

**Michael Moffitt: *The Four Ways to Assure Mediator Quality (and why none of them work)*
Breakout Session Transcript**

MICHAEL MOFFITT: My name is Michael Moffitt. I am the Dean of the Law School here at the University of Oregon and I get to look at this every day. Yeah, it is not exactly fair, is it? I think that they thought they were doing me a favor by not having that as a backdrop, but I actually think it just makes you wonder what's behind you. And it's beautiful, trust me. I don't know how much propaganda they provide about the speakers in the materials. I am currently the dean of the law school here. My roots are in mediation. My practice was almost exclusively mediation before I started teaching. And when I started teaching, the very first thing I taught was mediation. I used to run the mediation program at Harvard for a number of years, and I taught mediation and negotiation there and at a couple of schools and helped to run the ADR Center here at Oregon for a bunch of years before I became dean. My topic today is about quality control. And it is framed not -- well, I guess here's the slide I made to help myself feel better. I just need you to remember this. It will help me so that I don't need to keep reminding you that I actually love mediation because a chunk of what I am going to talk about this morning is about those instances in which mediation is failing to live up to its promises, in which individual mediators are failing to live up to best practices, how we might reassure the consumers of mediation that what they are getting is what we typically advertise. And to fast forward to the end, mine is something of a cautionary tale because I'm not sure that the structures exist for consumers of mediation reliably to trust that what they are getting is what mediation often promises in good faith and for good reasons and because lots of us also heart mediation. So that's the fast-forward, but it takes me a while to get to that point. The first thing that I'm going to ask -- I'm not going to ask you to do a lot today, but I am going to ask you to do one thing today and it is something of a creative writing exercise. And I think it's best done with one or two other people. If you are insufficiently caffeinated to deal with other human beings, you can do this on your own, I'm perfectly fine with that. But what I'm going to ask you to do, and again, I think this is best if you have another creative mind or two to help you out, I'm going to ask you to take a couple of minutes and imagine a mediation gone very badly. Not, oh gee, I wish I would have asked this question at a different time, or I wish I would have framed it. I mean really, really bad, creatively bad. Not just sort of kind of bad, debacle mediation. And I'm going to ask you to create that story for me at a little bit greater specificity. What went so badly? What was it that the mediator did or was, or what was the context in which the mediator was doing

such awful things? And I'd like some detail on the awfulness of it. And I promise that we will all trust that this is not you that we are talking about. You would never have done such a thing. In fact, no one in your program would have ever done such a thing. You're not even sure you could ever imagine anybody ever -- but, well, I guess one could imagine that a mediator might. And then just get creative and awful. And again, we will just imagine that it has nothing to do with anybody here. So take a few minutes, three minutes, to robustly come up with one example of a mediation gone terribly awful, awry. Creative writing exercise, it need never have actually happened. Just as a creative writing exercise, please come up with some awful mediation stories. I'll ask you to at least pause that piece of the creative writing exercise. And what I would really find helpful would be some short examples, excerpts of the -- you don't need to tell me -- show me the entire movie of the awful mediation, but enough of a headline that we can all wag our heads up and down and say, "Oh yeah, that's bad." And I'm a law professor, so I will actually just call on people if they -- avoiding eye contact doesn't work after a while, but I guess I'd prefer volunteers. Who would share at least pieces of the awful story?

AUDIENCE MEMBER: In North Carolina, mediation is a forced step before you can go to due process, and one of the cases that a friend of mine saw was that a child had been denied services when he was diagnosed with a degenerative genetic disease. And the parents and school districts essentially came to the mediation absolutely unwilling to deal and actually became more hostile as the environment set in, and the mediator had no control over the situation at all.

MICHAEL MOFFITT: All right. And so the mediator, the bad mediator here, would be unable to control something that was spiraling downward. And in fact, as long as we're in creative license land, the mediator made it worse, right? The mediator amped it up by, well, you can imagine a couple of different ways that a mediator might amp it up by making it worse. What else? Give me another example.

AUDIENCE MEMBER: Well, since we're in --

MICHAEL MOFFITT: Yeah, yeah. It's never. No, none of you -- yup, yup.

AUDIENCE MEMBER: No, no, no. Well, let me step in with more information.

MICHAEL MOFFITT: Hypothetical, yeah, yeah.

AUDIENCE MEMBER: So the mediator essentially put the SpEd director in a position where if she didn't settle, if she didn't come to some agreement, that she was being a real jerk because everybody settles at mediation every time there's a mediation. So she sort of backed her in a corner where like [inaudible].

MICHAEL MOFFITT: You have to settle or you are a jerk. Or as long as we're getting super hyperbolic, you have to settle or I'll go to the media, says the mediator. I'll write a book about you. By the way, I've been audio recording this, right? As long as we're making it super extra bad, we can imagine even worse than I'll think you're a jerk, right? What else, other examples?

AUDIENCE MEMBER: The mediator -- again, this feels like [inaudible]. So I'm picturing a situation where the mediator might actually offer counsel to perhaps the parents in caucus meeting to say, "You know, what you should do to ramp things up is this." So for example, going to the media or actually encouraging more intransigence or aggressiveness on their part.

MICHAEL MOFFITT: So it might be, what you should do is -- and then as long as we're making it super bad, it's also really bad advice, right? What you should do is sue them in traffic court, right? So let's make it bad legal advice too, right? What else, what else? Awful mediator.

AUDIENCE MEMBER: How about the situation where in caucus the mediator got some sort of information and did not get permission from that party, goes back into the other caucus, tells the other party whatever. Finally when they close the settlement, the second party disclosed, oh, that she just found out what was said in the first caucus, and then the whole settlement falls.

MICHAEL MOFFITT: Great. So the mediator learns the secret, uses the secret.

AUDIENCE MEMBER: To influence the settlement, to influence that party to come into an agreement.

MICHAEL MOFFITT: And then if we're extra creative, even gets the secret wrong, you know, in some fabulously libelous way, right? I mean, if we really -- yeah, good, another.

AUDIENCE MEMBER: I might have hypothetically been at that second mediation when she said that they must settle. And the mediator may have hypothetically said it in front of this special education [inaudible] whose head was twitching that parents are [inaudible].

MICHAEL MOFFITT: Yeah. One could imagine a mediator in a really awful mediation in which the mediator is unambiguous about certain biases which could be reflected in the mediation conversation. It could be that the mediator owns stock in one of the parties. It could be that the mediator -- we could -- yeah, so it could be in good faith that just the tears flow and yeah, all right. Another? Another bad mediator?

AUDIENCE MEMBER: The mediator forgets their role in the room and becomes the expert in the room and starts giving advice, special ed advice because they have that background, and then gets themselves in trouble because they're wrong or just alienates people in the room.

MICHAEL MOFFITT: Right, so the mediator is playing expert. And if we do this, you know, in the hyperbolic way, the mediator is the expert and gets some of it right and gets some of it wrong, and in all events messes things up by taking on that role.

AUDIENCE MEMBER: And on the other end of the spectrum, I may have --

MICHAEL MOFFITT: Witnessed hypothetically. You've imagined at least --

AUDIENCE MEMBER: I've imagined a situation where a mediator has called the special ed director prior to the mediation for setup and started asking them essentially to explain special ed to them.

MICHAEL MOFFITT: Yeah, so we'll combine those. They present themselves as an expert on special ed, but don't actually know anything about it, right? That would be a super good mediation.

AUDIENCE MEMBER: [inaudible] before we go in.

MICHAEL MOFFITT: Ah good, yeah.

AUDIENCE MEMBER: Or the mediator brings in their other profession, which would be that psychologist. Particular mediation [inaudible] had a parent and principal at odds. Turns out they had an intimate relationship.

MICHAEL MOFFITT: Good, thank you, thank you. So no, no, see, in the hyperbolic one, I've been doing this exercise with groups of professional mediators now for six and a half years. Never once in this exercise has someone failed to suggest that somebody might sleep with somebody, right? It's just part of the exercise. The only question is who's sleeping with who, right? Because

you can usually get to a pretty bad mediation story if somebody's sleeping with somebody, right? So yeah, absolutely. Or having other sorts of relationships that might, yeah.

AUDIENCE MEMBER: How about you have a bad mediator who is a retired judge? And he decides to tell both parties, whether in caucus or whatever, that, "Well, if you don't settle here today, this is what would happen when you go to court." Their roles are reversed. They're not mediator anymore, they're now playing judge, but yet still they're supposed to be a mediator.

MICHAEL MOFFITT: Right. So, "Here's what a court could do," could come out of the mouths of any sort of a trained mediator or untrained mediator. But it might have a special potency if it is a former judge mediator and messes up the dynamic in other sorts of creative ways. All right, I'm out of this page, so I declare us sort of done. But you know, we could, with beer, you could get even more creative about the kinds of things that might go wrong in a mediation. And I'm --

AUDIENCE MEMBER: What's in the cup?

MICHAEL MOFFITT: What's in the cup? Did you really just ask that? That's good mediating right there, right? At least ask the questions, see where it might go. I'm going to choose not to answer that. So I come back to this notion that I actually like mediation, I like very much the idea that what you just described ought not to happen, right? I think we could get heads wagging that at least that list ought not to happen. There are lots of places in the mediation literature and in mediation practice where I don't think we would have uniform head-wagging about exactly what a mediator ought to do or not do at a particular point, right? That's what's part of makes this practice so interesting is maybe this way, maybe that way is a best practice. But those are not best practices we could all, I think, probably agree. A lot of the literature in mediation talks about -- that's about as good as my graphics get, talk about mediators in a sort of a heroic way, right? That the notion is here's this great service that mediators are able to provide to the parties and to the community, and and and, right? It's got a romantic component to it. One which, again, I buy not necessarily as a descriptive matter, but at least as a potentiality. Now we know that there are hundreds of thousands of mediations that go on in this country every year. And every one of them is done by a human being, and so it's reasonable for us to imagine that not all of them go strictly to the ideal to which one might aspire if life had a rewind button, right? Most of us with an honesty hat on would say, "I might at least sometimes be able to think of things I wish I had done differently," right? Not this list sort of things, but one can imagine that occasionally mediators are just goofy, right? We just do things and you think, "Oh, I did not

just do that.” And that is true of every human endeavor and so fine. There are a very small number of human beings on this planet who aren’t just human. They’re really, really bad, right? They’re actually really bad people or they are so aggressively incompetent that the experience of them from the consumer perspective might as well be bad, right? They may not have bad intentions. Most of the things on this list aren’t necessarily about intent. You could imagine a very well-meaning mediator doing some pretty awful things. I’m not sure from a consumer perspective I care whether their heart was pure if this is what they did to me. And so my question, the question that has driven a lot of my scholarship in recent years, is about how consumers of mediation services might reasonably be assured that they’re not getting this. And so what I want to suggest is that as a basic matter, if you think about other kinds of service providers, which is how I looked at this question, looking at lots of other people who get paid to do things for others, doctors, attorneys, plumbers, tattoo artists, whatever, there are some fundamental differences in the ways that people are assured of the quality of those kinds of services. There are two fundamental distinctions that I want to call your attention to. One is that of the mechanisms that exist for other sorts of practices, one of the distinctions is between public mechanisms and private mechanisms. That is, some of the things that provide consumers with confidence come from the state or the feds or the local or whatever, the government, and some of them are market driven or privately driven. Then the other distinction that exists is that some of them are front-end. That is, we try to weed out the bad eggs before they do anything as a basic notion. And others are back-end, which is, well, punish those who do the bad stuff with the theory being they won’t continue and it will serve an educative function for others so that those others won’t do it, right? Those are just two fundamental distinctions. And it makes me a nice 2x2 grid and for the sort of visual-spatial folks in the group, that’s sometimes helpful. So for example, if you think about doctors, how do you know your doctor is any good? Well, there are some pieces of each of these quadrants operating. The state creates a front-end preventive measure, which is the license to practice medicine. And part of the theory of having the medical boards is that it weeds out the people who can’t even pass the medical boards, right? And so as a mechanism for assuring quality, that’s a piece of the puzzle. If a doctor does something badly, the state’s response can include revoking that license, right? If you’re bad enough, they say, “Never mind. I know we said you could practice law. What we meant by that is no, do something else.” Right? There are also private non-state-centered mechanisms for assuring the quality of medical services. There are reputational markets. Hospitals get ranked, doctors get ranked, and

frankly, even more important I think here, is somebody you know told you that doctor is good. That's how most people respond as to the doctor piece of things. There's a reputational market out there. And then on the back end, if a doctor does something really bad, we have private liability that permits the injured party to sue the doctor, right, for the damages that the doctor created. And the idea is that with malpractice lawsuits, we both make that particular victim whole and serve the preventive function of that particular kind of error happening again because people learn about it, and either the doctors themselves learn not to do that thing or, more likely, their insurance companies come in and say, "Hey, here's an idea. Don't leave the sponge inside the body before you sew it up." Or you know, whatever it might be, right? So the idea is that some combination of these sorts of mechanisms combine to create whatever confidence there is. And please don't mishear me. I'm not saying that everybody should be perfectly confident in their doctors because these mechanisms exist. I'm just saying that it is the combination of these things that create whatever confidence there might be. And you could go through a similar exercise with lots of other kinds of practitioners, and what you would find is that different kinds of practitioners emphasize some quadrants more than others. Some may not even exist for some kinds of practitioners. But it is a combination of one or more of these that I think exists for all the kinds of service providers about which I could think. And so then my question became, well, what about for mediators? What does the landscape look like in that framework for quality assurance of mediator services? And so I'm just going to walk through that grid. Front-end public, that sort of upper left-hand quadrant, does the public do anything to assure the quality of mediator services in a licensure sort of way? Well, not really. There is no license requirement for mediation in the way that there is for lawyering or doctoring. We create some barriers to entry into the market, but the problem for the idea writ large of licensure is if you want to set up a licensure regime, the only way to do that is to create a monopoly over the service, right? And then grant or deny a license for somebody providing that service. The only reason you need a medical license is that the state has created a monopoly over it and then distributed the rights to practice medicine to doctors, or lawyers for law, or whatever it might be. The state has not created a monopoly over mediation writ large. You can be sued for the unauthorized practice of law, the unauthorized practice of medicine. You cannot be sanctioned for the unauthorized asking of an open-ended question, right? That doesn't happen and it is because there is no generalized monopoly on the practice. Now there are particular pieces of the practice where what the state has done is, as a matter of the source point of the practice,

has said, "Look, you can print out business cards tomorrow, everybody on the planet, saying mediator, and we can't do anything about that. But what we can say is if you're going to do a particular kind of mediation with the particular kind of reference, then you have to have satisfied this, this, that, or the other." And where that has happened, that is where the state has created source point restrictions, then you see some of the more typical kinds of opportunities for quality control that you see in the monopolized professions or practices, right? How do you get on the list of people who are allowed to do it? Well, you've typically got a certain kind of training or education, you've signed onto a particular set of standards, you've agreed to this, that, or the other, and that's just sort of typical of any kind of practice or profession. So part of the issue with it for mediation in general is the monopoly problem, part of it is what I call the schmediation problem, which is a definitional problem. If the state were to try to say who can and cannot do mediation, whatever definition the state draws up, whatever it is, the next day, any entrepreneurial service provider who did not care to abide by those state restrictions would just reprint their business card to say schmediator or facilitator or consultant or advisor or whatever they want. Because definitionally, I have yet to see a definition of mediation that is not either under-inclusive or over-inclusive, right? You could define mediation in such a narrow way that basically none of you really does it most of the time that you're actually thinking you're mediating, or you could do it in a way that would engulf people who are accountants or therapists or business consultants or -- and they, of course, would say, "No, I'm not mediating. I'm," and then on we go. There just is a definitional problem which wraps back into the monopoly problem. So it's not that the front-end public operates nowhere. There are, in fact, even some states in the special ed context where they have more restrictions than just simple market, right? And in those contexts, what you can see is you start to get some examples of the kinds of things that operate here. But it certainly isn't true for mediation writ large. It's not even true for mediation in all special ed contexts that the state has this sort of monopoly that would permit it to do the kind of front-end public work that you would see for doctors or lawyers or the like. Now we still have three quadrants in the grid, so don't despair yet, but that's -- I think the most we could say is, well, kinda sometimes in some places, right, about this one. Back-end public: could the state sanction a lousy mediator? Well, probably not, right? Because first of all, they have to have something to take away. If there isn't a licensure regime, then the state's threat to take away your license is meaningless. Now the state doesn't just sanction people for licensure reasons, right? The state can also sanction you for committing securities fraud or

parking in the wrong place or -- right? There are all kinds of criminal laws that might apply, but your hypotheticals would have to be a lot more creative before the state's going to intervene, right, and say, "That constitutes manslaughter," right? I mean, those aren't manslaughter sorts of things. Sometimes there is behavior that constitutes a separate crime, but boy, you've got to work hard at it before even your really bad mediator conduct constitutes a crime that the state would punish you for. And so if what we're really talking about is super bad mediation that nobody would think is good mediation, what's the state going to do? And even if there were a license to take away, my next question would be, okay, but do they? Do they actually take that permission away from really bad mediators? Well, the state can only do that if it can hold the conduct of a mediator up against a standard and then say, "Well, you fell below that standard." What is the standard against which your behavior as a mediator is measured? The state probably hasn't told you. It probably has some vague references to competence, to knowledge, maybe things like impartiality and confidentiality, right? It's got some at most sort of vague things. Very few states have defined those in a way that would permit the state to come in and use that as the basis for a revoking. If you get creative enough, I bet they would, but you have to be almost entrepreneurially bad before it would trigger the state. And so I think back-end public is hard. There's a chance that what we've got is front-end private. That is, you know, markets. We sort of know who's good. The people who stink aren't going to keep getting cases is the idea behind that. And that may be right, at least in some limited way. I have some concerns about trusting this mechanism generally, and I would name three. The first is that as a reputational matter, we typically don't see repeat players on both sides of the V in a dispute in ways that would permit people to learn over time who the good and the bad folks are. And the marketplace for mediators is not consolidated the way it is for, let's say, accountants, right? If you want to hire an accountant, how do you know who a good accountant is? You probably just ask your neighbor. But if you don't do that, what you probably do is think about what company they work for, right? Because the company has a reputation. The individual accountant doesn't have a reputation. Frankly, if you know who an individual accountant is, something probably went wrong, right? You don't -- you kind of get to be a good accountant by not getting your name in the newspaper is the idea. And so accounting firms or law firms develop reputations. Mediation hasn't developed a marketplace of large firms. The companies therefore can't serve as a proxy for the quality of the people in them. And there're some good reasons why and we can talk about why it is that you haven't seen the emergence of big mediation firms that have to

do with leverage models and conflicts rules and all that sort of stuff. But it's a -- reputational markets would work a lot better if mediators were clustered in some way that we could use as a proxy for their quality, and they just aren't. There are some really good people out there, there're some less good people out there, and maybe you know who they are maybe, but consumers in general would have a hard time. The second thing that's hard about mediation reputation is I'm not sure what proxies we'd look to. Is it professional background? Well, we had the example of the judge. What do you want? This guy was a judge for 140 years, right? He must be good at mediating. Well, that's not a great proxy. This guy has four degrees in special ed mediation. He must be good. This mediator has a ton of experience. She's mediated five billion cases. Maybe that's a proxy, except that that's a circular -- that's imagining that the second case she got, she got because she was good on the first case, right, and then fast forward. They passed a test, they've been observed, they belong to an organization, right, might be a proxy. She's a member of ACR. Well yeah, that would be a proxy for quality if it were the case that ACR would kick you out if you were bad. ACR will kick you out if your check bounces, right? I have personal experience with that. It's not -- there aren't super proxy -- settlement rates? Troublesome proxy for quality of mediation services, right? So there's -- it's hard. If you're trying to trust a reputational market, it should be a reputation for something and so the proxies aren't great. And then layered onto that, in theory if they're good, you don't know a lot about what they're doing in that mediation, right? Actually, the more you know about what they do in mediation, maybe the less confidence you should have in them. Except that if you don't know what they're doing, how can you have any? So there's something broken about mediator reputational market. Not so fundamentally broken that I think, "Ah, it's completely random, there's no way to tell." But I think it actually requires consumers to have a lot more sophistication than consumers of other kinds of services, and so my enthusiasm for this part of the quadrant being the answer is dampened. It's not nothing, but it's dampened. And then the fourth of the quadrants, well, why don't we just let people sue the bad ones, right? And early in my academic career, I wrote a bunch of articles about suing mediators and then promptly was disinvited from all of the speaking engagements like this one. "Terrible idea," said the mediation community. But the theory is there, right? The theory is, look, if you're a service provider, you provide a lousy service, you injure people for it, they should be able to sue you for it. Make them whole, teach the rest of the community about what mediators ought not to do." That's the idea behind it. As you know, because you can pay your insurance premiums with the change

you find in your couch, this is not a widely available quality control mechanism. And there are a number of legal reasons why that is the case. For quickies, although it turns out that there are more, if you want to sue someone for malpractice in anything, you have to establish that they breached a duty that they owed you. What duty does a mediator owe to parties? Well, mediate is essential. Impartiality? Maybe. But you know what? I'd defend that case. You go on the street corner today and you ask random person, "Name me a mediator," person's probably going to say, "Who are you and why are you asking me that?" But if you actually got an answer out of them, they're probably going to say something like, "I don't know, Jimmy Carter." Jimmy Carter's a lot of things, mediator included. Impartial is not on the list, right? Just unarguably is not impartial and unapologetic about that, and frankly, thank goodness he is not. Has an agenda, is a mediator. Now maybe as a contractual matter, we have promised to be something. I did a study of mediators' contracts, collected hundreds and hundreds of them, and by collected I mean paid research assistants to collect hundreds and hundreds of them and analyze them. You would be either shocked or impressed by how little mediator contracts promise. Take a look at your own at some point. What do you promise? My guess is you promise something like, "We'll make best efforts to facilitate dialogue." Breach that! I mean, try to breach that. That's really hard, right? Because after the fact, part of the problem with establishing a breach of a duty is establishing a standard of practice. If you want to sue a doctor, if you want to sue a lawyer, what you do is you say, "Nobody in the medical community in their right mind, nobody in the legal community in their right mind would do X." X is really hard to say in mediation. Nobody would separate the-- oh well, they -- nobody would push the -- well, they -- nobody would ever advise them about -- well actually, some do, but I -- right? You see the problem, right? We have this gloriously diverse practice of mediation, which, among other things, serves the function of making us very hard to sue for having done something no mediator would do because it turns out lots of mediators -- oh, it turns out my computer's unimpressed with something I have failed to do here. It's hard to say what no mediator would do because mediators do a lot of things in good faith, probably for good reasons in different contexts. So part of the problem is this breach of duty. Part of the problem is a causation problem. Let's say - - let's look at your list here. Let's say the mediator tells party that they're a jerk if they don't do something and tells them what a court would do and breaches confidence. Yeah, does all kinds - - does everything on this list, all of them in one mediation.

AUDIENCE MEMBER: Awesome!

MICHAEL MOFFITT: I know! It would take a while. Here's the thing. You need causation and damages. What is the injury to the party, the aggrieved party? Well, there are two possible scenarios, right, in the mediation in a simplistic, legalistic way. Either they settled and they now wish they hadn't settled on those terms, or they didn't settle and they think they could have if the mediator had only been competent, right? Those are the two possibilities. So now from a legal perspective, look at that. If they settled and now regret the terms of the settlement, see how hard it is for that aggrieved party to say, "I wouldn't have if the mediator had not done X. I know that's my signature there, but I can prove to you that I would not have done that if the mediator had not done X." That's hard. It's hard to prove what you would have done. I'm not saying this is fair, but a defense lawyer defending the attorney -- the mediator here doesn't have a very hard job.

AUDIENCE MEMBER: But in education, all the parents have to do is re-file the case and go back into mediation or go into a hearing on it.

MICHAEL MOFFITT: And so therefore the prospect of suing the mediator for damages, what are the damages? I wasted a month. I had to re-file. I want my filing fees. And I want --

AUDIENCE MEMBER: No, no, the problem is compensatory education for the kid.

MICHAEL MOFFITT: Ah, but the mediator's not on the hook for that.

AUDIENCE MEMBER: No, right, he's not. But that's where the --

MICHAEL MOFFITT: Right. But if the mediator's not on the hook, does the mediator get sued? No. What plaintiff's attorney takes a case where the homerun is, "I get a week of your time paid for and the filing fees refunded." 30% of that on a contingent fee basis. No plaintiff's attorney takes that, right? And so then the other possibility is they didn't settle, but you think they should have. It's the same damages problem, right? We wasted more time than we needed to. Okay, let's say somehow you proved that. Okay, you get your time paid for? You don't have to pay the mediator bill? These don't have enough zeroes attached to them to make it attractive to plaintiff's attorneys, and you need an attorney to win in something like this because it's a hard slog. There was a hand over here.

AUDIENCE MEMBER: Putting aside finding an attorney for it, can you help me or all of us think through what breach of confidentiality, what the duty -- because that's the only way you're going to have [inaudible].

MICHAEL MOFFITT: A reasonably clear duty. So breach of confidentiality is one of the very few avenues through which the law has analogues that would help someone in a lawsuit against mediators. So let's just assume, and it's a big assumption, but let's just assume somehow that the damages associated with the breach of confidentiality were establishable and big enough to be of interest. Yeah, then you do have a clearer path because it turns out lots of professionals have duties of confidentiality. And what you would wind up doing is piggy-backing on the law that has been established for therapists, doctors, lawyers, right? Those are the three biggies. Priests turn out to be harder to -- but those three, those three there is an established set of malpractice cases that at least the legal theories of which you can go ahead and do. Now the fourth thing up here complicates it, but for now let me just tell you that there is a wrinkle that is unique to mediation. And I don't think we ought as a community to be proud of this wrinkle. We have established confidentiality rules that are different than any other practice's confidentiality rules. Not all states have adopted them, but some of the confidentiality rules out there don't have an exception for allegations of malfeasance by the mediator herself. So you could wind up in the absolutely indefensibly absurd situation where a former mediation party would be saying about a mediator, "She breached her duty of confidentiality," and the mediator could come in and in defense say, "I'm sorry, that's confidential." Bad us, bad, right? That's really not how it ought to be. Most states have carved exceptions, but not all of them.

AUDIENCE MEMBER: Is there case law that supports a mediator in the same position as a doctor or lawyer or a therapist?

MICHAEL MOFFITT: There's not in the direct and immediate sense of the implied -- some states have something that is essentially a tort. Some states permit lawsuits that are essentially breach of trust lawsuits. None has imposed that on mediators the way they have on some others, but at least the legal framework is there where if what we had was truly a breach of confidentiality, the framework is there so that what we could imagine I think quite easily happening would be an argument by analogy that says, "Look, the contract, the mediation agreement says confidential. The nature of the position depends on confidentiality. See, e.g., all these state statutes that provide for mediation confidentiality. Confidentiality is embedded in there. For a mediator to breach that does constitute a breach of a duty, even if there isn't a state statute creating that cause of action." I think that wouldn't be so super hard to prove. There are not

good examples of successful lawsuits out there, but I don't think that's because it cannot be proven, I don't think that's because the legal impediment is there. I think it is because as a practical matter, there weren't enough zeroes attached to the damages or because a lot of jurisdictions have immunity for mediators so that even if you get past all three of these, the mediator has a trump card. Some states have what is called qualified immunity; some states have what's called quasi-judicial immunity. Quasi-judicial immunity is a common law created that is court-created immunity that says, "Look, mediators are like judges, hence the quasi-judicial. You can't sue a judge for a bad decision. Your remedy is to appeal the decision, but you can't sue that judge personally for being a lousy judge." Quasi-judicial is essentially absolute immunity. If you are in a state in which quasi-judicial immunity exists, I don't know why you're paying insurance premiums at all. If, instead, you're in a state that has qualified immunity, that typically is a statutory immunity and you can look up in your state whether you do or don't. Lots do have qualified immunity for mediators. And the way that the qualification reads is if all you were is negligent, you can't be sued. No matter how bad you were, if you were merely negligent, you can't be sued. Now if you were intentional in inflicting harm on a party, then fine, all bets are off and you can be sued, but recall whether we thought any of these were intentional, whether you could demonstrate they were intentional. Most of them probably not, right? And so the only parties who would successfully prevail in a breach of confidentiality case in a qualified immunity state would be mediators who you'd be able to say, "Actually, they got me to reveal a bunch of deep, dark secrets so that they could go and breach. This was intentional." That is a rough barrier, right? I mean, yeah, you can allege it, but proving that? That'd be a case I'd be unlikely to take, right, as a plaintiff's attorney. Absent some smoking gun audio recording of the mediator say, "I'm going to get you now," and running to the microphone. It's really hard. I'm imagining you all have mediator malpractice insurance. If you don't, you're in good company. I don't. I operate without the net. It turns out there are a lot of different providers out there who will sell you mediator malpractice insurance. If you look really carefully, it's all underwritten by the same company, and it is phenomenally cheap. Those who do have it, how much is it running these days? Do you remember?

AUDIENCE MEMBER: \$600 a year.

MICHAEL MOFFITT: \$600 a year. By contrast, doctor's malpractice insurance, you know, you probably add two digits. It's a reflection of the insurance companies' assessments of their

exposure to the risk to this quadrant, right? And most of that \$600 is not based on their assessment that they will ever have to pay damages. It's just cost of defense insurance, right? You're essentially, get it, paying for insurance for the lawyer to defend you, but everybody knows you're going to win. That's how that price is set. I mean, I'm being a little bit flippant and I actually quite like the folks at Complete Equity Markets, which is the underwriter for all of this. We've been in dialogue ever since they heard about my horrible idea about suing mediators. And I said, "Folks, I didn't invent the idea of suing mediators. I'm just studying whether it could actually happen." And so we've been mutually interested, one in the other, for now some good number of years. As a matter of practice, even though there are hundreds of thousands of mediations going on every year in this country, the number of successful lawsuits, private lawsuits brought against mediators in the past 15 years, I think, I'm not positive because I'm not sure how you would ever know for sure, I think the answer is two. And neither of them was really a mediator, but they were sort of kind of a mediator, enough that they fell into the -- one was a court advisor that was acting in a sort of a mediatory capacity, and another was sort of a judge doing a settlement conference-ish sort of -- but you know, close enough to mediation. Real vanilla-flavored mediators out there getting sued for malpractice, it's just not happening. So that's good news, right, for mediators. From a quality control perspective, the how do we assure, this is how this inquiry started, how do we assure consumers that they're going to get quality? I don't think we should look to that bottom right quadrant as the likely avenue for reassurance.

AUDIENCE MEMBER: What are you proposing?

MICHAEL MOFFITT: Well see, there's the problem, right? None of the four -- yeah, and that is, I think, actually part of what I worry about is I worry that the fact that nobody is getting sued is being used as evidence that we are all so good. The fact that nobody's having their license revoked is evidence that we all are great.

AUDIENCE MEMBER: We know we're not.

MICHAEL MOFFITT: Right, yeah, we're not. So here's the thing. I've studied legal malpractice and legal insurance. I've studied medical malpractice and medical insurance. I've looked at a few different professions or practices. They all started roughly where we are. In the 1950's, medical malpractice was an additional rider on your homeowner's insurance. It cost \$50 a year. Legal malpractice insurance was actually hard to get until as recently as 30 or 40 years ago. Something

will give. I'm not sure which of these things is going to give, but this is not a stable condition. Our successors some small number of decades from now will not be giving the same speech. Something in one of these quadrants is going to give, and I'd love your guesses. I have some guesses about the more likely and the less likely, but the answer is not, "So sit back and relax." The answer is, "Let's think hard about which of these quadrants might present some opportunity," because something's going to unless we are utterly different than every other practice about which I've learned anything.

AUDIENCE MEMBER: What about lawyers who offer mediation as one of their portfolio services? Is there a curtain of immunity that comes down when they're wearing their mediator hat and lifts back up when they're not?

MICHAEL MOFFITT: That's a great question. So there are lawyers who periodically put on the hat with the M on it and then take it off and whatnot. They are at greater risk than people who don't have the lawyer hat, but I don't think it's because of anything particular to mediators. I think it is because lawyers' ethics rules are drafted in a way that presumes the predominance of lawyers' ethics rules over anything else. So what you don't see in legal ethics rules is something that says, "A lawyer shall not do X unless they're doing something that has a different ethics code, in which case we cede." They just assume that the lawyers' ethics trump. And so I do think that there are malpractice opportunities that that sort of private, back-end, after the fact and public, back-end, after the fact sanctioning opportunities. But here's the thing. I think they're not for mediation malpractice. They are for legal malpractice, right? And so the question is, do any of these things constitute legal malpractice? And if so, then yes, right? So if breaching confidentiality is a breach of a legal ethics duty, which it may or may not under the ways that this usually spills out, but if it is, then fine. If fraud -- right, legal ethics say 4.1, 8 -- there are legal rules that say that lawyers can't commit fraud. If you can get an attorney mediator for having committed fraud, then you've got an avenue through legal malpractice to get you there. The challenge with that, the reason that that doesn't just answer everything for me is there're a lot of people doing mediation who are not lawyers and a lot of the stuff you came up with isn't actually legal malpractice. It's stinky, but other than some generalized articulations in legal ethics that say you have to be competent, it just wraps back in on itself, right? What do you mean by competent? Are you suggesting that no mediator would ever push a party, challenge that party's thinking about -- of course they would. Might have done it in-artfully, but can you

say that crossed the line into incompetence? That's really rough because we in the mediation community have this wonderfully inclusive umbrella of practices that we say -- and I do mean that. I do think it's wonderful. There's no articulation of mediation best practices that could get me to wag my head up and down and say, "Yeah, that's right, all mediators should." "Oh, well unless," winds up always being my -- but that means the standard of care isn't there, so competence isn't. Legal malpractice, yes, but it doesn't answer fully.

AUDIENCE MEMBER: Yeah, how about distinguishing between types of mediation?

MICHAEL MOFFITT: Good, yeah. So one possibility, and we can draw some lessons from psychologists, therapists in this, is that a mediator might advertise herself a certain way. I am an X-style mediator, right? Then in theory, at least as a matter of contract, if they do something that isn't X-style, you can say, "Hey, that's not what I paid for. That's not what I signed up for," right? So if I advertise myself as a, I don't know, as a Jungian therapist and I go do something that isn't Jungian, well, might there not be a cause of action? There might be. It's very hard in the mediation world to make that happen, in part because there's a whole bunch of research that says that mediators mis-self-identify with considerable frequency. "I am a insert blank facilitative mediator." And then a careful look at the transcript says, "Well, you did do some facilitative things in there, and you did some other stuff too." There's just a bunch of research out there that says the practice doesn't always match the description. And that even assumes that we know what we mean by descriptions. And if you've been through various trainings of one level or another or one label or another, you know that even the very narrowly defined approaches to mediation have a lot of slough room in there where it'd be hard to say, "You breached that."

AUDIENCE MEMBER: You know, well I was thinking more of different areas that people would mediate in, distinguishing between educational mediation versus EEOC or employment or something in that way.

MICHAEL MOFFITT: The opportunity there, the upside there is that the more narrowly defined the area of mediation, the greater the likelihood that a standard of practice and a corresponding standard of care would be established. If it were the case that special ed mediators collectively said and did a more narrowly defined range of things than mediators writ large, then yes, then you get an easier time in a lawsuit, for example, of saying they breached their duty because no special ed mediators of any competence or care would do X. If that's true, then yes. I don't know

and I haven't studied special ed mediation other than just some literature reviews and whatnot, I have not lived your world. Maybe that kind of consensus exists in your practice area. I haven't found any practice areas in which that kind of consensus exists, but maybe it exists here. And if so, then there's at least an opportunity as to duty.

AUDIENCE MEMBER: Our state, which is Michigan, we operate on a contract -- we are an independent non-profit who receives the OSEP money for our department. And then we, in turn, contract with local non-profits who use volunteers. So the mediators are not receiving any kind of reimbursement for their time, for their expertise. We as the grantee are reimbursing these local non-profits, so where does the exposure lie in something like that?

MICHAEL MOFFITT: To the extent there is exposure, right, it could be at any link in that chain. The fact that you're not getting paid to do something doesn't mean you can't be sued for doing it. It just means that the demand for damages can't be a reimbursement of the funds that you've received. But if you are on a volunteer basis performing surgery on someone, right, you can still get sued if you hurt them, right? So the individual mediator still has that duty. In theory, there would be a duty to each of the organizations in that chain. The nature of that duty, or rather establishing a breach of the relevant duties, is similarly very hard. Now if you as an organization providing funds to organizations that organize the volunteers who actually provide the services, if I came in as a plaintiff's attorney and I said, "Can you show me your application?" And you say, "Oh yeah, anybody who applies gets in." And I say, "Show me your evaluation." And you say, "We've never asked anyone for their feedback on anything." And I say, "Well, show me your training that you require, whatever requirements you might have on that intermediary organization." And you say, "Never occurred to us to have any. We just dole out the state money to whoever asks for it." That's attractive, right? I mean, that's -- you're making the case look better from a plaintiff's perspective there, but in the real world you've probably got something, right? You've got something that says, well, you at least have to be a mediation organization of some sort, maybe even some requirements on that. As soon as you get that baseline in there, do you see how hard it's going to be for me as a plaintiff's attorney to say, "Well, if only you had articulated your standards differently, you would have -- not impossible. The organizational exposure exists, but I think it's very hard. And in some states, I don't know how Michigan does it, but in some states then, even in the granting of it, you may enjoy certain levels of governmental immunity organizationally as an agent of that ought not in my sort of

normative sense be the case, but it is sometimes. Because you're treated as an administrative branch or an executive -- and that means that actually your realistic chance of exposure from private back-end seems low to me. Public back-end? Maybe, right? Paula Young has done some studies of complaints about mediators, not actual lawsuits because everybody can read my articles and see why they can't win, but they still complain, right? "Dear program administrator, I went through this crappy mediation. You should do something awful to that mediator. Love and kisses." You know, whatever. Those sorts of letters could, in your context, have an effect that would be a back-end public, right, where if enough of those folks create enough noise of unhappiness, then the government comes in and says, "You know what? We're going to find somebody else to provide these services." Would be the theory, right? I doubt that happens very often, and it's not much exposure in the true technical sense.

AUDIENCE MEMBER: Can you see a scenario, because you said we've got a few decades maybe before things change --

MICHAEL MOFFITT: I think so, yeah.

AUDIENCE MEMBER: So can you see a scenario that would trigger I would think front-end public, and then move it over to -- by having that, then that would then make a back-end public also a fairly --

MICHAEL MOFFITT: A real possibility. I think there is virtually no chance of a global licensure, global monopoly, no one can mediate without a license. The schmediation problem will just cure for that overnight. What I do think we're likely to see, and I have mixed feelings about this, but what I do think we're likely to see is increasing source point restrictions. That is, an increasing percentage of the kinds of cases that appear in mediation going through a state either court or administrative body that then puts restrictions on who can mediate that. They're not saying you can't mediate in general, but if you want to get this kind of case referred to you, you have to meet these standards, you have to agree to these ethics, you have to do these continuing ed requirements, right? You can start to see that. I think you're going to see more of that. I think the challenge, the opportunity in that is those in theory would be good mechanisms to have. There are some challenges associated with it. One of them is I don't think any of us knows really what the good things to impose would be, right? You've seen Florida go through gymnastics trying to figure out different mechanisms for what makes a good mediator, and I think with good reason because I don't think we know. But there's at least some opportunity there. The

other thing is that you will -- I was going to say never. Maybe never is too strong, but something approaching never be able to fully shut off the private market. And I do have some fears that what you'll wind up with is a two-tier system where people who can't pay get the government mediator.

AUDIENCE MEMBER: Nothing wrong with the government mediator.

MICHAEL MOFFITT: Might not be. But I think we have a fair number of examples of other kinds of private practitioners where it is not accurate to say that there's no difference between a public defender and the person who can afford the million dollar defense attorney. And I say that with all love and respect for public defenders. Their job is structured in a way that makes that not a choice where you would say, "Well, I would be indifferent."

AUDIENCE MEMBER: As a former public defender in Florida, actually -- yes, the million dollar one, but at some level you were getting better representation with the institutional government regular practitioner than you would be from a person trying to make a go of it as a business.

MICHAEL MOFFITT: As a solo I hung my shingle and they look up DUI as you're telling them what -- I think that's right. No, I think that's right. And I think you would say the same about medical professionals, right? The doctor in the VA hospital may be better than whoever it might be, but we're not ever going to, I don't think, I don't even think I hope, that that government mediator is the only game in town. I don't think that's going to happen and I think there are risks associated with that. But I do think -- the original question was about prediction. I think that there is going to be movement in this northwest quadrant here. I think you will start seeing more. I suspect this is one of the areas in which that will be increasingly true not because of who you are, but because of who the parties necessarily are. You couldn't do public front-end if what you were really caring about is multinational business disputes. Because you don't have -- you the state don't have any control over either of those parties. Where there is a state entity that is a party to the case, I think you have greater opportunity for the state then to be involved in saying who gets to provide those services, right? I think there is an opportunity.

AUDIENCE MEMBER: Well, right now -- I mean, still you have to choose. Going back to your idea about psychologists and therapists, you have a two-tiered market for them anyway. You have licensed psychologists, you have licensed therapists, MSW's, things like that. And at the same

time, you have kind of a subrosa culture of counselors, you know, folks that, you know, provide a listening voice.

MICHAEL MOFFITT: They're life coaches.

AUDIENCE MEMBER: Coaches, yeah.

MICHAEL MOFFITT: They're schmediators.

AUDIENCE MEMBER: Yes. And well we still have that, okay, and arguably it's not the best system. But you know, you don't see that happening with mediation also?

MICHAEL MOFFITT: I worry very much. Well, not worry. I think it is quite unlikely that you will ever find a way to establish a monopoly, right, over what mediation is or isn't. You have to have a definition before you can create the monopoly. And then you have to have the political will to create the monopoly. I don't think either of those is likely writ large. In a particular context, maybe like special ed I could see, but only because we can restrict the source of the cases, right? You couldn't be -- imagine, I think this is easy to imagine. You couldn't make a living as a private mediator doing special ed mediations outside of the system, right? I don't sign onto any of this, but I'll make it -- you know, I think that's a great example of a place where it's not because you're not allowed to be a mediator, it's because you won't get any cases, right? So the market will sort of cure -- I mean, you can print up a business card and that's fine. I also think that, probably not in this context, but I also think there's a possibility that insurance companies, not as a public body, but as a private matter won't pay for mediators who don't do X, right? And so we may have this sort of funky mediation. It won't really be certification in the sense of the state license, it's just that you won't get -- now most of us, sadly, don't charge enough to make that a true barrier, but especially if what you're talking about is a regular stream of cases, you could imagine that insurance companies would come along and say, "No, look, if you want to get that covered, here's what it's got to take. You've got to sign onto the following ethics codes. I know that mediators in general don't have to sign on, but if you want us to pay for your mediation, you're going to have to..." And that's what you've seen a lot in the medical field is it's not that you can't do X, you can't have certain billing practices, you can't have certain -- but if you want to get reimbursed by, then you have to meet. That there's some possibility of.

AUDIENCE MEMBER: And that would be if you were to ask me to make a prediction, I think that's where it would be driven from in terms of if the amount of charges that you could get

paid for by a third party were significant enough then, and you would have third parties that would be willing to reimburse for that based on policies or whatever, I think that's the way it would go.

MICHAEL MOFFITT: I don't know whether the market for special ed mediation in particular has that market feature. The concept I get and quite like. I have a hard time getting us to the point where there is a robust enough fee and insurance structure to make that happen. It could, but I'm not sure. I'm not sold that we're going to get complaint mechanisms so that, you know, if enough grouchy people -- but you know what? I have to say, I never would have predicted the impact of thumbs up, thumbs down, and online clicking, how many stars does somebody get on whoever's list. Who knew that could have the -- it does. And so maybe, maybe there are reputational things I'm underestimating here. It's possible that the market will shake out in a way where if you as mediator make people mad enough, they're going to go online and say bad things about you and you're going to have a hard time getting cases. I wouldn't have thought it possible even ten years ago, but if you look at the devastating impacts of online grouchy reviews, it apparently really, really matters to a lot of kinds of service providers. Why not mediators? Maybe, you know, maybe.

AUDIENCE MEMBER: It could be like Twitter.

MICHAEL MOFFITT: It could be, yeah. The blogosphere, exactly. Now in theory, an educated consumer would say, "Wait, let me get this straight. I'm hiring a mediator who is tweeting while mediating." I mean, you know, it should not be a symbol, a proxy for quality that you're getting a lot of followers on that. But again, I wouldn't have even predicted the blogosphere and the tweeting and the Amazon stars. Just even ten years ago, I wouldn't have, so maybe there's a reputational opportunity.

AUDIENCE MEMBER: I, in addition to doing mediation, facilitation, coordination for the state of Ohio, I also investigate complaints. And I had a complaint recently where a parent got on Facebook and just trashed the special ed director, all that kind of stuff, and had a huge following of people like all over the country who were telling her how awful this district was. And I mean, I was amazed.

MICHAEL MOFFITT: She wrote me, actually.

AUDIENCE MEMBER: Are you serious?

MICHAEL MOFFITT: Yeah. Because if you do a google search for suing mediators, like I pop up. And people misunderstand me as an entrepreneur who, you know, wants to sue mediators. Yeah, it's really active, I cannot unsubscribe from her email list now, yeah.

AUDIENCE MEMBER: [inaudible] I got copies of the Facebook postings. But I was like, "Holy crap!"

MICHAEL MOFFITT: Yeah. And so, you know, maybe, maybe this is actually going to go someplace. Now I'm not sure we should have a lot of hope and confidence and optimism about that, right, because one angry person is not actually a proxy for quality, but might the reputational marketplace look different ten years from now?

AUDIENCE MEMBER: That's also very manipulable. There are firms that manipulate that stuff.

MICHAEL MOFFITT: Absolutely. You hire them to say the most glowing or the most awful --

AUDIENCE MEMBER: But just where you come up in the list.

MICHAEL MOFFITT: Absolutely, because very few of us click through the first page, right, and so you always want the first page of comments to be fabulous or terrible, depending. Yeah, there's a whole market around this.

AUDIENCE MEMBER: In Wisconsin, we had the state-wide mediation organization in Wisconsin.

MICHAEL MOFFITT: WAM.

AUDIENCE MEMBER: Wisconsin Association of Mediators, right. And so we looked into the whole licensure issue, realized we couldn't monitor that, so we went to a practitioner's status so that the public, when they're looking for a mediator, can search in our website for mediators in their area that have this practitioner's status, and we require certain educational components. And we also wrote a guide to selecting a mediator that we pass out to the consumer so that they can have some idea of how you could choose a mediator, so it's some small steps, but it's still something that's there for the consumer to access.

MICHAEL MOFFITT: And that's exactly this thing. It demands that you make some decisions about what is and isn't on that list. You know, there's some policy decisions embedded in there, and different states have emphasized some more than others. The WAM one looks very different than Florida's, but yeah, you could imagine trying to get consumers to pay attention to

some things and not other things on the idea that there's a reputational market. Now maybe your clients, the people who consume the mediator services that you administer, have choices. I don't know. If not, then all this market reputational stuff doesn't much matter if they just get assigned a mediator. It's really hard to -- well, then it puts more burden on you to be super confident of the quality of the mediator and a lot of the marketplace stuff goes away if the consumer doesn't have a choice. But in lots of contexts, the consumer at least has some ability to affect the choice of who's going to walk in with the M on his or her head.

AUDIENCE MEMBER: And I think in special ed mediation, the school districts are repeat players, and they do talk to each other and special ed directors talk to themselves. And so the market does take care of mediators in that way. Or parents sometimes talk to advocates who are repeat players as well.

MICHAEL MOFFITT: Right. If it is just the school district that is the repeat -- if you don't have the advocates as well, then actually I would say that would be a negative, right? If you have repeat players only on one side of the V and they're the ones choosing the neutral, that ought not to give us confidence. But if you've got them on both sides, then that should give us more confidence, right? And that's the arbitration literature, you know, in there. I'm not sure it's terribly different, at least in a logic perspective.

AUDIENCE MEMBER: So I was going to comment that you mentioned in Florida in this recent discussion about there's a gatekeeper function here. I'm wondering about back-end public and front-end privates in that formula and I think about Florida's processes, [inaudible] mediator sanction is it gets published in, you know, local weekly notice. And all the courts are on notice that this mediator is off the list for now. And so it's this public exposure element. It's government regulated in that way. And in the special ed context, we often have sort of a brokerage channel, right? You have to contact Wisconsin SEMS to get assigned one of the 35 mediators if I'm recalling correctly. And so there's this -- it's a gatekeeper who's primed to do some of that front-end public. You have to take our prescribed training. Our manual is here, it's very clear. If you don't pass it by our standards, you don't get in. But I guess I just struggle with the fact that the reputational effect sometimes happens in a little smaller area, right? In local legal cultures where attorneys are choosing the mediator or advising clients, the reputation doesn't have to be Facebook.

MICHAEL MOFFITT: The people who are actually making choices, that's exactly right. Yeah, and that is a way in which mediation is at least likely to be more like lawyering than doctoring. You don't have that analogue in doctoring, but in lawyering, I don't know how many of you are lawyers, but if you ever get the monthly bar magazine in whatever state you're in, odds are decent that at some point in a sort of voyeuristic, rubbernecking kind of way, you flip to see who got the disciplinary action, right? It's that, right? Because it's actually -- it's like, "Oh my god, I can't believe she did that!" Right? I mean it's totally interesting because it's like even better stories than this, right? Yeah, there is that possibility and I think it's very real in states where such a mechanism exists. And I don't think that that is yet the majority of states. In most states, there is an office that receives complaints, period, right? They sure did receive your complaint. In fact, I bet they've got it in a file somewhere. I mean, as a practical matter, there's just not even that publicity function, much less the sanctioning function. There is some possibility that what we're going to see is a lawsuit. There are enough creative people out there doing enough creative things to each other that eventually somebody's going to do it in some way that gets past the barriers that I named, right? It's going to be somebody who is rich and therefore price insensitive to the whole calculation. They're going to be pissed off and they're going to have suffered some injury in a way that is identifiable. It's not going to happen in a state where there's immunity. And they're going to have done -- that mediator's going to have something bad enough where a fact-finder's going to say, "Yeah, actually you can't do that. That did hurt that party in this way." And out of that we're likely to get the skids greased in a way. There have been a couple of lawsuits in the last 24 months that have proceeded in ways that I thought, "Ah, this is it, this is the one!" And then they've sort of petered out for one reason or another. But that doesn't mean it'll never happen. At some point, it will. Anyway, the notion here is partially a predictive one, something's going to change, but partially a normative one because I think that, especially in a community like this where the mediation practice is similar enough across state lines and a small enough community, that you actually probably do have some control over which of these is likely to be pronounced. If there are standards that you think in this community are actually articulable, that could attach broadly across so that you could establish - you've got an opportunity here in a way that generic business mediators don't. Whether you want to do something with that, I don't know. I'm not advising. I just from an outside perspective, this is an example of a mediation community that could articulate standards, that would create standards of care, that could, for example, attach uniformly to mediators because

of source point restrictions, that could even use things that mediators need as the hook. So for example, could a state confidentiality statute be conditioned on compliance with something? I think it could in ways that isn't true for the broad mediation community. I think we are very close up on the time when this session was scheduled to end, and I think there's lunch after this. And it's a silly idea to be late for lunch. And so I thank you. I'm happy to stay and talk as long as you want, but you should go. So, thanks.