, which was also thought to benefit clients.

9

Public policy is an attempt by the government to address a public issue.

The government, whether it is city, state, or federal, develops public policy in terms of laws, regulations, decisions, and actions.
There are three parts to public policy-making: problems, players, and the policy.

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The problem is the issue that needs to be addressed. The player is the individual or group that is influential in forming a plan to address the problem in question.

Policy is the finalized course of action decided upon by the government. In most cases, policies are widely open to interpretation by non-governmental players, including those in the private sector. Public policy is also made by leaders of religious and cultural institutions.

Academics continue to contemplate the definition of public policy, since there is currently no consensus.

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More recently, the American Bar Association Commission on Nonlawyer Practice has recommended a somewhat narrower approach to protecting the public from nonlawyers engaged in law-related activities.

This ABA commission recommends that states consider regulating UPL when a nonlawyer activity poses a serious risk to a consumer's life, health, or safety.

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Adoption of Tests

- Since the passage of more expansive and non-specific UPL statutes following the Depression, courts have struggled to define the unauthorized practice of law on a case-by-case basis.
- In attempting to reach a workable definition of UPL, courts and bar associations in the various states have usually adopted one of five different "tests."

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The "Commonly Understood" Test

- The "commonly understood" test defines the practice of law as being comprised of activities that lawyers have traditionally performed.
- The leading case that adopts this approach is *State Bar v. Arizona Land Title & Trust* Co. In that case, the Arizona Supreme Court held that the practice of law consists of those activities, "whether performed in court or in a law office, which lawyers customarily have carried on from day to day through the centuries."
- Under this test, no distinction is drawn between litigation and court-related activities and activities that involve giving legal advice and drafting legal instruments.

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The "Commonly Understood" Test Cont'd

The "commonly understood" test is subject to a number of exceptions recognized by courts.

For example, some courts permit nonlawyers to perform activities usually performed by lawyers if those activities are incidental to the nonlawyers' professions.[9]

The justification for this exception is that too broad a definition of the practice of law would severely limit the common business practices of other professionals, including real estate agents, accountants, and investment counselors and, therefore, would not serve the public interest.[10]

In Commonwealth v. Jones & Robins, Inc.11, the Supreme Court of Virginia held that real estate agents can prepare contracts for the sale of real property.

The court reasoned that to deny real estate agents this ability would severely impact their business and would run counter to the long-standing practice among real estate agents of preparing sales contracts.[12]

15

The "Commonly Understood" Test Cont'd

Another exception to the "commonly understood test" allows nonlawyers to provide services that are commonly understood as the practice of law so long as those services do not involve difficult or complex questions of law.[13]

For example, in *Agran v. Shapiro*,[14] a California appellate court ruled that the preparation of simple income tax forms was not the practice of law.

Similarly, the Minnesota Supreme Court has held that only the resolution of complex tax questions constitutes the practice of law.[15]

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The "Client Reliance" Test

A second test used in defining the practice of law asks whether a client believes that he or she is receiving legal services.

Under this approach, a person is practicing law if others believe that the person is engaged in the traditional role of giving legal advice.

The focus of this test is on whether the client relied on the services rendered and thus requires an inquiry into the client's state of mind.

17

The "Client Reliance" Test Cont'd

In *State Bar v. Arizona Land Title & Trust* Co17 the Supreme Court of Arizona noted that "reliance by the client on advice or services rendered…[is pertinent] in determining whether certain conduct is the purported or actual practice of law."18

In that case, the court held that certain activities of real estate title companies constituted the practice of law both because they were activities that lawyers have traditionally performed and because customers of title companies rely on those activities as legal services.

In his *Williamette Law Review* article on party empowerment and mediation, Donald Weckstein defines legal advice "as the application of general principles or statements of law to a particular person's transactions or activities, with the mutual expectation of influencing that person's legal behavior."

Thus, under this definition, both client reliance and the intent of the purported attorney are relevant in determining whether a person has engaged in the practice (or unauthorized practice) of law.

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The "Application of Law to the Facts" Test

Another test used by courts to define UPL identifies the practice of law as relating the general body of legal knowledge to the facts of a particular case or to the specific legal problems of a client.

Some courts, for example, have approved of the sale of "divorce kits" on the grounds that they merely provide legal information to purchasers.

Other courts have concluded that the selection of certain forms to include in divorce kits necessarily involves the giving of legal advice because it involves the application of law to a particular problem (divorce).

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The "Application of Law to the Facts" Test Cont'd

Presumably under this test, merely stating what the law is on a general legal topic would not constitute UPL.

A person engages in the practice of law only when he or she takes a generally applicable legal principle, applies it to the facts of a specific case, and thereby reaches a legal conclusion.

However, as the cases mentioned above illustrate, stating a general legal principle in the context of a dispute involving that same principle may be viewed by a court as applying law to fact.

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The "Affecting Legal Rights" Test

A fourth test used by courts to define the practice of law is the "affecting legal rights" test.

Under this test, a person engages in the practice of law if he or she provides services that affect another's legal rights.

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The "Affecting Legal Rights" Test Cont'd

Thus, the drafting of contracts—or settlement agreements—clearly affects the legal rights of those bound by the contracts.

Likewise, providing legal information or advice, to the extent that someone acts upon the information or advice, also affects legal rights.

Because almost any activity from investment advice to counseling forgiveness and reconciliation can potentially affect someone's legal rights, this test is among the broadest of the approaches used by courts to define UPL.

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The "Attorney-Client Relationship" Test

The fifth test used by courts to determine what constitutes the practice of law focuses on the existence of an attorney-client relationship.

According to this test, there must be a personal relationship tantamount to that of attorney and client before the practice of law is implicated.

An example of such a test can be found in the Unauthorized Practice Rules of the Supreme Court of Virginia. Subsection B of Part Six provides that "it is from the relation of attorney and client that any practice of law must be derived."

23

What does this have to do with mediation?

As parties enter into the mediation process, they often ask questions or raise issues about their legal rights and responsibilities.

They may ask their mediator to assist them in evaluating or clarifying their legal positions.

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What does this have to do with mediation?

Similarly, mediators may find it useful to ask reality-testing questions of the parties that implicate legal issues.

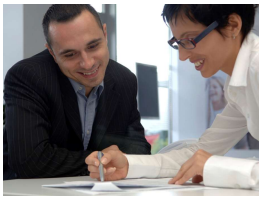
The providing of legal information and the asking of reality-testing questions are valuable to the mediation process in that these activities promote informed and considered decision-making by the parties.

25

What does this have to do with mediation?

If a settlement is reached, the mediator may be asked or may take it upon herself to assist the parties in committing the agreement to writing, which is useful in helping the parties clearly articulate, remember, and remain committed to the settlement reached during the mediation.

The effectiveness of the mediation process is thus served when the mediator is permitted to provide appropriate legal information and to memorialize the parties' settlement.



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What does this have to do with mediation?

- Depending upon how the practice of law is defined in a given jurisdiction, a typical mediation session may involve a range of activities by the mediator that approaches the practice of law.
- The following are the two most common categories of mediator activities that may potentially involve the practice of law:
  - applying law to facts
  - drafting settlement agreements that may be viewed as legal instruments

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The Debate

- Mediation practitioners, state bar ethics committees, and academic commentators are currently engaged in a heated debate over the question of whether any or all of the activities listed above constitute the practice of law.

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One side of the debate

- Representative of one side of this debate is Professor Carrie Menkel-Meadow.30
- Professor Menkel-Meadow argues that when a mediator evaluates the strengths and weakness of a client's case by applying legal principles to specific facts he or she is engaged in the practice of law.31
- She is concerned that mediation clients may be injured by reliance on erroneous information given to them by nonlawyer mediators,32 and she believes that current ADR guidelines and rules of ethics do not adequately address the practice of law issues inherent in mediation.33

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The other side of the debate

- On the opposite side of the spectrum, Donald Weckstein34 encourages mediators—both lawyers and nonlawyers alike—to actively evaluate the strengths and weaknesses of the disputing parties' cases by applying legal principles to the facts in the mediation.35
- He argues that "legal advice" should be construed narrowly for UPL purposes and that it requires both the mediator and the person receiving the advice to have a mutual expectation that the advice given will influence the recipient's behavior.36
- Under his approach, a nonlawyer mediator would be free to employ a wide range of evaluative techniques during mediation without engaging in the practice of law.

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What does the ABA say?

- The ABA (American Bar Association) Section of Dispute Resolution has noted the wide range of views expressed by scholars, mediators, and regulators concerning the question of whether mediation constitutes the practice of law.
- The Section believes that both the public interest and the practice of mediation would benefit from greater clarity with respect to this issue in the statutes and regulations governing the unauthorized practice of law (UPL).

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What does the ABA say? (cont'd)

- The Section believes that such statutes and regulations should be interpreted and applied in such a manner as to permit all individuals, regardless of whether they are lawyers, to serve as mediators.
- The enforcement of such statutes and regulations should be informed by the following principles:
  - Mediation is not the practice of law
  - Mediators' discussion of legal issues.
  - Drafting settlement agreements.
  - Mediators' responsibilities.

32

Mediation is not the practice of law.

Mediation is a process in which an impartial individual assists the parties in reaching a voluntary settlement. Such assistance does not constitute the practice of law.

The parties to the mediation are not represented by the mediator.

33

Mediators' discussion of legal issues

In disputes where the parties' legal rights or obligations are at issue, the mediator's discussions with the parties may involve legal issues.

Such discussions do not create an attorney-client relationship, and do not constitute legal advice, whether or not the mediator is an attorney.

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Drafting settlement agreements

When an agreement is reached in mediation, the parties often request assistance from the mediator in memorializing their agreement.

The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law.

If the mediator drafts an agreement that goes beyond the terms specified by the parties, he or she may be engaged in the practice of law.

However, in such a case, a mediator shall not be engaged in the practice of law if (a) all parties are represented by counsel and (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys.

35

Mediators' responsibilities.

Mediators have a responsibility to inform the parties in a mediation of the nature of the mediator's role in the process and the limits of that role.

Mediators should inform the parties:

A. that the mediator's role is not to provide them with legal representation, but rather to assist them in reaching a voluntary agreement;
B. that a settlement agreement may affect the parties' legal rights;
C. that each of the parties has the right to seek the advice of independent legal counsel throughout the mediation process and should seek such counsel before signing a settlement agreement.

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Your Student Manual

A survey was sent to 180 bar associations and mediation programs throughout the country on the subject of mediation and the unauthorized practice of law .

The vast majority of responding states indicated that they do not have any formal or informal rules regarding UPL and mediation and that they are unaware of any court cases or ethics opinions in their states that deal with this issue.

In your manual there is a summary of the responses from those few states that have addressed the issue of mediation and UPL, either through ethics or UPL opinions, court rules, or guidelines.

Only Virginia and North Carolina have attempted to create rules or guidelines to assist non-attorney mediators in avoiding the unauthorized practice of law.

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Errors & Omissions Insurance

Errors and Omissions Insurance protects your company from claims if your client holds you responsible for errors, or the failure of your work to perform as promised in your contract.

Coverage includes legal defense costs - no matter how baseless the allegations.

Errors and Omissions Insurance will pay for any resulting judgments against you, including court costs, up to the coverage limits on your policy.
Can be purchased at mediate.com

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Practical Exercise 4

Compose a list of preventative measures that you will employ to prevent the unauthorized practice of law as a mediator.

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Question & Answer
GET IN TOUCH
1-877-850-0052
info@mediatorcertification.org

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