Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana

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TABLE OF CONTENTS

I. Introduction .................................. 887
II. Definition of Mediation ...................... 888
III. A Brief History of Mediation ................ 889
IV. The Development of Competing Schools of Thought Regarding the Goals, Form, and Methodology of Mediation ........ 892
   A. The Proliferation of Litigation and the Efficiency Model .................. 893
   B. The Neighborhood Justice Movement and the Quality Process Model .......... 895
   C. Protection-of-Rights Model ...................... 896
   D. Mediation Methodologies ...................... 897
      1. The Basic Consensus Methodology—Mediation as Settlement Negotiation Facilitator .......... 897
      2. Variations in Mediator Activism .................. 899
         a. Rights-Based or Predictive Mediation ........... 899
         b. Interest-Based or Problem Solving Mediation .... 900
         c. Fairness Mediation ...................... 901
   E. Parallels Between Schools of Thought and Methodologies ................. 901
V. The Emerging Dominant Model of Mediation—A Blending of Forms and Methodologies ................ 903
VI. The Pros and Cons of Mediation ................ 906
   A. Benefits and Advantages of Mediation .................. 906
   B. Criticisms of and Resistance to Mediation ........ 909
      1. Criticisms ...................... 909
      2. Resistance ...................... 912
   C. Potential Contributions of Mediation to the Legal System ................. 914

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VII. Results of Empirical Studies ........................................ 917
   A. Efficiency of Mediation ........................................ 918
   B. Effectiveness of Mediation .................................... 919
   C. Efficacy of Mediation .......................................... 922
   D. Other Information About Mediation ......................... 923

VIII. The Creation of State-Wide, Court-Connected Mediation Programs .................................. 924

IX. Crucial Issues Posed by Institutionalization of the Mediation Process ................................ 927
   A. Purposes and Goals of the Mediation Program ............... 928
   B. Qualities and Qualifications of Mediators .................. 928
      1. Personal Characteristics .................................... 928
      2. Background and Experience .................................. 929
      3. Certification Standards and Training ....................... 930
   C. Ethics and Standards of Conduct .............................. 932
      1. Creating Standards for Mediators .......................... 933
      2. Attorney Ethical Standards and the Attorney-Mediator  .... 936
         3. Obligations of Attorneys to Advise Clients Regarding
            ADR ......................................................... 940
   D. Mediator Liability and Immunity .............................. 941
      1. Mediator Liability ............................................ 941
      2. Immunity ..................................................... 944
      3. Exculpatory Contractual Clauses ............................ 946
   E. "Mandatory" Versus "Voluntary" Mediation .................... 947
   F. Confidentiality and Privilege of Communications During Mediation .................................... 950
      1. Confidentiality Versus Privilege ............................ 951
      2. Mediation Communications as Settlement
         Negotiations ................................................. 952
      3. Creation of a Mediation Privilege? .......................... 953
      4. Private Confidentiality Agreements ......................... 955
      5. Contradictory Obligations of the Mediator: The Duty to
         Disclose ..................................................... 955
            a. Statutory Obligations .................................... 956
            b. Common Law Liability .................................... 956
            c. Conflict With Professional Responsibility ............. 958
      6. Confidentiality Statutes ....................................... 959
      7. The Need for Truth and Accuracy in Descriptions of
         Confidentiality ............................................... 964
   G. Coercion in Mediation .......................................... 965
   H. Selection of Cases Appropriate for Mediation ............... 967
   I. Good Faith Participation in Mediation ....................... 969
   J. The Timing of Mediation ....................................... 970
I. INTRODUCTION

Over the past several years, Louisiana lawyers have begun to encounter on an increasingly frequent basis the dispute resolution process known as mediation. Some out-of-state clients, especially insurance companies, insist that their cases be mediated. Attorneys are confronted by judges and magistrates who strongly suggest that the parties try to settle their differences by mediation. Offers of continuing legal education programs and publications abound, promising to enhance practitioners' skills as advocates in mediation or to train them as mediators. There is no doubt that mediation is a "hot topic."

However, the practitioner will search in the Louisiana Code of Civil Procedure, the Louisiana Revised Statutes, the Louisiana Rules of Professional Conduct and the Rules of the Louisiana Supreme Court in vain for any reference to the procedure in which he is increasingly expected to represent clients. Unless the attorney's case happens to be pending before one of two courts in the State, there are no statutes, rules, or authoritative standards to serve as a guide through the process, to inform the attorney—or the parties and the mediator—what the process expects of them, or what they should expect from the process.

Today, Louisiana stands at a cross-roads. In 1991 and 1992, policy-makers took what appeared to be a decisive step toward institutionalizing mediation in Louisiana by authorizing the creation of an experimental program in New Orleans. However, since then there seems to have developed a reticence to move forward with the task. Inertia and strategically placed resistance have contributed to a relatively low utilization of the experimental program and have helped to defeat legislative proposals to adopt a state-wide mediation program.

This article is intended to assist policy-makers, practitioners, mediators, and academicians to gain a greater understanding of mediation and its processes in historical, theoretical, and practical contexts. Although it is far from a nuts-and-bolts practical guide, we hope it also provides the uninitiated with some greater understanding of the basics of the actual mediation process.

In this article, we attempt to survey the current state of the art of mediation and to place the process in historical perspective. To do this, we define mediation, review its history, and trace the development of the various schools of thought which have influenced the forms and methodologies used in mediation.

1. A pilot mediation program has been adopted in Civil District Court for the Parish of Orleans and New Orleans First City Court. See infra text accompanying notes 738-792.
today. We then describe what we believe to be the dominant form of mediation that is emerging in modern practice.

Next, we review both the criticisms and the accolades bestowed by commentators upon mediation and survey the results of empirical studies of the process. A discussion of the trend toward adoption of state-wide court-annexed mediation programs is followed by an analysis of ten crucial issues that policy-makers generally consider when adopting state-wide programs or otherwise institutionalizing mediation. It is our hope that this information will be helpful to policy-makers in identifying, confronting, and resolving these issues. We also seek to inform mediators and other participants in mediation of pitfalls and dangers that will continue to surround mediation practice so long as mediation remains ad hoc with these crucial issues not being resolved through institutionalization.

Finally, we review the status of mediation in Louisiana, describe the state’s efforts toward institutionalization, and answer the question whether Louisiana should adopt a state-wide mediation program.

It is our conclusion that Louisiana should institutionalize mediation by adopting a state-wide mediation program. It is our opinion that mediation is a valuable process that should be encouraged and promoted. We believe that institutionalization is the best way to achieve that end. However, it is also our thesis that because mediation is being used and will likely continue to be used in Louisiana, institutionalization is a practical necessity, quite apart from any motive to promote the process, in order to provide sufficient structure and certainty to protect all of the participants in the process.

II. DEFINITION OF MEDIATION

The traditional form of dispute resolution employed in this country is the adversarial adjudicatory system. In recent years, however, use of alternative forms of dispute resolution, either in conjunction with or separate from the traditional adversarial court system, has expanded.

Mediation is but one of a variety of alternative dispute resolution ("ADR") procedures available. Mediation, in particular, "is becoming an increasingly popular alternative to formal adjudication," and has been winning praise from many quarters, including attorneys, parties to the process, and scholars "as a

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tremendous breakthrough in dispute resolution. Mediation programs have been adopted in certain federal and state district courts and increasingly in state courts on a state-wide basis. Almost daily, new applications are found for this dynamic, flexible tool.

Despite the recent expanded use of alternative dispute resolution methods, there remains much confusion regarding the distinctions among the various ADR methods. Apparently, this confusion stems from a lack of familiarity with the various ADR methods and a resulting tendency to lump them together. However, some forms of ADR are as different from one another as they are from the traditional adversarial process.

In the broadest sense, mediation can be defined as an alternative dispute resolution device in which a neutral third-party assists two or more disputing parties in reaching a mutually acceptable resolution of their dispute. It is important to distinguish mediation from arbitration. While both of these forms of ADR involve the use of neutral third-parties, the role of the neutral third-party in each of these devices is vastly different. Unlike the arbitrator, the mediator is not given the power to decide the outcome of the dispute or to force the parties to settle their dispute.

III. A BRIEF HISTORY OF MEDIATION

Although mediation has only recently begun to enjoy widespread use in this country, it has a long history as a dispute resolution method. It is "deeply rooted

7. See, e.g., Martha K. Gooding, NASD and IRS Implement Pilot Mediation Programs, 1 A.B.A. Sec. Litig. Conflict Mgmt. Newsl. 1 (Summer 1995) (on file with the Louisiana Law Review). The National Association of Securities Dealers and the Internal Revenue Service have both recently initiated pilot mediation programs to resolve disputes. Id.
9. Id.
10. Rosenberg, supra note 5, at 471; Gary D. Condra, Representing Agricultural Clients in Mediation, 73 Neb. L. Rev. 154 (1994) (noting that in recent years, as the use of mediation has expanded, many states have promulgated more specific legal definitions); Jessica Pearson, An Evaluation of Alternatives to Court Adjudication, 7 Just. Sys. J. 420, 421-22 (1982).
12. Roger J. Patterson, Dispute Resolution in a World of Alternatives, 37 Cath. U. L. Rev. 591, 594 (1988). This fact may account for the frequent confusion between these two forms of ADR.
13. Rosenberg, supra note 5, at 471.
14. Id.
in the history and tradition of many lands and cultures." Ironically, mediation actually predates litigation as a means of resolving disputes. The earliest known use of mediation was in ancient Sumerian society. In that culture, before a dispute could be presented to a judicial panel it must have been submitted to a "mashkim," whose role (like that of a present-day mediator) was to assist the disputants in attempting to reach a settlement of the dispute.

Mediation is, and traditionally has been, a dominant method of resolving disputes in Asian, European, African, and Native American cultures. In fact, in parts of the Orient, litigation is viewed as "a shameful last resort" used only when all else has failed.

Mediation also has roots in Western religious tradition. A procedure for dispute resolution is set forth in St. Matthew's gospel. That procedure provides for the parties to attempt to resolve their dispute first through conversation between themselves. If that failed, mediation was to be employed. Only in the event of the failure of mediation does the Biblical formula provide for presentation of the dispute to representatives of the community.

Mediation has a long history of selective use in the United States. In addition to Native American mediation, the process has been used by the Quaker denomination, as well as the Chinese and Jewish immigrant communities. There is also a tradition of using mediation to resolve labor disputes. Moreover, legal aid societies, police departments, small claims courts, and domestic relations courts made experimental use of mediation during the early 1900s.


17. Patterson, supra note 12, at 594 n.22.
18. Id.
19. Rosenberg, supra note 5, at 471 n.15.
20. Riskin, supra note 15, at 29. Scholars often note the connection between Confucian teachings and the dominance of mediation in oriental culture. Id.
22. Id.
24. Id.
25. Pearson, supra note 10, at 422 ("Progressive era conciliation tribunals, however, were soon declared failures and fell into disuse because few parties would agree to submit their disputes to voluntary conciliation." Id.).
The modern development of mediation in the United States has expanded into virtually all areas of civil litigation. That expansion can generally be seen as having progressed in three successive waves.\(^2\)

The first wave was in the 1960s and early 1970s with the development of community-based mediation for resolving minor criminal and civil matters.\(^2\) Community mediation programs and neighborhood justice centers were set up with a vision of substituting reconciliation for controversy and punishment.\(^2\) These programs generally served low income, unrepresented disputants.\(^2\)

The second wave of the modern development of mediation followed the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, popularly known as the Pound Revisited Conference.\(^3\) At the Pound Revisited Conference, Professor Frank A.E. Sanders of the Harvard Law School introduced the concept of the multi-door courthouse.\(^4\) This concept “envisioned the courthouse of the future” as offering options to traditional litigation, such as mediation and arbitration, for resolving disputes.\(^5\) During this phase of development, the use of mediation spread beyond minor matters to specialized areas such as divorce and child custody cases.\(^6\) This stage saw the emergence of mediation centers and private mediation programs.\(^7\)

The third wave of the modern development of mediation came during the late 1980s and has continued into the 1990s. During this period, mediation has been recognized “as a viable dispute resolution tool” for much more than just minor and specialized disputes.\(^8\) Mediation has expanded to encompass all types of cases,\(^9\) often in a court-annexed set-

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27. Id.
28. Id. See also Riskin, supra note 15, at 31.
31. Lieberman & Henry, supra note 3, at 427 n.17.
32. Honorable Gladys Kessler & Linda J. Finkelstein, The Evolution of a Multi-Door Courthouse, 37 Cath. U.L. Rev. 577 (1988). The District of Columbia became one of these multi-door sites in 1984. Id. at 578. The first dispute resolution program or “door” to open was Small Claims Mediation in April 1985. Id. at 580. That was followed by Domestic Relations Mediation in November 1985. Id. at 581.
34. Adler, supra note 26, at 1015.
35. Id. at 1016.
36. In 1986 the first bankruptcy mediation program was established. Lisa A. Lomax, Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Program, 68 Am. Bankr. L.J.
ting,\textsuperscript{37} with the parties represented by attorneys and attorneys serving as mediators.\textsuperscript{38}

The acceptance and expansion of alternative forms of dispute resolution, including mediation, are, at least in part, reflected in and attributable to recent legislative enactments. Many state legislatures have enacted legislation encouraging or mandating the use of ADR devices, including mediation.\textsuperscript{39} In 1990, Congress enacted two pieces of legislation dealing with ADR on a national level. The Administrative Dispute Resolution Act authorized and also encouraged the use of ADR devices by federal agencies.\textsuperscript{40} Congress also enacted the Judicial Improvements Act of 1990, an important component of which is the Civil Justice Reform Act ("CJRA").\textsuperscript{41} The CJRA provided for the selection of certain pilot districts within the federal judiciary\textsuperscript{42} and required these pilot districts to adopt, and the other federal district courts to consider adopting, ADR programs.\textsuperscript{43} On the executive level, President George Bush promulgated Executive Order 12,778 in October 1992, requiring government lawyers "to participate in ADR programs, if this activity will foster prompt, fair and efficient resolution of civil cases."\textsuperscript{44}

There are now hundreds of mediation programs in the United States.\textsuperscript{45} Court-annexed mediation has expanded and its use continues to increase.

IV. THE DEVELOPMENT OF COMPETING SCHOOLS OF THOUGHT REGARDING THE GOALS, FORM, AND METHODOLOGY OF MEDIATION

A number of forces and interests have joined to furnish the impetus for growth in the use of mediation. Some of these forces arise from exigencies in


\textsuperscript{37} Mediation can be either private or court-annexed. Anne C. Morgan, Note, \textit{Thwarting Judicial Power to Order Summary Jury Trials in Federal District Court: Strandell v. Jackson County}, 40 Case W. Res. 491, 493 (1990). Private mediation is consensual and is subject to individualization to meet the needs of the parties. \textit{Id.} Court-annexed mediation can be just as flexible but it is ordered by the court. \textit{Id.} at 494.

\textsuperscript{38} Irvine, \textit{supra} note 29, at 161.

\textsuperscript{39} See Moberly, \textit{supra} note 33, at 702-03. See also Underwood, \textit{supra} note 3, at 310-11. Court-annexed mediation has become pervasive in many states, including Texas and Florida.


\textsuperscript{41} Dayton, \textit{supra} note 6, at 947.

\textsuperscript{42} \textit{Id.} at 948.


\textsuperscript{45} Adler, \textit{supra} note 26, at 1016.
and dissatisfaction with the status quo adversary system. Increasingly, however, interest in mediation appears to be growing of its own momentum as the process gains acceptance as a valuable method of dispute resolution.

One's rationale for promoting mediation strongly influences his view of the form that the mediation process should take and the goals that mediation should seek to attain. An understanding of the historical development of the various movements championing ADR generally, and mediation in particular, is the first step in defining the competing schools of thought regarding these issues.

A. The Proliferation of Litigation and the Efficiency Model

One of the predominant factors influencing the increased use of mediation has been the "explosion" in litigation over the past twenty-five years. There have been tremendous increases in the number of lawsuits filed, in the length and complexity of pretrial proceedings, and in the length and complexity of the trials themselves. In the mid-1980s, Chief Justice Warren Berger noted with alarm that from 1971 to 1981 there was a 344% increase in the number of trials lasting more than thirty days. He warned that because of the trend in new filings and longer trials the crisis would worsen unless a solution was found. In 1987, Chief Justice William Rehnquist reported a continuing increase in the number of lawsuits and predicted that the situation would worsen.

In 1990, litigation cost the United States an estimated $16.5 billion, an increase of nearly 94% since 1971. Estimates regarding the total of direct and indirect costs from litigation each year range from $80 billion to $300 billion. A poll of America's leading corporate executives conducted in 1994 indicated that 83% of them felt that concern over potential litigation influenced their decisions to a greater degree than it did ten years before. Also, over 60% of the executives felt that the justice system significantly weakened the ability of United States companies to compete with Europe and Japan.

The deluge of litigation has been seen as resulting from society's increased litigiousness and the more frequent resort to the courts to resolve business

47. Id. at 967.
48. Id.
49. Id.
51. Id.
52. Id. The poll was conducted by Business Week Magazine.
53. Id.
Some suggest that a basic change in the way businesses conduct disputes with one another took place in the 1970s and 1980s, giving rise to "megalitigation" characterized by intense exploitation of the open-ended discovery afforded by the Federal Rules of Civil Procedure. The typical "scorched earth" litigation, allegedly undertaken largely for business reasons, led in most cases to out-of-court settlements, but only after extensive—and expensive—pre-trial proceedings.

In 1984, the Commission on Professionalism expressed serious concern over these perceived developments. The ABA Committee on Minor Disputes, which was born of the bar's earlier civil justice reform efforts initiated after the Pound Revisited Conference, emerged in 1987 as the Committee on Dispute Resolution. The main theme of the ABA annual meeting in 1989 was dispute resolution. In early 1993, a formal Section on Dispute Resolution was established by the ABA and nearly every local and state bar association has taken up the cause of ADR.

Even earlier, in 1979, a group of corporate counsel formed the Center for Public Resources ("CPR"), whose program centered around "a pledge to seek resolution of disputes short of litigation." Many major corporations rushed to embrace the CPR concept. During the 1980s and 1990s, corporations, with the power to shop for legal services, were able to advance the ADR agenda and to secure pledges from over 1,400 law firms in forty-seven states that the law firms "will be knowledgeable about ADR and offer [their] clients alternatives to traditional litigation."

The Reagan and Bush administrations also tapped into the criticisms of "megalitigation." As chair of the President's Council on Competitiveness, former Vice President Dan Quayle complained of the cost of discovery, legal fees, delays incident to trial, and appeals of contested cases, asserting that modern litigation—and especially discovery—was a principal cause for the loss of America's competitive edge and the continuing decline of the United States' legal culture.

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55. Bryant Garth, From Civil Litigation to Private Justice: Legal Practice at War With the Profession and Its Values, 59 Brook. L. Rev. 931, 939 (1993).

56. There is disagreement as to the cause of this change. However, Ronald Gilson suggests that businesses began engaging in "strategic litigation" designed primarily to gain economic advantage. Garth, supra note 55, at 939-40 (citing Ronald J. Gilson, The Devolution of the Legal Profession: A Demand Side Perspective, 49 Md. L. Rev. 869, 872 (1990)).

57. Garth, supra note 55, at 942.

58. Id. at 944.

59. Id.

60. Id. at 947.

61. Id.

62. Id. at 950.

63. Id.

64. Smith, supra note 50, at 95.

This and other criticisms led to the adoption of amendments to the Federal Rules of Civil Procedure, which became effective on December 1, 1993.66

Thus, the first group advocating the use of mediation is composed of judicial administrators, politicians, and businesses, who advocate ADR as a solution to congested dockets, gridlock in the judicial system, and the high costs and delays which typify late twentieth-century litigation in the United States.67 ADR adherents in this camp see mediation primarily as a tool for enhancing the efficiency of the dispute resolution system.68 This group considered mediation a more expeditious, less expensive, and procedurally simpler process than the adversary system.69

B. The Neighborhood Justice Movement and the Quality Process Model

A second dynamic contributing to the development of mediation as a form of dispute resolution predates the emergence of the efficiency model activists. This ideology, which differs vastly from the efficiency model, can be traced to the 1960s, when a variety of groups began urging that dispute resolution should more fully involve the disputants themselves.70 These champions of community empowerment viewed mediation as both a means of allowing individuals to make their own decisions and of enhancing access to justice.71 This movement resulted in the creation of neighborhood justice centers, primarily involved with resolving minor civil and criminal disputes using non-lawyer, largely volunteer mediators.72

The primary interest underpinning this current of the mediation movement is to encourage dispute resolution processes which are "less formal" and "more responsive to the unique needs of the participants and to human values."73 The legacy of the early neighborhood justice programs is expressed today by those proponents of mediation who see the primary value of mediation in the quality of the process if affords disputants.74 Although there are various opinions

66. A centerpiece of these amendments is the change in Rule 26 establishing disclosure obligations. Concern has been expressed that these amendments will result in greater discovery abuse and litigation costs. However, Erickson argues that the greater obligation to disclose information could have the beneficial effect of increasing the use of ADR. Erickson, supra note 65 at 303-04.
70. See supra text accompanying notes 27-28.
71. Menkel-Meadow, supra note 68, at 6.
72. Id.
73. Riskin, supra note 8, at 19.
74. Menkel-Meadow, supra note 68, at 6-8.
regarding what it is about the mediation process that renders it of high quality, two characteristics emerge as particularly important qualities for those who focus on the process as a good in and of itself.

The first is the consensual nature of mediation which "seeks self-determined resolutions." Proponents view mediation as placing the outcome of disputes "within the control and determination of the parties themselves," freeing them from reliance upon and subjection to "opinions and standards of outside 'higher authorities,' legal and otherwise." In theory, mediation prompts the parties to endeavor to find a resolution that they have the power to implement. Whether or not they reach agreement, the parties come to recognize their potential to solve their own problems independent of outside authority. This "capacity to encourage the parties to exercise autonomy, choice and self-determination" has been referred to as the "empowerment function" of mediation.

Mediation's "capacity to reorient the parties toward each other ... by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another" is the second important characteristic. This quality is seen as valuable not only because it facilitates settlement, but also because it encourages each party to acknowledge, and perhaps even to empathize to some degree with, the opposing party's situation. This potential has been referred to as mediation's "recognition function."

C. Protection-of-Rights Model

As mediation developed and was increasingly used as a dispute resolution method, a third conception of its purpose and utility emerged. Under this view, the role of mediation is to insure that neither party's rights are compromised during the settlement process. This protection-of-rights view holds that the principal value of the mediation process is that it assures that the disputants, as well as others having an interest in the outcome of the controversy, are protected by substantive and procedural safeguards in the mediation process that otherwise would not exist. Proponents of this approach emphasize the need to prevent settlements from compromising important rights. Persons or groups promoting

76. Id.
77. Id.
78. Id. at 267-68.
79. Id. at 268.
80. Id. at 269 (citing Lon Fuller, Mediation—Its Forms and Functions, 44 S. Cal. L. Rev. 305, 325 (1971)).
82. Id. at 270.
83. Id. at 260.
a particular substantive agenda, such as protection of the weaker party in divorce proceedings and environmental protection, often advocate this approach. Under the protection-of-rights view, a dispute resolution device should produce a "fair" or "just" result for the party or for society.

Given the diversity of orientation of the proponents of mediation, the absence of any consensus regarding the ends and goals of that process comes as no surprise. Indeed, "until now pluralism has reigned in mediation practice." While the three dominant conceptions of the purpose of mediation are not mutually exclusive, there are tensions among them and differences in the form of mediation process called for by each of them.

D. Mediation Methodologies

The literature regarding the nature, goals, and advantages of mediation discloses several competing conceptions of how the process is to be carried out. Each of these conceptions is closely related to one of the goals that mediation is thought to be designed to advance. However, there does appear to be some consensus regarding certain essential qualities and goals of the process based upon mediation's uncontested role as a form of settlement negotiation between the parties.

1. The Basic Consensus Methodology—Mediation as Settlement Negotiation Facilitator

It is well recognized that the vast majority of lawsuits filed in this country—90-95% of them—are settled rather than being litigated to conclusion. However, a large proportion of these settlements occur "on the courthouse steps." Research has indicated widespread dissatisfaction among trial attorneys with this phenomenon, and 85% of those surveyed expressed the

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87. Adler, supra note 26, at 1014.
89. Press, supra note 68, at 1035.
91. Press, supra note 68, at 1064 n.192 (citing Stephen Landsman et al., What to Do Until the Lawyer Comes 139-40 (1977)).
opinion that the negotiation process typically used during litigation "could be significantly improved." In that system, the compromise comes too late, is too expensive, and is too stressful. By the time of settlement, the vast majority of the costs, fees, emotional distress, and diversion of time have already been expended.

Many lawyers delay initiating discussion of compromise for fear that their actions will be viewed by their opponents as evidence of a lack of confidence in their position. Moreover, the adversarial culture often causes lawyers to acquire a false optimism regarding the strength of their cases and correspondingly inaccurate expectations regarding the likely outcome of the litigation. Adversarial dynamics seem to mandate that disputants and advocates representing them argue extreme positions which drive parties away from, rather than toward, agreement. In addition, discovery often results in additional strategic skirmishes that preoccupy the litigants and further alienate them from one another. Animosity between the parties arising out of the central dispute may also impede negotiations.

Mediation can assist in bringing the parties closer to settlement by overcoming these institutional roadblocks. At the most basic level, the mere occurrence of the mediation, particularly if initiated by someone other than one of the parties, eliminates the "first move" obstacle that often prevents settlement negotiations from getting started. If the lawyers or parties are having a difficult time speaking to one another, due to animosity or otherwise, the mediator, through performance of his most essential role as communications facilitator, can help overcome this inhibition to negotiations. Thus, the essential goal of the mediation process is simply getting the disputing parties to communicate meaningfully with each other—an endeavor they often resist.

The mediation process is often referred to as "supercharged negotiations." Mediation reduces the fragmentation that characterizes traditional settlement negotiations by offering an opportunity for intensive and focused exchanges of information and discussion, concentrated into a matter of hours

92. Edwards, supra note 90, at 670.
93. Smith, supra note 50, at C3.
94. Edwards, supra note 90, at 670.
95. Id.
96. Patterson, supra note 12, at 600.
98. Patterson, supra note 12, at 602.
99. Riskin, supra note 15, at 25-26; Rosenberg, supra note 5, at 471; Patterson, supra note 12, at 602.
100. Brown, supra note 4, at 309.
rather than weeks or months. Thus, even if the mediator does no more than bring the parties together and insure the exchange of information between them in an environment concentrated on settlement, an important promotion of the settlement dynamic has been accomplished. Regardless of one's conception of the goals of mediation or the role of the mediator, practically all would agree that mediation should at least accomplish this much.

2. Variations in Mediator Activism

Beyond this basic consensus model, enormous differences exist in the procedures employed and the roles adopted by mediators. The extent and aggressiveness with which the mediator intervenes runs along a continuum, whose application in any particular case will depend upon the situation and the philosophy of the mediator. Some mediators limit their function to that of a go-between who keeps the lines of communication open.\textsuperscript{103} These mediators may do no more than urge the parties to propose solutions. Others believe that participants do not want a mediator to be a "totally uninvolved observer," and that it is appropriate to give their own suggestions and to persuade the parties to accept them.\textsuperscript{104} In the most extreme case, mediators may "apply economic, social or moral pressure to achieve a 'voluntary' agreement."\textsuperscript{105} However, the vast weight of opinion holds that the mediator should not exercise coercive authority.\textsuperscript{106}

One factor which plays an important role in limiting the activism of the mediator—or at least in causing the mediator's activism to be carefully channeled and structured—is the need for apparent and actual neutrality. Neutrality is an essential quality of a mediator and is "crucial to effective mediation."\textsuperscript{107} All parties must have confidence in the mediator and in his neutrality.\textsuperscript{108} The greater the degree of mediator activism, the greater the risk that his neutrality will be compromised in the view of the parties.

Among those who feel that the mediator should take a more active role in the process, there is disagreement as to what activities the mediator should be pursuing. Three broad mediation methodologies exist based upon the direction of the mediator's activism—"rights-based" or "predictive" mediation, "interest-based" or "problem solving" mediation, and "fairness" mediation.

a. Rights-Based or Predictive Mediation

Weighing the legal merits of each party's case and offering their opinion regarding the likely outcome if the case goes to trial is one type of activism

\textsuperscript{103} Riskin, \textit{supra} note 15, at 25.
\textsuperscript{104} \textit{Id.} at 36; Moberly, \textit{supra} note 33, at 711-12.
\textsuperscript{105} Riskin, \textit{supra} note 15, at 36.
\textsuperscript{106} Rosenberg, \textit{supra} note 5, at 471.
\textsuperscript{107} Mebane, \textit{supra} note 102, at 1863.
\textsuperscript{108} \textit{Id.}
engaged in by some mediators. Such "reality testing" and "risk infusion" can serve to remind attorneys suffering from adversarial delusions of the true value of their cases and offer them an unbiased expert view of their chances if they continue in their pursuit of litigation. The mediator can also serve as a disinterested person affirming counsel's advice to the client that he is unlikely to prevail before the judge or jury.

When mediators forge settlements by advising the parties regarding the strength of their cases and their conception of the likely outcome at trial, they are engaging in predictive or rights-based mediation. This version of mediation consciously considers what is likely to happen if the case is litigated, and, therefore, necessarily considers the legal rights of the parties. Active pursuit of the predictive model tends to endanger mediator neutrality. However, a variety of techniques have been developed which enable a mediator to maintain his neutrality while engaging in some limited predictive risk injecting activity.

b. Interest-Based or Problem Solving Mediation

The second major mediation methodology or basis for mediation activism is "interest-based" or "problem-solving" mediation. In interest-based mediation, the mediator explores the needs, desires, and concerns of the parties, and assists them in pursuing an agreement which maximizes, to the extent possible, the interests of both parties. Unlike rights-based mediation, the central goal of interest-based or "problem-solving" mediation is to reach an agreement which "meets the needs and responds to the underlying interests of the parties . . . ."

Interest-based mediation consciously minimizes consideration of legal rights and the likely trial outcome. Each conflict is viewed as unlike any other and insusceptible to resolution by application of any universal rule.

Much of the philosophy underlying interest-based mediation is shared with the proponents of the "principled" negotiation ideas of the Harvard Negotiation Project. Negotiation, whether facilitated by mediation or conducted independently, is seen as an opportunity to develop a "win-win" solution to disputes. Unlike the standard adversarial "winner-take-all" orientation, this

109. Edwards, supra note 90, at 673.
111. See id. See also Note, supra note 90, at 1088 n.19.
112. Note, supra note 90, at 1088 n.19.
113. McEwen, supra note 110, at 79.
114. Riskin, supra note 15, at 34.
115. Roger Fisher & William Ury, Getting to Yes (1991). However, the Harvard approach also recognizes the importance of predictive methodology, as disclosed by the concept of Best Alternative to a Negotiated Agreement (BATNA). Id. at 99-100.
approach seeks to examine the parties’ underlying preferences and to achieve a solution that better satisfies the preferences of both parties than the usual adjudicatory outcome would. In economic terms, the goal of mediation is to assist the parties in achieving a joint gain.

Another characteristic that interest-based mediation shares with the principled negotiation philosophy is its use as an opportunity for brainstorming, or the uninhibited generation of ideas through free association. The mediator’s function is to assist the parties to experiment in generating the greatest number and diversity of solutions to their conflict as possible. The process is seen as the polar opposite of the linear thinking that characterizes operations within the traditional adversarial legal system.

Proponents of interest-based mediation argue that by focusing the parties away from their legal rights and offering more flexible remedies than a court can render, disputes can be resolved in ways that are better for both parties.

c. Fairness Mediation

The third form of mediator activism sometimes urged as a basis for the mediation process is “fairness.” Under this concept, the mediator is expected to forge an agreement between the parties that is substantively “fair,” or which otherwise furthers some policy interest of the mediator or society in general. The mediator is expected to take into consideration both subjective and objective fairness. In its most strident form, the substantive fairness model conceives of “an accountable, non-neutral mediator with power to impose his or her concerns on the parties.”

E. Parallels Between Schools of Thought and Methodologies

Although the congruence is not perfect, some identity exists between those who support each of the three goal orientations of mediation and the advocates of each of the three mediation methodologies or activistis. Those who look to mediation for its efficiency in saving the parties’ and the court’s money and time or to relieve congested dockets also tend to be those who advocate rights-based mediation styles. They generally are fully entrenched in the adversarial litigation system and do not see mediation as a radical departure from that system.

117. Mebane, supra note 102, at 1860-61.
119. Greenebaum, supra note 54, at 774.
120. Id.
121. Riskin, supra note 8, at 27.
124. McEwen, supra note 110, at 80.
This model simply seeks to improve the overall functioning of the adversary system by offering mediation as a complementary process.

Interest-based/quality process mediation, on the other hand, began and continues to be urged in its purest form by critics of the adversarial process. By proposing systems that seek to resolve disputes by negotiation centered on the parties' interests rather than their rights, these advocates challenge the very premises of the adversary legal system. Many of those who focus on the quality of the process and its ability to foster self-determination and recognition in the participants also tend to pursue the interest-based approach to mediation. Indeed, advocates often consider this approach of higher quality than the legal solutions offered by the adversary system.

Finally, there is an obvious connection between the protection-of-rights conception and the fairness mediation methodology, both of which call for injection of the mediator's judgments regarding the dispute and the appropriateness of any resolution. Proponents of both generally seek to further a substantive agenda quite apart from saving time and money or improving the quality of the dispute resolution process.

Purists from each of the above three broadly defined "camps" are critical of each other. They argue that mediation of a variety other than the one they espouse is destructive, and dangerous to the parties or to societal values. Interest-based/quality process proponents see rights-based efficiency mediation as a blunting and co-opting of the mediation process—which was originally conceived as a critical challenge to the status quo—by the very forces that mediation was intended to change. They see lawyers using mediation not to improve the quality of the dispute resolution process, but to further manipulate that process for the benefit of their clients and themselves.

Other interest-based/quality process purists suggest that efforts to use mediation to further the efficiency conception result in that process being "either useless or abusive." They suggest that if the mediator's primary motive is to reach agreements as expeditiously as possible, he is acting as a mere functionary with no ethical constraints. This creates perverse incentives, they argue, opening the door to manipulative and coercive mediator behavior, especially given the general absence of procedural and substantive rules applicable to mediation and the cloak from public scrutiny afforded by mediation confidentiality.

Interest-based mediation, on the other hand, is often criticized as being too unprincipled because of its reliance upon the vague concept of the parties' needs and wishes rather than the rule of law. There is concern that at times our nation's most basic values conflict with local, non-legal mores and that

125. Id. at 80-81.
126. Menkel-Meadow, supra note 68, at 3.
127. Id.
129. Id. at 264.
inappropriate solutions might be reached in individual cases. Some have also suggested that mediation conducted without reference to legal principles can leave the less powerful unprotected and compromise “important legal and political rights and principles.”

Finally, the fairness/protection-of-rights model has been criticized as undermining the basic characteristic of a mediator—neutrality. Mediators who promote substantive rights or fairness in compromises necessarily act in ways that erode the parties’ confidence in their impartiality.

Real, practical differences exist in the manner in which mediation is conducted, depending upon which of the three models is being followed. The role of the mediator, the standards applicable to his conduct, and a myriad of other variables are influenced by the basic determination of what goals mediation is supposed to accomplish and how those goals are to be pursued. However, while it is important to conceptualize the discrete, stylized sets of goals and methods underlying each of the pure theoretical models of mediation, it is even more crucial to recognize the actual practice of mediation today.

V. THE EMERGING DOMINANT MODEL OF MEDIATION—A BLENDING OF FORMS AND METHODOLOGIES

The mediation process remains a varied and flexible one that is constantly evolving. Indeed, to a great extent, it is applied differently in each case. The procedure followed in each mediation depends in large part on the particular style of the chosen mediator. It has been observed by one commentator that mediations “vary in as many ways as there are mediators.”

However, in recent years, as mediation has come to be used to resolve disputes in a broad range of mainstream civil litigation, an emerging form of the process bearing a fairly well defined set of procedures and techniques has gained considerable acceptance. Rather than being strictly rights-based/predictive/efficiency, interest-based/problem-solving/quality of process, or fairness/protection-of-rights in its orientation, this emerging mediation process is a hybrid of all three models. In this hybrid model, the mediator, depending upon his style and the particular circumstances of the case, blends the forms and methodologies of all three types of mediation and emphasizes the techniques of one or the other as he deems appropriate.

In what we call the emerging dominant model of mediation, the mediator searches for the common interests of the parties and seeks to brainstorm for creative alternatives to invent a settlement that will enhance the interests of the parties and will be agreeable to them. The mediator, then, assists the parties in

130. Edwards, supra note 90, at 676-78.
133. Id.
134. Mebane, supra note 102, at 1884.
devising a "win-win" solution. In the course of this process, the mediator also
seeks to foster in the parties a sense of empowerment, self-determination, and
mutual recognition. At the same time, however, the reality that continued
litigation is the alternative to a mediated resolution is not ignored. The law
continues to be germane during the mediation process. This is true not only
because the participants "must understand their legal rights in order to be fair to
themselves and to make the negotiated mediation agreement self-enforcing over
the long term," but also because in default of settlement there will be a
determination based on legal principles. When the interest-based regimen does
not yield a solution, in varying degrees depending upon mediator style and the
nature of the case, the emerging dominant form of mediation injects predictive,
rights-based elements into the process to encourage settlement. The emerging
dominant mediation seeks to complement, not to replace, formal adjudica-
thion.136

What follows is a very general description of the objectives, methodologies,
and techniques of this emerging dominant mediation procedure.137

The emerging dominant mediation procedure was primarily developed in
substantial civil cases, but offers a viable methodology for other types of cases
as well. The process begins with the selection of the mediator and initial contact
with the disputants and their attorneys.138 During this initial phase of the
mediation process, the mediator begins the crucial task of gaining the trust of the
parties in his neutrality and integrity.139 This objective continues into what
could be termed the "heart" of the mediation process, the mediation session
itself.140 Individuals with settlement authority are required to attend the
mediation session and participate in good faith.141

The mediation begins with the opening session, typically a joint session,
attended by the mediator, all parties, and their attorneys. It starts with an opening
statement by the mediator in which he usually explains to the participants the
procedure involved in the mediation session.142 During the opening statement,

136. See Lieberman & Henry, supra note 3, at 433 & n.39.
137. See Dayton, supra note 6, at 911 (describing use of such a procedure by Judge Patrick F.
Kelly of the District of Kansas).
138. In most cases the parties are represented by counsel and the initial contact is made through
counsel. Typically, the attorneys will submit pre-mediation memoranda containing a statement of
the facts and issues and any other information they believe would help the mediator understand the
case. Mebane, supra note 102, at 1883.
139. See Irvine, supra note 29, at 159.
140. Typically, the mediation session lasts no more than one day, even in relatively complex
cases, although the session can and often does go into the evening hours. Sandman, supra note 101,
at 26-27; but see Kessler & Finkelstein, supra note 32, at 589 ("The typical small claims case . . .
can be mediated in one to two hours, whereas the complex civil dispute typically takes over thirty
hours to mediate." Id.).
141. See Carl Tobias, Civil Justice Reform in the Fourth Circuit, 50 Wash. & Lee L. Rev. 89,
103 (1993).
142. See Condra, supra note 10, at 155.
the mediator will usually remind the parties that all communications are of a confidential nature, that he does not have the power to and will not impose or force a settlement of the dispute, and that he is completely impartial and neutral.143

In addition to his continued objective of gaining the trust and respect of all involved in the mediation, the mediator’s general objectives in this stage of the mediation session are to open the channels of communication, to allow for venting of emotion by the parties, to diffuse hostility where necessary, and to begin the process of identifying the issues.144 Thus, following the mediator’s opening statement, each party and his attorney is given an opportunity to present his view of the dispute.

At the conclusion of the opening session, each party and his attorney is assigned a separate room, and the mediator meets sequentially with each party in private meetings called caucuses.145 The objectives of the initial caucus include: continuing to build trust, allowing the parties to vent feelings and emotions,146 permitting the mediator to learn about the case, allowing the mediator to determine the underlying interests of the parties, and generating an offer.147 The mediation process is geared toward allowing the mediator to acquire information from each side that would never have been disclosed in the traditional adversarial process.148 The mediator accomplishes this by listening actively, asking open-ended questions, and listening more.149 Indeed, careful listening is a key strategy used by mediators to resolve disputes.150 With the insights the mediator gains in these private caucuses, he can begin to formulate options for resolution of the dispute.151

The same objectives flow over into the subsequent or “interim” caucuses. In addition, in the interim caucuses the mediator typically begins to insert reality into the process by encouraging the parties to analyze, from all angles, the risks they face if the case goes to trial.

One paradox of the mediator’s role is that he must “be neutral and impartial, yet at the same time, persuasive.”152 At a minimum, the mediator persuades

143. Moberly, supra note 33, at 708.
144. See Pearson, supra note 10, at 421-22.
145. The most common form of mediation format used today in commercial matters is “caucus mediation.” Sandman, supra note 101, at 26. The process of negotiating by means of these private meetings or caucuses is often referred to as shuttle diplomacy. See Condra, supra note 10, at 155. See also Sandman, supra note 101, at 26. The caucus style of mediation gives the parties an opportunity for candor. Mebane, supra note 102, at 1886-87.
146. See Patrick E. Longan, Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators, 73 Neb. L. Rev. 712, 722 (1994). Allowing the parties to express their feelings and positions concerning the dispute is an integral part of the mediation process.
147. See Condra, supra note 10, at 155-56. See also Patterson, supra note 12, at 594.
149. Irvine, supra note 29, at 159.
151. Lieberman & Henry, supra note 3, at 428.
152. Cooley, supra note 150, at 83.
the parties to come to a mutually acceptable resolution of their dispute. Typically, the mediator in the emerging dominant process seeks to persuade the parties both by suggesting the risks of not settling—based on predictions of how their rights would be adjudicated—and by promoting cooperative problem-solving rather than adversarial competition.153

In the emerging dominant mediation, there is a recognition that active persuasion undermines mediator neutrality; therefore, techniques are used to render the persuasive feature of the process imperceptible to the participants.154 The techniques used derive from the classic art of rhetoric, although most mediators who are trained to use this technique are probably unaware of its origin. Such techniques as the dialectic (or Socratic) method, which call for the mediator to ask carefully framed questions to the parties rather than making direct statements, “grant to the parties the facility to persuade themselves” and allow the mediator to maintain his appearance of neutrality.155

Mediators exercise techniques to create momentum in the negotiations, to break “log jams,” and to avoid impasses as the mediation proceeds. Should the parties reach a settlement of their dispute, the basic agreement is usually reduced to writing and executed by all parties and their attorneys.

VI. THE PROS AND CONS OF MEDIATION

Much has been written and spoken about the perceived strengths and weaknesses of mediation as a dispute resolution process. The majority of this commentary on both sides of the issue consists of expressions of opinion. As with all opinions, these tend to be colored by the perspectives, biases, experiences, and interests of the sources. Nonetheless, any meaningful appraisal of the desirability of institutionalizing a system of mediation must consider the views expressed by thoughtful and knowledgeable observers of the process.

A. Benefits and Advantages of Mediation

Many of the advantages urged by proponents of mediation have been foreshadowed in the above discussions of the goals and methodologies of the process.156 Mediation is touted as being less expensive, faster, and more efficient than adversary proceedings, thus offering the potential for both the court

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154. Cooley, supra note 150, at 83-84.
155. Id. at 84. In its most highly developed form, the “artistic” means of persuasion consist of methods derived from (1) the character of the mediator (ethos), (2) the emotion (pathos) evoked by the mediator and the parties, and (3) true or probable argument (logos). “The byproduct of classical rhetoric is persuasion.” Id. at 89-90.
156. See supra part IV.
system and private litigants to save money. Another proffered advantage of mediation is its capacity to improve the accessibility of the justice system to the public. Mediation hastens the disposition of other cases that require processing through the adversary system.

Mediation is viewed by many as "potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants." It informs litigants regarding the needs and interests of their opponents and of the community, and assists them in identifying mutually advantageous courses of action.

Considering that the vast majority of civil cases are resolved prior to trial, mediation is perhaps more accurately characterized as an alternative to the current settlement procedure rather than an alternative to our current system of adjudication. Mediation speeds the settlement process by getting the parties to the table, offering a less fragmented method of negotiation than the "impersonal and inconstant" telephone communications typically used, and facilitating frank discussions that help lead to closure.

Mediation intervenes and breaks the spiral of escalating hostilities that is often a byproduct of the adversary process. It bridges the communications gap that frequently exists between parties and their counsel, and provides an atmosphere for intensive, uninterrupted negotiations. Mediation can also encourage the parties to exchange information, help them to understand one another's views, and help them to realistically assess alternatives to litigation.

Mediation is often seen as an empowering device which increases the parties' self-determination and allows them to reach agreements that consider all of the facts and circumstances that are important to them. Parties to the dispute are more likely to be satisfied with mediated agreements than with court orders and thus are more likely to comply with the agreements.

Mediation serves as an opportunity to bring emotions into the settlement process. Because of the consensual nature of its outcome, mediation offers the parties an opportunity to devise a "win-win" resolution of their controversy.
with professional help.\textsuperscript{169} This approach is in contrast to the "winner-take-all scenario" which often characterizes litigation.\textsuperscript{170} Mediation allows the parties to exchange concessions on the issues that are most important to each of them.\textsuperscript{171} The mediation process reduces alienation of the litigants\textsuperscript{172} and permits them to view themselves as winners.\textsuperscript{173} As a result, mediation tends to be more accommodative and conducive to compromise; it improves relations among the participants, permitting continuation of long-term relationships that might be destroyed by the adversary process.\textsuperscript{174} It can reduce disputants' anxiety caused by the "conflict situation."\textsuperscript{175} From an economic perspective, it has been argued that mediation using the caucusing format can reduce inefficiencies from "adverse selection" and "moral hazard," and thereby increase the expected gains from the trade.\textsuperscript{176}

Advocates of the process also suggest that mediation allows the parties to transcend the narrow issues of their dispute and focus on the underlying circumstances that resulted in or contributed to that dispute.\textsuperscript{177} Mediation has been advocated as a method for providing an atmosphere which maximizes the chances for reaching an agreement.\textsuperscript{178} It provides a method for exchange of information and enables the parties to obtain special "expert information" which might facilitate settlement.\textsuperscript{179} The mediator also can function as a sounding board and counselor.\textsuperscript{180}

In a broader sense, mediation and other methods of alternative dispute resolution are advanced by their proponents as "refining and improving America's social, political and economic institutions—making them work better and for a greater number of people."\textsuperscript{181} Borrowing an idea from Buckminster Fuller, mediation and other forms of ADR have been likened to "institutional 'trim tabs,' small rudders that help big boats make needed, and sometimes urgent, mid-course corrections."\textsuperscript{182} They have the potential for increasing fairness, efficiency, and informed participation, and also of fostering wise outcomes and reducing injustice.\textsuperscript{183}

\textsuperscript{169} See Purnell, \textit{supra} note 11, at 1016.
\textsuperscript{170} Mebane, \textit{supra} note 102, at 1861.
\textsuperscript{171} Note, \textit{supra} note 90, at 1092.
\textsuperscript{172} Pearson, \textit{supra} note 10, at 422.
\textsuperscript{173} Note, \textit{supra} note 90, at 1092.
\textsuperscript{174} \textit{Id.} at 1091.
\textsuperscript{175} Purnell, \textit{supra} note 11, at 988.
\textsuperscript{177} Pearson, \textit{supra} note 10, at 422; Note, \textit{supra} note 90, at 1091.
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} Adler, \textit{supra} note 26, at 1027.
\textsuperscript{182} \textit{Id.} (citing Lucien Rhodes, \textit{Being Dead is Bad for Business}, INC., July 1984, at 79).
\textsuperscript{183} Adler, \textit{supra} note 26, at 1027.
It has been argued that the combination of mediation and the adversary process promotes "a more sophisticated conception of social interactions that emphasizes the importance of cooperation and consensus, as well as confrontation." 184

B. Criticisms of and Resistance to Mediation

As discussed above, 185 there have been and continue to be criticisms leveled by proponents of the various schools of thought within the ADR community at particular forms of the mediation process. In addition, and in some instances in tandem with these criticisms, various objections have been raised to mediation generally, or to certain types of mediation, by voices in the legal practice, academic, and political realms. 186 At times, hostility and resistance to the mediation process are more subtle, and perhaps even unarticulated. This section explores some of these criticisms as well as the resistance and its causes.

1. Criticisms

Some critics have argued that there is a danger that mediation will result in unfair settlements when there is an imbalance between the parties in terms of their skill or power, or in the information they possess. 187 In pure interest-based mediation, one concern is that parties who are unaware of their legal position might be dominated by their more powerful adversaries. 188 Great disparities in bargaining power can result in coercion and an unjust settlement for the weaker party. 189 Participation in mediation can be a burden to parties with limited resources, 190 and some argue that litigation has the effect of equalizing bargaining power. 191

The danger that an unrepresented party, who is unknowledgeable about his legal rights and in a weak bargaining position, may be taken advantage of by a more powerful opponent. This danger is certainly one which must be guarded against in mediation. However, this situation should seldom arise in mediations conducted under the emerging dominant model because both parties are represented by attorneys who can inform them of and protect their legal rights. 192 There is also reason to question the legitimacy of the argument that mediation is more threatening to weaker parties than litigation. Considering the costs of the litigation process, a powerful and knowledgeable party has an

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184. Note, supra note 90, at 1095.
185. See supra text accompanying notes 126-133.
186. See infra text accompanying notes 216-236.
187. Riskin, supra note 8, at 27.
188. Riskin, supra note 15, at 34-35.
189. Note, supra note 90, at 1100.
190. See Tobias, supra note 141, at 103.
191. McThenia & Shaffer, supra note 21, at 1664.
192. It may be appropriate to adopt special safeguards to protect parties' interests when they are not represented by counsel.
enormous advantage over his weaker opponent. Indeed, the most important motivation for a weaker party to agree to an “unfair” settlement, whether in mediation or outside of it, is the daunting prospect of having to engage in expensive litigation against a financially resourceful opponent. Mediation at least offers the possibility that the involvement of a skilled neutral party will serve to mitigate somewhat the disparity in strength between adversaries in the negotiation process.\footnote{193}

In answer to the arguments of mediation proponents that the process promises low cost and efficiency, some observers note that these attributes are not inherently fair. They warn of the sacrificing thoroughness and decision-making accuracy for an excessive concern for efficiency.\footnote{194}

Another objection raised to mediation is that it unfairly coerces parties to settle rather than to adjudicate.\footnote{195} For example, some mediators prohibit the parties from leaving the session until the mediator declares that the session is over.\footnote{196} Some feel that holding of the parties hostage in this manner inappropriately burdens their wills.

Once again, these are legitimate criticisms that must be guarded against, but they do not seem to be fundamental objections to mediation as a process. Indeed, the coercion that can be brought to bear by a mediator, whose role in the parties’ dispute is limited to the mediation process, is infinitesimal compared to that inherent when a judge or a magistrate conducts a settlement conference in a case over which he is presiding.\footnote{197}

Some complain that the mediation process is unsuitable for resolving certain types of disputes because the results of mediation are excluded from public scrutiny, thus the public might be robbed of vital information.\footnote{198} A related argument suggests that because mediation establishes no precedents, its widespread use could undermine the operation of \textit{stare decisis} by reducing the volume of cases which give guidance for future conduct.\footnote{199} Some mediation proponents point out, however, that this argument runs counter to the more dominant concern that large caseloads prevent judges from spending the adequate time to consider the cases requiring “serious deliberation and opinion writing.”\footnote{200}

There seems to be little disagreement, even among the strongest proponents of mediation, that cases involving important or difficult issues of constitutional or public law should not be subject to mediation or other forms of private

\begin{thebibliography}{99}
\bibitem{193} Mebane, \textit{supra} note 102, at 1888-89.
\bibitem{194} Lynn A. Kerbeshian, \textit{ADR: To Be Or . . . ?}, 70 N.D. L. Rev. 381, 400 (1994).
\bibitem{195} Mebane, \textit{supra} note 102, at 1888.
\bibitem{197} \textit{Cf.} Note, \textit{supra} note 90, at 1094-95.
\bibitem{198} Mebane, \textit{supra} note 102, at 1887-88.
\bibitem{199} Note, \textit{supra} note 90, at 1103-04 n.124.
\bibitem{200} Menkel-Meadow, \textit{supra} note 86, at 488 n.18.
\end{thebibliography}
resolution. Certain cases, including those in which the plaintiff seeks a declaration of law by the court, simply do not lend themselves to resolution other than by the judiciary.

Some commentators have expressed concern that mediation, particularly if it is a required step in the adjudication process, improperly burdens the parties' ability to obtain a judicial determination of their dispute. Courts generally dismiss constitutional challenges to mandatory mediation which are based upon a denial of the right of access to courts or the right to a jury trial because mediation only delays and does not deny the parties the right to litigate in court. It is difficult, however, to ignore the fact that mandatory mediation does impose some burden on a party's right to litigate. The appropriate analysis is whether, as a matter of public policy, the burden of being required to participate in mediation justifies the benefits derived from such a program.

Additional complaints about mediation include the concerns that it adds to the cost of litigation if the case does not settle, that it threatens litigation strategy because parties are required to disclose positions that they otherwise could conceal until a time closer to trial, and that bad deals come about when one of the parties is particularly "averse to conflict or a poor negotiator." Some critics have expressed the opinion that mediation is incompatible with a civil jury resolution process based upon the premise that there is always a single appropriate outcome to every dispute. Because mediation always leads to compromise or middle ground, it conflicts with the notion that one party to a dispute could be clearly right or absolutely wrong. Moreover, the concern has been expressed that mandatory court-annexed ADR will encourage litigants to inflate initial settlement demands when they come to realize that the "middle ground" is always the goal of ADR.

Finally, various criticisms have been directed, not so much toward mediation, but toward those who seek to use the mediation process for their own purposes. First, there are those perceived to inappropriately market themselves as mediators for personal gain and profit. In many jurisdictions, there are no
controls on mediators or methods for licensing and regulating their practice.\textsuperscript{210} It has also been suggested that some promoters of ADR support it as a way to limit the courts' involvement "in areas affecting minority interests, civil rights, and civil liberties."\textsuperscript{211} Echoing the views of the interest-based/quality process mediation advocates, the view also has been expressed that many who support mediation because it is efficient and inexpensive are unconcerned about the substantive results of the process.\textsuperscript{212} Additionally, critics have suggested that lawyers manipulate the process to obtain "cheap discovery."\textsuperscript{213} However, it has also been pointed out that the costs of engaging in such abuses—long-term damage to these attorneys' credibility and effectiveness—would usually outweigh any short-term gains from such practices.\textsuperscript{214}

2. Resistance

In addition to the explicit criticisms, resistance by attorneys and members of the public, who see court adjudication and the adversary system as the only appropriate method for dispute resolution in our culture create a second obstacle to the spread of mediation. Subtly blended with this deeply entrenched animus against mediation is a concern that this alternative process constitutes a threat to the lawyer's livelihood, to a successful outcome of a particular dispute, or to both. Although this attitude is by no means universal and while it has waned considerably in recent years, this type of resistance to mediation is still significant in certain parts of the legal community.

Studies indicate that lawyers strongly influence the willingness of their clients to participate in mediation. Low participation in certain mediation programs has been tied to negative attitudes in the legal community. On the other hand, a principal motivation for parties to choose to mediate disputes is their attorneys' recommendation to do so.\textsuperscript{215}

One basic problem is that many members of the bar do not truly understand mediation or the mediation process.\textsuperscript{216} Many lawyers fail to realize that mediation is different from arbitration, particularly in its consensual nature.\textsuperscript{217}

Additionally, some commentators believe that mediation is based upon assumptions which are fundamentally different from those underlying the way most lawyers have been taught to look at the world. Leonard Riskin has

\begin{itemize}
  \item \textsuperscript{210} Garth, supra note 55, at 949-59; Rosenberg, supra note 5, at 467.
  \item \textsuperscript{211} Edwards, supra note 90, at 668-69.
  \item \textsuperscript{212} Id. at 669.
  \item \textsuperscript{213} Lomax, supra note 36, at 81.
  \item \textsuperscript{214} Id.
  \item \textsuperscript{215} Rosenberg, supra note 5, at 504; Pearson, supra note 10, at 428; Kerbeshian, supra note 194, at 398.
  \item \textsuperscript{216} Karen A. Zerhusen, Reflections on the Role of the Neutral Lawyer: The Lawyer as Mediator, 81 Ky. L.J. 1165, 1166 (1993).
  \item \textsuperscript{217} Mebane, supra note 102, at 1889.
\end{itemize}
hypothesized that the "philosophical map" employed by the majority of practicing attorneys and law professors varies dramatically from that used by mediators. He identified as the two essential assumptions underlying the attorney's handling of cases: "(1) that disputants are adversaries—i.e., if one wins, the others must lose—and (2) that disputes may be resolved through application, by a third party, of some general rule of law." He posited, as the exact opposite of the lawyer's assumptions, the premises underlying the mediator's activities: (1) two adversaries can reach agreement that furthers the interests of both of them; and (2) that each conflict is different from all others and therefore should not be resolved in accordance with any universal rule unless the parties decide it will be. Riskin suggested that the lawyers' two assumptions, together with the "real demands of the adversary system and the expectations of many clients" result in lawyers' lack of interest in and distrust of mediation. These assumptions also prevent lawyers from recognizing certain types of information which mediators consider, such as the parties' emotional needs and their desire for mutual respect, security, and other non-material concerns.

The "adversarial mind-set" of some lawyers causes an obsession with winning. When lawyers "think like lawyers," in Riskin's view, they tend to categorize people and events in ways that are legally meaningful but insensitive to human values. The legal system also causes attorneys to try to translate emotional and other intangible interests into pecuniary values, or simply to ignore them. An attorney representing a party in mediation must abandon his usual role as a gladiator and become a negotiator, assisting the mediator in the ultimate goal of reaching settlement. Often this is not an easy or comfortable transition.

Other observers offer additional reasons why members of the legal community have a tendency to avoid suggesting mediation to their clients. One is the lawyer's perception that the client expects him to assert the client's position without compromise. Another inhibitor to the lawyer suggesting mediation is his desire to achieve a result that meets the client's articulated goals, even when that result is inconsistent with the client's true interests.

Some lawyers fear that the opposing party's suggestion of mediation is nothing more than a strategy to gain advantage rather than a genuine effort to

218. Riskin, supra note 15, at 43.
219. Id. at 44.
220. Id.
221. Id.
222. Id.
225. Id. at 45.
226. Condra, supra note 10, at 159.
227. Zerhusen, supra note 216, at 1167.
228. Id.
Some resistance by lawyers may simply stem from inertia. The vast majority of attorneys have neither been educated about nor trained in mediation skills and they simply may not want to try something that is unfamiliar to them. Lawyers may also fear that they will lose control of the process if a mediator gets involved.

Finally, some lawyers see mediation as an economic threat. Some lawyers who collect their fees on a contingency basis are concerned that mediation will reduce the dollar amount recovered by the plaintiff. If the parties substitute non-material considerations for money in settling their dispute, or if mediation tends to result in a more moderate recovery than a windfall jury award would afford, the contingent-fee attorney may receive correspondingly less for his services. Likewise, the attorney paid on an hourly basis may earn less if mediation results in an earlier settlement of the case, and he may earn less in the future if his client and the client's adversary learn through the mediation process to manage their relationship so as to avoid more litigation.

C. Potential Contributions of Mediation to the Legal System

While it is unrealistic to minimize the tensions between the practice and premises of mediation and those of adversary adjudication, the emerging dominant model of mediation offers a practical accommodation between the two. Lawyers should not fear mediation either as a threat to the adversarial philosophy or to their economic well-being. The reality is that lawyers and the legal system are going to dominate the methods used to resolve disputes in American society. Lawyers should feel entirely comfortable with the rights-based/predictive aspect of the process, and, as they become more familiar with interest-based problem solving by participating in mediation, this too will become second-nature and recognized as a useful tool to resolve conflict.

With respect to the economic issue, there is no reason to expect significantly different outcomes in mediated settlements than in ordinary settlements. Since cases almost always settle, contingent recoveries should almost always be the same with or without mediation. To the extent that the use of mediation results in settlements in cases which otherwise would have gone to trial, any reduction in windfall plaintiffs' verdicts should be offset by a similar diminution of zero verdicts

229. Id.
231. Riskin, supra note 15, at 49.
232. Sandman, supra note 101, at 27.
234. Id. at 49.
235. Id.
236. Id.
238. McEwen, supra note 110, at 82.
in favor of defendants. Furthermore, if an attorney paid on an hourly fee basis earns less on a particular case because mediation results in an earlier settlement, the increased satisfaction experienced by the client as a result of achieving a satisfactory settlement at a lower cost may lead to the client’s repeated patronage of the attorney’s services and his referral of other clients to the attorney. Moreover, attorneys stand to benefit more generally from improvements in the dispute resolution system that may be wrought by greater use of mediation, especially if lawyers are seen as promoting rather than impeding the adoption of the process.

The demand by clients for mediation is increasing, and likely will continue to increase. Mediation is an innovation in the field—a better technology. In a free market system, it is impossible to successfully hold on to an outdated technology by refusing to accept more efficient innovations. If lawyers refuse to relinquish adherence to a process that works inefficiently, the profession will ultimately suffer.

There is evidence that attorneys are increasingly accepting mediation, and, in some localities, they seem to have embraced the concept wholeheartedly. Large numbers of attorneys in those jurisdictions which have adopted mandatory or semi-mandatory mediation have become “ardent mediation converts.” By some accounts, once attorneys have tried mediation, they have found that it increases their resolution success rate, increases client satisfaction, and helps attorneys exercise greater control over their practice by improving their time management and efficiency. Several studies have shown that attorneys, as well as clients who have used mediation, are becoming committed repeat users.

Florida attorneys, who initially were negative about mediation under their state’s mandatory program, have revised their opinion of the process. Counsel on both the plaintiff and defense side see a benefit in mediation’s ability to educate their clients, thus validating or reinforcing the attorney’s advice and placing attorneys in a stronger position.

Some of the Florida attorneys surveyed about their state’s mandatory mediation program expressed reservations, suggesting that at times participants simply “go through the motions” rather than engaging in a good faith effort to negotiate. However, most attorneys interviewed stated that they believed

239. Indeed, empirical research supports this conclusion. See infra note 330 and accompanying text.
240. Riskin, supra note 15, at 57.
244. Id. at 6.
245. Id.
246. Alfini, supra note 196, at 62.
247. Id.
248. Id. at 62-63.
that this was a problem associated with the early days of the program, when there was less familiarity with the process and when attorneys often were unprepared for the mediation session.  

The interest-based enthusiasts, though they object to the co-option of the mediation process by the legal system, should be heartened by the indoctrination taking place within the legal community. Increasingly, lawyers participate in mediations and pursue training both in mediation advocacy and in mediator techniques. Practicing attorneys are gaining exposure to the principles and ideals of the traditional mediation culture, as shown by the fact that the emerging dominant mediation model—which is largely controlled by lawyers—has not discarded empowerment, interest searching, problem-solving, and the other basic elements of traditional mediation for a purely rights-based/predictive model. If these procedures are in fact superior, they will gradually take root over time. Then, the "non-legal," human-oriented values that are the essence of the quality process mediation will become as integral a part of the "philosophical map" employed by practicing attorneys as the adversarial assumptions are.

It is doubtful that mediation will become the dominant method of processing disputes in the United States. However, an increased use of this method may help satisfy the yearning by many in our society for a greater degree of the "natural harmony . . . in human affairs." Problem-solving and rights-oriented approaches can co-exist and offer a rich blend of the competitive and the conciliatory. The problem-solving methodology promotes "trust, respect, love and caring," as well as fostering relationships, while the rights-based approach stresses "protection, separation and material values." The melding of the two approaches can be accomplished by lawyers, by increased participation in mediation, and by changes in their mode of practicing law. What may result is a more complex professional role for lawyers and a broadening and deepening of the levels on which they operate. Lawyers have the potential to become dispute resolution specialists rather than merely litigators. If this promise is fulfilled, there could be great advantages to society, the legal system, and lawyers themselves.

249. Id.
250. Cohen, supra note 15, at 1206-07; Riskin, supra note 15, at 29-30. In the Confucian view, a lawsuit symbolizes destruction of the natural harmony that was thought to exist in human affairs. Id. This contrasts sharply with the perspectives of Western culture which emphasize freedom, autonomy, and individual liberty as the greatest values. Cf. William May, Adversarialism in America, Center Magazine, Jan.-Feb. 1981, at 47-48.
251. Riskin, supra note 8, at 27.
252. Id.
253. Id.
254. McEwen, supra note 110, at 87-88.
255. The President of the ABA recently urged lawyers to "embrace [their] role as peacemakers as vigorously as [they] embrace [their] role as advocates" and to pursue alternatives to the adversary system like mediation. Roberta Cooper Ramo, Lawyers as Peacemakers, 81 A.B.A. J., Dec. 1995, at 6.
Mediation education has the potential to help lawyers and law schools to "fulfill the strong impulses . . . to make law more responsive to the needs of individuals and society."\(^{256}\) It could also enhance lawyers' awareness of the full spectrum of their clients' needs and interests, and expand their ability to understand, intellectually and emotionally, both sides of a case and to comprehend the interests and needs of opposing parties so as to pursue the resolution of controversies in a manner that maximizes the benefits to everyone.\(^{257}\) Lawyers who mediate might become more sensitive to the "interconnectedness of human beings" which the process fosters and perhaps be less prone to the adversary excesses which have done so much to tarnish society's view of lawyers and the entire adjudicatory system.\(^{258}\) Participation in the mediation process may also enhance the ability of attorneys to fully comprehend their clients' interests and to be responsive to those interests in negotiating with opposing counsel.\(^{259}\) In the opinion of one noted commentator, this expanded awareness "could be the greatest contribution of mediation to contemporary America."\(^{260}\)

VII. RESULTS OF EMPIRICAL STUDIES

Until the 1980s, there was very little empirical data to support or refute the myriad of opinions expressed regarding the advantages and disadvantages of mediation.\(^{261}\) However, since that time, the number of reliable studies accompanying mediation experiments have greatly increased.\(^{262}\) While sophisticated empirical evaluation of mediation programs is still in its infancy, significant advances have been made in this area. Evaluation programs established in recent years as research components of newly-adopted mediation programs offer great hope for increased information. These programs can be used to evaluate mediation and optimize its functioning.\(^{263}\) However, many observers feel that current limitations in methodology and research design make it difficult to properly assess the success of the process.\(^{264}\)

The most obvious subject of empirical research into the mediation process is an examination of how well it works. A common approach to investigating this subject identifies three criteria used to define quality in mediation: efficiency, effectiveness, and efficacy.\(^{265}\) While each of these concepts is subject to differing definitions, efficiency is usually equated with cost savings to

\(^{256}\) Riskin, supra note 15, at 58.
\(^{257}\) Id.
\(^{258}\) Id.
\(^{259}\) Riskin, supra note 8, at 27.
\(^{260}\) Id.
\(^{261}\) Pearson, supra note 10, at 424.
\(^{262}\) Id.
\(^{263}\) See supra part VIII.
\(^{264}\) Kerbeshian, supra note 194, at 399-400.
courts and/or disputants. Effectiveness is usually measured (1) from the disputants' perspective, by the degree of user satisfaction and compliance with the agreement produced by the mediation, and (2) from the judicial standpoint, by the settlement rate and speed of case processing. There is less consensus regarding the criteria which should be considered to measure efficacy, but as a general matter, this criteria relates to the fairness of the process.

A. Efficiency of Mediation

There does not appear to be a great deal of consensus regarding how efficient mediation is. Differences in findings depend in part upon whether the study considers cost savings to participants or to the courts and the type of mediation program involved.

One study concluded that while initially there were neither substantial nor consistent cost savings to parties in divorce mediation, there was less relitigation and ultimately lower costs over time. Other studies have found mediation to be less costly than adjudication in neighborhood justice centers and in divorce cases.

On the other hand, at least two studies of the neighborhood justice movement have found that mediation is not an efficient process. In a study of the Denver Custody Mediation Project, it was found that costs incurred by those who participated in unsuccessful mediation were greater than those incurred by parties who did not participate in mediation at all.

More recent studies of new court-sponsored mandatory and semi-mandatory mediation programs in courts of general jurisdiction tend to demonstrate a greater degree of savings to litigants. A legislatively funded study of Florida's court-sponsored mediation program found that mediation was faster and less expensive than adjudication. Although not based upon scientific methodology, estimates given in testimony before the California Senate Judiciary Committee in May of

266. Id.
267. Id. at 7-8.
268. Id.
269. Id. at 6 n.14.
274. Moberly, supra note 33, at 703 (citing Karl D. Schultz, Florida Dispute Resolution Ctr., Florida's Alternative Dispute Resolution Demonstration Project: An Empirical Assessment viii (1990)).
1995 by the Association of Attorney-Mediators, a Texas-based organization founded in the 1980s, indicate that the 54,000 mediations its members had conducted had resulted in direct savings to litigants, in attorney's fees and expenses, in excess of $800 million.\textsuperscript{275}

In assessing public cost savings as opposed to savings to litigants, it is questionable whether there is sufficient data to conclude that court-sponsored mediation results in overall savings of judicial resources.\textsuperscript{276} Some evidence exists that the volume of cases processed by a mediation program strongly affects costs. Per-case costs in voluntary mediation programs are often greater than standard court handling largely because of the low volume of mediation. "Mandatory mediation . . . programs, on the other hand, appear to be decidedly cost effective" and helpful to the courts because they satisfactorily handle a much larger volume of cases.\textsuperscript{277}

Attorneys participating in the first year of the court-annexed program in Cincinnati estimated an average savings of forty hours per case of attorney time when their clients participated in a successful mediation.\textsuperscript{278} While this indicated real cost savings for successful disputants, it is unclear whether the program resulted in net gains: it is conceivable that the savings enjoyed by those who reach a mediated settlement are largely offset by increased costs incurred by those who fail to do so.\textsuperscript{279} In a District of Columbia mediation study, researchers concluded that a mediation program did not save a significant amount of judicial resources by encouraging settlements.\textsuperscript{280}

\textbf{B. Effectiveness of Mediation}

While the cost savings efficiency attributable to mediation appears to depend largely upon the type of program, there is general agreement that empirical studies affirm mediation's effectiveness.\textsuperscript{281} Studies have found a 58% settlement rate in divorce cases,\textsuperscript{282} a 66.1% settlement rate in small claims mediation,\textsuperscript{283} settlement rates ranging from 60-90% in neighborhood justice centers,\textsuperscript{284} and an 80% settlement rate in a custody mediation project.\textsuperscript{285}

\begin{itemize}
\item \textsuperscript{275} Letter from J. Michael Amis, Association of Attorney-Mediators (October 11, 1995) (on file with authors).
\item \textsuperscript{276} Bohman & Bohman, \textit{supra} note 2, at 250 n.116.
\item \textsuperscript{277} Pearson, \textit{supra} note 10, at 437, 439.
\item \textsuperscript{278} Tomain & Lutz, \textit{supra} note 265, at 16.
\item \textsuperscript{279} \textit{Id.} at 17.
\item \textsuperscript{280} Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 Stan. L. Rev. 1339, 1366 n.105 (1994).
\item \textsuperscript{281} Tomain & Lutz, \textit{supra} note 265, at 6.
\item \textsuperscript{282} \textit{Id.} at 6 n.16.
\item \textsuperscript{284} Roehl & Cook, \textit{supra} note 270, at 102.
\item \textsuperscript{285} Evarts, \textit{supra} note 271, at 73.
\end{itemize}
Approximately 40% of custody and visitation disputes reached full settlement in court-based mediation programs in Los Angeles, Minnesota, and Connecticut, while another 20-30% reached partial or temporary agreements.\textsuperscript{286} A study of neighborhood justice centers indicated a 65-78% settlement rate for civil mediations and a 81-95% settlement rate for "interpersonal mediations."\textsuperscript{287} One study found that in excess of 80% of couples who engaged in mediation achieved their own custody and visitation agreements during or after the process while only half of those not exposed to mediation did so.\textsuperscript{288}

The settlement rates in mediations involving commercial cases and in other situations where the emerging dominant process is employed appear to be even higher than in the traditional small claims and domestic contexts. It has been reported that commercial mediation works about 85% of the time.\textsuperscript{289} Two large providers of commercial mediation services have reported in recent years that they resolved more than 90% of the cases they mediated.\textsuperscript{290} From September of 1989 through May of 1992, the judicial administrator of the 101st District Court in Dallas County, Texas reported that 964 cases were mediated and that 83% of them settled.\textsuperscript{291}

Early statistics from North Carolina's state-wide court-annexed mediation projects indicate that 57% of the cases mediated were settled.\textsuperscript{292} However, these results may be somewhat skewed in that many of the cases initially sent to mediation in the pilot districts were the oldest ones and thus the least likely to settle.\textsuperscript{293} Moreover, in at least one district which kept such statistics, following the adoption of the mediation program there was an increase in the court's overall settlement rate from 85% to 90%, or a one-third decrease in the number of cases going to trial.\textsuperscript{294} This decrease appeared to have been accompanied by a decrease in the average period elapsing between the filing of a case and its final disposition.\textsuperscript{295}

Florida Supreme Court administrators are of the opinion that the state's mandatory mediation program has played a significant role in reducing the judicial workload.\textsuperscript{296} Statistics indicate that while civil case filings continue to rise, there

\textsuperscript{286} Pearson, supra note 10, at 430.  
\textsuperscript{287} Id.  
\textsuperscript{288} Id.  
\textsuperscript{289} Smith, supra note 50, at C3.  
\textsuperscript{290} Id. (JAMS/EnDispute reported that it mediated 17,000 disputes of all kinds in 1994 and resolved over 90% of them. The American Arbitration Association reported a similar success rate for the 12,858 commercial disputes it mediated in 1992.).  
\textsuperscript{291} Statistics on Mediation in the 101st Judicial District Court, Dallas County, Texas, as of May 11, 1992 (compiled by Debbie Morse, former Court Administrator of the 101st District Court, Dallas County, Texas) (on file with authors).  
\textsuperscript{292} Mebane, supra note 102, at 1890.  
\textsuperscript{293} Id.  
\textsuperscript{294} Id.  
\textsuperscript{295} Id. at 1890-91. This logically suggests a reduction of litigation expenses for the parties.  
\textsuperscript{296} Moberly, supra note 33, at 703.
is a substantial decrease in the number of jury trials due to more cases being successfully mediated.\textsuperscript{297}

Research also suggests that parties experience both a high level of satisfaction with mediation and good compliance, with agreement rates in the range of 60-90\%.\textsuperscript{298} Such results, together with low levels of relitigation, are the universal findings in mediation studies.\textsuperscript{299}

One sample study showed a high level of user satisfaction among participants both in cases which settled and in those which reached an impasse.\textsuperscript{300} Whether the case settled or not, the parties and their counsel reported that they had a positive impression of the mediation, considered it fair, and found the mediator unbiased.\textsuperscript{301}

In the Denver Custody Mediation Project, 77\% of those who tried mediation reported being satisfied with the process compared with 40\% who were satisfied with the court process.\textsuperscript{302} Seventy-eight percent of those participating in the community mediation program in Dorchester, Massachusetts were glad they had done so; 50\% thought participation improved their situation; and 70\% felt they had been given a chance to "air their complaints."\textsuperscript{303} Enthusiasm about mediation was expressed by 88\% of the respondents at neighborhood justice centers.\textsuperscript{304}

In long-term follow-up in the Denver Custody Mediation Project, 79\% of successful mediation participants reported that their spouses were in compliance with child custody and financial terms of the mediated agreement compared to 67\% of those who did not participate in mediation.\textsuperscript{305} Thirty-three percent of the adversarial parties—versus only 6\% of those who reached settlement through mediation—stated that there had been serious disagreements in carrying out their settlements.\textsuperscript{306} In Maine's small claims mediation program, 70.6\% of the parties who participated in mediation and who had agreed to a monetary settlement were paid in full as opposed to 33.8\% of those who obtained a verdict.\textsuperscript{307}

A recent study from Minnesota found that a greater number of participants in mediation than in adjudication rated the process as fair and satisfactory.\textsuperscript{308} Moreover, those who settled their cases in mediation gave the process higher ratings for fairness and efficiency than those who did not.\textsuperscript{309}

\textsuperscript{297} Id.
\textsuperscript{298} Tomain & Lutz, supra note 265, at 6-7. Some observers suggest that user satisfaction may be overrated as a measure of effectiveness. Kerbeshian, supra note 194, at 400.
\textsuperscript{299} Pearson, supra note 10, at 426.
\textsuperscript{300} Tomain & Lutz, supra note 265, at 16.
\textsuperscript{301} Id.
\textsuperscript{302} Pearson, supra note 10, at 432.
\textsuperscript{303} Id.
\textsuperscript{304} Id.
\textsuperscript{305} Id. at 433.
\textsuperscript{306} Id.
\textsuperscript{307} Id. at 434.
\textsuperscript{308} Galenter & Cahill, supra note 280, at 1356 n.68.
\textsuperscript{309} Id.
Another study comparing mediation and adjudication found greater satisfaction with the dispute resolution process among parties who mediated rather than litigated, but concluded that satisfaction with the actual outcome was the same in either case.\textsuperscript{310} Interestingly, the opposite result emerged from another study. In that study, there was no difference in the level of satisfaction with the process, but mediation participants reported greater satisfaction with the outcome.\textsuperscript{311} One study analyzed the differences in satisfaction rates among plaintiffs and defendants. It showed that 74\% of plaintiffs and 71\% of defendants expressed satisfaction with the mediation process compared to 66\% of plaintiffs and 68\% of defendants who litigated their claims and expressed satisfaction with the litigation process.\textsuperscript{312}

A 1993 study reported greater satisfaction with outcome among all groups who mediated rather than litigated with the exception of white women.\textsuperscript{313} Another survey found plaintiffs more satisfied with the outcome of mediation while defendants preferred the outcome of adjudication.\textsuperscript{314} Paradoxically, the groups who appeared to fare better in the outcome of mediation tended to be less satisfied with both the process and the outcome.\textsuperscript{315}

Judges in North Carolina state that the recently implemented court-annexed mediation program there has "great potential for benefiting the judicial system as a whole."\textsuperscript{316} Attorneys have found participation in that program a "highly satisfying experience."\textsuperscript{317}

C. Efficacy of Mediation

While efficacy or fairness is harder to measure,\textsuperscript{318} the general satisfaction of the participants with the mediation process suggest that they perceive that it is fair. In a study conducted after the first year of operation of the court-annexed program in Cincinnati, both disputants and their counsel described the mediation process as fair, regardless of outcome.\textsuperscript{319} Similarly, a legislatively-funded study of Florida’s state-wide, court-annexed mediation programs found that participants believed mediation to be fair to the parties.\textsuperscript{320}

\textsuperscript{310} Id.
\textsuperscript{311} Id.
\textsuperscript{312} Galanter & Cahill, supra note 280, at 1357 n.72.
\textsuperscript{313} Id. at 1357-58.
\textsuperscript{314} Id. at 1357 n.72.
\textsuperscript{315} Id. at 1358.
\textsuperscript{316} Mebane, supra note 102, at 1891.
\textsuperscript{317} Id.
\textsuperscript{318} "Efficacy is the least explored, owing to the difficulty of determining the relationship of outcome and process and to the amorphous nature of identifying fairness." Tomain & Lutz, supra note 265, at 7-8.
\textsuperscript{319} Tomain & Lutz, supra note 265, at 16.
\textsuperscript{320} Moberly, supra note 33, at 702-03.
D. Other Information About Mediation

In addition to telling us how well mediation has succeeded, empirical studies also furnish various other types of information about the mediation process. For instance, some studies have attempted to explain the reasons for variations in cost and success rates in different programs. One study explained a program's high cost per case by the intense style of mediation practiced.\textsuperscript{321} In another study, it was found that the source of the mediator—whether the Federal Mediation and Conciliation Service, the Public Employee Relations Board, or ad hoc mediators—determined the settlement rate of cases.\textsuperscript{322} Researchers concluded that varying degrees of training among the groups and different styles of mediation techniques resulted in different degrees of success.\textsuperscript{323} Still another study suggests that variations in the outcome of the mediation can be explained entirely by the degree of admitted liability of the defendant.\textsuperscript{324}

Some empirical studies have explored the extent to which the characteristics of mediation as a process affected the perceptions of the parties and outcomes.\textsuperscript{325} The studies concluded that characteristics of mediation such as privacy, self-determination, perceived neutral role of the mediator, and the removal of the formal limitations of the adversarial process did influence, and in fact enhanced, the participants' perceptions of the legitimacy of the dispute resolution process and of our legal institutions.\textsuperscript{326}

Research supports the accuracy of mediation theory, which holds that mediation is more accommodative and conducive to compromise than the traditional adversary adjudication system.\textsuperscript{327} For instance, studies have found joint custody to be a more common result of mediation than of court adjudication.\textsuperscript{328} More visitation characterizes those mediated settlements which did not provide for joint custody.\textsuperscript{329} While plaintiffs were awarded all (or almost all) of the damages in nearly 50% of the adjudicated cases as compared to 20% of mediated cases, they were found to be "more likely to win something in mediation than in adjudication."\textsuperscript{330}

A 1992 study conducted by the National Institute for Dispute Resolution found that the more accurate information individuals had about mediation and

\textsuperscript{321} Tomain & Lutz, supra note 265, at 10.
\textsuperscript{323} Id. at 149.
\textsuperscript{325} Tomain & Lutz, supra note 265, at 10-11.
\textsuperscript{326} Id. at 11.
\textsuperscript{327} Pearson, supra note 10, at 431.
\textsuperscript{328} Id.
\textsuperscript{329} Id.
\textsuperscript{330} Id. This supports the argument that any elimination of plaintiffs’ windfall jury verdicts will be offset by fewer zero verdicts.
other ADR processes, the more likely they were to use those processes.\textsuperscript{331} After being told about what mediators and arbitrators do, 62\% of the respondents indicated that they were likely to use the services of a mediator, 32\% somewhat likely, and 30\% very likely.\textsuperscript{332} Eighty-two percent stated that the next time they were involved in a dispute, they would like to use an arbitrator or a mediator instead of going to court.\textsuperscript{333}

VIII. THE CREATION OF STATE-WIDE, COURT-CONNECTED MEDIATION PROGRAMS

Since the 1960s, various forms of mediation programs have been established throughout the country. Some of these were affiliated with or sponsored by individual courts, while others functioned independently. As mediation has gained greater acceptance and its usefulness in a wide variety of cases has become increasingly recognized, broader programs have emerged. The clear trend in the late 1980s and into the 1990s is toward the creation of comprehensive, state-wide mediation programs annexed to civil courts of general jurisdiction.

In 1984, the National Institute of Dispute Resolution (NIDR) instituted a modest effort at establishing state offices of mediation.\textsuperscript{334} NIDR’s goal was to “systematically build capacity” by strengthening the mediation venues, focusing the use of mediation more carefully on complex cases, seeking to have “services offered on a state-wide basis,” encouraging the marketplace for “increasing numbers of private mediators,” and developing “more thoughtful and systematic applications [of mediation] in government.”\textsuperscript{335} Although the NIDR initiative has lost some of its momentum in recent years due to the decreased availability of funding, many state offices are still operating.

As a result of the seeds planted by the NIDR program, and in response to other forces and developments, a number of states enacted legislation or established task forces or commissions culminating in the creation of state-wide, court-connected ADR programs.\textsuperscript{336} Court-connected or court-annexed mediation encompasses programs or services under which courts refer lawsuits pending before them, whether with the consent of the parties (“voluntary”) or without (“mandatory”), and whether or not the mediation programs or services are

\textsuperscript{331} Zerhusen, \textit{supra} note 216, at 1168.
\textsuperscript{332} \textit{Id.} at 1168-69.
\textsuperscript{333} \textit{Id.} at 1169.
\textsuperscript{334} Adler, \textit{supra} note 26, at 1017.
\textsuperscript{335} \textit{Id.} NIDR established state-wide offices located in various branches of government, selecting Alaska, Massachusetts, Minnesota, Wisconsin, New Jersey, and Hawaii as recipients of its initial grants. \textit{Id.} Additional state-wide offices were funded in Ohio, Florida and Oregon between 1989 and 1991. \textit{Id.} at 1019.
\textsuperscript{336} Press, \textit{supra} note 68, at 1029 n.1. These states include Arizona, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Maine, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Tennessee, Texas, Virginia, Wisconsin, and Washington, D.C. \textit{Id.}
actually operated by the referring court. The program of each jurisdiction has evolved in a slightly different way. Some states have created state offices to administer court-annexed mediation, while others have state-wide programs but do not have a central administrative authority. Likewise, states must choose between establishing a uniform state-wide program and leaving it to local circuits and jurisdictions to decide whether to participate in developing mediation programs. The advantages of state-wide programs include uniformity, known expectations, universal availability of mediation, and economies of scale in providing technical assistance.

A variety of agencies coordinate state-wide offices ranging from the executive, legislative, or judicial branches to state university systems. State-wide programs have been established by statute or by a combination of statute and court rule. Funding for state offices varies, but typically the state entity of which the office is a part supports it, with the assistance of income from filing and mediator certification fees that are dedicated to the office.

Progressive southern states have been at the forefront of the state-wide mediation movement. In 1987, Florida and Texas adopted legislation empowering judges to order mediation in any civil case. The growth of mediation in Florida's circuit courts has been explosive and frequently applied in large civil cases. Reported caseload from mediation annexed to these courts nearly tripled between 1989 and 1991. Almost 50,000 reported cases statewide go to mediation. As of 1994, over 4,800 individuals had completed mediator training in the state of Florida and over 2,300 mediators had been certified by the Florida Supreme Court. Florida's statute calls for mandatory mediation only in cases referred to mediation at the trial court's discretion.

The Florida legislation passed in 1987 culminated a process begun in 1984, when the Florida legislature established the Study Commission on Dispute Resolution. The commission issued two reports, the second of which

337. Press, supra note 68, at 1029 n.4.
338. Id. at 1029 n.5. As of 1993, California, Colorado, Florida, Massachusetts, Michigan, New York, Ohio, Oregon, and Virginia had such offices. Id.
339. Id. at 1030.
340. Id.
341. Id.
342. Id. at 1031.
343. Id. at 1030, 1032-33.
344. Id. at 1033.
346. Moberly, supra note 33, at 702.
347. Id.
348. Id. This figure included all court-ordered mediation in all types of courts, state-wide. It did not include voluntary mediation. Id.
349. Id. at 702-03.
351. Id. at 1043.
“proposed legislation for the comprehensive court mediation and arbitration program” which was eventually adopted.\textsuperscript{352} The provisions governing Florida’s mediation program are found both in state statutes and in court rules.\textsuperscript{353} As a part of the Florida structure, the Florida Dispute Resolution Center (“FDRC”), a joint program of the Florida Supreme Court and the Florida State University College of Law, was established in January, 1986. The first ADR center to combine the resources of an academic institution with that of a state supreme court,\textsuperscript{354} FDRC experiments with ADR methods, serves as a research center and information clearinghouse on ADR, conducts educational programs, and provides technical assistance.\textsuperscript{355}

The North Carolina Bar Association established a subcommittee, composed of judges, court administrators, mediators, law professors, and attorneys, to examine the desirability of adopting a mediation program in that state.\textsuperscript{356} After careful study of Florida’s program, they drafted proposed legislation.\textsuperscript{357} In 1991, Senate Bill 791 (a substituted and amended form of the proposed legislation) unanimously passed the North Carolina Senate and House of Representatives.\textsuperscript{358} To implement the Act, the North Carolina Rules of Mediated Settlement Conferences were adopted.\textsuperscript{359} The mediation program in North Carolina began with the establishment of pilot programs in eight districts, all of which had commenced operation by July of 1992.\textsuperscript{360} The gradualist approach used in North Carolina and the absence of a centralized state office contrasts with Florida, whose program was implemented more quickly and uniformly.

The impetus for the adoption of a state-wide mediation program in Georgia was the urging of Chief Justice Harold Clark of the Georgia Supreme Court.\textsuperscript{361} Contrary to the non-activist tradition of his office, Chief Justice Clark made alternative dispute resolution a major theme of his tenure and aggressively pursued implementation of a mediation program.\textsuperscript{362}

The Georgia State Bar Association (“GSBA”) president joined the Chief Justice, at his invitation, in creating a joint commission on ADR.\textsuperscript{363} In 1990, the commission—composed of fifteen members selected jointly by the Chief

\textsuperscript{352} Id. at 1043-44. The Florida Bar Association did not take an active role in working on the mediation initiatives, but it also did not oppose them.

\textsuperscript{353} Id. at 1048.

\textsuperscript{354} Id. at 1044 n.61.

\textsuperscript{355} Id. at 1044.

\textsuperscript{356} Mebane, supra note 102, at 1861.

\textsuperscript{357} Id. at 1861-62.

\textsuperscript{358} Id. at 1862.

\textsuperscript{359} Id.

\textsuperscript{360} Id. at 1863.

\textsuperscript{361} Jack P. Etheridge, Establishing a Joint Bar Association and Supreme Court Commission on Alternative Dispute Resolution, 81 Ky. L. J. 1085, 1086 (1993).

\textsuperscript{362} Id.

\textsuperscript{363} Id. at 1087.
Justice and the GSBA president—was charged with exploring “the feasibility of a comprehensive court-annexed alternative dispute resolution program” focusing on mediation and arbitration. The commission first gathered information and studied alternative dispute resolution programs throughout the country. Then, the commission then developed pilot programs in Georgia and evaluated the functioning of those programs, receiving input from all interested parties. After a year of studying and experimentation, in September of 1992 the commission presented to the Georgia Supreme Court a set of eight recommendations.

Among other suggestions, the commission recommended that the supreme court adopt rules implementing a state-wide ADR system and create a successor commission that would certify and adopt rules for court-annexed programs as well as govern mediator training and standards of conduct. Thus, within two years of the creation of the commission, a state-wide comprehensive program of alternative dispute resolution was adopted with little controversy and with the approval of both the GSBA and the appellate courts.

These three case studies demonstrate that each state must pursue its own path to adopt state-wide, court-annexed mediation programs, depending upon the particular circumstances and dynamics at work in that jurisdiction. Likewise, the form of the program, the manner in which it is implemented, and the degree to which administration is centralized are matters which are handled differently in each state.

IX. CRUCIAL ISSUES POSED BY INSTITUTIONALIZATION OF THE MEDIATION PROCESS

Aside from details regarding how state-wide programs are initiated and implemented, there are a number of issues regarding mediation that should be considered when establishing such a program or otherwise institutionalizing the practice of mediation. Because mediation is being practiced on an ad hoc basis, these issues exist in practice today but are not being systematically addressed. In a sense, institutionalization means confronting and deciding crucial issues posed by mediation practice in order to inject structure and certainty into the process.

Our primary goal in this section is to identify and to explain to some degree important mediation practice issues. In some instances, we suggest how we believe the issues raised should be decided. In others, we merely venture that there should be some resolution of the issues to assure certainty and fairness in the mediation process and to those who participate in it.

364. Id.
365. Id. at 1088-89.
366. Id. at 1090.
367. Id.
368. Id. at 1091.
A. Purposes and Goals of the Mediation Program

First, we must consider the goals and purposes of mediation. The competing goals advanced by various proponents of mediation are discussed in part IV of this article. States adopting mediation programs should establish the goals policy-makers wish mediation to achieve in order. That way parties and mediators will know both what to expect from the process and what is expected from them.

We have seen that the emerging dominant process seeks to achieve a number of potentially contradictory goals. If the decision is made to pursue all or some of these goals, the state should establish priorities among them to provide participants guidance in the process.

While establishing goals and priorities has the disadvantage of crystallizing the process and arguably stifling creative growth of mediation, this inhibition is outweighed by the increased certainty infused into the system. Moreover, nothing done at this stage of the institutionalization process is immutable. Continued experimentation may result in changes in goal orientations in the future, and the mediation frameworks set up by the states should be structured so as not to discourage corrections and revisions in the system.369

B. Qualities and Qualifications of Mediators

In setting up a mediation program, there must be some determination of who can serve as a mediator. Studies indicate that the success of mediation is largely dependent on the skill, training, and experience of the mediator.370 However, substantial disagreement exists regarding what qualifications should be required to be a member of the profession. A threshold question should be what personal qualities, background characteristics, and training make for an effective mediator.

1. Personal Characteristics

It is generally recognized that a mediator should facilitate contact between the parties in an atmosphere calculated to enhance their ability to exchange information constructively and to seek consensus.371 A mediator should possess "a degree of empathy and subtlety in personal interaction."372

369. Because of the fewer number of decision-makers involved and the greater simplicity of the procedures for revising court rules as compared to passing amendatory legislation, the authors believe that it may be prefereable to have the details of the mediation system established on a state-wide basis by court rule of the state's supreme court rather than by legislative enactment.


372. Id. at 526. One commentator has suggested that the "perfect mediator" possesses the following characteristics: "(1) the patience of Job; (2) the sincerity and bulldog characteristics of the English; (3) the wit of the Irish; (4) the physical endurance of the marathon runner; (5) the broken-
Other suggested desirable mediator characteristics include “demonstrated integrity and impartiality, basic knowledge of and belief in the negotiation process, . . . faith in voluntarism, . . . belief in human values and potentials, tempered by the ability to assess personal weakness and strengths, hard-nosed ability to analyze what is available in contrast to what may be desirable,” and “drive and ego” tempered by an ability “to be self-effacing.”

2. Background and Experience

Because modern mediation is still in the development stage, there is no consensus regarding the skills, knowledge base, and background that are suitable for mediators. It has been suggested that mediators can be recruited from lawyers, social workers, and psychologists if they are properly trained and have the ability to conduct an orderly meeting, identify issues, and deal with people. Those who believe that lawyers are well-suited to serve as mediators point out that lawyers’ training and experience in “negotiating, consulting, researching, conciliating, . . . planning,” and active listening make them well suited to serve as mediators. Because mediation must, as a practical matter, be complementary to the adjudicative process, and because society and most individuals consider lawyers as protectors of their rights and the appropriate source of assistance in asserting and protecting such rights, lawyers are logical candidates to be mediators. However, others suggest that, because of their adversarial orientation, lawyers are poorly suited to serve as mediators. Nonetheless, some state court-annexed mediation programs not only allow but require that mediators appointed by the courts be attorneys.

There is also serious disagreement regarding the importance of a mediator having knowledge in the substantive field involved in the dispute. While many suggest that knowledge of mediation techniques is the only relevant criterion for qualification, others believe that familiarity with the subject matter of a dispute enhances the mediator’s ability to perform successfully. One view suggests that substantive knowledge in the field of the dispute

field dodging ability of a halfback; (6) the guile of Machiavelli; (7) the personality-probing skills of a good psychiatrist; (8) the confidence-retaining characteristic of a mute; (9) the hide of a rhinoceros; and (10) the wisdom of Solomon.” Sato, supra note 116, at 526 n.118.

373. Irvine, supra note 29, at 155 n.1.
375. Moberly, supra note 33, at 707.
376. Sato, supra note 116, at 514.
377. Riskin, supra note 15, at 42. It has also been suggested that lawyers are more likely to refer cases to mediators who are lawyers. Id. at 43.
378. Irvine, supra note 29, at 156 n.2.
379. See e.g., Mebane, supra note 102, at 1860; Irvine, supra note 29, at 156 n.3.
enhances the mediator's ability to suggest "options and possible settlement formats."\textsuperscript{381}

3. 	extit{Certification Standards and Training}

Certification and training requirements for mediators are advanced as methods to protect the public from unqualified persons holding themselves out as mediators.\textsuperscript{382} A number of national professional dispute resolution organizations and state and municipal governing bodies have developed position papers and direct legislation addressing the establishment of mediator qualifications.\textsuperscript{383}

In 1989, the Society for Professionals in Dispute Resolution ("SPIDR") published a report of their Commission on Qualifications.\textsuperscript{384} It suggested that protection of the consumer of mediation services and the integrity of the mediation process prompted the need for establishing mediator qualifications.\textsuperscript{385} The commission also identified three central principles with respect to qualifications: first, a variety of organizations, rather than any single entity, should establish mediator qualifications; second, the more choice the parties have over the process, program or identity of the mediator, the less mandatory the qualifications of the mediator should be; third, qualification criteria should be based on performance, not paper credentials.\textsuperscript{386} The SPIDR Commission made four recommendations: (1) experience and ability should be the criteria for selection and qualification; (2) performance criteria and performance-based testing should be used in training and apprenticeship programs; (3) trainers should be qualified; and, (4) participation in continuing education programs should be required of neutrals.\textsuperscript{387}

It has been suggested by some that mediation is an insufficiently developed field to require certified mediators.\textsuperscript{388} Others oppose certification on the grounds that inappropriate barriers to entry into the practice may be created, impeding innovative development of the profession.\textsuperscript{389}

As of 1993, it was reported that twenty states had adopted qualifications for practicing as a mediator, either by statute or by court rule.\textsuperscript{390} However, in some of these states, the qualifications only relate to limited programs that are

\textsuperscript{381} Stulberg, \textit{supra} note 380, at 87.
\textsuperscript{382} Edwards, \textit{supra} note 90, at 683; Zerhusen, \textit{supra} note 216, at 1173.
\textsuperscript{383} Edwards, \textit{supra} note 90, at 682-83. Toni L. Griffin, \textit{Mediator Training: A Focus of ABA Meeting}, Disp. Resol. Times, Fall 1995, at 5. During the 1995 American Bar Association annual meeting, a panel focused on the debate regarding formal accreditation of mediators.
\textsuperscript{384} Press, \textit{supra} note 68, at 1036.
\textsuperscript{385} Id.
\textsuperscript{386} Press, \textit{supra} note 68, at 1036; Zerhusen, \textit{supra} note 216, at 1173.
\textsuperscript{387} Zerhusen, \textit{supra} note 216, at 1173.
\textsuperscript{388} Press, \textit{supra} note 68, at 1039.
\textsuperscript{389} Id. at 1039-40.
\textsuperscript{390} Id. at 1037 & n.28.
not state-wide in character or that only apply to certain types of cases.391 The typical qualification requirements include some combination of attending mediation training, participating in apprenticeship or mentorship programs, and meeting specified educational or professional requirements.392 The training for certification usually must be performed by a certified and specialized trainer; it tends to include instruction in "general dispute resolution theory" and mediation skills, as well as participation in a mock mediation as the mediator.393 Great variations exist in the type and intensity of the apprenticeship, but these programs usually require the certification applicant to observe a real mediation and conduct an actual mediation under the supervision of an experienced mediator who critiques his or her performance.394

Typical educational and professional criteria require mediators to be lawyers or judges, and, in some cases, include other "related" professionals as well, such as social workers and psychologists.395 Many mediation proponents are critical of the "Florida model," which limits court-appointed mediators to lawyers and other professionals.396 They argue that reliance on academic credentials as qualification criteria is "patently exclusionary," and contrary to the practical reality that many excellent mediators are not lawyers or other professionals.397 Florida's rules have been revised to permit the parties to chose "non-professional" mediators, although credentials as a professional continue to be mandatory for court-appointed mediators.398

There is increasing support for performance-based testing of the type suggested by the SPIDR Commission, which evaluated the credentials of mediators based on the observation and assessment of the skills that seem to make for a good mediator.399 A research study conducted by the Wisconsin Employment Relations Commission analyzed mediation skills in terms of five elements: investigation, empathy, persuasion, invention, and distraction.400 In addition, the study found that knowledge of the substantive area involved in the

391. For instance, Louisiana is listed as one of the states establishing a certification requirement, and the only such requirements in effect in 1993 were those of the Orleans Civil District Court/First City Court Pilot Program.

392. Id. at 1037.

393. Id. Law schools are beginning to become involved in education regarding mediation and mediation training. At present more than 25 law schools in the United States have mediation clinics. Griffin, supra note 383 (citing Leonard Riskin, Director of the University of Missouri School of Law's Center for the Study of Dispute Resolution).

394. Press, supra note 68, at 1037.

395. For instance, North Carolina requires that mediators in its court-affiliated program must be members of the North Carolina State Bar for at least five years. Mebane, supra note 102, at 1860 (discussing N.C. Mediated Sett. Conf. R. 8).

396. Alfini, supra note 196, at 48-49.

397. Id. at 48 n.7.

398. Id. at 48-49. See also Mebane, supra note 102, at 1881 n.196.

399. Press, supra note 68, at 1038.

400. Id.
dispute was helpful. The Wisconsin study concluded that this combination of skills can be used to develop a training program and "a reasonably reliable oral examination for selecting mediators." A test design project was created by the Wisconsin Commission in 1990 "to pursue development of guidelines for performance-based selection of mediators." These guidelines formed the basis for an experimental mediator selection program at Suffolk County Superior Court in Massachusetts. Oklahoma, while emphasizing training, also requires that mediators who apply for certification be observed conducting actual mediation. Although expensive, performance testing is increasingly being accepted as the preferred method of selecting qualified mediators.

Once a state determines what qualifications to establish for mediators, a decision must be made between a formal certification process and self enforcement. When formal certification involves uniform state-wide qualification requirements, consistency in the application of standards and convenience to mediators are served by adoption of a centralized certification process. Moreover, if the state establishes uniform standards of conduct and rules of discipline for mediators, such a central system is essential.

As an additional check on mediation service providers, it has been suggested that reporting requirements be imposed on entities and individuals who provide private dispute resolution services. For example, there should be disclosure of the owner of the entity, possible conflicts of interest, and the identity of repeat client users. Individual mediators should likewise be required to disclose the kinds of cases they mediate and their typical clientele.

C. Ethics and Standards of Conduct

As the practice of mediation has grown, increasing attention has been paid to the absence of standards of practice, ethical guidelines, and rules applicable to mediators. In addition, questions exist regarding the interplay of standards of conduct and ethical rules when persons who are members of other professions act as mediators.
1. Creating Standards for Mediators

Critics and advocates of mediation generally agree that the public interest requires that mediators "be subject to appropriate and uniform professional standards." There is at present no single accepted code of professional conduct for mediators. This absence is viewed as a danger to the users of mediation services who might be exposed to unscrupulous practitioners.

One view is that in formulating mediator standards of practice and ethical rules, policy-makers should first come to grips with the fundamental question of the role of the mediator in the process. Standards of conduct and ethical rules should reflect society's conception of what it wants mediators to do. Just as the lawyer's role as a loyal and zealous advocate of the client's interests largely shapes the ethical code of the legal profession, some basic overall vision of the mediator's function is essential. This, in turn, refers back to the need for a determination of the purposes and goals of mediation. Indeed, the lack of consensus regarding such goals has constituted a crucial impediment to formulating professional standards to guide the mediator in the performance of his functions.

An opposing view is that mediator standards of conduct should not necessarily be designed to further any particular conception of mediation, but rather simply to prevent what is "clearly unacceptable conduct." This belief is based upon the recognition that differences in mediation styles and theories make it difficult to establish detailed rules of appropriate conduct applicable to specific circumstances and that there likely will be considerable evolution of standards over time as mediation matures as a profession.

During the 1980s, there were a number of efforts to draft uniform standards of practice and codes of professional conduct for mediators, especially in limited fields of mediation, such as divorce. More recently, ethical rules have been adopted by at least three states—Florida, Texas, and Indiana. Moreover, in September, 1995, the first set of model ethical standards for mediators was adopted, endorsed by the ABA's Dispute Resolution and Litigation sections, the American Arbitration Association, and the Society of Professionals in Dispute Resolution.

Some of the earlier proposed standards of conduct have been criticized as placing limitations on mediation's greatest potential for good. A prime
example of the limiting nature of some proposed codes is the prohibition against meeting separately with the parties without the prior consent of both sides.\textsuperscript{424} Many mediation practitioners and, certainly, proponents of the emerging dominant model of mediation, recognize separate caucusing as a vital and valuable technique in the process.\textsuperscript{425} Separate caucusing allows the mediator to push for a "full understanding and consideration of all information and options,"\textsuperscript{426} allows for the infusion of risk and reality testing without unacceptable disclosure to the other side or peril to the mediator's impartiality, and permits the mediator to facilitate a dialogue between the parties which would not take place in a face-to-face meeting. Sometimes, because of the adversary dynamics in play during the course of a dispute, there may be resistance to such separate caucusing by the parties or their counsel, and it should not be unethical for the mediator to require use of this device over the objection of the parties.

Some themes that commentators have suggested should be included in mediator standards based on the empowerment and recognition notions include that the mediator should (1) insure "that the parties act with full information and understanding"; (2) encourage disclosure of all pertinent information by the parties and assess the importance of any missing information; (3) have the parties "fully identify and consider all possible options for resolving" their disputes and "understand fully the consequences" of settlement or a failure to settle; (4) urge unrepresented parties to consider legal advice before entering into an agreement but not to render inappropriate deference to legal experts; (5) seek to have the parties clearly express their positions and the underlying rationale supporting that position; (6) translate and explain the parties' positions and their rationales; (7) seek recognition and empathy of each party for the other's position in such a way that no party feels threatened; and (8) pursue "active impartiality" by being visibly evenhanded so that the mediator can serve both as a translator between the parties and as devil's advocate.\textsuperscript{427} These principles seem to be consistent with the role of the mediator in the emerging dominant mediation process.

Also consistent is another concept suggested for establishing appropriate standards of conduct for mediators. This concept is "accountability," defined more broadly than neutrality and relating to "ethical, moral, and legal obligations" of the mediator.\textsuperscript{428} Under this concept, the mediator is obligated to insure a procedurally fair process, an atmosphere of dignity and respect, and freedom from abusive or intimidating behavior by either party.\textsuperscript{429} Generally, accountability would not encompass an obligation on the part of the mediator to insure the fairness of the outcome of the mediation because it is "the parties'
mutual sense of fairness," and not the mediator's, which is to determine the appropriateness of a particular outcome.\textsuperscript{430} The mediator, in this view, should not attempt to impose an agreement merely to adjust for an imbalance of power between the parties.\textsuperscript{431} A mediator should become involved in assessing the outcome only when a resulting agreement will be "illegal, grossly inequitable, or based on false information."\textsuperscript{432}

The new Model Ethical Standards for Mediators, which took three years to draft, are designed to provide a general framework of ethical guidance to mediators.\textsuperscript{433} The diversity of mediation practice clearly had its effect on the standards, as evidenced by the drafters' concentration on the "common denominators."\textsuperscript{434} There was a split of opinion among the drafters regarding whether mediators should simply facilitate formulation of a settlement by the parties, or whether mediators should forthrightly evaluate the parties' positions and offer opinions regarding the likely litigation outcome.\textsuperscript{435} As drafted, the standards, to a great extent, adopt the former philosophy of facilitation. One official comment to the standards states that the mediator should "refrain from providing professional advice."\textsuperscript{436}

Under the model rules, the mediator is to: (1) conduct himself on the premise that mediation is based on principles of self-determination of the parties; (2) conduct the mediation in an impartial manner; (3) disclose actual and potential conflicts of interest; (4) mediate only if he has the necessary qualifications; (5) maintain the "reasonable expectations" of the parties regarding confidentiality; (6) conduct the mediation fairly and diligently; (7) be truthful in advertisement and solicitation; (8) make full disclosure and explain the basis for fees; and (9) make efforts to improve the practice of the profession.\textsuperscript{437} These requirements are fairly basic and do not conflict with the practice under the emerging dominant process. The predictive/rights-based aspects of that process could be carried out in conformity with the proposed rules so long as subtle rhetorical techniques are used to avoid risking the mediator's impartiality.

Among the crucial provisions of the model code are those relating to confidentiality. A fuller discussion of mediation confidentiality appears in part IX.F of this article.

Florida has led the way in the field of formalizing mediator standards.\textsuperscript{438} In 1989, the Florida Supreme Court Standing Committee on Mediation and Arbitration Rules, composed of fifteen mediators, judges, attorneys and law

\textsuperscript{430} Id. at 130.
\textsuperscript{431} Id.
\textsuperscript{432} Id.
\textsuperscript{433} Reuben, supra note 421, at 25.
\textsuperscript{434} Id.
\textsuperscript{435} Id.
\textsuperscript{436} Id.
\textsuperscript{437} Id.
\textsuperscript{438} Moberty, supra note 33, at 702.
professors, was established. Over a two-year period it held public hearings and meetings, received written commentary, and created two subcommittees, one focusing on standards of conduct and the other on rules of discipline.439

The committee reviewed pertinent literature, considered existing standards of mediator conduct from other jurisdictions and organizations, and, on November 1, 1991, submitted a report to the supreme court. The court issued an opinion on May 28, 1992 substantially adopting the committee’s proposals.440 The Rules for Certified and Court-Appointed Mediators consist of three parts. The first part sets forth the qualifications for certification, the second consists of the standards of conduct for mediators, and the third constitutes the rules of discipline.441 The standards of conduct address “the mediation process, self-determination, impartiality, confidentiality, professional advice, fees and expenses, training and education, advertising, and relationship with other professionals.”442

Significantly, Florida is the first state to adopt a procedure to enforce mediation standards of conduct. A Mediator Qualifications Board, complaint committees, and the Florida Dispute Resolution Center staff are the elements of the enforcement mechanism.443 When a complaint committee finds probable cause that a complaint is valid, a panel of the Board hears and decides the case.444 Adverse decisions may be appealed to the Florida Supreme Court.445 The panel has the power to conduct the proceedings, including compelling witnesses and ordering production of documents.446 Upon a finding of “clear and convincing evidence” supporting violation of the rules, the panel may impose sanctions, ranging from assessment of the cost of the proceeding to decertification or disbarment from service as a mediator.447

2. Attorney Ethical Standards and the Attorney-Mediator

A second, separate set of ethical issues arises when the mediator is also an attorney—the usual situation in the operation of the emerging dominant model. In this situation, the basic question is whether the standards of conduct and ethical rules which apply to lawyers generally apply when the attorney is acting as a mediator. If so, what happens if there is a conflict between the attorney-mediator’s duties as an attorney and his duties as a mediator?

439. Id. at 703-04.
440. Id. at 705.
441. Press, supra note 68, at 1059.
442. Id. at 1060.
443. Moberly, supra note 33, at 719. Board members are appointed by the Chief Justice of the Florida Supreme Court and serve four-year terms. Id. at 720.
444. Id. at 719.
445. Id.
446. Id. at 720.
447. Id. at 722.
Although attorneys play many roles in society, ethical guidelines for their conduct primarily envision the attorney's functioning within the adversarial justice system. This is a problem in that many assumptions underlying the adversarial system are inappropriate in other contexts within which attorneys function. Ethical standards requiring that lawyers be zealous advocates, employ legal procedures to the fullest in order to further the client’s cause, and adhere to other similar standards, while useful in the adversary process, “limit the problem-solving abilities of lawyer-participants” in mediation.

Even more so, these adversarially spawned values are inconsistent with the role of the attorney-mediator. Although the attorney-mediator is loyal to the basic precepts of the adversarial system, the role of a zealous advocate of one party, which is inherent in the adversarial context, is fundamentally different from the mediator’s duty to promote the interests of all participants in the process. While both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct (which was adopted in Louisiana as the Rules of Professional Conduct, effective January 1, 1987) acknowledge non-advocate functions of attorneys, they fail to develop meaningful guidelines for lawyers acting as negotiators, advisors, or mediators.

Moreover, neither the Model Rules of Professional Conduct nor the Model Code of Professional Responsibility applies to attorney conduct which does not constitute the practice of law. Thus, if acting as a mediator falls outside of the range of conduct considered “the practice of law,” attorney professional standards and disciplinary rules of conduct should not apply to attorney-mediators when functioning as mediators. Case law from other jurisdictions supports a cogent argument that under most circumstances what mediators do does not constitute the practice of law. Under these authorities, an attorney is only “acting as a lawyer” when (1) the party alleged to be his client reasonably believes that he is representing her, advocating her interests, and otherwise acting as her attorney, and (2) the lawyer is applying rules of law to specifics of the party’s situation disclosed to the lawyer in confidence and, based upon this analysis, offering legal advice. Under these standards, it seems that the

448. Purnell, supra note 11, at 986.
449. Id.
451. Id. at 530.
452. Id. at 507-08.
453. Purnell, supra note 11, at 987.
454. Id.
mediator who makes clear that he is not representing either or both of the parties and who does not purport to give advice applying law to the facts of the case is not practicing law. Indeed, when the parties are represented by counsel in the mediation, it seems difficult to envision a situation in which the mediator could be considered to be practicing law.

It is unclear, however, whether the Louisiana courts would adopt this same approach. Our courts have not applied a quite so analytic approach in considering the question of what constitutes the practice of law. In Louisiana State Bar Association v. Edwins, the Louisiana Supreme Court quoted an amalgam definition of the practice of law and also cited as “persuasive, but not binding” the legislative definition of the practice of law found in Louisiana Revised Statutes 37:212. Literal application of parts of these definitions could arguably result in the conclusion that mediator activities constitute the practice of law. However, there is nothing in the case law suggesting that a more sophisticated and realistic analysis would not be applied, distinguishing the attorney-mediator’s function from that of an attorney acting in a representative capacity.

Model Rule 2.2 and its Louisiana analog have introduced the concept of an attorney as “intermediary.” The role contemplated by this rule “seems to be primarily to negotiate agreements among clients whose interests are basically compatible.” Thus, in cases of contentious negotiation of or imminent or ongoing litigation, which is almost always the case in a mediation, the attorney could not act as a mediator under this rule. Moreover, no mediation could be conducted consistent with this rule unless it was purely voluntary on the part of both parties.

It is arguable that the ethical constraints of Rule 2.2 would not apply to the attorney-mediator. The official comments to Model Rule 2.2 state that the rule “does not apply to a lawyer acting as arbitrator or mediator between . . . parties who are not clients of the lawyer . . . .” However, nowhere in the text of the Louisiana rule is this limitation stated, and it is unclear the effect that a Louisiana court would give to this comment.


456. Under the emerging dominant model, asking open-ended questions to instill doubt regarding a party’s legal position likewise should not be considered the practice of law.

457. 540 So. 2d 294 (La. 1989).


459. 540 So. 2d at 300.

460. La. R.S. 37, Ch. 4 App., art. 16, Rule 2.2(a) (1988 and Supp. 1996).

461. Purnell, supra note 11, at 990.

462. Id. at 991.

463. Id.

464. Mebane, supra note 102, at 1863-64.

Some opinions issued during the 1980s by various state and city legal ethics commissions apply the adversarial expectation and assume that the role of the attorney-mediator implies independent representation of both parties. These opinions led some of these bodies to rule that lawyers acting as mediators violated the Disciplinary Rules. The Oregon State Bar committee concluded that an attorney-mediator acting as part of an interdisciplinary team in a family mediation represented all of the parties. Other state bar opinions similarly viewed the mediator as a representative of the parties to the mediation and concluded that the attorney cannot appropriately champion the interests of the opposing parties involved in litigation, or in a pre-litigation dispute, that is in a highly adversarial posture. A second group of opinions during the 1980s found that while the general rule against dual representation of actively adverse parties applied, the particular facts of the case constituted an exception to the general prohibition. A third set of opinions held categorically that attorney-mediators were not functioning as attorneys regardless of their particular actions in conducting the mediation.

At this point, the most that can be said about the applicability of attorney standards of conduct and ethical rules to attorneys acting as mediators and the effect of such rules if they do apply, is that there is a tremendous amount of uncertainty. A danger exists that potential attorney-mediators will be deterred from pursuing that role by this “present ethical ambiguity.” Likewise, attorneys who do opt to become mediators may tend to protect themselves by constructing an elaborate procedural framework which may have the effect of restricting, rather than promoting, the resolution of disputes.

A number of solutions have been proposed to resolve the confusion that presently surrounds the duties of attorney-mediators. One suggestion is that a separate set of ethical guidelines be developed for attorney-mediators that would govern in place of either attorney or mediator rules. An alternative solution is to broaden the scope of the “practice of law” concept to encompass such non-adversarial activities as serving as a mediator. However, such an approach would require a correlative broadening and a revision of the ethical rules.

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466. Sato, supra note 116, at 517-18; Purnell, supra note 11, at 989-90 & n.31.
467. Sato, supra note 116, at 517-18; Purnell, supra note 11, at 989-990 & n.31.
468. Sato, supra note 116, at 518. This implicated Disciplinary Rule 5-105 of the Model Code of Professional Responsibility, making it difficult or impossible to act as mediator when the parties are in an adversarial posture.
469. Sato, supra note 116, at 518; Purnell, supra note 11, at 989 n.31.
471. Id. at 519-20.
472. Purnell, supra note 11, at 1017.
473. Sato, supra note 116, at 528.
474. Purnell, supra note 11, at 1015. See also the Appendix to the Purnell article which contains a proposed set of ethical guidelines.
475. Id. at 1015.
476. Id. at 1015-16.
A third approach is the one taken in Florida. There, mediator standards of conduct have been adopted which parallel and run concurrently with the ethical standards applicable to the mediator's other profession. However, the mediator ethical standards take precedence when a conflict arises between the two sets of applicable standards. This solution does not entirely eliminate the uncertainties addressed above because it does not answer the basic question of whether an attorney-mediator represents the parties to the dispute. This omission could be remedied by a revision of the standards of conduct for lawyers to clearly establish that attorney-mediators do not engage in the practice of law when they act as mediators. Such a rule would clearly comport with reality in cases in which the parties are represented by their own attorneys. In addition, mediator standards of conduct could be drafted to prohibit specified conduct of attorney-mediators which in fact would constitute the practice of law. This would have the effect of protecting unrepresented parties from attorney-mediators who might overstep the bounds of their appropriate function.

Confidentiality obligations of attorney-mediators sometimes conflict with their ethical obligations. This subject is discussed in part IX.F of this article.

3. Obligations of Attorneys to Advise Clients Regarding ADR

A final ethical issue which must be mentioned relates not to attorney-mediators, but to practicing attorneys advising their clients regarding their disputes. Under Rule 1.2(a) of the Model Rules of Professional Responsibility, lawyers must consult with their clients in determining the means that will be used to pursue the client's objectives. The comments to that rule further suggest that the lawyer should defer to the client regarding practical considerations such as expenses and the effect of the means pursued on third parties.

It has been suggested that this ethical standard imposes a duty on practicing attorneys to inform clients of the alternative to mediate their cases and to meaningfully explain the benefits and risks of all alternatives. A California court held that lawyers can be liable for malpractice if they fail to pursue settlement negotiations, "even if the client is initially opposed to settlement." In 1992, the Colorado Rules of Professional Conduct were amended to require specifically that: "In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."
Louisiana's version of Rule 1.2 does not contain the same language as the Model Rule, but rather states that the lawyer and client both have authority and responsibility in the objectives and means of the representation. It has been urged that regardless of current ethical compulsion, the lawyer's role in society should be revised so that the primary function is to serve as problem-solver. As such, the attorney should seek the most appropriate avenue to resolve his client's problems, including disputes with third parties. It may well be that such a conception of the lawyer's role is the "wave of the future" which will not only enhance the depth and significance of that role, but also will restore to the bar an appropriate degree of faith, trust, and respect.

D. Mediator Liability and Immunity

Another issue created by the use of mediation is the potential liability of mediators in connection with the performance of their functions. Few reported cases exist dealing with mediator liability, and there appear to be no reported cases in which a claimant has prevailed against a mediator. However, the increasing use of mediation in a wide area of dispute contexts may result in an increase in the number of cases in which plaintiffs seek to assert such claims. Indeed, the question of mediator liability is a matter of growing concern.

1. Mediator Liability

Generally, three legal theories are advanced as potential bases for establishing liability of a mediator: tort, breach of contract, and breach of fiduciary duty. The tort theory relies upon standard principles of professional liability employed in actions involving professions such as attorneys and physicians. One of the essential elements of a tort cause of action would be "a breach of the duty by failure [of the mediator] to comply with acceptable standards of practice." It is highly doubtful that the mediation profession is sufficiently developed at this time to support an ascertainable set of professional standards for mediators that could be used as a benchmark to establish delictual liability.

484. La. R.S. 37, Ch. 4 App., art. 16, Rule 1.2(a).
485. Pitts, supra note 482, at 204 (citing Leonard L. Riskin and James E. Westbrook, Dispute Resolution and Lawyers 21-27 (1987)).
486. Richardson, supra note 15, at 625.
488. Irvine, supra note 29, at 157 n.10.
490. Id. at 626.
491. Chaykin, supra note 178, at 736.
There is a great diversity of opinion regarding the appropriate course of action a "reasonably competent mediator" should take under given circumstances. There are no generally accepted professional standards for mediators. It has been argued that mediation is more an art than a science, requiring the exercise of highly subjective judgment, and making it difficult to prove that a given action by a mediator has fallen below minimum professional standards. This situation is further complicated by the different contexts in which mediators operate, which often vary widely in the degree of formality employed. The degree of uniformity and consistency which typifies activities of other professionals who function under established standards of care simply does not yet exist among mediators. Indeed, there is a question whether such a degree of uniformity and consistency will ever exist in the profession.

The second theory which might form a basis for mediator liability is the breach of an express or implied contractual duty. Generally, to furnish some independent basis for a claim against the mediator, a contract would have to contain some specific undertaking by the mediator, such as a promise to achieve a particular result or provide certain procedural protections. For instance, if a mediator undertakes in his contract to insure a fair exchange of information between the parties, or if he promises to hold the mediation within a set period of time, and fails to fulfill either undertaking, liability could arise under a contractual theory.

Typical mediation agreements used in practice today do not include such undertakings by the mediator. Such agreements tend to be much more general and primarily serve as a vehicle to insulate the mediator and inform the participants.

A third possible theory of liability that might be applied to mediators is breach of fiduciary duty. Under the law of fiduciary duty, an equitable remedy arises in favor of a claimant who placed his trust in another with whom he has a confidential relationship if the trusted party fails to carry out the justifiable expectations of the claimant. Liability may result from even the "slightest breach" of the fiduciary’s duty.

Although some commentators have argued that the breach of fiduciary duty is the most appropriate remedy in the mediator liability context, others disagree and have expressed concern that judging mediators under such a

492. Id.
493. Richardson, supra note 15, at 626.
494. Chaykin, supra note 487, at 63.
495. Id.
496. Id.
497. Richardson, supra note 15, at 626-27.
498. Id. at 626-27; Chaykin, supra note 487, at 55-56, 68-70.
499. Chaykin, supra note 487, at 55.
500. Chaykin, supra note 178, at 738.
501. Chaykin, supra note 487, at 70.
502. Chaykin, supra note 178, at 742.
503. Id. at 738, 757.
standard may inhibit the development of mediation. Mediators do not represent the parties as do other fiduciaries. The mediator's duty is to the mediative process itself, which embraces and includes all of the parties to the mediation. This concept views the mediator as more akin to a judge or arbitrator, whose primary duty is not to the individuals but to the abstract value of fairness. In this context, as in others, it may be appropriate to draw a distinction between a mediator who presides over a mediation in which the parties are represented by counsel and one in which the parties are unrepresented.

Another factor to be considered in the area of mediator liability is the difficulty in establishing causation and damages. Assume, for instance, that the mediator has promised to furnish a fair procedural forum and fails to deliver; or, that he has provided inaccurate information upon which the parties relied during negotiations; or, that he breaches his confidentiality obligations. In each of these situations it will likely be very difficult to prove either that the conduct of the mediator caused damage to the party or the amount of that damage. The claimant will likely have a difficult time establishing what the result would have been but for the mediator's alleged conduct, and the difficulties of proof may well preclude recovery.

As a practical matter it seems that there are very narrow circumstances under which mediators are likely to be held liable under the present state of the law. There is no legal theory into which mediator liability fits comfortably. Practical impediments to establishing causation and damages also work against such verdicts. Nonetheless, a tremendous amount of uncertainty exists in this area of the law, and few guidelines are available to courts which increasingly may be faced with lawsuits against mediators. As with the absence of ethical rules and standards of conduct, uncertainties regarding potential civil liability may be undesirable not only from the point of view of mediators, but also from that of parties to mediations and the public. Although some commentators have expressed the opinion that mediator liability should be allowed "to develop naturally from common law," the opposite argument—that a greater degree of certainty is desirable—has much legitimacy.

A related question is whether an attorney-mediator can be liable for legal malpractice for conduct in the course of his performance as a mediator. The

504. Richardson, supra note 15, at 627.
505. Chaykin, supra note 178, at 745.
506. Id.
507. Id.
508. Chakin, supra note 487, at 60, 64-70.
509. An often cited example of these difficulties is the case of Lange v. Marshall, 622 S.W.2d 237 (Mo. Ct. App. 1981). *Lange* is one of the few cases considering mediator liability and its result may well have deterred other parties from bringing similar actions.
510. Chaykin, supra note 487, at 50.
511. Id. at 83.
512. One important basis for potential mediator liability involves disclosure of confidential information and related issues. This subject is discussed in greater detail infra part IX.F.
principles discussed above in connection with the applicability of attorney standards of conduct and ethical rules to attorneys acting as mediators should apply in this context as well. A lawyer acting as a mediator should not be subject to a legal malpractice claim if his activities as mediator fall outside the scope of what is considered to be encompassed within the practice of law. However, uncertainties regarding the scope of the practice of law and the resulting potential for liability add to the need for clarified attorney-mediator’s responsibilities.

2. Immunity

One proposed “solution” or partial solution for dealing with mediator liability is to grant immunity from liability to mediators acting in the course of their functions as mediator. Immunities from liability generally exist when the law considers an activity’s social importance sufficient to allow those carrying out the activity to do so without threat of civil suit. The two related types of immunity to which potential mediator immunity is usually compared are judicial immunity and arbitrator immunity.

There is a difference of opinion as to whether mediators should enjoy immunity in the same way that judges and arbitrators do. While a mediator, like a judge or arbitrator, “performs a socially useful function demanding a high degree of independence” which is threatened by the prospect of civil actions, mediators do not decide cases, the essential conduct with respect to which judges and arbitrators are insulated from liability. It has also been suggested that empirical evidence establishing that immunity is necessary to avoid discouraging qualified mediators from engaging in the practice is lacking and that mediator immunity could destroy the “prophylactic” factor that potential civil liability can have to insure the quality of professional services.

Others are less categorical, suggesting that qualified immunity be extended such that mediators’ liability would be limited to “bad faith” conduct. Another compromise proposal suggests extending immunity only to mediators acting as part of court-annexed projects, under the theory that the judge’s immunity should be transferred with the function. However, this approach has been criticized as creating a distinction which has no sound practical basis.

513. See infra part IX.C.3.
514. Chaykin, supra note 487, at 52.
515. Chaykin, supra note 178, at 762.
516. Id.
517. Richardson, supra note 15, at 640.
518. Chaykin, supra note 487, at 50-51. This commentator, however, admits that liability can have a negative and demoralizing impact on the service providers. Id. at 51.
519. Chaykin, supra note 178, at 762.
520. Chaykin, supra note 487, at 53 and 83.
521. Id.
If immunity is to be extended to mediators, it could be done by the courts under general principles of immunity or by legislation. In *Butz v. Economou*, the United States Supreme Court articulated a two-pronged test for determining the existence of absolute immunity. If the official’s function is judicial in nature and an allegedly injured party’s constitutional rights are protected by safeguards built into regulatory procedures, then the officer’s conduct is immune. Thus, grand jurors, prosecutors, witnesses, and petit jurors enjoy immunity. Mediators, though they have no decisional authority, might qualify for immunity under the *Butz* test. However, it is probably preferable that immunity be legislatively enacted if it is to be extended to mediators.

By the late 1980s at least fourteen states had enacted some form of immunity applicable to mediators in certain types of mediation. The recent trend in states adopting state-wide, court-annexed mandatory mediation appears to be to extend absolute immunity to mediators in the programs.

In 1989, the Florida Legislature, for the purpose of assuring participation of qualified mediators, enacted legislation extending to court-appointed mediators absolute judicial immunity. This legislation was enacted on recommendation of the state’s Senate Judiciary-Civil Committee, the Family Law Section of the Florida Bar Association, and the Mediation and Arbitration Committee of the

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Supreme Court of Florida. The stated purpose was to protect mediators from harassing litigation brought by parties disappointed with the outcome of their mediations. The Florida Bar Association took the position that such immunity was necessary to assure availability of mediators in the state’s program.

As discussed above, Florida also adopted a detailed set of ethical rules and standards of conduct for mediators, together with a comprehensive enforcement mechanism. Thus, the Florida model eliminates the availability of private civil remedies against mediators, but places into effect a highly structured system of professional regulation. Although the Florida system does not do so, legislation or court rules might be adopted to afford relief in appropriate cases to parties who have been subjected to mediator misconduct. Such relief could allow the aggrieved parties to rescind settlement agreements that have been inappropriately entered.

North Carolina followed the Florida model in its court-annexed program by extending “the same immunity from criminal and civil penalties as that given ‘a judge of the General Court of Justice.’” This immunity was bestowed not primarily to protect mediators but to benefit the public by encouraging mediators to carry out their duties free from fear of adverse consequences.

3. Exculpatory Contractual Clauses

In the absence of immunity legislation, mediators sometimes attempt to limit or exclude their liability by inserting general exculpatory clauses in mediation agreements executed by the parties prior to mediation. An example of a standard clause of this type states: “The mediator shall not be liable for any act or omission in connection with his role as mediator.” Grave doubt exists regarding the enforceability of general exculpatory clauses. Such provisions are disfavored and courts often have found them unenforceable in other contexts. Mediators should not rely on the effectiveness of these clauses, and, if it is determined that insulation from liability is in the public interest, legislation is a more appropriate method of achieving this end.

528. Id. at 636-37.
529. Id. at 636.
530. Id. at 638.
531. See supra text accompanying notes 438-447.
532. It has been suggested that there may be an argument that granting absolute immunity to court-appointed mediators violates the constitutional right of access to the courts. Richardson, supra note 15, at 641-43. Presumably, the analysis to determine constitutionality would consider whether the state’s purposes in recruiting volunteers and easing case loads are sufficiently compelling to deny a constitutional right. However, a more appropriate analysis might consider whether the state has an obligation to allow a cause of action against a mediator.
534. Mebane, supra note 102, at 1870.
535. Chaykin, supra note 487, at 47 n.2.
536. Id.
E. "Mandatory" Versus "Voluntary" Mediation

One of the issues posed by the institutionalization of mediation about which the most controversy exists is the extent to which participation in mediation should be "mandatory" or "voluntary." Mandatory in today's ADR vernacular does not mean that every case is referred to mediation, but rather that the judge has authority to order the parties to mediate in cases he feels are appropriate, even though one or both parties would prefer not to participate.\textsuperscript{537} Some mediation referral schemes are "semi-mandatory," allowing one or both parties to opt out, with or without showing good cause.\textsuperscript{538} The methods for selecting the cases to be referred to mandatory mediation are discussed elsewhere in this article.\textsuperscript{539}

The philosophy behind compelling mediation in some cases is that initial compulsion is sometimes required to get the parties to concentrate on settlement, and that, particularly in jurisdictions where mediation is not yet a common practice, some period of forced participation is required to overcome opposition to this innovative dispute resolution process.

Experience has shown that initial participation in alternative dispute resolution programs tends to depend on the degree to which it is compulsory. Voluntary programs initially attract a substantially lower number of participants than do compulsory programs.\textsuperscript{540} This phenomenon has been attributed to the attitudes of attorneys toward new programs as well as the expectations of most parties for the traditional judicial forum.\textsuperscript{541} Low levels of coercion appear to result in high rates of refusals to mediate and failures to appear: "the less the cost of rejecting the mediation (the less unpleasant the alternative), the less likely the respondent will be to agree to mediation."\textsuperscript{542} These findings suggest that mandatory mediation may be necessary to bring about interest in and allow exposure to the mediation process. By such exposure that the public and the legal community will realize mediation's value.\textsuperscript{543}

\textsuperscript{537} See Morgan, supra note 37, at 502 n.70.
\textsuperscript{538} Note, supra note 90, at 1103-04. See, e.g., Tex. Civ. Prac. & Rem. Code Ann. § 154.022 (West 1994) ("allowing parties to object to an ADR referral but prohibiting a court from referring a case only if it finds a 'reasonable basis' for the objection"). Note, supra note 90, at 1104 n.125.
\textsuperscript{539} See infra part IX.H.
\textsuperscript{540} Pearson, supra note 10, at 426-27.
\textsuperscript{541} Id. at 427-28.
\textsuperscript{542} Id. at 428-29 (citing William F. Felstiner & Lynn Williams, Community Mediation in Dorchester, Massachusetts 18 (1979/1980)).
\textsuperscript{543} Pearson, supra note 10, at 429. In the federal District Court pilot programs, it is typically in the districts where the program is mandatory that the volume of cases mediated is substantial. However, two of the voluntary programs enjoy a large number of referrals per year. The distinguishing factor of these programs from those which "lack substantial volume is that they are formally organized and administered," with active solicitation by the courts of volunteers and efforts to "make participation easy." Also, both programs are "in states with established mediation programs in the state court systems" which therefore have a large number of attorneys experienced in mediation. Dunworth & Kakalik, supra note 43, at 1333.
Voluntary mediation programs, because they do not attract significant numbers of participants, generally are not cost effective, are unsuccessful in reducing crowded dockets, and are unable to establish a core of experienced mediators.\textsuperscript{544} Because there is some evidence that mediation resolution rates are related to the level of experience of the mediator, it is essential that the volume of mediations be sufficient to afford mediators on-the-job training.\textsuperscript{545}

In the belief that court-ordered mediation will promote “valuable long-term changes in the civil justice system,” and because there has been an under-use of voluntary mediation, some observers have argued that Congress and state legislatures should allow courts to mandatorily impose mediation on a widespread basis.\textsuperscript{546} One way to allay fears of coercion in association with mandatory mediation is to adopt safeguards to assure that mediation is fair and effective.\textsuperscript{547} Some suggested safeguards include requiring the presence of both lawyers and clients willing to participate meaningfully; providing appropriate oversight mechanisms to assure quality in confidential proceedings; insuring that trial is not significantly delayed; and screening to exclude cases more appropriate for handling through the traditional adversarial process.\textsuperscript{548}

Studies indicate that those who voluntarily choose mediation over traditional judicial process tend to be those who are generally more willing to try new things.\textsuperscript{549} Frequent exposure to particular ideas influences individuals to choose those ideas.\textsuperscript{550} For the same reason companies spend billions of dollars to advertise their products, forced exposure to systems, programs, and practices may be the best way to overcome opposition and convince the public to try alternatives to the traditional.\textsuperscript{551} “Most people learn about mediation most efficiently and effectively by participating, and the vast majority are pleased with what they learn.”\textsuperscript{552}

Although there initially appears to be some contradiction between the voluntariness and self-determination that mediation is intended to foster and the coercion of a mandatory mediation requirement, mandatory proponents argue that there is no real inconsistency. Because no party can be forced to settle or otherwise alter his or her position in a mediation, the coercion only relates to requiring that parties try to reach an agreement to resolve their dispute.

It has also been noted that non-mandatory mediation is not really a voluntary system.\textsuperscript{553} In a non-mandatory mediation program, either party can force the

\begin{small}
\textsuperscript{544} Pearson, supra note 10, at 439.  \\
\textsuperscript{545} Id. at 427-28.  \\
\textsuperscript{546} Note, supra note 90, at 1095.  \\
\textsuperscript{547} Id. at 1095.  \\
\textsuperscript{548} Id.  \\
\textsuperscript{549} Rosenberg, supra note 5, at 503-04.  \\
\textsuperscript{550} Id. at 504.  \\
\textsuperscript{551} Id.  \\
\textsuperscript{552} Id.  \\
\textsuperscript{553} Id.
\end{small}
other to forego mediation by refusing to mediate.\textsuperscript{554} The issue is perhaps more appropriately framed not as one of voluntariness or coercion, but rather as which preference will have veto power over the other.

The law can mandate attendance at mediation sessions without mandating agreement. Compelled mediation does not interfere with constitutional rights because parties retain their right to litigate in court.\textsuperscript{555} The premise underlying mandatory mediation is that many who could have opted not to mediate but are forced to mediate end up satisfied with the process and glad they were ordered to participate.\textsuperscript{556}

The voluntariness with which the parties participate does not appear to affect mediation outcomes. Studies indicate that there is no difference in the likelihood of reaching settlement in cases where the parties choose to mediate as opposed to those in which mediation is mandatorily imposed upon them.\textsuperscript{557} "Empirical studies have suggested that most parties involved in mandatory mediation express greater satisfaction than do those involved in adjudication."\textsuperscript{558} On the other hand, opponents of mandatory court-annexed programs argue that merely because parties, judges, and attorneys express satisfaction with mandatory mediation, this satisfaction does not justify a practice which they consider an affront to established notions of "fairness and due process."\textsuperscript{559}

One interest-based mediation proponent has questioned whether mandatory programs can serve an educational function.\textsuperscript{560} Her skepticism is based upon doubt that those who are totally ignorant of mediation can be properly instructed. This is based on the conviction that "a certain consciousness" is required in order for "quality solutions" to be achieved.\textsuperscript{561} Another concern expressed by others is that mandatory programs "may force litigants to endure a costly procedure implemented on an ad hoc basis with minimal benefit."\textsuperscript{562}

Brown and Ayres have advanced what amounts to be a compromise of the mandatory versus voluntary mediation debate, at least in connection with contractual disputes. They suggest that legislation be enacted which would "imply a default mediation provision" into contracts in the absence of an explicit

\begin{footnotes}
\footnote{554}{\textit{Id.}}
\footnote{555}{Note, supra note 90, at page 1094.}
\footnote{556}{Id. at 1093; Rosenberg, \textit{supra} note 5, at 468. While one-third of spouses in certain studies would have refused to participate in mediation if given the choice, when mandatory mediation was imposed on them, 75-80\% expressed satisfaction with the process and were happy mediation had been ordered. Id. at 504-05.}
\footnote{557}{Note, supra note 90, at 1094. A study of small claims mediation in Maine reported a nearly identical settlement rate (77.7\%) in cases where mediation was elective and in cases ordered to mediation (73.2\%). Craig A. McEwen & Richard J. Maiman, \textit{Mediation in Small Claims Court: Achieving Compliance Through Consent}, 18 L. & Soc'y Rev. 11, 21, 26 (1984).}
\footnote{558}{Note, supra note 90, at 1093.}
\footnote{559}{Kerbeshian, \textit{supra} note 194, at 424.}
\footnote{560}{Menkel-Meadow, \textit{supra} note 68, at 45.}
\footnote{561}{\textit{Id.}}
\footnote{562}{Rammelt, \textit{supra} note 46, at 988.}
\end{footnotes}
opt-out, such that any dispute arising out of the contract would be mediated unless the parties agreed otherwise. They argue that many of mandatory mediation’s advantages are retained with such legislation. Certainly, such a presumption would eliminate the power of one party to prevent submission of a dispute to mediation by refusing to consent. Moreover, the “private information” that makes it difficult for adverse parties to affirmatively opt for mediation under the current system when it would be efficient to do so might also make it difficult for them to opt out of a default requiring mediation.

F. Confidentiality and Privilege of Communications During Mediation

One of the propositions regarding mediation with respect to which there is a strong consensus is the importance of confidentiality to the integrity of the process. Confidentiality is essential to the functioning of mediation. Confidentiality engenders frankness and facilitates a complete exploration of the issues underlying the parties’ dispute. Parties usually work more cooperatively in an “atmosphere of privacy and discretion.” They generally resist disclosing information, personal needs, and strategies if there is concern that such disclosures can be used against them.

Given that mediation is conducted in the context of a dispute—often hotly contested and charged with emotion—the participants ordinarily approach one another with a great deal of distrust. Under such circumstances, a disputant is understandably hesitant to give his adversary information which could be used to his great detriment. Confidentiality is essential to create the kind of safe environment which will permit meaningful interaction between the parties. Candid discussions in the separate caucuses that characterize the emerging dominant model often are premised upon a belief that all that transpires will be held confidential.

Disclosures during private caucuses are crucial to enable the mediator to understand the parties’ hidden motives and interests and thereby to formulate creative suggestions to resolve the dispute. Such disclosures would not be made if there were a possibility that mediators, whether voluntarily or in response to coercion, could divulge such confidences, in court or otherwise. Additional-

563. Brown & Ayres, supra note 176, at 387 (the authors point out that most current debate regarding mandatory and voluntary mediation fails to consider this possibility).
564. Id.
565. Id. at 387-88.
566. Brown, supra note 4, at 307-08, 310; Nolan-Haley & Volpe, supra note 23, at 584.
568. Id.
569. Brown, supra note 4, at 310.
570. Id.
571. See id. See also Irvine, supra note 29, at 160.
572. Brown, supra note 4, at 310.
573. Id.
ly, if conduct and statements made during mediation are inadmissible, the risk that mediation will be used as a subterfuge for unprincipled discovery is reduced.\textsuperscript{574} Finally, confidentiality encourages parties who wish to shield their disputes or certain aspects of it from public view to participate meaningfully in the mediation process.\textsuperscript{575} Quite simply, if confidentiality is absent, both the mediator’s effectiveness and the disputant’s willingness to risk exposure would be destroyed, as would the future viability of mediation as a dispute resolution process.\textsuperscript{576}

Typically, mediators represent to the parties and their counsel that any disclosures made during the course of mediation are confidential. They generally state that anything said during the joint sessions cannot be introduced into evidence in court; that the mediator will not and cannot be forced to disclose anything he has been told in separate caucuses; and that all information generated by the mediation process “will go no further.” The only caveat usually added to these broad assurances is that facts which otherwise would be discoverable cannot be shielded merely by virtue of their disclosure during the mediation.

There are serious questions regarding the accuracy of such sweeping representations. The bases available to shield disclosures made during mediation—which vary from one jurisdiction to the next—determine the degree to which such assurances deviate from reality.

1. Confidentiality Versus Privilege

In order to properly conceptualize the protection afforded communications made during mediation, a distinction must be made between confidentiality and privilege. If a communication is confidential, it may not be offered as evidence in proceedings in the same case.\textsuperscript{577} If a communication is privileged, on the other hand, virtually any disclosure, in or out of court, is prohibited.\textsuperscript{578}

There are different points of view regarding the degree of protection that should be afforded to communications made during mediation. Some believe that confidentiality is so important to mediation and that mediation is so important as a means of dispute resolution that there should be “sweeping protection” preventing disclosure under all circumstances.\textsuperscript{579} Others express the opinion that “narrow coverage . . . limited to subsequent proceedings in the same case” is sufficient.\textsuperscript{580}

As discussed below,\textsuperscript{581} a number of states have adopted statutes relating to confidentiality in mediation. In the absence of such a statute or a court rule, mediators rely upon general evidentiary exclusions and agreements between the

\textsuperscript{574} Mebane, supra note 102, at 1872.
\textsuperscript{575} Id.
\textsuperscript{576} Id.
\textsuperscript{577} Irvine, supra note 29, at 156 n.4.
\textsuperscript{578} Id.
\textsuperscript{579} Irvine, supra note 29, at 164-65, 182.
\textsuperscript{580} Id. at 165, 181-82.
\textsuperscript{581} See infra part IX.F.6.
parties to the mediation as the basis for asserting that disclosures made during mediation are privileged or confidential.\textsuperscript{582} However, the confidentiality expectations under these general principles and under private agreements—and indeed even under many mediation confidentiality statutes—are often much greater than the protection actually afforded.\textsuperscript{583}

2. Mediation Communications as Settlement Negotiations

A logical basis for shielding from disclosure communications made during mediation is the notion that they are part of settlement negotiations which are inadmissible under the common law and under modern rules of evidence.\textsuperscript{584} While this evidentiary exclusion does provide some protection, it does not offer the degree of coverage sometimes suggested. Under the common law exclusion, it was only an actual offer of settlement that was inadmissible at trial. In fact, if the offer included an independent statement of fact, that statement could be offered as an admission against the offeror.\textsuperscript{585} Perhaps even more crucial, the offer itself was admissible to prove any relevant matter other than liability, including agency, bias, and impeachment.\textsuperscript{586}

While the Federal Rules of Evidence and the Louisiana Code of Evidence have expanded the scope of confidentiality accorded to communications during settlement negotiations,\textsuperscript{587} there are still large gaps in the protection afforded. Federal Rule 408 and Louisiana article 408 (hereinafter “Rule 408”) make inadmissible not only offers, but statements made in an attempt to settle disputes. However, such inadmissibility still only applies with respect to proof of liability for or invalidity of a claim.\textsuperscript{588} Such statements or conduct may be offered for a legitimate purpose other than to prove liability or amount.\textsuperscript{589} This constitutes a huge loophole which able counsel seeking to use the evidence can often exploit. In particular, because of the nature of mediation, the scope and type of disclosures made by the parties often are very broad and likely to furnish valuable sources of impeachment and bias.\textsuperscript{590}

Additionally, the risk that damaging information disclosed in confidence during the mediation may be used to establish liability in the case is only one of the dangers that a party may consider when determining whether to make a disclosure. Rule 408 only applies to admissibility at trial; it does not protect parties from

\begin{thebibliography}{9}
\bibitem{582} Irvine, \textit{supra} note 29, at 165.
\bibitem{583} \textit{Id.}
\bibitem{584} Brown, \textit{supra} note 4, at 311-12; Fed. R. Evid. 408; La. Code Evid. art. 408.
\bibitem{585} Brown, \textit{supra} note 4, at 312.
\bibitem{586} \textit{Id.}
\bibitem{587} \textit{Id.}
\bibitem{588} \textit{Id.} at 313.
\bibitem{589} \textit{Id.}
\bibitem{590} \textit{Id.}
\end{thebibliography}
discovering mediation communications. Nor does it prevent disclosure of statements to the public or others outside of court. Such uncertainty regarding possible disclosure of sensitive information operates as a serious impediment to the frankness and open disclosure which are so essential to successful mediation.

Neither the common law rule nor Rule 408 would block compelled disclosure or prohibit the introduction into evidence of the mediator's own "perceptions, statements, and conduct." Finally, Rule 408 does not offer any protection for agreements arising out of mediation. Therefore, if parties admit liability or guilt in settlement agreements, those admissions could later be used against them in criminal trials or in civil suits brought by third parties.

3. Creation of a Mediation Privilege?

Another possible source of protection for communications made during mediation is the judicial recognition or creation of a new privilege applicable to such communications. Various courts and commentators have considered whether the traditional professional privileges enjoyed at common law between doctors and patients, priests and penitents, and attorneys and clients should be extended to the mediator-mediator relationship.

The decision to create a new privilege is left to each individual court. Historically, a four-part test formulated by Wigmore has been employed to evaluate this question: (1) does the communication originate in confidence that it will not be disclosed; (2) is confidentiality essential to the full and satisfactory maintenance of the relations between the parties; (3) is the relationship one which the community considers worthy of protection; and (4) would the injury to the relationship caused by the disclosure of confidential communications be greater than the benefit to be gained by accurate disclosure?

A number of judicial opinions disclose a growing solicitude for mediation and a recognition of the importance of confidentiality to the process. While most

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591. Id. at 314.
592. Lomax, supra note 36, at 77.
593. Brown, supra note 4, at 314.
594. Id. at 312.
595. Id. at 313.
596. Id.
597. Id. at 316-17. Rule 501 of the Federal Rule of Evidence recognizes the power of courts to create new evidentiary privileges under appropriate circumstances. Id. at 315.
599. Brown, supra note 4, at 315.
600. See Murphy, supra note 598, at 237 (citing John H. Wigmore, Evidence and Trials at Common Law § 2285, at 527 (John T. McNaughton rev. ed. 1961)). See also United States v. Funk, 84 F. Supp. 967 (E.D. Ky. 1949) and Marceau v. Orange Realty Co., 92 A.2d 656 (N.H. 1952). This discussion assumes, of course, that the attorney operating as a mediator is not engaged in the practice of law and therefore that neither he nor a party to the mediation could claim the attorney-client privilege.
of the cases upholding non-disclosure merely confirm the enforceability of existing mediation privilege or confidentiality statutes and do not create a new privilege, the attitudes disclosed may presage the outcome of future judicial efforts to create a mediation privilege.  

In United States v. Gullo, a defendant who was before a federal court on criminal charges had previously participated in a mediation under an agreement which provided that "the neutral . . . will hold all information received during the hearing as confidential and will not voluntarily divulge that information." Moreover, the New York statute under which the mediation was conducted made all proceedings confidential and inadmissible in the state courts. After finding that the federal court was not bound by the New York law, the court considered whether it should find a common law privilege under Wigmore's four-part balancing test. The court noted the strong public policy favoring admission of all relevant facts in a criminal case, but also recognized that confidentiality is at the very core of a successful mediation. The court also noted that the state had failed to demonstrate any particularized need for the information sought to be admitted. Considering the damage to the local policy if the privilege was not recognized and concluding that any disclosure would undermine the overall effectiveness of the mediation system, the court held that the mediation communications were privileged. The court excluded all statements, terms, and conditions of the settlement from use at trial.

Though the facts of Gullo favored a finding of privilege, other courts in other circumstances may reach a different conclusion. Mediators should not rely upon the possibility that a new privilege will be created as a basis for giving parties assurances regarding the confidentiality of their disclosures. Definitive statements of the availability of a special mediation privilege are simply not accurate at this point in time and threaten to undermine the trust parties must have in mediators.

601. Brown, supra note 4, at 309-30, 316, 321-22. The author cited the following cases as reflective of such judicial attitudes: International Ass'n of Machinists & Aerospace Workers v. National Mediation Bd., 425 F.2d 527 (D.C. Cir. 1970) (characterizing mediation "as a subtle and delicate process, where the mediator functions as a catalyst, and where privacy is a key element."); Brown, supra note 4, at 309-10.; Local 808, Building Maintenance, Service & Railway Workers v. National Mediation Bd., 888 F.2d 1428 (D.C. Cir. 1989) (praising mediation process "as a black box where mediators work their own brand of magic to break deadlocks" and as "an art form fundamentally different from adjudication."); Brown, supra note 4, at 316.; In re Parkway Manor Health Care Center, 448 N.W.2d 116 (Minn. Ct. App. 1989) (recognizing "compelling need for confidentiality in the mediation process because it fosters party confidence" and perception of mediator impartiality and recognizing mediation privilege before effectiveness of newly passed statutory privilege. Brown, supra note 4, at 321-22.; Byrd v. State, 367 S.E.2d 300 (Ga. App. 1988) (holding, subject to a strong dissent, that admission of guilt in mediated settlement agreement could not be introduced in criminal trial, noting there might be a different outcome in a private, voluntary mediation rather than a court-ordered one).  


603. Id. at 102.  

604. See also NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 54 (9th Cir. 1980).
4. Private Confidentiality Agreements

A third basis often relied upon by mediators for confidentiality of mediation proceedings are private agreements entered into by the parties. However, once again, the effectiveness of such agreements is dubious. Under private confidentiality agreements, the parties generally promise not to call the mediator to testify if the case does not settle nor to subpoena records maintained by the mediator. Such agreements usually include a promise not to attempt to introduce into evidence any statements made by any other party during the mediation and often prohibit the parties and the mediator from disclosing conduct that occurred during the mediation.

Private confidentiality agreements do not guarantee protection from legal discovery. Some courts have upheld while others have overturned confidentiality agreements challenged on public policy grounds. However, a trend to uphold such agreements has been noted. It is generally held that except in certain limited circumstances, courts have "the right to every man's evidence." While the law can establish privileges when called for by public policy, such privileges may not be created by private parties. The reality is that if a court wants to receive evidence, it is difficult, if not impossible, to prevent it from doing so.

Moreover, when the information purportedly protected by a private agreement is sought to be used in some context other than as evidence in litigation between the parties to the mediation, the difficulties become even more formidable. In State v. Castellano, it was held that the mediator's guarantee to the parties that everything said in the mediation was confidential did not bar compelling testimony from him in the criminal trial of one of the parties for murder of the party with whom he was mediating.

5. Contradictory Obligations of the Mediator: The Duty to Disclose

Even more threatening to the mediator than the possibility that his assurances of confidentiality cannot be realized is the dilemma posed when the mediator

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605. Brown, supra note 4, at 318.
606. Zerhusen, supra note 216, at 1170.
607. Mebane, supra note 102, at 1874.
608. Id. at 1874.
609. Id.
610. Murphy, supra note 598, at 227. See also Note, Contracts to Alter the Rules of Evidence, 46 Harv. L. Rev. 138, 142-43 (1932) ("a contract to deprive the court of relevant testimony . . . is an impediment to ascertaining the facts.").
611. Murphy, supra note 598, at 227.
612. Id.
614. Id. at 482. The defendant claimed self-defense and wanted the mediator to testify regarding threats that the victim had made during the mediation sessions.
actually owes a conflicting affirmative duty to disclose information he promised to hold confidential. Such an obligation to disclose may be imposed by statute, may arise from common law, or may be derived from the mediator's ethical duty as a member of another profession. 615

a. Statutory Obligations

The most common duty to disclose established by statute relates to child abuse. There are statutes in every state mandating reports of child abuse by covered professionals, 616 including lawyers, social workers, and psychologists, who often act as mediators. Some commentators have suggested that mediators may be civilly or criminally liable for failure to disclose information about child abuse to proper authorities. 617

In recognition of this conflicting duty of mediators who belong to other professions, the Colorado Council of Mediation Organizations drafted a Code of Professional Conduct for Mediators. 618 The code states that "information received by a mediator in confidence, private session, caucus or joint session with the disputants is confidential and should not be revealed to parties outside of the negotiation . . . ." 619 However, an exception is made "in the event of child abuse by one or more of the disputants," in which case the mediator is "obliged to report these actions to the appropriate agencies." 620 Thus, the mediation confidentiality is limited.

Also, freedom of information laws may place obligations on mediators to disclose information they consider confidential. Although such laws should have no applicability in totally "private" mediations, when mediations are conducted under programs which receive public funds, mediators may be subject to them. 621

b. Common Law Liability

In addition to obligations imposed by statute, mediators may also have a duty under certain common law principles to disclose confidential information which they have learned from the parties. A primary example occurs when a party discloses to the mediator information indicating the existence of a risk of danger to one of the other parties to the mediation, or to a third party who is not

615. Mebane, supra note 102, at 1874-75; Irvine, supra note 29, at 160-61.
616. Murphy, supra note 598, at 221.
617. See, e.g., Mebane, supra note 102, at 1874-75 nn. 138-39.
618. See Murphy, supra note 598, at 221.
619. Id.
620. Id. See infra note 634 and accompanying text regarding the further exception in the Colorado code for information learned by the mediator indicating that a crime which may result in drastic psychological or physical harm to another person will probably be committed.
621. Brown, supra note 4, at 319.
a participant. Similarly, if the parties enter into an illegal agreement which is damaging to others, the same type of duty may arise. In either of these situations, in the absence of a statutory or other basis for overriding the duty, any potential privilege or confidentiality obligation of the mediator to the parties would likely be secondary to the duty to disclose.622

A primary jurisprudential basis for the concern that mediators might be held liable under the duty to disclose theory found in Tarasoff v. Regents of the University of California.623 In that case, the California Supreme Court found a psychotherapist negligent for his failure to warn a third party of a patient's threats to murder her.624 That decision constitutes a departure from the general rule that one is not liable for the wrongful conduct of others. It is generally felt that Tarasoff will not be broadly extended.625 The psychotherapist's duty to disclose in Tarasoff primarily was based upon his special relationship with his patient, which "places the psychotherapist under a duty to control the patient's conduct."626

Unlike a psychotherapist, a mediator ordinarily does not have the intimate relationship with the parties that typically exists between a psychotherapist and his patient.627 In addition, mediators generally are not trained in areas that enable them to judge the true danger of a particular threat.628 Thus, it is possible that the Tarasoff theory will not be applied to mediators.

On the other hand, because mediators urge the parties to openly disclose their thoughts and feelings, and "to delve into collateral issues that would not be raised in formal litigation," participants sometimes admit wrongdoings or liability during the course of the process.629 Such self-incriminating statements may suggest to mediators that third parties or parties to the mediation are in serious peril unless warned.630 In this situation, the mediator faces a dilemma, not only because of potential liability to which he might be exposed, but also because it is hard to know to whom the mediator owes the greater duty professionally and morally—to the party whom he has promised confidentiality or to the person whom the mediator believes to be threatened with harm.

There is a basic difference of opinion among commentators and policy-makers as to which interest is more worthy of protection.631 The choice

622. Chaykin, supra note 487, at 73.
624. Chaykin, supra note 487, at 73 (citing Tarasoff, 551 P.2d at 343).
625. Id.
626. Id.
627. Id. at 74.
628. Id.
629. Murphy, supra note 598, at 210.
630. Chaykin, supra note 487, at 75.
631. Compare, e.g., Stulberg, supra note 380, at 87-88 (arguing that "as a matter of policy and practice" it is preferable that the mediator have "no obligation to block such conduct once the mediation conference has concluded") and Murphy, supra note 598, at 212 (arguing "that legislation should be adopted to reflect a public policy that favors the long-term benefits derived from mediation
between the two is a matter of policy which should be addressed by the legislature and the courts. However, it is crucial that the issue be resolved in some manner in order to establish certainty in this area. Mediators must know what their obligations are and they must be able to inform parties whose disputes they mediate of the extent of confidentiality afforded their disclosures.

It has been recognized that imposing a duty on a mediator to disclose that a participant has an intention to commit future crimes, engage in conduct contrary to public policy, or cause injury to another, may have a "negative effect . . . on a disputant's willingness to engage in mediation"; or, it may significantly diminish the party's sense of comfort and trust with the mediator. Likewise, it may deter the mediator "from inquiring too deeply into the root causes and collateral issues" in cases before him out of concern that he may uncover information that would require disclosure. For these reasons, imposing as narrow a duty as possible might be advisable.

For example, the Colorado Council of Mediation Organizations Code of Professional Conduct for Mediators excepts from the rule of mediation confidential information indicating probable cause that a "crime will be committed that may result in drastic psychological or physical harm to another person." Another solution may be to limit duties of disclosure by establishing exceptions to the mediator privilege comparable to the exceptions applicable to the attorney-client privilege.

c. Conflict With Professional Responsibility

Ethical rules to which mediators are obligated as members of other professions may clash with the confidentiality obligations they owe as mediators. A particularly vexing example of such potential conflict arises under Rule 8.3 of both the Model Rules of Professional Conduct and the Louisiana Rules of Professional Conduct (hereinafter "Rule 8.3").

Under Rule 8.3, an attorney-mediator who observes an attorney-advocate engaging in unethical conduct during the course of a mediation has a duty to report the conduct to disciplinary authorities. When the attorney-mediator has both an obligation to maintain confidentiality of the proceedings and an

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program over relatively short-term benefits gained from disclosure of individual criminal acts") with Chaykin, supra note 487, at 75 (arguing that "no reason exists to require the mediator to keep . . . information confidential").

632. Murphy, supra note 598, at 222-23.

633. Id. at 223. In addition to the moral and professional duty of mediators not to disclose information revealed by mediation participants in confidence, some jurisdictions actually impose criminal sanctions on mediators who disclose confidential mediation information. Irvine, supra note 29, at 157 (listing Arizona, California, Delaware, Florida, Georgia, Nebraska, New Mexico and Virginia).

634. Murphy, supra note 598, at 221 n.75.

obligation to report attorney misconduct, he faces an irreconcilable conflict.\textsuperscript{636} The attorney-mediator in this situation is confronted with the stark choice between being faithful to his obligations as a mediator to the mediation process or to his duties to the legal profession. He cannot honor both.\textsuperscript{637}

The only satisfactory manner in which this and similar conflicts can be resolved is through legislation or court rule. As will be discussed below,\textsuperscript{638} legislatures are increasingly addressing the confidentiality issue. Unfortunately, even those jurisdictions which recognize the need to establish certainty in the mediation confidentiality area are neither thinking through nor fully addressing potential conflicts of this nature. Colorado and Oklahoma have adopted both Section 8.3 of the Model Rules and mediation confidentiality statutes which do not include an exception for reporting unethical conduct.\textsuperscript{639} The combination of such broad mediation confidentiality provisions with an unqualified duty to report attorney misconduct exacerbates this "ethical quagmire."\textsuperscript{640} Attorney-mediators have a right to know what is required of them in this contest.\textsuperscript{641}

6. Confidentiality Statutes

It is generally agreed that the most appropriate basis for establishing mediation confidentiality is by statute or court rule.\textsuperscript{642} While state confidentiality enactments probably do not bind federal judges and may not apply to state criminal trials, these are well-defined exceptions that mediators can fairly and easily use to accurately inform participants of the true scope of confidentiality.\textsuperscript{643}

\textsuperscript{636} Irvine, supra note 29, at 162.
\textsuperscript{637} A less daunting but practically important pressure upon mediators conflicting with their confidentiality obligations is the reported practice of judges in some areas to routinely ask the mediator "to evaluate the parties or to reveal information obtained during mediation." Zerhusen, supra note 216, at 1171. This practice should also be curbed by statute or court rule.
\textsuperscript{638} See infra part IX.F.6.
\textsuperscript{639} Irvine, supra note 29, at 181.
\textsuperscript{640} Id.
\textsuperscript{641} There is no reason to suspect that requiring attorney-mediators to disclose attorney misconduct would chill the proper operation of the mediation process. Indeed, there is no interest in shielding attorneys from such reports. It is critical, however, that mediators know what the rules are so that they can be accurately disclosed to the parties and their attorneys as a basis for the mediation.
\textsuperscript{642} Guarantees of confidentiality should be based upon the public policy that mediation is a valuable dispute resolution device. See Murphy, supra note 598, at 231. There is some question regarding whether a court rule or order purporting to create a mediator privilege will be upheld. Lomax, supra note 36, at 77. Under federal practice, "privileges are governed by the principles of common law unless otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority." Id. (quoting Fed. R. Evid. 501). It is questionable "whether a court can, by order, create and enforce a privilege that does not otherwise exist." Lomax, supra note 36, at 77.
\textsuperscript{643} Brown, supra note 4, at 317-18.
The American Bar Association has developed a Model Rule on Confidentiality in Mediation ("Draft Model Rule"). The Draft Model Rule was the product of collaboration among dispute resolution experts and practitioners as well as representatives of concerned sections and committees of the ABA. Undoubtedly, the lack of consistency and structure in this area and the conflicting obligations of mediators constituted the impetus for adoption of the Draft Model Rule.

The Draft Model Rule provides that "all mediation documents and mediation communications are privileged and confidential and shall not be disclosed. They are not subject to disclosure through discovery or any other process, and are not admissible into evidence in any judicial or administrative proceeding." The Draft Model Rule calls for each jurisdiction to "insert appropriate expressions of public policy . . . deemed to override the general rule of confidentiality." Aside from the exceptions that each jurisdiction might tailor, the privilege created by the Draft Model Rule is analogous to the attorney-client privilege in its scope and operation.

A symposium panel was held on the subject of the Draft Model Rule and mediation confidentiality generally. The panel produced a document entitled the Symposium Rule: Confidentiality in Mediation ("the Symposium Rule"). Like the Draft Model Rule, the Symposium Rule bars disclosure whether "through discovery or any other process" of communications agreed to be confidential by the parties and the mediator and excludes admission of such communications "into evidence in any judicial or administrative proceedings." The Symposium Rule establishes its own confidentiality exceptions rather than leaving their formulation to the states. The exceptions are divided into "disclosures that the parties may make, and those disclosures the mediator may make."

644. Irvine, supra note 29, at 165.
645. Id.
646. Id.
647. Id. at 166. The drafters envisioned such standard exceptions as information regarding child abuse and attorney misconduct. Id.
648. Id.
649. Id.
650. Id. at 167.
651. Id.
652. Id. The parties may disclose information: (1) "by agreement of the parties"; (2) "if a legal claim against the mediator is made"; (3) "if there is evidence of ongoing or future criminal activity"; (4) "to prevent manifest injustice"; (5) "to resolve disputes about the agreement that resulted from the mediation"; (6) "if disclosure is required by statute"; (7) "to enforce the agreement to mediate"; or (8) "if the parties . . . are together engaged in litigation with third parties and a court determines fairness to third parties requires disclosure." Id. at 167-68. The mediator is allowed to disclose information: (1) "if required by statute"; (2) "as evidence of ongoing or future criminal activity"; (3) "if it is necessary to prevent manifest injustice"; (4) "if the parties agree to disclosure"; (5) "if there is a legal claim against the mediator"; and (6) "to resolve disputes about the agreement that resulted from the mediation." Id. at 168 & n.68.
The Draft Model Rule and the Symposium Rule both meet the objectives of commentators who urge that the privilege accorded to mediation communications be broad, cover "any matters discussed in mediation," and include not only statements made to the mediator but also communications between the parties. However, the exceptions to confidentiality under the Symposium Rule are somewhat more expansive than those urged by many mediation proponents.

A number of states have enacted mediation privilege or confidentiality statutes. As of October, 1995, 47 states and one territory had enacted some sort of mediation confidentiality statute, although some of these applied only to certain types of mediation. The statutes vary in the breadth of their coverage. Some extend only an immunity from subpoena; while others bar any disclosure, even for purposes relating to interpretation or nullification of settlement agreements produced by a mediation. Some statutes specifically exclude protection of the confidentiality of settlement agreements: others protect only "disclosures related to the topic of the mediation" rather than other topics which might surface during a session. At least five states extend to mediation communications a privilege that is comparable to the attorney-client privilege.

Many statutes incorporate exceptions to the confidentiality rule, most commonly including reports of elder or child abuse. The rationale for these limitations is that unrestricted confidentiality would cause far more harm to the parties than benefit. However, some supporters of mediation argue that a blanket privilege is required in order to assure that parties participating in mediation will disclose all relevant information.

Some mediation statutes, such as Florida's, apply only to court-referred mediation. Others, like the Oregon statute, apply to private mediation as well. A survey of a few of the typical mediation confidentiality statutes demonstrates the variety of the provisions adopted by the states.

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653. Murphy, supra note 598, at 242.
654. See id. (suggesting that the disclosure of information should be "only under the most compelling circumstances," such as "saving a life or preventing drastic psychological or physical harm").
655. Nancy H. Rogers & Craig A. McEwen, Mediation: Law, Policy and Practice, Appendix B.
656. Brown, supra note 4, at 317.
657. Id. at 317-18.
660. Id. at 182.
661. Id. at 183.
662. Id. at 169.
The Oklahoma mediation confidentiality statute provides sweeping protection: "[a]ny information received by a mediator . . . through files, reports, interviews, memoranda, case summaries, or notes and work product of the mediator, is privileged and confidential." Under the statute, no mediator and no party to a mediation proceeding is "subject to administrative or judicial process requiring disclosure of any matters discussed or shall disclose any information obtained during . . . mediation proceedings." An exception to confidentiality in Oklahoma occurs when a disputant waives the privilege by suing the mediator for damages. Also, there is an exception to confidentiality in cases involving child or elder abuse, when the mediator has a duty to report such abuse.

Massachusetts designates "any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person . . ." as a confidential communication not subject to disclosure in any judicial or administrative proceeding. The only exception to the confidential communication provision is for mediations of labor disputes. There is no exception for reporting child or elder abuse.

Under the Colorado Dispute Resolution Act, neither the parties nor the mediator may "voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator . . . ." Exceptions include written consents by all of the parties and the mediator, communications revealing an "intent to commit a felony, inflict bodily harm, or threaten the safety of a minor child," a statutory requirement that a mediation communication be made public, and disclosure of the information if it is "necessary and relevant to an action alleging willful or wanton mediator misconduct." Unlike the attorney-client privilege, there can be no unilateral waiver of the statutory mediation privilege by a disputant. Moreover,
mediators cannot *sua sponte* report attorney misconduct occurring during the course of a mediation unless a felony or bodily harm is involved.673

Under Florida law, each party has a privilege to refuse to disclose communications made during a mediation. Such communications, except for an executed settlement agreement, are confidential and inadmissible, unless all parties agree otherwise.674 Mediators must maintain confidentiality except when otherwise required by law to disclose information. The information protected includes that obtained in individual caucuses.675 Under the Florida statute, "subsequent legal proceedings" are defined as "any legal proceeding between the parties to the mediation."676

Texas protects from disclosure all "communications made in the course of any ADR proceeding," and makes them "unavailable as evidence against a participant."677 Moreover, "conflicts between confidentiality requirements and a duty to disclose are . . . heard in camera to determine the proper course of action."678

The North Carolina General Assembly has made all conduct and communications in their state-wide mediated settlement conferences subject to Rule 408 of the North Carolina Rules of Evidence, which is analogous to Rule 408 of the Federal Rules of Evidence.679 As discussed above, this offers relatively little protection for mediation communications.680

Some cases interpreting statutes and court rules establishing mediation confidentiality have not extended protection as broadly as might be expected.681 In a number of instances, however, courts interpreting mediation confidentiality statutes have given them a broad reading and allowed the policies underlying confidentiality to overcome other competing policies.682

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675. Id.
676. Id. § 44.102(4).
680. See *infra* text accompanying notes 584-596.
681. See, e.g., Brown, *infra* note 4, at 330-32 (discussing Newark Bd. of Educ. v. Newark Teachers Union, 377 A.2d 765 (N.J. Super. Ct. App. Div. 1977) (holding that a rule providing that information disclosed by a party to a mediator in the performance of his duties would not be divulged did not apply to documents given by one side to the mediator merely for transmittal to the other side); Krueger v. Washington Fed. Sav. Bank, 406 N.W.2d 543 (Minn. Ct. App. 1987) (holding that a state confidentiality statute "did not prevent access to discussions as to why the mediation should take place"); Harriman v. Maddocks, 518 A.2d 1027 (Me. 1986) (holding that a blanket mediation communication exclusion barred admission of communications only when offered to prove liability. The court apparently read into the statute the limitations of common law and Rule 408 upon the exclusion of offers of settlement)).
682. See, e.g., Brown, *supra* note 4, at 321-22 (discussing People v. Snyder, 492 N.Y.S.2d 890, 891-892 (N.Y. Sup. Ct. 1985) (construing New York mediation confidentiality statute as being non-
7. The Need for Truth and Accuracy in Descriptions of Confidentiality

From the above discussion, it is clear that under any circumstances there are limitations upon the protection afforded to confidential disclosures made during the course of mediation. In some jurisdictions, there are enormous ambiguities regarding when confidentiality actually will be enforced. This is particularly true in those states, like Louisiana, which have not adopted confidentiality statutes. In order to maintain the integrity of the mediation process and to engender the trust that is essential to make the process work, mediators must be precise and honest in explaining to the parties and their attorneys the degree of protection afforded communications made during the mediation.

At present, a mediator cannot represent with any certainty that statements made during mediation will be held in confidence. Yet, an ABA survey of 288 mediation programs showed that most participants believed that their disclosures were privileged when they probably were not. Truthfulness is essential if parties are to trust mediators. Accurate disclosure of the confidentiality limitations initially may result in fewer disclosures and reduce the effectiveness of mediation, but "[i]n the long run, ... it is the only viable solution."

As subpoenas seeking information from mediators increase, it becomes increasingly important for mediators to honestly and forthrightly disclose the status of confidential protection in their respective jurisdictions. "Inducing disclosure of private information from a reluctant party on representation of confidentiality which the mediator knows to be false is an unacceptable practice." Mediators at least should inform mediatrans that they can only guarantee confidentiality to the greatest extent permitted by law. However, this vague commitment is likely insufficient, and a full and more precise disclosure seems the better practice. Moreover, policy-makers should clarify the rules applicable to confidential

waivable. Snyder involved a mediation following which one party allegedly killed the other. The mediation records were subpoenaed by the district attorney. The court quashed the subpoena, rejecting the state's argument that the defendant had waived the privilege and holding that New York's statute guaranteed absolute confidentiality that even the parties could not waive. The case suggests that the policy behind confidentiality is intended to protect not only the individual mediation participant, but also to further the social goal of resolving "disputes without resort to the courts);

Minnesota Educ. Ass'n v. Bennett, 321 N.W.2d 395 (Minn. 1982) (holding that a mediation confidentiality law overcame an open meetings law applying to school boards and permitted the mediator to authorize a private caucus involving the school board as a party)).

683. Brown, supra note 4, at 308 (quoting Protecting Confidentiality in Mediation, 98 Harv. L. Rev. 441, 441 (1984)).
684. Brown, supra note 4, at 311.
685. Id. at 334.
686. Id.
687. Id. at 308.
688. Id. at 311.
689. Id.
communications so mediators are better able to accurately explain to the parties precisely what protections are afforded to disclosures made during mediation.

On the other hand, some commentators have more ambitious aspirations regarding the disclosures mediators should make about how confidential information will be treated. In particular, Brown and Ayres argue that, while mediators often claim that they should and do maintain complete confidentiality of all communications learned in the private caucus, in reality, mediators often make indirect disclosures of such information to the other party. For example, they suggest that mediators often “determine whether a zone of agreement exists” between the parties or calculate “a set of trades that will bring the participants as close to agreement as they can possibly get.” They maintain that revealing to either party that such gains might exist indirectly discloses the mediator’s private discussions with the other side. Indeed, Brown and Ayres argue that such indirect disclosure is a valuable part of what the mediator does and is one of the benefits of the caucus technique. They see a “tension between the mediator’s duty of confidentiality and the need for indirect disclosure,” and urge mediators to be more frank with the parties in explaining how they use confidential information. They suggest that in the absence of contrary language in mediation agreements, the courts enforce an implicit provision requiring strict mediator confidentiality in order to encourage more explicit contracting about how mediators will use caucus information, reasoning that to contract out of the strict confidentiality default, the mediator would have to precisely specify all circumstances in which departure from absolute confidentiality is allowed.

While there is some validity in their thesis, it might be questioned whether the disclosures and explanations Brown and Ayres urge are justified by the benefits that might be derived, particularly considering the potential detriment. The “indirect disclosures” made by mediators are extremely subtle and appear to be non-injurious. Indeed, the parties and their attorneys must realize they are taking place if they are paying any attention at all to the process. Moreover, both parties benefit from the disclosures and neither is hurt. Given the much larger problem of properly disclosing to the parties the uncertain parameters of the mediation privilege, which involves risk of direct and potentially notorious disclosure of sensitive and damaging information, attempting to deal at this stage of the evolution of mediation with the relatively innocuous indirect disclosure issue seems ill-advised.

G. Coercion in Mediation

Although empirical research does not seem to support the concern, another issue often raised about mediation and considered in the institutionalization

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692. Id. at 327.
693. Id.
694. Id. at 326-27, 389-90.
695. Id. at 390-91.
process is the danger of coercion. The first type of potential coercion is that which might be applied by the mediator against the parties. It has been suggested that legislation and mediator ethical rules should prohibit coercion of settlement by mediators.\textsuperscript{696} There is also sentiment that policy-makers should invent safeguards to insure that the confidentiality guaranteed to parties in mediation is not used to veil coercive tactics by mediators.\textsuperscript{697} Some states, such as Texas\textsuperscript{698} and Oklahoma,\textsuperscript{699} have enacted such prohibitions.

One example of coercion that has been cited by observers of the Florida program relates to the question of who should determine when there is an impasse calling for an end to the mediation. Many mediators in Florida have expressed the opinion that it is their prerogative to decide when a session is over and that the parties are not permitted to leave until the mediator has so decided.\textsuperscript{700} It has been suggested that such an approach is contrary to the traditional mediation practice, which allows the parties the right to withdraw whenever they wish.\textsuperscript{701}

While such mediator tactics do sound rather high-handed, it is generally recognized that a certain amount of “pushing” is required at times to keep the parties on track with their negotiations. If there is no pressure to continue with negotiations when the parties reach a “log jam,” many settlements which could be concluded with a little bit of hard work will be missed. At the same time, it is important that this pressure not be applied in such a way as to destroy the parties’ trust and confidence in the mediator or the self-determination that is the hallmark of the mediation process.

The mediator may be able to retain control over determining when to declare an impasse without strong-arm tactics. At the beginning of the mediation, the mediator might request from the parties a voluntary commitment to allow the mediator to determine when an impasse has been reached and the mediation ended. This approach usually achieves the mediator’s goal in a manner which enhances rather then denigrates both the mediator’s trustworthiness and the parties’ self-determination. A commitment of this sort from the parties, based upon logic, reason, and trust in the mediator, should result in self-imposed pressure on the parties to continue on with the mediation, if so urged by the mediator, when it reaches a point common to many mediations at which there seems to be little hope that a settlement will be concluded.

\textsuperscript{696} Note, supra note 90, at 1098-99. The danger of this type of coercion seems to be much greater in cases in which a mediation or settlement conference is conducted by the judge who will preside over the trial of the case if it does not settle. See id.

\textsuperscript{697} Id. at 1098.


\textsuperscript{700} See Moberly, supra note 33, at 717. See also Alfini, supra note 196, at 74-75.

\textsuperscript{701} Moberly, supra note 33, at 717; Alfini, supra note 196, at 74.
It also has been suggested that mediation legislation should seek to prevent a second type of potential coercion—that which might be applied by a powerful party against a weaker one resulting in an unfair settlement. This is an increasingly controversial issue as mediation seems to be shifting away from a protection-of-rights philosophy. This shift may reflect the increasing frequency with which mediation is conducted between parties represented by attorneys. It may be that in this area, as in others, it is appropriate to apply different standards, depending on whether the parties are represented by counsel in the mediation or not.

H. Selection of Cases Appropriate for Mediation

Legislatures adopting statutes creating mediation programs, judges deciding whether to assign cases to mediation, attorneys representing parties, and many others involved in the system would like to know which cases are appropriate for referral to mediation. There are really two levels at which this inquiry is made. The first level asks the question whether there are certain types of cases which, as a matter of public policy, should not be resolved by mediation. At the second level, the question is whether there are particular characteristics of cases, or of the disputes underlying them, which render them more amenable to resolution through the mediation process than through traditional adjudication or some other form of alternative dispute resolution.

With respect to the first question, there seems to be general agreement that public disputes, including those “concerning constitutional issues, issues surrounding existing government regulation, and issues of great public concern” are not appropriate for mediation. In addition, other more “private” disputes, where there is a need for an authoritative third-party ruling or a public airing, are similarly not proper candidates for non-judicial resolution.

The second question is more complex and is surrounded by more controversy. What types of cases are most amenable to mediation? And, in the policy-making sphere, what procedures should be adopted to select cases for assignment to mediation? There are essentially two methods for selecting cases—the categorical approach and the case-by-case approach. Categorical selection automatically refers cases to mediation on the basis of specific criteria, such as minimum or maximum monetary amounts sought, case subject matter, type of relief sought, number of issues, number of parties, and the like. Case-by-case referrals, on the other hand, involve review by a screening agent or the trial judge to determine individual appropriateness.

702. Note, supra note 90, at 1100.
703. Mebane, supra note 102, at 1867 (quoting Harry T. Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668, 671 (1986)).
704. Note, supra note 90, at pages 1103; Press, supra note 68, at 1040-41.
705. Press, supra note 68, at 1041; Menkel-Meadow, supra note 68, at 34 n.170.
706. Note, supra note 90 at 1103; Press, supra note 68, at 1041.
Categorical assignment of cases is easy to administer and provides consistency and uniformity,\textsuperscript{707} attributes which tend to encourage widespread use of mediation.\textsuperscript{708} However, the more subjective and analytical case-by-case method allows consideration of "additional factors that may be unique to the controversy," or which can only be evaluated by the intervention of a human being.\textsuperscript{709} Factors which practical experience or empirical research have indicated are important in determining whether mediation will be successful include the need in any particular case for privacy and secrecy, the predominance of legal as opposed to factual disputes, time pressures for resolution, the nature of the relationship between the parties, and the potential for a continuing relationship into the future, the parties' attitude toward settlement, whether the attorneys perceive that mediation will save their clients money, whether one or both parties are reluctant to go to trial, the nature and standard of proof, the cost of formal adjudication (including potential delays), the financial strength and risk aversion of the parties, their willingness and ability to act in good faith, and their commitment to prudently and intelligently enter into negotiations.\textsuperscript{710}

From this litany of factors believed to influence the likelihood of a successful mediation outcome, it is apparent that the process of selecting cases could become as complicated as the mediation itself. There is some question whether the cost of engaging in such a sophisticated screening process is justified by the benefits that would be derived. Moreover, there is a good deal of skepticism regarding whether it is possible to develop, much less apply, such predictive criteria with any degree of success. In any case, application of these numerous criteria often gives contradictory indications regarding amenability to mediation. It seems highly unlikely that any accurate predictive model could be created for use either in a categorical or a case-by-case screening system.\textsuperscript{711} At the least, additional study is required to understand more about the types of cases that are being referred to mediation, other forms of alternative dispute resolution,\textsuperscript{712} and which characteristics are indicators of cases most likely to be good candidates for mediation.

One lesson learned from experience thus far is that there is no particular case subject matter or amount in controversy which renders a dispute insuscepti-
ble to resolution by mediation. Perhaps because mediation was originally used to settle small claims, it was once considered inappropriate for large or complex cases. However, this premise has proved untrue. It is now recognized that mediation is not only suitable, but often particularly appropriate, in large complex cases.

In Florida, with a few discrete exceptions, cases of all types may be referred to mediation. A survey of Florida mediators and attorneys disclosed their conviction that mediation was "appropriate for a wide range of substantive case types." There was no consensus among those surveyed regarding case characteristics which might presage a successful mediation.

I. Good Faith Participation in Mediation

Because mediation is a consensual process, its effectiveness necessarily depends upon the meaningful participation of the parties and their counsel in the process. Unless all participants are serious about trying to settle a dispute, mediation almost certainly will not be successful.

When mediation is fully voluntary, all parties generally will approach the mediation seriously with an intent to try to settle the case, unless one or more of them has agreed to participate in the mediation solely for strategic purposes such as delay or to engage in "informal" discovery. In situations in which cases have been referred mandatorily to mediation, however, the likelihood increases that one or more of the parties may "go through the motions" and fail to participate meaningfully.

One of the issues to be considered in constructing a mediation program is whether a rule or statutory requirement should be adopted requiring that parties engage in "good faith" mediation. Opposition to adoption of such a mandatory good faith standard is often grounded on the criticism that the requirement is too vague and can be held coercively over the heads of parties so as to distort the

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713. In fact, many believe mediation is flexible and adaptable enough to "make it suitable for any kind of dispute." Mebane, supra note 102, at 1866-67.

714. See Mebane, supra note 102, at 1866 (North Carolina's statewide mediation program applies to cases in which the amount in controversy exceeds $10,000); Alfini, supra note 196, at 60 (under the Florida program, the predominant type of case ordered to mediation was one which the "likelihood of settlement [was] between $25,000 and $100,000," and numerous cases were reported settled in excess of $1 million); Sandman, supra note 101, at 27 (mediation has been used to great benefit in complex bankruptcy matters); Lieberman & Henry, supra note 3, at 437 ("[t]he best use for ADR may be to resolve . . . cases that are extremely difficult or exceedingly costly to resolve in court," including multi-party cases); Tomain & Lutz, supra note 265, at 3 (criteria for referral to court-annexed mediation program in Cincinnati include $25,000 minimum claim and cases "involving complex rights and duties"). See also Honorable Gladys Kessler & Linda J. Finkelstein, The Evolution of a Multi-Door Courthouse, 37 Cath. U. L. Rev. 577, 582, 589 (1988).

715. Moberly, supra note 33, at 708.

716. Alfini, supra note 196, at 60.

717. Id.
mediation process. Another danger in the imposition of the standard is that it will cause the mediator to become embroiled in the parties’ controversy. When one party charges another with a breach of the good faith standard, it leaves the mediator as the sole disinterested party who is available to testify on the issue. Such a role constitutes a frontal assault on the mediator’s neutrality as well as the confidentiality of the mediation process. The imposition of a good faith standard would result in additional litigation and frustrate several of the primary attributes and objectives of mediation.

One proposal suggests that the good faith mediation standard be made more concrete by legislation which punishes only those parties who act affirmatively to frustrate the process by their lack of cooperation. While this approach does ameliorate the vagueness objection to the good faith requirement, it does not eliminate the need for involving the mediator in an inappropriate role. Nor does it prevent the proliferation of litigation that such a standard would spawn.

If mediation works as well as its proponents claim, parties and attorneys will want to participate meaningfully in the process once they become familiar with it and realize its value. If a party is so recalcitrant that he must be sanctioned for a flagrant refusal to cooperate, it is highly unlikely that a successful mediation would result in any case. It is not worth the risk posed to the mediation process to impose a legally enforceable good faith requirement in order to achieve a highly uncertain benefit.

A much more accessible alternative—and one which may be equally effective in practice—is for the mediator to request from the parties a voluntary commitment that they will use their best efforts to settle the case and that they will engage in good faith negotiations toward that end at the beginning of the mediation session. Such an approach is much more in keeping with the realities of what brings parties to settlement and with mediation's role as a facilitator of the parties’ self-determination.

J. The Timing of Mediation

Another issue which must be considered in establishing a mediation program is the point at which mediation is injected into the adjudicatory process. While timing is very important to a successful program, there is no consensus as to when cases are “ripe for mediation.” One point of view suggests that

718. Alfini, supra note 196, at 64-65. Most Florida lawyers interviewed expressed the opinion that a mediation-in-good-faith requirement and sanctions should be imposed on parties to discourage artificial participation in mediation. Id. at 63.
719. Mebane, supra note 102, at 1868.
720. Id.
721. Id.
722. Id.
723. Note, supra note 90, at 1097.
724. Alfini, supra note 196, at 61.
mediation at too early a stage, especially at a time when insufficient discovery has been taken, is unlikely to be successful.\textsuperscript{725} Under this argument, mediation is much more meaningful once the facts have been sufficiently developed and the issues clarified.\textsuperscript{726} This certainly makes sense if one of the things the parties do during mediation is to assess likely litigation outcomes.

Others argue that mediation should intervene as early as possible after suit is filed.\textsuperscript{727} Those advocating early mediation contend that it will increase efficiency by eliminating unnecessary expenditure of time and money on discovery.\textsuperscript{728}

While there is some appeal to the idea of an immediate diversion of cases at the beginning of the process, as a practical matter, it seems unlikely that parties or their counsel would be willing, in most instances, to seriously consider settlement without conducting some discovery to enable them to evaluate their case and, more particularly, their litigation risks. Automatic and formalistic referral at too early a stage generally results in a waste of resources and can create an impression that the mediation process does not work.\textsuperscript{729} While mediation should be available to the parties at any time during the proceeding, including the very earliest stages, the ordinary time for referral should be some point after there has been sufficient opportunity to conduct meaningful discovery. Certainly, mediation on the eve of trial comes too late.\textsuperscript{730}

One proposal calls for “a more focused and limited discovery process” aimed specifically toward preparation for mediation. Under this system, intervention would occur at filing, unless the parties requested discovery. In this event, a court official would establish a limited discovery schedule.\textsuperscript{731} After this discovery period, a meeting would be held to determine whether the case should remain on the mediation track.\textsuperscript{732} While this system would require some administrative effort, it, or some similar device, might be worth considering as a method for achieving both the savings of early mediation and the enhanced predictability afforded by the availability of an appropriate amount of discovery.

X. MEDIATION IN LOUISIANA

Over the years, Louisiana has adopted by statute various forms of mediation to be applied in resolving disputes in limited, specified areas. State law has long

\textsuperscript{725} Id. See also Tomain & Lutz, supra note 265, at 3 (Cincinnati court-annexed mediation program requires that counsel “have a sufficient period for discovery in order to recommend settlement” before case is referred to mediation); Honorable E. Joseph Bleich, \textit{Meandering on Mediation}, 43 \textit{La. B.J.} 149, 149 (1995).

\textsuperscript{726} Note, supra note 90, at 1102.

\textsuperscript{727} Alfini, supra note 196, at 61.

\textsuperscript{728} Note, supra note 90, at 1102.

\textsuperscript{729} Some practitioners believe that this is true of referrals under the Louisiana workers compensation statute. See infra note 735 and accompanying text.

\textsuperscript{730} Bleich, supra note 725, at 149.

\textsuperscript{731} Note, supra note 90, at 1102.

\textsuperscript{732} Id.
provided that no restraining order or injunctive relief shall be granted to any complainant in a labor dispute who has failed to make every reasonable effort to settle such dispute, either by negotiation or with the aid of any available machinery of governmental mediation or voluntary arbitration.733 Since 1984, Louisiana statutes have provided for mediation in matters involving child custody and visitation issues.734 In worker’s compensation cases, since 1990 an informal conference has been required within fifteen days of receipt of a claim before a dispute resolution officer who is to mediate and encourage settlement of the case.735 Complaints claiming discriminatory housing practices under Louisiana’s Open Housing Act are referred to mediation panels within ten days of filing of the answer.736 Finally, Louisiana laws on professions and occupations provide, in certain instances, for mediation by professional regulatory boards in controversies between members of the profession or occupation.737

More recently, Louisiana has begun to experiment with the use of mediation on a broader basis. With participation by the Legislature, the Supreme Court, Orleans Civil District Court and First City Court, and others, Louisiana has taken its first steps toward the institutionalization of mediation in the State.

A. The Orleans Parish Pilot Program

During the 1991 Regular Session of the Louisiana Legislature, the Louisiana House of Representatives passed House Resolution 32 which urged and requested the Judicial Council, the State Bar Association, and others “to supervise and oversee the work of a task force to develop a plan to implement a pilot program of alternative dispute resolution in the city of New Orleans.”738

After meeting on five occasions, the task force agreed upon the implementation of a pilot program in Civil District Court and First City Court in Orleans


734. 1984 La. Acts No. 788 (formerly La. R.S. 9:351-56 (1950), replaced by La. R.S. 9:331-333 (Supp. 1996) (effective January 1, 1994)). During the 1995 Regular Session of the Louisiana Legislature, Act No. 287 § 1 was passed by the Legislature establishing qualifications of mediators in child custody dispute cases. Prior to this legislation, there was no provision regarding the qualifications of such mediators.


738. H.R. Res. 32, Reg. Sess. La. Leg. (1991). As provided, the task force was composed of two members of the House Civil Law and Procedure Committee to be designated by the speaker; two members designated by the Judicial Council of Louisiana; two members designated by the Louisiana State Bar Association; two members designated by the Louis Martinet Society; one member designated by the Louisiana Trial Lawyers Association; and one member designated by the American Arbitration Association. As finally constituted, two additional members, a representative of the Judicial Council and retired First Judicial District Court Judge John R. Ballard, also served on the task force.
Parish, limited to mediation only. The task force also decided to include all types of cases in the program, except for domestic cases, which were already subject to mediation under state law.

Because the task force considered that "the pilot program might be deemed 'experimental,'" it decided to ask the Louisiana Supreme Court to authorize the program. The task force decided not to request that enabling legislation be submitted. It anticipated implementation of the program through local rules of court. The task force also anticipated the pilot program running one year, with a possible additional one-year extension, and expected to report at the conclusion of the pilot program to the House Civil Law and Procedure Committee regarding the program's success and possibly recommending legislation regarding mediation.

The task force submitted a report to the legislature which embodied its recommendations, and, in response, the legislature passed House Concurrent Resolution No. 76 of 1992. In that resolution, the legislature urged and requested the Louisiana Supreme Court to authorize implementation of a pilot program as proposed in the task force report. The resolution also urged and requested the task force to continue its work toward implementing the pilot program and to supervise its inception.

On September 3, 1992, the Louisiana Supreme Court authorized the establishment and implementation of the pilot program, finding it "would advance the administration of justice in Louisiana . . . ." Finally, on June 1, 1993, the judges of the Civil District Court for the Parish of Orleans adopted Rule 18 of its Rules of Court to implement the pilot mediation program envisioned by the prior legislative and judicial resolutions. The pilot program commenced on September 1, 1993, and was originally set to terminate on August 31, 1994. All twelve divisions of Civil District Court were to participate in the pilot program.

739. Report of the Alternative Dispute Resolution Task Force to the Louisiana House of Representatives, Civil Law and Procedure Committee, undated, 1 (on file with authors) [hereinafter Task Force Report].
740. Id. at 2.
743. Id.
745. Id. at 1, 4.
747. Resolution of the Louisiana Supreme Court, September 3, 1992 (on file with the Clerk's office of the Louisiana Supreme Court).
748. On that same date, the judges of First City Court for the City of New Orleans adopted a parallel Rule 30 of its Court Rules implementing the pilot program in that court. The provisions of Orleans Parish Civil District Court Rule 18 discussed herein also appear in First City Court Rule 30.
749. Orleans Parish Civil District Court Rules of Court, Rule 18, § 1 (the termination date has now been extended until August 31, 1997).
750. The task force originally proposed that only 4 of the 12 divisions would participate in the program.
The basic parameters of the program as envisioned by the Task Force Report were included in the program as implemented by the Civil District Court, with Rule 18 providing some additional details not included in that Report.

The task force's concept of a "semi-mandatory" or "opt-in" mediation program was adopted by the court. Under Rule 18, a form letter is to be "forwarded to all parties after issue is joined" advising litigants of the mediation program and encouraging their participation. Any party may then request mediation, and, upon receiving such a request, the court is required to issue an Order of Referral for Mediation. However, any other party is entitled to object by filing a written motion stating the basis for the opposition within ten days. The court then considers the opposition, and for good cause shown "may retract the Order of Referral for Mediation." This semi-voluntary program was considered by the task force to offer the best opportunity to balance the interests of those who wanted their cases mediated and those who did not.

To avoid imposing additional administrative responsibilities on the court as a result of the pilot program, the task force recommended that the greater part of that burden should be borne by the appointed mediators. The judges would order mediation and simply await the results while the mediator scheduled the mediation and reported back to the court. This approach was adopted by the Civil District Court in Rule 18. After appointment, the mediator is required to file notice of his acceptance with the court and to report back to the court following the mediation regarding the outcome. The Task Force Report "anticipated that statistics concerning the success of the pilot program will be kept."

Under Civil District Court Rule 18, the alternative dispute resolution task force was authorized to "develop an approved list of mediators for use by the judges in appointing mediators" under the pilot program. Attorneys and non-attorneys are eligible to serve as mediators. As a prerequisite to appointment, a mediator "must have participated in and successfully completed a mediator training and certification course" sponsored by one of several named organizations or some other provider certified by the task force. Originally, Rule 18 required 16 hours of approved mediator training, but this was increased to thirty-two hours as of January 1, 1995. Rule 18 encourages parties to select their own mediator.

751. Task Force Report, supra note 739, at 3.
752. Orleans Parish Civil District Court Rules of Court, Rule 18, § 2.
753. Id.
754. Id. at 2.
756. Orleans Parish Civil District Court Rules of Court, Rule 18, §§ 8(a) and (d).
757. Task Force Report, supra note 739, at 3.
758. Orleans Parish Civil District Court Rules of Court, Rule 18, § 3.
759. Id.
760. Id. The named organizations are the Louisiana State Bar Association Continuing Legal Education Committee, and the American Arbitration Association.
761. Orleans Parish Civil District Court Rules of Court, Rule 18, § 3.
In such cases, the mediator need not be on the approved list and presumably is not required to meet the training and certification standards. If the parties do not select a mediator within fifteen days after notice of the Order of Referral for Mediation, the court appoints a mediator from the approved list.\textsuperscript{62}

Each person on the approved list is required to furnish a statement of his or her fee schedule prior to being placed on the list.\textsuperscript{63} The mediation costs are initially shared by the parties and ultimately “taxed as costs of the litigation in the event the mediation does not resolve the dispute.”\textsuperscript{64} In order to be placed on the approved list, mediators must volunteer to handle 10% of their assigned cases on a pro bono basis.\textsuperscript{65}

Rule 18 further provides that mediators are to “preserve and maintain the confidentiality of mediation proceedings,” keeping “confidential from opposing parties any information obtained in individual caucuses” unless otherwise authorized.\textsuperscript{66} They are also to “maintain confidentiality in the storage and disposal of records” and insure that any identifying information in materials used for research, training, or statistical purposes is rendered anonymous.\textsuperscript{67} Rule 18 also states that “all proceedings of the mediation, including statements made by any party, attorney or other participant, are privileged in all respects.”\textsuperscript{68} The proceedings are not to be “reported, recorded, placed into evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest.”\textsuperscript{769} The Rule prohibits the naming of the mediator as a witness, the subpoena or use of his records as evidence, the taking of the mediator’s deposition, or prosecution of any other type of discovery against the mediator.\textsuperscript{770}

Absent express authorization of the disclosing party, the mediator is forbidden from revealing to one party information disclosed to him in confidence by the other party. The mediator “shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.”\textsuperscript{771} Rule 18 reiterates the degree of confidentiality applicable to the mediation proceeding by stating that “[u]nless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing Court.”\textsuperscript{772}

\begin{itemize}
\item \textsuperscript{62} \textit{Id.} § 3.
\item \textsuperscript{63} \textit{Id.} § 4.
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.} § 6.
\item \textsuperscript{67} \textit{Id.}
\item \textsuperscript{68} \textit{Id.}
\item \textsuperscript{69} \textit{Id.}
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} \textit{Id.} § 8(c).
\item \textsuperscript{72} \textit{Id.} § 8(d). It is not entirely clear that a local court has the power to create a mediation communication privilege by local rule. Lomax, supra note 36, at 76-77.
\end{itemize}
Unless the time is extended by court order or stipulation of the parties, mediation must be completed within ninety days of notice of the Order of Referral for Mediation.\textsuperscript{773} Rule 18 is extremely general in its directives to the mediator regarding how mediation should be conducted. The only substantive affirmative directive is that the mediator "encourage and assist the parties in reaching a settlement of their dispute."\textsuperscript{774} The rule also specifically prohibits the mediator from coercing the parties to enter into a settlement agreement.\textsuperscript{775} Finally, Rule 18 provides for enforceability of any written agreement memorializing a mediation settlement "in the same manner as any other written contract."\textsuperscript{776}

In June, 1994, the judges of the Civil District Court extended the term of the program for an additional year, to terminate on August 31, 1995. Subsequently, during the 1995 Regular Session of the Louisiana Legislature, House Concurrent Resolution No. 197 sponsored by Representative Farve was passed. It urged the continuation of the pilot mediation program.\textsuperscript{777} In conformity with that resolution, the judges of the Civil District Court extended the pilot mediation program through August 31, 1997.

As of mid-1995, approximately 200 cases had been referred to mediation through the pilot program.\textsuperscript{778} The average of 100 cases per year is extremely low compared to the number of referrals in other jurisdictions where mediation is more established.

The majority of referred matters were personal injury disputes, but virtually every type of case handled by the court has been referred to mediation.\textsuperscript{779} According to the deputy judicial administrator for the Louisiana Supreme Court, who is charged with monitoring the pilot mediation program, "approximately 54\% of the completed mediations in the pilot program have been successful."\textsuperscript{780} This percentage appears to fall into the lower range of success rates reported in the literature, but is not totally out of line.\textsuperscript{781} The peak number of mediators on the approved list for the pilot program at any one time was 213.

\textsuperscript{773} Orleans Parish Civil District Court Rules of Court, Rule 18, § 7.
\textsuperscript{774} Id. § 8(b).
\textsuperscript{775} Id.
\textsuperscript{776} Id. § 9.
\textsuperscript{777} Averill, supra note 754, at 150; H.R. Con. Res. 197 (1995).
\textsuperscript{778} Averill, supra note 754, at 150.
\textsuperscript{779} Id.
\textsuperscript{780} Id. ("For statistical reporting purposes, a successful mediation is one in which a major portion of the litigation settled at mediation, or shortly thereafter, and a participant in the mediation indicated that mediation played a role in the settlement of the case.").
\textsuperscript{781} See supra text accompanying notes 281-297. Timothy Averill, Deputy Judicial Administrator for the Louisiana Supreme Court, characterizes this success rate as comparing "favorably to those shown by empirical studies of civil case settlement rates in Florida and Minnesota." Averill, supra note 754, at 150. Averill argues that higher reported settlement rates generally come from private mediation service providers whose results would not be expected to be comparable to those of a court-annexed program. Telephone Interview with Timothy F. Averill, Deputy Judicial Administrator for the Louisiana Supreme Court (Feb. 12, 1996).
The vast majority of that number were attorneys—171 compared to 42 non-attorneys. The number of qualified mediators dropped precipitously from 213 to 94 on January 1, 1995, when the number of training hours required for qualification increased. Still, the vast majority of qualified mediators continue to be attorneys—79 compared to 15 non-attorneys. Interestingly, there appear to be no cases in which a non-attorney has served as a mediator in the pilot program.

A survey of attorneys who participated in mediation under the auspices of the pilot mediation program indicated that 85% believed that the process was fair: this perception was not substantially affected by the success or failure of the mediation. Of surveyed attorneys who participated in successful mediations, approximately 83% reported that they were "at least somewhat satisfied with the agreements reached in, or as a result of, mediation." Nearly two-thirds of the attorneys surveyed were at least somewhat more satisfied with mediation than with other court experiences. And finally, "[m]ore than 80% of the surveyed attorney-participants would recommend mediation to others and would use mediation again."

At the end of October, 1995, a program organized by judicial personnel of First City Court and volunteers from the New Orleans Bar Association began. Under that program, one volunteer is available to the judges of First City Court each day court is in session for referral of cases to mediation. The volunteers are all mediators certified by the pilot program and they perform all services under the project on a pro bono basis.

In some degree due to the low number of reported mediations, there is some concern among those involved in the pilot mediation program that the participating courts and the judicial administrator's office are not "capturing" all cases that have been mediated under the auspices of the pilot program. Under Section 8(a) of Rule 18 of the Civil District Court, the mediator is to "file with the Court notice of his/her acceptance of the appointment" and send a copy of the notice of acceptance to the Louisiana Supreme Court judicial administrator's office. In December, 1995, the Judicial Administrator's office notified mediators participating in the pilot program that the intent of this provision was to encourage notification of mediation whether or not there was formal court intervention and requested that mediators file acceptances whether they were...

782. Averill, supra note 754, at 150, 153.
783. Id. at 153.
784. Id.
785. Id.
786. Id.
787. Id.
788. Id.
789. Letter from Timothy F. Averill, Deputy Judicial Administrator for the Louisiana Supreme Court, to mediators on pilot program "approved" list (Dec. 11, 1995) (on file with authors).
790. Orleans Parish Civil District Court Rules of Court, Rule 18, § 8(a).
chosen through agreement of the parties or through court appointment. At the same time, the Judicial Administrator asked all mediators to retroactively report all cases mediated since the beginning of the pilot program, regardless of the manner of appointment. The decision of the task force to leave administration of the pilot program essentially to the mediators themselves, while reducing the cost of the program, may reduce the quality of the information generated about the utilization and success of the program.

However, retroactive reports after December, 1995 do not indicate a large number of failures to report. Thus, the reasons for the low number of reported mediations may lie elsewhere. A likely cause for the low level of reported mediations is the fact that in many cases, and perhaps in most, no letter notifying the parties of the availability of mediation is sent to the parties despite the explicit requirement of Rule 18, section 2 of the Local Rules. It appears that there is no standard procedure implemented in the clerk's office to trigger the transmission of such a letter and, therefore, that it is often not sent. It is not surprising that only a minuscule percentage of the cases filed at Civil District Court is referred to mediation.

B. House Bill 1367 of the 1995 Regular Session

During the 1995 Regular Session of the Louisiana Legislature, three bills were introduced to establish a state-wide mediation system. None of these legislative proposals succeeded, but House Bill 1367 sponsored by Representative Farve enjoyed greater success than any of the other state-wide mediation bills introduced since 1993. House Bill 1367 was reported, with amendments, by a vote of 5-4 of the House Committee on Civil Law and Procedure, but failed to pass the House by a vote of 36-55. A motion to reconsider the bill on the House floor was tabled and the bill died at the end of the session.

As originally proposed, House Bill 1367 embodied a procedure very similar to the one used in the Civil District Court pilot mediation program. Among the

791. Averill, supra note 789, at 1.
792. Id.
794. H.R. 4 was withdrawn while H.R. 641 was never reported out of the House Committee on Civil Law and Procedure. 1995 Legislative Calendar of the Legislature of the State of Louisiana, 21st Reg. Sess., La. Leg., 524, 749.
The salient features of the bill were a provision requiring that upon the filing of suit, the court was to furnish prompt notice to the parties stating that mediation was available and encouraging the parties to participate in mediation. Each party then was to be afforded a period of twenty days from notice from the court to request a referral to mediation. Upon receipt of such a request, the court then would render an Order of Referral for Mediation. Under the original bill, any party opposing mediation would have been required to file an objection and to show good cause why the mediation should not proceed. As amended in committee, no good cause showing would have been required for either party to opt out of mediation and any objection within fifteen days of the court's Order of Referral would have required the court to rescind its Order. Thus, defeated House Bill 1367, as amended, would have given either party an absolute veto over the referral to mediation.

As with the pilot program procedure, House Bill 1367 would have permitted the parties to choose their own mediator, in default of which the court would make an appointment. Under the bill, the judicial administrator's office of the state supreme court was to develop the policy and procedure for qualifying as a court-approved mediator, including educational and continuing training requirements, and ethical, disciplinary, and disqualification provisions consistent where applicable with the Rules of Professional Conduct of the Louisiana State Bar Association. The court was also to establish application fees and mediator dues sufficient for administration of the provisions of the Act and to insure that the costs of any program or office established pursuant to the Act would be funded. In addition, for certification as a mediator, the bill would have required completion of a minimum of thirty-two hours of approved mediator training and satisfaction of all continuing mediator education requirements established by the Louisiana Supreme Court.

House Bill 1367 included very strong provisions regarding confidentiality. First, it stated that "the mediator may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute," unless expressly authorized by the disclosing party. It further provided that,

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795. Id. § 4104(A).
796. Id. § 4104(B).
797. Id. § 4104(C).
798. Id.
799. Id. (as amended).
800. Id. § 4106(B). The amended bill provided for a more involved procedure for court appointment of a mediator. The court was to furnish the parties with a list of the names of five mediators selected by the court from the approved list. Within 15 days each party would have had the right to eliminate two of the five listed and the court would then have appointed one mediator from the modified list. H.R. 1367, § 4106(B) (as amended).
801. H.R. 1367, § 4107(B).
802. H.R. 1367, § 4107(C).
803. H.R. 1367, § 4108(C).
unless the parties agreed otherwise, "all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court."\textsuperscript{804} Mediators would have also been required to "maintain confidentiality in the storage and disposal of records . . . ."\textsuperscript{805} Additionally, "[a]ll proceedings of the mediation, including statements made by any party, attorney or other participant," would have been privileged.\textsuperscript{806} As under the pilot program, the proceeding could not have been "reported, recorded, placed into evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest."\textsuperscript{807} The mediator could not be named as a witness nor his records "subpoenaed or used as evidence," nor could "the mediator's deposition be taken, nor any other discovery had against the mediator."\textsuperscript{808} However, the bill did make clear that an "oral communication or written material used in or made a part of the mediation procedure" was not thereby made inadmissible or undiscoverable if otherwise admissible or discoverable apart from disclosure in mediation.\textsuperscript{809}

Unlike the pilot program provisions, House Bill 1367 confronted the difficult situation where mediation confidentiality conflicted with other legal requirements for disclosure. In this situation, the issue of confidentiality would have been "presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warranted a protective order . . . or whether the communications or materials are subject to disclosure."\textsuperscript{810} This provision was not entirely satisfactory for a number of reasons. First, it did not provide the standard for determining when disclosure is appropriate. Second, it did not specify in sufficient detail the types of "other legal requirements for disclosure" envisioned. For instance, would an ordinary subpoena constitute a "legal requirement for disclosure," or does this provision contemplate more explicit disclosure obligations such as those provided by "sunshine laws," or child abuse disclosure laws? Finally, the conflicts provision in House Bill 1367 did not describe in sufficient detail the circumstances under which information conveyed in confidence might have to be disclosed so that mediators could convey this information to mediation participants.

There was very little stated in House Bill 1367 concerning the details of the mediator's role. Section 4108(B) stated that mediators were to encourage and assist the parties in reaching a settlement of their dispute, but specifically provided that they may not compel or coerce the parties to enter into a settlement

\textsuperscript{804} Id. § 4108(D).
\textsuperscript{805} Id. § 4108(E).
\textsuperscript{806} Id. § 4112(A).
\textsuperscript{807} Id.
\textsuperscript{808} Id. § 4112(B).
\textsuperscript{809} Id. § 4112(C).
\textsuperscript{810} Id. § 4112(D).
agreement.\textsuperscript{811} Section 4110(B) of the bill would have required that all parties "meaningfully participate in all mediation proceedings."\textsuperscript{812} While this provision stops short of imposing a participation in good faith requirement, it does impose an obligation regarding the manner of participation which could give rise to litigation similar to that caused by the good faith requirement.

Finally, House Bill 1367, in its opening section stating the policy behind the legislation, implicitly established the goals and purposes intended to be furthered by the mediation program proposed in the legislation. These goals were articulated as: (1) "lessening already crowded court dockets," (2) "reducing litigation costs to all parties," (3) "expediting resolution of the disputes between the parties," (4) "encouraging resolutions that are suited to the parties' needs," (5) "increasing voluntary compliance with settlements," and (6) "improving the public's overall satisfaction with the justice system."\textsuperscript{813} This list of goals discloses a mixture of the efficiency and the quality of process approaches to mediation, with a somewhat greater emphasis on the former.

The failure of House Bill 1367 to achieve the necessary support to pass the House of Representatives will not deter future efforts to institutionalize mediation in Louisiana. On the contrary, it appears likely that supporters of state-wide mediation will continue to seek passage of legislation each year.\textsuperscript{814} Interestingly, the only persons to appear or speak in opposition to House Bill No. 1367 when it was considered by the House Civil Law and Procedure Committee were two representatives of the local branch of a national franchisor of mediation and arbitration services.\textsuperscript{815} One of the representatives of the franchise operation told the committee that in his opinion the vast majority of mediations are taking place outside the court system and that the decision of when and where to mediate should be the decision of the parties involved.\textsuperscript{816}

In addition to the representatives of the franchise mediation services operation, there was organized opposition to House Bill 1367 from the Louisiana Trial Lawyers Association.\textsuperscript{817} It seems likely that both of these groups are opposing the enactment of mediation legislation in Louisiana because they view such legislation as a threat to their own interests. This attitude is shortsighted, not only because it is detrimental to the public interest, but also because institutionalizing mediation and injecting certainty and predictability into the

\textsuperscript{811} \textit{Id.} § 4108(B).
\textsuperscript{812} \textit{Id.} § 4110(B).
\textsuperscript{813} \textit{Id.} § 4101(A).
\textsuperscript{814} Telephone Interview with Timothy F. Averill, Deputy Judicial Administrator for the Louisiana Supreme Court (Feb. 12, 1996). Such legislation was not appropriate during the 1996 Regular Session because that session was a fiscal session.
\textsuperscript{815} Minutes of meeting of House Civil Law and Procedure Committee, 14-15 (May 2, 1995) (on file with authors). Roger Larue, indicated to be associated with "United States Arbitration and Mediation," is shown as having spoken in opposition to the bill and Robert Jenks, indicated to be associated with "United States Arbitration," is shown to have appeared in opposition.
\textsuperscript{816} \textit{Id.}
\textsuperscript{817} Telephone Interview with former State Representative Edward J. Deano, Jr. (Feb. 27, 1996).
system offers long-term benefits to attorneys, including the plaintiff's bar, and to mediators, including those who already have cornered a sizeable share of the market for mediation services.

XI. SHOULD LOUISIANA ADOPT A STATE-WIDE MEDIATION PROGRAM?

The great weight of considered opinion is to the effect that mediation holds tremendous promise as a form of dispute resolution. Mediation offers the prospect of eliminating unnecessary litigation, saving scarce judicial resources, and accelerating substantially the speed with which parties reach the inevitable outcome of nearly all litigation, settlement. Whether mediation is accepted as efficient or effective in terms of saving money or increasing settlement rates and party satisfaction, there can be little disagreement that, at the very least, it enhances settlement possibilities by getting the parties to the table and helping them to talk to one another. Perhaps mediation's greatest value, though, is its capacity to empower the parties to control their own affairs.

We believe mediation should be encouraged and promoted as a dispute resolution process in Louisiana. We also believe that institutionalization of mediation by adoption of a state-wide, court-annexed program is the best method of encouraging and promoting it. However, institutionalization is in the public interest for another reason. Because mediation is such a powerful tool, it has been very successful in those jurisdictions where it has been given a fair chance. Mediation has spread rapidly, and its popularity is continuing to grow throughout the country. National businesses, as well as local parties who have heard about mediation, are demanding it. Mediations are being performed in relatively large volumes by certain providers in the State of Louisiana, away from the scrutiny of the courts or any other regulatory body. Unless the state is willing to outlaw mediation entirely, there will be mediations in Louisiana and it is likely that they will become even more pervasive in the future. Thus, the real question is how mediation will be conducted and what sort of controls will be exercised over it.

Whether motivated by a desire to promote mediation or simply to establish consistency and order, it is desirable that policy-makers institutionalize mediation on a state-wide basis by adopting some form of regulation and structure to protect the public, parties to mediation, mediators, and attorneys. The necessary result of a failure to institutionalize mediation is that many critical issues, as discussed in part IX of this article, are not addressed or resolved.

The need for enacting provisions offering guidance is particularly great in the area of mediation confidentiality and privilege. As discussed above, it is essential to the mediator, to the parties, and to the public that the precise contours of the privilege be established. Without such guidance, not only is the mediation process crippled, but mediators and parties participating in the process are placed at risk.

818. See supra part IX.F.7.
Regardless of the degree of complexity or the precise framework of the mediation program enacted by the legislature or established by court rule, the following matters should be addressed and provided for:

(1) The precise contours of the privilege and confidentiality to be afforded to communications and conduct that occur during mediation.
(2) The qualifications, training requirements, testing requirements, and continuing educational/experiential requirements for mediators.
(3) Rules of conduct, ethical standards, and ethical enforcement mechanisms applicable to mediators, including reconciliation of conflicts between attorney and mediator standards and rules.
(4) Civil liability and immunity from liability for mediators.
(5) Appropriate timing for the intervention of mediation into the adjudicatory process.
(6) Adoption in appropriate categories of different rules incorporating special protections applicable to parties who are not represented by counsel in the mediation.
(7) A determination of whether mediation will be mandatory under certain circumstances or purely voluntary.

We submit that history, including Louisiana's own experience with under-utilization of the Orleans Pilot Program, demonstrates that mediation should at least initially be implemented on a mandatory or semi-mandatory basis. Such an approach offers the best practical hope that mediation will be permitted to take root and to flourish.

Although it is not essential, it would be best if the mediation program adopted in Louisiana provided that some agency, perhaps the office of the Judicial Administrator of the Louisiana Supreme Court, keep statistics and conduct research regarding the program, to test the effectiveness of mediation and to determine ways in which the program might be changed to improve its operation. The cost of this rather modest effort could be financed by certification and annual fees paid by mediators.

As demonstrated in this article, each state takes its own route to establishment of its state-wide, court-annexed mediation program. It may be that the most appropriate approach for the State of Louisiana is to gradually expand institutionalized mediation by court rule and by extension of the function and operation of the existing task force in coordination with the Louisiana Supreme Court and its Judicial Administrator's office.

The Legislature might adopt a resolution requesting that the Louisiana Supreme Court adopt court rules implementing a state-wide program of mediation, to be gradually expanded until it eventually encompasses all judicial districts in the state. The task force could broaden its work to advise the supreme court regarding the substance of the rules that should be adopted to implement a state-wide program. Such rules could make provisions regarding the seven essential issues listed above, as well as the general contours of the
mediation program and any other details that the task force and the court might feel appropriate. The only two areas in which legislative enactment is probably preferable are with respect to confidentiality/privilege of mediation communications and in the area of civil liability and immunity.

In addition to other advantages, implementing the state-wide program by Louisiana Supreme Court rule offers the opportunity to easily make appropriate revisions in the details of the program over time. This is a convenient feature in an area in which flexibility and change are almost as important as certainty and predictability.

The task force could also serve as the coordinator of the research function suggested above. On a more ambitious level, the task force and its staff could function as a state office of mediation under the auspices of the judicial branch, networking with other state offices to refine and perfect over time Louisiana’s system of state-wide court-annexed mediation.