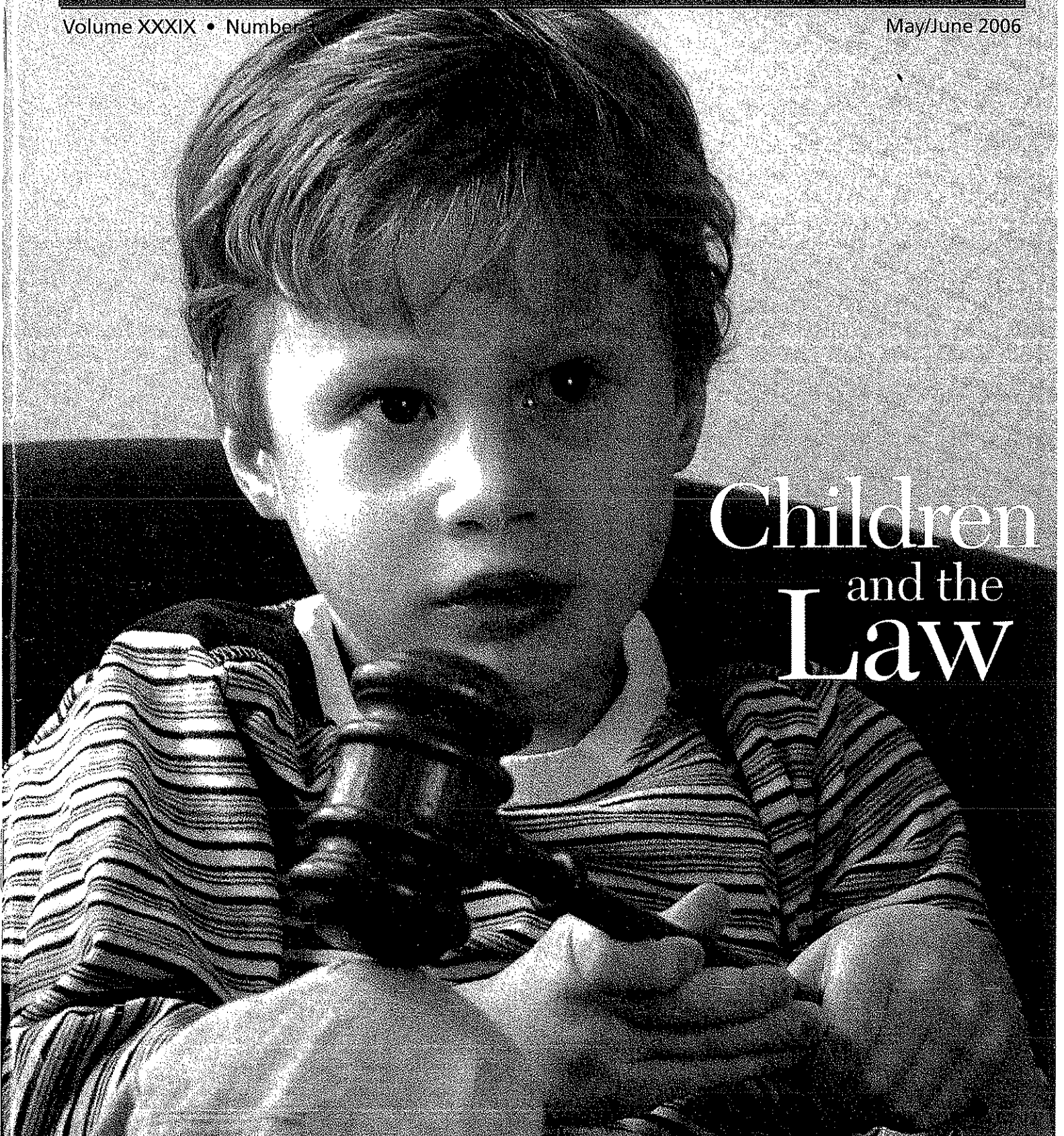


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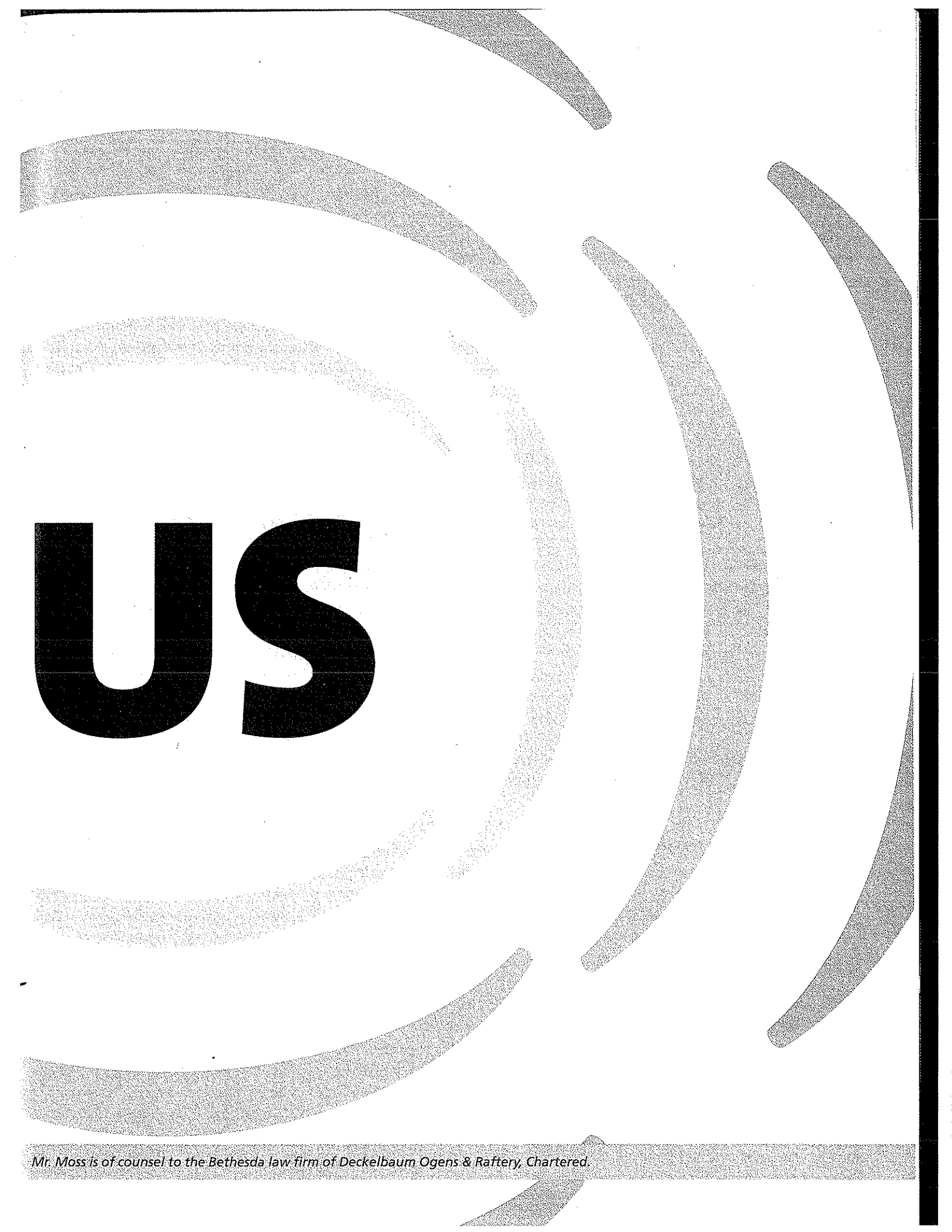


## Children and the Law

# RULES OF **Mediation** Surround

**“Love is All Around Us.”** Just like the lyrics from a Kenny Chesney ballad, the rules of mediation are “all around us.” This is particularly true now that the Court of Appeals has adopted, effective July 1, 2005, the Maryland Lawyers Rules of Professional Conduct (the “Lawyers’ Rules”) and the comments thereto, which replace the Maryland Rules of Professional Conduct.

By Stephen E. Moss



**us**

*Mr. Moss is of counsel to the Bethesda law firm of Deckelbaum Ogens & Raftery, Chartered.*

If anything is clear, it is that lawyer-neutrals and lawyers who participate in mediation and alternative dispute resolution must ascertain and adhere to the rules which govern their professional and ethical obligations, while either conducting or participating in mediation. Let's turn over a few legal rocks in order to discover many of these rules.

### Rules Governing the Lawyer-Neutral

There was a time when parties could go to a third party and obtain assistance in resolving their differences. Because of the potential for success, the courts were quick to turn to this process in order to clear their docket by utilizing a form of mediation called alternative dispute resolution. One of the problems was that the courts were not over-concerned about the manner in which a case was resolved; just that it was resolved: the "ends justified the means."

A second problem was that everyone was clamoring for a "slice of the pie"—but not everyone was qualified to perform this service, particularly under the *aegis* of the courts. The response of the Court of Appeals was Maryland Rule 17 ("the ADR Rules"). These Rules governed "the qualifications and selection of a person designated to conduct court-ordered alternative dispute resolution proceedings..."

Under this Rule, the concept of "alternative dispute resolution" encompassed settlement through a settlement conference, neutral case evaluation, neutral fact finding, arbitration, mediation and other non-judicial dispute resolution processes and sought to define each of them. Importantly,

minimum qualifications and training were established to conduct ADR with additional qualifications specified in the case of child access disputes, business and technology case management program cases and marital property issues.

One of the problems with the ADR Rules, however, is that, with certain exceptions, they did not specify how alternative dispute resolution was to be conducted. In the case of "mediation," Rule 17-102 (d) specified that the mediator was to assist the parties in reaching their own voluntary agreement "without providing legal advice" and was not "to recommend the terms of an agreement."

Other than these admonitions, the mediator was free to use, for example, a "transformative" approach and allow the parties to be free to pursue their own solution, or could be "facilitative" and assist the parties as much as possible in suggesting alternatives. Moreover, there was a dearth of guidance from the circuit courts. For example, in the order for alternative dispute resolution issued by the Circuit Court for Montgomery County, the mediator is referred to as a "facilitator" which suggests that facilitation is expected of the mediator. No other guidance was provided.

These Rules are a far cry from the kind of regulation existing in a few other states. For example, Florida provides comprehensive procedures for conducting mediation. Their rules include the admonition that "A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute." Fla.R.Med. 10.370 (c).

Comments to the rules, however,

make a distinction between supplying information and options based upon the qualification and experience of the mediator. But the rule also provides that "A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation." Fla.R.Med.10.310(b). And when a mediator crosses the line, the agreement reached by the parties can be set aside by the court and the mediator is deemed guilty of unethical conduct. (*See Kalliope Vitakis-Valchine v. Valchine*, Fla. District Court of Appeal, 4th Dist., 2001). California Rules of Court Rule 1620 also is equally detailed.

An illustration of an interesting rule is Rule 1620.7 requiring a mediator to conduct mediation "in a procedurally fair manner"—"a balanced process in which each party is given an opportunity to participate and make uncoerced decisions. A mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties."

Rules such as those of Florida and California are not irrelevant to Maryland practitioners. They fill the void and constitute part of the growing body of mediation law that may be applied to judge the "lawyer-neutral." Comment 2 to Lawyers' Rules Rule 2.4 expressly provides that "In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party-neutrals generally or to lawyers serving as third-party neutrals. See Md. Rules 17-101-17-109.

Lawyer-neutrals may also be subject to various codes of ethics, such as the Maryland Standards of Conduct for Mediators, Arbitrators and other

ADR Practitioners adopted by the Maryland Court of Appeals or the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association." There really are lots and lots of rules to consider!

The next effort by the Court of Appeals to regulate lawyer-neutrals was accomplished through the Maryland Standards of Conduct for Mediators, Arbitrators and other ADR Practitioners ([courts.state.md.us/macro](http://courts.state.md.us/macro)). The Standards, of course, recognize that mediation is based upon the principle of self-determination by the parties; emphasize that the process is confidential and that the lawyer-neutral should be impartial and avoid conflicts of interest.

However, Standard IV requires "that neutrals assigned to the parties have the requisite training and experience" and imposes upon the neutral the duty to improve their skills and to conduct the process fairly, diligently and in a manner consistent with the principle of self-determination by the parties. (See Standard VI and IX). At best, these Standards are rather nebulous, and it may be suggested that this was intended as the preface indicates that they were provided as "guidelines." However, the lawyer-neutral would be wise to regard these Standards as a minimum basis by which to critique the lawyers conduct.

In the family law field, however, the lawyer-neutral should not stop at these Standards in his or her search for applicable rules. For example, the American Bar Association, Family Law Section, and other organizations

have promulgated Standards of Practice for Divorce and Family Mediation which implement the same concepts as the Maryland Standards but are broader in scope and are more precise in their dealing with some of the issues which are unique to mediation of divorce and family issues. ([abanet.org/family/reports](http://abanet.org/family/reports)).

Moreover, the Federal government has not been asleep at the mediation wheel, either. If you serve as a lawyer-neutral before a federal agency, the Administrative Dispute Resolution Act, 5 USC Section 571, *et. seq.* should be consulted for rules governing for rules governing training, conflicts of interest, confidentiality and rights of participants.

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ric of law governing lawyer-neutrals is to be found in the Lawyers' Rules. The Court of Appeals adopted the Ethics 2000 amendments to the ABA Model Rules of Professional Conduct and the comments thereto by incorporating them into the Maryland Rules of Professional Conduct, together with various amendments. The rules were effective July 1, 2005. ([courts.state.md.us/rules](http://courts.state.md.us/rules))

The most significant addition is Rule 2.4, Lawyer Serving as Third-Party Neutral, which provides as follows:

(A) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(B) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Clearly there has been recognition of the need to protect the public and structure the mediation process, especially because the courts require liti-

gants to participate in the process. The few express rules governing the conduct of the lawyer-neutral are surely warranted and helpful.

### The Lawyer Participant

In the main, the Lawyers' Rules left intact most of the Maryland Rules of Professional Conduct as they relate to an attorney participating in the mediation process. There are some notable clarifications, however. Before the adoption of the Lawyers' Rules attorney's had little direction as to whether the Rules of Professional Conduct were applicable to mediation.

We had the decision of the Committee on Ethics of the Maryland State Bar Association in Ethics Docket 99-6, which held that an intentional misrepresentation, if made by an attorney during the course of mediation, constituted a violation of the Rules. But the Court of Appeals had not adopted the American Bar Association Model Rules of Professional Conduct which had existed for some time which were quite clear on this point. This issue has now been laid to rest by the adoption of Lawyers' Rule 2.4, and particularly Comment 5 thereto which provides that:

Lawyers who represent clients in alternative dispute-resolution processes are governed by the Maryland Lawyers' Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(o)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

One of the most interesting aspects of the Rules is the clarification that a lawyer has a duty to advise his or her client about the mediation process. This has been a debatable issue for some time, although a number of organizations have addressed this issue. For example, the Lawyers' Creed of Professionalism of the Bar Association of Montgomery County, Maryland expressly provides that:

"5. I will endeavor to resolve my clients' causes by negotiation and by other means where appropriate in order to avoid litigation and trial, consistent with my clients' best interests.

Thus, although not mentioning mediation, this process surely was a form of dispute resolution contemplated by this Creed. Now Comment 5 to Lawyer's Rule 2.1 expressly provides that "Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."

Surely, this Comment is not limited to the alternative dispute resolution process. For example, there is a growing trend towards using collaborative law procedures where the parties and lawyers are bound to pursue a potential settlement. A basic tenant of this process is that in the event the parties are not successful, they may not use their collaborative lawyers in a litigation process. Thus, there is always the potential for the lawyer to lose his or her client when pursuing this course of action.

However, it appears that the lawyer is duty bound to explain the availability of this process as well as other means of dispute resolution, if in the

clients' interest. In this regard, a recent Ethics Opinion of the Kentucky Bar Association (No. KBA E-425, issued June 2005) made the important observation "that the collaborative law agreement between a lawyer and the client cannot alter the lawyer's ethical obligations under the Rules of Professional Conduct."

Although we have lived under many of the Lawyers' Rules and Comments over the years, it is best to review them in the mediation context in order to gain a clear perspective of the manner in which the Rules govern professional and ethical obligations during the course of the mediation. These obligations start from the moment when you advise the client of relevant courses of action, and continue throughout the mediation process. This is best seen if we analyze the Lawyer's Rules in terms of pre-mediation responsibilities, and responsibilities during the course of mediation. Because they are numerous and well-know in our experience, I will review these rules sequentially and with little comment.

### Pre-Mediation Counseling

- In all professional functions a lawyer should be competent, prompt and diligent. (Preamble).
- A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions. (Rule 1.4)
- A lawyer may not bring or defend a proceeding or assert or controvert an issue, unless there is a basis for doing so that is not frivolous. (Rule 3.1)
- In advising a client, a lawyer may refer to the law but also to other relevant considerations such as moral, economic, social and political factors. (Rule 2.1)

- With certain exceptions, a lawyer shall abide by a client's decisions concerning the objectives of representation. (Rule 1.2(a))

- A lawyer may not assist a client in conduct which the lawyer knows to be fraudulent. (Rule 1.2(d))

- A lawyer shall not use means which have no purpose other than to delay or burden a third person. (Rule 4.4)

### Pre-Mediation Preparation

- A lawyer shall provide competent representation, including the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. (Rule 1.1)

### Participating in Mediation

- A lawyer may not represent anyone in connection with a matter in which the lawyer participated as an arbitrator, mediator, judge or third-party neutral. (Rules 1.12 and 2.4).

- A lawyer may not bring or defend a proceeding or assert or controvert an issue, unless there is a basis for doing so that is not frivolous. (Rule 3.1)

- A lawyer may not make a false statement of material fact or law to a third person or fail to disclose a material fact when necessary to avoid assisting a client in a criminal or fraudulent act. (Rule 4.1)

- A lawyer may not unlawfully obstruct another party's access to potential evidence. (Rule 3.4)

- A lawyer may not assist a client in conduct which the lawyer knows to be fraudulent. (Rule 1.2(d))

- A lawyer may not reveal information relating to representation of a client except as reasonably necessary to represent the client or to prevent

the client from committing a criminal or fraudulent act. (Rule 1.6)

- In advising a client, a lawyer may refer to the law but also to other relevant considerations such as moral, economic, social and political factors. (Rule 2.1)

- The lawyer shall abide by the decision of the client concerning settlement. (Rule 1.2).

In sum, the Rules require just as much from lawyers involved in mediation as those participating in litigation, It is not enough to merely suggest to a client that you meet at the mediation or ADR hearing and see what result can be negotiated. The Rules contemplate that the lawyer fully inform the client, be thoroughly prepared and be an effective advocate so that the client and the mediation process have every chance of success.

### Conclusion

While the Lawyers' Rules and the other standards and guidelines adopted by the Court of Appeals provide ready guidance to the lawyer-neutral and lawyer-participant in the mediation process, it should be obvious that the standards adopted by organizations interested in the mediation process, formal rules adopted by other courts and an evolving common law of mediation may well govern both the professional and ethical conduct of the lawyer in the mediation process. These rules surely "are all around us."

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*Mr. Moss may be reached at  
Smoss@deckelbaum.com.*