

Center for Dispute Settlement □ The Institute of Judicial Administration
Standards for Court-Connected Mediation Programs

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**National
Standards
for
Court-Connected
Mediation Programs**

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This document was developed under a grant from the State Justice Institute. Points of view expressed herein are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.

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INTRODUCTION

These Standards for court-connected mediation programs have been developed to guide and inform courts interested in initiating, expanding or improving mediation programs to which they refer cases.

Courts across the country are seeking ways to provide a better quality of justice for various kinds of litigation, improve citizens' access to justice, save court and litigant costs, and reduce delays in the disposition of cases. As the use of new forms of dispute resolution as an alternative to litigation has become a more widely accepted and understood phenomenon, the number of court-connected dispute resolution programs has proliferated. In particular, courts are referring parties increasingly to mediation in civil, domestic relations and minor criminal cases. Because mediation usually requires less time and fewer resources than trials and produces earlier settlements, significant savings often can be realized in time and costs for both courts and litigants. The direct involvement of the parties in the process of reaching resolution also can provide a greater level of satisfaction, permit outcomes that may be better suited to the parties' needs and, in some cases, produce greater likelihood of compliance with agreements than traditional adjudicative processes.

Yet the greater the documentation of growing numbers of court-connected mediation programs, the clearer it becomes that there are wide variations in their design and implementation, and that there are few generally accepted methods of assessing their quality. The dearth of generally accepted principles to guide courts in designing, implementing and improving such programs risks not only the waste of scarce resources on programs that may be only marginally successful, but also confusion and dissatisfaction on the part of individual users as well as the public at large, who could come to view these programs as a form of second-class justice. Generally accepted standards promoting quality should assist the effectiveness of programming efforts, as well as their acceptance by users, including those whose only contact with the public justice system may be their participation in court-connected mediation programs.

Funded by the State Justice Institute, the Standards that follow were developed as a joint project of the Center for Dispute Settlement in Washington, D.C., and the Institute of Judicial Administration in New York City, with the active involvement of an 18-member Advisory Board comprised of experienced and respected individuals from throughout the country. A list of Advisory Board members and project staff follows this introduction. Points of view expressed in the Standards are those of the Advisory Board members and project staff, and do not necessarily represent the official position or policies of the State Justice Institute.

The Advisory Board includes judges, state and local court administrators, mediators and mediation program administrators, attorneys for both lower and higher income individuals and corporations, academics, evaluators, and officers of professional court and mediation organizations. The Standards that have resulted from the deliberations of this diverse Board as well as from input during a public comment period reflect consensus among people of very different perspectives and points of view.

Mediation is a term that has been used to describe a range of practices designed to help parties in conflict. Likewise, various kinds of relationships have been established between mediators and mediation programs and the courts. The terms "mediation" and "court-connected," as used in these Standards, are defined at the outset of this document (see Definitions at iv.)

The Standards recognize that mediation is used in many different types of cases, from minor criminal disputes, small claims disputes and domestic relations cases to complex civil matters. The Standards are intended to apply to court-connected mediation programs that handle all such cases, although some of the Standards will apply with more force in some types of programs than in others. The Standards are not intended, however, to apply to judicially-hosted settlement conferences. While judges often encourage parties to settle cases using some of the techniques used by mediators, judges are subject to their own codes of ethics, and their handling of the cases before them is within the exercise of their individual discretion. Nor are the Standards intended to apply across the board to programs at the appellate level. While many of the Standards may be applicable to programs handling cases on appeal, they have been developed with trial courts in mind.

The goal of the Standards is to inspire court-connected mediation programs of high quality. The Standards are intended to be used by courts as guidelines to achieving that end. They are not intended to be adopted in legislation or court rule, to create new duties and responsibilities that give rise to liability, or to function as rules that inhibit creativity and innovation. The Standards recognize that court-connected mediation programs need to be designed and implemented in ways that take account of local needs and circumstances. In some jurisdictions, for example, guidelines for "courts" will need to be read as applying to court administrators; in others, depending upon the size and structure of the court system, they will need to be read as applying to judges. Finally, the Standards should not discourage courts from adopting programs because current shortages of resources preclude adherence to all of their provisions. The Standards do not distinguish between required and recommended provisions. At the same time, they reflect the best thinking currently about what constitutes quality in court-connected mediation programming efforts.

The Standards are organized sequentially in the order in which issues might be expected to arise during a program's operation. Thus, they begin with provisions related to access, and end with program evaluation. There are a number of areas where, because of the interrelatedness of the topics, a certain degree of duplication occurs. Given the importance of each of the topics addressed, consolidation was rejected in favor of publishing a set of Standards, any one of which could stand on its own.

Overall, it is hoped that general acceptance and widespread implementation of these Standards will enhance confidence in and satisfaction with our public justice system. At a minimum, their publication should promote thoughtful dialogue about the critical issues they address.

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DEFINITIONS**Mediation**

Mediation is a term that has been used to describe a range of practices designed to help parties in conflict. In these Standards, the term is used to describe a **process in which an impartial person helps those parties to communicate and to make voluntary, informed choices in an effort to resolve their dispute.**

Court-Connected

These Standards are intended to apply to all programs that are court-connected, defined as **any program or service, including a service provided by an individual, to which a court refers cases on a voluntary or mandatory basis, including any program or service operated by the court.** The distinction sometimes is made between "court annexed" and "court-referred" mediation. Use of the term court-connected in these Standards is intended to apply equally to both.

**NATIONAL STANDARDS
FOR COURT-CONNECTED MEDIATION PROGRAMS**

1.0 ACCESS TO MEDIATION

1.1 Mediation services should be available on the same basis as are other services of the court.

COMMENTARY: Access to court-connected mediation services should be provided as broadly as possible. Specifically, courts should not make mediation available based on whether the parties are able to pay, whether they are represented, whether they have a particular physical disability or might have difficulty speaking or understanding English. Judges and court managers have already created mechanisms for providing in-court assistance for parties and witnesses falling into these categories. Offering or encouraging mediation through the court demands the same type of creativity to provide for open access to court-connected services. See Standard 13.0 on Funding. Mediation services should be located in a physical setting conducive to mediation and consistent with the requirements of the Americans with Disabilities Act and local statutes regarding disability.

1.2 Each court should develop policies and procedures that take into consideration the language and cultural diversity of its community at all stages of development, operation and evaluation of court-connected mediation services and programs.

COMMENTARY: Precisely how this principle would be implemented by a specific court must be determined by the circumstances in which judges and court administrators find themselves. At a minimum, however, judges or court administrators seeking to create a new mediation service or modify existing programs should seek ways to involve the client community in the task.

Some non-native speakers of English may wish to use the services of the court even though they are not legal immigrants. The court must think through carefully what its posture will be towards such litigants, and whether anything disclosed in mediation sessions is to be released to immigration authorities. Clearly, a policy of reporting would discourage mediation. If such a policy is adopted, the court should disclose that fact before permitting any mediations to go forward.

1.3 To ensure that parties have equal access to mediation, non-judicial screeners should have clearly stated written policies, procedures and criteria to guide their discretion in referring cases to mediation.

COMMENTARY: To ensure full access to mediation, all barriers created by

gatekeepers need to be lowered. Many mediation programs do not rely on judges to make case-by-case determinations of the appropriateness of mediation. If court officials other than judges make decisions regarding referring cases to mediation, uniform policies, procedures and criteria minimize the risk that individual court officers will refer certain categories of cases to mediation more than others.

1.4 Courts should take steps to ensure that *pro se* litigants make informed choices about mediation.

COMMENTARY: When parties to mediation have neither legal representation nor access to legal information, they are often vulnerable to pressure to settle and to accept unfair results. When parties are unrepresented, courts should make special efforts to alert them to settlement alternatives (possibly through pre-mediation education). Similarly, courts should be sensitive to practices that make the uninformed perceive that they must settle. For example, courts could provide written information to parties containing answers to frequently asked questions (regarding statutory rights, for example). *Alternative Disp. Resol. Comm., American Civ. Liberties Union, Draft Statement of Mediation Principles and Commentary 3 (1991).*

Lawyers, or the availability of adequate legal information, may also act as a crucial check against uninformed, pressured settlements. See Standard 10.0 on Role of Lawyers in Mediation. This concern is especially important when the party is unsophisticated about legal processes and might easily be intimidated or manipulated. Generally, it is recognized that the mediator cannot provide the same protections provided by an individual's personal advocate. Some legal authority permits limited advice and drafting by the mediator, and at times, even requires the mediator to recommend obtaining outside legal advice. Some of these authorities also have drawn distinctions between "representation" and "protection of basic interests." See Vermont Bar Ass'n Prof. Responsibility Comm., Op. N. 80-12 (1980).

Courts should avoid two common responses to the problems presented by *pro se* litigants. Courts may tend to bar *pro se* disputants from any mediation. This provides the most complete assurance to courts that the customary courtroom protections afforded vulnerable litigants will not be lost in mediation, but it clearly defeats the goal of equal access to mediation. Further, *pro se* litigants are often the individuals who could most benefit from the lower cost and lack of procedural complexity of mediation. Exclusion of *pro se* litigants from mediation also may disadvantage those who may be able to represent themselves in the more flexible and informal mediation setting, as well as those who might otherwise benefit from other possible advantages of mediation such as higher quality solutions that meet their underlying needs.

Similarly, judges and administrators, working in an overburdened court system, may tend to make decisions regarding the referral of cases to mediation for entire classes or types of cases rather than on an individual basis. Neither option provides unrepresented parties with the degree of information or choice that is desirable.

1.5 Courts should ensure that information about the availability of mediation

services is widely disseminated in the languages used by the consumers of court services.

COMMENTARY: A major barrier to the use of mediation is the lack of knowledge of availability and understanding of the process by individual litigants and their attorneys. Although lawyers' knowledge of mediation has increased dramatically in the past ten years, lack of familiarity remains. The public at large knows much less. See Standard 3.0 on Information for Judges, Court Personnel and Users.

Effective dissemination of material announcing availability of mediation services -- and what might be expected to result from use of the process -- requires materials in the languages of the court's consumers.

- 1.6 (a) Courts should provide orientation and training for attorneys, court personnel and others regarding the availability and use of mediation services.**
- (b) Prior to and at the filing of a case, courts should provide to the parties and their attorneys information regarding the availability of mediation.**

COMMENTARY: Court personnel often are the gatekeepers for court services, especially for the poor and disadvantaged. Court clerks, and other court personnel likely to be in the position of answering questions regarding the court's services, need to understand the mediation process so that they can explain it to the public. Furthermore, although the past ten years have seen a vast increase in lawyers' knowledge about mediation, that knowledge is not evenly distributed. If lawyers are to be truly useful in helping their clients consider whether mediation might be the correct choice in a given litigation, they must become much more knowledgeable about the process. A successful mediation program needs to include educating members of the bar. See Standard 3.0 on Information for Judges, Court Personnel and Users.

Courts should aim to remove as many barriers as possible to the use of mediation. Informing litigants, as well as their counsel, upon filing about the availability of mediation ensures the best chance that a serious discussion about the viability of its use in a particular case can take place. The Supreme Court of Missouri, in Rule 17 (November 30, 1989), established that parties in most newly filed actions must receive written notice describing the availability and purpose of ADR options. In Jackson County, the Circuit court implementing rule (Local Rule 25.1) specifies that the parties must receive such notice from the Court if a pro se litigant, or from the party's attorney if represented. The attorney, in turn, must certify to the court that such notice was given to the client.

- 1.7 In choosing the location and hours of operation of mediation services, courts should consider the effect on the ability of parties to use mediation effectively, and the safety of mediators and parties.**

COMMENTARY: In contrast to litigation, mediation relies heavily on the direct participation of the parties to a dispute. For mediation to be most effective, courts should consider ways to encourage the participation of the parties.

The location at which mediation services are provided will have an impact on participation by the parties in some disputes. Courts should consider the feasibility of offering services in multiple locations. Mediation conducted in a number of decentralized locations is more likely to attract disputants than a system designed to conduct all mediations in a central facility. While the creation of a decentralized model for the provision of mediation services may have relatively high start-up costs, the larger number of cases a decentralized model will attract may off-set those costs over time.

Similarly, the hours of operation of mediation services will have an impact on participation by some parties, who may need to attend during non-working hours. At the same time, the safety of mediators and parties should be considered when scheduling the time and place of mediations.

2.0 COURTS' RESPONSIBILITY FOR MEDIATION

2.1 The degree of a court's responsibility for mediators or mediation programs depends on whether a mediator or program is employed or operated by the court, receives referrals from the court, or is chosen by the parties themselves.

- a. The court is fully responsible for mediators it employs and programs it operates.
- b. The court has the same responsibility for monitoring the quality of mediators and/or mediation programs outside the court to which it refers cases as it has for its own programs.
- c. The court has no responsibility for the quality or operation of outside programs chosen by the parties without guidance from the court.

COMMENTARY: The Standards take the position that the method of referral, rather than the sponsorship of the mediation program, should govern the court's responsibility to monitor a program. The court should be responsible for monitoring both its own selection of cases for mediation and the operation of all of the mediation programs to which it refers cases.

This standard makes the court responsible for the quality of services provided by all court-connected mediation programs. Although the court naturally has no direct responsibility for the operation or administration of outside programs or mediators to which it refers cases, it is responsible for monitoring the quality of those individuals or programs that receive its imprimatur. This is so regardless of whether the court's referrals occur through the suggestion of a particular mediator or program by a judge or by court staff or through maintenance of a list of mediators that is provided to parties.

This approach is based on the same rationale as that taken by the Conference of State Court Administrators (COSCA) Committee on Alternative Dispute Resolution:

The more closely connected to the court an alternative dispute resolution program is, the higher the degree of control the court should exercise.

COSCA Committee on ADR, "Report to the Membership," 3 (12/11/90 draft) (hereafter "COSCA Report").

COSCA offers the following discussion of its principle:

If judges and court administrators institute a court-annexed program, they have responsibility for establishing program goals, structure, procedures, and the qualifications of those who serve as mediators, arbitrators and other types of neutrals. The court should regularly and rigorously monitor and evaluate the program's performance. Judges and court administrators should be prepared to modify any and all aspects of a program that fail to meet the court's goals.

If judges and court administrators adopt a policy of referring a portion of the court's caseload to a dispute resolution program outside the court, they should establish mechanisms to review periodically the quality of the services provided by the program. The relationship of the court to the program should be maintained by an appointed liaison to ensure that communications with the program administrators are regular, clear and effective.

The court has no direct responsibility to monitor or to evaluate private programs, but judges and court administrators should be knowledgeable about private programs in the community as well as the community needs that these programs address. The court should maintain some communication with private programs so that in appropriate circumstances parties can be made aware of the services of private programs and the benefits they may offer.

Id. at 4.

2.2 The court should specify its goals in establishing a mediation program or in referring cases to mediation programs or services outside the court and provide a means of evaluating whether or not these goals are being met.

COMMENTARY: The court should ensure that program goals are clearly articulated and related to its specific needs. Given the variety of possible goals of referring cases to mediation, a court need not have a backlog of cases to institute a mediation program or refer cases to outside mediators. Yet clarity of goals is important to ensure that

- A case or class of cases is referred to an appropriate mediator or program.
- The program is of high quality and suitable to the case or class of cases referred.
- The court has clear objectives by which to monitor and evaluate the program's performance.

Among the possible goals are to:

- provide a broader range of dispute resolution options
- increase the involvement of parties in the process of resolution of their disputes
- provide a mechanism to deal with the real issues in dispute
- facilitate the early resolution of disputes
- decrease the cost to parties of resolving disputes
- increase parties' satisfaction and compliance with the results of dispute resolution
- assist the parties in developing a wider range of outcomes than are available through adjudication
- provide access to a process that for many litigants is less formal and intimidating than the traditional adjudicatory process
- increase the court's ability to resolve cases within given resources.
- increase the parties' ability to resolve their own disputes without court intervention.

All too often courts implement programs based on models from other courts without evaluating their own particular operating environments and needs. This situation is likely to result not only in the court's failing to achieve the particular benefits it seeks but also in litigants' confusion and dissatisfaction with the justice system as

a whole. Even when a program is not initiated or operated by the court itself, the program's goals should be clear and relate directly to the rationale for a court's referring individual cases or categories of cases to it. Clarity of goals will facilitate effective monitoring and evaluation. (See Standard 16.0 on Evaluation.)

2.3 Program Management

a. Information provided by the court to the mediator

- (1) When parties choose to go to mediation outside the court, the court should have no responsibility to provide any information to the mediator.
- (2) When a court makes a mandatory referral of parties to mediation, whether inside or outside the court, it should be responsible for providing the mediator or mediation program sufficient information to permit the mediator to deal with the case effectively.

COMMENTARY: If the parties choose to use outside mediators, whether or not they are suggested by the court, the court should be able to rely on the parties to provide the mediator with whatever information is required. When the court requires the parties to participate in mediation, on the other hand, the Standards require the court to provide whatever information is needed. The precise information required will vary with the type of case and with whether the parties are represented. It includes such data as the case and parties' names; case type; dates of filing and referral to mediation; the amount of the claim and any counterclaim; any dispute motions, court orders and/or trial date; and the stage of discovery, where applicable.

b. Information provided by the mediator or the parties to the court

For purposes of quality control and the court's exercise of responsibilities to manage its caseload, providers of mediation services have the following responsibilities to provide information to the court:

- (1) If the program is court-operated, or if the case is referred to an outside program or mediator by the court, the program or individual mediator should have the responsibility to report information to the court, in order to permit monitoring and evaluation.
- (2) If the mediator or program is chosen by the parties without guidance from the court, the provider should have no responsibility to report to the court.

COMMENTARY: This standard makes the responsibility of the program to provide the court with certain data depend on the court's responsibility for monitoring its quality. Although a mediator or program chosen without guidance from the court has no responsibility to provide the court with data, the parties may be required to furnish the information in the case of mandatory mediation, or asked to furnish it in the case of voluntary mediation, to the extent that the information is necessary for the court to manage its docket. Such information may include case name and type, the date the case was referred, the name of the mediator or mediation program, the names of the parties or party representatives attending mediation, the outcome of the mediation, and, if the parties agree, any further court action required. Ordinarily, there is no need for the parties to furnish their agreements to the court.

2.4 Aggregate Information

Court-operated mediation programs and programs to which the court refers cases

should be required to provide periodic information to the court. The information required should be related to:

- a. The court's objectives in establishing the program; and
- b. The court's responsibility for ensuring the quality of the services provided.

COMMENTARY: In addition to case-specific information, programs to which the court refers cases may be required to provide the court with aggregate information on a periodic basis, which will permit the court to monitor the quality of the services provided. The precise type of information required should depend in part on the program's goals. For example, information about parties' costs per case and time to resolution is important if the primary goal of the program is to save litigants time and money, whereas such information might not be important if the primary goal is to provide a more appropriate mechanism for resolution.

In general, however, the information should be adequate to permit:

- effective case management by the court
- monitoring of the quality of service provided (the percentage of cases reaching agreement, for example, and the average time between referral and agreement)
- the nature of agreements, and information about the parties' satisfaction
- evaluating whether the program is meeting its goals over time and the needs of litigants and the court

Periodic reports from programs, containing aggregate information about cases referred, is necessary to enable the court administration to determine whether the program is meeting its articulated goals as well as the needs of the court in referring individual cases or categories of cases to it. Such information should be evaluated regularly by the court administration to identify any deficiencies in the dispute resolution system.

2.5 The court should designate a particular individual to be responsible for supervision, monitoring and administration of court-connected mediation programs.

COMMENTARY: The presiding judge or the presiding judge's designee has the ultimate responsibility for the operation of court-connected mediation programs. For day-to-day administration, however, a member of the court staff, who should be a person in a senior management position, should be designated to operate court-based programs or to act as liaison with private, court-referred programs or mediators. This need not be a full-time position in a small jurisdiction.

The administrator should be knowledgeable about the goals, process and procedures of mediation, as well as about the court's process and procedures and its goals in referring individual cases or categories of cases to mediation. This individual should meet regularly with court administrators, groups of outside mediators who receive court referrals, and judges who refer cases to mediation, in order to ensure that the program is functioning effectively.

2.6 Complaint Mechanism

Parties referred by the court to a mediation program, whether or not it is operated by the court, should have access to a complaint mechanism to address any grievances about the process.

COMMENTARY: Increasing numbers of states have adopted official procedures allowing a party to register a grievance against a mediator or a mediation program and delineating an investigatory and disciplinary process. There seems to be widespread agreement that specific, written complaint mechanisms are needed, and several states have been developing proposals on this subject. Different models have been suggested, and questions have been posed concerning the level of formality needed, participation of parties and mediators complained about in the process, types of sanctions, and the procedures for appeal or review.

Any complaint mechanism should be based upon a clear code of ethical conduct by mediators. (See Standard 8.0 on Ethical Standards for Mediators.) The complaint process should screen complaints that do not allege ethical misconduct and refer these to program administrators in charge of supervising and reviewing mediators' skills or competence. (See Standard 16.0 on Evaluation.)

In Michigan, where the mediation of custody and visitation issues is offered on a voluntary basis by the court under state statute, the statute includes a grievance procedure.

Parties may file a grievance in writing with the appropriate "Friend of the Court" office, the administrative bureau within the Office of Court Administration responsible for implementing the statute. The office then investigates and decides the complaint. If the party is not satisfied with the decision, a further grievance in writing can be filed with the Chief Judge, who investigates and decides the matter. Each Friend of the Court office is required to maintain a record of each grievance received, together with its status. This information must be submitted to the State Office of Court Administration at least biannually. Public access to such reports is required.

Mich. Comp. Laws Ann. §552.526.

New Hampshire has also established a procedure to process complaints brought against marital mediators who are certified by the state. §328-C:7, Disciplinary Action. The State Board of Marital Mediation Certification (consisting of one Superior Court judge, one full-time marital master, one attorney, one mental health professional, and two members of the public) is required to hold a hearing in response to any complaint brought against a certified individual or program. The mediator or program is given an opportunity to respond in writing to the complaint, and to be present at the hearing. If the Board finds that there is a violation of a provision in the legislation dealing with marital mediation, it is authorized to: 1) issue a written warning; 2) suspend certification temporarily (and establish conditions for reinstatement); or 3) permanently suspend certification.

The Florida Statutes of Professional Conduct for Certified & Court Appointed Mediators provide detailed procedures for a Complaint Committee, to be composed of one judge or attorney and two court certified mediators. If the Complaint Committee finds probable cause to believe that alleged misconduct by a mediator would constitute a violation of the Standards, the Committee has discretion, before referring the matter to a hearing panel, to "meet with the complainant and the mediator in an effort to resolve the matter. This resolution may include sanctions if agreed to by the mediator." §2-5.0(H) 1991.

Although the Standards concluded that it would be inappropriate to require parties dissatisfied with mediation to mediate their complaints against the mediator, it considers it appropriate to offer parties the option of participating in mediation before launching a formal hearing against a mediator.

3.0 INFORMATION FOR JUDGES, COURT PERSONNEL AND USERS

3.1 Courts, in collaboration with the bar and professional organizations, are responsible for providing information to the public, the bar, judges and court personnel regarding the mediation process; the availability of programs; the differences between mediation, adjudication and other dispute resolution processes; the possibility of savings in cost and time; and the consequences of participation.

COMMENTARY: Establishing court mediation programs involves a significant investment in time and resources. The investment is justified if the programs are used by a significant number of people, who find that the programs meet their needs.

Experience with court mediation programs has shown that voluntary programs often are underutilized. In spite of the increasing number of ADR programs in courts and communities, mediation remains a largely unfamiliar process to judges, court administrators, citizens and attorneys. Judges, lawyers and clients tend to do things in the way to which they are accustomed and may resist new processes with which they are unfamiliar.

Judges and court administrators play a leadership role in the courts and their communities. Judges in some courts are responsible for deciding which cases go to mediation, explaining the process to disputants and helping to make program decisions regarding such issues as mandatory referral and choice of mediator. Their understanding and support of court mediation programs can make them powerful allies and help ensure a program's success.

The New Jersey Supreme Court Task Force on ADR addressed the need for judges and court personnel to have an understanding of the role of dispute resolution programs in the justice system. It recommended that judges and court personnel "be encouraged to develop and participate in educational and training programs," suggesting that they receive instruction about programs and how "to communicate information to disputants regarding the referral process and their rights." Supreme Ct. of the St. of N.J. Task Force on Disp. Resol., *Final Report* (1990), at 18, 20 (hereafter "N.J. Report").

Education of court administrators and judges should focus on the differences between mediation and adjudication, the participatory nature of mediation and the possibility of creative solutions that deal with future relationships. This information can help to ensure that they will be better advocates and wiser planners of mediation programs, better able to select cases appropriate for mediation and more expert at explaining mediation to parties and their attorneys.

Parties and attorneys may not choose mediation over adjudication because they are unfamiliar with the advantages of mediation, or because they do not know how to prepare for or participate in a mediation session. Mediators' experience is that, when attorneys understand mediation, they can facilitate the process and increase the likelihood of settlement. It follows that, with increased familiarity with mediation, more people will choose it in voluntary programs, more people will feel comfortable with it in mandatory programs, and more people will be better able to participate in both voluntary and mandatory programs.

Not only do courts have an interest in maximizing the use of mediation programs, but they also have a responsibility to ensure that parties and attorneys who have a choice between mediation and other alternative processes have enough information to enable them to make an informed choice. Although courts do not normally assume the responsibility of educating parties or attorneys, when they introduce new programs under their authority they should provide information about them.

Missouri Supreme Court Rule 17 and Jackson County Rule 25.1 require each court to provide notice of dispute resolution services to all parties to the action:

- (a) In each civil action to which the early dispute resolution

program applies, a notice of dispute resolution services shall be furnished to all parties to the action. The notice shall be provided to the party initiating the action at the time the action is filed. The opposing party shall receive the notice with the summons and petition. Other means of providing notice may be provided by local court rule.

(b) The notice shall advise parties of the availability and purposes of early dispute resolution services. The notice shall list individuals and organizations that provide such services. The notice may set out a brief description of the occupations and backgrounds of the individuals and organizations listed and fees that may be charged for their services.

Mo. Sup. Ct. R. 17.03.

The Judicial Council of California states that "each court should develop a pre-mediation education program based on current research and established court mediation practice." Judicial Council of Cal., Uniform Standards of Practice for Court-Connected Mediation of Child Custody and Visitation Disputes, ¶26(b) (1990). The council comments that "orientating parties prior to mediation may have several benefits . . . reducing their [parties'] fears; preparing the parties for sessions by giving them the opportunity to ask questions and raise concerns; helping to normalize the family crisis; and promoting an out of court settlement." *Id.*

In making its recommendations regarding mandated participation in court programs, the SPIDR Law and Public Policy Committee concluded: "Mandatory participation should only be used when a high quality program . . . (iv) provides clarity about the precise procedures that are being required." The committee cautions, "It is important to inform parties about the dispute resolution procedures, especially if they are unrepresented." Society of Professionals in Dist. Resol., Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts (1991), at 3 (hereafter "SPIDR Report").

While the Standards endorse the principle that courts have the responsibility to educate and inform, they also support the role of the local bar and law schools in education. As courts take the primary initial responsibility to educate, they can encourage local bars and law schools to offer courses and CLE credits and encourage law schools to include mediation in particular and dispute resolution in general in the curricula.

3.2 Courts should provide the following information:

a. To judges, court personnel and the bar:

- (1) the goals and limitations of the jurisdiction's program(s)
- (2) the basis for selecting cases
- (3) the way in which the program operates
- (4) the information to be provided to lawyers and litigants in individual cases
- (5) the way in which the legal and mediation processes interact
- (6) the enforcement of agreements
- (7) applicable laws and rules concerning mediation

COMMENTARY: Recognizing the pressures and demands placed on judges' time, it may be necessary to provide flexible processes for informing them about court-connected mediation programs. The best introduction to mediation is to observe a live simulation. Where that is not possible, videotapes of mediations can be made available so that judges can view them as time permits. Written descriptions of process and programs should be prepared. Mediation program staff can meet individually with judges to provide further information. In Florida, for example, the court mediation office works closely with general civil division judges, holding periodic meetings to keep them informed of new developments or changes in program rules. In the United States District Court for

the District of Columbia, program staff and consultants meet regularly with individual judges to discuss the program and the susceptibility to mediation of the judges' individual caseloads.

b. To users (parties and attorneys) in addition to the information in (a):

General information:

- (1) issues appropriate for mediation
- (2) the possible mediators and how they will be selected
- (3) party choice, if any, of mediators
- (4) any fees
- (5) program operation, including location, times of operation, intake procedures, contact person
- (6) the availability of special services for non-English speakers, and persons who have communication, mobility or other disabilities
- (7) the possibility of savings or additional expenditures of money or time

Information on process:

- (1) the purpose of mediation
- (2) confidentiality of process and records
- (3) role of the parties and/or attorneys in mediation
- (4) role of the mediator, including lack of authority to impose a solution
- (5) voluntary acceptance of any resolution or agreement
- (6) the advantages and disadvantages of participating in determining solutions
- (7) enforcement of agreements
- (8) availability of formal adjudication if a formal resolution or agreement is not achieved and implemented
- (9) the way in which the legal and mediation processes interact, including permissible communications between mediators and the court
- (10) the advantages and disadvantages of a lack of formal record.

COMMENTARY: At a minimum, courts should provide written information to explain the dispute resolution service to which parties are referred and instruct parties on how to use it. If a significant number of the population served is non-English speaking, the material should be available in other languages as well. (See Standard 1.0 on Access to Mediation.) Whether written information alone is sufficient may depend on the kind of disputes included, the sophistication of the parties, and whether or not parties are represented by attorneys.

The experience of dispute resolution professionals has been that, although it is helpful to talk and read about mediation, the process becomes most clear to people when they can see an actual or mock mediation. Program staff and funding constraints may make it impractical to consider regular demonstrations of mediations. It may be more feasible to have videotaped demonstrations and explanations available for viewing. The Judicial Council of California suggests "providing information in advance of mediation that may include individual presentation by the mediator, group instruction, video presentations, intake forms, and written materials." *Uniform Standards of Practice*, ¶26(b).

When parties are unrepresented and the court is concerned that a party will need extra information or assistance in making a choice, or the court has a special interest in encouraging the use of mediation, additional informational efforts may be required. The Judicial Council of California recommends that, in addition to premediation education, the mediator or court representative conduct an individualized orientation with the parties before beginning mediation. *Uniform Standards of Practice*, ¶26(b).

Courts also have the responsibility of providing information on mediation to the public at large. In

order to encourage familiarity with and use of mediation, courts should inform the public about the mediation process, the availability of programs, the differences between mediation and adjudication, the possibility of savings in cost and time, and the advantages and disadvantages of participation in the determination of solutions.

Law enforcement agencies, social service agencies and schools can be approached to increase their understanding of available resources and to enable them to make appropriate referrals. For instance, the Superior Court Multi-Door Mediation Program in Washington, D.C., has made presentations including mediation demonstrations to parent-teacher groups, community groups and agencies such as the Office of Paternity and Child Support.

Another way to educate the community is by using advisory committees. When a court-connected mediation program is planned, an advisory committee on planning and implementation can be formed, which includes representatives of the local bar, judges, court, citizen groups, social service agencies and the schools. By participating on the committee, its members become informed and educated. These people then carry that information to their constituencies and provide information and education to the community at large.

3.3 The court should encourage attorneys to inform their clients of the availability of court connected mediation programs.

COMMENTARY: An issue in cases where parties are represented by counsel is whether it is sufficient for the court to provide information to counsel in the hope that it will be shared with the parties. Is there an infringement on the attorney/client relationship if the parties receive information on mediation programs from the court itself rather than from their attorneys? In New Jersey, the bar objected to the suggestion of mandatory attendance by parties at educational sessions as unnecessary and potentially costly for clients and raising the possibility of "interpos[ing] an intake specialist between the Bar and potential clients." The Task Force did recommend and the Supreme Court endorsed recommendations permitting mandatory referral to mediation for educational purposes. The Task Force also agreed that an "individual disputant's attorney has the primary role in explaining to the disputant the available CDR programs and processes." N.J. Report, at 18, 20.

Missouri Supreme Court Rule 17 and Jackson County Rule 25.1 have taken a different approach, setting strict requirements for attorneys to provide clients with "Notice of Dispute Resolution Services," as described under 3.1, *supra*.

Similarly, Colorado's Rules of Professional Conduct state that attorneys should advise their clients in all litigated cases of alternative forms of dispute resolution. (Colorado Rules of Professional Conduct, Rule 2.1 (January 1, 1993).)

4.0 SELECTION OF CASES AND TIMING OF REFERRAL

4.1 When courts must choose between cases or categories of cases for which mediation is offered because of a shortage of resources, such choices should be made on the basis of clearly articulated criteria. Such criteria might include the following:

- a. There is a high probability that mediation will be successful in the particular case or category of case, in terms of both the number and quality of settlements.
- b. Even if there is not a high probability that mediation will be successful in the particular case or category of cases, continuing litigation would harm non-parties, the dispute involves important continuing relationships, or the case, if not mediated, is likely to require continuing involvement by the court.

COMMENTARY: Available resources in the justice system are limited. Although ideally a full range of dispute resolution options should be made available to litigants in every case, the reality of limited funds and time to implement and monitor quality programs and services requires that choices be made between the kinds of options that can be provided and the types of cases in which those options will apply.

While the Standards do not recommend specific policies with respect to resource allocation, they do emphasize that choices should be made with thought and care, and guided by the premise of doing no harm. Examples of criteria that might be used by courts in allocating resources for court-connected mediation programs and services include a high probability of success measured both quantitatively and qualitatively, and potential negative impact on the parties, the court, or others if a case or type of case is litigated or mediated. Whatever the criteria for choice, such criteria should be clearly articulated by the court to enhance thoughtful decision-making as well as understanding and acceptance by court personnel, users and the public of the choices that are ultimately made.

4.2 The following considerations may militate against the suitability of referring cases to mediation:

- a. when there is a need for public sanctioning of conduct;
- b. when repetitive violations of statutes or regulations need to be dealt with collectively and uniformly; and
- c. when a party or parties are not able to negotiate effectively themselves or with assistance of counsel.

COMMENTARY: Courts should consider carefully whether to exclude certain kinds of cases from mediation altogether, or to refer such cases to mediation only on a very selective, case-by-case basis.

For example, there is some conduct that the legislature has determined to be so intolerable to public health and welfare that criminal penalties should attach to its proven occurrence. While neighborhood justice centers typically mediate misdemeanor cases, and programs attached to prosecutors' offices mediate such cases as bad checks, serious criminal conduct may be inappropriate for mediation because of the potential for avoidance of sanctions the legislature has determined are important to deter future similar conduct and protect the public. Other conduct that is similarly intolerable to public health and welfare, although penalties attached to its proven occurrence are civil in nature, also may not be suitable for referral to mediation, such as the intentional dumping of toxic waste.

Likewise, there are some situations that need to be dealt with collectively and uniformly, such as a recurring pattern of consumer fraud. A manufacturer sued by numbers of customers for supplying defective

products should not be allowed to continue such conduct by reaching individual private settlements. Such recurring practices may require court intervention to establish a clear rule for future conduct.

Finally, there are cases that courts should consider excluding from mediation because the parties are not able to negotiate effectively on their own behalf. One example is a case in which physical or psychological victimization has occurred that impairs the ability of one or both parties to protect their own interests during the process or to honor their agreements. It may be possible to introduce into the mediation process, on a case-by-case basis, a variety of special procedures to address this situation (see Standard 11.0 on Inappropriate Pressure to Settle). At a minimum courts should, in consultation with representatives of all of the interests involved, develop special protocols to govern referrals to mediation of these kinds of cases.

4.3 Courts should make available or encourage the availability of mediation to disputants before they file their cases in court as well as after judgment to address problems that otherwise might require relitigation.

COMMENTARY: Court-connected mediation programs and services generally are designed and implemented to provide alternatives to the litigation process. What often is forgotten is the goal of litigation prevention. Courts can play an important role in promoting the availability of mediation before disputes are filed in court as well as after cases have been settled or judgment has been rendered. Such promotion can take the forms of opening the caseloads of court-connected mediation programs and services to cases pre-filing and post-judgment, working directly with agencies and individuals in the community to encourage the provision of mediation, and advocating publicly through bar associations or otherwise for the increased availability of such services. To encourage pre-filing mediation, court statistical methods may have to be modified so that the court receives recognition for the services provided.

4.4 While the timing of a referral to mediation may vary depending upon the type of case involved and the needs of the particular case, referral should be made at the earliest possible time that the parties are able to make an informed choice about their participation in mediation.

COMMENTARY: There may be some types of cases where immediate referral to mediation is needed. Eviction cases are an example, as may be cases such as neighborhood disputes in which tensions are escalating.

In most other cases, the timing of a referral is variable. State statutes that address this issue differ. For example in the domestic relations area, child custody mediation in Alaska may be ordered within 30 days after a petition is filed (Alaska Stat. 25.2g.080 (1)); California requires that such cases be ordered to mediation no later than 50 days after the filing of a petition (Cal. Civ. Code 4607a); in other states referrals can be made "at any time." Iowa Code Ann. 598.16, Kan. Sta. Ann. 23-602 (a); Me. Rev. Stat. Ann. tit. 19 636,637.

In other types of cases, the interests of court efficiency and speedy resolution of disputes appear to underlie references to timing. For example, New Hampshire Superior Court Rule 170 provides for mediation to be conducted no later than 210 days from the date the action was entered. Minnesota's Task Force on Alternative Dispute Resolution has recommended that in all civil cases parties should be required to meet within 45 days of the filing of a case to discuss management issues, including the selection of an ADR process and timing of its use, and communicate the results, in writing, to the court within another 15 days. Its reasoning is that "[e]arly case evaluation and referral to an appropriate ADR process has proven to facilitate speedy resolution of disputes." Minnesota Supreme Court and State Bar Task Force on Alternative Dispute Resolution, Final Report, approved by Supreme Court June, 1990 (hereafter "Minn. Report").

There may be categories of cases, for example, small claims cases, where appropriate timing can be presumed by category of case. However, for many other cases, the timing of a referral should be determined on a case-by-case basis. In some kinds of cases early referral will be desirable before the parties' positions become hardened and substantial costs are incurred. In others, referral should be delayed to allow sufficient information to

be gathered to ensure meaningful negotiations. In general a determination as to timing should take into account both the parties' capacity to mediate and the ripeness of the issues for mediation.

Courts should not lose sight of the fact that mediation itself is a case management tool that can be used to help parties determine and set a schedule for their discovery needs and thus create the conditions most conducive to assisted negotiations.

4.5 Courts should provide the opportunity on a continuing basis for both the parties and the court to determine the timing of a referral to mediation.

COMMENTARY: Assessment of the parties' capacity to mediate and the sufficiency of the information gathered through discovery should be conducted on a continuing basis. The danger is that a case assessed initially as not ready for mediation will be allowed to languish, with parties' positions allowed to harden and the opportunity for early resolution lost. Case tracking should be built into the court's case management system and provide for regular and periodic assessment of readiness for mediation.

4.6 If a referral to mediation is mandated, parties should have input on the question of when the case should be referred to mediation, but the court itself should determine timing.

Parties should have input in the question of when the case should be referred to mediation. As Minnesota's Task Force on Alternative Dispute Resolution has noted,

Parties should have the opportunity to discuss among themselves . . . the timing of the ADR process. Such participation may lead to better cooperation in an ADR process, ultimately facilitating more efficient and less rancorous settlement of disputes.

Minn. Report, *supra*, at 14.

At the same time, the court should retain its ultimate responsibility for case management. If the final decision with respect to timing rests with the court, the possibility of delaying tactics on the part of one or both parties can be minimized.

4.7 Courts should establish presumptive deadlines for the mediation process, which may be extended by the court upon a showing by the parties that continuation of the process will assist in reaching resolution.

COMMENTARY: State statutes vary with respect to whether there is a limit on the length of time allowed for mediation, and how much time is allowed. For example, in Colorado custody/visitation mediation must be completed within 60 days. Colo. Rev. Stat. 14-10-129.5(1)(c). In Florida the outcome must be reported within 14 days after the referral. Fla. Stat. Ann. 39.429(3)(d). Other statutes are silent on the subject of time for mediation. (See e.g., Tex. Code Ann. 152.001 *et seq.*).

Since mediation is voluntary in the sense that parties are free to settle or not settle, its continuation could be assumed to reflect the parties' judgment that negotiations continue to be productive. At the same time, the courts have a clear interest in managing their cases and in preventing delay. Balancing these interests, the Standards recommend that courts establish presumptive deadlines for the process, deadlines integrated into existing case management procedures and time frames, and give the parties themselves, rather than the mediator, the opportunity to request an extension. The court should freely grant such requests if the parties can show that continuation will be helpful in reaching resolution. Since good mediation takes time, courts should not be unduly restrictive in establishing deadlines.

5.0 MANDATORY ATTENDANCE

5.1 **Mandatory attendance at an initial mediation session may be appropriate, but only when a mandate is more likely to serve the interests of parties (including those not represented by counsel), the justice system and the public than would voluntary attendance. Courts should impose mandatory attendance only when:**

- a. **the cost of mediation is publicly funded, consistent with Standard 13.0 on Funding;**
- b. **there is no inappropriate pressure to settle, in the form of reports to the trier of fact or financial disincentives to trial; and**
- c. **mediators or mediation programs of high quality (i) are easily accessible; (ii) permit party participation; (iii) permit lawyer participation when the parties wish it; and (iv) provide clear and complete information about the precise process and procedures that are being required.**

COMMENTARY: Many courts, by statute, court rule or rule of procedure, refer parties to mediation on a mandatory basis. In using the term "mandatory attendance" the intention of the Standards is to clarify that by referring parties to mediation on a mandatory basis a court should require only that they attend an initial mediation session, discuss the case, and be educated about the process in order to make an informed choice about their continued participation. See Standard 11.0 on Inappropriate Pressure to Settle.

There are both benefits and costs to mandated attendance. Among the benefits are that rates of voluntary usage of mediation are often low, even though parties reach agreement more often than not, regardless of whether their initial participation was voluntary or mandatory. The increased mediation caseloads resulting from mandated attendance allow more cost-effective administration of mediation programs and services. Settlements through mediation also free court resources for other cases. Finally, mandated attendance may increase future voluntary use by educating parties and their lawyers about the process.

On the other hand, mandatory referral risks forcing cases into a process that for one reason or another may be inappropriate. It may engender institutionalized programs that offer an inferior quality of justice, or, at a minimum, a costly and unnecessary hurdle for parties who prefer or are likely to resolve their cases through other means.

In weighing these costs and benefits, the Standards adopted SPIDR's recommendation that the appropriateness of mandatory referral depends on its application:

Mandatory dispute resolution could either improve or impede the administration of justice. This uncertainty counsels for careful consideration before a compulsory program is instituted and careful monitoring as it is administered. At a minimum, participation should be compulsory only when the three conditions articulated in this Standard regarding funding, coercion to settle, and quality, are met.

SPIDR Report, at 16. (See also Standard 13.0 on Funding of Programs and Compensation of Mediators and Standard 11.0 on Inappropriate Pressure to Settle.)

In most courts mandatory attendance at a mediation session generally requires participation by parties (and often their insurers) with settlement authorization. The Standards endorse this practice. (See Standard 10.0 on The Role of Lawyers in Mediation.) The Standards recognize, however, that in cases involving large private entities or government agencies it may not be feasible to have all the parties whose assent is necessary to a final agreement present at the mediation. In such cases an alternative to physical presence may be availability by

telephone.

- 5.2 **Courts may use a variety of mechanisms to select cases for mandatory referral to mediation. Any mechanism chosen should provide for: individual assessment of each case to determine its appropriateness for mediation, which takes into account the parties' relative knowledge, experience and resources.**

COMMENTARY: Various mechanisms have been used in different jurisdictions to select cases for mandatory referral to mediation, including (1) mandating referral to mediation by category of case with opt-out provisions (for example, more than half the states now mandate mediation of child custody cases); (2) mandating referral to some kind of ADR process by category of case, with a method for case-by-case screening to determine what particular process is appropriate (D.C. Super. Ct. Mandatory Arbitration R. I-IV); (3) mandating referral to mediation where one or both parties request it; (4) mandating referral to mediation by judicial determination on a case-by-case basis (Texas Civ. Prac. & Rem. Code Ann. §154.021 (West Supp. 1992)); and (5) mandating the referral of a case to mediation by a special master in a case found to present "extraordinary circumstances" under Rule 53 of the Federal Rules of Civil Procedure.

Courts should balance the advantages and disadvantages of each approach. For example, the Minnesota Task Force on Alternative Dispute Resolution recommends that parties be required to select an ADR process, subject to court approval or court selection if the parties cannot agree:

Such participation [by the parties in selection of a particular ADR process] may lead to better cooperation and a more positive attitude toward participation in an ADR process, ultimately facilitating more efficient and less rancorous settlement of disputes Referral of a case to an ADR process is dependent upon many factors, most of which are unique to the controversy being considered. For example, the relationships of the parties and the attitude of the parties toward ADR must be considered. Successful ADR depends on case-by-case selectivity. Across-the-board mandatory ADR will ultimately undercut its efficiency and acceptance. Judges should examine the factors in each case before determining that referral to an ADR process is appropriate.

Minn. Report, 14-15.

A recent evaluation of a pilot program in Hennepin County, Minnesota, found that the outcome of the case and the satisfaction of litigants both were highly dependent on the participants' initial reluctance or enthusiasm to engage in mediation. W. Kobbervig, Office of the St. Ct. Admin., Mediation of Civil Cases in Hennepin County: An Evaluation (1991).

On the other hand, leaving selection of a particular ADR process to the parties risks creating the opportunity for unnecessary procedural skirmishing. Case-by-case selection of cases for initial referral to mediation also may increase costs and delay for both the parties and the courts. Even without such efficiency considerations, such a mechanism may also result in underutilization of the process, particularly where judges and parties are not fully educated about the procedure and its benefits.

In the absence of research concerning the relative effects of courts' use of different mechanisms for selecting cases for mandatory mediation, the Standards do not recommend any one mechanism over another. Whichever mechanism is chosen, it is important for the court to ensure that each case mandated to participate is assessed individually, either before or during the initial session, to determine whether it is appropriate for mediation.

There are a number of considerations that may make individual cases inappropriate for mediation. Among them are physical or psychological victimization that has impaired the ability of a party to protect his/her own interests or honor his/her agreements; real inequality of knowledge or sophistication between the parties that cannot be balanced in the mediation; and significant resistance to settlement on the part of one or both parties. Proceeding with mediation under such circumstances is likely to be unproductive or harmful. Often these kinds of circumstances can be discovered only once the process has begun. Thus these Standards underscore the importance of viewing the first mediation session as an educational and screening process, with parties afforded the opportunity both then and later to opt out freely. Even if an individual case is determined to be appropriate for mediation and the parties choose to proceed, appropriateness should be assessed on a continuing basis to ensure that the process is terminated if circumstances come to light that warrant its discontinuation.

- 5.3 Any system of mandatory referral to mediation should be evaluated on a periodic basis, through surveys of parties and through other mechanisms, in order to correct deficiencies in the particular implementation mechanism selected and to determine whether the mandate is more likely to serve the interests of parties, the justice system and the public than would voluntary referral.**

COMMENTARY: As SPIDR has stated:

During the early period of a mandatory program, it is especially important that data be collected to determine whether it is meeting the goals set by planners. As part of this process, it is important to examine the effect of the program on such matters as the parties' costs, interest, and satisfaction as well as the effect on court resources. During early stages, data should be gathered to determine whether a substantial number of the participants believe that mandated participation has been so burdensome for them to pursue a trial or so injurious to other interests that, in their view, the costs of the mandate outweigh the benefits.

SPIDR Report, at 23.

Surveys of parties should be made part of the evaluation to ensure that it addresses qualitative as well as quantitative measures. (See also Standard 16.0 on Evaluation.) Evaluation data should be monitored carefully and used on an ongoing basis to correct any deficiencies identified in selection mechanisms.

6.0 QUALIFICATIONS OF MEDIATORS

- 6.1 Courts have a continuing responsibility to ensure the quality of the mediators to whom they refer cases. Qualifications of mediators to whom the courts refer cases should be based on their skills. Different categories of cases may require different types and levels of skills. Skills can be acquired through training and/or experience. No particular academic degree should be considered a prerequisite for service as a mediator in cases referred by the court.

COMMENTARY: In the most comprehensive effort to date to examine the subject of qualifications for mediators and arbitrators in both court-connected and independent programs and services, the Commission on Qualifications of the Society of Professionals in Dispute Resolution (SPIDR) states:

The most commonly discussed purposes of setting criteria for individuals to practice as neutrals are: 1) to protect the consumer and 2) to protect the integrity of various dispute resolution processes. Concerns also have been raised, particularly about mandatory standards or certification, including 1) creating inappropriate barriers to entry into the field, 2) hampering the innovative quality of the profession, and 3) limiting the broad dissemination of peace-making skills in society.

Qualifying Neutrals: The Basic Principles (1989) (hereafter "SPIDR Commission").

Courts have a continuing responsibility to ensure the quality of the mediators to whom they refer cases. At the same time, courts should not set up barriers that inappropriately exclude competent mediators and should encourage diversity among service providers, including gender, racial and ethnic diversity.

Mediation requires a particular set of skills, knowledge and personal qualities. A variety of lists of mediator skills have been developed, such as those developed by the SPIDR Commission on Qualifications, the New Jersey Symposium on Critical Issues in Alternative Dispute Resolution, and individual mediation programs. The following list developed by SPIDR should be considered by courts and applied depending upon the type of case involved:

- a. Skills necessary for competent performance as a neutral include:
 - (1) General
 - (a) Ability to listen actively;
 - (b) Ability to analyze problems, identify and separate the issues involved, and frame these issues for resolution or decision making;
 - (c) Ability to use clear, neutral language...;
 - (d) Sensitivity to strongly felt values of the disputants, including gender, ethnic, and cultural differences;
 - (e) Ability to deal with complex factual materials;
 - (f) Presence and persistence, i.e., an overt commitment to honesty, dignified behavior, respect for the parties, and an ability to create and maintain control of a diverse group of disputants;
 - (g) Ability to identify and to separate the neutral's personal values from issues

under consideration; and

- (h) Ability to understand power imbalances.
- (2) For mediation
- (a) Ability to understand the negotiating process and the role of advocacy;
 - (b) Ability to earn trust and maintain acceptability;
 - (c) Ability to convert parties' positions into needs and interests;
 - (d) Ability to screen out non-mediable issues;
 - (e) Ability to help parties to invent creative options;
 - (f) ability to help the parties identify principles and criteria that will guide their decision making;
 - (g) Ability to help parties assess their non-settlement alternatives;
 - (h) Ability to help parties make their own informed choices; and
 - (i) Ability to help parties assess whether their agreement can be implemented.
- b. Knowledge of the particular dispute resolution process being used includes:
- (1) Familiarity with existing standards of practice covering the dispute resolution process; and
 - (2) Familiarity with commonly encountered ethical dilemmas.
- c. Knowledge of the range of available dispute resolution processes, so that, where appropriate, cases can be referred to a more suitable process;
- d. Knowledge of the institutional context in which the dispute arose and will be settled;
- e. In mediation, knowledge of the process that will be used to resolve the dispute if no agreement is reached, such as judicial or administrative adjudication or arbitration;
- f. Where parties' legal rights and remedies are involved, awareness of the legal standards that would be applicable if the case were taken to a court or other legal forum; and
- g. Adherence to ethical standards.

SPIDR Commission, *supra* at 20.

While many jurisdictions require their mediators to have a particular educational background or professional standing, no degree ensures competent performance. In fact, competence has been found in individuals with very different backgrounds and experiences, suggesting that performance may be attributable to personal characteristics rather than to education, profession, age or other criteria. While in some cases, such as complex civil cases, legal or other knowledge or experience related to the subject matter of the case may be appropriate, parties should be free in most circumstances to select a mediator of their choice. (See Standard 7.0 on Selection of Mediators).

Qualifications, rather, should be based on skills which may be acquired through training, experience, and skills-based education. These are the only criteria that have been correlated with successful mediation. See, e.g., J. Pearson, N. Thoennes, and L. Vanderkoi, "Mediation of Child Custody Disputes," *Colorado Lawyer* Vol. 2, No. 2 (February, 1982) at 335. The amount of training and experience required for mediators handling divorce and child custody cases are typically higher, for example, than those for mediators handling cases in court-sponsored settlement weeks. A report to the National College of Juvenile and Family Law suggests that mediators in family and juvenile courts must have not only the necessary process skills but also an understanding of juvenile and family law and the concepts of child development. Court Approved Alternative Dispute Resolution: A Better Way to Resolve Minor Delinquency, Status Offense and Abuse/Neglect Cases, Report by the Key Issues Curriculum Enhancement Project Faculty Consortium of the National College of Juvenile and Family Law 65-66 (1989).

The Standards make no recommendations with respect to the number of hours of training or experience that should be required. The amount of training and experience will vary depending upon the type of case being mediated.

6.2 Courts need not certify training programs but should ensure that the training received by the mediators to whom they refer cases includes role-playing with feedback.

COMMENTARY: While the Standards make no recommendations with respect to the numbers of hours of training that should be required, they do call for courts to ensure that the training received by the mediators to whom they refer cases includes role-playing with individualized feedback. While training, by itself, does not guarantee competence, experiential programs that allow participants to engage in simulations and receive individual observation and feedback are most likely to advance quality performance.

A number of jurisdictions require that mediators handling court-referred cases participate in a training program certified by the Court. (See e.g., Florida Supreme Court Rules Governing Qualifications of Mediators and Arbitrators, September 23, 1988.) The Standards do not discourage, but do not require this practice.

6.3 Courts are responsible for determining that the mediators to whom they refer cases are qualified. The level of screening needed to determine qualifications will vary depending upon the type of case involved.

COMMENTARY: Assuring that court-connected mediation programs and services are of high quality is of special concern when parties are mandated to participate. Even when courts refer parties to mediation on a voluntary basis, if the referral is specifically to court staff providing mediation services, to a particular program, or to a roster maintained by the court, such a referral carries the court's imprimatur. Thus the court should ensure that the mediators to whom such referrals are made, whether they are on the court's staff, employed by a program or on a roster, are qualified.

Courts presently have various methods to screen for qualifications. Some ask applicants to fill out questionnaires or submit curriculum vitae and paper-screen applicants. Others go one step further to conduct individual interviews. Sometimes courts rely on outside organization to certify mediators. Mentoring programs also can be required. See, e.g., Fla. R. Civ. Pro. 1.760. Performance-based testing has been advocated by several groups, including SPIDR's Commission on Qualifications, and has been used successfully by several court-connected mediation programs. (See, e.g., B. Honoroff, D. Matz and D. O'Connor, "Putting Mediation Skills to the Test," *Negotiation Journal* 37 (1990).

The level of screening needed will depend upon the type of case involved. For example, a higher level of screening will be required for domestic relations mediators than for those participating in court-sponsored settlement weeks.

6.4 Courts should orient qualified mediators to court procedures.

COMMENTARY: In addition to being trained in mediation skills and techniques, mediators to whom the court refers cases should be required to attend an orientation on court procedures. To be effective, mediators need to know the institutional context of the cases they are handling, including how the case was processed by the court before mediation, how it will be processed afterwards, and any time deadlines and reporting mechanisms that are in place. Mediators handling court-referred cases should also be informed routinely of any changes in court procedure. Dissemination of this information will ensure smooth functioning of court-connected mediation programs.

6.5 Courts should continue to monitor the performance of mediators to whom they refer cases and ensure that their performance is of consistently high quality.

COMMENTARY: It is not enough for courts to make an initial determination that the mediators to whom they refer cases are qualified. Monitoring their performance may be equal in importance to the initial selection process. It can ensure, for example, that programs once offering a collaborative problem-solving process do not degenerate into case status conferencing procedures. The quality of mediators' performance should be monitored by the courts on a continuing basis.

There are a number of mechanisms that have been used to monitor the quality of mediators' performance, and courts should consider using them in combination. Peer review and supervisor observation are valuable, as are client surveys, feedback from the judges who referred cases, and outcome data. The latter should be used with extreme caution, since success in helping parties reach agreement is not the only measure of mediators' competence.

Courts also should ensure that the mediators to whom they refer cases continue to improve their skills on an ongoing basis through additional training, study and practice. While continuing education by itself does not guarantee quality performance, it is a way in which mediators can maintain and enhance their skills and should be encouraged by the court. A number of jurisdictions require continuing education. See, e.g., Fla. Rules for Certified and Court-Appointed Mediators 10.010-10.290. Courts also should ensure that the mediators to whom they refer cases are updated continually on changes in court rules and procedures and on their ethical responsibilities.

6.6 Courts should adopt procedures for removing from their roster of mediators those mediators who do not meet their performance expectations and/or ensuring that they do not receive further court referrals.

COMMENTARY: Ongoing monitoring of mediator quality and removal of mediators who do not meet the court's performance expectations from the court's roster are the most critical components of any system that seeks to ensure mediator competence. Substandard mediator performance can be addressed in a variety of supportive ways. Courts can require that mediators who do not meet their performance expectations undergo additional training, supervision, and/or co-mediate with an experienced mediator for a designated period of time. Ultimately, however, courts also need to institute procedures to ensure that mediators who, even with additional help, are not performing at expected competence levels do not receive further referrals of cases from the court. Since the court cannot refer mediators to independent licensing or certification organizations, they should consider providing notice of removal and an opportunity to be heard. As an alternative to a formalized hearing process for removal, courts can review and reappoint panels of mediators or renew arrangements with mediation programs on an annual or other periodic basis.

7.0 SELECTION OF MEDIATORS

7.1 To enhance party satisfaction and investment in the process of mediation, courts should maximize parties' choice of mediator, unless there are reasons why party choice may not be appropriate. Such reasons might include:

- a. there is significant inequality in the knowledge or experience of the parties.
- b. the court has a particular public policy it is trying to achieve through mediation, which requires selection of a particular mediator or group of mediators.
- c. party choice would cause significant and undesirable delay.

COMMENTARY: There are a number of mechanisms that have been used to select one or more mediators for a particular case:

1. The parties agree on an individual and submit the name to the court. Their choice may be limited to a panel of mediators considered qualified by the court.
2. The judge selects the mediator, subject to the parties' objections.
3. The judge or court staff asks each party to submit a list of acceptable mediators. Court staff contact any individual who appears on both lists. If the lists do not contain a common name, the court gives the parties the opportunity to strike names for cause, then randomly chooses from those that remain.
4. The judge or court staff provides the parties with a list of mediators. Each party may strike names for cause and the court then randomly chooses from those that remain.
5. Court staff select the mediators, without input from the parties or the judge, based on the mediators' availability, rotation, or particular expertise.

Several policies favor maximizing the parties' role in selection of mediators. First, party choice may increase the parties' satisfaction with the process. Second, party choice may be the most effective way of ensuring the quality of mediators. Third, giving parties, as opposed to judges, the choice of mediators is a way of guarding against judicial favoritism in making referrals.

Several other policies argue against party choice. First, judges or program administrators may be better informed than the parties about mediators' qualifications. Second, it may be faster and more convenient for court personnel to choose the mediators. Third, if there is significant inequality in the knowledge or experience of the parties, the inequality may be exacerbated by leaving the selection of the mediator in the parties' hands. Fourth, court selection may give the process greater dignity and legitimacy, especially where the parties are unsophisticated or unrepresented and the mediator is a party's only contact with the court. Fifth, at least in cases of particular public significance, the court and public at large may have a stake in the choice of mediator.

Except in certain specified circumstances, the Standards endorse maximizing the parties' choice in order to enhance party satisfaction and investment in the process of mediation. Maximizing party choice includes allowing the parties to choose a mediator from among the court staff providing mediation services, among mediators available through a program to which the court refers cases, or among the names on a roster maintained by the court or to reject a mediator chosen by the court if the parties cannot agree. It also includes permitting parties to choose their own mediator as an alternative to mediators on the court's staff, in a program or on a roster.

While there may be risks to allowing parties to choose their own mediator as an alternative to a mediator who has been found qualified by the court, the advantages outweigh the disadvantages in most circumstances.

Among the risks are the likelihood that indigent parties, and lower income parties for whom transaction costs already are high, will not have the same opportunity to select their own private mediator as higher income parties, resulting in the possibility of a two-tiered system of justice. In addition, if a significant number of higher-income parties opt out of the public system to employ private mediators, pressure on the public system to maintain a high level of quality could diminish and thus the quality of the public system might suffer.

On the other hand, allowing parties to choose their own alternative will lead to a more cooperative, positive attitude toward participation in mediation. When parties can choose mediators who they believe are best suited to handle their cases, particularly complex cases, they are likely to be more satisfied with the process. On balance, then, except in the following specific circumstances, the Standards favor permitting parties to choose their own mediator as an alternative to mediators on the court's staff, in a program, or on a roster.

The Standards recognize that there may be certain specific circumstances in which it is appropriate for courts to limit parties' choice of mediator. If parties have significantly unequal knowledge or experience, the court may need to step in to protect the disadvantages party by ensuring that choice is made from among mediators found to be qualified by the court.

Party choice also may need to be limited in situations where the court has a particular policy it is trying to achieve through mediation. For example, in domestic relations cases, the state has a significant interest in protecting the best interests of the child. In jurisdictions where thorough judicial review of mediated agreements cannot be ensured, the court may determine that parties should choose a mediator found to be qualified by the court. In addition, there may be cases or classes of cases in which the court is likely to have continuing involvement, such as suits against public institutions, and thus its concerns about the nature of the outcome of mediation would legitimize some limitation on party choice of a mediator.

Finally, the court may find that permitting parties to choose their own mediator would cause unacceptable delay in the proceedings, as in high volume, low stakes categories of cases, such as small claims, or in cases where the party-chosen mediator is unavailable for a period of time. Court assignment of a mediator, or assignment of mediator by the program to which the court refers cases, may serve court efficiency as well as party interests in small cases. Regardless of the type of case, the unavailability of a mediator chosen by the parties also may interfere with the court's needs to manage its docket. In this circumstance as well, limitation on party choice of mediator may be appropriate.

7.2 When a court determines that it should refer the parties to a private mediator who will receive a fee, the court should permit the parties to choose from among a number of providers.

COMMENTARY: Only under unusual circumstances should the courts require the use of a specific individual mediator when that mediator will receive a fee for services. Rule 53 of the Federal Rules of Civil Procedure and comparable state rules recognize that there are exceptional circumstances, particularly in complex cases, where either public policy or the needs of the court justify a judge's designating a particular individual to serve as special master and requiring that the master be paid by the parties. Even in these circumstances, however, many judges solicit the parties' views before making the appointment.

As the Society of Professionals in Dispute Resolution has stated:

When the third party will receive a substantial fee, either from the court or from the parties who are mandated to use the process, referral should not be made to a particular individual except in unusual circumstances. Instead, the parties typically should be permitted to choose from a panel of qualified persons and should be told the qualifications of the panel members.

Courts should avoid either the appearance or reality of "featherbedding" or "cronyism." There is also a potential for perceived judicial abuse in that requiring the use of a specific individual mediator may be seen as giving the judge control over the mediator. Thus the Standards oppose this practice.

8.0 ETHICAL STANDARDS FOR MEDIATORS

8.1 Courts should adopt a code of ethical standards for mediators, together with procedures to handle violations of the code.

Any set of standards should include provisions that address the following concerns:

- a. Impartiality
- b. Conflict of Interest
- c. Advertising by Mediators
- d. Disclosure of Fees
- e. Confidentiality
- f. Role of Mediators in Settlement

COMMENTARY: In creating a code of ethics, courts should consider the dual purposes of such a code: the promotion of honesty, integrity and impartiality in mediation, and the effective operation of a mediation program. Confidentiality, for instance, serves not only to protect the parties, but to build the parties' confidence in the effectiveness of the system. A demonstration of bias by a mediator is not only unethical; it can destroy the necessary foundation of good faith upon which mediation is built.

Each court should consider existing standards when drafting its code. Several court mediation programs, the Association of Family and Conciliation Courts and the American Bar Association's Family Law Section, have formulated standards of practice for mediators. In addition, two national associations for professional mediators, the Society for Professionals in Dispute Resolution ["SPIDR"] and the Academy of Family Mediators ["AFM"], have developed standards or codes of ethics for their members. See Program on Alter. Disp. Resol., Standards for Private and Public Mediators in the State of Hawaii, (1986) ["Haw. Stds."]; Florida Standards of Professional Conduct for Certified and Court-Appointed Mediators, (1991) ["Fla. Stds."]; Dispute Mediation Serv. of Dallas, Inc., Code of Ethics for Staff and Mediators, (1986) ["Dal. Stds."]; Family Ct. Servs., Superior Ct. of Cal., Standards of Conduct Working Paper (1991) ["Cal. Stds."]; State Bar of Texas Alternative Dispute Resolution Committee, Ethical Guidelines and Standards of Practice for Impartial Third Parties in the State of Texas, Proposed, (1992) ["Texas Stds."]; SPIDR, Ethical Standards of Professional Responsibility, (1991) ["SPIDR Stds."]; Academy of Fam. Mediators, Standards of Practice For Family and Divorce Mediation ["AFM Stds."]; Association of Fam. and Conciliation Cts., Model Standards of Practice for Family and Divorce Mediation, (1984) ["AFCC Stds."]; A.B.A., Standards of Practice for Lawyer Mediators in Family Disputes, (1984) ["ABA Stds."].

Most ethical standards for mediators are not described as "rules," but as "guides to reasonable behavior." See AFM Stds., Fla. Stds., Dal. Stds., Haw. Stds. These Standards take the position that this distinction is misplaced. Whether ethical standards are "rules" or "guides" is irrelevant if mediators who do not follow a standard are considered to have behaved unethically. If mediators' behavior differs from the standard, the implication is that it is "unreasonable," and "unreasonable" is equated with "unethical." T. Bishop, Standards for Family and Divorce Mediation, Disp. Resol. F., Dec. 1984, at 4. SPIDR responded to this distinction by setting a stricter standard of compliance with its ethical standards than "guides to reasonable behavior," stating that "adherence to these ethical standards by...SPIDR members and associates is basic to professional responsibility." SPIDR Stds. A better response may be to eliminate the distinction between "rules" and "guides" altogether.

The Advisory Board has reviewed a number of codes of ethics adopted by courts and associations throughout the country. Its recommendations on the subject may provide valuable guidance in designing ethical standards for mediation programs.

a. Impartiality

The mediator should maintain impartiality toward all parties. Impartiality means

freedom from favoritism or bias either by appearance, word or by action, and a commitment to serve all parties as opposed to a single party.

Impartiality is at the heart of mediators' ethical responsibilities. SPIDR defines impartiality as freedom from favoritism or bias either by appearance, word or by action, and a commitment to serve all parties as opposed to a single party. SPIDR Stds.

The Hawaii, Florida, and AFCC Standards mirror this language. Hawaii and Florida define impartiality by adding freedom from bias in "appearance," in addition to "word" and "action." Haw. Stds., at ¶III(1); Fla. Stds., at ¶V(A); AFCC Stds., at 7-9. The Florida Standards require mediators to disclose "any circumstances bearing on possible bias, prejudice, or impartiality." Fla. Stds., at ¶V(A)(1).

Most standards contain language prohibiting the exchange of gifts or information that could bias mediators. For example, Florida forbids mediators from "accepting or giving a gift, request, favor, loan or any other item of value to or from a party, attorney, or any other person involved in any pending or scheduled mediation process." Fla. Stds., at ¶V(A)(3). This prohibition does not apply to mediators' fees, which are allowed and covered under a separate section. *Id.*, at ¶VIII.

The broadly phrased "anything of value" could be construed to include any information which mediators could use for personal gain. The Dallas and Hawaii Standards address this possibility directly. The Dallas Standards state, "The mediator shall not collude with one party for personal or corporate gain." Dal. Stds., at ¶II(A)(5). The Hawaii Standards expand upon this concept:

Mediators shall not use information disclosed during the mediation process for private gain or advantage nor shall a mediator seek publicity from a mediation effort to enhance his or her position.

Haw. Stds., at ¶XI(2).

Mediators should not practice, condone, facilitate or collaborate with any form of discrimination on the basis of race, religion, national origin, marital status, political belief, mental or physical handicap, gender or sexual preference. Dal. Stds., at II.B. California adds that mediators should be aware of cultural differences and how they may affect parties' values and style of negotiating to avoid stereotypical attitudes toward parties in mediation. Cal. Stds., at 7.

Most standards recommend withdrawal by mediators who cannot maintain the requisite impartiality in a mediation.

b. Conflict of Interest

The mediator should refrain from entering or continuing in any dispute if he or she perceives that participation as a mediator would be a clear conflict of interest. The mediator also should disclose any circumstances that may create or give the appearance of a conflict of interest and any circumstances that may raise a question as to the mediator's impartiality.

The duty to disclose is a continuing obligation throughout the process. In addition, if a mediator has represented either party in any capacity, the mediator should disclose that representation.

After the mediator discloses the prior representation, the parties may choose to continue with the mediator.

A mediator should disclose any known, significant current or past personal or professional relationship with any party or attorney involved in the mediation and the mediator and parties should discuss on a case-by-case basis whether to continue.

Conflicts of interest can arise due to both prior and future relationships between mediators and parties. These relationships may be professional or personal. Existing codes advocate three responses to conflicts of interest: abstention, withdrawal, and disclosure. The AFCC Standards is illustrative:

The mediator shall not proceed if previous legal or counseling services have been provided to one of the participants. If such services have been provided to both participants, mediation shall not proceed unless the prior relationship has been discussed, the role of the mediator made distinct from the earlier relationship and the participants have been given the opportunity to freely choose to proceed....The mediator should be aware that post-mediation professional or social relationships may compromise the mediator's continued availability as a neutral third party.

AFCC Stds., at II.B.1-2. See also SPIDR Stds., at ¶4.

The ABA Standards take a stronger position against attorneys acting as mediators for former clients:

The mediator shall not represent either party during or after the mediation process in any legal matters. In the event the mediator has represented one of the parties beforehand, the mediator shall not undertake the mediation.

ABA Stds., at III.A.

When disclosure is required, it is generally a continuing obligation:

A mediator must disclose any current or past representation or consulting relationship with any party or attorney involved in the mediation. Disclosure must also be made of any pertinent pecuniary interest. All such disclosures shall be made as soon as practical after the mediator becomes aware of the interest or the relationship.

Fla. Stds., at ¶V(B)(1). See also AFCC Stds., at II.3; SPIDR Stds., at ¶4 ("The duty to disclose is a continuing obligation throughout the process.")

The comment to the Florida Standards lists some subjects for disclosure, including membership on a board of directors, work as an advocate or representative, consulting for a fee, stock ownership (other than mutual fund or trust arrangements), previous business contact or other managerial, financial, or immediate family interest in a party. Comment to Fla. Stds. ¶V(B)(1). In addition to disclosure to the parties, the Florida Standards require disclosure to the court. Fla. Stds., at ¶V(B)(2).

Perceived conflicts sometimes warrant disclosure. Hawaii requires disclosure to the parties of any "prior relationships that might be perceived as a conflict of interest," and prohibits mediators from continuing the mediation

unless (a) such prior relationships have been discussed; (b) the role of the mediator has been made distinct from earlier relationships; and (c) all of the parties freely choose to proceed.

Haw. Stds., at ¶III(2).

Both the Dallas and Florida Standards provide that a mediator should withdraw if he or she "believes or perceives that there is a clear conflict of interest...irrespective of the expressed desire of the parties." Fla. Stds., at ¶V(B)(3); Dal. Stds., at ¶II(9)(C).

c. Advertising by Mediators

A mediator should not make exaggerated claims about the mediation process, its costs and benefits, its outcome or the mediator's qualifications.

No current ethical standards prohibit advertising by mediators. The SPIDR Standards suggests that advertising is not permissible "in some conflict resolution disciplines, such as labor arbitration" but does not indicate why advertising is acceptable for mediation and not labor arbitration. SPIDR Stds.

SPIDR, Florida, Hawaii, and the AFCC require that any statements about mediation services be honest and accurate. SPIDR Stds.; Fla. Stds., at ¶XI(B); Haw. Stds., at ¶X(3); AFCC Stds., IV 1984. For example, the Hawaii Standards state that "A mediator shall only make accurate statements about the mediation process, its costs and benefits, and the mediator's qualifications." Haw. Stds., at ¶X(3). Similarly, the SPIDR Standards require that "No claims of specific results or promises which imply favor of one side over another for the purpose of obtaining business should be made." SPIDR Stds., at ¶6. The Florida Standards caution against using the mediation process to incur future business. Fla. Stds., at ¶XI(A).

d. Disclosure of Fees

Where costs and fees are funded by the parties, the mediator should enter into a written agreement with the parties that includes costs, fees, and time and manner of payment before beginning the mediation.

No commissions, rebates or other similar forms of remuneration should be given or received by a neutral for the referral of clients. Fees should not be based on the outcome of the dispute.

Ethical standards generally require disclosure of fees before services are rendered and prohibit fees based upon the outcome of the dispute.

SPIDR requires that mediators explain to the parties at the outset "the bases of compensation, fees, and charges, if any." SPIDR Stds. The Florida Standards require written disclosure of fees and costs, "including time and manner of payment," and Hawaii requires a written agreement with the parties before commencing the process. Fla. Stds., at ¶VII(A); Haw. Stds., at ¶IV(1).

SPIDR and Florida prohibit the acceptance of commissions or fees for the referral of mediation clients. SPIDR Stds.; Fla. Stds., at ¶VII(C). The SPIDR Standards state:

No commissions, rebates, or other similar forms of remuneration should be given or received by a neutral for the referral of clients.

SPIDR Stds.

Hawaii and Florida prohibit basing fees on the outcome of the dispute. Haw. Stds., at ¶IV(2); Fla. Stds., at ¶VII(D).

e. Confidentiality

In the absence of a statute to the contrary, the mediator should treat information revealed in a mediation as confidential, except for the following:

- (1) Information that is statutorily mandated to be reported.**
- (2) Information that, in the judgment of the mediator, reveals a danger of serious physical harm either to a party or to a third person.**
- (3) Information that the mediator informs the parties will not be protected.**

The mediator should inform the parties at the initial meeting of any limitations on confidentiality.

Ethical standards require strict compliance with the promise of confidentiality as an integral element of the mediation process. According to SPIDR:

Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candor, a full exploration of issues, and a neutral's acceptability. There may be some types of cases, however, in which confidentiality of the proceedings cannot necessarily be maintained. Except in such instance, the neutral must resist all attempts to cause him or her to reveal any information outside the process. A commitment by the neutral to hold information in confidence within the process also must be honored.

SPIDR Stds., at ¶3.

There may be instances in which confidentiality is in conflict with other mediator responsibilities. For example, mediators may learn of child abuse and be mandated by statute to report it despite a general pledge of confidentiality. Similarly, lawyers who mediate may feel obliged to report the unethical conduct of an attorney in the mediation to a court or bar association.

In *In Re: Waller*, the District of Columbia Court of Appeals approved a decision of the Board of Professional Responsibility, which held that the confidentiality requirement of a trial court's civil mediation order was not intended to preclude a disclosure by the mediator to the judge of a possible conflict of interest by one of the attorneys. *In Re: Waller*, 573 A.2d 780 (D.C.App. 1990). The court may have been swayed by the mediator's belief that his disclosure was consistent with the confidentiality provision because "it was a matter that had nothing to do with the negotiations between the parties but might affect the administration of justice in the Superior Court." *Id.*, at 781.

The Dallas Standards include an exception to confidentiality when, in the judgment of the mediator, there is a physical threat to a party or evidence of child abuse (Dal. Stds., at ¶II(A)(7)-(8)), or there is evidence of unethical conduct by another mediator. *Id.*, at ¶IV.A.(1)-(2).

What is important is that the parties understand at the outset what is and is not confidential. The AFCC Standards require mediators to explain to the parties all exceptions to the promise of confidentiality:

The mediator shall inform the parties at the initial meeting of limitations on confidentiality such as statutorily or judicially mandated reporting. The mediator shall inform the parties of circumstances under which mediators may be compelled to testify in court...The mediator shall discuss with the participants the potential consequences of their disclosure of facts to each other during the mediation process.

AFCC Stds., at IV.A.1-3.

Standards concerning confidentiality often include provisions protecting records and other written information. As with verbal communications, parties can agree to release written materials in certain circumstances. The Florida Standards provide:

[Mediators] shall preserve and maintain the confidentiality of all mediation proceedings to the full extent required by law. [They] shall keep confidential from opposing parties any information obtained in individual caucuses unless the party to the caucus permits disclosure. [They] shall maintain confidentiality in the storage and disposal of records and shall render anonymous all identifying information when materials are used for research, training or statistical compilations.

Fla. Stds., at ¶VI(A)-(C).

Mediators should not be held to a standard that precludes participation in program evaluation and research. See Standard 9.0 on Confidentiality.

f. Role of Mediators in Settlement

The mediator has the responsibility to see that the parties consider the terms of the settlement and be sensitive to inappropriate pressures to settle. In adhering to this standard, the mediator may find it advisable to educate the parties or to refer one or more parties for specialized advice.

By definition, mediation is a process in which decisions are made by the parties, not by mediators. Mediators, unlike the parties, have no stake in the outcome. However, they serve the parties and the process well when they educate the parties about the possible consequences of a proposed agreement, and are alert to whether continuation of the process would harm one or more of the participants. A history of violence between the parties, for example, raises the possibility of future problems if agreements require direct contact between the parties. Mediators cannot be expected to be able to foresee all possibilities of future problems, however. The primary responsibility is with the court at intake to ensure that appropriate cases go to mediation. In addition, courts have the responsibility to train mediators to be alert to possible dangers to the parties and to develop techniques for handling difficult cases. See Standard 11.0 on Inappropriate Pressure to Settle.

The primary responsibility for the resolution of a dispute rests with the parties. The mediator's obligation is to assist the disputants in reaching an informed and voluntary settlement. At no time and in no way shall a mediator coerce any party into agreements or make substantive decisions for any party. Mediators may make suggestions and may draft proposals for the parties' consideration, but all decisions are to be made voluntarily by the

parties themselves.

Haw. Stds., at ¶I(1).

A mediator shall inform the participants of their right to withdraw from mediation at any time and for any reason. If a mediator believes the participants are unable to participate meaningfully in the process or that a reasonable agreement is unlikely, a mediator may suspend or terminate mediation and encourage the parties to seek other forms of assistance for the resolution of their dispute. If participants reach a final impasse, a mediator should not prolong unproductive discussions that would result in emotional and or monetary costs to the participants.

Id., at ¶X(2).

Both SPIDR and the ABA require mediators to terminate the mediation if they believe that either continuation of the process or agreements proposed will be harmful to the parties.

[Mediators] must be satisfied that agreements in which [they have] participated will not impugn the integrity of the process.

SPIDR Stds., at ¶6.

When the interests of parties not participating will be affected by the mediation, some standards require mediators to consider those interests. This concern applies especially to children in family and divorce mediations. Although some standards make a general statement on this issue, Hawaii's standard includes a clause requiring the mediator to withdraw if he or she believes those interests are not being served:

A mediator has a responsibility to promote consideration of the interests of persons affected by actual or potential agreements and not present or represented at the bargaining table. Minimally, a mediator has a duty to raise the possibility of including additional representation in the mediation. Where a mediator believes the best interests of an absent party are not being served and where the parties themselves refuse to consider inclusive participation, a mediator is encouraged to withdraw his or her services.

Haw. Stds., at ¶VI(2).

9.0 CONFIDENTIALITY

9.1 Courts should have clear written policies relating to the confidentiality of both written and oral communications in mediation consistent with the laws of the jurisdiction. Among the issues such a policy should address specifically are:

- a. the mediators and cases protected by confidentiality;
- b. the extent of the protection;
- c. who may assert or waive the protection; and
- d. exceptions to the protection.

COMMENTARY: The Standards do not prescribe any particular set of policies relating to confidentiality in mediation but rather call for courts to develop their own written policies. These policies should be clear and address four specific areas: 1) the mediators and types of cases protected; 2) the extent of the protection; 3) who may assert or waive the protection; and 4) exceptions to the protection.

Courts should consider the policy considerations which favor confidentiality in mediation. Some relate to evidentiary use, some to public disclosure, and some to both. The one most frequently cited is that confidentiality is required for the process to be effective. The assurance of confidentiality encourages parties to be candid and to participate fully in the process. A mediator's ability to draw out the parties' underlying interests and concerns may require discussion -- and sometimes admissions -- of facts that disputants would not otherwise concede. Further, because parties often speak in mediation without the expectation that they will later be bound in another forum by what they said, subsequent use of their communications also could be unfairly prejudicial, particularly when the parties' levels of sophistication are unequal. Confidentiality also helps ensure the mediator's continued neutrality, since a mediator's subsequent testimony at trial would inevitably favor one side or another and destroy his or her role as an "impartial broker." Finally, confidentiality in mediation may enhance the use of mediation and optimize the settlement potential of a case. Many parties are concerned about protecting private information, such as trademarks and trade secrets which are often difficult to protect in a court proceeding.

Confidentiality has both societal and evidentiary costs. When the government is a party to a dispute, confidentiality may frustrate accountability to the public and/or public access to the decision-making process. Confidentiality may also prejudice the interests of affected parties who are not represented at the bargaining table, for example the interests of homeowners in proximity to a toxic waste site.

Protecting information revealed in mediation may prejudice the interests of third parties in dispute with one or both of the mediating parties, whose communications could reveal a claim or defense available to the third party. It also may screen information about the commission of past or future crimes, such as the threat of violence during mediation by a defendant later accused of murder, or the incidence of child abuse which, if revealed, could warrant state intervention.

Finally, closed proceedings and outcomes eliminate one check on the integrity and appearance of fairness of the proceedings. This lack of openness may be of concern, particularly when mediation is mandated by the court.

In weighing the benefits of confidentiality protections against the potential costs of nondisclosure of information in order to determine their policies regarding confidentiality, courts should take care to preserve the integrity of the mediation process. At a minimum, policies regarding confidentiality in mediation should provide no less protection than policies regarding confidentiality in settlement conferences. It should be noted, however, that while court rules can protect confidentiality in many instances, they cannot create or modify the existing

statutory law of privilege.

In developing their policies for confidentiality in mediation, courts may want to refer to settlement conference policies or to a model statute such as the one developed by the New Jersey Symposium on Critical Issues in Dispute Resolution to guide their deliberations. 1 *Seton Hall Legis. J.* 12, 72 (1988). Courts can also look to other current sources of protection of confidentiality in mediation, including Federal Rule of Evidence 408 and its state counterparts. Fed. R. Evid. 408. A number of states also have enacted statutes specifically protecting confidentiality in mediation. These statutes vary widely in terms of the nature and extent of the confidentiality protected. Some are very broad, and some cover only particular types of cases, programs or communications. See N. Rogers & C. McEwen, *Mediation Law, Policy, Practice* 95-146 (1989).

9.2 Courts should ensure that their policies relating to confidentiality in mediation are communicated to and understood by mediators to whom they refer cases.

COMMENTARY: It is important for mediators to whom the court refers cases to be knowledgeable about the law and the courts' policies relating to confidentiality in mediation. While the Standards require that such policies be in writing, written communication alone is likely to be insufficient. Mediators need to acquire the kind of full understanding that will enable them to convey the policies accurately to the parties and to act in accordance with them. Experience has shown, for example, that many mediators are unaware of the extent to which policies relating to confidentiality in mediation preclude the discussion of details of their cases with their colleagues.

Courts' policies relating to confidentiality in mediation should be covered thoroughly in training programs for mediators. In addition, courts have the responsibility to apprise mediators to whom they refer cases of any changes in their policies or in the way these policies can be applied.

9.3 Courts should develop clear written policies concerning the way in which confidentiality protections and limitations are communicated to parties they refer to mediation.

COMMENTARY: Parties in mediation need to understand clearly whether statements they may make in mediation or information they may disclose in connection with the mediation process will remain confidential and under what circumstances disclosure by the mediator or other parties may be permitted or required. Communicating this information accurately to parties can be extremely difficult, particularly given the complexity of confidentiality policies and the fact that they are subject to interpretive changes. Even if mediators themselves understand the complexities, they often are faced with the dilemma of overwhelming the parties in their explanation of legal niceties or misleading them in an effort to be succinct.

Given these dangers, courts should develop policies concerning the way in which confidentiality protections and limitations on the protections are communicated to parties they refer to mediation. Such policies should be clear and in writing to ensure that they are implemented appropriately.

9.4 Mediators should not make recommendations regarding the substance or recommended outcome of a case to the court.

COMMENTARY: Communications between courts and mediators relating to the substance or recommended outcome of cases destroy confidentiality and impugn the integrity of the process either by discouraging open communication or allowing mediators to use information revealed in confidence against a party's interest. See Standard 12.0 on Communications between Mediators and the Court.

9.5 Policies relating to confidentiality should not be construed to prohibit or limit effective

monitoring, research or program evaluation.

COMMENTARY: Courts are responsible for ensuring the quality of the programs to which they refer cases, and they need adequate information to allow them to fulfill this responsibility. Policies on confidentiality should accommodate this need. See Standards 2.0 on Courts' Responsibility for Mediation Programs and 16.0 on Evaluation.

Effective research, monitoring or program evaluation may require not only collection of aggregate statistics, but also access to individual case files and/or observation of actual mediation sessions as well as interviews with parties, mediators and mediation program personnel. Courts must balance the need for this kind of data with the need to protect confidentiality.

There are a number of ways to effect such an accommodation. Data can be made available only to officially sanctioned research and evaluation efforts. The researchers and evaluators themselves can be bound by courts' confidentiality policies. Protocols can be developed to ensure, for example, that names are replaced by numbers and that specific identifying data are altered to protect individual parties. Procedures can be devised to provide that mediation sessions are observed only with the parties' permission.

Given the availability of such protocols and procedures and courts' need for data to fulfill its responsibility for ensuring quality, provision of information for the purposes of program monitoring, evaluation and research should not be construed as violating policies relating to confidentiality in mediation.

10.0 THE ROLE OF LAWYERS IN MEDIATION

10.1 Courts should encourage attorneys to advise their clients on the advantages, disadvantages, and strategies for using mediation.

COMMENTARY: Lawyers have several possible functions to perform in connection with their clients' participation in mediation:

1. Before their clients decide whether to mediate, lawyers may give initial advice concerning whether it is in the clients' best interest to participate in mediation and what substantive rights will govern if the case goes to trial.
2. Lawyers may attend mediation sessions and participate directly in mediation. Alternatively, they may participate indirectly by advising clients before, during, or after mediation sessions.
3. Lawyers may review draft agreements reached in mediation or, alternatively, they may draft the agreements themselves.
4. Following mediation, lawyers may complete the legal process, either by filing a consent decree or praecipe if agreement was reached, or by continuing the pre-trial process if issues remain to be resolved by the court.
5. If necessary, lawyers may act to enforce any agreements reached in mediation.

The Standards deal explicitly with lawyers' roles in helping clients choose an appropriate process and in assisting their clients to participate in mediation.

Where participation in mediation is voluntary, courts should encourage lawyers to assist their clients in making an informed choice among the available processes. Although the information to be provided will vary with the circumstances, in most situations it will include consideration of the costs and potential benefits of mediation compared to alternative processes and of the substantive rules most likely to govern should the dispute be resolved by other means.

Even where participation in mediation is mandatory, legal advice prior to participation will be useful in explaining the process and considering how to exercise any options the parties may have. For example, even in a mandatory mediation scheme, the parties may be able to choose when to mediate, which mediator to use, and whether to conduct any discovery prior to mediation. Finally, regardless of whether they have any choices to make before entering mediation, all parties will benefit from discussing with their own attorneys the procedures governing mediation and the negotiating strategies they wish to use.

Some state statutes reflect a concern for disputants' who enter mediation without legal counsel, by requiring that they be informed of the risks of proceeding with mediation while unrepresented. For example, enforcement of a Minnesota civil mediation agreement is conditioned on its containing provisions that

the parties were advised in writing that (a) the mediator has no duty to protect their interest or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights.

Minn. Stat. Ann. §572.35(1). Similarly, parties in Kansas divorce mediation must be advised to obtain a lawyer before the process begins. Mediators are also required to advise the parties in writing to obtain legal help before

drafting or reviewing agreements. Kan. Stat. Ann. §23-603(a)(5).

In the absence of state statutes, courts can adopt rules which encourage attorney participation. Colorado has adopted an ethical rule requiring that attorneys advise their clients of alternative forms of dispute resolution in any matter "involving or expected to involve litigation."

10.2 Parties, in consultation with their attorneys, should have the right to decide whether their attorneys should be present at mediation sessions.

COMMENTARY: Attorney attendance at mediation sessions has been the subject of considerable debate. The Minnesota Supreme Court and State Bar Association Task Force on Alternative Dispute Resolution recommends that attorneys be permitted to attend all alternative dispute resolution proceedings to "facilitate discussion with clients about their case." Minn. Report, at 16-17. In Alaska, a statute prohibits the exclusion of attorneys from divorce mediation sessions. Alaska Stat. §25.24.060(c). Two states take the opposite view, allowing mediators to exclude lawyers from proceedings at their discretion. The Florida rules of civil Procedure provide that mediators have discretion to direct counsel to be excluded unless a court orders otherwise. Fla. R. Civ. P. 1.720(d). Similarly, in California child custody and visitation mediation, mediators have "authority to exclude counsel from participation in the mediation proceedings where, in the discretion of the mediator, exclusion of counsel is deemed by the mediator to be appropriate or necessary." Cal. Civil Code §4607(d), 4351.5(e).

The Society of Professionals in Dispute Resolution opposes all efforts to exclude attorneys from mediation sessions where parties desire to have their lawyers present:

Lawyers may act as a crucial check against uninformed and pressured settlements, particularly when they are knowledgeable about the dispute resolution process. It is the parties in consultation with their lawyers -- not public authorities -- who are in the best position to decide when the lawyers' presence is indicated.

SPIDR Report, at 20. The Standards have adopted this position.

Where one or more parties are unrepresented, mediators may reduce any actual or perceived imbalance that results by any one of the following means:

1. Advising unrepresented parties of their right to have an attorney present and of possible sources for obtaining legal representation.
2. Maximizing the use of separate sessions, so that the unrepresented party will be less intimidated and so that the mediator may spend additional time with the unrepresented party, if necessary.
3. As a last resort, the mediator may decide that the case is not appropriate for mediation.

10.3 Courts and mediators should work with the bar to educate lawyers about:

- a. the difference in the lawyer's role in mediation as compared with traditional representation; and
- b. the advantages and disadvantages of active participation by the parties and lawyers in mediation sessions.

COMMENTARY: The appropriate role for attorneys in mediation sessions varies with the type of case

and the relative sophistication of the parties. Lawyers generally play a more active role in personal injury mediation than, for example, in divorce mediation, where it is common even for represented parties to attend sessions without their attorneys. In general, however, the attorney's role tends more to legal advice before and after the mediation session, to advice and coaching during mediation, and less to advocacy than the attorney's traditional role in trial-type proceedings.

Rogers and McEwen point out numerous benefits for parties when lawyers take an active role in mediating disputes. For instance, they state that allowing attorneys to participate may be the best means of ensuring an equitable settlement where a party does not possess the skills to negotiate or is overly emotional. N. Rogers and C. McEwen, *Mediation: Law, Policy, Practice* 22 (1989). Further, participation of lawyers in some cases can reduce the risk of harmful consequences if no settlement is reached by decreasing "the chances of harmful admissions and disclosure of matters of strategic importance by the client to the other party, which is of particular significance if no settlement results." *Id.* at 28-9. Rogers and McEwen also caution that the necessity of having attorneys present is at its greatest if the mediator reports the merits of the dispute to the trier of fact, "because mediation might become, in essence, a contested hearing at which each side tries to persuade the hearing officer." *Id.* at 29. See Standard 12.0 on Communications Between Mediators and the Court.

Having lawyers participate actively in mediation sessions, on the other hand, may have its drawbacks in reduced efficiency and, at times, in diminished participation by disputants in the process. In many cases, the best role for the lawyer may be a limited one, where the attorney educates the principals on the legal standards that courts might be expected to apply to their cases and advises them on negotiation strategies, while allowing the parties to negotiate on their own behalf. In other cases, especially where parties are unsophisticated, a more equal partnership between lawyer and client may be the most effective strategy.

The Standard takes the position that it is the parties, and not the mediators, who have the right to decide whether, and to what extent, their attorneys should participate in mediation sessions. The Standard adopts this position in order to maximize the parties' choice and protection, in full recognition of the fact that in some instances there will be a tension between attorneys' advocacy and problem-solving negotiation. Courts should not require the parties to play the dominant role in mediation if they do not choose to do so.

The greatest need in connection with this subject is the education of lawyers concerning their potential roles in mediation and the advantages and disadvantages of each of these possible roles in particular situations. For a discussion of the possible roles of clients in settlement conferences, see Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 Wash. U.L.Q. 1059 (1991); see also Standard 3.0 on Information for Judges, Court Personnel and Users. The attorney's role may be different in each context--before, during, and after the mediation session.

When a client decides to attend mediation sessions without an attorney but to have an attorney review the resulting agreement before it is signed, the attorney may apply different standards of review from those that would govern if the attorney were negotiating the agreement herself or himself. Some attorneys have considered whether the agreement is within an acceptable range of possible results, or "fair enough." See, e.g., D. Samuels and J. Shawn, *The Role of the Lawyer Outside the Mediation Process*, 2 *Mediation Quarterly* (1983).

11.0 INAPPROPRIATE PRESSURE TO SETTLE

- 11.1 Courts should institute appropriate provisions to permit parties to opt out of mediation. Courts also should consider modifying mediation procedures in certain types of cases to accommodate special needs, such as cases involving domestic violence. Special protocols should be developed to deal with domestic violence cases.**

COMMENTARY: Fairness of the mediation process requires that both courts and mediators protect the parties' ability to make free and informed choices about whether or not to settle. There are different kinds of incentives and pressures on parties in mediation to settle, such as the cost and time of litigation, uncertainty of outcome at trial, the desire to avoid publicity and, often, the dynamics of the negotiation process itself. These kinds of incentives and pressures are to be distinguished from inappropriate practices and procedures which result in inappropriate pressure to settle.

Mandating referral to mediation often is appropriate. (See Standard 4.0 on Selection of Cases). However such a mandate inevitably places additional costs on parties such as the financial, time, travel or other costs associated with attending a mediation session. While these kinds of additional costs may be acceptable in most cases, particularly when mediation is likely to be helpful, there may be instances in which they result in inappropriate pressure to settle. It is for this reason that any mandatory referral system should include liberal opt-out provisions. Parties should also be permitted to reject a particular mediator assigned from among the court staff providing mediation services, from among mediators available through a program to which a court refers cases, or from among the names on a roster maintained by the court. (See Standard 7.0 on Selection of Mediators.)

Even requiring attendance at an initial mediation session risks creating inappropriate pressures to settle on some kinds of parties, such as those whose ability to protect their own interests has been impaired by psychological or physical victimization, or those who are substantially disadvantaged in relation to the other party in terms of knowledge, experience and/or resources. Depending upon available resources, courts should consider these kinds of cases carefully before referring them to mediation. (See Standard 4.0 on Selection of Cases).

Finally, courts should consider modifying the procedures of mediation when they make mandatory referrals in some kinds of cases, in order to minimize the potential for inappropriate pressure to occur. For example, one or both parties may be concerned that face-to-face meetings will create inappropriate pressures to settle. This may be a concern in cases where physical or psychological victimization has occurred or where other particular kinds of interpersonal dynamics exist between the parties caused by gender, culture or the parties' perceived relative status. When physical violence has occurred, parties always should be permitted to opt out of face-to-face meetings in mediation. In other circumstances, the issue should be considered by the court on a case-by-case basis and, at a minimum, discussed by the mediator with each of the parties at the outset of the initial mediation session. See also Standard 12.0 on Communications between Mediators and the Court.

- 11.2 Courts should provide parties who are required to participate in mediation with full and accurate information about the process to which they are being referred, including the fact that they are not required to make offers and concessions or to settle.**

COMMENTARY: Inadequate information may lead parties to believe that they must settle in mediation. At a minimum, care should be taken to inform them at the outset that the mediator has no authority to impose a solution, and that no adverse consequences will be imposed as a result of their failure to settle. Informing parties that the mediator has no authority to impose a solution may be particularly important if a retired judge is serving as the mediator, because of the likelihood, given a retired judge's status, that parties may assume otherwise. When mediation involves unrepresented or unsophisticated parties, who may be more susceptible, courts should provide even fuller information. (See Standard 3.0 on Information for Judges, Court Personnel and Users).

Courts have the responsibility of ensuring that parties who are required to mediate are required only to

attend an initial mediation session and to be educated about the process so they can make an informed choice about continued participation. (See Standard 4.0 on Selection of Cases.) While parties attending mediation may be required to bring with them the information they would need if they chose to continue participating, it should be made clear to them that they are not required to make offers or concessions or to settle their case in mediation. See *Decker v. Lindsay*, Texas Ct. App. 1st Dist., No. 01-91-01299-CV, Jan. 15, 1992.

In some jurisdictions, mandated referrals explicitly provide or are interpreted to provide that parties must participate in the process "in good faith." See Me. Rev. Stat. Ann. tit. 19, §§214, 752 (West Supp. 1991); and Wash. Rev. Code 59.20.080 (3) (1990). Although there is no doubt that successful mediation involves good faith, requirements to participate in good faith are vague, counterproductive, and cannot be enforced without the mediator's testimony. They may also pressure parties to make offers of settlement that might not be made in the absence of such provisions.

11.3 Courts should not systematically exclude anyone from the mediation process. Lawyers never should be excluded if the parties want them to be present.

COMMENTARY: Some parties, particularly those who are unsophisticated or lack negotiation experience, may want another person to be present during mediation. They may feel that the presence of another person will help protect their interests in mediation and prevent them from being coerced to settle in the process. For example, a tenant in dispute with a landlord who is perceived to be powerful may wish to have a neighbor present, or a woman who has been physically or psychologically victimized may wish to bring her own advocate. This other person may be a lawyer, but many times he or she is a lay person on whom a party relies for support.

Mediators should consider this issue carefully, particularly when the presence of another person is desired at the initial mediation session. It is important for parties in mediation to have the assurance that they will not be coerced to settle in the process. At the same time, the process may become unwieldy if additional people are permitted to be present, and the participation of others may itself become an issue between the parties.

Lawyers never should be excluded if the parties want them to be present. The parties and the mediator should make the decision about the presence of others on a case-by-case basis. (See Standard 10.0 on Role of Lawyers in Mediation.)

11.4 Settlement rates should not be the sole criterion for mediation program funding, mediator advancement, or program evaluation.

COMMENTARY: As court-connected mediation programs become institutionalized and an integral part of the public justice system, there is a danger that bureaucratic routinization may occur. Administrative rewards and incentives may come to focus on the numbers of settlements reached in mediation. The individual mediators themselves may begin to suffer from "burnout," focusing less on the particular issues and dynamics in each case than on whether the parties are able to reach agreement. All of these factors may result in undue pressure being placed on parties to settle so that the existence of programs and services can be justified.

Programs should adopt support systems for their mediators to minimize mediator "burnout" and guard against "selective facilitation," or the tendency of mediators to guide the parties inappropriately to a particular result. Ongoing training and peer review are important ways to ensure mediator quality. Such training and review should emphasize other aspects of the mediator's role besides promoting parties' agreement, such as communication skills and the ability to frame issues effectively. (See Standard 6.0 on Qualifications of Mediators.) Other ways can also be found to reward superior performance, such as giving mediators enhanced roles within the program itself, instituting special awards programs, or using them as trainers or mentors.

Likewise, program evaluation should not focus exclusively on the numbers of settlements reached in

mediation (see Standard 16.0 on Evaluation), nor should program funding be entirely dependent upon this factor. Other goals articulated by the court in implementing the program should be taken into account. These may include increasing the involvement of parties in the process of resolving their disputes, increasing parties' satisfaction and compliance with the results of mediation, or assisting the parties to develop a wider range of outcomes than would be available through adjudication.

11.5 There should be no adverse response by courts to nonsettlement by the parties in mediation.

COMMENTARY: The failure of mediation to produce a settlement should not adversely affect the parties' treatment by the court. Such treatment may manifest itself in a number of ways. For example, courts may place a case that has not settled in mediation on a long trial list; they may draw inferences concerning the reasons a case did not settle that are adverse to one of the parties; they may solicit a recommendation from the mediator as to the best outcome for a case; or, they may require parties who have not settled in mediation to participate subsequently in a judicial settlement conference where they are pressured to come to agreement. Concern about the consequences of these kinds of practices may lead parties to settle in mediation involuntarily. Courts should take special care to avoid them.

12.0 COMMUNICATIONS BETWEEN MEDIATORS AND THE COURT

12.1 During a mediation the judge or other trier of fact should be informed only of the following:

- a. the failure of a party to comply with the order to attend mediation;
- b. any request by the parties for additional time to complete the mediation;
- c. if all parties agree, any procedural action by the court that would facilitate the mediation; and
- d. the mediator's assessment that the case is inappropriate for mediation.

COMMENTARY: The purpose of this standard is to insulate the mediator from the court during the mediation and, except for reports of violations of the court's orders (which preferably would be made to a judicial officer other than the trial judge), to keep from any judge who may be involved in a trial of the case if it does not settle, any information about the substance of the mediation. Thus the mediator's assessment of the inappropriateness of a particular case for mediation should be conveyed to the court without elaboration.

The policy rationales behind this concern were expressed by SPIDR:

Settlement coercion tied to a neutral's evaluation has a significant negative impact on mediation. The coercion results in strategic argument by the parties, who accurately view the mediator as having an effect on an adjudicated outcome. Thus, the coercion destroys the environment of frank communication necessary for the negotiation process. Further, the mediator's recommendation seems unlikely to provide the proper basis for judicial resolution . . . because mediators hold separate meetings with the parties and do not hear evidentiary presentations.

SPIDR Report, at 18.

The Missouri Supreme Court has a similar rule:

Except by agreement of the parties no lawyer or party shall communicate to the court, nor shall a court receive from any source, any information concerning: (1) a party's willingness or unwillingness to participate or to continue to participate in mediation; (2) why, or what caused the mediation to cease; (3) a party's willingness or unwillingness to be bound by the results of mediation; or (4) the results of mediation.

Mo. Sup. Ct. R. 17.06 (1989).

Thus the Standards reject the practice of a few courts where, in cases in which the parties do not reach agreement on child custody and visitation, the mediator (or "conciliation court counselor") is required to recommend to the judge which parent should be awarded custody. See McLaughlin v. Superior Court for San Mateo County, 140 Cal. App. 3d 473, 89 Cal. Rptr. 479 (1983) (either party may call as a witness or cross-examine a conciliation court counselor who renders a report to the judge).

The harm such practices can do to the mediation process outweighs any efficiencies that the court may achieve by using the mediator as part of its investigatory process:

This procedure [of mediators' recommendations to the trier of fact] is radically different from conventional mediation. It compromises the mediator's neutrality, discards any semblance of confidentiality, and confuses mediation with other procedures of a more investigatory nature.

L. Singer, Settling Disputes: Conflict Resolution in Business, Families, and the Legal System, 42-43 (1990).

In the opinion of J. Folberg and A. Taylor:

[A]llowing the mediator to make a recommendation and testify creates an untenable Hobson's choice for divorcing parents: either refrain from being candid in mediation discussions or reveal relevant confidences knowing that they can be used later against your individual interests. This challenge has been countered with the argument that parties to a court-compelled mediation are unlikely to reveal confidences that would threaten their desired custody resolution, whether or not those confidences would be revealed in court.

J. Folberg and A. Taylor, Mediation, 280 (1984).

A similar although less obvious problem exists where a statute or court rule requires parties to make a "good faith" effort to mediate. See Me. Rev. Stat. Ann. tit. 4, §581 (when "agreement through mediation is not reached on any issue, the court must determine that the parties made a good faith effort to mediate the issue before proceeding with a hearing"). See Standard 9.0 on Confidentiality.

Eric R. Max of the New Jersey Department of the Public Advocate, Office of Dispute Settlement, points out that, although "in some cases it may be appropriate for a judge to completely separate himself [sic] from the process, . . . in other cases he may play a number of important roles during mediation. This includes supporting the process, setting time deadlines and resolving discovery disputes Although he is not involved in the substance of the mediation, a judge can greatly increase the effectiveness of the process by working closely with the mediator." E. Max, Bench Manual for the Appointment of a Mediator, 18 (1990).

In the interests of minimizing communications between the mediator and the judge, however, all communications with the judge on procedural matters during the mediation should be made by someone other than the mediator. Courts should develop an administrative procedure or form for communication to enable conveying a mediator's recommendation on procedural matters.

12.2 When the mediation has been concluded, the court should be informed of the following:

- a. **If the parties do not reach an agreement on any matter, the mediator should report the lack of an agreement to the court without comment or recommendation.**
- b. **If agreement is reached, any requirement that its terms be reported to the court should be consistent with the jurisdiction's policies governing settlements in general.**
- c. **With the consent of the parties, the mediators' report also may identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.**

COMMENTARY: This standard is based on Rule 1.730 of the Florida Rules of Civil Procedure.

These Standards reject the approach of those who propose extensive communications between the mediator and the judge after a mediation in which settlement is not reached. Cf. E. Max, Bench Manual for the Appointment of a Mediator, 16 (1990). The Standards reject this approach.

Although communications between the mediator and any judge who may try the case should be discouraged, the Standards are not intended to preclude discussions with administrative staff responsible for the mediation program or reports to the court designed to permit monitoring of the quality of the mediation services being provided. (See Standards 16.0 on Evaluation and 2.0 on Courts' Responsibility for Mediation Programs.)

Mediation agreements should not be kept private *per se*, but should be treated as other court settlements. Parties may request that settlement terms be confidential as part of the mediated agreement. In those cases where the public interest demands, such as cases involving environmental or consumer protection issues, mediated agreements should not be held private.

12.3 Whenever possible, all communications with the judge who will try the case should be made by the parties. Where the mediator must communicate with the trial judge, it is preferable for such communications to be made in writing or through administrative personnel.

COMMENTARY: The purpose of this preference is to prevent any appearance of impropriety or threat to confidentiality. The rationale behind a preference for such communications to be made in writing or through administrative personnel is that it offers mediators the most complete protection from being questioned by judges about their mediations and, in turn, offers parties the most complete assurance of confidentiality and insulation of the eventual outcome of their case from influence by the mediators' observations. The Standards should not be read as endorsing the practice of some courts, however, which keeps the identity of the mediator from the judge or prohibits judges from knowing even that a case has been mediated. Such practices appear to go too far, by prohibiting mediators, where the parties agree, from communicating with judges or their law clerks concerning procedural matters, such as the need for discovery or extensions of time and failing to inform judges about the value of mediation in general and the performance of individual mediators in particular.

13.0 FUNDING OF PROGRAMS AND COMPENSATION OF MEDIATORS

13.1 Courts should make mediation available to parties regardless of the parties' ability to pay.

- a. Where a court suggests (rather than orders) mediation, it should take steps to make mediation available to indigent litigants, through state funding or through encouraging mediators who receive referrals from the court to provide a portion of their services on a free or reduced fee basis.
- b. When parties are required to participate in mediation, the costs of mediation should be publicly funded unless in the view of the court the case is an exceptional one.

COMMENTARY: Ideally mediation as a basic dispute resolution service should be funded by the public to the same extent as adjudication and other court services. See Standard 1.0 on Access.

The New Jersey Supreme Court's Task Force on Dispute Resolution recommends an annual legislative appropriation for alternative dispute resolution. Because "providing the best option for the resolution of each dispute is a public purpose of the Judiciary, [it] is, therefore, appropriately funded by that public." N.J. Report, at 25. The Minnesota Supreme Court and State Bar Association's Task Force on ADR, on the other hand, concludes that the fee in all ADR processes shall be set by the marketplace The parties shall pay for the neutral. It is presumed that the parties shall split the costs of the ADR process on an equal basis." Minn. Report, at IV A (1)-(3).

The Standards take no position concerning the advisability of a court's charging fees to litigants for the use of other court services, such as transcripts or probation, or of increasing filing fees to pay for mediation or other services. They do state that court-connected mediation should be a part of the regular court budget and publicly funded to the same extent that adjudication and other court programs are funded.

Under present fiscal conditions this standard may have to be viewed as a goal rather than a minimal requirement. For example, some states rely on fees paid by the parties to fund mediation in whole or in part. If other court processes are offered free of charge, however, user fees for mediation programs could act as a disincentive to using mediation, regardless of the parties' ability to pay. SPIDR Report, at 16. The Society of Professionals in Dispute Resolution (SPIDR) has expressed a special concern about charging for mediation when it is offered as an alternative to the pursuit of a criminal complaint.

Harvard Law Professor Frank E. A. Sander, widely regarded as the originator of the multi-door courthouse concept, recently expressed concern about two funding alternatives developed by states and localities strapped for funds. One is overreliance on volunteers. While volunteers have a valuable role to play in many kinds of court-connected mediation programs, caution is needed:

If ADR is to develop responsibly as a profession, its practitioners need to be reasonably compensated [I]f mediation is to be widely used in large-scale commercial and public policy disputes then we cannot look solely to volunteers.

F.E.A. Sander, Who Should Pay for Court-Connected ADR?, A.B.A. J., Feb. 1992, at 105. Professor Sander also addressed party payment of neutrals:

The other solution adopted in some places (such as Florida and Texas) is to have the disputants pay the neutrals to whom the case has been referred. From the point of view of most commercial clients, this may not pose much of a problem But, [i]f the public justice system has an obligation to

make available a range of dispute resolution options -- as I believe it does -- then we unfairly bias the choice by making court adjudication available free or for a modest filing fee, yet charging the parties for alternative processes that may be more appropriate in a particular case.

See also Minn. Report, at IV A (1)-(3) (concluding that the parties should pay equal amounts for mediation).

There are several options for providing publicly funded mediators. Courts may choose to provide trained staff mediators, whether from the ranks of professional mediators, former judges, magistrates, or court social workers, as one option. Alternatively, they may create a fund, either from legislative appropriations or from add-on filing fees, to compensate private mediators. The latter method has the advantage of maximizing the court's flexibility and the parties' ability to choose from among a number of qualified mediators.

The most short-sighted of the available options is the exclusive reliance on volunteers. Not only does it risk the demise of programs, or at the very least, a severe dilution of quality, after initial enthusiasm has waned and volunteer mediators want to be compensated; it also denigrates what should be a profession, with continuing commitment to improving skills, into a hobby. As Professor Sander puts it:

What do we say to our talented young graduates who want to make a career of helping others resolve their disputes? That they should find some other work to support themselves and do dispute resolution in their spare time?

Id.

Where financing of ADR from general public funds is unavailable due to the current financial conditions of many of our court systems, Professor Sander advocates the use of add-on filing fees, as in California, as "a fairer form of assessment [than financing through volunteers or party fees] since the costs of improving the public dispute system are thus spread over all litigants, not simply imposed on the immediate disputants seeking to avail themselves of ADR procedures." Sander, *supra*, at 105.

Even under current fiscal constraints, a court should not require parties to participate in mediation unless public funds are available to compensate the mediators. This is the approach recommended by SPIDR. SPIDR Report, at 16. According to Professor Sander, in addition to the arguments supporting the public funding of ADR procedures in general as part of the public justice system, "[w]here the referral to ADR is mandatory there is the added question whether it is fair or legal to compel users of the public justice system to use certain alternative processes and then to bill them for the cost." Sander, *supra*, at 105.

An exception to the requirement of public funding of mandatory mediation may be warranted in unusual cases, where state or local rules may authorize courts to appoint experienced special masters to manage and/or mediate in particularly large or complex cases and to order their costs to be borne by one or more of the parties. See Fed. R. Civ. P. 53; E. Max, *Bench Manual for the Appointment of a Mediator* 16 (1990).

Where the court suggests, rather than requires, mediation, it should take steps to ensure that mediation is available to low income parties. See Iowa Code Ann. §598.16 (costs "shall be paid in full or part by the parties...however, if the court determines that the parties will be unable to pay the costs without prejudicing their financial ability to provide themselves and any minor children with economic necessities, the costs may be paid in full or in part by the county"). An alternative approach is for each court to implement rules to provide for judicial review of the appropriateness of any fees charged to the parties for mediation services. If this review indicates that the fees are excessive or the parties do not have the financial ability to pay, a judge may reduce the fee or order other financial arrangements, including assignment of a mediator who has agreed to provide the services *pro bono* or for a reduced rate of compensation. Cf. Fla. Sup. Ct. Regs., Fla. Stat. Ann. §44.108 (West Supp. 1992). The Florida Standards of Professional Conduct for Court Appointed Mediators provide that, "[a]s a means of meeting the needs of the financially disadvantaged, a mediator should provide mediation services *pro bono*, or at a reduced

rate of compensation whenever appropriate." Florida Standards of Professional Conduct for Court Appointed Mediators, §XIII(A) (1991).

13.2 In allocating public funds to mediation, a court may give priority for funding to certain types of cases, such as family and minor criminal matters.

COMMENTARY: Many courts already operate publicly funded mediation programs for some types of cases. Data from the National Center for State Courts' ADR Database illustrates the diversity of current funding sources for court-connected mediation programs. For example, most custody mediation programs use court-funded mediators (89 out of 110 programs), whereas almost 40 percent (21 out of 53) of tort programs rely on user fees to fund mediators.

PROGRAM SERVICES RENDERED							
BASIS	Cust./ Vis.	Con- tract	Tort	Small Claim	Land./ Tenant	Min. Crim.	Other
Free	89	43	44	33	31	15	28
Fixed Rate	13	16	17	2	3	1	10
Sliding Scale	4	1	1	0	0	0	2
Other	7	3	3	2	1	1	4

SOURCE OF FUNDS TO PAY NEUTRALS							
SOURCE	Cust./ Vis.	Con- tract	Tort	Small Claim	Land./ Tenant	Min. Crim.	Other
Court Budget	89	31	30	26	25	10	19
Non-Court Budget	11	2	2	0	2	2	6
Parties	10	19	21	0	3	0	12

The effect of the Standards would be that a court could operate either mandatory or voluntary programs in its priority areas, with public funding provided, and voluntary programs in other areas, with fees paid by the parties. Even in these lower priority, voluntary programs, provision should be made for serving indigent litigants.

13.3 Where public funds are used, they may either: (a) support mediators employed by the court or (b) compensate private mediators. Where public funds are used to compensate private mediators, fee schedules should be set by the Court.

COMMENTARY: In deciding whether to use public funds to support court-employed mediators or fees for private mediators, a court should consider the following:

- Does the size of its current or projected mediation caseload justify the hiring and training of full-time court personnel to mediate? Alternatively, should the court hire only one or more administrators to manage the use and compensation of private mediators?
- Which approach makes it more likely that the court can attract and retain qualified, experienced mediators?
- Which approach will produce a greater diversity of mediators in terms of race, sex, age, and experiences?
- Which approach will maximize the parties' choice among mediators?

The Standards conclude that the use of public funds to pay private mediators requires the uniformity, consistency, and predictability that can come only from having fee schedules set by a public body. The recommendation that fees or schedules be set by the court, or an administrative arm of the court, is based on a desire for a more flexible alternative to the setting of fees by the legislature.

- 13.4**
- a. Where courts offer publicly funded mediation services, courts should permit parties to substitute a private mediator of their own choosing except in those circumstances under which the court has decided that party choice is inappropriate.**
 - b. Where parties elect to pay a private mediator, they should be permitted to agree with the mediator on the appropriate fee.**

COMMENTARY: This standard parallels Standard 7.0 on Selection of Mediators, which states that parties ordinarily should be given the widest possible latitude in selecting mediators, even beyond the mediators included on rosters of qualified mediators prepared by the court. The Standard on Selection also discusses the exceptional policy considerations that occasionally may override the general preference for party choice. The rationale behind these standards is to give the parties the widest possible latitude in selecting mediators, consistent with public policy.

Of the state statutes that establish the right of a private mediator to receive compensation, some, e.g., Haw. Rev. Stat. §672-3 (1985); Mont. Code Ann. §27-6-203 (1991), actually set the fee and specify who is responsible for payment. Other statutes delegate the task of setting and allocating fees to other bodies. Iowa Code Ann. §679.7 (West 1987) provides that the Training Coordination Council in the Department of Justice shall establish a sliding scale of fees to be charged based upon a party's ability to pay. Some statutes give the courts the explicit authority to order the parties in a particular dispute to bear the costs of engaging a mediator's services and to set a reasonable fee. E.g., Tex. Civ. Prac. & Rem. Code Ann. §154.054, (West Supp. 1992) (Compensation of Impartial Third Parties) ("The court may set a reasonable fee for the services of an impartial third party appointed..."). The Minnesota Supreme Court's Task Force on ADR recommends that "[t]he fee in all ADR processes . . . be set by the marketplace." Minn. Report, at IV A(1)-(3).

When parties use their own funds to pay a private mediator on a voluntary basis, there appears to be no reason to override their own negotiations, based on market rates. In those states that require parties to pay for private mediators, on the other hand, it is appropriate for the court to set a range of fees.

14.0 LIABILITY OF MEDIATORS

Courts should not develop rules for mediators to whom they refer cases that are designed to protect those mediators from liability. Legislatures and courts should provide the same indemnity or insurance for those mediators who volunteer their services or are employed by the court that they provide for non-judicial court employees.

COMMENTARY: Immunity from liability is one means of encouraging the participation of individuals as mediators, especially where the risk of suit is not outweighed by the level of compensation for the mediators' services. As the Arizona Commission on the Courts put it, there is a need to "promote the use of mediation as an alternative form of dispute resolution and to encourage the participation of persons as professional or volunteer mediators," since mediators are "serving the courts and acting in the place of judges." Commission on the Courts, *The Future of Arizona Courts* 42 (1991). At the same time, these interests must be balanced against the concern for protecting litigants who may be harmed by incompetent service. As the Arizona Commission recognized, "the social value of a grant of immunity [must be measured] against the lost opportunity for recovery of claims." *Id.*

Several states have addressed the issue of mediators' liability by statute. See, e.g., Cal. Civ. Proc. Code §1297.432; Haw. Rev. Stat. §§672-679; Ill. Rev. Stat. ch. 111, para. 4804(B); Iowa Code §§13.14, 654A.15, 679.13; Me. Rev. Stat. Ann. tit. 4, §18(2-A); Miss. Code Ann. §69-2-49 (expired); Mont. Code Ann. §80-13-213; N.J. Rev. Stat. §§2A:23A-9(c), 34:13A-16(h); N.D. Cent. Code §6-09.10-04.1; Va. Code Ann. §8.01-581.23; Wash. Rev. Code §7.75.100; Wis. Stat. §93.50(2)(c). Statutes typically provide limited immunity for certain mediators, or absolute immunity for acts within the scope of their duties.

Statutes that provide limited immunity commonly protect mediators from civil liability for negligent acts or omissions. For instance, Colorado provides that mediators hired by the state's Office of Dispute Resolution are immune from liability unless they act "in bad faith, with malicious purpose or in a manner exhibiting willful and wanton disregard of human rights, safety, or property." Colo. Rev. Stat. §13-22-305(6). See also Okla. Stat. Ann. tit. 12, §1805(E) (To be liable, a mediator or agent must exhibit "gross negligence with malicious purpose or in a manner exhibiting willful disregard. . ."); Wyo. Stat. §11-41-105(d) ("Mediators are immune from civil liability for any good faith act or omission within the scope of the performance . . . of their duties.")

Connecticut, under a general statutory provision of immunity, pays legal fees and costs for state employees acting within the scope of their employment, if the "act or omission is found not to have been wanton, reckless or malicious." All claims are reviewed by a panel before a mediator or expert appointed by the court is indemnified. Conn. Gen. Stat. §5.141d.

The Arizona Commission on the Courts recommended granting "qualified" immunity to mediators in court-annexed or government-sponsored programs. "Qualified immunity would apply to all acts or omissions of 'covered' mediators except those acts or omissions that could be characterized as exhibiting a reckless disregard of a substantial risk of significant injury to the rights of others, or intentional misconduct." Commission on the Courts, *supra* at 42. The Commission recommended certification and completion of an approved training program as a prerequisite to a grant of limited immunity.

Eight states provide absolute immunity from civil liability. Six states protect members of medical claim conciliation panels authorized to mediate malpractice claims, for acts within the scope of their duties. Haw. Rev. Stat. §671-17; La. Rev. Stat. Ann. §1299.47(H); Mont. Code Ann. §27-6-106; Neb. Rev. Stat. §44-2844(3); Nev. Rev. Stat. §630.364; Utah Code Ann. §78-14-15. Minnesota provides absolute immunity to farm-lender mediators for acts within the scope of their duties. Minn. Stat. Ann. §583.26(7)(a). A Florida statute, recently amended, gives court-appointed mediators full judicial immunity "in the same manner and to the same extent as a judge." Fla. Stat. Ann. §44.107.

Other jurisdictions have taken a different approach. The New Jersey Supreme Court Task Force on

Dispute Resolution, for example, considered mediators' liability in court-annexed programs but refrained from recommending immunity for mediators. N.J. Report, at 23-24. The Task Force concluded that it was premature to recommend immunity, given the likelihood that unforeseen circumstances might arise and given the risk of denying recovery for participants with valid claims of malpractice. However, because of the need to encourage the involvement of members of the public in providing dispute resolution services, the Task Force recommended that the state provide indemnification to any mediator found liable for malpractice, as well as underwrite the defense of any mediator sued as a result of participating in court-annexed programs.

The U.S. Justice Department has informed program administrators that it generally will defend court-connected volunteer mediators for the U.S. District Court and Court of Appeals for the District of Columbia if they are sued for malpractice. The District of Columbia Superior Court has purchased group insurance to cover all of its mediators, who are volunteers (although they may be paid modest stipends).

The Standards take the position that granting mediators immunity from liability inappropriately denies recourse to litigants injured by incompetent service, especially when litigants are required to pay for the service. Malpractice insurance is available in the private sector. It seems appropriate to expect mediators who are compensated for their services to purchase such insurance. In this context it should be noted that no court, to date, has upheld a finding of mediator liability.

Other methods than a grant of immunity are available to encourage the participation of volunteers and to protect court employees. Non-judicial court employees usually are protected from liability for negligent acts or omissions either through indemnification or insurance. The Standards recommend that whatever protections are in place for non-judicial court employees in any given jurisdiction be provided for mediators who serve as volunteers or are employed by the court and receive court referrals. This will allow courts to encourage the participation of individuals as mediators by those for whom the risk of suit otherwise would not be outweighed by the level of compensation for their services. At the same time, standards of liability for malpractice in mediation, as in any other profession, can continue to evolve and litigants who participate in court-connected mediation be protected from injury.

15.0 THE ENFORCEABILITY OF MEDIATED AGREEMENTS

15.1 Agreements that are reached through court-connected mediation should be enforceable to the same extent as agreements reached without a mediator.

Commentary: Basic contract principles dictate that an agreement among parties that contains all the elements of a contract should be enforceable when brought before a court. For matters already before the court, such an agreement may be presented to the court as a consent judgment, which is immediately enforceable through contempt or other post-judgment procedures. N. Rogers & C. McEwen, *Mediation: Law, Policy, Practice* 198 (1989).

Some states have codified these axioms. See Iowa Code Ann. §601A.15(9) (West 1988) (agreements reached in civil rights mediation must be issued as consent judgments which are enforceable by contempt); Ind. Code Ann. §22-9-1-6(n) (West 1991) (conciliated agreements in civil rights mediation are enforceable by a summary court procedure as consent judgments). More often, however, states require additional protections such as special language or court approval. See Colo. Rev. Stat. Ann. §13-22-308 (West Supp. 1991) (mediated agreements in court programs must be drafted as stipulations which are enforceable only after court review and approval); Mich. Comp. Laws. Ann. §552.513(2) (West 1988) (mediated agreements in domestic relations disputes must be drafted as a consent order and approved by court); N.D. Cent. Code §14-09.1-07 (1991) (domestic relations mediated settlements only binding after court approval); Cal. Bus. & Prof. Code §467.4 (West 1990) (mediated agreements under state-funded programs enforceable only if specified in writing); Mo. Sup. Ct. Rule 17.07 (mediated agreements enforceable only if not prohibited by law, the parties agree and settlement is adopted at conclusion of mediation); Minn. Stat. Ann. §572.35(1) (West 1988) (mediated agreements enforceable only if in writing stating that parties were given written notice that the mediator has no duty to protect their interests and that they should consult an attorney before signing if they are uncertain of the adverse effects that the agreement could have on their legal rights). These requirements are often based on the apprehension of legislatures that mediation is "second class justice" lacking in traditional court protections: These special protections are unnecessary in the context of court-connected mediation where other mechanisms safeguard the parties.

Firstly, contract law provides protection from various evils such as unconscionability, fraud, and mistake. Secondly, courts should institute monitoring and evaluation procedures to ensure that mediators are qualified and held accountable for their performance. See Standard 16.0 on Evaluation. Thirdly, legal advice should be available where it is needed. See Standard 11.0 on the Role of Lawyers in Mediation. Fourthly, courts can continue to utilize procedures traditionally applied in court-sponsored settlements. The only issue is whether an agreement reached through mediation (especially in cases where attorneys for the parties do not participate in the process) should be held to stricter or more lenient standards in order to be enforceable as a contract or judgment. If there is no reason to treat agreements that are mediated in court-connected programs any differently from other settlements, courts can follow whatever their usual practices are in connection with different types of agreements. Many courts, for example, review and modify agreements reached in class actions or in divorce actions involving children. In a few states, violating certain types of mediated agreements itself constitutes a violation of law. For instance, non-compliance with a settlement agreement in Minnesota environmental mediation is subject to a civil fine. Minn. Stat. Ann. §103F.421-5 (West Supp. 1991). Breaking a Georgia labor mediation agreement also constitutes a violation of the law. Ga. Code Ann. §45-19-32 (Michie 1990).

Although not required by the Standards, it is usually desirable to include in all agreements dispute resolution clauses that encourage or require the parties to return to mediation before they pursue other remedies for a claimed breach. Parties who do not wish to put their agreements in writing should be reminded that rules of the parties' agreement on confidentiality may preclude the mediator from testifying as a witness to the terms of an oral agreement. This limitation provides an additional reason to put settlements in writing.

The imposition of additional requirements on agreements reached through court-connected mediation is

not only unnecessary, it is potentially harmful. By requiring more of agreements reached through court-connected mediation than of other settlements, these requirements could create the very second-class status that some policy makers fear.

16.0 EVALUATION

16.1 Courts should ensure that the mediation programs to which they refer cases are monitored adequately on an ongoing basis, and evaluated on a periodic basis and that sufficient resources are earmarked for these purposes.

COMMENTARY: Program monitoring is usually an internal function and involves ongoing assessment of how the program is operating and whether policies and procedures are being implemented as intended. Evaluation is often conducted by an external entity and involves periodic assessment to determine, from a policy perspective, whether the program is meeting the goals articulated for its implementation relative to other actual or potential programming efforts. For example, monitoring might answer the question "Are parties settling cases early in mediation?", while evaluation might determine whether parties are settling cases earlier in mediation than in litigation.

While monitoring and evaluation are undertaken for different purposes, both are essential to permit courts to fulfill their responsibility for ensuring the quality of the programs to which they refer cases. (See Standard 2.0 on Courts' Responsibility for Mediation Programs.)

The process of evaluation can have a number of goals: (1) to determine whether a program should be continued or discontinued; (2) to garner public or funding support for a program; (3) to assist in adjusting and improving a program; (4) to meet the requirements of a granting agency; and (5) to advance general knowledge about dispute resolution. See C. McEwen, *Evaluating ADR Programs in Emerging Issues in State and Federal Courts* (F. Sander ed., 1991). The goal of the evaluation prescribed in these Standards should be to ensure that the courts' mediation programs are meeting the specific goals articulated for their implementation and that they are being operated at levels of consistently high quality.

In this regard, disputants' perceptions of the legitimacy and fairness of the process are among the important elements of evaluation. Also among them are outcome measures, such as the extent to which mediated agreements maximize the parties' joint gains and/or endure over time. See, e.g., J. Pearson and N. Thoennes, *Reflections on a Decade of Divorce Mediation Research, in The Mediation of Disputes: Empirical Studies in The Resolution of Conflicts* (K. Kressel and D. Pruitt eds., 1987). Exclusive focus on efficiency measures, such as time and numbers of settlements, can have deleterious effects, such as increasing inappropriate pressures to settle in mediation and creating inferior forms of justice.

Evaluation should not be understood to involve the collection and analysis of quantitative data only. Qualitative data gathered through observations or open-ended interviews, for example, may provide special insights about the character and quality of mediation services.

Courts also should keep in mind that program evaluation can range from rigorous collection and analysis of a comprehensive empirical data base that may or may not compare "experimental" and control groups, and include rich observations and accounts of what mediators do, to periodic review of data collected on a regular, ongoing basis in individual case files. The level of evaluation conducted will depend upon program goals and resources and on the type of program being evaluated. For example, the newer and more experimental the program, the more rigorous should be the evaluation.

Courts also have choices with respect to who conducts the evaluation. Evaluation can be conducted in-house, by an outside entity such as a research firm or university, or by some combination of the two. There are advantages and disadvantages to each option. Outside evaluation preserves both the appearance and reality of objective assessment, but it may be more costly and likely to be limited to one particular stage of the program's operation. In-house evaluation may be less costly and provide ongoing feedback about the nature and effects of the program. There is a danger, however, that it will be used -- whether consciously or unconsciously -- by program personnel to justify continuation of the program. Outside evaluators may be retained simply to consult or carry out a segment of an in-house effort. However, their timetables and agendas may differ from those of program

personnel. Courts should ensure that sufficient resources are earmarked for whichever option is selected.

Finally, courts should consider whether evaluation will be conducted on a program-by-program basis or coordinated throughout the jurisdiction. Program-by-program evaluation may be more costly, but it allows for program design variations to be taken into account when assessing the program's effects. At the same time, the effects of program design variations may make generalizations from research findings more difficult for system-wide program planners. It is for this reason that some states have recommended or implemented statewide evaluation programs:

The (New Jersey) Task Force envisions a statewide evaluation program working closely with the vicinages to provide direction where uniformity is required and technical assistance where it is needed. Prior to the implementation of new programs, the Statewide Committee on Dispute Resolution should determine categories of information to be required and should develop either uniform reporting forms or specific questions or data elements to be included in any such reporting forms. The Statewide Committee should, with the approval of the Supreme Court, seek appropriate resources to support such evaluation, including such options as monetary grants, establishing closer ties with local universities whose professors and graduate students may wish to participate in research efforts, and retaining paid consultants to help guide local and state evaluation efforts.

N.J. Report, at 37.

The degree to which coordinated assessment of court-connected mediation programs is needed may vary with the degree to which a jurisdiction is engaged in comprehensive statewide court-connected ADR program planning. As programs are initiated, however, consideration should be given to future system-wide data needs.

16.2 Programs should be required to collect sufficient, accurate information to permit adequate monitoring on an ongoing basis and evaluation on a periodic basis.

COMMENTARY: Monitoring and evaluation should be built into a program's routine functioning, with a carefully conceived information system which will provide accurate data on an ongoing basis. (See Standard 2.0 on Courts' Responsibility for Mediation Programs.) Policies relating to confidentiality should not be construed to prohibit or limit effective monitoring and evaluation. (See Standard 9.0 on Confidentiality.)

The type of data collected should capture the timing and outcomes of key events, such as the date of referral, whether a mediation session was held, the date of the mediation session, whether agreement was reached, whether the agreement was a partial or complete resolution of the case, and the types of issues that were resolved (or unresolved). The program's information system should be designed to permit the monitoring of cases as well as the evaluation of mediation both in the short-run (e.g., the rate of settlement, the number of days from referral to resolution for both successfully and unsuccessfully mediated cases) and in the long run (e.g., the rate of compliance, the rate of relitigation). Programs also should be reminded that there are various sources of data for evaluation, including data that can be collected from the parties themselves (e.g., users' satisfaction with mediation, whether satisfaction varies by gender, area of law, or expectations). This data can be gathered through periodic surveys of participants, including the parties and their attorneys.

16.3 Courts should ensure that program evaluation is widely distributed and linked to decision-making about the program's policies and procedures.

COMMENTARY: Program evaluations should play a formative role in program development. Courts

need to ensure that the programs to which they refer cases have "loopback" mechanisms in place which will translate research findings into program improvements. Empirical evidence regarding the program's operation and consequences should be used to identify deficiencies in the program's policies and procedures, to assess those deficiencies and to find ways to correct them.

As programs become institutionalized, resistance to change may become increasingly entrenched. As Craig McEwen has written:

Do not assume ... that routine monitoring through collection and reporting of data about cases or case flow constitutes managerial evaluation. Evaluation is a state of mind after all. That state of mind includes a disposition to assess the worth of practices in the light of evidence and to make changes in response to that assessment.

McEwen, *supra*. In a similar vein the Conference of State Court Administrators cautions:

Judicial planners should not become wedded to particular programs, structures or procedures, but rather should be willing to modify or to eliminate alternative programs if evaluation reveals the programs or procedures are not serving their defined purposes.

COSCA Report, at 3.

A continual process of evaluation, intervention on the basis of that evaluation, and re-evaluation needs to be implemented. In some jurisdictions, such as New Jersey and Florida, a statewide committee or the administrative office of the courts is designated to ensure that program change based on evaluation occurs. In others, responsibility may rest with the individual court.