UNIVERSITY OFFICIALS AS ADMINISTRATORS & MEDIATORS: THE DUAL ROLE CONFLICT & CONFIDENTIALITY PROBLEMS

Jeffrey C. Sun*

I. INTRODUCTION

"Mediation is a voluntary process in which a neutral third party with no authority to impose a solution helps parties reach a personalized agreement for resolving their differences." The process of mediation is not a new approach to problem solving. The conciliatory scheme has been recognized as an "ancient concept." In fact, alternative dispute resolutions have been referred to in writings dating back to biblical times. Although the concept of mediations has developed in conjunction with adversarial proceedings in other cultures, that has not been

* Jeffrey C. Sun, B.B.A. Loyola Marymount University, M.B.A. Loyola Marymount University, J.D. The Ohio State University, Doctoral Studies (in progress) at Teachers College, Columbia University.

Special thanks to Matthew H. Fields and Professors Nancy H. Rogers and Laura Williams of The Ohio State University College of Law, and Dr. L. Lee Knefelkamp of Teachers College, Columbia University for their feedback and support, making the completion of this article possible.


3. See, e.g., Jacqueline M. Nolan-Haley, Court Mediation and the Search for Justice through the Law, 74 WASH. U. L.Q. 47, 100 n.2 (1996) ("Biblical references to mediative conflict resolution are found in St. Paul's admonition to the people of Corinth. 1 Corinthians 6:1-4."); Andrew W. McThenia & Thomas L. Shaffer, For Reconciliation, 94 YALE L.J. 1660, 1666 & n.36 (1985) (explaining that Judeo-Christians have been advised to first discuss their problems and alternatively mediate their disputes).

4. See Stephen G. Bullock & Linda Rose Gallagher, Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana, 57 LA. L. REV. 885, 890 (1997) ("Mediation is, and traditionally has been, a dominant method of
the case for this nation. As a result, this particular medium of dispute resolution is still an evolving concept in the United States. Indeed, mediation programs in the United States are only in their infancy.

Because mediation is only recently gaining widespread acceptance, many organizations need guidelines for implementing such a program. In constructing an effective mediation program, the planners of an alternative dispute resolution system must identify and evaluate their desired outcomes along with the potential barriers to such outcomes. Generally, these desired outcomes of mediation have been identified by various phrases such as "party satisfaction, empowerment, and ownership," prevention of improper conduct, and development of a "healing approach." Whichever terms are employed, the common element is the conciliatory nature of the desired result. This characterization, however, does not adequately reflect the multitude of barriers that exist and must be addressed in the mediation process.

For instance, in mediated dispute resolution systems, a key component to success is the confidentiality of the proceedings. By the very nature of their role, mediators are in a position to hear confidences such as trade secrets, embarrassing, un

11. See, e.g., American Airlines, Inc. v. National Mediation Bd., 588 F.2d 863, 870 n.14 (2d Cir. 1978) (stating that the legislative history supports the proposition that "commercial information," i.e. trade secrets, is exempted from Freedom of
comfortable, or sensitive disclosures;\textsuperscript{13} and privileged information that allows them to evaluate the strengths and weaknesses of a disputant's case.\textsuperscript{14} Another reason for confidentiality is to "preserve the appearance of the mediator's impartiality and neutrality."\textsuperscript{15} Many parties who have participated in mediations would probably have opted not to follow the alternative approach to dispute resolution if their discussions did not remain confidential.\textsuperscript{16} Consequently, a confidentiality provision serves to promote mediation as a "preferable alternative to judicial proceedings." Simply stated, the absence of confidentiality assurances could deter the use of mediations. Thus, these assurances are necessary to overcome one of the barriers to effective mediation.\textsuperscript{17}

As more intraorganizational mediation programs begin to form, the confidentiality element of mediation has become a crucial element to the success of a dispute resolution system. In particular, many institutions of higher education have created conflict management centers or have further developed their existing programs.\textsuperscript{18} Their goal is to resolve disputes using a neutral\textsuperscript{19} in order to minimize future conflicts. These disputes


\textsuperscript{14} See, e.g., Poly Software Intern., Inc. v. Su, 880 F. Supp. 1487, 1494 (D. Utah 1995) ("Where a mediator received confidential information in the course of mediation, that mediator should not thereafter represent anyone in connection with the same or substantially factually related matter unless all parties to the mediation proceeding consent after disclosure.").


\textsuperscript{16} \textit{Cf.} S. REP. NO. 1277 (1974), \textit{reprinted in} 1974 U.S.C.C.A.N. 7051 (Senate Report discussion of rule 408 of the Federal Rules of Evidence stated: "The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible.").


\textsuperscript{19} "Neutral" is a term of art used throughout this article meaning "mediator."
may exist among roommates, classmates, faculty, staff, or between members of the university and its neighbors.\textsuperscript{20} Because the benefits of alternative dispute resolution are so advantageous to the parties involved, mediation has been an attractive forum for dispute resolution at college campuses.\textsuperscript{21} Understanding that statements made at a mediation session will remain confidential provides further support that mediation is the best approach to dispute resolution. With the growing prevalence of mediation at universities, the confidentiality issues raised by such programs warrant careful attention.

In order to effectuate a truly confidential process, colleges and universities must carefully select a mediator who will not be influenced by the institution's authority, particularly when the mediator is also a university administrator.\textsuperscript{22} Moreover, the institution must provide mechanisms to avoid "mediator taint," because the neutral will have gained confidential information. Finally, a mechanism to deter breaches of confidentiality should be included that would address the problem of the dual role of the university official serving as both administrator and mediator.

To explore these issues under the context of student-to-student mediations in higher education, Part II looks at the purposes of mediations within the higher education context. Part III addresses legislative mandates and judicial determinations with which universities may be required to comply in order to conduct legally prescribed, confidential mediation sessions. To illustrate these barriers, the Family Education Rights and Privacy Act will be applied to mediation confidences. Part IV recommends four measures to promote confidentiality and to encourage student participation. Part V concludes by summarizing the confidentiality issues in university mediations, particularly when the mediator is a university administrator.


Alternative dispute resolution mechanisms have existed as part of the higher education environment for some time. Indeed, many colleges and universities have participated in systematic conflict resolution sessions in the form of collective bargaining proceedings. One study has recognized the potential benefits of collective bargaining as a means to resolving disputes in the higher education context. Similarly, the use of mediation in the higher education context may serve as a valuable means to resolving disputes. Moreover, evidence exists that conflict resolution training and implementation in the schools can serve to reduce future disputes among the students.

Certainly, "[t]he 'business' of a university is education." Courts have viewed this duty to educate in broad terms. In fact, courts have charged colleges and universities with the duty to protect their students under the doctrine of in loco parentis. Consequently, university administrators have gradually become aware that their responsibilities naturally extend beyond the classroom.

In addition to the duties prescribed by the courts, university administrators recognize and understand the need to maintain a peaceful educational environment. Because of the day-to-day

23. See Bialik, supra note 21, at 61.
29. See also William S. Haft & Elaine R. Weiss, Note, Peer Mediation in
interaction of students who may have disputes with each other, resolution of differences through mediation can be an attractive means of keeping order.\textsuperscript{30} Furthermore, mediation may serve as a preventative measure for future confrontations, whereas conflicts addressed through a court-summoned or university-sponsored judicial proceeding may not yield the same result.\textsuperscript{31}

It has been stated that "[m]ediation is the least intrusive method of alternative dispute resolution where a neutral third party assists in negotiations between the parties to resolve their conduct."\textsuperscript{32} Mediations have naturally become an attractive alternative to formal university disciplinary hearings, counseling meetings, or judicial proceedings, because the process allows for greater flexibility. Furthermore, unlike court proceedings, a mediation session is not bound by formalities of a structured judicial process, and collateral issues may be raised and resolved in a more comprehensive fashion.\textsuperscript{33} Specifically, a mediation's informal manner provides opportunities for broader discussions than traditional adjudicative proceedings would otherwise allow; traditionally, the issues raised or evidence introduced would be classified as "irrelevant" to the case at hand. In reality, it is precisely this type of interaction or discussion that might be instrumental in finding an agreeable or workable resolution between two students mired in conflict.

III. THE MEDIATOR–ADMINISTRATOR

A. Who is the Mediator?

"A mediator works with the parties together and separately to identify important issues, to minimize the retrospective plac-

\begin{thebibliography}{9}
\item See infra note 35 and accompanying text.
\item Bialik, supra note 21, at 62.
\item See Bullock & Gallagher, supra note 4, at 957 (citing John R. Murphy, III, Comment, In the Wake of Tarasoff: Mediation and the Duty to Disclose, 35 Cath. U. L. Rev. 209, 216 (1985)).
\end{thebibliography}
ing of blame, to stress potential areas of agreement, and to build a desire to reach a settlement acceptable to both parties. 34 An intimate knowledge of student concerns coupled with the ability to draw out unstated, underlying issues from the disputants is crucial for successful university mediations. 35 Without these skills, the final agreement may only serve as a temporary remedy, and the disputants may soon return with another conflict. 36 Additionally, the mediator must successfully dispel the student-disputants' fears of backlash from incriminating or embarrassing disclosures made during the mediation process. Students may fear the possibility of university sanctions, fraternity/sorority alienation, peer humiliation, or scrutiny by university officials if discussions from their mediation are revealed to others. Therefore, to administer a more open and effective student-to-student mediation, each party should be given complete information about the process, with an emphasis on the confidentiality and neutrality of the mediator. 37

Generally, mediated conflicts between students have been funded through the Student Affairs Division of the college. 38 Traditionally, the mediators have been university staff members with some formal training in conflict resolution. 39 However, with financial constraints on many colleges and the limited number of mediated disputes, these mediators rarely function exclusively as a mediating neutral. Consequently, information obtained from the mediation may be valuable to the university official in another capacity, such as the Residence Life Director, Dean of Students, Director of Public Safety, Greek Advi-
sor, Counseling and Guidance Personnel, or Academic Programs Officer.

B. Dual Roles of University Mediators: Neutral and Administrator

Problems typically addressed in university conflict resolution sessions have included roommate problems, vandalism, harassment, noise control, school violence, use of drugs and alcohol, work arrangements, and ethnic and lifestyle tensions. Not surprisingly, the information disclosed in these dispute resolution meetings tends to revolve around issues that are sensitive for the students involved. Furthermore, a mediation study comprised of college students also supported the basic assertion that disputants are "sensitive to the procedures which govern their interaction and decision making." Thus, in order for the mediator to foster participation and promote active listening by the disputants, a relationship of trust should be formed during the process.

Unfortunately, in a situation where the neutral is also a college administrator, the trust factor becomes a major concern.

40. See Gibson, supra note 22; see also Bill Warters, Campus Mediation Resources: Campus Mediation Program Planning Guide (visited April 2, 1999) <http://www.mttds.wayne.edu/guide.htm>.


43. See In re Florida Rules of Civil Procedure, Florida Rules for Certified and Court-Appointed Mediators, and Proposed Florida Rules for Court-Appointed Arbitrators, 641 So.2d 343, 349 (Fla. 1994) ("A mediator occupies a position of trust with respect to the parties and the courts.").

Under the language of "impartiality," the Committee notes state, "[m]ediators establish personal relationships with many representatives, attorneys, mediators, and other members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances, but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality." Id.

For purposes of mediations conducted in higher education institutions by school administrators, the language here indicates disclosure of possible biases would occur after application of the objective test of impaired impartiality. This objective standard seems to utilize the reasonableness of a mediator not a disputant in determining where "a particular relationship might reasonably appear to impair impartiality." Id.
for the student-disputant. In fact, it has the potential of becoming a deterrent to conflict resolution. A student may view the neutral as a university administrator and not as a neutral. In other words, the student would label the administrator as one who is incapable of being impartial as a third-party mediator because of ties and allegiance to the university as employer. Therefore, the mediator who plays this dual role must overcome any possible impartiality concerns. In addition, fears of disclosure to another college administrator or even the possibility of penalties from the mediator acting in her non-neutral role should be dispelled from the outset.

Whether or not the mediation program is university sponsored, its success is predicated on the existence of confidential proceedings. Accordingly, courts have also identified the necessity of maintaining the confidentiality of mediation sessions. As a matter of sound public policy,


46. See, e.g., Marchal v. Craig, 681 N.E.2d 1160, 1163 (Ind. Ct. App. 1997) ("The mediator should be perceived as impartial and willing to protect the confidentiality of the process."); but see Pyne v. Procacci Brothers Sales Corp., No. CIV.A.96-7314, 1997 WL 634370, at *1 (E.D. Pa. Oct. 8, 1997) (discussing a plaintiff who alleged that the mediator represented herself as an impartial mediator when in fact she was at the time representing defendants).

47. See Paranzino v. Barnett Bank of South Florida, N.A., 690 So. 2d 725, 728 (Fla. Dist. Ct. App. 1997) ("This court finds that, in the instant case, all parties were aware of the precedent condition of absolute confidentiality regarding the mediation proceedings." In addition, the parties explicitly provided for a confidentiality provision in the mediation agreement.).

[i]t is essential for the parties to feel confident that anything they reveal privately to the mediator or in open mediation sessions cannot be used against them should the mediation fail. Otherwise, parties would be reluctant to make the kinds of concessions and admissions that pave the way to settlement.49

IV. LAWS RELATING TO CONFIDENTIALITY

In the higher education context, there are times when a mediation session cannot remain confidential.50 For example, disclosure laws applicable to public institutions may trump university policies of mediation confidentiality.51


The laws pertaining to disclosure of a student’s record have undergone several challenges because the language of the statutes and their corresponding applications have been unclear to school administrators.52 The courts’ interpretations of these laws weigh heavily on the possible legitimacy of various mediation procedures. For example, the Family Education Rights and Privacy Act of 1974 ("FERPA") has traditionally been viewed as a protective measure for students. FERPA prohibits an educational institution from carelessly disclosing students’ records to


51. See DTH Pub. Corp. v. University of North Carolina at Chapel Hill, 496 S.E.2d 8 (N.C. Ct. App. 1998) (holding that the information disclosed in an undergraduate court proceeding was not considered privileged or confidential under FERPA because it was subject to the North Carolina Open Meetings Law).

52. See, e.g., Lewin v. Medical College of Hampton Roads, 931 F. Supp. 443 (C.D. Va. 1996) (finding no valid claim under FERPA when the student requested to review the challenged exam which he failed).
the public. Specifically, FERPA's coverage is confined to improper disclosures of "education records" or "personally identifiable information." Educational records are defined as "records, files, documents, and other materials which . . . (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." Traditionally, courts have narrowly interpreted what constitutes "educational records" by focusing merely on "records related to academic performance, financial aid, or scholastic probation." Similarly, "personally identifiable information" has been held to represent data contained in a student's records, such as a student's Social Security number. Besides prohibiting an educational institution from revealing a student's Social Security number, the language has been found to bar disclosure to the media of a non-criminal incident where the student can be identified as a result of the school's disclosure. Considering the possibility of improper disclosures of "educational records" and "personally identifiable information," institutions of higher education that conduct mediations must concern themselves with proper maintenance of a student's record.

At the same time, institutions of higher education should be aware of two state supreme court cases. In State v. Miami University and Red & Black Publishing Company, Inc. v. Board of Regents, two state supreme courts found university disciplinary

59. The parents of the minor may also retrieve a student's records from the university; thus, parents may potentially represent another class of persons whom the student fears will receive mediation information.
records were outside the scope of educational records.60 Because both of these states also had an open records act, the disciplinary units of those universities were required to disclose all the files not pertaining to "academic performance, financial aid, and/or scholastic probation."61 Applying this FERPA analysis, information gathered from university-sponsored mediations that does not pertain to academic performance, financial aid, and/or scholastic probation would be considered accessible under a state’s open records act.62

Fortunately, many states with an open records act also have included a provision that precludes the act’s application when otherwise prohibited by state or federal law.63 To overcome the potential damaging application of an open records act, a university should carefully examine the confidentiality protections for mediations under its state’s statutes.64 A state statute requiring the confidentiality of mediations would supercede the open records act. As a result, a student who participates in a university-sponsored mediation in such a state could openly discuss underlying issues with respect to the dispute and not fear public disclosure. To illustrate, mediation communications in Ohio are generally confidential.65 Because section 2317.023 of the Ohio Code holds mediation communications confidential, the language would be sufficient to override the Ohio Public Records Act.66

On the other hand, confidentiality provisions that prohibit general public disclosure do not effectively bar a college administrator from reviewing a student’s file, which may contain a mediation agreement. Despite the FERPA provisions and the state confidentiality statutes, there are insufficient restraints

61. 680 N.E.2d at 959; 427 S.E.2d at 261.
placed on other school administrators to keep them from accessing a student's file.\textsuperscript{67} Furthermore, confidentiality protections currently in place for students are primarily geared toward nondisclosure to the general public; thus, they are ineffective in preventing another school administrator from retrieving mediation session notes that are contained in a student's file.\textsuperscript{68} Likewise, the provisions do not effectively deter the administrator-neutral from using the information learned in a mediation against the student-disputant, another student, or in attempting to draft school policies. Because the mediation session itself is not defined as a disciplinary proceeding, the best solution to mediation-inhibiting disclosure under the Open Records Act is to minimize the paperwork produced during a mediation session.\textsuperscript{69}

**B. Family Education Rights and Privacy Act of 1974: \textit{Legitimate Educational Interest}**

FERPA was designed to suspend federal funding to educational institutions that ignore the statute's mandates.\textsuperscript{70} The language of the Act pertinent to mediation confidentiality states:

\begin{quote}
(a)(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school . . . the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be in-
\end{quote}


\textsuperscript{68} See \textit{infra} Part III.C.

\textsuperscript{69} See \textit{id}.

formed of the specific information contained in such part of such material. \ldots \textsuperscript{71}

(b)(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—\textsuperscript{72}

(b)(1)(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required.\textsuperscript{73}

From the language in the last quoted provision, 20 U.S.C. §1232g(b)(1)(A), school officials within the educational institution may access a student’s records after determination that the school official has a “legitimate educational interest.”\textsuperscript{74} This potential access does not encourage students to pursue a university-sponsored mediation if the student’s hesitancy to proceed is based on the reaction of university officials. Of course, if the dispute is not recorded with the university police or security\textsuperscript{75} and the student does not care that the university

\textsuperscript{74}See Eastern Connecticut State Univ. v. Freedom of Information Comm’n, No. CV 960556097, 1996 WL 580966, at *1 (Conn. Super. Ct. Sept. 30, 1996). Adjunct professor sought to retain a copy of the audiotapes from a hearing that he participated in. The hearing proceedings disclosed a student’s behavior records. The court found the professor’s legitimate educational interest in the student’s behavior. Thus, his obtaining the tapes did not require the consent of the student, and consequently, the passing of the tapes did not violate any FERPA provision. \textit{Id.} at *3; \textit{but see} Krebs v. Rutgers, 797 F. Supp. 1246, 1259 (D. N.J. 1992) (finding no legitimate educational interest to provide the post office personnel with students’ social security numbers).

\textsuperscript{75}The term ‘educational records’ is not all-inclusive. The term ‘education records’ does not include— (i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or
will obtain information concerning the substance and nature of the dispute, a university-sponsored mediation would be a viable alternative to resolve the dispute.

Generally speaking, FERPA does not provide students sufficient protection to satisfy all possible confidentiality concerns. In particular, even with the protections provided by FERPA, students may still fear the repercussions of their actions or statements to a university official disclosed in the mediation session. For example, in the course of a mediation, a student may reveal information regarding a third-party student's plagiarized paper, substance abuse problems in a dormitory, excessive cheating on exams with a particular professor, or knowledge of an on-campus sexual assault. The mediator-administrator who learns this type of information may feel compelled to disclose the existence of the uncontrolled environments to another school official.

Furthermore, in the event the school improperly discloses a student's records, whether it be to the public or an official within the institution with no legitimate educational interests, the student has no private right of action against the school under FERPA. Consequently, under the current legislative

revealed to any other person except a substitute; (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement; (iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or (iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.


scheme, a student may hesitate to put forward candid comments that would otherwise aid in resolving the conflict. Therefore, to rectify these problems, higher education institutions must adopt appropriate policies and procedures if they wish to conduct an effective mediation program. 77

C. Criminal Violations

Commonly referred to as the Crime Awareness and Campus Security Act of 1990 ("Campus Security Act"), colleges and universities are required to develop policies that encourage prompt reporting of crimes to police and college officials. 78 In addition, this Act, which is within the Higher Education Amendments of 1998, 79 places a mandate that colleges compile and report statistics on crimes specifically listed in the statute. 80 Under the Campus Security Act, disputes that are brought to mediation have the potential for disclosure. 81 In addition, several courts have held that educational records under FERPA exclude disciplinary proceedings. 82 In the absence of some other protective

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77. See infra Part IV. A-D.
81. Easily traceable information, such as residence hall room number, date and time of the incident, etc., which is filed to campus security, reduces the probability of keeping the information confidential. See, e.g., State v. Miami Univ., 680 N.E.2d 956, 962 (Ohio 1997) (Lundberg-Stratton, J., dissenting).
82. Several courts have been asked to determine the relationship between FERPA confidentiality and First Amendment rights to general public access of records. There is a conflict between the two District Courts on this issue. Compare Student Press Law Center v. Alexander, 778 F. Supp. 1227 (D.D.C. 1991) ("The right to receive information and ideas 'is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution.' Therefore, plaintiffs' claim that the FERPA interferes with their ability to gather information regarding campus crimes implicates the First Amendment." 778 F. Supp. at 1233 (citing Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982))), and Bauer v. Kincaid, 759 F. Supp. 575, 593-95 (W.D. Mo. 1991) (holding that FERPA does not act to bar public access to criminal investigations and incident
measures, disputants who are aware of the relevant case law and reporting statutes will be less inclined to be forthright with sensitive, embarrassing, or incriminating information.

Similarly, if the university requires the mediator to file all documents and notes created from the mediation, the mediator may be cautious with the information gathered from the dispute resolution session in an effort to protect the students. The mediator may not record the entire content of the proceeding for fear any notes may unfairly taint one of the disputants. The uncomfortable tension between unfettered mediations and the laws requiring or permitting disclosure may adversely impact a potentially effective mediation program in colleges and universities. Moreover, this tension may cause administrators to be less inclined to serve the dual role of administrator and neutral or even support the existence of a mediation program.

Another concern for the dual role neutral is the potential legal liability for the university. In *Tarasoff v. Regents of the University of California*, the California Supreme Court found a special relationship to exist between the defendant-psychotherapist and a third party individual who was killed by the psychotherapist's patient. Following the *Tarasoff* analysis, a neutral school administrator may attach liability to the university for failing to warn a third party of a discussion that transpired during the mediation involving threats of violent acts.

The problem in *Tarasoff* arose when the patient informed the psychotherapist that he intended to kill an individual. In the session, the intended victim was specifically named. Bothered by the comments, the psychotherapist contacted the campus police. The police detained the patient, but they released him shortly thereafter because he seemed rational. Two months later, the intended victim was killed. Prior to the killing, no one informed the intended victim of the potential harm.

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reports conducted by university police), *with* Norwood v. Slammons, 788 F. Supp. 1020 (W.D. Ark. 1991) (In declining to follow Bauer, the court stated: "because the press may have a right to print accurate information, for example, regarding the identities of crime victims and gory details of the crime, [it] does not, by any stretch of the imagination, compel the conclusion that members of the general public have a right to acquire that information from any governmental employee, or body which might possess the same.").


"Once foreseeable danger to a party with whom the professional had a special relationship has been established, the issue becomes whether reasonable care was exercised to protect the threatened victim."\(^{85}\) In \textit{Tarasoff}, the California Supreme Court held that the psychotherapist had a duty to take reasonable steps to protect the intended victim.\(^{86}\) Under the \textit{Tarasoff} doctrine, it has been stated that "[w]here... the potential victim threatened by disputants in a mediation program is foreseeable, the mediator would have an affirmative duty to disclose this information."\(^{87}\) In essence, there may be times that the intended victim is not a party to the mediation, yet the individual could still be subject to a violent act. Thus, despite the victim's lack of involvement in the proceedings, the mediator must inform the victim of the threats in order to avoid liability in jurisdictions that follow the \textit{Tarasoff} doctrine.\(^{88}\)

Indeed, a neutral who also serves as a college administrator would probably be more likely to take proper measures and disclose confidences of a disputant to prevent the school from later being found negligent for its nondisclosure. In the alternative, an administrator-neutral may discuss the matter with another school official for advice. She may decide to consult the other administrator so that a third-party individual may evaluate the circumstances of the dispute and the potential harm at issue. Moreover, absent any express policies prohibiting such conduct, the administrator-neutral may feel obligated to inform another administrator of impending or suspecting problems.

Looking at the conflict from a risk management perspective, precautions taken to protect the university would be the most economical and beneficial for the school, not to mention the benefits to the person threatened.\(^{89}\) Unfortunately, revealing the danger could severely hamper future mediations under a university-sponsored program. Progress in future mediations


\(^{86}\) See id. at 340 (The psychotherapist "did not confine [the patient] and did not warn [the victim] or others likely to apprise her of the danger."); Accord Schuster v. Altenberg, 424 N.W.2d 159 (Wis. 1988).

\(^{87}\) Murphy, supra note 85, at 216.

\(^{88}\) See id.

\(^{89}\) For public policy reasons, disclosure may be warranted to avoid risk of serious bodily harm upon a third party.
could be hindered by student fears of disclosure to other school officials, rendering the university's mediation program ineffective.

V. SATISFYING THE DISPUTANTS' CONCERNS: CONFLICTS AND CONFIDENTIALITY RESOLVED

A. The Chinese Wall

To avoid conflicts and confidentiality dilemmas in university-sponsored mediations, the educational institution must provide an impartial neutral. Student disputants would not necessarily view a person who serves the dual role of administrator and neutral as impartial. Instead, students may perceive that the neutral will display a marked allegiance to the university should a conflict arise between the disputants’ confidentiality concerns and the best interest of the educational institution. Therefore, disputants would be more apt to participate in a university-sponsored mediation if there were mechanisms in place to insulate the neutral from conflicts of split loyalties. 90

Under the Model Rules of Professional Conduct ("Model Rules"), an attorney who has represented one client cannot later represent a client who is opposing the original client in a substantially similar case. 91 In such an instance, the attorney must either decline the work with the latter client or be disqualified from the case. Furthermore, when an attorney represents a client, that representation and associated conflicts of interest are generally imputed to other members of the law firm. 92 The problem becomes much more complex when the attorney leaves the firm for a government lawyer post or another law firm. Because these conflicts could potentially eliminate a vast majority of practicing attorneys in an area, the Model Rules established an approach that erects a "Chinese

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92. See, e.g., State v. Lentz, 639 N.E.2d 784 (Ohio 1994).
wall" around attorneys who have gone to another law firm or have chosen to work in a government agency's legal division.93

A Chinese wall is a procedure that insulates the attorney who represented a former client and that former client now becomes an adversary of a client of the firm or agency for whom the attorney currently works.94 Thus, the attorney with the conflict is "walled off" from any potentially improper conflicts, and disqualification of an entire firm is not necessary. A Chinese wall balances the need for exclusion of attorneys from inside or incriminating information and avoids the blanket elimination of law firms or government agencies after an attorney joins the new organization. This concept of building a Chinese wall could also be implemented where a school official plays the dual role of a university administrator and mediator.

Unfortunately, it is inevitable that there will be "continuing danger that a [school official] may unintentionally transmit confidential information" to the administrator who serves as a neutral for a case substantially related to the information passed.95 Therefore, the goal of the Chinese wall "is to minimize the potential for the transmission of confidential information" between other school administrators and the neutral.96

To properly implement an effective Chinese wall, universities may employ several possible methods of insulating the administrator-neutral. First, the mechanism should prohibit the neutral from participating in disciplinary proceedings with students who sought mediation.97 Without this barrier, students would likely distrust the mediator and fear the reprisals from the former neutral who might later become a disciplinary officer.98 Second, the neutral should not be provided with previ-

97. Cf. State v. Tolias, 954 P.2d 907 (Wash. 1998) (describing where the defendant waived his rights to challenge the possible improper dual role of the prosecutor who also arguably served as a mediator to the case).
ously filed information regarding the student. Therefore, de­
spite any "legitimate educational interest" that would normally
permit a university official to examine a student's records with­
out her consent, the neutral should be prohibited from access­
ing a student's file, since it may unfairly taint the outcome of
the mediation. Third, distributions of inter-departmental and
intra-departmental memoranda, letters, e-mails, and faxes
should be carefully screened before issuing them to one who is
both neutral and a university administrator. A coding system
could alert the neutral of an inadvertently delivered correspon­
dence that should not be read. For instance, the system may
operate by placing a mediation code or a number that indicates
the subject matter pertains to a student dispute. Once such a
code is seen, the neutral would return the correspondence to
the sender. Likewise, an e-mail may be "filtered" by subject
matter. Thus, once an e-mail subject matter has been labeled
with specific codes, the e-mail would be rejected and returned
to the sender.

In addition, the files of a neutral-administrator should be
securely maintained and should not be intermingled with the
files of other departments. Likewise, the neutral's files should
not be placed with files dealing with the neutral's other role as
an administrator. Only the neutral-administrator would have
access to the mediation records, thereby eliminating possible
access by other administrators or even work study students
from gaining any information from the mediation session.

Many of the potential problems mentioned above may be
alleviated to some degree if the university creates an
ombudsperson to handle all mediations. An ombudsperson is
generally a neutral official of the university who handles com­
plaints and disputes within the university.99 At Columbia Uni­
versity, the ombudsperson is charged with the responsibility of
maintaining the neutrality and confidentiality of all disputes
filed.100 To ensure insulation, this individual reports directly to
the president of the university rather than to a particular ad­

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ministrative office. Moreover, confidentiality is maintained because the ombudsperson does not report the names of any office visitors without consent, except in cases of serious threats to individual safety. Therefore, the use of an ombudsperson would satisfy the disputants' concerns of confidentiality and neutrality.

Alternatives to hiring one person dedicated to conflicts within the university include the use of individuals not related to an administrative position. For instance, the university may consider the use of peer mediators, administrators from other schools, students from other schools, or administrators with little day-to-day interaction with students.

Once a Chinese wall has been erected, notification to the students of the various confidentiality mechanisms would enhance the program and attract student participation. Furthermore, students who feel compelled to resolve their disputes through mediation would feel more free to discuss their conflicts without withholding information than they would have felt in the absence of the Chinese wall.

B. Contract and Tort Liability

Disclosure of confidential information, whether required by law or not, brings an uneasy feeling for mediators and the dis-

101. Budgetary constraints may eliminate the use of an ombudsperson. Therefore, the university should examine the use of other resources.

102. The use of students from other schools has many implications attached with its use. In particular, the creation of a coop-type program could possibly avoid university liability. For instance, a neutral-administrator who mediates a case where she learns of a discrimination claim or a sexual harassment charge may create the appropriate scienter to meet the requisite elements of knowledge or awareness by the university. On the other hand, using a mediator who has no administrative capacity in that particular university may not be sufficient to place the school on notice of the problem.

103. At the beginning of the mediation, the mediator would qualify herself as a neutral person in the process. For instance, she may state that she has no affiliation with the university because she is in fact a law student at another university. She would then inform the disputants of the confidentiality requirements and wait for their acknowledgment of this policy. In addition, she would specify that she will shred her notes at the end of the mediation and no paper trails will exist except for the possible signed mediation agreement which the disputants will keep for themselves. Finally, before beginning discussions, the mediator must clearly disclose her duty to reveal criminal activity including of potential harm to another.
Mediators are constantly in fear of the possibility that a former disputant may bring suit for "libel, slander, defamation, invasion of privacy, and breach of an express or implied confidentiality contract" when information is disclosed, even when required by law. Similarly, the disputants are never provided absolute guarantees that their statements will remain within the walls of the mediation room. As a result, they do not feel completely free to tell the mediator their account of the dispute. Instead, they are preoccupied that their statements will later be used against them.

In the event that statutes governing confidentiality do not exist in a particular state or are not applicable to a specific situation, the university may opt to implement a contractual promise of confidentiality. The agreement should clearly indicate that matters addressed in mediation would remain confidential unless prohibited by law. In addition, a clause may state that the mediator's role may not be imputed to the university or any other individual, department, or office within the university. Such a provision would eliminate any ambiguities of confidentiality disclosures and file accessibility to other university officials. It would also further the mediator's insulation and identify another expressly stated protective measure for the students.

"While mediation communications are confidential, confidentiality does not prevent a party from bringing suit for breach of a mediation agreement." In general, confidentiality

105. Murphy, supra note 87, at 224.
agreements are enforceable among the signatories in the absence of a subpoena.\textsuperscript{110} Such agreements are important to the process because they add to the likelihood that the parties involved in the mediation will keep their conferences confidential. Furthermore, the agreements provide an avenue for bringing legal action against individuals who breach the confidentiality of the mediations.\textsuperscript{111} Therefore, if a mediator who also serves as a university administrator discloses information when not required by law, the mediator will have breached the contract. In such an instance, the educational institution through the law of agency, may be held liable for the administrator-mediator’s actions.\textsuperscript{112}

Contracts maintaining the confidentiality of a mediation proceeding may be attractive to the participants. The parties may draft a confidentiality agreement tailored to their specific needs before the proceedings begin. Although it may seem awkward to negotiate terms for a mediation, the parties’ control over their dispute may provide more opportunities for an eventual settlement. Moreover, the confidentiality agreement may have more strength than a state statute mandating confidentiality.\textsuperscript{113} Because mediation confidentiality laws are unsettled, courts may unexpectedly intervene and require disclosure of what at first seemed to qualify as a confidential statement.\textsuperscript{114} By contracting, the parties may also address their choice of laws to be applied.\textsuperscript{115} This would be particularly helpful if a suit is filed in federal court and a party asserts that another party


\textsuperscript{112} See RESTATEMENT (SECOND) OF AGENCY §§ 1, 140 (1958).

\textsuperscript{113} See generally JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION WITH FORMS §§ 7.13 to 7.16, at 122-25 (2d ed. 1997); but cf. Bullock & Gallagher, supra note 4, at 961.


\textsuperscript{115} Cf. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (explaining that a franchise agreement that included a provision of a “choice of law” was valid).
violated the confidences of the mediation proceedings.\textsuperscript{116} Likewise, one state law may have stronger language to protect a mediation session than another state.\textsuperscript{117} Thus, the choice of laws provision could determine the outcome of later challenges.

A confidentiality agreement places the needed emphasis on the sensitivity of mediations. By contracting confidentiality, disputants may clearly express preventative measures to mediation disclosure. The agreement can include the understanding of the parties that any mediation communication shall not be revealed to any other school employee without the express authorization of the disputants. In addition, the neutral-administrator shall not knowingly use any information revealed through the mediation process against any student, staff, or faculty member of the university, whether in specific proceedings for any of the named individuals or groups, or while proposing or drafting policy matters for the educational institution.\textsuperscript{118} A liquidated damages clause, holding the administrator-neutral personally liable for non-negligent disclosures, may also serve as a deterrence to mediators who contemplate revealing confidential information.

Another avenue that a disputant may take is tort liability. For instance, if a neutral discloses information that may be harmful to one of the party’s academic research, the party may seek damages by claiming actions such as misappropriation of information\textsuperscript{119} or improper disclosure of trade secrets.\textsuperscript{120}

\begin{footnotesize}
\textsuperscript{116} See Cronin-Harris, supra note 114, at 542.
\textsuperscript{117} Compare Mass. Gen. Laws ch. 233, § 23C (stating in part: “Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be confidential communication and \textit{NOT SUBJECT TO DISCLOSURE IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING}; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.”) (emphasis added), with Tex. Rev. Civ. Stat. Ann. § 154.073 (West 1997) (stating in part: “An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.”).

\textsuperscript{118} Columbia University allows the information to be used in a “constructive format.” Similar to the Campus Safety statutes, “[t]he Ombuds Officer keeps aggregate statistics of the types of complaints received by the office.” In addition, the Ombuds Officer “may periodically report problem areas to senior administrators and make recommendations for institutional improvements as appropriate. See Facets 1998-1999: Student Resources-Ombuds Office (visited April 2, 1999) <http://www.columbia.edu/cu/facets/30.html>.

\textsuperscript{119} See Den-Tal-Ez, Inc. v. Siemens Capital Corp., 566 A.2d 1214, 1224 (Pa.
dition, disputes between other students outside the academic context may include libel, slander, defamation, and invasion of privacy.121

In sum, improper disclosures of confidential information by a neutral may bring about claims under contract and tort liability. Unfortunately to assert these claims, the damage will have already taken place, and such disclosure may be so harmful to a student-disputant that money damages will never fully compensate the disputant for her injury. On the other hand, a student-disputant who truly fears the chance of improper disclosure may seek a court injunction against the neutral-administrator from revealing the potentially harmful information. To succeed, the student will have the burden of establishing the necessary relationship, the confidentiality agreement, and the irreparable harm that would result from improper disclosure.122 Similar to injunctions, protective orders may be available to student-disputants to prevent disclosure at an earlier time and to assure that confidences will not be revealed. The act of seeking a protective order may be enough to keep the other disputant and the neutral-administrator mindful of the possible consequences of improper disclosure.123

C. Confidentiality Statutes

In the past several decades, the number of state statutes that govern mediations has increased in reaction to the growth of alternative dispute resolution programs. Consequently, legislators have promulgated laws to promote mediation proceed-

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120. See Burten v. Milton Bradley Co., 763 F.2d 461, 463, 465 (5th Cir. 1985).
121. See Murphy, supra note 87, at 224; see also City of Middletown v. Von Mahland, 643 A.2d 888, 891 (Conn. Ct. App. 1994).
122. See International Paper Co. v. Suwyn, 966 F. Supp. 246, 258 (S.D.N.Y. 1997) (describing where former employer was trying to enforce a noncompete clause, but failed to establish likelihood of irreparable injury).
123. A protective order does not guarantee Full Faith and Credit by all sister states. See Baker v. General Motors Corp., 118 S. Ct. 657, 664-65 (1998) ("Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law.").
ings. Specifically, many states and federal regulations have been issued to maintain the confidentiality aspect of mediations.\textsuperscript{124} Although "[m]any states have confidentiality statutes governing mediation and ADR processes, . . . these statutes vary considerably in both coverage, exceptions and scope."\textsuperscript{125}

For instance, a federal statute that governs the Department of Commerce's Community Relations Service Mediation Program states in part:

\begin{quote}
(b) The activities of all officers and employees of the Service in providing conciliation assistance shall be conducted in confidence and without publicity, and the Service shall hold confidential any information acquired in the regular performance of its duties upon the understanding that it would be so held. No officer or employee of the Service shall engage in the performance of investigative or prosecuting functions of any department or agency in any litigation arising out of a dispute in which he acted on behalf of the Service. Any officer or other employee of the Service, who shall make public in any manner whatever any information in violation of this subsection, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000 or imprisoned not more than one year.\textsuperscript{126}
\end{quote}

From the language of this statute, the mediator is charged with the responsibility of maintaining confidentiality of the information obtained in the "regular performance of its duties."\textsuperscript{127} In addition, the language of the statute indicates a mutual "understanding" that a level of trust may be imputed to the mediator.\textsuperscript{128} Furthermore, a deterrent factor has been encompassed in the statute. A mediator who violates the confidentiality requirement will face criminal penalties that may include a monetary sanction.\textsuperscript{129}

\begin{thebibliography}{99}
\bibitem{124} See generally ROGERS, supra note 66, at 243-72.
\bibitem{125} Cronin-Harris, supra note 114, at 453.
\bibitem{126} 42 U.S.C.S. § 2000g-2(b) (Law. Co-op. 1996) (entitled: Cooperation with appropriate agencies; activities confidential).
\bibitem{127} Id.
\bibitem{128} See id.
\bibitem{129} See id.
\end{thebibliography}
A statute modeled after the federal Community Relations Service Mediation Program would provide greater incentive for students to participate openly in university-sponsored mediations and remind neutrals within the educational institutions of their confidentiality obligations. In the event that a state statute fails to provide an appropriate confidentiality deterrence, the college or university may wish to adopt its own sanction for further support of confidential mediation proceedings. This may allow for specific consideration and appropriate language to address the complexities of maintaining a dual role as a university administrator and neutral. Whatever the imposed sanction becomes, the students should be made aware of the institution's attempts to promote candid discussions with the university-sponsored mediator.

D. Professional Standards for Confidentiality

Confidentiality is a major concern, which may be remedied through the implementation of professional standards. Although statutory schemes are an alternative, a code of professional standards may contribute to a uniform system and a general understanding. Likewise, students would become acquainted with the standards and would know what to expect from mediation sessions.

Several suggested uniform standards have been published in the last two decades. In 1987, the Symposium Rule, which was a spin-off of the ABA's Draft Model Rules, was created. After critiquing the Draft Model Rules, the Symposium members formulated a new confidentiality standard for mediators that states:

[All] mediation documents and mediation communications are privileged and confidential and shall not be disclosed where the parties and mediator have agreed that they shall be confi-

130. See supra Part IV.C.
confidential pursuant to this statute/rule. If confidential pursuant to this statute/rule, they are not subject to disclosure through discovery or any other process, and are not admissible into evidence in any judicial or administrative proceeding. 133

Similarly, the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution worked together to craft a mediator's code of professional conduct in 1992. 134 Of course, confidentiality and impartiality were relevant issues and they were specifically examined. The code addresses these two areas in the following manner:

2. Impartiality: a mediator shall conduct the mediation in an impartial manner.
A mediator should only mediate those matters in which he or she can remain impartial and should withdraw if unable to meet such a standard. The comments further state that a mediator should avoid the appearance of partiality toward one of the parties, including partiality based on the parties' personal characteristics, background, or performance at the mediation. An unstated premise is that the quality of the process is enhanced only to the extent the parties have confidence in the mediator's impartiality. When a mediator is appointed by a court or institution, the comments provide that it is the responsibility of the appointing authority to make reasonable efforts to ensure impartiality.

133. Id. at 167 & nn.60, 63-64. The Symposium Rule gives eight bases for the parties to disclose information: by agreement of the parties; if a legal claim against the mediator is made; if there is evidence of ongoing or future criminal activity; to prevent a manifest injustice; to resolve disputes about the agreement that resulted from the mediation; if disclosure is required by statute; to enforce the agreement to mediate; or "if parties to mediation are together engaged in litigation with third parties and a court determines fairness to third parties requires disclosure." By contrast, the mediator may disclose information: if required by statute, as evidence of ongoing or future criminal activity, or if it is necessary to prevent manifest injustice. Disclosure of attorney misconduct may fall under the exception for prevention of manifest injustice. The mediator must get permission from the court before breaching the confidentiality of the mediation under this exception. See id. at 167-68.

134. See Feerick, supra note 131, at 314.
5. Confidentiality: a mediator shall maintain the reasonable expectations of the parties with regard to confidentiality. Since the parties' expectations regarding confidentiality are critical, the mediator should ascertain and discuss these expectations with them. The parties' expectations may be shaped by the circumstances of the mediation and any prior confidentiality agreements. A mediator must not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy. The comments further state that a mediator should avoid communicating outside the mediation any information about how the parties acted, the merits of the dispute or any settlement offers. 135

Although these model rules assert confidentiality provisions, specific language for university mediations would eliminate ambiguous policies. In particular, it would clarify any misconceptions of disclosure to other university administrators and the prohibited use of communications in subsequent proceedings. Because university mediators should be charged with confidentiality applicable to all mediation communications, this article proposes a university administrator-neutral code of professional conduct that reads as follows:

A university mediator shall keep any mediation communication confidential, except when otherwise prohibited by law. The mediator shall not reveal any information acquired through the mediation to any person not a party to the mediation, including other school employees, without the express authorization of the disputants. In addition, the university mediator shall not knowingly use any information revealed through the mediation process in other university or judicial proceedings. Furthermore, the university mediator may not use information acquired from mediation communications to propose or draft policy matters for the university which would directly and adversely affect a student, faculty, or staff member mentioned in the mediation. The provisions stated in this paragraph are not applicable if otherwise required by law.

135. Id. at 316-17; see also, John D. Feerick, The Lawyers' Duties and Responsibilities in Dispute Resolution: Toward Uniform Standards of Conduct for Mediators, 38 S. TEX. L. REV. 455, 481-82 (1997).
Any university mediator who shall make public in any manner information obtained through mediation communication shall be in violation of this section. Violators shall be subject to university disciplinary proceedings which may include discontinuance from mediating any future disputes in the university and dismissal from the university.

As used in this proposed university administrator-neutral code of professional conduct, “[m]ediation communication’ means a communication made in the course of and relating to the subject matter of a mediation”\(^{136}\) and “university” includes all post-secondary educational institutions. Finally, the university’s adoption of a rule, similar to the one stated above, would alleviate the apprehension that many students may have toward university-sponsored mediations. Specifically, a university may adopt a policy where non-negligent disclosures of mediation confidences would subject the neutral-administrator to university disciplinary proceedings. From these hearings, a neutral-administrator may be subject to termination.

Once this separation of confidential information from administrative decision-makers is in place, the students will be open to developing a trust relationship with the mediators. Mediation will become a viable option for students to resolve their conflicts in a nonadjudicatory manner.

VI. CONCLUSION

Justice Felix Frankfurter once stated that “[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.”\(^{137}\) Today, mediations in higher education institutions represent one of the significant areas for program development. In an effort to create an environment where students have respect for one another, universities have implemented mediation programs with


the intent to promote a peace-making approach for student-to-student disputes.\textsuperscript{138}

Currently, records laws and confidentiality provisions are insufficient to consistently hold university administrators accountable for confidentiality of mediation sessions. Therefore, this article recommends that universities examine confidentiality mechanisms such as the Chinese wall, contract and tort liability, proposed confidentiality provisions, and the establishment of a code of professional standards.

"Mediation can serve as a model on which to establish other creative forums in which members of the college community may express their concerns . . . ."\textsuperscript{139} However, without a code of conduct for university administrators-mediators, the policy regarding confidentiality with other university officials may be unclear. Consequently, students may hesitate to use this alternative forum for dispute resolution or may refrain from disclosing confidences for fear of adverse repercussions.


\textsuperscript{139} Maria R. Volpe & Roger Witherspoon, \textit{Mediation and Cultural Diversity on College Campuses}, 9 \textit{Mediation Q} 341, 351 (1992).