

Fall 2003

Alternative Dispute Resolution and Professional Responsibility in South Carolina: A Changing Landscape

Van A. Anderson

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Anderson, Van A. (2003) "Alternative Dispute Resolution and Professional Responsibility in South Carolina: A Changing Landscape," *South Carolina Law Review*. Vol. 55 : Iss. 1 , Article 8.

Available at: <https://scholarcommons.sc.edu/sclr/vol55/iss1/8>

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

ALTERNATIVE DISPUTE RESOLUTION AND PROFESSIONAL RESPONSIBILITY IN SOUTH CAROLINA: A CHANGING LANDSCAPE*

I. INTRODUCTION

Alternative Dispute Resolution (ADR) is firmly rooted in the legal field as a viable means of dispute resolution. Today, virtually every state has at least one form of mandatory mediation for filed cases, and the story is much the same in the federal courts.¹ South Carolina is right in line with these trends, both at the state and the federal level.² In response, the contemporary lawyer has embraced ADR not only by using it to reconcile disputes for clients, but also by actually conducting the process as the mediator or the arbitrator.³ An

* I would like to thank Dr. Gregory B. Adams for his advice and guidance; Biff Sowell, Karl Folkens, Kevin Barth, Andrew Walsh, Mike Battle, Danny Mullis, and Jimmy Long for their time, energy, and willingness to help; and Frances Brown for her patience, love, and support.

1. See Phyllis Bernard & Bryant Garth, *Introduction to Dispute Resolution Ethics: A Comprehensive Guide*, 2002 A.B.A. SEC. DISP. RESOL. 1 (Phyllis Bernard & Bryant Garth eds., 2002); see also SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* app. B (2d ed. 2001); John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813, 813-24 (1999). For interesting statistics on the proliferation of ADR, see Hope Viner Samborn, *The Vanishing Trial: More and More Cases Are Settled, Mediated or Arbitrated Without a Public Resolution. Will the Trend Harm the Justice System?*, 88 A.B.A. J., Oct. 2002, at 24, 27 (documenting that, in the federal courts, 2.2% of all civil cases in 2001 were resolved after trial versus 10% in 1970; and at the state level, the percentage of cases going to trial dropped in sixteen of the twenty-two states that reported statistics); 1 MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* § 3.01 (West Group rev. ed., 2002) (reporting that “[f]ilings with the American Arbitration Association rose from 6448 in 1981 to 64,423 in 1995.”). See also The Hon. Beverly J. Hodgson, *Do ‘Real Lawyers’ Do ADR? You Bet*, CONN. L. TRIB., Aug. 19, 2002, at 9. This growing trend towards ADR seems to be self-perpetuating in that the more often parties employ ADR, the more they will tend to do so in future disputes. Hodgson explains that “a lawyer wouldn’t follow the scenario of years of warfare followed by eve-of-trial settlement discussions more than a few times before deciding that maybe it would make sense instead to focus from the start on resolution, not mainly on trial.” *Id.* at 9.

2. At the state level, the Supreme Court’s Commission on ADR is currently in the process of consolidating the various ADR pilot programs around the state into a uniform statewide initiative. Telephone Interview with Mike Battle, Former Chairman of the South Carolina Bar’s ADR Section (Jan. 7, 2003). At the federal level, the Federal District of South Carolina recently became the eighth out of ninety-three districts nationwide to be classified as having a “robust” ADR program, and the first district to do so through the application process. Telephone Interview with Danny Mullis, ADR Program Director for the District of South Carolina (Jan. 7, 2003).

3. A database of dispute resolution neutrals at the South Carolina Bar contains about 709 active neutrals holding 959 certificates. Of those 959 certificates, 312 are Circuit Court Arbitration certificates, 435 are Circuit Court Mediation certificates, and 212 are Family Court Mediation certificates (about 42 of which were issued to non-attorneys). E-mail from Andrew Walsh, Public Services Counsel, South Carolina Bar Association, to Van A. Anderson (Aug. 19,

increasing number of attorneys are expanding and diversifying their practices by offering mediation and arbitration expertise in addition to the traditional range of attorney services.

But with the proliferation of ADR comes other considerations. The focus of this Comment is on the ethical impact that this burgeoning field of dispute resolution has had on lawyers. My mission is to contribute a pragmatic assessment of the South Carolina Circuit Court ADR Pilot Program.⁴ After providing a broad overview of some of the forms and approaches to ADR, I address how the pilot program interacts with the South Carolina Rules of Professional Conduct⁵ and how the pilot program may interact with the new Rules of Professional Conduct recently approved by the South Carolina Bar.⁶ In addition, I convey some of the concerns voiced to me by mediators practicing under the current ADR Rules and suggest how a revised statewide program could meet these concerns with solutions.

II. FORMS AND APPROACHES TO ADR

A. Mediation

In order to best describe mediation, one must first understand the concept of negotiation. Negotiation is defined as “[a] consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. Negotiation usu[ally] involves complete autonomy for the parties involved, without the intervention of third parties.”⁷ Negotiation is something we do—whether consciously or unconsciously—in virtually every aspect of our lives, from transactions on EBay to discussions with a spouse or significant other. At the very core of negotiation is the idea that one party is willing to compromise its expectations in consideration for an opposing party’s willingness to compromise its own expectations for the sake of reaching an agreement. For example, a plaintiff in a product liability action may expect to recover \$50,000 in damages from a manufacturer, while the very same manufacturer may expect to pay only \$25,000. Negotiation is the process whereby the plaintiff reduces his expectation of recovery in consideration for

2003, 14:29 EST) (on file with author).

4. S.C. CIR. CT. ALT. DISP. RESOL. RULES (2003). Hereinafter referred to as the ADR Rules. The complete ADR Pilot Program includes mediation rules for family court as well, but family court disputes fall outside the scope of this Comment.

5. S.C. APP. CT. R. 407 (2003). Hereinafter referred to as the South Carolina Rules.

6. See <http://www.scbarr.org> (last visited Sept. 9, 2003) (explaining that the “final Ethics 2000 report has been approved with amendments by the House of Delegates and presented to the Supreme Court for consideration.”). Although the Bar has accepted the 2002 revisions, the Supreme Court must officially adopt them before they will replace the current South Carolina Rules.

7. BLACK’S LAW DICTIONARY 1059 (7th ed. 1999).

the manufacturer increasing its expectation of liability. The parties are willing to change their expectations for a variety of reasons, ranging from a desire to avoid litigation and media coverage to expediting the resolution. Whether the parties actually resolve the dispute at this stage depends upon how much each side is willing to compromise.

Mediation involves "a neutral third party who tries to help the disputing parties reach a mutually agreeable solution."⁸ In other words, it is negotiation conducted by a mediator. While the parties to the dispute still have ultimate control over how much to compromise, the mediator can significantly influence the success or the failure of the negotiation in ways discussed below.

There are two basic types of mediators: facilitative and evaluative. It is perhaps more helpful to think of this dichotomy in terms of a spectrum, rather than an on/off switch. The distinction between the two is not always clear, and virtually all mediators (whether they admit it or not) incorporate a blend of the facilitative and evaluative approaches into the mediation.⁹ One commentator defines facilitative mediation as focusing on the extra-legal, interest-based conflicts at stake in a dispute.¹⁰ For example, in the very same product liability hypothetical introduced above, imagine that the injured plaintiff is an employee of the defendant-manufacturer. A facilitative mediator may initiate a discussion between the parties on the plaintiff's ability to return to his job without fear of being demoted, fired, or treated differently as a result of the settlement. This could have the effect of reducing the plaintiff's expectation of monetary

8. *Id.* at 996.

9. See STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION § 4.13, at 228 (West Group, Hornbook Series, 2001) ("Whether a mediator is evaluative is not a yes-or-no question, but a matter of degree Despite the mediator's efforts to be non-evaluative, to focus on interests, she will usually betray at least some of [sic] hint of her views on the merits."). For a more comprehensive approach to the facilitative versus evaluative dichotomy, see also Joseph B. Stullberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 1002-03 (1997).

10. [I]nstead of staking out opposing positions and then moving toward a value between these, parties should focus on identifying the different interests that underlie their dispute and on attempting to shape a mutually beneficial resolution—a so called "win-win" solution. Rather than narrowing the issues in the case to a consideration of monetary value, parties may be advised to put more issues on the table, so as to create more opportunity for trade-offs. The role of the mediator, from this perspective, is to help parties focus on their interests, rather than on their bargaining positions, and to assist them in generating options for resolving their dispute that will maximize joint gains. An effective mediator facilitates this value-creating process, rather than pressing parties to put a compromise dollar value on their dispute; hence, this process is often called *facilitative mediation*.

Deborah R. Hensler, *In Search of "Good" Mediation: Rhetoric, Practice, and Empiricism*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 231, 234 (Joseph Sanders & V. Lee Hamilton eds., 2001) (footnotes omitted).

recovery, thereby bringing the parties closer to agreement. In contrast, evaluative mediation, as the same commentator describes, is “bargaining in the shadow of the law,”¹¹ denoting that this approach focuses only on legal, monetary rights. Other scholars use even finer distinctions between the two paradigms.¹² For the purposes of the cursory overview of mediation in this Comment, facilitative and evaluative mediation are the two main approaches. However, keep in mind that in practice, mediators typically use both approaches as different circumstances, different disputes, and different parties dictate.

B. Arbitration

In order to describe arbitration, one must first define adjudication. Adjudication is simply the process of deciding a dispute between two or more parties.¹³ Arbitration, then, is a private (or non-governmental) adjudication.¹⁴ In contrast to mediation, the parties to the dispute do not decide their own fate. Rather, they present evidence and arguments to an arbitrator (or a panel of arbitrators) who then adjudicates the parties’ rights.¹⁵ Because arbitration is akin to a judicial trial,¹⁶ it is not as complex or novel as mediation. The rules pertaining to arbitration avoid many of the ethical difficulties that arise in mediation simply by prohibiting certain practices that mediation embraces. For instance, an arbitrator may not communicate *ex parte* with a party.¹⁷ Conversely, mediation often consists of *ex parte* communications in which the mediator shuttles back and forth between two rooms, relaying and discussing things with one party that another party authorizes the mediator to disclose.

-
11. Rational negotiators estimate how the case would be decided at trial, and then discount the expected value of the case by the costs of proceeding to trial and the risk of misestimating the trial outcome, to reach an acceptable settlement amount—hence the phrase “bargaining in the shadow of the law.” The role of a[n] [evaluative] mediator is to help parties reach this convergence.

Id. at 233 (footnotes omitted).

12. See, e.g., Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) (dividing mediation into four groups: facilitative-narrow, facilitative-broad, evaluative-narrow, and evaluative-broad).

13. See also BLACK’S LAW DICTIONARY 42 (7th ed. 1999) (defining adjudication as the “legal process of resolving a dispute; the process of judicially deciding a case.”).

14. WARE, *supra* note 9, at § 2.1.

15. *Id.*

16. See Sarah Johnston, *ADR in the Employment Discrimination Context: Friend or Foe to Claimants*, 22 HAMLINE J. PUB. L. & POL’Y 335, 337 (2001) (“In essence, an arbitration hearing is similar to a ‘mini-trial,’ minus the formalities and staggering degree of adversarial energy that are usually found inside the courtroom.”).

17. See S.C. CIR. CT. ALT. DISP. RESOL. RULES, app. A, Canon III (B) (2003) (stating that “[u]nless otherwise provided in applicable arbitration rules or in an agreement of the parties, arbitrators should not discuss a case with any party in the absence of each other party.”).

Because arbitration is more in line with our traditional notions of dispute resolution—that is, it is part of the adjudicative genus—I will not spend much time in this Comment on issues unique to arbitration. However, the brief overview above is necessary to understand the hybrid forms of ADR.

C. *The Hybrids—“Alternative” ADR*¹⁸

The two most notable hybrid ADR forms are early neutral evaluation (ENE) and mediation-arbitration (med-arb). ENE can either be agreed to by the parties or ordered by the court.¹⁹ It occurs at a very early stage in the litigation, usually before discovery.²⁰ In ENE, the evaluator’s function is two-fold: 1) to streamline the dispute, serving a case management function; and 2) to evaluate the merits of the case, an evaluative mediation function.²¹ From a case management perspective, ENE segregates the disputed facts from those upon which the parties agree, enabling parties to draft stipulations or informal agreements setting forth undisputed facts.²² In addition to stipulations, ENE can also produce a “comprehensive scheduling order for submission to the court.”²³ This, in turn, streamlines the case before it goes to trial. ENE also has an evaluative mediation facet. After each party presents its case in ENE, the evaluator issues a non-binding opinion on the merits of the case. This opinion can be completely rejected by both parties, but it also can be helpful to them in resolving the case before it goes to trial; calibrating their expectations if they were either too high or too low; or, at the very minimum, advising the lawyers where they need to focus their time and energy at trial.

The other alternative ADR mentioned above, med-arb, is a true hybrid of mediation and arbitration. Med-arb occurs when parties first try to mediate a dispute and then agree to submit all remaining unresolved claims to arbitration.²⁴ The subsequent arbitration proceeding may be binding or non-binding at the stipulation of the parties.²⁵ An odd attribute of this process is that the mediator may also serve as the arbitrator in the subsequent proceeding,

18. For an excellent synopsis of up to thirty different variations of ADR, see Karl A. Folkens, *Selecting the “Right” Form of ADR* (Jan. 23, 2003) (unpublished manuscript, on file with author) (describing, among others, incentive arbitration, fact-finding, confidential listener, dispute panels, med-arb, co-med-arb, arb-med, multi-party coordinated defense, ombudsperson, and my personal favorite, “night baseball” arbitration).

19. WARE, *supra* note 9, at § 4.34.

20. *Id.*

21. *Id.*

22. *Id.*

23. Folkens, *supra* note 18, at 11.

24. J. Brad Reich, *Attorney v. Client: Creating a Mechanism to Address Competing Process Interests in Lawyer-Driven Mediation*, 26 S. ILL. U. L.J. 183, 184 (2002); Folkens, *supra* note 18, at 14.

25. Reich, *supra* note 24, at 196.

creating a myriad of ethical dilemmas and procedural and systemic difficulties.²⁶

The reason I present these two alternative forms of ADR is to show that ADR is not a choice between mediation and arbitration. Rather, it is a collection of different processes with a range of goals in mind—from streamlining a case so the judge has less tedious, administrative work to do, to resolving the dispute altogether.

III. ADR IN SOUTH CAROLINA

A. The South Carolina Rules of Professional Conduct²⁷ and Mediation

In mediation, there are two types of attorney participants: the parties' lawyers and the mediator.²⁸ This initial distinction is important in determining which of the South Carolina Rules apply to whom and in what way they apply. For the parties' lawyers,²⁹ the issue is more straightforward. These lawyers are simply acting in a representative capacity—one that the South Carolina Rules contemplate and address. The lawyer acting as mediator, however, is not the type of role that the drafters of the Rules of Professional Conduct envisioned. Indeed, it was not until February 2002 that the American Bar Association even recognized the role of mediator in the Model Rules of Professional Conduct.³⁰ Thus, determining which of the South Carolina Rules apply to mediators is a difficult task.

The proliferation and widespread acceptance of ADR as a viable (and often times preferred) means of dispute resolution may slightly alter the meaning of some of the representative lawyers' duties and obligations to their clients.³¹

26. See Folkens, *supra* note 18, at 14 (stating that "this process may have a chilling effect on full participation in the mediation portion since a party may not believe that the arbitrator will be able to discount unfavorable information learned in mediation when making the arbitration decision.").

27. S.C. APP. CT. R. 407 (2003).

28. For purposes of this discussion, I make the assumption that all mediators are attorneys. This certainly is not always the case, especially in family court mediation. See E-mail from Andrew Walsh, *supra* note 3 (noting that 42 out of 212 Family Court Mediator certificates were issued to non-attorneys).

29. I refer to these attorneys as representative lawyers to distinguish them from lawyers serving as third-party neutrals.

30. See MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 3 (2002) ("In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter."); *Id.* at R. 1.12 (adding "Mediator or Other Third-Party Neutral" to the title of the rule); *Id.* at R. 2.4 (creating an entirely new rule for the lawyer serving as third-party neutral).

31. For arguments that the Model Rules of Professional Conduct should not apply to lawyers participating in ADR because ADR is inconsistent with an adversarial paradigm, see generally Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991); Carrie Menkel-Meadow, *Ethics in*

Although there is no express requirement in the South Carolina Rules to advise clients about ADR, there may be an implied duty. For example, South Carolina Rule 2.1 defines the representative attorney's role as advisor.³² It obligates the attorney to advise the client on all matters relevant to the client's situation. Further, the South Carolina Rules provide that "a client also has a right to consult with the lawyer about the means to be used in pursuing [the] objectives [of representation]."³³ Finally, Rule 1.4(b) states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."³⁴ Today, with ADR as such an integral part of the legal system, I maintain that these provisions create an implied duty to advise the client about ADR.³⁵

The kind of ADR advice a lawyer should give to clients depends on a number of factors. First, it depends on whether the plaintiff has already filed a complaint and the county in which the complaint has been filed. If filed in one of the counties participating in a court-annexed ADR program,³⁶ the attorney should advise the client that the case will be ordered into some form of ADR before proceeding to trial. Furthermore, depending on the client's sophistication, the attorney may also need to explain generally what ADR is in order to properly communicate the procedure and the objectives of litigation.³⁷ Lastly, the attorney should warn the client of the costs associated with ADR and determine whether the client or the lawyer will be responsible for them.³⁸ In a court-ordered ADR situation, the costs of mediation are so imminent that they rise to the level of affirmative disclosure. Of course, because of the indeterminate nature of the duration and success of the mediation, a lawyer need only inform the client of a ballpark hourly rate (typically around \$150 per

Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities, 38 S. TEX. L. REV. 407 (1997).

32. S.C. APP. CT. R. 407, R. 2.1 (2003).

33. *Id.* at R. 1.2 cmt. 1.

34. *Id.* at R. 1.4(b).

35. For an argument that the Model Rules of Professional Conduct should contain an explicit duty to advise about ADR, see Frank E. A. Sander & Michael L. Prigoff, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options?*, 76 A.B.A. J. 50 (Nov. 1990) ("An explicit requirement obviously is the best way to make sure lawyers become proficient in the field.").

36. For example, Florence, Horry, Lexington, Richland, Greenville, and Anderson counties all have court-annexed ADR programs. S.C. CIR. CT. ALT. DISP. RESOL. R. 18 (2003). Rule 18 is not an exhaustive list of counties with court-annexed ADR programs since this list is often "in a state of flux;" thus, some of the counties mentioned above may not be listed in this rule. E-mail from Andrew Walsh, *supra* note 3.

37. See S.C. APP. CT. R. 407, R. 1.4 cmt. 1 (2003) ("The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.").

38. See *id.* at R. 1.5 cmt. 1 ("[A]n understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation.").

hour).³⁹ To satisfy this duty to disclose the general costs associated with ADR, attorneys should consider including a boilerplate provision in their standard engagement agreements.

If the plaintiff has not filed a complaint, or if one was filed in a county not participating in the court-annexed ADR program, then the attorney should consider other factors. For example, what is the nature and the strength of the plaintiff's claim? All claims are different and have different strengths and weaknesses. Furthermore, not every case is a good candidate for ADR. For instance, if a plaintiff brings a wrongful death action that has a strong legal foundation, a plaintiff's attorney should advise about ADR, but should be careful to note that it may not be the client's best option. This claim may fare better at trial, in front of a jury that is more sensitive to the emotions involved in the case and that has wide latitude in awarding damages. Counterbalancing the possible advantages of litigation, an injured client should also realize that it may take years of trial and appellate work to receive an award and that ADR could greatly expedite this process. From the perspective of defense counsel, an attorney may encourage a party to seek a pretrial resolution to prevent exposure to the risk of a large judgment and possible extensive media coverage of the trial. On the other hand, a weak case based on tenuous legal theory may be one where ADR would be more advantageous for the plaintiff, but defense counsel may prefer to proceed to trial and move for summary judgment.

The complexity involved in a case also affects ADR's potential utility. While breach of contract and simple personal injury claims can be relatively cut and dry, other legal claims, such as strict liability in tort for defectively designed products and toxic tort actions, can be extremely complex and require an enormous amount of discovery and expert testimony. These complex cases may not be good candidates for ADR because without extensive discovery on issues of causation and proof of defect, often neither party really knows who was at fault and the true extent of damages. In this case, the attorney may not need to be too concerned with advising the client about ADR. This is not to say that a hybrid form of ADR, such as ENE, may not be extremely helpful in agreeing upon stipulations and drafting a scheduling order to streamline the case. But seeking a complete resolution of the dispute through mediation or arbitration may be unrealistic in many complex suits.

Another factor for the representative attorney to consider is the relationship between the parties, both before and after resolution of the dispute. ADR is typically a good solution for parties that need or want to have a continuing, civil relationship. For example, parties interested in maintaining and preserving a symbiotic business relationship after resolution of a dispute are usually good

39. I arrived at this figure by asking a number of mediators around the state: Mary Lowndes Bryan, Karl A. Folkens, and Thornwell F. Sowell, III. If the court appoints the mediator, then the ADR Rules prescribe the rate of compensation (\$125 per hour). S.C. CIR. CT. ALT. DISP. RESOL. R. 10(b) (2003).

candidates. Also, in divorce proceedings, where ex-spouses may need to remain on amicable terms because they share child custody, ADR can obviate the adversarial pressure and tension of a judicial proceeding.

Finally, an overarching theme in advising a client about ADR is competence. South Carolina Rule 1.1 establishes a general duty of competent representation, stating that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁴⁰ Therefore, attorneys should be familiar with ADR and capable of determining when it is more or less appropriate for clients. Moreover, they should be able to function and participate effectively in mediations and arbitration proceedings. Attorneys should consider attending CLEs and seminars on how to participate in ADR in order to maintain the requisite competence to represent clients.

Applying the South Carolina Rules to attorneys acting as neutrals is more problematic. A mediator is not an advisor,⁴¹ representative,⁴² intermediary,⁴³ advocate,⁴⁴ or any of the other “legal” roles⁴⁵ in which the South Carolina Rules envision lawyers. Therefore, the rules pertaining to those roles do not apply to mediators or arbitrators.

However, some of the South Carolina Rules do apply to attorneys acting as neutrals, namely, those that apply to attorneys simply by virtue of their membership in the legal profession. For example, the rules dealing with law firms and associations⁴⁶ apply to mediators inasmuch as they would apply to any other similarly situated attorney. Furthermore, mediators and arbitrators still owe a duty of public service,⁴⁷ they must comply with the advertising rules,⁴⁸ and they certainly must maintain the integrity of the profession.⁴⁹ However, the South Carolina Rules do not provide ethical guidance for neutrals in the practice of resolving disputes. Rather, a separate set of rules, the ADR Rules, sets forth the standards of conduct for mediators and the code of ethics for arbitrators. The following subsection discusses the ADR Rules and the

40. S.C. APP. CT. R. 407, R. 1.1 (2003).

41. *Id.* at R. 2.1.

42. *Id.* at R. 1.2.

43. *Id.* at R. 2.2.

44. *Id.* at R. 3.

45. See NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 435 (2d ed. 2000) (explaining that in the absence of a special rule governing attorney-neutrals, “the Model Rules would apply to lawyers serving as neutrals only to the extent that the rules apply to lawyers serving in a nonlegal capacity or to the extent that a court extends the Model Rules by analogy to cover service as a neutral.”) (footnote omitted).

46. S.C. APP. CT. R. 407, R. 5 (2003).

47. *Id.* at R. 6.

48. *Id.* at R. 7.1-7.5.

49. *Id.* at R. 8.1-8.5.

ethical standards pertaining to mediators and arbitrators.

B. Ethical Concerns in the Current Pilot Program

South Carolina has instituted a number of pilot programs in different counties to introduce mandatory ADR into the state judicial system. The counties this Comment will review are the ones to which the ADR Rules apply.⁵⁰ In those counties, parties may have to participate in some form of ADR before trying the case. Rule 2 of the ADR Rules defines which actions are subject to court-ordered mediation and arbitration.⁵¹ Rule 2(a) provides that “[a]ll civil actions filed in the circuit court in which there is a claim or there are claims for monetary relief exceeding \$25,000 . . . are subject to court-ordered mediation under these rules.”⁵² Rule 2(b) provides that “[a]ll civil actions filed in the circuit court in which there is a claim or there are claims for monetary relief *not* exceeding \$25,000 . . . are subject to court-ordered arbitration under these rules.”⁵³ Basically, unless a case falls within one of the exceptions to this rule enumerated in subsection (c),⁵⁴ every civil action brought in a mandatory mediation county is subject to ADR. Needless to say, there is a substantial amount of ADR in South Carolina and as the need for neutrals increases with the use of ADR, a standard code of ethics that functions in *all* ADR processes—both court-ordered and voluntary ADR—will become even more necessary.

Attached as appendices to the ADR Rules are a Code of Ethics for Arbitrators⁵⁵ and Standards of Conduct for Mediators.⁵⁶ They establish canons for the attorney-neutral to follow to ensure that the ADR process retains its legitimacy and integrity as a viable alternative to the courtroom. Based on the codes promulgated by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution, the appendices represent the work and ideas of the figures at the forefront of the

50. These counties include Florence, Horry, Lexington, and Richland. S.C. CIR. CT. ALT. DISP. RESOL. R. 18 (2003). Again, this is not an exhaustive list of counties currently using mandatory mediation. This list is constantly changing. *See supra* note 36.

51. S.C. CIR. CT. ALT. DISP. RESOL. R. 2. (2003).

52. *Id.* at R. 2(a).

53. *Id.* at R. 2(b) (emphasis added).

54. Cases not subject to court-ordered mediation or arbitration include the following:

(1) special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition; (2) cases which are appellate in nature such as appeals or writs of certiorari; (3) post-conviction relief matters; (4) contempt of court proceedings; (5) forfeiture proceedings brought by the State; (6) cases involving mortgage foreclosures; and (7) cases that have been submitted to mediation with a certified mediator prior to the filing of the civil action. *Id.* at R. 2(c).

55. *Id.* at app. A.

56. S.C. CIR. CT. ALT. DISP. RESOL. RULES, app. B (2003).

ADR ethical debate.⁵⁷ In this respect, the standards are comprehensive and thoughtful. However, by the very terms of the ADR Rules that antecede them, they are limited to court-ordered ADR, leaving the realm of non-court-ordered (or voluntary) ADR in ethical limbo.

Appendix A, dealing with ethics for arbitrators, closely resembles the Code of Judicial Conduct. This is a logical relationship since the function of an arbitrator is adjudicative, much like that of a judge. Common to both codes are the requirements to uphold the integrity and fairness of the process,⁵⁸ avoid partiality or the appearance of partiality or bias,⁵⁹ perform duties fairly and diligently,⁶⁰ and avoid impropriety and the appearance of impropriety.⁶¹ However, as mentioned earlier, this Comment will not focus on ethical issues pertaining to arbitration.

Appendix B, titled "Standards of Conduct for Mediators," functions in much the same way as its counterpart, Appendix A. It includes standards on competency,⁶² diligence and fairness,⁶³ full disclosure of conflicts of interest,⁶⁴ and confidentiality.⁶⁵ However, Appendix B focuses on the goals specific to mediation and provides a useful contrast between the two forms of ADR. While arbitration is more adjudicative in nature, mediation is a facilitation of the negotiation process. Thus, reflecting this fundamental difference, Standard I of Appendix B provides that "a mediator shall recognize that mediation is based on the principle of self-determination by the parties."⁶⁶

An important feature of the ADR Rules is that they provide for a wide variety of sanctions for nonconforming behavior. For attorney-neutral misconduct, the list of sanctions includes public reprimand by the supreme court, an order permanently or temporarily enjoining the transgressor from serving as a neutral in any South Carolina court, an order requiring additional training, and a levy of fines.⁶⁷ Moreover, parties affected by neutral misconduct may seek the relief afforded under Rule 413 of the South Carolina Appellate

57. *Id.* at app. A, n.1.

58. *Id.* at app. A, Canon I; S.C. APP. CT. R. 501, Canon I (2003).

59. S.C. CIR. CT. ALT. DISP. RESOL. RULES, app. A, Canon II (2003); S.C. APP. CT. R. 501, Canon III (2003).

60. S.C. CIR. CT. ALT. DISP. RESOL. RULES, app. A, Canon IV (2003); S.C. APP. CT. R. 501, Canon III (2003).

61. S.C. CIR. CT. ALT. DISP. RESOL. RULES, app. A, Canon III (2003); S.C. APP. CT. R. 501, Canon II (2003).

62. S.C. CIR. CT. ALT. DISP. RESOL. RULES, app. B, Standard IV (2003).

63. *Id.* at app. B, Standard VI.

64. *Id.* at app. B, Standard III.

65. *Id.* at app. B, Standard V.

66. *Id.* at app. B, Standard I.

67. *Id.* at R. 16(d).

Court Rules.⁶⁸

Separate from neutral misconduct, the ADR Rules also provide sanctions for representative attorney misconduct. ADR Rule 5 sets forth which parties must physically attend a mediation,⁶⁹ and Rule 6 sets forth which parties must physically attend an arbitration.⁷⁰ If a party fails to satisfy the attendance requirements in these rules, the court may impose sanctions ranging from attorney's fees and mediator's or arbitrator's fees to any other sanction authorized by South Carolina Rule of Civil Procedure 37(b).⁷¹ This wide variety of sanctions enables the reviewing court to appropriately discipline improper and inappropriate behavior by neutrals and parties to the dispute and to compensate those injured by the misbehavior if necessary. It also serves to deter future unethical conduct.

The appendices to the ADR rules are flawed in one respect: it is unclear whether they apply to voluntary ADR. The ADR Rules to which Appendices A and B relate only expressly apply to court-ordered ADR. First, the heading of the ADR Rules state that they are "[a]pplicable to Charleston, Florence, Horry, Lexington, and Richland Counties [o]nly."⁷² Furthermore, while the rules do not prohibit voluntary ADR, only the reporting requirements apply to this type of resolution process.⁷³ The reporting requirements merely relate to administrative protocol, such as reporting the result of an arbitration hearing.⁷⁴ Thus, none of the ethical guidelines and canons in the appendices expressly apply to voluntary ADR. This leaves a realm of ADR—the non-court-ordered variety—completely neglected.

Appendices A and B should be revised to expressly apply to non-court-

68. S.C. CIR. CT. ALT. DISP. RESOL. R. 16(d) (2003). *See* S.C. APP. CT. R. 413 at R.7(b) (2003) which provides for the following sanctions:

disbarment; suspension for an indefinite period from the office of attorney of law; public reprimand; admonition by an investigative panel of the Commission or by the Supreme Court; deferred discipline agreement; restitution to persons financially injured, repayment of unearned or inequitable attorney's fees or costs advanced by the client, and reimbursement to the Lawyer's Fund for Client Protection; assessment of the costs of the proceedings; limitations on the nature and extent of the lawyer's future practice; any other sanction or requirement as the Supreme Court may determine is appropriate.

69. S.C. CIR. CT. ALT. DISP. RESOL. R. 5 (2003).

70. *Id.* at R. 6.

71. *Id.* at R. 11(b)-(c). The sanctions authorized by South Carolina Rule of Civil Procedure 37(b) include, but are not limited to, the following: contempt of court, default judgment against the disobedient party, an order striking out all or parts of the pleadings in the judicial proceeding, an order designating that facts shall be taken as established in the judicial proceeding. S.C. R. CIV. P. 37(b) (2003).

72. S.C. CIR. CT. ALT. DISP. RESOL. R. 18 (2003).

73. *Id.* at R. 2(e).

74. *Id.* at R. 9(e). But, the "South Carolina Court Administration may require the arbitrator to provide additional statistical data for evaluation of the arbitration hearing." *Id.*

ordered ADR. Without such a clause, the appendices create unnecessary ambiguity and confusion as to whether they apply to voluntary ADR. This is not to suggest that parties in a voluntary ADR setting should not be free to craft their own ethical standards or choose the code of conduct that best suits their needs. In fact, parties do this all the time in private ADR agreements.⁷⁵ But what if the parties are not as sophisticated and do not provide for such details? What if they simply contact one of the mediators advertised in an issue of *South Carolina Lawyer*? What rules apply? Appendices A and B should contain a gap-filling provision stating that it will operate subject to any agreement among the parties providing otherwise. Such a provision covers all of our ethical bases.

C. *The 2002 Model Rules and the Proposed Revisions to the South Carolina Rules of Professional Conduct*

The ABA commissioned Ethics 2000 "to revise the Model Rules in light of developments in law and practice."⁷⁶ The 2002 Model Rules change the scope of the Rules of Professional Conduct as they relate to ADR in four different sections: the Preamble, Rule 1.12, Rule 2.4, and Comment 5 to Rule 2.1. The South Carolina House of Delegates approved these revisions in toto in January 2003.⁷⁷ Although they have not been integrated officially into the current South Carolina Rules, this Comment proceeds under the assumption that they will be. Thus, my discussion of the significance of the 2002 Model Rules applies with equal force to South Carolina.

The 2002 Model Rules made meaningful additions to the description of the lawyer's responsibilities in the Preamble. First, on a structural level, the drafters enumerated the lawyer's different responsibilities, providing for a clear, accessible delineation of attorney duties. While this may seem like a trivial point, it cannot be overlooked. One scholar stated that "[l]awyers seeking ethical guidance in the existing lawyer ethics regime will find a dearth of direction."⁷⁸ Thus, a sensible reorganization of the ethical scheme has notable utility.

The Preamble begins by defining the lawyer's general role "as a member of the legal profession, . . . a representative of clients, an officer for the legal

75. Two examples of private ADR organizations that provide for their own programs, services, and ethics are the American Arbitration Association (AAA) and the Better Business Bureau (BBB). Information about the AAA programs, services, and code of ethics is available at <http://www.adr.org>. A description of the Better Business Bureau's private ADR services, solutions, and code of ethics is available at <http://www.columbia.bbb.org>.

76. MODEL RULES OF PROF'L CONDUCT, Introduction (2002).

77. The complete proposed revisions to the South Carolina Rules are available at <http://www.scbarr.org/pdf/e2kfinal.pdf>.

78. Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendation of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 212 (2001).

system and a public citizen having special responsibility for the quality of justice.”⁷⁹ Then, it discusses the lawyer’s traditional roles as a representative of clients, zealous advocate, negotiator, and evaluator.⁸⁰ Most important to this Comment is Section 3 of the Preamble, which provides that “[i]n addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter.”⁸¹ This simple acknowledgement that the neutral is yet another role that attorneys may play in the dispute resolution process is important because it instills legitimacy and validation in that role. In the words of Douglas Yarn:

Arguably, this is the single most important proposed revision to the Model Rules and a radical departure from the dominant lawyering paradigm previously reflected in ethical standards for lawyers. . . . Because the neutral-disputant relationship is antithetical to the attorney-client relationship . . . , the Model Rules had to recognize the role in order to regulate lawyers in that role.⁸²

Thus, introducing this role in the Preamble lays a firm foundation on which to build a new set of ethics for the attorney-neutral.

The addition to the Preamble is particularly important in South Carolina, where judicial resistance to court-annexed mediation may explain some of the failures of the ADR program.⁸³ Adoption of the new Preamble is, in essence, an adoption of ADR, particularly with respect to mediation. Promulgating the new rules is one way in which the South Carolina Supreme Court could lead the ADR movement. It would show judges around the state, particularly the ones who may be skeptical of court-ordered mediation, that our judiciary trusts and believes in the process, thereby encouraging them, individually, to trust and believe in it.

Model Rule 1.12, which defines conflicts in matters where a lawyer was formerly a judge or arbitrator in a proceeding, now includes “Mediator or Other Third-Party Neutral”⁸⁴ in the title. Again, the importance of clear language (in titles as much as in text) cannot be overstated, especially when it concerns an area such as ethics in ADR where there has historically been confusion as to which set of rules apply. The revisions to the text of Rule 1.12 are not earth-

79. MODEL RULES OF PROF’L CONDUCT pmb1. § 1 (2002).

80. *Id.* at § 2.

81. *Id.* at § 3.

82. Yarn, *supra* note 78, at 228-29 (footnote omitted). Yarn refers to the revisions as “proposed revisions,” because, at the time he wrote his article, the 2002 Model Rules had yet to be adopted.

83. See Part III, section D, *infra*.

84. MODEL RULES OF PROF’L CONDUCT R. 1.12 (2002).

shattering, but they are certainly necessary. They clarify that the conflict-of-interest rules which previously only applied to former judges and arbitrators now apply to mediators and other third-party neutrals as well.

Perhaps just as significant as the title of Rule 1.12 was Ethics 2000's decision to insert this revision in Rule 1.12 rather than in Rule 1.9, which defines conflicts-of-interest rules for lawyers and former clients. Originally, Ethics 2000 decided that the revision should fall under Rule 1.9, reflecting a belief that mediators and other neutrals should be treated more like lawyers than judges and arbitrators for conflicts of interest.⁸⁵ Upon further consideration, it chose to place these revisions in Rule 1.12. Integrating mediators and other third-party neutrals into the conflict-of-interest rules applicable to judges and arbitrators is consistent with the overarching theme in the Model Rules that the attorney-neutral role is inherently non-representative.⁸⁶ Therefore, it would have been contradictory and counter-intuitive to group mediators into the same category as attorneys in Rule 1.9 for conflict-of-interest purposes. Including mediators and other neutrals in Rule 1.12 was also significant in that it "minimiz[ed] potential disqualifications and hence maximiz[ed] opportunities for lawyers to serve as neutrals."⁸⁷ Conflicts under Rule 1.9 are imputed to all of the other lawyers working in the conflicted attorney's law firm under Rule 1.10.⁸⁸ However, Rule 1.10 does not impute Rule 1.12 conflicts to the lawyer's firm. Rather, Rule 1.12 contains its own imputation provision that can be avoided if "(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule."⁸⁹ Thus, there will be less disqualification of lawyers and law firms in matters where a lawyer has previously served as a neutral. This encourages (or at least does not discourage) lawyers to serve as neutrals.

Model Rule 2.4 is a completely new rule. Thus, it deserves to be reprinted below:

- (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

85. Yarn, *supra* note 78, at 244.

86. *Id.*

87. *Id.* at 245.

88. MODEL RULES OF PROF'L CONDUCT R. 1.10 (2002) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9.").

89. *Id.* at R. 1.12(c)(1)-(2).

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.⁹⁰

Rule 2.4(a) does not limit the definition of the third-party neutral to mediation and arbitration, but expands it to include other capacities "as will enable the lawyer to assist the parties to resolve the matter."⁹¹ Therefore, Rule 2.4(a) applies not only to mediators and arbitrators, but also other neutrals participating in the hybrid forms of ADR discussed briefly above, such as early neutral evaluation.⁹²

Subsection (b) to Rule 2.4 stresses the importance of clarifying the neutral's role to all parties involved in a dispute over which a third-party neutral presides. It creates a strong affirmative duty on the part of the neutral, requiring an explanation of the difference between his or her role and that of a representative of clients when the neutral knows "or reasonably should know" that a party does not understand the difference.⁹³ This assures that neutrals will be diligent in effectively clarifying their roles to all the parties involved. While this issue particularly arises when one (or both) of the parties is pro se, it may just as plausibly be necessary to clarify the neutral's role to representative attorneys. Role clarification is especially important in mediation, where the mediator may frequently offer his or her opinion on the merits of the case or encourage parties to consider extra-legal bargaining tools.

The significance of Comment 5 to Rule 2.1 is that attorneys now have an affirmative duty to inform clients about ADR as a reasonable alternative to litigation. If there was any doubt under the old rules as to whether South Carolina attorneys had to previously advise their clients about ADR, Comment 5 resolves it. It states that "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."⁹⁴ One of the lawyer's duties as advisor is to "provide[] a client with an informed understanding of the client's legal rights and obligations and [to] explain[] their practical

90. *Id.* at R. 2.4.

91. *Id.* at R. 2.4(a).

92. *See infra* Part II, section C.

93. MODEL RULES OF PROF'L CONDUCT R. 2.4(b) (2002).

94. *Id.* at R. 2.1 cmt. 5.

implications.”⁹⁵ Because “[a]lternative dispute resolution has become a substantial part of the civil justice system,”⁹⁶ attorneys will need to include a discussion of ADR in advising a client about his or her legal options.

D. Specific Concerns Voiced by South Carolina Mediators

The existence of an ADR pilot program in South Carolina provides the opportunity to audit the process, to pinpoint strengths and weaknesses, and to receive feedback from mediators operating under the pilot program. As a result, in crafting and implementing a statewide ADR program,⁹⁷ drafters will have the experiential knowledge they need to create a more effective model. I interviewed mediators in the counties participating in the ADR pilot program to catalogue some of the ethical concerns expressed by those operating under the South Carolina ADR Rules. Perhaps as South Carolina moves forward in adopting a statewide ADR program, it can consider and address some of these issues.

The first issue involves good faith participation by the parties in mediation. Good faith participation is a general concept that comprises a number of ethical duties, such as honesty in negotiation, attendance by all parties involved with full authority to settle, and a sufficient knowledge of the facts and legal issues in the case necessary to participate meaningfully in negotiation discussions. While good faith participation can be problematic in voluntary mediation, it is of particular concern in a mandatory mediation setting. If two or more parties voluntarily agree to mediate, presumably they are both interested in resolving the dispute at this stage. Therefore, good faith participation in the process probably will not impede the voluntary mediation, except perhaps to the extent that the parties engage in dishonesty or make material misrepresentations.⁹⁸ However, in a court-ordered setting, one or more of the parties may not be interested in mediation. As a result, that party, possibly predisposed to litigation, may simply go through the motions during the mediation to comply with the ADR Rules, never really participating in good faith in the process. This results in a “hollow mediation,” because, while on the surface it may appear to be an attempt to resolve the dispute, there is no true substance to the mediation and it is a failure from the outset.

95. *Id.* at pmb1.

96. *Id.* at R. 2.4 cmt. 1.

97. The formulation of a statewide ADR program is already underway. Currently, the South Carolina Bar's ADR Section is focused on presenting a statewide ADR plan to the Joint Commission, which, upon approval of the plan, would then submit the proposal to the South Carolina Supreme Court for promulgation. Telephone Interview with Mike Battle, *supra* note 2.

98. I do not discuss the issue of honesty in negotiation and mediation because it was not a concern that was ever voiced to me by the mediators I interviewed. However, for an excellent discussion of this topic, see Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055 (1998-1999).

One way that a party may “go through the motions” is to send a representative to the mediation with no authority (or limited authority) to settle the case. The ADR Rules generally proscribe this type of conduct. Rule 5 requires certain people to “physically attend a mediated settlement conference.”⁹⁹ Those required to physically attend include:

(2) All individual parties; or an officer, director or employee having full authority to settle the claim for a corporate party; or in the case of a governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and recommend a settlement to the appropriate decision-making body of the agency;

(3) The party’s counsel of record, if any; and

(4) For any insured party against whom a claim is made, a representative of the insurance carrier who is not the carrier’s outside counsel and who has full authority to settle the claim.¹⁰⁰

The ADR Rules never define “full authority to settle,” leaving parties somewhat confused as to how to comply with Rule 5. For instance, if a plaintiff has a product liability claim against a manufacturer and the extent of injury is in dispute (as it often is), how much authority must the manufacturer’s agent have at mediation? The concept of full authority to settle becomes even less clear when the plaintiff is seeking damages beyond just compensation for injury. What amount over and above plaintiff’s actual past and future expenses with regard to the injury must the manufacturer authorize? The ADR rules provide no guidance on these questions. At least one federal judge in South Carolina, however, has issued a standing order containing a definition of “full settlement authority.” Judge David C. Norton defines it as follows:

“Full settlement authority” for the defendant means an individual who can decide to offer the plaintiff a sum up to the existing demand of the plaintiff or the policy limits of any applicable insurance policy, whichever is less. “Full settlement authority” for the plaintiff means the plaintiff himself or herself or a representative of the plaintiff who can make a binding decision on behalf of the plaintiff or plaintiffs.¹⁰¹

99. S.C. CIR. CT. ALT. DISP. RESOL. R. 5(a) (2003).

100. *Id.* at R. 5(a)(2)-(4).

101. Standing Order to Conduct Mediation, United States District Court Judge David C. Norton, January 2002, http://www.scd.uscourts.gov/JUDGES/D_NORTON.asp.

This definition is logical and seems to account for the full range of possible settlement amounts upon which opposing parties could agree. Furthermore, it sufficiently puts parties on notice as to how much authority is "full settlement authority," thereby facilitating compliance with the rule. It should not alarm defense attorneys or insurance adjusters that full authority to settle is defined in terms of a plaintiff's last demand or the maximum coverage of an applicable insurance policy. Indeed, these are merely the limits of the mediation conference, and virtually any skillful negotiator for the defendant will leave the mediation paying less than this amount. The ADR Rules should expressly incorporate this definition into Rule 5, because it clarifies a material, ambiguous term.

Aside from the issues surrounding full settlement authority, good faith participation also requires that the parties' representatives have sufficient familiarity with the dispute to be able to meaningfully participate in the settlement dialogue. Just recently, an attorney in Florence successfully petitioned the court for sanctions for lack of good faith participation arising out of one party's lack of knowledge of the legal and factual issues involved in the case.¹⁰² In *Redbone Alley*, an insurance company sent a representative to appear at the mediation conference. The representative knew "virtually nothing about the facts of th[e] case or the law applicable thereto," including the concept of joint and several liability, which was a key issue.¹⁰³ The plaintiff's attorney had to spend an "excessive number of hours" educating the representative about the facts and legal theories in the case.¹⁰⁴ Subsequently, the mediation was adjourned and rescheduled for a later date so that the representative could discuss the matter further with her superiors.¹⁰⁵ Approximately one month later, at the next mediation conference, the insurance company sent a different representative who also knew virtually nothing about the case and had limited authority to settle.¹⁰⁶ When communications between the plaintiff's attorney and the insurance representative failed again, the attorney for the plaintiff filed a motion for sanctions.¹⁰⁷ The insurance company took the position that it complied with ADR Rule 5(a)(4)'s attendance requirement because it sent someone to "physically attend" the mediation.¹⁰⁸ The plaintiff, on the other hand, successfully argued that "the mediation process will be completely thwarted and avoided by Defendants and their carriers if the rules simply require the physical attendance of someone at the mediation conference, even

102. *Redbone Alley of Columbia, Inc. v. Florence Rest. Supply, Inc.*, No. 00-CP-21-902 (S.C. 12th Cir. Feb. 22, 2002) (granting motion for sanctions and protective order).

103. *Id.* at 5.

104. *Id.*

105. *Id.*

106. *Id.* at 6, 8.

107. *Id.* at 7.

108. *Redbone Alley*, No. 00-CP-21-902 at 7.

though that person might have no knowledge of the file, and no ability to discuss and negotiate a settlement.”¹⁰⁹ The court awarded the plaintiff reasonable attorney’s fees, its portion of the mediation fees, and service of process and court reporting fees.¹¹⁰

Another issue highlighted by *Redbone Alley* that the ADR Rules do not address is how a mediator or a representative attorney should report instances of misconduct during the mediation. The strict confidentiality rules that apply to mediators seem to foreclose any possibility of reporting or testifying to misconduct that occurred at a mediation conference. In fact, in *Redbone Alley*, the court denied the plaintiff’s request to depose the mediator and quashed the plaintiff’s attempt to subpoena him as well.¹¹¹ This poses a significant obstacle to parties seeking sanctions for failure to participate in good faith, or who wish to pursue any other claim or defense arising out of the mediation conference.¹¹² The foundation for this strong duty of confidentiality is located in the ADR Rules. First, Rule 8 states that a mediator shall define and describe “[t]he inadmissibility of conduct and statements as evidence in any arbitral, judicial or other proceeding.”¹¹³ Moreover, it also provides that a “mediator shall not be compelled by subpoena or otherwise to divulge any records or to testify in regard to the mediation in any adversary proceeding or judicial forum.”¹¹⁴ Finally, in the Standards of Conduct for Mediators, the comments provide that the only instance in which a mediator may report anything related to the conduct of the parties is whether the parties appeared.¹¹⁵

At least one South Carolina attorney that I interviewed expressed his concern about this rule and explained that there should be an exception to the confidentiality rule when motions are filed for sanctions for failure to participate in good faith.¹¹⁶ Indeed, such an exception, if properly applied, would not undermine the integrity of the mediation process. Furthermore, disclosure of this exception to the parties at the beginning of the mediation certainly would not violate their “reasonable expectations . . . with regard to

109. *Id.*

110. *Id.* at 10.

111. Telephone Interview with Kevin Barth, Senior Partner, Harwell, Ballenger, Barth & Hoefer (Mar. 31, 2003).

112. One of the only reasons the plaintiff was able to successfully move for sanctions in *Redbone Alley* was because the insurance adjusters admitted to not knowing any of the factual or legal issues at both mediation conferences. Without this admission, plaintiff would have had a much harder time proving that the insurance company did not participate in good faith. *Id.*

113. S.C. CIR. CT. ALT. DISP. RESOL. R. 8(b)(3) (2003).

114. *Id.* at R. 8(e).

115. *See id.* at app. B, Standard V cmt. (“In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process The mediator may report, if required, whether parties appeared at a scheduled mediation.”).

116. Telephone Interview with Kevin Barth, Senior Partner, Harwell, Ballenger, Barth & Hoefer (Feb. 25, 2003).

confidentiality.”¹¹⁷ Finally, courts could hold limited hearings on the issue of good faith participation in which evidence and testimony disclosing mediation discussions would be shielded by a protective order and thus could not be used in any concurrent or subsequent proceeding.¹¹⁸

In *In re Anonymous*,¹¹⁹ the Fourth Circuit addressed the issue of how and in what circumstances parties can disclose information relating to discussions from a mediation conference.¹²⁰ This case involved a dispute as to whether a lawyer or his client was responsible for fees incurred during a mediation conference.¹²¹ The fee dispute was submitted to an arbitration panel for resolution.¹²² At the arbitration, each party disclosed information relating to statements made at the prior mediation.¹²³ The court held that each party breached the duty of confidentiality for mediations, but did not subject the parties to discipline because there was no bad faith or prejudice resulting from their disclosures.¹²⁴ In arriving at its conclusion, the court set forth the appropriate procedure for obtaining consent to disclose confidential information in connection with a mediation conference. The court started with the proposition that the confidentiality requirement does not always preclude parties from using information gained at mediation in a subsequent dispute.¹²⁵ In order to successfully gain consent to disclose such information, a party must demonstrate to the Standing Panel on Attorney Discipline that “manifest injustice” will result from the inability to disclose.¹²⁶ In making this determination, the Standing Panel balances the public interest in protecting the confidentiality of mediation conferences against the private interest in using this information to establish a party’s claim or defense.¹²⁷

117. S.C. CIR. CT. ALT. DISP. RESOL. RULES, app. B, Standard V (2003).

118. This type of exception would be analogous to the situation described in comment 18 to South Carolina Rule 1.6(b)(2), authorizing a lawyer to disclose information otherwise protected by the attorney-client privilege in order to establish a claim or defense. Comment 18 to Rule 1.6(b)(2) states that “disclosure should be made in a manner which limits access to the information to the tribunal or other person having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.” S.C. APP. CT. R. 407, R. 1.6(b)(2) cmt. 18 (2003).

119. 283 F.3d 627 (4th Cir. 2002).

120. *Id.* at 632-33, n.7 (examining the confidentiality rule that “[i]nformation disclosed in the mediation process shall be kept confidential and shall not be disclosed by a circuit mediator, counsel, or parties to the judges deciding the appeal or to any other person outside the mediation program participants.”).

121. *Id.* at 630. This dispute could have been avoided if the lawyer in the case had set forth in an engagement agreement that his client was responsible for mediation fees. *See supra* Part III, section A.

122. *In re Anonymous*, 283 F.3d at 630.

123. *Id.* at 632.

124. *Id.* at 636.

125. *Id.* at 634.

126. *Id.* at 637.

127. *Id.*

This case could serve as a useful model for South Carolina in determining how and when parties or mediators breach their duties of confidentiality. It allows for a more flexible approach to mediation confidentiality and vests the power to grant permission to disclose in a panel of judges on a case-by-case basis.

Finally, an overarching issue that frequently arose in my interviews with South Carolina mediators is the courts' adherence to and enforcement of the ADR Rules. Although the ADR Rules provide that "[t]he mediator shall at all times be authorized to control the conference and the procedures to be followed,"¹²⁸ and that "[t]he parties and representatives shall cooperate with the mediator,"¹²⁹ mediators essentially are powerless when it comes to making the parties to a dispute conform to the ADR Rules.¹³⁰ The only authority that a mediator has is the power to petition the court to impose sanctions on the hostile party.¹³¹ Even this authority is limited by the mediator's duty of confidentiality. Consequently, the mediator's ability to control the process ultimately depends upon the judge's willingness to enforce the ADR rules when an appropriate motion for sanctions is filed. Therefore, without judges who believe in the process and enforce the rules, parties can thumb their noses at the rules and disrupt and thwart the mediation conference with impunity.¹³²

Once a mediator or the other party perceives that a party does not have full authority to settle or otherwise is not exhibiting good faith participation, what recourse is available? The answer depends on the county in which the mediation occurred. According to the attorneys I interviewed, Richland County judges have been more hesitant to impose sanctions on parties for lack of good faith participation.¹³³ Consequently, many court-ordered mediation conferences in Richland last less than an hour and are channeled back into litigation.¹³⁴ However, in Florence County and Greenville County, the courts have sanctioned parties for failure to comply with the good faith requirement.¹³⁵ As a result, the perception is that Florence and Greenville Counties have a more successful court-annexed ADR program than Richland County.

It is clear that the success of court-ordered ADR directly relates (in part at

128. S.C. CIR. CT. ALT. DISP. RESOL. R. 8(a) (2003).

129. *Id.* at R. 5(c).

130. Interview with Thornwell F. Sowell, III, Senior Partner, Sowell, Gray, Stepp & Laffitte, in Columbia, S.C. (Jan. 14, 2003).

131. *Id.*

132. As an aside, I maintain that mediations in which this type of behavior occurs ultimately drive up the cost of litigation. A completely fruitless mediation produces only cost and no benefit for *all* the parties involved. At this point, mediation becomes a burden and an obstacle in resolving a dispute.

133. Interview with Thornwell F. Sowell, III, *supra* note 130.

134. *Id.*

135. Telephone Interview with Karl A. Folkens, Senior Partner, Folkens & Jernigan (Feb. 24, 2003); Telephone Interview with Kevin Barth, *supra* note 111.

least) to the willingness of courts to require parties to make a good faith effort to participate in mediation. How does one remedy the problem in Richland County? Or, more fundamentally, how do you encourage judges to enforce rules when the enforcement of the rules lies completely in their discretion? In my judgment, continuing legal education about mediation is the only answer. Once judges see the benefits of mediation and trust the process, I believe they will be more willing to remove a case from their jurisdiction and allow the parties to determine an appropriate outcome for themselves.¹³⁶ While some of the revisions to the South Carolina Rules of Professional Conduct may affect the judicial attitude towards mediation—for instance, the revisions to the Preamble—something more needs to be done. The South Carolina Supreme Court must lead the statewide ADR movement by example.¹³⁷ It must encourage judges to enforce the rules and to support ADR where they are not already doing so. Not only that, it should publicly commend those judges who do enforce the rules.

IV. CONCLUSION

Before the adoption of a statewide ADR program, the ADR Rules need to be revised to expressly apply to non-court-ordered ADR. There is no reason that such a patent ambiguity should be allowed to exist any longer, especially if a statewide program is instituted. Second, the ADR Rules should define “full authority to settle.” The fact that a number of mediators expressed a concern about this phrase is a sign that it is significant and it should be resolved. In defining full authority to settle, Judge Norton’s construction of the same term in the federal local rules may be a helpful benchmark. Third, the ADR Rules should clarify that full authority to settle alone does not satisfy the good faith participation requirement. Rather, the parties attending the mediation conference must have a sufficient knowledge of the factual and legal details in the case to be able to meaningfully participate in the settlement discussions. Otherwise, the attendance requirement in Rule 5 will be nothing more than an

136. Similarly, arbitration encountered resistance when it was first introduced into the legal system. Professor Domke notes that from the 1920’s to the 1980’s, “[j]udicial hostility toward enforcing arbitration agreements was rooted in the perception that the agreements allowed parties to circumvent the court’s jurisdiction. In other words, parties agreeing to arbitration were indicating their intention of bypassing or ousting the courts, an act which the courts did not wish to encourage.” DOMKE, *supra* note 1, at § 3.01. Finally, the movement towards encouraging and embracing arbitration was led by the United States Supreme Court. Professor Domke states that “[d]uring the past 10 years the United States Supreme Court has led the change in judicial attitudes by abandoning its long-standing skepticism toward contractual commercial arbitration.” *Id.*

137. The Commission on Alternative Dispute Resolution will also play an important role in educating the legal community and promoting ADR. See S.C. APP. CT. R. 422(c)(1)-(2), (7)-(8) (2003).

empty mandate allowing for “hollow” mandatory mediations. Fourth, the ADR Rules should set forth the procedure for gaining consent to disclose mediation discussions to the extent necessary to enforce the good faith participation requirement and to establish other appropriate claims or defenses. The Fourth Circuit opinion in *In re Anonymous* is an effective model to emulate. It adds much needed flexibility to the duty of confidentiality and facilitates enforcement of the ADR Rules. Finally, the supreme court should promulgate the 2002 Model Rules, at least inasmuch as they revise the rules relevant to ADR. Their adoption would be another gesture to the legal community that ADR is an integral part of how disputes are resolved. Furthermore, the new South Carolina Rules would clear up some ethical concerns that the ADR Rules do not address, such as conflict of interest considerations, role clarification by neutrals, and the affirmative duty to advise clients about ADR.

With the revised South Carolina Rules of Professional Conduct nearing the final stages of promulgation and with the implementation of a statewide court-annexed ADR program possibly around the corner, lawyers and judges alike can expect a shift in the practice of law and the resolution of disputes. But with the arrival of such changes comes the need to adapt and embrace them. The judges who have already embraced ADR need to continue to do so. They should also consider speaking and writing about ADR to influence judges still resistant to the movement. Moreover, attorneys may need to restructure their approach to the practice of law. Attorneys should amend their engagement agreements to include a provision about ADR fees. Those not familiar with ADR should attend CLEs to achieve the level of competence required by the South Carolina Rules. Lawyers also should consider how this affects their role as advisor, and they should think about the ways in which their advice about ADR will change as different clients come to them with different needs.

As we move into this new era of dispute resolution, the words of Justice Burger ring true: “The notion that most people want black-robed judges, well-dressed lawyers, and fine paneled courtrooms as the setting to resolve their dispute is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.”¹³⁸

Van A. Anderson

138. Chief Justice Warren E. Burger, *Our Vicious Legal Spiral*, 16 JUDGES' J. 23, 49 (1977).