

PLANNING MEDIATION PROGRAMS

A deskbook for
COMMON PLEAS JUDGES

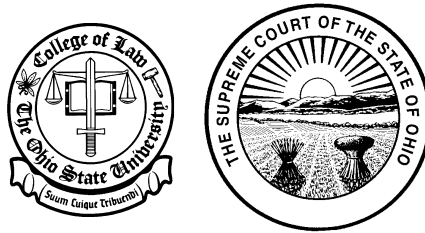


PLANNING MEDIATION PROGRAMS: A Deskbook for Common Pleas Judges

Written by:

Beverly Draine Fowler
Paul Garver
Glenda D. Gelzleichter
Jonathon Goodman
Tanya Johnston
Liza-Marie Merida
Jason Noel
Timothy G. Pepper
Kristen Whitmer

The Ohio State University College of Law
2000



© Copyright 2000 The Ohio State University College of Law

Prepared by the Supreme Court of Ohio Office of Dispute Resolution
under Byrne Memorial Grant No. 98DG-E01-0011 awarded by the Office of Criminal Justice Services

Foreward

Judges in the general divisions of Ohio's common pleas courts face many challenges in the administration of civil litigation. Mediation helps address those challenges by offering less costly and less contentious services to litigants.

The use of mediation in our courts springs from the very foundation of our nation's legal system. If we consider James Madison's belief in personal rights and responsibilities, mediation preserves and enhances self-determination. In Federalist Paper 51, Madison wrote:

“In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger.”

The ability of the stronger party to impose its will on another has no role in mediation. No jury or judge selects a so-called winner or loser and outside forces do not control the process. Mediation is an example of a process that enhances democratic self-determination, while at the same time preserving a healthy sense of the civil community.

My personal goal is to assist the establishment of mediation in every common pleas court by 2005. *Planning Mediation Programs: A Deskbook for Common Pleas Judges* will help us meet this goal.

Chief Justice Thomas J. Moyer
Supreme Court of Ohio


Acknowledgments

This book was written in cooperation with the Supreme Court of Ohio Committee on Dispute Resolution, by Professor Nancy Rogers' class in Advanced Studies in Dispute Resolution, the capstone class for students seeking a Certificate in Dispute Resolution as a part of their law degree at The Ohio State University College of Law. We wish to thank Chief Justice Thomas J. Moyer and the Supreme Court of Ohio for supporting this project and the Office of Criminal Justice Services for funding this publication. We appreciate the support of Dean Gregory H. Williams and The Ohio State University College of Law. We are indebted to Frank Motz, Eileen Pruett, Crevon Tarrance, Jessica Shimberg Lind, David Doyle, Robert Rack, Joseph Stulberg, Craig McEwen, Judge Harry Klyde and Judge James L. Deweese for their critiques and ideas. Editing assistance was provided by Emily Haynes. We were fortunate to have the able secretarial assistance of Trina Lott. Dan Willis of the Ohio Department of Administrative Services and Mollie McCament of the Supreme Court of Ohio Office of Dispute Resolution Programs coordinated the design and layout of the publication.



TABLE OF CONTENTS

Chapter One	Choosing to Offer Mediation
Chapter Two	Understanding the Mediation Process
Chapter Three	Planning a High-Quality Mediation Program
Chapter Four	Educating the Concerned Constituencies
Chapter Five	Budgeting for and Funding the Mediation Program
Chapter Six	Staffing the Mediation Program
Chapter Seven	Implementing a Mandatory Referral System
Chapter Eight	Selecting the Cases and the Time for Mediation
Chapter Nine	Ensuring Confidentiality
Chapter Ten	Promoting Ethical Mediation
Chapter Eleven	Monitoring and Evaluating Court-Connected Mediation Programs
Chapter Twelve	Considering the Adoption of a Victim-Offender Mediation Program
Chapter Thirteen	Implementing a Volunteer Program



CHAPTER ONE ~ CHOOSING TO OFFER MEDIATION

Until fairly recently it was generally assumed that the primary function of judges was to decide cases ...[P]ublic opinion now backs an alternative dispute resolution function for the courts ... The goal [should] be to weave ADR procedures into society's dispute resolution fabric so that such processes will be automatically considered along the way, rather than putting the burden on the party seeking to invoke such procedures.

~Stephen Goldberg et al.,
DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 363, 570 (3rd ed. 1999)



- | | |
|--|--------------|
| I. Choosing Mediation | 1 - 2 |
| <i>This section introduces mediation and the benefits that a mediation program can bring to Ohio and its court system.</i> | |
| II. Mediation in Ohio ~ The Ohio Experience | 1 - 5 |
| <i>This section details the history of mediation programs within Ohio.</i> | |
| III. FAQs About Mediation | 1 - 7 |
| <i>Frequently asked questions regarding mediation and their answers</i> | |

I. Choosing Mediation

Mediation is a process in which a neutral third party facilitates settlement discussions.¹ The mediator, in contrast to the arbitrator, lacks authority to issue an award if the parties fail to reach an agreement. Courts that provide mediation can serve their communities more effectively in several ways:

Mediation increases the satisfaction of parties and their attorneys with the court process. More than 90 percent of parties and their attorneys expressed satisfaction with their mediation session in exit surveys distributed in seven Ohio courts (see Chapter 7). Studies comparing satisfaction rates between litigants exposed to a variety of processes indicate that parties experiencing mediation are more positive about the process than those experiencing pre-trial conferences or trials.² The parties themselves participate in mediation, and the mediator encourages them to speak about what is most important to them about the dispute. This may explain why the parties rate mediation highly, even if they fail to reach settlement.³

¹ See Lex K. Larson, *Mediation of Industrial Commission Cases*, 17 CAMPBELL L. REV. 395, 398 (1995).

² See Allen Lind & Tom Taylor, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE*, 106 (1988).

³ See Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* §404 n. 29 (1999).

Judge Barbara Pugliese Gorman, Administrative Judge, Montgomery County Common Pleas, suggests that mediation may add something that parties may not always achieve in litigation:

“A meaningful benefit which flows from the mediation process and is not quantifiable in dollars or time savings is simply that the individual parties are given an opportunity to tell their story to a representative of the court, and then may resolve their dispute to their satisfaction.”⁴

Mediation can move up the time of settlement. Research on Settlement Week and staff mediation in Ohio courts indicates that mediation can be set early in the case, even before completion of formal discovery, and result in the same settlement rates as reached when mediation is set after formal discovery or even close to trial (see Chapter 8). As a result, the court can use mediation to move up the time of settlement.

If set early in the case, mediation can reduce resolution costs. Earlier settlement translates into cost savings for both parties, according to their lawyers, as expensive discovery and motion practices are averted. Even when no settlement was reached, attorneys often report that mediation either saved or at least did not increase costs (see Chapter 8).

⁴ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

The planning function of mediation eases processing of cases that do not reach settlement. If the parties do not settle all aspects of the dispute, they often report agreement on some issues, including procedural steps.⁵ Stark County Common Pleas Court Administrator Marc R. Warner explains that “the mediation process has added significantly to the effectiveness of case management.”⁶

Court mediation programs serve to change typical practices of lawyers with respect to the private use of mediation. Research on Ohio attorneys documents the influence of court mediation programs in spurring the use of private mediation (see Chapter 7). Simply put, lawyers whose cases are mediated tend to refer other clients to mediation, and lawyers in counties with court mediation programs began considering mediation as another option for their clients.

⁵ See Roselle Wissler, EVALUATION OF SETTLEMENT WEEK MEDIATION, 2-1 (The Supreme Court of Ohio Committee on Dispute Resolution, 1997).

⁶ See IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

II. Mediation in Ohio ~ The Ohio Experience

The Supreme Court Committee on Dispute Resolution became committed to the idea of bringing mediation to Ohio in 1989.⁷ After experience in several areas in Ohio with municipal court mediation, domestic relations court mediation and appellate court mediation, the Committee, in 1995, began looking for ways to bring mediation to Ohio's general jurisdiction common pleas courts as well. To this end, the Committee did extensive research on Settlement Week programs in four common pleas courts. Then, in 1996, the Committee planned the three-court pilot mediation program, with grants to begin staff mediation programs to common pleas courts in Stark, Clinton and Montgomery counties.

⁷ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

All three of these initial pilot programs were successful. During their first three years of operation, these three programs mediated 1,095 cases.⁸ Of these cases, 755 (69 percent) were settled either at mediation or before a pre-trial hearing was scheduled in the case.⁹ In fact, the initial pilot program was so successful, that in 1998, the Court expanded the program to 12 additional counties. The part-time programs established in two of the pilot programs were expanded to full-time positions.¹⁰ Judges in these programs are pleased with their contributions.¹¹

⁸ *See id.* at 2-1.

⁹ *See id.* at 2-2

¹⁰ *See id.*

¹¹ *See* letters written to Chief Justice Thomas J. Moyer in the Supreme Court of Ohio Committee on Dispute Resolution's IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

III. Frequently Asked Questions

How does mediation differ from judicial settlement conferences and negotiations conducted without a mediator?

Unlike judicial settlement conferences and negotiations, experienced mediators commonly include individual parties in the give and take of negotiations, allowing parties to discuss the past, but redirecting the focus of the session on the future. These mediators also spur new ideas for resolution, set agendas that build momentum toward settlement, and in general, engage in other activities that produce settlement earlier in the case and with more frequency than settlement conferences and negotiations. Chapter 2 outlines these basic mediation techniques.

What steps should courts take to start a mediation program? Chapter 3 provides a primer on planning that walks the reader through the necessary steps, from developing a vision statement to implementation and evaluation of a program.

What should courts do to educate their staff and the broader community about the mediation program? Chapter 4 suggests mechanisms for educating court personnel, the local bar, litigants, the community and local businesses.

How can courts fund mediation programs? Chapter 5 describes the Supreme Court's new grants initiative and other sources of funding.

What persons make effective mediators? Effective mediators are the cornerstone of a successful court mediation program. Chapter 6 details mediator characteristics and styles that a court should look for to complement its own goals for the program, as well as the basis of training and interviewing of potential mediators.

How should cases be referred to mediation? What should be required? If the parties must all agree before the court will refer a case to mediation, experience indicates that the mediation caseload will be small, perhaps not even large enough to justify administrative expenses. As a result, planners must face decisions about when and how they will provide incentives or directives to mediate. Chapter 7 provides extensive background on the policy, legal and practical issues involved in mandatory mediation.

Which cases are appropriate for mediation? When should referral occur? These questions raise issues about which cases are most likely to settle in mediation and which cases are appropriate for policy reasons. In the event decisions are made on a case-by-case basis, the question also should be answered in terms of the process for selecting the cases. All of these issues are discussed in Chapter 8.

How confidential is mediation? Chapter 9 takes the reader through the complex legal doctrines regarding confidentiality.

Should courts create standards and ethical provisions for their mediators? Courts have an abiding interest in maintaining an ethical mediation program. Although many jurisdictions have decided to forego adoption of ethical standards for mediators, concerns over party perception of mediators remain. Chapter 10 addresses the issues surrounding the adoption of the standards, and discusses the advantages and disadvantages of such an adoption from various angles.

How can courts determine if their mediation programs are working and document any successes that are achieved? Much depends on the courts' goals for mediation. If a high settlement rate is the only goal, measurement is easy. Courts concerned with the perception of fairness and other measures, in contrast, face a more complex task. Chapter 11 provides a primer for monitoring the program.

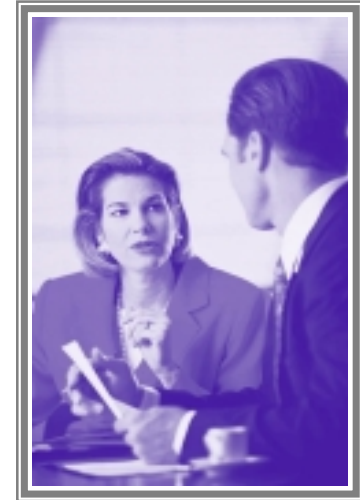
Should the court add a victim-offender mediation program? Some contend that a facilitated dialogue between victim and offender does not constitute mediation. Beyond the definitional debate, courts have reached differing conclusions about whether to include criminal mediation on policy grounds. These issues, and the design issues unique to victim-offender programs are reviewed in Chapter 12.

How can volunteer mediators be used effectively to extend a mediation program? Chapter 13 reviews the issues raised when volunteers join the ranks of court employees, and discusses the Supreme Court Committee's research on how volunteers can make valuable contributions.

CHAPTER TWO ~ UNDERSTANDING THE MEDIATION PROCESS ¹²

“The process experienced mediators use is simple, even in complex disputes . . . The parties are provided a forum where they can vent their feelings while telling their ‘stories’ so that they feel heard and understood. The mediator thus enables them to approach their conflict with clear heads and greater objectivity. They are then encouraged to disclose information they have not disclosed before, listen to things they have not heard before, open their minds to ideas they have not considered and generate ideas that may not have previously occurred to them.”

~ Nancy H. Rogers and Richard A. Salem
A STUDENT’S GUIDE TO MEDIATION AND THE LAW 10 (1987)



- | | |
|--|--------------|
| I. Introduction | 2 - 2 |
| <i>Mediation differs from unfacilitated negotiation and pre-trial conferences in several ways. This section highlights the advantages of mediation over these processes.</i> | |
| II. Typical Mediation Techniques | 2 - 4 |
| <i>Mediators respond to perceived barriers to settlement with targeted approaches.</i> | |
| III. A Mediation Session | 2 - 7 |
| <i>This includes excerpts from a typical mediation session.</i> | |

¹² Beverly Draine Fowler and Kristen Whitmer made contributions to this chapter.

I. Introduction

Mediators tend to tailor their approaches to overcome perceived barriers to negotiated settlement in the case before them. As a result, the techniques they use vary from mediation to mediation. Their focused efforts to find a path to settlement tend to result in earlier settlement than unassisted negotiation between counsel. Typically, mediators involve the parties as well as their lawyers in the sessions. The parties' involvement in mediation increases their satisfaction with the court.

Even the most experienced litigators sometimes leave a mediation session expressing surprise that it resulted in settlement, especially so early in the life of the case. Mediation elevates the level of engagement, as well as candor, above that which is common in negotiation among lawyers without the assistance of the mediator or in a judicially hosted pre-trial settlement conference. Mediators involve the parties in finding a solution in a manner unusual in the litigation process. These differences may explain why attorneys who attended mediation sessions in the Ohio pilot courts thought they were valuable.¹³

Mediation adds a number of benefits to negotiation. For instance, the parties often will trust the mediator, an experienced neutral, to control the agenda. In separate sessions, they may confide in the mediator, who then may realize that the parties' settlement positions are not far apart. The neutral mediator also may cause the parties to face reality. The mediator may help them communicate more effectively and listen to each other. The next section of this chapter discusses these and many other common mediator contributions.

¹³ Roselle L. Wissler, *EVALUATION OF SETTLEMENT WEEK MEDIATION* (The Supreme Court of Ohio Committee on Dispute Resolution, 1997).

Mediation also differs markedly from pre-trial conferences hosted by the judge. In mediation, the parties have no reason to act strategically before the mediator during separate caucuses. In contrast to the judge, the mediator will not rule if the case does not reach settlement. This leads to more party participation and more candor on the part of the parties. Mediators, unlike judges, can be frank, even in the presence of the parties. Mediators can meet separately with each side, without the concern that judges may have about hearing ex parte communications. Typically, mediators can spend more time than is available to judges to explore possible avenues to settlement.

II. Typical Mediation Techniques

The mediator approaches each session with a set of hypotheses about why the parties and their attorneys have failed to reach settlement on their own. The mediator may read the file, ask for pre-mediation briefs or have separate conversations with each lawyer prior to the session. Once mediation begins, the mediator listens carefully, intent on revising these hypotheses and determining which mediation techniques to employ.¹⁴ The following segments describe several common obstacles to settlement, and the mediation techniques that mediators use to overcome them.

Close-to-the-vest negotiators: One common cause of negotiation failure is the strategic behavior of the lawyer-negotiators. If each attorney tries to mask the client's "bottom line" while simultaneously seeking to discover the adversary's, both may fail to discover that their settlement positions overlap. The mediator may discover the overlap by meeting separately with the lawyer and client on each side and encouraging a level of candor about settlement positions that could not be achieved in joint sessions.

¹⁴ See generally Dwight Golann, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* (1997); Joseph Stulberg, *TAKING CHARGE/MANAGING CONFLICT* (1998); Carl A. Slaikeu, *WHEN PUSH COMES TO SHOVE: A PRACTICAL GUIDE TO MEDIATING DISPUTES* (1996).

Emotional parties or lawyers: Emotional negotiators sometimes create their own blocks to settlement.

They may choose language in their anger that offends opposing counsel or parties and increases the chances of early termination of settlement negotiations. These outbursts may even exacerbate the dispute. Unexpressed emotions, in contrast, may prevent the parties from hearing each other or may undermine rational decisions about the future. Mediators help overcome these emotional barriers by setting up an orderly way for the parties to express their emotions. Through active listening, mediators help the parties to feel heard and understood. Mediators set ground rules to preclude rude behavior that might offend or bring the session to an impasse. They stand ready to move quickly to separate sessions when emotions begin to escalate. In these ways, the mediators permit expression of anger when it is productive to better negotiations, but preclude it when its effect is destructive.

Differing views about the result of litigation: The parties, and sometimes even their lawyers, often develop inflated views of their chances of succeeding through litigation. The opening process of mediation, in which lawyers and their clients characterize their view of the merits of the case, may introduce doubts in their minds about their chances of success. Mediators add to these doubts by asking tough questions in their caucuses with each side. In this way, mediation forces parties to be more realistic regarding their options, and thereby increases the chances that the parties will have a common view about an approach to settlement.

Pessimism about the likelihood of settlement: Lawyers who have already attempted to settle a case may deem the chances of settlement to be dim. Because they are discouraged about achieving agreement, they will be less engaged in the process of looking for alternatives to continued litigation. They may also be wary of disclosing anything because their focus is on discovery and trial. Mediators introduce optimism in a number of ways. They project confidence that the sessions will result in a viable settlement. They often begin with issues that will be easy to resolve, and, in this way, create a sort of momentum that may make agreement on other issues seem likely. Mediators also comment frequently about the progress that has been achieved. They hold out the hope that the parties might leave this session with all their differences resolved.

Disorganization: Negotiations often fail simply because the right people don't participate or because they are inadequately prepared for the negotiation. Mediators introduce a strong organizing force in terms of who participates, what information is brought to the session and how information is exchanged. Mediators set the agenda. Often they will begin with a focus on the past – allowing the parties to express their emotions and views. The mediators then isolate the issues that should be involved in finding an agreed resolution, using these issues to set the agenda.

III. A Mediation Session

In a typical mediation session in a common pleas court,¹⁵ the mediator greets the parties and their lawyers, introduces them to each other and seats them around the table with each lawyer accompanying that lawyer's client. The mediator begins with an opening statement, recognizing the importance of establishing control over the agenda. Although short, the opening statement clears up misperceptions that the parties, if not their lawyers, might have about mediation. In this way, the mediator tries to ease the concerns of the participants and lower their resistance to new ideas. The mediator may set ground rules and assure the participants of confidentiality. In addition, mediators use the opening statement to gain the trust of the participants in their neutrality and competence.

A mediator might open with the following statement:

"Good morning. Once again, I am Georgia McKinley. I am a mediator, which means that I will help you in your efforts to resolve your conflict. It is important for each of you to know that any resolution of this dispute in mediation will be voluntary. In other words, you will agree to it. I am not a judge or an arbitrator. I will not impose a solution on you. In fact, mediation is confidential. Have you discussed the mediation privilege with your lawyers?"

¹⁵ For a more extensive excerpt, *see* F. Knebel & Gerald Clay, *BEFORE YOU SUE* (1987).

To begin the process, I will ask each of you to give me background on what brought you here today – perhaps about 10 minutes worth. It's customary to begin this process with the plaintiff. Ms. Cole, please tell us about this matter from your clients' perspective.”

Once the lawyers and their clients have expressed their views on the case to date, the mediator typically summarizes the statements using neutral language. The summary assures the parties that the mediator heard what they had to say. It also affords the parties an opportunity to listen, in a way that they may not have done before, to a neutral statement of the other party's views. The summary also serves to conclude that part of the mediation that looks toward the past and helps the mediator to move the parties' focus toward the future. The mediator's summary tends to use the parties' language and to include issues of importance to the parties even when these are not legal in nature.

In a wrongful death case, the mediator might summarize as follows:

“Mr. and Mrs. O’Keefe, you indicated that last March you heard the devastating news that your son had been in a traffic accident. Later that day, you learned that the doctors’ efforts to save his life had failed. Since that day, your lives have not been the same. Mr. George, as a representative of the insurance company, you contacted the O’Keefes. You and the O’Keefes sat down to discuss possible resolutions to this matter. Coming to this mediation represents an interest by all of you to find an agreed-upon resolution of the matter and to move on with your lives. You exchanged views about the circumstances of the accident. You have gathered significant amounts of evidence about the occurrence and are in the midst of the discovery process. You have acknowledged that substantial discovery remains to be done and have estimated that the costs of that discovery and of proceeding to trial, in attorneys’ fees alone, would be in the tens of thousands of dollars. Each of you has expressed goals about the negotiation process. Mr. and Mrs. O’Keefe, you want to be certain that the settlement helps provide a college education for your grandchildren. Mr. George, you want to be able to justify any settlement on behalf of the company in terms of what the court might ultimately award.”

Having used the summary to focus the parties and their lawyers on the future, the mediator may try to set forth a series of issues. For example, the mediator might say:

“It appears that what we need to focus on today, in order to reach a resolution of this matter, is, one, what should be the form of any settlement reached here today? In other words, should settlement be in the form of a lump sum or through some other means? Two, what amount or amounts should be paid? And three, should any statements be made to others about the settlement? From your viewpoints, are these the issues that we need to address today? Are there any others?”

Often, the mediator will hold a separate session, called a caucus. The mediator might begin the caucus as follows:

“I want to thank you both for coming to the mediation. It is clear from your facial expressions and your voices that these discussions are particularly painful for you, and understandably so. I wanted to speak separately with you so that we could explore those matters that you might not be quite so comfortable discussing in front of Mr. George and his lawyer, Ms. Connolly. I want you to know that whatever you say here will be held in confidence unless you give me permission to share it with Mr. George and Ms. Connolly. Now, you have mentioned that you would like to disclose the amount of any settlement as a means of sending a message to other drunk drivers. You also have expressed your concern about providing for the college education of your grandchildren. If it is not possible to achieve both of these goals, and I do not know yet what is the case, which of these goals is most important to you?”

Mr. O’Keefe: “If we go to trial we may be able to achieve both.”

Mediator: “This is true. Mr. Cole, in your experience, have there been instances in which the jury has not returned the verdict you expected?”

Through these and other methods, court-connected mediators help the parties reach settlement in more than half of mediated cases. If settlement is reached, the mediator may encourage the lawyers to draft the agreement and have it signed before leaving the session. If that is not possible, the parties may want to state into a tape recorder that the mediation has concluded and recite the basics of the settlement. This would provide for admissible evidence of the agreement, because Ohio’s mediation privilege statute precludes the establishment of oral agreements reached in mediation through evidence of what was said during the mediation session alone (see Chapter 9).

The Supreme Court of Ohio, through its Committee on Dispute Resolution, is offering start-up funds to institute court mediation programs in Ohio's 88 common pleas courts. As a result, each court is in a unique position to provide leadership within the community to institute mediation as an alternative means to resolve disputes. The successful institution of any program requires a vision and a plan. This chapter outlines a step-by-step strategic planning process that will aid in the development of a vision statement which will articulate the court's view of a high-quality mediation program and its purpose within the adjudicative process. In addition, the process provides the tools for developing goals and strategies to ensure that the program will satisfy the needs and concerns of the community as well as the court. These goals and strategies will provide the basis for effective and efficient monitoring and evaluation of a high-quality program. While the strategic planning process can be done solely by the court, a plan developed in a collaborative effort with the court, lawyers and other court users ensures cooperation and buy-in. Section III describes three methods of involving court users (stakeholders) and constituents in every step of planning and implementing a high-quality program. However, whether developed individually or in collaboration with stakeholders and constituents, a strategic plan is only the framework for maintaining a mediation program. Section IV suggests a judicial role as well as management tools for use in overseeing a high quality mediation program.

CHAPTER THREE ~ PLANNING A HIGH-QUALITY MEDIATION PROGRAM

By Beverly Draine Fowler

The marks of great leaders are their clearly defined footsteps left for others to follow. The value of a vision statement is that it inspires and motivates forward movement; it taps resources of intention, will and aspiration; it focuses energy toward a goal; it aligns resources in a common direction and creates resilience and perseverance. The purpose of a strategic plan is to chronicle the footsteps of a great leader.



I. Introduction	3 - 2
II. Planning for Excellence: a Step-by-Step Process	3 - 4
Step One: Develop and articulate a vision statement	
Step Two: Develop goals that reflect the court's vision	
Step Three: Design strategies that will accomplish the goals	
Step Four: Implement the plan and start the program	
Step Five: Monitor the program's impact on users and constituents	
Step Six: Evaluate program results against its goals and similar programs	
III. Who will Develop and Implement the Plan?	3 - 25
A. Develop a two-way communication system	
B. Delegate tasks to organized groups	
C. Establish a Committee on Dispute Resolution	
IV. The Judiciary's Role	3 - 53
A. Role modeling as an advocate for court mediation	
B. Useful steps in sustaining a high-quality mediation program	
V. Conclusion	3 - 55

I. Introduction

Once a decision has been made to offer mediation services, the goal is to deliver a high-quality program responsive to the needs of the court and its users.¹⁶ Because each court and the legal culture of each community are unique, replicating an existing program may not meet this goal.¹⁷ A mediation program reflecting an individual court's high standards requires vision, planning, program structuring, as well as instituting effective and efficient monitoring and evaluating devices.¹⁸ This process of strategic planning is key to ensuring that the court's program is connected to available resources, which in turn are connected to results.¹⁹

¹⁶ “The diversity of goals makes it critical for courts to state, and understand, why they are instituting ADR programs. Such clarity helps enhance bench and bar acceptance of new program and facilitates program monitoring and evaluation.” Elizabeth Plapinger & Margaret Shaw, COURT ADR: ELEMENTS OF PROGRAM DESIGN 2, 1992 (citing Wayne Brazil, *Institutionalizing Court ADR Programs*, in EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS, 62 (A.B.A. Litigation Section, 1991).

¹⁷ *Id.* at xi. (“The ADR experience in other districts has demonstrated that the most daunting task facing a district wishing to undertake the implementation of an ADR plan is the resolution of fundamental issues which must necessarily be addressed as a precondition to the implementation of a program.”)

¹⁸ Georgia Commission on Dispute Resolution.

¹⁹ “Strategic Planning [blueprinting] at HUD connects the vision contained in the second edition of the Secretary’s vision for reinventing HUD, entitled *Renewing America’s Communities from the Ground Up: the Plan to Continue the Transformation of HUD (Blue II)* See also The Government Performance and Results Act (requiring all federal agencies to submit to Congress and the Office of Management and Budget a strategic plan for their programs prior to funding) <<http://www.npr.gov/library/studies/aboutsp.html>> (visited March 17, 1999). Stating also that “Strategic planning involves an assessment of an organization’s mission and goals in relation to its external environment and internal capabilities, projected into the future by several years.

By planning strategically, the court can ensure that its program will reflect its high standards while imposing minimum burdens with maximum benefits. Moreover, because strategic planning incorporates and solicits input from stakeholders and constituents,²⁰ the court is assured that its program satisfies the needs and concerns of the community.²¹

This chapter begins with a discussion of starting a mediation program by using the strategic planning process of vision, planning, implementing, monitoring and evaluating. It then posits three ways to share and delegate specific tasks of strategic planning to those most affected by a court mediation program. This chapter suggests that appointing a Committee on Dispute Resolution best “facilitate[s] the efficient use of court personnel and other resources and create[s] a climate of cooperation and acceptance among stakeholders and constituents.”²² Finally, it suggests the role of the judiciary in sustaining a quality court mediation program. Collectively, this chapter provides the framework to deliver high-quality mediation services.

²⁰ While not exhaustive, a list of stakeholders and constituents includes defense and plaintiff bar; local bar association, local corporate entities (insurance companies, banks, etc.), industries, potential litigants, court personnel, other members of the judiciary, activist groups, members of the Alternative Dispute Resolution community, the media.

²¹ See CALHOUN COUNTY JUDICIAL COUNCIL LETTER OF UNDERSTANDING, <<http://courts.co.calhoun.mi.us/coun001.htm>> (visited January 15, 1999).

²² *Id.*

II. Planning for Excellence: a Step-by-Step Process

Strategic planning involves a balanced consideration of all issues critical to a program's success by incorporating data gathering and analysis, forecasting and financial feasibility testing as a means of arriving at realistic integrated goals and supporting strategies which direct all subsequent activities.²³ Strategic planning begins with articulating a vision for a high-quality program.²⁴ Goals and supporting strategies are then created to provide direction and guidance for the development of a yearly plan of work for program personnel.²⁵

²³ *Id.*

²⁴ *See* A STAIRCASE TO STRATEGIC PLANNING, COMMUNITY POLICING CONSORTIUM <<http://www.communitypolicing.org/strategy.htm>> (visited March 18, 1999).

²⁵ The staff mediator is responsible for completing this phase of the planning.

In addition, the plan provides the criteria for monitoring and evaluating staff performance and adjusting program components that fail to meet the court’s standards.²⁶ Moreover, the plan is a valuable tool in providing the basis for justifying public support and obtaining program funding.²⁷ The Ohio Judicial Conference, in a collaborative effort with 40 judges and lawyers, developed a strategic plan to “preserve the independence of, promote public confidence in and provide support for the judiciary.”

Strategic Plan for Developing and Maintaining a High-Quality Mediation Program

- Step One:** Develop and articulate a vision statement.
- Step Two:** Develop goals that reflect the court’s vision.
- Step Three:** Design strategies that will accomplish the goals.
- Step Four:** Implement the plan and start the program.
- Step Five:** Monitor the program’s impact on users and constituents.
- Step Six:** Evaluate program results against its goals and similar programs.

²⁶ Nancy H. Rogers & Craig A. McEwen. *MEDIATION: LAW, POLICY, PRACTICE* § 6:14 (2nd ed. 1994 & 1998 Supp.).

²⁷ *Id.* It gives a rationale for public support by outlining where the court is going and why support is needed to get there. It also provides a road map that serves as a checklist so that detractors and supporters can easily discern that the program is doing what it said it would do (goals and strategies).

STEP ONE: DEVELOP AND ARTICULATE A VISION STATEMENT

Vision statements reflect a court's philosophy, values, strategic intent, objectives and infrastructure.²⁸ In short, a vision statement can clarify the court's definition of a high-quality mediation program and articulate its purpose.²⁹ Judge Harry Klide, who initiated the Common Pleas Pilot Mediation Program in Canton, Ohio, states that "the vision has to be to reduce the human agony, pain, and reduce expenses – let's find another way." Another court's vision is "to encourage the peaceable resolution of disputes and early settlement of pending litigation by voluntary action of the parties and to identify cases appropriate for referral to mediation pursuant to [the court's] goals."³⁰ A vision statement is synonymous with a mission statement whose purpose is to answer the question "Why do we exist?"³¹

²⁸ See A STAIRCASE TO STRATEGIC PLANNING, COMMUNITY POLICING CONSORTIUM <<http://www.communitypolicing.org/strategy.htm>> (visited March 18, 1999).

²⁹ See THE DAILY REPORTER, Friday, January 19, 1999, 4. Article quoting Chief Justice Moyer's vision of Ohio, "We are taking dispute resolution from the experimental state to making it a permanent part of Ohio's legal system. By continuing court programs of well-designed growth, we can establish mediation programs in all common pleas courts in six years.

³⁰ *Id.* See also The Supreme Court of Mississippi, AUTHORIZATION OF COURT-ANNEXED MEDIATION PLAN <<http://www.mslegalforms.com/CourtRules/mediation/wholeplan.htm>> (visited February 6, 1999).

³¹ See A STAIRCASE TO STRATEGIC PLANNING, COMMUNITY POLICING CONSORTIUM <<http://www.communitypolicing.org/mission.htm>> (visited March 18, 1999). "It focuses on the essence of what a law enforcement agency is and what it wishes to become."

As the examples below indicate, vision statements are unique to each court or program.³²

“The Stark County Court of Common Pleas recognizes the importance of alternative dispute resolution and through Local Rule 16 has established mediation as a method to resolve disputes.”³³

“WE PROVIDE THE COMMUNITY AND COURT WITH AN EFFECTIVE ALTERNATIVE TO COURT TRIAL THROUGH MEDIATION OF CIVIL CASES SUCH AS EMPLOYMENT, NEIGHBORHOOD AND CONSUMER DISPUTES AS WELL AS CRIMINAL CASES.”³⁴

“It shall be the policy of the courts of the State of Mississippi to encourage the peaceable resolution of disputes and early settlement of pending litigation by voluntary action of the parties and to identify cases appropriate for referral to mediation pursuant to our goals.”³⁵

³² Superior Court of California for the County of San Mateo. SUPERIOR COURT STRATEGIC PLANNING COMMUNITY FOCUS <<http://www.co.sanmateo.ca.us/sanmateocourts/comoutreach.htm>> (visited March 18, 1999).

³³ See Stark County Court of Common Pleas Vision/Mission Statement. IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

³⁴ The Supreme Court of Mississippi, AUTHORIZATION OF COURT-ANNEXED MEDIATION PLAN <<http://www.mslegalforms.com/CourtRules/mediation/wholeplan.htm>> (visited February 6, 1999).

³⁵ *Id.*

The following questions will aid the court in developing its own vision statement representative of its purpose in delivering mediation services to its stakeholders:

What are the court's expectations of this program?³⁶

- Early resolution of cases?
- Lowering litigant costs?
- Role modeling alternative dispute resolution processes to attorneys and the community at large?
- Maximizing the court's resources?
- Broadening litigant's options in resolving cases?³⁷
- Facilitation of early, direct communication and understanding among the parties of the essential issues on each side of the dispute?³⁸
- Confidentiality and privacy?³⁹

³⁶ “Our mediation program saves the court, the attorneys and the parties time and money. Perhaps more importantly, it often results in resolutions that are preferable – to everyone – than ‘traditional’ litigation.” Honorable Jeffrey E. Froelich, Judge, Montgomery Court of Common Pleas letter to Honorable Thomas J. Moyer, Chief Justice, The Supreme Court of Ohio, January 5, 1999, in IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

³⁷ See FEDERAL MEDIATION PROGRAM <<http://www2.pair.com/cba/ed-fmp.htm>> (visited January 26, 1999).

³⁸ *Id.*

³⁹ *Id.*

Will it provide equal access to justice?

- Will the program structure be reflective of the population it serves?⁴⁰

Should *pro se* litigants be included?⁴¹

- Will the mediation playing field be level when only one litigant is represented?

Who will bear the cost of the program?

- Will community leaders support public funding?
- Will the program meet expectations of national funding sources?
- What program will garner support from the legal community?

A vision statement can be developed by the judiciary alone, or better yet, in collaboration with those who will be most affected by the mediation program.⁴²

⁴⁰ See Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 6:12 (2nd ed. 1994 & 1998 Supp.) “Neither volunteers nor paid mediators represent well the age, gender and ethnic diversity of the society. Many community mediation programs rely heavily on well-educated, white, middle class women.” (citing Christine Harrington & Sally Merry, *Ideological Production: The Making of Community Mediation*, 22 *LAW & SOCIETY REVIEW*, 709 (1998); Ronald Pipkin & Janet Rifkin, *The Social Organization in Alternative Dispute Resolution*, 9 *JUST SYS J.* 204 (1984); Nancy Rogers, *Ten Ways to Work More Effectively with Volunteer Mediators*, 7 *NEGOTIATION J.* 201 (1992).

⁴¹ For more information on how to incorporate *pro se* litigants into court mediation services contact Office of the Administrative Director – Center for Alternative Dispute Resolution, The Judiciary, State of Hawaii, P.O. Box 2560, Honolulu, Hawaii 96804.

⁴² *Id.*

STEP TWO: DEVELOP GOALS THAT REFLECT THE COURT'S VISION

Goal setting within the strategic planning process allows the court to take charge of its future, by asking how it wants its dispute resolution system to grow⁴³ and “answering it in light of opportunities it sees on the horizon and existing strengths which will help it get there.”⁴⁴ Goals set the direction for the program⁴⁵ and provide a measurement for success of the program.⁴⁶ In addition, goals provide a time line, enabling the court to plan its work and resources. However, as Robert W. Rack, Chief Mediator of the U.S. Court of Appeals for the Sixth Circuit, cautions, “It is important to stay open and flexible, leaving room for adjustments when developing goals.”⁴⁷ Therefore, when developing goals, the following can be considered:

⁴³ See NEW MEXICO STATE UNIVERSITY STRATEGIC PLANNING PROCESS <<http://www.nmsu.edu/Strategic/process/process.html>> (visited May 30, 2000).

⁴⁴ *Id.*

⁴⁵ See generally A STAIRCASE TO STRATEGIC PLANNING, COMMUNITY POLICING CONSORTIUM <<http://www.communitypolicing.org/stairs.htm>> (visited May 30, 2000). See also STRATEGIC PLAN, NORTHEASTERN REGIONAL ASSOCIATION OF STATE AGRICULTURAL EXPERIMENT STATION DIRECTORS 1996-2000 <<http://www.agnr.umd.edu/users/NERA/newplan.html>> (visited May 30, 2000) and NEW MEXICO STATE UNIVERSITY STRATEGIC PLANNING PROCESS <<http://www.nmsu.edu/Strategic/process/process.html>> (visited May 30, 2000).

⁴⁶ *Id.*

⁴⁷ Robert W. Rack, Chairman, Ohio Supreme Court Alternative Dispute Resolution Committee, Chief Mediator U.S. Court of Appeals for the Sixth Circuit.

- How, when and whom will the program serve?
- What level of financial support will the program need? from whom? by when?
- How much community support will the program engender?
- Who are the beneficiaries of the program?
- What are the benefits for participating parties?
- How will the integrity of the program be maintained, especially with respect to mediator neutrality and confidentiality?
- How long will it take to mediate cases after filing?
- When and how will the program be monitored?
- When and how will the program be evaluated?

Since measurability is an important aspect of goals, the court will likely consider the following when setting its goals.⁴⁸

- The indices that will measure a successful program
- The rate of party compliance with settlements⁴⁹
- The number of litigants requesting mediation
- The rate of participant satisfaction to participant dissatisfaction
- The numbers of civil cases on the court docket waiting to be adjudicated

⁴⁸ *Id.*

⁴⁹ While currently not widely used as a measurement tool, it is a useful tool to determine the rate of compliance with a “self-directed” settlement. In other words, does mediation have an impact on voluntary compliance? If so, this is a useful fact to have when seeking funding from state, city, county, federal and private funding sources. The rationale is that if disputants produce a mutually acceptable agreement, it is one more likely to be adhered to. The community is spared the cost of intervention and enforcement. Therefore, community dollars for court services and policing can be spent in other needed areas.

“Since staff views indices as measures of success, it is a good idea to broaden these indices beyond settlement rates.”⁵⁰ Listed below are examples of program goals that may help realize an individual court’s vision of a high-quality mediation program and reflect the concerns and needs of its stakeholders and constituents:

- By year 2005, the court will provide mediation services to 25 percent of its civil litigants at no cost to its participants.
- By year 2005, the court will develop a system to provide equal access to its mediation program for all litigants, including *pro se* litigants.
- By year 2002, there will be early mediation of civil cases referred to the program, reducing average case processing time for civil cases to within 120 days of filing an Answer.
- By year 2001, appropriate and effective monitoring, evaluation and corrective devices will be developed and implemented to respond to the needs and concerns of stakeholders.
- By year 2005, the Court of Common Pleas Mediation Program will become a community model for resolving disputes.

Currently there are 19 court mediation programs operating with grant funding and program support from the Supreme Court of Ohio Office of Dispute Resolution Programs.⁵¹ One of the pilot programs developed the following policy statement indicating its vision and purpose for a mediation program:⁵²

⁵⁰ See Nancy H. Rogers, Attorney at Law, Professor of Law and Chair, Evaluation and Institutionalization Steering Subcommittees of the Supreme Court of Ohio Committee on Dispute Resolution, Memorandum dated April 16, 1999.

⁵¹ C. Eileen Pruett, Coordinator, Supreme Court of Ohio Office of Dispute Resolution..

⁵² Stark County Court of Common Pleas, Program Goals, adopted October 3, 1996. IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

Stark County Common Pleas Court Mediation Program Goals

- Provide a broader range of dispute resolution options.
- Increase the involvement of parties in the process of resolution of their disputes.
- Facilitate the early resolution of disputes.
- Decrease the cost to parties involved in dispute resolution.
- Increase parties' satisfaction and compliance with the results of dispute resolution.
- Provide access to a less formal process than litigation.
- Provide neutral and impartial services without regard to race, religion, national origin, marital status, political belief, mental or physical handicap, gender or sexual preference.⁵³

Whatever goals⁵⁴ the court decides will best realize its vision of a high-quality mediation program, they must be prioritized and reviewed annually against the actual results.⁵⁵ Moreover, it is important to be flexible and willing to revise goals as unanticipated benefits are anticipated.⁵⁶ The most effective method of achieving goals is to “drive them” through strategies.⁵⁷

⁵³ *Id.*

⁵⁴ *Id.* at 3-8. General goals the court might consider: “Saving judicial time, reducing backlog, expediting categories of cases, encouraging earlier settlement discussion of civil cases, providing a mediation process that maintains complete confidentiality.” *Id.* at 3-8.

⁵⁵ This is part of an effective and efficient evaluation system. *See generally* A STAIRCASE TO STRATEGIC PLANNING, COMMUNITY POLICING CONSORTIUM <<http://www.communitypolicing.org/stairs.htm>> (visited March 17, 1999).

⁵⁶ Robert W. Rack, Chairman, Ohio Supreme Court Alternative Dispute Resolution Committee, Chief Mediator, U.S. Court of Appeals for the Sixth Circuit.

⁵⁷ *Id.*

STEP THREE: DESIGN STRATEGIES THAT WILL ACCOMPLISH THE GOALS

Once the court’s vision of a high-quality mediation program has been articulated and the goals set and prioritized,⁵⁸ the next step is to develop strategies that will help realize those goals.⁵⁹ For purposes of this section, the author uses the sample goals as set out above to explain the relationship between strategies and goals. These are not meant to be inclusive or intended to determine the depth and scope of an individual court’s goals and strategies. As previously mentioned, each court is unique. Therefore, each court’s goals and strategies will represent its needs. However, all sample strategies listed are realistic and have been accomplished through similar mediation programs.

GOAL 1: By year 2005, the court will provide mediation services to 25 percent of civil litigants at no cost to participants.

Strategy 1.a: Recruit and hire a staff mediator by July 1, 2000.

Strategy 1.b: Set up a case referral system by August 1, 2000 that provides an opportunity for voluntary participation as well as judicial mandated participation.⁶⁰

Strategy 1.c: Develop a program that will attract 50 trained volunteer mediator attorneys to provide pro bono mediation services by

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See REPORT TO THE LEGISLATURE ON THE IMPACT OF ALTERNATIVE DISPUTE RESOLUTION ON THE MASSACHUSETTS TRIAL COURT, Standing Committee on Dispute Resolution <<http://www.1weekly.com/mtreas/adrcomm.htm>> 10 (visited February 8, 1999). This goal places “a strong emphasis on self-determination by the parties.”

January 2, 2002 to handle complex litigation cases.⁶¹

Strategy 1.d: Collaborate with community mediation centers to coordinate mediation services of non-complex civil litigation cases.⁶²

Strategy 1.e: Develop income revenues through national granting foundations.⁶³

Strategy 1.f: Develop income revenues through add-on filing fees and public support.⁶⁴

Strategy 1.g: Develop and implement a system to educate litigants and attorneys on the benefits of using court mediation services by December 15, 2000.⁶⁵

Strategy 1.h: Increase participants' confidence in the mediation process by developing a Mediator Code of Professional Conduct to ensure confidentiality and neutrality of process by August 15, 2000.⁶⁶

⁶¹ *Id.* at 11. E.g., "Co-mediation and supervised apprenticeships. New mediators conduct their first mediations with experienced mediators to confirm that the skills they displayed during training are used during actual mediations. Co-mediation is a powerful means of enhancing one's skills during and after mediation."

⁶² *Id.* The San Diego Mediation Center is a private, non-profit corporation providing full-service ADR directly to courts, to businesses and to the community since 1983.

⁶³ See, e.g., *Establishing a Justice System Futures Network* in Denver, Colo., a grant through a Center for Public Policy Studies; *Vision for the Courts: Capacity Building Project* in Williamsburg, Va., a grant through National Center for State Courts; *Conducting Futures Activities with Limited Resources* in Chicago, Ill., a grant through American Judicature Society. See also IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

⁶⁴ See IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999). See also ALTERNATIVE DISPUTE RESOLUTION RULES as amended by the Georgia Supreme Court, March 5, 1998, 8. "The funding of court-annexed and court-referred ADR programs is primarily a public responsibility. Permanent funding will be sought through a filing fee surcharge and fees for registration and re-registration of neutrals [mediators]. Appropriate legislation will be sought to authorize permanent funding." <<http://www.doas.state.ga.us/Courts/adr/adrrules.htm>> (visited April 23, 1999).

⁶⁵ *Id.* at 7 "In order to educate the bar about the benefits of ADR and the specifics of ADR processes, each member of the State Bar of Georgia shall be required to complete a one-time mandatory three-hour CLE credit in dispute resolution."

⁶⁶ See FIVE STATE MEDIATION PROJECT I, D-1. The Colorado Judicial Branch Office of Dispute Resolution developed a Mediator's Code of Professional Conduct.

GOAL 2: By year 2002, there will be early mediation of civil cases referred to the program, reducing average case processing time for civil cases to within 120 days of filing an Answer.

Strategy 2.a: Include in the staff mediator's performance goals, an accountability for implementing the mediation process within 60 days of a litigant's filing of answer, by June 30, 2000.⁶⁷

Strategy 2.b: Develop incentive programs that will encourage litigants using mediation to expedite response to pre-mediation discovery by January 1, 2001.⁶⁸

Strategy 2.c: Develop an external and internal communications plan that keeps litigants informed and tracks cases referred to mediation by January 1, 2001.⁶⁹

Strategy 2.d: Develop system to fast-track civil cases that are not settled to trial within 45 days of termination of mediation by January 1, 2001.⁷⁰

Strategy 2.e: Develop pre-mediation evaluative system to distinguish *pro se* cases that are ripe for mediation by January 1, 2000.⁷¹

⁶⁷ See REPORT TO THE LEGISLATION ON THE IMPACT OF ALTERNATIVE DISPUTE RESOLUTION ON THE MASSACHUSETTS TRIAL COURT, Standing Committee on Dispute Resolution <<http://www.1weekly.com/mtreas/adrcomm.htm>> 10 (visited February 8, 1999).

⁶⁸ See State Center for Alternative Dispute Resolution, ADR TRENDS, Fall 1997 <<http://www.state.m.us/jud/trends.html>> (visited April 24, 1999).

⁶⁹ See Chapter 7 for information and methods to develop a case referral system. See also IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

⁷⁰ See Roger A. Hanson & George W. Hersey, *An Assessment of Florida's Fourth District Court of Appeals Settlement Conference Program*, 18 FLA. ST. U. L. REV. 177, 182 (1990). The conference is scheduled within 45 days of filing the notice of appeal. Participation is mandatory; both the attorney and client must attend the conference. A party who lives outside the district may request permission to miss the conference only if his or her attorney is given full settlement authority.

⁷¹ *Id.*

GOAL 3: By year 2005, the court will develop a system to provide equal access to its mediation program for all litigants, including *pro se* and victim/offenders.⁷²

Strategy 3.a: Develop a pre- and post-filing system to educate parties on their rights and responsibilities during mediation by June 15, 2003.⁷³

Strategy 3.b: Collaborate with the local bar to develop and implement pre-mediation negotiation skills training for *pro se* litigants by January 1, 2003.⁷⁴

Strategy 3.c: Develop a pre-mediation consultation process to ascertain *pro se* litigants' readiness for mediation by December 31, 2004.⁷⁵

Strategy 3.d: Develop collaboration with local law school to provide telephone "advise and support" services to *pro se* litigants by December 31, 2004.⁷⁶

Strategy 3.e: Pilot and evaluate a victim/offender mediation program by December 31, 2003.⁷⁷

⁷² See Chapter 12 for full information on developing and implementing a victim-offender program.

⁷³ See Chapter 4, Educating the Concerned Constituencies.

⁷⁴ See REPORT TO THE LEGISLATURE BY STANDING COMMITTEE ON DISPUTE RESOLUTION, <<http://www.1weekly.com/matreas/adrcomm.htm>> 9 (visited February 8, 1999). "The District Court approach toward the expansion of high-quality dispute resolution services has been distinguished by ready collaboration with other groups and organizations sharing a common interest in mediation or conciliation."

⁷⁵ *Id.*

⁷⁶ See THE MEDIATION ASSISTANCE PROGRAM < <http://www.ais.d/gic/map.htm> > Albany N.Y. found a unique way to offer mediation services through a strategic alliance with its local law students. Through a grant made possible from the U.S. Department of Education's Fund for the Improvement of Post-Secondary Education (FIPSE). This cooperative educational effort provides students with New York state court-certified community mediation training and an opportunity to mediate disputes on site in the Civil Court in Albany.

⁷⁷ See Chapter 12, Considering the Adoption of a Victim-Offender Mediation Program.

GOAL 4: By year 2001, monitor, evaluation and correction systems will be developed and implemented that will respond to the needs and concerns of stakeholders.

Strategy 4.a: Recruit researcher to develop and implement a system to monitor mediator neutrality and impartiality by June 15, 2000.⁷⁸

Strategy 4.b: Establish monitoring practices to ensure mediator confidentiality by December 31, 2000.⁷⁹

Strategy 4.c: Develop and implement an evaluation tool to determine program effectiveness by December 31, 2000.⁸⁰

Strategy 4.d: Develop and implement a survey to determine participant satisfaction and compliance with settlement terms.⁸¹

Strategy 4.e: Network with market research firm to provide pro bono services to survey constituents' opinions of court mediation program by December 31, 2004.⁸²

Strategy 4.f: Develop and implement a system for handling grievances by December 31, 2000.

⁷⁸ See Roselle L. Wissler, EVALUATION OF SETTLEMENT WEEK MEDIATION, (The Supreme Court of Ohio Committee on Dispute Resolution, October 1997).

⁷⁹ See Chapter 9, Ensuring Confidentiality; Chapter 10, Promoting Ethical Mediation; and Chapter 11, Monitoring and Evaluating Court-Connected Mediation Programs.

⁸⁰ See Chapter 11.

⁸¹ *Id.*

⁸² This will meet two needs of the court: information retrieval and public relations. The latter obtained because market research firms will want to advertise results to solicit paid business.

GOAL 5: By year 2006, the Court of Common Pleas Mediation Program will become the community model for resolving disputes.

Strategy 5.a: Develop an interactive web site that will assist the community in creating programs to resolve community disputes by December 31, 2003.⁸³

Strategy 5.b: Develop and implement community training opportunities that will increase exposure for alternative dispute resolution techniques by December 31, 2002.⁸⁴

Strategy 5.c: Memorialize and advertise courts' efforts in delivering high-quality mediation programs — ongoing.⁸⁵

Strategy 5.d: Develop a task force to create innovative ways of delivering mediation services to civil litigants by December 31, 2001.⁸⁶

Strategy 5.e: Increase funding, develop strategic alliances and exposure through on-site consultation with other community adjudicative processes (EEOC, schools, police) starting a mediation program.⁸⁷

Strategy 5.f: Increase income revenue to implement innovative ways to deliver mediation services to civil litigant — ongoing.⁸⁸

⁸³ As can be ascertained from the research contained in this chapter, courts across the country use the Internet to educate and communicate their publics on services in their courts. *See*, e.g. KNOW YOUR COURTS <<http://courtlink.utcourts.gov/mediation/adr.htm>> (visited January 25, 1999).

⁸⁴ *See* Chapter 6, Staffing the Mediation Program.

⁸⁵ *See* Chapter 4, Educating the Concerned Constituencies.

⁸⁶ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999). The Supreme Court Committee on Dispute Resolution has developed subcommittees to distribute tasks.

⁸⁷ This strategy would set the court's program apart as an innovator in strategic alliances.

⁸⁸ THE MEDIATION ASSISTANCE PROGRAM <<http://www.ais.d/gic/map.htm>> Albany, N.Y. obtained a grant to develop and implement strategic alliances that resulted in trained mediators and increased mediation services in court.

STEP FOUR: IMPLEMENT THE PLAN AND START THE PROGRAM

Once the court's committee on dispute resolution, along with the staff mediator, drafts the program goals and strategies for judicial approval, the next step in the process is to develop a plan of work.⁸⁹ This becomes a task for the staff mediator, with input from the committee. Once developed, the plan of work directs the work of the staff mediator, making it a simple process to evaluate his or her performance.⁹⁰

This plan of work is comprised of action steps that are designed to accomplish the court's strategies.⁹¹ Following are samples of these developed by courts to operate their mediation programs.⁹²

⁸⁹ See THE STAIRCASE TO STRATEGIC PLANNING, COMMUNITY POLICING CONSORTIUM <<http://www.communitypolicing.org/stairs.htm>> (visited March 17, 1999).

⁹⁰ See REPORT TO THE LEGISLATURE ON THE IMPACT OF ALTERNATIVE DISPUTE RESOLUTION ON THE MASSACHUSETTES TRIAL COURT, Standing Committee on Dispute Resolution <<http://www.1weekly.com/mtreas/adrcomm.htm>> 10 (visited February 8, 1999).

⁹¹ See Chapter 6, Staffing the Mediation Program. See also IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

⁹² *Id.*

1. Select and hire the staff mediator.⁹³
2. Develop a method of case referral.⁹⁴
3. Identify funding sources.⁹⁵
4. Develop procedures for scheduling mediations.⁹⁶
5. Implement monitoring system.⁹⁷
6. Recruit researcher to evaluate program.⁹⁸

⁹³ *Id.* at 4-3. “The pilot courts found that hiring the mediator early in the process was helpful. This allowed the mediator to be involved in the development of polices and procedures.”

⁹⁴ E.g., In The Supreme Court of Mississippi, “Civil cases may be referred to mediation in the following manner: (A) Any circuit, chancery and county court in this state may, either on it’s own motion or on the motion of any party, determine that a case is appropriate for mediation. A court may not order a case to mediation more than one time. If the court . . .” <<http://www.mslegalforms.com/CourtRules/mediation/wholeplan.htm>> (visited January 25, 1999) Each of the three pilot sites used random selection of some cases for mediation.

⁹⁵ See generally FUTURES AND STRATEGIC PLANNING <<http://www.clark.net/pub/sji/grantinfo/futures.htm>> for examples of how courts have funded progressive programming. (visited January 26, 1999).

⁹⁶ E.g., In the Eastern District of North Carolina, “unless otherwise ordered by the court, the mediation session must begin within 60 days of the court’s referral order and be completed within 30 days of the first session.” <<http://www.fjc.gov/ALTDISRES/dsource/ncaroed.html>> (visited January 26, 1999).

⁹⁷ See *Monitoring for Quality*, IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

⁹⁸ E.g., Roselle L. Wissler, EVALUATION OF THE PILOT MEDIATION PROGRAM IN CLINTON AND STARK COUNTIES (The Supreme Court Of Ohio Committee on Dispute Resolution, 1997).

STEP FIVE: MONITOR THE PROGRAM'S IMPACT ON USERS AND CONSTITUENTS

There is a “universal need” for ongoing monitoring of the operation of a mediation program to sufficiently assure quality and to improve management.⁹⁹ Unlike evaluation as discussed below, monitoring does not require outside experts to be done efficiently.¹⁰⁰ One of the functions of the court’s committee on dispute resolution can be to develop and implement a monitoring system. The system should include methods to monitor mediator effectiveness as well as litigant participation and satisfaction.¹⁰¹ While an outside expert is not needed for the actual monitoring of the program, it might behoove the court to solicit support from a local social scientist or institution of higher learning to develop a monitoring tool that fits its unique needs.¹⁰² In fact, the need for monitoring may prompt the court to recruit a committee member with specific skills to fill this need. Chapter 8 gives an in-depth discussion on developing and implementing a court monitoring system.

⁹⁹ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 6:18 (2d ed. 1994 & 1998 Supp.).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

STEP SIX: EVALUATE PROGRAM RESULTS AGAINST ITS GOALS AND SIMILAR PROGRAMS

Evaluating a court mediation program is critical to assessing program performance against program goals.¹⁰³ For example, by evaluating its program against similar programs, the court can assure that its program is meeting users' needs.¹⁰⁴ While court-connected mediation programs are breaking new ground in the traditional legal system of litigation, it is vital that its policy and procedural details described above are continually evaluated and revised. To emphasize the importance of testing the ongoing viability of policy and procedure, some states codify their requirements of evaluation.¹⁰⁵

“California statute requires research on new dependency mediation programs administered by the juvenile courts. The goals for results are very specific: 75 percent satisfaction rates among mediation participants; earlier settlement 70 percent of the time than cases that did not go to mediation; and 25 percent reduction in foster care placements.”¹⁰⁶

¹⁰³ See Nancy H. Rogers & Craig a. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 6:15 (2d ed. 1994 & 1998 Supp.).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (citing Cal. Health & Safety Code § 10605).

Similar to the California statute, after developing a strategic plan, the court will have goals that are clearly defined and measurable.¹⁰⁷ To adequately assess the court's mediation program through evaluation tools, it may be necessary to hire an outside expert to develop the assessment tools and render an impartial assessment from collected data.¹⁰⁸ Or, as in Massachusetts, the court can appoint an expert to its committee on dispute resolution to develop and implement a research project to evaluate the program.¹⁰⁹

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at § 6:15 (2d ed. 1994 & 1998 Supp.). *See also* Chapter 11 Monitoring and Evaluating Court-Connected Mediation Programs.

¹⁰⁹ *See* THE MASSACHUSETTS ADR PROGRAM. <<http://www.1weekly.com/matreas/adrcomm.htm>> 22 (visited February 8, 1999) (“The most recent study of ADR programs in Massachusetts was completed in spring of 1997 by Richard J. Maiman, Ph.D. for the Standing Committee on Dispute Resolution. At this site review findings of these reports.”).

III. Who Will Develop and Implement the Plan?

While instituting a court mediation program represents an exciting addition to adjudicative services, its initial success is dependent on the response of stakeholders¹¹⁰ and constituents.¹¹¹ The bonding element that holds the strategic planning process together is “the empowerment, participation, input, support and commitment of the affected parties.”¹¹² Judge John Haas stated that “until the concept of mediation permeates the profession, which takes time and publicity and education of local lawyers, results at the beginning do not demonstrate the ultimate effectiveness of the program.”¹¹³ However, involving those who will be affected by the program will best “facilitate the efficient use of judicial court personnel and other resources”¹¹⁴ and “create a climate of cooperation and acceptance among stakeholders.”¹¹⁵

¹¹⁰ For purposes of this chapter, stakeholders are defined as anyone who is affected or could be affected by the implementation of a court mediation program. Although not exhaustive, a list of stakeholders would include the trial bar (defense and plaintiff), insurance companies, community mediation centers, potential litigants (both *pro se* and represented).

¹¹¹ Plapinger, Elizabeth. *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges & Lawyers*, 1996, WL 797360 (F.J.C.).

¹¹² A STAIRCASE TO STRATEGIC PLANNING, COMMUNITY POLICING CONSORTIUM <<http://www.communitypolicing.org/stairs.htm>> (visited March 17, 1999).

¹¹³ Stark County Common Pleas Court Judge in a letter dated December 12, 1998 to Chief Justice Moyer recommended the expansion of court mediation programs, IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

¹¹⁴ CALHOUN COUNTY JUDICIAL COUNCIL LETTER OF UNDERSTANDING, <<http://courts.co.calhoun.mi.us/coun001.htm>>(visited January 15, 1999).

David A. Doyle, Conference Attorney, provides another rationale for utilizing stakeholders and constituents in an organized manner. He states, “Think of a team – the mediator is the player upon whose performance you win or lose, [and] the committee [or] external groups are the coaching staff.”¹¹⁶ In addition, according to Robert W. Rack, it would behoove planners of mediation programs to remember that “a good mediator may not be a good administrator.”¹¹⁷ Mr. Rack believes that it is in the best interest of the program not to burden a mediator with administrative and other tasks.¹¹⁸ If given administrative responsibilities, organized and consistent support is needed to aid the mediator and utilize the court’s resources to their fullest potential.

¹¹⁵ “The Advisory Committee identifies the problems and needs to be addressed through a mediation program and lends their collective expertise to the program’s formation.” IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

¹¹⁶ *Id.* Court of Appeals of Ohio, Tenth Appellate District, letter dated April 7, 1999.

¹¹⁷ Chairman, Ohio Supreme Court Alternative Dispute Resolution Committee, Federal Mediator 6th Circuit.

¹¹⁸ *Id.*, stating that if the mediator is not burdened with other tasks, he or she will be able to devote all of his/her time ensuring that the mediation process is fair, impartial and a speedy alternative to other adjudicative processes.

Providing opportunities for stakeholder participation will facilitate buy-in and speed up the effectiveness of the program.¹¹⁹ Increased participation by stakeholders disseminates information regarding court mediation programs and, in turn, will result in receiving a greater allocation of public support.¹²⁰ One area that can be impacted by stakeholder participation and that is vital to the success of a court mediation program is funding.¹²¹ Therefore, stakeholders should participate in all phases of the strategic planning process -- visioning, planning, implementing, monitoring and evaluating -- to ensure public awareness and speed up public acceptance.¹²² Methods for utilizing stakeholders and constituents in the development and implementation of a high-quality mediation program include: developing a two-way communication system; delegating specific tasks to organized groups; and establishing a committee on dispute resolution.

¹¹⁹ The Massachusetts Office of Dispute Resolution reports on its web site, “Since the Norfolk Mediation Program began accepting referrals in 1991, both the number of cases referred and those choosing to pursue mediation have greatly increased. The program has benefited from the cooperation and enthusiasm with which the Superior Court judges, clerks and personnel have embraced the ADR concept. The support of the bar membership has also contributed to the overall success and popularity of mediation at the Norfolk facility. The mediation program enjoys an excellent reputation, with the result that a large percentage of cases are referred directly by attorneys.” <<http://www.state.ma.us/modr/norfolk.htm>> (visited March 1,1999).

¹²⁰ “One of the general themes of National Symposium on Court-Connected Dispute Resolution Research was summarized as follows: “Courts need more reliable findings on the benefits of ADR, including any cost avoidance or reductions, not only to develop and improve ADR programs, but also to obtain political and financial support for those programs.” Nancy H. Rogers & Craig A McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 6:12 (2d ed. 1994 & 1998 Supp.).

¹²¹ “In times of scarce resources and when courts themselves are struggling to find the money necessary to support their operations, funding of public and private mediation programs is particularly difficult.” Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 6:13 (2d ed. 1994 & 1998 Supp.). *See also* Chapter 5: Budgeting for and Funding the Mediation Program.

¹²² *See* John Naisbitt, *Global Paradox: The Bigger the World Economy, the More Powerful Its Smallest Players* (New York: William Morrow and Company, Inc., 1994).

A. DEVELOP A TWO-WAY COMMUNICATION SYSTEM

Another way to garner support and elicit input from stakeholders is to create a system that facilitates communication between the court and its stakeholders.¹²³ A systematic approach to providing stakeholder input in the planning, implementing and assessing phases of the court mediation program would include:

1. Planning:

- Review responses for validity and viability.
- Develop and submit strategies for meeting program goals.
- Send completed goals and strategies to stakeholders.
- Communicate through media sources the court's vision statement, goals and strategies

2. Implementing:

- Develop program structure.
- Recruit staff mediator and begin program.
- Give stakeholders and constituents progress report.

¹²³A conceptual model for dealing with relationships among functional sub-units is offered in Paul R. Lawrence & Jay W. Lorsch, *Organization and Environment: Managing Differentiation and Integration* (Boston: Division of Research, Graduate School of Business Administration, Harvard University, 1967).

3. Assessing - monitoring and evaluating:

- Request input for developing monitoring and evaluation tools.
- Develop assessment tools and implement assessments.
- Share monitoring and evaluation reports, request recommendations for improvement.
- Incorporate suggestions, where applicable, in revised model.

Communicating with stakeholders puts structure around what would otherwise be threatening and helps make difficult communication situations more manageable.¹²⁴ The task of maintaining a valid communications system requires time, money and human resources.¹²⁵ Therefore, the court might want to consider other models for involving stakeholders and constituents.

¹²⁴ *Id.*

¹²⁵ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 6:13 (2d ed. 1994 & 1998 Supp.).

B. DELEGATE TASKS TO ORGANIZED GROUPS

Using the same grouping of tasks – planning, implementing and assessing – the court provides opportunities for stakeholder input by delegating subsets of these tasks to organized groups. First, the court or its designee identifies organized groups of stakeholders within its jurisdiction – local bar associations, consumer groups, chambers of commerce, Better Business Bureaus, neighborhood block associations, civic groups, political parties as well as universities and their faculties and student groups. Next, the court or its designee divides each large task into subsets – planning, visioning, goal setting and developing strategies; implementing; developing program structure, case referral system, hiring staff mediator; program assessment: developing assessment tools, monitoring and evaluating. Once tasks are delineated and organized groups are identified, the process of including stakeholders in the development of a high-quality mediation program begins.

1. Planning:

Local bar association	Draft purpose statement
Plaintiff's bar	Draft program goals & strategies
Defense bar	Draft program goals & strategies
Law School ADR Department	Draft program strategies

Bar committees can also be a great help in researching policy issues. For instance, a bar committee can be asked to review the law on the issue on mandatory vs. voluntary mediation programs and submit a report to the court. Another area of interest to this segment of stakeholders may be the issue of mediator ethics and accountability. Again, the bar committee would review the issue and make a report on its findings.

2. Implementing:

Chamber of Commerce	Develop and implement community awareness and education programs
Chamber of Commerce	Identify funding sources
Court personnel	Recruit applicants for staff mediator position

3. Assessing -- monitoring & evaluating

University Social Science Department	Develop and implement evaluation tools
Law School	Volunteer mediators
Law School	Develop and implement monitoring tools

The benefits of this strategy are twofold. First, it provides an opportunity for stakeholders to participate and give input in areas of concern to them without making a long-term commitment.¹²⁶ The general rule is that those who are asked to participate are more likely to put forth a greater effort if the assignment is short-term. It also prevents the normal positioning for power that is identified with established committees. Second, it speeds up the permeation of education among all stakeholder professions.¹²⁷ It will be a plan developed by stakeholders for the benefit of stakeholders.¹²⁸ This decreases the publicity costs to educate stakeholders. However, this strategy does not come without its drawbacks.

¹²⁶ *E.g.*, The Ohio Judicial Conference use of attorneys to develop strategic plan.

¹²⁷ *Id.*

¹²⁸ NEW MEXICO STATE UNIVERSITY STRATEGIC PLAN < <http://www.nmsu.edu/Strategic/process/process.html> (visited March 17, 1999) “The first phase of the planning process will involve information — gathering an analysis of NMSU’s institutional culture and values, the goals and expectations of stakeholders, the external environment and those opportunities and threats it holds for NMSU’s future, and the internal institutional environment with a focus on NMSU’s special strengths as well as its weaknesses.”

Once this strategy is implemented, each delegated task must be coordinated with every other delegated task. Each group must be kept appraised of the big picture and the impact its recommendation has on it. In addition, each recommendation undertaken and implemented has to be communicated to court personnel and other stakeholders. Therefore, in courts without the wherewithal to monitor this process, information will fall through the cracks, making the process detrimental to the program. The flow of information within stakeholder groups will be seriously curtailed.¹²⁹ Without a fluid flow of information among groups, a disjunctive plan may result.¹³⁰ If so, the resulting plan will not represent a consensus and can defeat the purpose of involving stakeholders and constituencies.

¹²⁹ See COMMON PROBLEMS IN PLANNING PROCESS, *Failure to link the major elements of strategic planning and the implementation process*, <<http://ceeble.org/strapln.htm>> (visited January 26, 1999).

¹³⁰ *Id.*

C. ESTABLISH A COMMITTEE ON DISPUTE RESOLUTION

An effective committee is one that works in collaboration with court personnel to ensure high-quality mediation services.¹³¹ It must be composed of members capable of achieving assigned tasks and functions. Its structure and hierarchy must be clearly defined. Further, to efficiently support the court, a committee must have a clear understanding of its tasks and functions as well as the parameters of its authority. Finally, there must be an aggressive plan in place for recruiting and recognizing committee members.

A committee on dispute resolution can be the court's tool to develop, implement and oversee a high-quality mediation program.¹³² The Supreme Court of Ohio Committee on Dispute Resolution recommends this method of involving stakeholders because "a committee identifies the problems and needs to be addressed through a mediation program and lends its collective expertise to the program's formation."¹³³ The committee is a vehicle to develop communication tools to ensure the ongoing support for the program.¹³⁴ In addition, it will provide the court with tools

¹³¹ CALHOUN COUNTY JUDICIAL COUNCIL LETTER OF UNDERSTANDING, <<http://courts.co.calhoun.mi.us/coun001.htm>> (visited January 15, 1999)

¹³² Report of the Civil Justice Reform Act Advisory Group for the Eastern District of New York, (December 9, 1991). *See also* report to the legislature on the impact of alternative dispute resolution on the massachusetts trial court, Standing Committee on Dispute Resolution <<http://www.1weekly.com/mtreas/adrcomm.htm>> (visited February 8, 1999) (Report of the Civil Justice Reform Act Advisory Group for the Eastern District of Pennsylvania [August 1, 1991]).

¹³³ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

¹³⁴ Raethe Bourajouis, COMMUNICATION: AN EFFECTIVE TOOL OF STRATEGIC PLANNING (1998)

to ensure that mediation services are delivered in a fair and impartial manner.¹³⁵

1. Tasks that can be delegated to the committee¹³⁶

Once the decision is made to appoint a committee on dispute resolution, the next step is to determine what tasks and functions will be assigned to it. The following list serves two purposes. First, it connects the strategic planning process with the delegation of tasks associated with planning a court mediation program. Next, it can constitute the basis for a committee member volunteer job description. At the judiciary's discretion, a committee on dispute resolution can also provide assistance with the drafting policies and court rules, as well as actually implementing and maintaining the program.

a. Draft program policies

Using the strategic planning process as described above, the court's committee on dispute resolution can draft goals and strategies for court approval that are necessary for developing and maintaining a high-quality mediation program. Therefore, the committee can draft recommendations to the court on the following issues:

¹³⁵ MISSION STATEMENT OF THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN MATEO
<<http://www.co.sanmateo.ca.us/sanmateocourts/comoutreach.htm>> (“The court shall apply the law fairly to protect individual freedom and to promote the welfare of the people.”).

¹³⁶ *Id.* Judicial Council of California Committee on Dispute Resolution on ADR.

- Choosing Mandatory vs. Voluntary Mediation Services.¹³⁷
- Case Management: Selecting, Managing and Timing Case Referral for Mediation.
- Confidentiality Guidelines: Parties-Court/Public, Mediator-Judge and Mediation-Press.
- Mediator Ethics and Accountability.
- Offering Victim/Offender Mediation.
- Utilizing Volunteer Mediators.
- Protocols to Evaluate Staff Mediator Performance

b. Draft court rules

As a planning tool, the court may wish to develop local rules to deal with issues of controversy or to procedurally affect the program.¹³⁸ A committee can be a valuable tool in researching and drafting rules or general orders that the court might find necessary to the integrity of its program, such as:

¹³⁷ While the Supreme Court Committee on Dispute Resolution recommends making common pleas courts mediation programs mandatory for participation, it is important to note that this is a highly debated issue. *See* Chapter 7.

¹³⁸ *See* Court of Common Pleas, Clinton County, Entry in the Matter of Rules of Practice and Procedure Clinton County Common Pleas Court General Division: Rules of Local Practice 28. (The Ohio Constitution Article IV § 5(B) states that “[C]ourts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the Supreme Court.”).

- Maintaining confidentiality¹³⁹
 - Will there be safeguards to prevent disclosure of information obtained during mediation?
- Referring cases to mediation
- Mediator neutrality/impartiality¹⁴⁰
- How will the court deal with mediator conflicts of interest such as bias, bigotry?
- Should a mediator facilitate parties' informed decision?
- Sanctioning parties for non-compliance with mandated mediation

The Clinton County Common Pleas Court developed Rule of Local Practice 28 Mediation that includes rules concerning:

Case Selection — random selection, court referral or submission by agreement of the parties; Scheduling — scheduling of cases selected at random and scheduling of cases referred by the court or submitted to mediation by agreement of the parties; Exclusions from Mediation; Authority and Duties of the Mediator; Duties of Parties, Representative and Attorneys; Sanctions for Failure to Attend; immunity, Confidentiality and Privilege.¹⁴¹

¹³⁹ See Chapter 9 for full discussion on ensuring confidentiality in the court's mediation program.

¹⁴⁰ See NEW MEXICO STATE UNIVERSITY STRATEGIC PLAN < <http://www.nmsu.edu/Strategic/process/process.html>> (How can ethics/rules be applied/enforced? •Membership in voluntary or mandatory groups [e.g., membership in a college or association vs. membership in a bar association style group]. • Grievance vs. evaluation systems [a formal way to file complaints vs. each court taking evaluation feedback]. •Certification of mediators vs. certification of mediation training groups [or both]. •Common law immunity vs. liability. For full discussion see Chapter 10, Promoting Ethical Mediation).

¹⁴¹ See Chapter 9 for full discussion on ensuring confidentiality in the court's mediation program.

c. Implement program

A committee can be the additional arms and legs needed to carry out multiple tasks associated with starting and maintaining a high-quality mediation program.¹⁴² It can provide the link for feedback between other stakeholders and the judiciary while monitoring the integrity of the program.¹⁴³ In fact, a well-structured committee can negate the need for daily judicial oversight of program.¹⁴⁴ Included in the myriad of possible tasks that the committee could perform are as follows:

- Communicate the purpose of the program.
- Develop a program structure.
- Develop a staffing structure: selecting and training staff.¹⁴⁵

¹⁴²CALHOUN COUNTY JUDICIAL COUNCIL LETTER OF UNDERSTANDING, <<http://courts.co.calhoun.mi.us/coun001.htm>> (visited January 15, 1999).

¹⁴³*Id.* “The [purpose] of the Calhoun County Judicial Council is to facilitate the efficient use of judicial court personnel and other resources in matters of common interest: to promote understanding, communication and cooperation between the member courts and funding units; and to enhance the delivery of court services to the public.”

¹⁴⁴*E.g.*, REPORT TO THE LEGISLATURE ON THE IMPACT OF ALTERNATIVE DISPUTE RESOLUTION ON THE MASSACHUSETTS TRIAL COURT, Standing Committee on Dispute Resolution <<http://www.1weekly.com/mtreas/adrcomm.htm>> (visited February 8,1999).

¹⁴⁵*See* Chapter 4.

- Establish minimum standards for mediator qualifications.
- Develop criteria for mediator performance review.
- Develop and implement case referral guidelines.
- Represent community stakeholders.¹⁴⁶
- Develop and implement a monitoring system.
- Develop the tests and tools for evaluating the program.¹⁴⁷
- Develop a system to maintain mediator confidentiality and neutrality.¹⁴⁸
- Review and update promotional and informational tools.
- Provide a forum for handling grievances.
- Develop and maintain a pool of backup mediators.
- Review mediator performance and prepare advisory opinion.¹⁴⁹

¹⁴⁶ COURT-ANNEXED MEDIATION PLAN, Supreme Court of Mississippi, chancery, circuit and county courts, <<http://www.mslegalforms.com/CourtRules/mediation/wholeplan.htm>>.

¹⁴⁷ As suggested by Robert W. Rack, Chairman, Ohio Supreme Court Committee on Dispute Resolution, Senior Conference Attorney, U.S. Court of Appeals for the Sixth Circuit.

¹⁴⁸ See The San Mateo County Court articulating their mission as follows: Independent Judiciary; Equal Access to the Court for All; Equal Justice for All; Integrity and Excellence. <<http://www.co.sanmateo.ca.us/sanmateocourts/comoutreach.htm>> (visited February 12,1999).

¹⁴⁹ Currently, mediators are evaluated using client satisfaction survey as basis. See Chapter 11, Monitoring and Evaluating Court-Connected Mediation Programs.

2. Composition, structure and governance of the committee

Since a committee on dispute resolution represents an extension of the judiciary, the court will want to ensure that the committee is both efficient and effective. Therefore, once the judiciary has decided what tasks and functions to assign the committee on dispute resolution, the next step is to give careful attention to its composition, structure and governance.

a. Composition

Building a productive and successful committee lies in recruiting the right members to serve on it.¹⁵⁰ Careful planning and recruitment of capable participants will foster an effective network and provide the court with a strong advantage. For this reason, selection of members for the dispute resolution committee is the most important element of the process.¹⁵¹ In determining the composition of the committee, the court may want to consider: i) what skills and areas of expertise are needed on the committee; how the composition of the committee will impact the public's perception of the program's fairness; and how the composition of the committee will affect the court's day-to-day operation.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

i. Skills and areas of expertise

- knowledgeable in data collection and analysis
- skilled in creative problem solving
- familiar with finance and budgets
- capable of working on and supporting a team
- comfortable with process methods
- willing to commit to the process outcome
- able to function in a loose, open-ended environment
- comfortable with postponing closure
- skilled or expert in an identified critical issue area ¹⁵²
- capable of focusing on the future

¹⁵² For instance, the chairperson of the committee on dispute resolution needs leadership skills, while planning and organizational skills are essential for the development of program goals. Other skills needed are in social science research and dispute resolution.

ii. Public's Perception of Fairness

One of the purposes of appointing a committee on dispute resolution is to create a climate of cooperation and acceptance among stakeholders and constituents. To help sell the program to the court's constituents, the composition of the committee should reflect the variety of cases coming before the court.¹⁵³ Therefore, in addition to considering specific skills to accomplish assigned tasks, public perception of fairness must be taken into account as the committee is formed.¹⁵⁴ The following questions can help guide the judiciary's decisions when making appointments:

- **How many lay people should be asked to participate?**
 - Should they be recruited from organized groups?
 - Should they be garnered from the election lists?
 - Is it necessary to have individuals from all walks of life represented on the committee?
 - How will the public perception be affected by eliminating representation from the community at large?

¹⁵³ Crevon Tarrance, Program Manager, Supreme Court of Ohio Office of Dispute Resolution Programs.

¹⁵⁴ *Id.*

- **What and how much representation from the legal community is needed on the committee?**¹⁵⁵
 - Public interest law groups?
 - Personal Injury?
 - Corporate Law?
 - Environmental Law?
 - Should there be equal representation from plaintiff and defense bar?

- **Will community leaders play a pivotal role on the committee?**
 - Which community leaders will be most beneficial to the committee and the program?
 - Which community leaders will best represent their constituents?
 - Which community leaders will serve well in an advisory capacity to the committee?
 - How will the court utilize the local chamber of commerce and other civic groups?

¹⁵⁵ “In the Superior Courts of several counties [in Massachusetts], domestic relations programs are run by county bar associations.” REPORT TO THE LEGISLATURE ON THE IMPACT OF ALTERNATIVE DISPUTE RESOLUTION ON THE MASSACHUSETTS TRIAL COURT, Standing Committee on Dispute Resolution <<http://www.1weekly.com/mtreas/adrcomm.htm>>, 16 (visited February 8, 1999).

- **What about members from the media?**
 - Will placing members of the media enhance or hinder the public's image of the program?
 - Which members of the media will work best in cooperation with the goals of the program?

- **What representation should there be from the social science community?**
 - Should researchers be included to conduct monitoring and evaluation?
 - Is at least one demographer necessary to keep the program abreast of societal trends?

iii. Court's day-to-day operation

One of the purposes of appointing a committee on dispute resolution is to best facilitate the efficient use of court personnel and other court resources. Therefore, critical to the committee's success is which court personnel will be asked to participate, either as members or advisors to it. In deciding that question, the court may want to consider:

- What administrative services will the committee and program need?
- Who will educate the committee on court protocol?
- Where and how will the committee meetings be set up?
- Will the committee and program benefit by representation from other members of the judiciary?
- Will the court ask for volunteers or require mandatory participation?

By diversifying the composition of the committee, the court can ensure representation from multiple stakeholder and constituent groups. In turn, the committee members will be vehicles to garner support from and disseminate information to respective groups.¹⁵⁶ “This not only helps to spread the news about the new mediation program, it also communicates to the community that the program is being established in a thoughtful, deliberate way with consideration being given to each group’s interests and concerns.”¹⁵⁷

¹⁵⁶ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

¹⁵⁷ *Id.*

b. Structure and governance of the committee

An efficient and effective committee requires attention to housekeeping details such as the structure and governance of the committee. Therefore, at some point the following must be considered, either by the judge, a delegate or the committee itself:

i. Structure

- What maximum number of members should the committee have?
- Will the committee have a hierarchy?
- Will there be officers? (president, vice president)
- Will there be task force chairmen reporting directly to the judiciary?
- Will the committee operate through standing committees?
- Research and development?
- Monitoring and evaluating?
- Length of appointment to committee
- Will membership be ongoing for the duration of program?
- Will there be set terms for participation?
- Will there be an opportunity for temporary participation through task forces?

ii. Governance

- Chain of command between the judiciary and the committee
- Will the committee report directly to the judiciary?
- Will committee meetings be public or subject to public disclosure?
- Will the committee be self-perpetuating?
- Will each stakeholder group be given authority to recommend representative replacements?
- Will committee have an executive committee?
- Will hierarchical structure be accountable for managing committee members?
- Will there be a procedure for retiring, removing or replacing members?
- Will the committee develop rules of committee procedure?

3. Developing an effective committee

Although the stakeholders will readily accept an invitation from the judiciary to become a member of this committee, it is essential that acceptance means participation and commitment to the process.¹⁵⁸ Therefore, it is necessary to develop a recruiting system that weeds out meaningless acceptance and nurtures active and meaningful participation.¹⁵⁹ In addition, it is necessary to the ongoing success of the committee's work that there be a method to recognize the valued participation of its members. This section speaks to both these issues - recruitment and recognition.

a. Proactive recruitment

There are various sources, familiar to the judiciary, to aid in the recruitment of the right members for its committee on dispute resolution. These include the media, Bar Association, institutions of higher learning, community mediation centers, word of mouth and local chambers of commerce. However, what might not be so obvious are the steps in the recruitment process that are necessary to ensuring a productive committee. They include:

¹⁵⁸ See Edgar H. Schein, *Organizational Culture and Leadership*, 1-22 (San Francisco: Jossey-Bass Publishing, 1985).

¹⁵⁹ See *id.*.

- Developing a list of potential members and why they are needed in the process of developing a court mediation program.
- Developing and distributing a committee member volunteer job description to all potential members outlining the scope of their participation.
- Contacting potential members and informing them of the key role they can play in developing a mediation program.
- Giving potential members time to review their ability to participate before commitment.
- Developing a system of short-term assignments to allow other critical stakeholders an opportunity to participate.
- Developing a system of removal from committee and informing all potential members of the system prior to accepting a position.

To effectively recruit the right committee members, the court can solicit input from court personnel, the local bar and other community groups. It may decide to appoint a panel of distinguished leaders from diverse areas of the community to develop and implement the recruitment process. The key is to ensure that the committee is representative of the court's users.

b. Recognizing members' contributions

Regardless of where committee members originate, it is essential that the court acknowledge each member's contribution. To facilitate a process that meets this need, the court can implement a formal recognition process such as holding a dinner once a year and handing out certificates to committee members. Other less formal methods include keeping abreast of members' contributions and dropping them a note from time to time thanking them for their contribution. This can be accomplished through a contribution referral system implemented and maintained by the committee itself. Each time a committee member or the chairperson notices another member has made a particularly helpful contribution, he or she submits an acknowledgement card to the court. The court can then sign the card and present it at regular meetings.¹⁶⁰

¹⁶⁰ See Chapter 13, Implementing a Volunteer Program.

Another method of showing appreciation of the committee's contribution is for the court to be an active part of its work. Moreover, this is essential to ensure that the court's vision permeates the final product.¹⁶¹ Therefore, it is important that the judiciary:

- Make a point to stop in or participate in committee meetings.
- Read and comment on all committee reports.
- Praise the committee's work to the public and court personnel.

4. Authorizing the committee's work

Now that the court has recruited and developed a diverse committee with "a sense of ownership and commitment to the court's purpose,"¹⁶² the court must authorize its work. Unlike other states that establish dispute resolution committees' authority by statute,¹⁶³ Ohio leaves to the discretion of each court the parameter of authority to be delegated to its committees. As discussed above, there are a myriad of tasks and responsibilities that can be delegated to the committee. It is up to the court to clearly communicate to the committee its parameter of its authority.

¹⁶¹ See Paul R. Lawrence, *The Human Side of the Matrix*, 241-246, in ORGANIZATION, Kotter, Schlesinger & Sathe, eds. (Homewood, Ill., 1979).

¹⁶² IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

¹⁶³ See ORDS 36.210 establishes by statute the Oregon Dispute Resolution Commission's authority. See <<http://www.odrc.state.or.us/court.htm>> (visited February 14, 1999).

5. Judicial oversight of the committee

When establishing a committee and giving leadership to a high-quality mediation program, the judiciary is a critical link in ensuring its success. The following might be useful to consider when determining which roles the judiciary might want to retain for itself:

- Recruit committee members or recruit steering committee to recruit committee members.¹⁶⁴
- Develop guidelines for committee.
- Conduct committee orientation.
- Approve appointment of all committee members.
- Approve case referral guidelines.
- Approve local court rules or general orders drafts.
- Approve all press releases.
- Approve adjustments to goals and strategies.

By providing leadership to the development of a strategic plan, the court can guarantee that its mediation program is tailored to its goals and eliminate the need for daily judiciary oversight.¹⁶⁵

¹⁶⁴ Once the court has identified individuals, it may delegate the actual recruitment process to a steering committee to ensure that all recruited members understand the scope of their commitment.

¹⁶⁵ See A STAIRCASE TO STRATEGIC PLANNING, COMMUNITY POLICING CONSORTIUM <<http://www.communitypolicing.org/strategy.htm>> stating “The final products of the planning process are the strategies that the police department will implement to reach its objectives.” (visited March 18, 1999).

IV. THE JUDICIARY’S ROLE

According to Judge Gladys Kessler, U.S. District Court, Washington, D.C., “It is important for the judiciary to use its position of leadership within the justice system to introduce innovative alternative dispute resolution techniques in their communities for the ultimate benefit of all litigants.”¹⁶⁶ Therefore, whether the court decides to delegate the tasks of developing and implementing a high-quality mediation program or design one itself, once implemented, the judiciary is key to its success. “Developed properly,” the judiciary will want to ensure that “the choice of an ADR procedure or conventional litigation will not be an ‘either/or’ proposition.”¹⁶⁷ The judiciary may also want to ensure that “these ADR mechanisms [mediation] will complement the court system and become part of an expanding menu of choices for resolving disputes.”¹⁶⁸ The following are practices undertaken by judiciaries that are committed to the success of their mediation programs:

¹⁶⁶ ALTERNATIVE DISPUTE RESOLUTION: AN ADR PRIMER FOR JUDGES. American Bar Association, The Standing Committee on Dispute Resolution, Governmental Affairs Group Public Services Division (1989).

¹⁶⁷ *Id.* citing Robert D. Raven, Past President, American Bar Association.

¹⁶⁸ *Id.*

A. ROLE MODELING AS AN ADVOCATE FOR COURT MEDIATION

- Understand the mediation process by attending certified mediation training.¹⁶⁹
- Communicate the judiciary's vision to court personnel.
- Educate court personnel [including providing administrative and mediation training].
- Frequently attend meetings of the Committee on Dispute Resolution.
- Communicate to the public the benefits and rationale for implementing a court mediation program.
- Call press conferences to update the community.

B. USEFUL STEPS IN MAINTAINING A HIGH QUALITY MEDIATION PROGRAM

- Ensure that standards for mediator neutrality are instituted and maintained.
- Demand that all aspects of the mediation conference remain confidential.
- Review monitoring and evaluating tools and their measured outcomes.
- Ensure that outcomes of monitoring and evaluating result in recommendations and corrective measures taken.
- Evaluate, review and update goals and strategies annually.
- Broaden the range of stakeholders and constituents solicited for input.

¹⁶⁹ Crevon Tarrance, Supreme Court of Ohio Office of Dispute Resolution Programs. "Entire program seems to run better if the judge has been trained in mediation skills."

V. CONCLUSION

The strategic planning process will involve many people in long-term thinking and develop a systematic method for communication about the future. It allows for a more effective management system while establishing mutually agreed upon commitments from stakeholders and constituents. Moreover, it will identify critical issues, choices and priorities on which the court's attention must focus. Strategic planning will become woven into the fabric of the court to become a natural part of getting the job done.

Therefore, once a strategic plan is adopted, the court can confidently delegate the implementation of its mediation program. Soon, the committee will be briefed, the judiciary's vision articulated, the goals identified, the strategies developed, the staff mediator hired, cases referred, monitoring and evaluation institutionalized and a high-quality court mediation program realized.

Educating court personnel, attorneys, participants, the community and local businesses helps to create a successful mediation program. By educating the individuals closest to the mediation process, a basis is built from which to educate others. Court personnel need to be educated about the mediation process so that they can answer questions and promote the program. Courts can also take advantage of the valuable resources of local attorneys to promote the mediation program, if they provide educational programs for the bar. It is important to educate participants about the mediation program at the right time in the process. To educate the public the court must be able to communicate with the local media, utilize outreach programs and create printed and electronic materials. Local businesses also need to be educated about the option of mediation so they may instruct their attorneys of their desire to utilize it.

CHAPTER FOUR ~ EDUCATING THE CONCERNED CONSTITUENCIES

By Paul Garver

“The knowledge of court personnel can have a real impact on the education of the other constituencies involved. Courts need to start by effectively educating their personnel and then move outward to other constituencies.”

~ David A. Doyle, Conference Attorney
10th District Court of Appeals



- | | |
|---|--------------|
| I. Introduction | 4 - 3 |
| II. Educating Court Personnel
<i>Perhaps the most important constituent to educate appropriately, these individuals can help to educate the other constituencies. Through effective programs they can become valuable resources.</i> | 4 - 4 |
| III. Educating Attorneys
<i>The success of programs such as Settlement Week have shown that support from local attorneys can have a significant effect on mediation programs. This support starts with education and experience.</i> | 4 - 5 |
| IV. Educating Participants
<i>Whether a court chooses to utilize an attorney-instructor or court-educator approach, specific information needs to be provided to the participants so that they are fully aware of their rights and options.</i> | 4 - 6 |

continued

V. Educating the Community **4 - 8**

In order to effectively communicate to the community, the courts must understand the techniques and practices of communicating to the media.

VI. Educating Local Businesses **4 - 17**

Courts can utilize local businesses as an important resource by educating them about the mediation process so that they ask their attorneys to participate in it.

I. Introduction

Chapter one describes mediation as a process of placing a neutral observer between two parties with the intention of facilitating settlement discussions. The confidence of the parties in the mediation process is essential to a successful mediation. The ability of the mediator to help bring about settlement depends, in part, on the trust the parties have in the mediator.¹⁷⁰ This trust must also extend to the mediation process itself. The parties' confidence in and knowledge of the mediation process helps the mediator to bring about settlement.

Effective communication with and education of the public, participants, attorneys, businesses and court personnel help to create a successful mediation program. The remainder of the chapter supplies the tools and information necessary to communicate effectively and educate these constituencies.

¹⁷⁰ See Nancy H. Rogers and Richard A. Salem, *A STUDENT'S GUIDE TO MEDIATION AND THE LAW* (1987).

II. Educating Court Personnel

It is important to take the time to explain the mediation program to the court personnel. Even individuals whose jobs are not directly affected by the institution of this new program should be informed about its procedures. These individuals are likely to be questioned both on and off their jobs about the mediation program. If they understand the program and its benefits they can become advocates in the community as a whole.

By utilizing informational sheets, abbreviated training sessions and observations, court employees can become properly informed and educated on the mediation process. The informational sheet for court personnel could contain examples of disputes brought to mediation, a “story” of a typical mediation session and an “answers to commonly asked questions” section. Also, the court mediator could run a shortened training session for all court personnel and employees. This would provide the employees with a basis of knowledge from which to answer questions. Key employees could also “sit in” and observe a mediation session so that they have a better understanding of the benefits and process of mediation.

It is especially important to train the clerks who initially receive complaints from parties. These clerks must understand the mediation process and when to suggest it. To accomplish this, a specialized training session for these “intake” clerks is advisable. This training session could include a more comprehensive discussion of the types of disputes to be referred to mediation, more role-plays for the participants to watch and additional training for the appropriate filing and flow of paperwork and information.

III. Educating Attorneys

Local attorneys are a very important constituency to educate and utilize. The professional culture of attorneys can work against the use of mediation programs.¹⁷¹ By utilizing outreach programs and developing information pamphlets, the court can educate local attorneys on the mediation process. This has been shown to be effective in Settlement Week programs, where 56 percent of the cases for mediation entered at the nomination of one of the attorneys.¹⁷² The more exposure to training in and experience with mediation procedures that attorneys have, the more likely they are to advise clients to try mediation.¹⁷³ This makes it increasingly important to inform and educate local attorneys.

Working with the local bar association is an effective means of communicating with and educating local attorneys. Speaking engagements at bar meetings and articles in the local bar newsletter can help to reach local attorneys. Working with the local bar association to conduct a mediation training session for continuing legal education credit might also help attorneys learn when to refer clients to mediation. Having had a continuing legal education in dispute resolution has a strong effect on whether an attorney advises clients to try mediation, and having had mediation training makes it more likely that attorneys

¹⁷¹ See Craig A. McEwen, *Managing Corporate Disputing*, 14 OHIO ST. J. ON DISP. RESOL. 1 (1998).

¹⁷² See Roselle Wissler, *EVALUATION OF SETTLEMENT WEEK MEDIATION* (The Supreme Court of Ohio Committee on Dispute Resolution, 1997).

¹⁷³ See Roselle Wissler, *OHIO ATTORNEYS' EXPERIENCE WITH AND VIEWS OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES*, 1 (The Supreme Court of Ohio Committee on Dispute Resolution, 1996).

advise clients to try mediation.¹⁷⁴

Information pamphlets or sheets should be developed to specifically address the concerns of attorneys in regard to the mediation program, and should be submitted to the bar newsletter. This information sheet should address the concerns of client confidentiality, mandatory participation and where mediation fits in the court's case management system or plan.

IV. Educating Participants

Courts across the country have taken different approaches to educating parties about mediation and the dispute resolution process. These approaches rely upon either the attorneys or the courts to educate parties.¹⁷⁵

The attorney-instructor approach generally depends on two factors: (1) the knowledge of the local bar and (2) the obligation of lawyers to counsel their clients knowledgeably about the potential utility of mediation among other options for resolving a case.¹⁷⁶ State courts have ensured that these two factors are met in different ways: Several have considered proposals to require an alternative dispute resolution component for continuing legal education;¹⁷⁷ others require that lawyers

¹⁷⁴ *See id.* at 2.

¹⁷⁵ *See* Nancy H. Rogers and Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 6.06 (2d ed. 1994 & 1998 Supp.).

¹⁷⁶ *See id.* at § 6.06.

¹⁷⁷ *See id.* at § 6.06 (citing Plapinger & Shaw, *COURT ADR: ELEMENTS OF PROGRAM DESIGN* 122-124 [1992]). The Supreme Court of Ohio considered and rejected a proposal for mandatory continuing legal education about mediation in 1991.

inform clients about dispute resolution alternatives;¹⁷⁸ and still others stipulate that “lawyers shall provide clients with ADR information” prepared by the court administrator about ADR processes available in the county.¹⁷⁹

A court-educator approach can be implemented by providing written materials about mediation to parties filing suit and to respondents. These pamphlets need to describe the process, the effects, and options available after mediation. These pamphlets should be distributed to the individuals either when they file a complaint, when they receive the notice for mediation or before the mediation session. The mediator should also take a few minutes at the beginning of the mediation to explain the process to the participants.

In either the attorney-instructed approach or the court-instructed approach, it is important that the parties receive the information and are able to make informed decisions. Whichever way a court chooses to educate the participants, it is important that the participants are given all the pertinent information in an unbiased manner.

If the court decides to utilize an attorney-instructed approach, the court must have a program in place to educate *pro se* parties. For further discussion on this and other *pro se* issues, see Chapter 7.

¹⁷⁸ See *id.* at § 6.06 (citing generally, Sander & Prigoff, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options?* 76 ABA J 50 [1990]).

¹⁷⁹ *Id.* at § 6.06 (citing Minn. General Rules of Practice, Rule 114.03 (b)).

V. Educating the Community

Although many Americans have heard of the process of mediation, most are only somewhat or not very familiar with it.¹⁸⁰ After some education about dispute resolution, including litigation and mediation, Americans are 62 percent more likely to say they would go to a mediator rather than go to court.¹⁸¹ Educating the public about the mediation process can increase the use of the mediation program.

There are numerous ways information about the program can be distributed to the public. This section focuses on communicating with local media, utilizing outreach programs and creating printed and electronic materials as a means to educate the public. By utilizing these tools and observing the guidelines that follow, the court can disseminate information concerning the mediation program.

¹⁸⁰ See National Survey Findings on: Public Opinion Toward Dispute Resolution, 4 (National Institute for Dispute Resolution, 1992).

¹⁸¹ See *id.* at 4.

A. COMMUNICATING WITH LOCAL MEDIA

This section covers: 1) rules for dealing with the media, 2) techniques for news releases, 3) possibility of using op-ed pieces, and 4) techniques for press conferences.

There are no ironclad rules for dealing with the media. The following list of rules does not apply to every situation, but is a list of general guidelines that have been referred to in various media relations texts.¹⁸²

1. **Designate one individual as the contact person for media relations.** *Have all questions and calls directed to this individual. This can help to avoid confusion by the media and maintain a consistent message from the court.*
2. **Know the local media.** *Know the media's deadlines, news formats, audiences and needs.*
3. **Limit mailings.** *Send releases only to media outlets that would have an interest in the information.*
4. **Localize.** *Surveys show that the most effective materials have a local angle. Take time to develop that angle within the news releases.*
5. **Send newsworthy information.**
6. **Practice good writing.** *News materials should be well-written and concise.*
7. **Avoid gimmicks.**
8. **Be available.**

¹⁸² See Dennis L. Wilcox & Lawrence W. Nolte, PUBLIC RELATIONS – WRITING & MEDIA TECHNIQUES, 286 (3rd ed. 1997). See generally Scott M. Cutlip & Allen H. Center, EFFECTIVE PUBLIC RELATIONS, 388-389 (5th ed. 1982).

9. **Get back to reporters.**
10. **Be truthful.**
11. **Answer questions.** *There are only three acceptable answers to questions: “Here it is,” “I don’t know but I’ll get back to you within the hour,” and “I know but I can’t tell you now because ...” “No comment” is not an acceptable answer.*
12. **Be fair.** *Competing media deserve equal opportunity to receive information in a timely manner.*

News releases, when they form the basis of stories in the news columns of newspapers and magazines or are part of television news shows, create awareness about ideas and situations.

News releases adhere to a specific form and guidelines. The following is a sample press release that incorporates a list of basic components that should be adhered to when preparing a news release.¹⁸³

¹⁸³ See generally, Dennis L. Wilcox & Lawrence W. Nolte, PUBLIC RELATIONS – WRITING & MEDIA TECHNIQUES, 114-117 (3rd ed. 1997); Carole M. Howard & Wilma K. Mathews, ON DEADLINE – MANAGING MEDIA RELATIONS, 31-37 (1994); Kate Kelly, THE PUBLICITY MANUAL, 26–39 (1983).

Rogers County Court of Common Pleas
111 Judicial Street
Adrville, Ohio 11111
(111) 111-1111

1. The name of the organization

2. Contact Name and number → **Press Contact: Paul Garver (111) 222-3333**
Fax: (111) 333-4444

3. A headline or tag line 4. A release time → **FOR IMMEDIATE RELEASE**

→ **Common Pleas Court One of Three Award Mediation Grant** 5. A date

ADRVILLE, OHIO, January 16, 1999: The Clinton County Common Pleas Court has been chosen as one of only three counties in Ohio to receive grant monies to establish an in-court mediation program. Judge William S.Davis was informed today by the Supreme Court that a grant proposal submitted by the court has been accepted. Judge Davis stated, "We are proud to be selected for this grant, and look forward to instituting a dispute resolution program that will be beneficial for the people of Rogers County."

Rogers County was chosen from among all the other small counties that had submitted proposals. Merida County was chosen from among the medium sized counties and Whitmer County was chosen from among the larger counties.

Under the guidance of the Supreme Court, all three of these counties will be using grant monies to hire an experienced mediator who will offer litigants an alternative to taking their cases to trial.

Civil mediation is the process whereby a neutral third party encourages and facilitates the resolution of a dispute, other than a domestic realtions matter, without directing or prescribing the result. It is informal, non-adversarial, and has the objective of assisting the disputing parties to reach a mutually acceptable settlement agreement.

← 6. An ending, most news releases end with -30- or

Other suggestions for news releases include:

1. **Follow an accepted journalistic style of writing.** *Utilize Associated Press Stylebook and Libel Manual form.*
2. **Keep it concise.**
3. **Avoid breaks.** *Try not to split words and sentences at the bottom of a page. Write “more” at the bottom of page 1 of the release to indicate there is a second page. Write “over” at the bottom if it is printed on both sides of the paper.*
4. **Write in the inverted pyramid style.** *The important information is given first, with the less important information following and, finally, the least important information at the end.*
5. **Write clearly.** *Do not write the news release in legalese.*
6. **Indent the paragraphs.**
7. **Double-space the news release and keep standard margins.** *Standard margins are two inches from the top of the page and 1.5 inches from the sides and the bottom.*

News releases for radio and television are slightly different from those used for print media. The following is a list of easy-to-remember rules for radio and television news releases.¹⁸⁴

1. Along with the news release time, put down a “read time” such as “:15” for 15 seconds or “:30” for 30 seconds.
2. Since the material is written out for time and not for space, everything must be spelled out. There can be no abbreviations, no numerals, and all names and unusual words should be spelled phonetically.
3. Sentences should be short, with descriptive words before rather than after nouns. For example, “the thirty-nine-year-old vice president” instead of “the vice-president, 39.”
4. The inverted pyramid style is not used. In broadcast style, the release tells what the news is, then tells it again, and then tells it again.
5. For television the paramount consideration is visual interest.

The op-ed piece is an opportunity for the court to take a stand on an issue, named for its position in the newspaper on the page opposite the editorial page. On the average, op-ed pieces are run every day, from one article to two or three. The length appears most often to be about 750 words. It is best to call the local newspaper and ask for specific rules.¹⁸⁵

¹⁸⁴ See Carole M. Howard & Wilma K. Mathews, *ON DEADLINE – MANAGING MEDIA RELATIONS* 35 (1994).

¹⁸⁵ See *id.* at 38-39.

The following is an excerpt from a piece written by Judge Harry Klide:

As a judge, I wholeheartedly support the virtues of alternative dispute resolution. I see it as a mechanism that is more efficient and creative in a variety of cases I handle than the traditional adjudicatory process. I also see it as an opportunity for lawyers to familiarize themselves with a process that can have far-reaching benefits for them and the public. I seriously doubt that our clients and the public will continue to accept what many Americans deplore in the practice of law today. It is in the best interest of the lawyers to focus on collaboration, and to the extent possible, to return to the notion of law as a profession rather than law as a business. The traditional infrastructure that we call a courthouse is in need of resuscitation. Judges, in dealing with society's social, economic and racial issues, must embrace innovative legal tools to assist litigants and the judicial system.¹⁸⁶

A news conference should offer both news and a forum for the exchange of information. A news conference needs to announce something that will have a significant impact on the reading/viewing audience. It should also involve a complex issue that cannot be explained with a news release. There are a few general rules to observe when planning a news conference:¹⁸⁷

1. Know the local media, and know when the best time for them would be. This is generally in the late morning, after the television crews have been given their assignments to cover and when there is still time for news to go into the newspaper before deadline.
2. Notify the media a few days in advance.
3. Each member of the media should be greeted as he or she arrives at the news conference. They should be shown the layout of the site and where camera crews should go and where print reporters should sit.
4. The press kit given to the media at the end of the conference is critical. A variety of information should be included such as biographies and news releases.

¹⁸⁶ For the complete op-ed piece, *see* IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

¹⁸⁷ *Id.* at 41-44.

B. UTILIZING OUTREACH PROGRAMS

There are other opportunities for communicating with and educating the public. Speaking engagements and externship programs with local colleges and universities help to increase awareness.

Utilizing the court mediator as a speaker at local colleges and universities and also at bar and community events creates awareness of the program. Many law schools are also instituting clinical classes to teach the fundamentals of mediation. The court mediator or judge could be utilized in these classes as a commentator, speaker or evaluator of mediation techniques.

Many colleges, universities and law schools have externship and internship programs, which could be utilized by the court. By contacting these universities and describing the positions available, the court could receive needed help and also expose more people to the mediation process. These externs could help to evaluate data, set up events and make follow-up calls (see Chapter 13 on volunteer programs).

C. CREATING PRINTED AND ELECTRONIC MATERIALS

It is important to have a pamphlet or sheet that describes the mediation program to members of the general public.

This piece should explain the need for this program, the concept behind the program and any recent statistics about the program. The court can compile a list of local businesses and organizations to receive this informational pamphlet. This list could be obtained by contacting the local chamber of commerce or business association.

The creation of a web site for the mediation program or as part of the court's web site can help to educate the public and can contain information on various aspects of the mediation program. Both printed materials and electronic materials can convince people of the effectiveness of mediation. People are more likely to use mediation if they know that: (1) Mediation costs less money than going to court; (2) mediation takes less time than going through the court system; (3) mediation is more congenial and less combative than going to court; and (4) with mediation the participants are responsible for helping to solve the problem.¹⁸⁸ Information and statistics that support these statements can be included in pamphlets, web sites and other information that is distributed to the public.

¹⁸⁸ See National Survey Findings on: Public Opinion Toward Dispute Resolution, 17 (National Institute for Dispute Resolution 1992).

VI. Educating Local Businesses

It is important to communicate with and educate local businesses about the process of mediation. Many of these businesses may be involved in a substantial amount of litigation and therefore may have a vested interest in understanding the process of mediation. It may also help the mediation program if businesses ask their attorneys about the mediation program or instruct them to participate in it.

Speaking engagements at the local chamber of commerce and at local business associations to explain the mediation process and its benefits can help to inform local businesses. Also, an informational pamphlet discussing the process of mediation and its benefits can help. A mailing list could be obtained from the local chamber of commerce, or a sheet or pamphlet could be sent out with the chamber's news.

Mediation programs may ultimately help courts save money, but they involve initial outlays of funding. Currently, Ohio courts may seek state funding for the initial two years of operation. After that, state law authorizes filing fee add-ons that can provide ongoing funding. Some courts may reduce the need for funding by using volunteer mediators for some kinds of cases.

CHAPTER FIVE ~ BUDGETING FOR AND FUNDING THE MEDIATION PROGRAM

“... there likely will always be real limits on the resources that courts will be able to commit to their ADR programs. If those real limits force courts to choose between volume and quality, I believe the former always must be sacrificed for the latter. We should refuse to operate a program that is any larger or more ambitious than we can support at a high-quality level – especially in programs where the court either requires participation in an ADR process or generates considerable momentum in that direction.”

~ Wayne Brazil, Magistrate Judge
United States District Court, Northern District of California



- | | |
|--|--------------|
| I. Introduction | 5 - 2 |
| II. Applying for State Funding
<i>This section describes state grants for court mediation programs.</i> | 5 - 3 |
| III. Additions to the Filing Fee
<i>Ohio law authorizes an addition to the filing fee to support court mediation programs.</i> | 5 - 3 |
| IV. Other Budgeting Considerations
<i>Some courts use local funds and volunteers to augment funding, while others share costs with other courts or counties.</i> | 5 - 4 |

I. Introduction

The key components of the court mediation budget include compensation for the mediator and a secretary, funds for mediation training and travel and expenses for public awareness campaigns. Some of the Ohio urban courts have started mediation programs for \$100,000. Other courts have organized mediation programs that serve several counties for about the same amount of money.¹⁸⁹

The Supreme Court of Ohio court mediation projects demonstrate that additional filing fees can support mediation programs once they have been in operation for two years. The court grants provide the initial outlay required to get a mediation program started and operational for two years. By this time, experience indicates that the bar and public reaction for the mediation programs is sufficiently positive to support the imposition of filing fees for the programs, sometimes in combination with county funds.

¹⁸⁹ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999). These include: the Ashtabula Court of Common Pleas, General, Domestic Relations and Juvenile divisions, along with four local municipal courts; the Clark County Domestic Relations and Juvenile courts; the Henry County Court of Common Pleas, General, Domestic Relations, Juvenile and Probate divisions; the Defiance County Common Pleas, Juvenile and Probate divisions, and two local municipal courts; and the Richmond County Common Pleas Court, General, and Juvenile divisions.

II. Applying for State Funding

In 1999, the Ohio Legislature appropriated funds for approximately 20 new mediation programs. The Supreme Court of Ohio has issued guidelines for courts that seek to provide staff mediation. The grants fund only the first two years of operation for the mediation program. After that, the courts must rely on other sources of funding.¹⁹⁰

III. Additions to the filing fee

Ohio Revised Code section 2302.202 authorizes courts to assess a filing fee dedicated to the support of the court's mediation program:

(A) The court may charge, in addition to the fees and costs authorized under section 2302.20 of the Revised Code, a reasonable fee that is to be collected on the filing of each civil or criminal action or proceeding and that is used to implement the procedures, and court shall direct the clerk of court to charge the fee.

In explaining this filing fee addition, the court may want to release statistics indicating the success of the mediation program. For more information regarding monitoring and evaluating a mediation program, please see Chapter 11.

¹⁹⁰ For more information regarding these proposals, please refer to the IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

IV. Other Budgeting Considerations

Some courts use monies appropriated by the county commissioners to fund their mediation programs. They may justify the use of these funds in a variety of ways. For example, mediation programs can be justified as a means to save costs for parties' litigation and improve their satisfaction with the courts. In addition, some courts may be able to demonstrate cost savings for the court as well as the parties after adding mediation programs (see Chapter 1).

In some other states, courts commonly charge the parties for in-court mediation, even if they are statutorily required to participate. The Supreme Court of Ohio instead supports a court-paid mediation program. The debate over the wisdom of charging the parties for mediation in compulsory programs is discussed in Chapters 6 and 7.

Some Ohio courts stretch the mediation dollar by supplementing staff mediators with periodic Settlement Week programs involving volunteer mediators (see Chapter 13). Others use mediators on an ongoing basis, sometimes to co-mediate with staff mediators when specific substantive expertise is needed.

In order to staff a mediation program, there are many issues that the court will need to consider to ensure that the staffing structure coincides with the goals that the court has set for its program. The quality of the person or persons that the court employs to provide the parties with mediation services is central to an effective program. Moreover, important issues that include choosing the program's structure, deciding whether to set mediator qualifications, implementing a training requirement and interviewing potential candidates will play a role in staffing a highly effective and efficient mediation program.

CHAPTER SIX ~ STAFFING THE MEDIATION PROGRAM

By Liza-Marie Merida

A mediator who works in a court-sponsored program will be viewed by the parties and their lawyers, at least in some measure, as an agent of the court. A mediator who is so viewed must act in ways to conform to the most fundamental norms by which our judicial institutions are guided. As public institutions whose mission revolves around notions of justice, we can insist that 'quality' in our ADR programs include, at a minimum, neutrals and processes that are dominated by moral integrity and that reflect a deep commitment to procedural fairness.



~ Wayne Brazil, Magistrate Judge
United States District Court, Northern District of California

- I. Introduction** **6 - 3**

- II. Program Structure** **6 - 6**
This section addresses the importance of integrating the program's goals and the staffing decisions. A discussion on different strategies that a court may use in starting a program is also presented.

- III. Principles of Mediator Qualifications** **6 - 9**
Qualified mediators possess a variety of characteristics. To ensure the competency of its mediators, the court needs to understand which characteristics should be considered most important in meeting the program's goals.

IV. Mediator Style	6 - 17
<i>The mediator in most instances will use an approach that complements the parties' needs. The court should understand the facilitative and evaluative mediator models as they are applied in resolving disputes.</i>	
V. Training	6 - 23
<i>Many courts require certain training criteria of their mediators. This section addresses a variety of training programs available to a court establishing a mediation program.</i>	
VI. Selecting and Interviewing a Mediator	6 - 28
<i>Where to look for mediators, important characteristics to look for and a step-by-step process for interviewing and hiring mediators are the subjects of this section.</i>	
VII. Mediator Involvement in Complex Cases: Special Considerations	6 - 31

I. Introduction

A. AN OVERVIEW OF THE IMPORTANT ISSUES

There are a variety of options to consider in staffing a mediation program. Most importantly, staffing decisions should coincide with the court's vision statement and program goals (see Chapter 3). Some courts choose to implement a program that allows the parties to choose a mediator, while other courts implement programs where the court itself provides a mediator for the parties. There are advantages to both program types. Several policy arguments can be made in favor of a "party choice" method of mediator selection.¹⁹¹ Some of those reasons include whether a power imbalance would result if one party dominated the mediator selection process, whether the court has a specific goal or public policy that this method would impede and whether this method would promote unreasonable delay.¹⁹²

Many aspects of staffing a court mediation program build on the goals that a particular program wants to realize. Therefore, making those goals clear from the start will enhance the court's ability to choose the framework that will best suit the court's unique needs. Other issues a court should consider in designing an initial program staffing strategy include funding, requiring specific mediator qualifications and whether to adopt a volunteer program. Both funding

¹⁹¹ See National Standards for Court-Connected Mediation Programs 7-0 (Center for Dispute Settlement & The Institute of Judicial Administration 1992).

¹⁹² See *id.* at 7.1.

(see Chapter 5) and volunteer programs (see Chapter 13) are the subjects of other chapters in this book; whether to implement mediator qualifications is addressed later in this chapter.

Courts have found that making staffing decisions early in the development process is beneficial to ensuring an effective staffing structure.¹⁹³ In courts where a mediator will be provided for the parties, selecting the mediator early in the process allows the court to involve the mediator in important program decisions.¹⁹⁴

¹⁹³ See IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

¹⁹⁴ See *id.*

B. THE CHAPTER APPROACH

The following material will introduce staffing options and prevalent issues for courts. Section II will address the importance of program structure, the quality of the mediator and the mediation services the court will provide. Section III presents the principles for establishing mediator qualifications and whether the court should impose certain requirements of the mediators that are selected to mediate the court's cases. The court should understand that there is a significant division regarding what approach to adopt and therefore should consider the issue when thinking about how to effectively select quality mediators. Section IV provides the court with the information needed to recognize the difference between the facilitative and evaluative mediation styles and how these style approaches affect the court's goals. In Section V, general training recommendations are presented. Section VI gives the court guidelines in selecting and interviewing a mediator and addresses which mediator characteristics may or may not produce an effective mediator. Finally, there are special considerations when a court decides to mediate complex cases: Section VII provides a brief overview of the issues in this area.

II. Program Structure

A. INTEGRATION OF MEDIATION PROGRAM GOALS AND STAFFING DECISIONS

Chapter 3 of this book addresses how to lay a foundation on which a successful program can rest. In addition to a vision statement, the court should set some primary goals. These goals will focus the court on making decisions that will serve to further the development of a successful program. The box below enumerates some possible goals for mediation programs.

GOALS TO CONSIDER

Providing greater satisfaction to litigants
Encouraging earlier settlement
Preserving a good relationship between all parties involved
Saving the parties' cost
Saving judicial time
Reducing the length of time for case life
Establishing a court mediator program at no expense to the litigants
Changing the culture in which disputes are solved
Providing a mediation process that maintains complete confidentiality

Upon setting specific goals for the program, the next step is to integrate the goals into the decisions involved when considering the possible staffing options. In Ohio, court pilot programs provide a practical framework from which to learn what is necessary to operate a successful program. The project consultant for the Ohio three-court pilot mediation program provided the staffing structure data collected from the participating counties, and these are presented below.¹⁹⁵

Stark County	Montgomery County	Clinton County
One part-time mediator One part-time administrative assistant	One part-time mediator existing staff used for support	One part-time mediator existing staff used for support
<i>After One Year:</i> One full-time support staff	<i>After One Year:</i> One full-time support staff	
<i>In Year Two:</i> An additional part-time mediator hired	<i>In Year Two:</i> Mediator became full-time	

B. CONSIDERING DIFFERENT STAFFING STRATEGIES

There are other options available to a court looking to provide mediation as a mechanism for resolving disputes. Many of the court’s decisions with respect to staffing strategies will depend on budgetary constraints and program goals. The courts in the three-court pilot program did not charge mediation fees to the parties who were referred to mediation (see Chapter 7). However, a court may consider adding a small amount to the filing fee that would allow a court to offer this process to parties in dispute (see Chapter 5).

¹⁹⁵ See Interview with Frank Motz, Three Court Pilot Project Consultant, in Columbus, Ohio (February 10, 1999).

There are several models in use nationally for the staffing structure of the mediation program. The following table lists some of the common models.¹⁹⁶

PROGRAM MODELS

MODEL	IMPORTANT DISTINCTIONS
Full-time in-house neutral	The mediators are full-time court employees, and services are solely court-provided. ¹⁹⁷
Non-profit organization provides court with mediators and manages program	Courts can decide to charge or not charge the parties depending on whether the mediator will be paid or not.
Court pays the private mediators directly	Mediators are not full-time court employees, and they are sometimes paid on a per case basis.
Court arranges for voluntary private mediators to provide services	Parties are usually not charged to participate in the program. The court recruits, trains and supervises the service providers.
Court refers parties to private mediators who charge the parties directly	There are variations of this model that include: <ul style="list-style-type: none"> - The parties must use the mediator the court chooses - The parties must choose a mediator from an approved list - The parties find a private mediator themselves - The court accepts a stipulation that the parties will participate in a mediation

The advantages and disadvantages of each model, as they relate to choice of mediators, are discussed in the sections that follow (see also Chapter 7).

¹⁹⁶ See Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 747-750 (1999).

¹⁹⁷ See *id.* at 748.

III. Principles of Mediator Qualifications

A. STAFFING STRUCTURE AND MEDIATOR QUALIFICATIONS

U.S. Magistrate Judge Wayne D. Brazil draws on his experience with court dispute resolution programs to weigh the merits of various types of mediator qualifications based on each program's structure. He notes that in a court-connected mediation program where the court chooses to implement a staffing structure similar to the full-time, in-house neutral model in the preceding table, the public is less likely to call into question the mediator's qualifications.¹⁹⁸ Moreover, the parties' concerns about the mediator's motivations and intentions are eliminated when the court employs a full-time mediator.¹⁹⁹ In this instance, the public will not worry about whether the mediator is attempting to buildup a clientele via the mediation process.²⁰⁰ In a full-time, in-house staff neutral model, the concern is whether the mediator is pressured to reach settlement.²⁰¹ Pressure to settle would in turn affect the mediator's actions

¹⁹⁸ *Id.* at 51.

¹⁹⁹ *See id.*

²⁰⁰ *See id.*

²⁰¹ *See id.* at 56.

and compromise the court's mediation model.²⁰² (See Chapter 10 for questions involving mediator ethics and accountability).

The court should note that a well-respected and qualified mediator might be found privately as well as in non-profit mediation organizations.²⁰³ However, a disadvantage to allowing an outside organization to provide the court's mediation services rests in the parties' perception of the organization.²⁰⁴ If the parties perceive the mediation-provider/organization as holding views contrary to their own, then it is more likely that mediator qualifications will come into question.²⁰⁵

B. PERFORMANCE-BASED QUALIFICATIONS

The National Standards for Court-Connected Mediation Programs address the mediator qualifications issue in the following manner:

Courts have a continuing responsibility to ensure the quality of the mediators to whom they refer cases. Qualifications of mediators to whom the courts refer cases should be based on their skills. Different categories of cases may require different types and levels of skills. Skills can be acquired through training and/or experience.

²⁰² *See id.*

²⁰³ *See id.* at 51.

²⁰⁴ *See id.* at 56.

²⁰⁵ *See id.*

No particular academic degree should be considered a prerequisite for service as a mediator in cases referred by the court.²⁰⁶

Implementing specific qualifications for mediators may have the effect of narrowing the mediator pool.²⁰⁷

Therefore, the question is whether implementing certain mediator qualifications has an impact on mediation results. There are certain skills that the Society of Professionals on Qualifications in Dispute Resolution (SPIDR) has presented for neutrals in general and specifically for mediators that the courts can follow to ensure a qualified court mediator.²⁰⁸

²⁰⁶ National Standards for Court-Connected Mediation Programs, 6-1 (Center for Dispute Settlement & The Institute of Judicial Administration 1992).

²⁰⁷ See Nancy H. Rogers and Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 2.04, 855 (2d ed. 1994 & 1998 Supp.).

²⁰⁸ See *Qualifying Neutrals: The Basic Principles*, The Report of the SPIDR Commission on Qualifications, Report #1 (1989).

What mediator qualifications or characteristics affect the mediation process and its results? Research in the area indicates that the only mediator qualification impacting the success of the mediator is past experience in mediating cases.²⁰⁹ Given this evidence, SPIDR recommended performance-based mediator qualifications.²¹⁰ The criteria that programs should focus on are the ones listed in the table below. It is important to note that SPIDR makes a recommendation similar to the National Standards recommendation presented at the beginning of this section. SPIDR states:

Knowledge acquired in obtaining various degrees can be useful in the practice of dispute resolution. At this time and for the foreseeable future, however, no such degree in itself ensures competence as a neutral. Furthermore, requiring a degree would foreclose alternative avenues of demonstrating dispute resolution competence. Consequently, no degree should be considered a prerequisite for service as a neutral.²¹¹

²⁰⁹ *See id.* at § 11.02.

²¹⁰ *Id.*

²¹¹ *Id.*

SPIDR PERFORMANCE-BASED QUALIFICATIONS

FOR NEUTRALS IN GENERAL	FOR MEDIATORS
<p>Ability to listen actively;</p> <p>Ability to analyze problems, identify and separate issues involved and frame these issues for resolution or decision making;</p> <p>Ability to use clear, neutral language;</p> <p>Sensitivity to stronger felt values of the disputants including gender, ethnic and cultural differences;</p> <p>Ability to deal with complex factual matters;</p> <p>Presence and persistence, an overt commitment to honesty, dignified behavior, respect for the parties, and an ability to create and maintain control of a diverse group of disputants;</p> <p>Ability to identify and to separate the neutral's personal values from issues under consideration; and</p> <p>Ability to understand power imbalances.</p>	<p>Ability to understand the negotiating process and the role of advocacy;</p> <p>Ability to earn trust and maintain confidentiality;</p> <p>Ability to convert parties' positions into needs and interests;</p> <p>Ability to screen out non-mediatable issues;</p> <p>Ability to help parties invent creative options;</p> <p>Ability to help parties identify principles and criteria that will guide their decision making;</p> <p>Ability to help parties assess non-settlement alternatives;</p> <p>Ability to help parties make their own informed choices; and</p> <p>Ability to help parties assess whether their agreement can be implemented.</p>

SPIDR's report also recognizes that the qualifications issue must be considered in conjunction with the program structure that the court decides to implement. Hence, for those programs that allow total "party choice" in selecting a mediator, the program should avoid mediator qualification requirements.²¹² The reasoning is that if the parties have chosen a mediator in the free mediator market, then their choice should not be constrained.²¹³ Moreover, the responsibility for choosing a competent mediator falls on the parties whose final mediator choice should not undergo any review.²¹⁴

A different result follows when a program chooses to provide a mediator for the parties, thereby eliminating any party input about who will mediate the dispute. In this instance, the performance-based qualifications previously mentioned are the recommended guidelines that can be considered when setting any mediator qualifications.²¹⁵

Research indicates that "settlement was somewhat more likely if the mediator had previously mediated 16-50 cases or over 50 cases, than if the mediator had mediated three or fewer cases or 4-15 cases."²¹⁶ Data from Ohio's

²¹² *See id.*

²¹³ *See* Leonard Riskin & James Westbrook, *DISPUTE RESOLUTION AND LAWYERS* (1997).

²¹⁴ *See id.*

²¹⁵ *See id.*

²¹⁶ *Id.* The study states that 38 percent of the cases were settled by individuals who had previously mediated over 50 cases; 36 percent of the cases were settled by individuals who previously mediated 16-50 cases; 28 percent of the cases were settled by individuals who previously mediated 0-3 cases; and 25 percent of the cases were settled by individuals who previously mediated 4-15 cases.

Settlement Week Mediation and the Three-Court Pilot Program provide additional research supporting this conclusion. Specifically, Settlement Week Mediation research concludes that the only mediator characteristic that affected settlement rates was whether the mediator had mediated a considerable number of cases in the past.²¹⁷

In Ohio, the Supreme Court Committee on Dispute Resolution conducted public hearings on mediator qualifications in the area of domestic relations. The Rules of Superintendence for the Courts of Ohio require that mediators involved in disputes concerning the allocation of parental rights and responsibilities possess certain educational requirements.²¹⁸ Currently, however, no other qualification requirements exist for mediators who are involved in any other type of dispute.

C. ENTRY-LEVEL QUALIFICATIONS: SHOULD THEY BE ESTABLISHED?

The debate concerning mediator entry-level qualifications is important to understand in the initial stages of program development. An important question that will be addressed during the development stage is whether to impose qualifications on the selected mediators. Among other qualifications, requiring a particular educational degree may be a possible option to consider.²¹⁹ One of the reasons for this qualifications debate stems from the need to ensure

²¹⁷ See Roselle Wissler, *EVALUATION OF SETTLEMENT WEEK MEDIATION*, 18 (Supreme Court of Ohio Committee on Dispute Resolution, 1997).

²¹⁸ Rule 16 of the Rules of Superintendence for the Courts of Ohio (1997).

²¹⁹ See Lee Dobins, *The Debate Over Mediator Qualifications: Can They Satisfy a Growing Need to Measure Competence Without Barring Entry Into the Market?*, 7 U. FLA. J.L. & PUB. POLY 95, 101 (1995) (examples of educational degree requirements).

mediator competence. However, courts should note the fact that there is no evidence to support the view that the competence of a mediator or the party's evaluation of the mediation process is related to certain educational requirements.²²⁰ Even requiring law degrees does not seem to affect the quality of the mediator or mediation process.²²¹ Despite these conclusions, some states have imposed law degree requirements in higher-level courts of general jurisdiction.²²²

In addition to the lack of evidence linking mediator competence to certain educational requirements, the court would need to consider how imposing mediator qualifications will affect program costs. Mediation is an informal process often used to avoid the cost of litigating a dispute. If these formal requirements increase costs, they reduce the attractiveness of mediation.²²³ Such requirements may also affect the ability to recruit the most skilled mediators and those from varied backgrounds. The court may want to carefully evaluate whether imposing mediator entry-level educational requirements is sufficiently vital to justify added costs and a narrowed mediator pool.

²²⁰ See Kristen Whitmer, *Who's in Charge of Justice?: a Practical Look at Increasing Qualifications for Mediators* (Fall 1998) (unpublished manuscript, on file with the Ohio State University College of Law).

²²¹ See Charles A. Bethel & Melinda Ostermeyer, *CONFLICT RESOLUTION FOR COURTS* 42 (National Institute for Dispute Resolution).

²²² See Nancy H. Rogers and Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 2.04, 855 (2d ed. 1994 & 1998 Supp.).

²²³ See *id.*, at § 2.04, 855.

IV. Mediator Style

The style the mediator adopts is in part a product of experience and training. A mediator's style can be facilitative, evaluative or both. Courts need to understand the distinction between the two approaches in order to ensure that the goals of the mediation program work in conjunction with the style of the selected mediator.²²⁴ In most instances, mediators will invoke a style that combines the two approaches.²²⁵ Additionally, aspects of the mediation program itself will serve to shape the selected mediator's style because a mediator facilitates and/or evaluates according to what he or she perceives to be the parties' needs during the course of the mediation.

²²⁴ Leonard Riskin & James Westbrook, *DISPUTE RESOLUTION AND LAWYERS* (1997).

²²⁵ Interview with David Doyle, Conference Attorney, 10th District Court of Appeals for Franklin County (1999).

A. FACILITATIVE MEDIATORS

In a facilitative mediation, a third party uses empathetic listening skills, among other tactics, to enable the parties to formulate their own solutions to the dispute.²²⁶ Facilitative mediators possess little authority upon entering the mediation,²²⁷ and therefore, “the mediator’s substantive knowledge will not play a role [in the mediation].”²²⁸ The facilitative mediator focuses on remaining neutral during the mediation and on gaining the parties’ trust not only in him or herself but also in the process as a whole.²²⁹

B. EVALUATIVE MEDIATORS

There exist moments in a mediation session when either the parties fail to recognize possible solutions to the dispute or the parties ask the mediator for an analysis as to the strength of their cases. If the mediator declines to make an evaluation of the case or declines to provide suggestions to the parties about possible solutions to the dispute, then the mediator is continuing with a purely facilitative mediation model. It is up to each mediator to decide whether and how to make suggestions, provide evaluation of the strengths and weaknesses of the case or recommend a particular

²²⁶Nancy H. Rogers and Richard Salem, *A STUDENT’S GUIDE TO MEDIATION AND THE LAW* (1987).

²²⁷*Id.*

²²⁸Kristen Whitmer, *Who’s in Charge of Justice?: a Practical Look at Increasing Qualifications for Mediators* (Fall 1998) (unpublished manuscript, on file with the Ohio State University College of Law).

settlement. Initial research suggested that an evaluative approach may increase the likelihood of settlement and simultaneously promote attorney and party satisfaction.²³⁰

C. MEDIATOR STYLE AND SETTLEMENT RATES

In Ohio, the Settlement Week study concluded that a dispute was more likely to reach settlement if the mediator suggested a particular solution than if the mediator did not suggest a particular solution.²³¹ When the mediator suggested a particular solution, however, the parties were more likely to report that they were dissatisfied with the mediation process and less likely to perceive the mediation process as fair and neutral.²³² Thus, suggesting a particular solution was a high-risk strategy in terms of satisfaction despite its usefulness in reaching settlements. When the mediator suggested a variety of solution options for the mediation, the dispute was less likely to settle than when the

²²⁹ *Id.*

²³⁰ See Roselle L. Wissler, EVALUATION OF SETTLEMENT WEEK MEDIATION, 25 (The Supreme Court of Ohio Committee on Dispute Resolution, 1997).

²³¹ See Roselle L. Wissler, EVALUATION OF SETTLEMENT WEEK MEDIATION, 19 (The Supreme Court of Ohio Committee on Dispute Resolution, 1997). The study notes 49 percent of the cases in the study were more likely to reach settlement when the mediator suggested a particular solution. When the mediator did not suggest a particular solution, only 25 percent of the cases reached settlement.

²³² *Id.* at 39.

mediator did not make any solution recommendations.²³³ However, the likelihood of settlement was not affected in instances where the mediator evaluated the merits of the case.²³⁴

The results of the Three-Court Pilot Program reveal that when a case did not settle, there was greater progress toward settlement if the mediator advocated a particular settlement or if the mediator evaluated the merits of the case. As noted above, even though greater progress toward settlement was made when the mediator's actions included advocating a particular settlement or evaluating the merits of the case for the parties, the parties were more likely to report that the mediation was fair and neutral when the mediator evaluated the merits of the case and less likely to report that the mediation was fair and neutral if the mediator advocated a particular solution.²³⁵ The attorneys involved in Three-Court Pilot Program mediations indicated that the mediator was more effective when the mediator took an active and evaluative role toward the mediation.²⁴⁶

Which mediators tend to choose one style over the other? The Settlement Week study concludes that even though the only characteristic that affects settlement rates is whether the mediator has previously mediated a

²³³ *Id.*

²³⁴ *Id.* at 2.

²³⁵ *Id.* at 39.

²³⁶ *Id.* at 3. *See also*, Roselle L. Wissler, AN EVALUATION OF THE COMMON PLEAS COURT CIVIL MEDIATION PROJECT, 74-75 (The Supreme Court of Ohio, 2000). The final report evaluation of the Three-Court Pilot found, in a larger sample of cases, that parties were more pressured to settle if the mediator made a specific recommendation and the case did not settle. These factors, however did not have an impact on attorney satisfaction.

considerable number of cases, other mediator characteristics such as expertise in the subject area and training affect mediator actions.²³⁷ In turn, the mediator actions, and therefore, mediator style, may indirectly affect settlement rates.²³⁸

D. FACILITATIVE VS. EVALUATIVE: A WORD ABOUT THE CURRENT DEBATE

A number of scholars have struggled with the task of presenting the correct perception of mediator style. The challenge for the court is to determine whether style should impact the court's decision-making process in selecting a mediator. How important is this aspect of the mediator role? How should the court weigh the styles? Will a specific style provide better mediation? These are all questions that have fallen victim to unsettled analysis. The following current views on the debate should create awareness of this controversial issue.

Paradoxically, while the use of mediation has expanded, a common understanding as to what constitutes mediation has weakened. It is important to identify and clarify the principles and dynamics which together constitute mediation as a dispute settlement procedure.²³⁹ The perception of many scholars is that the use of evaluation in mediation may interfere with the basic goals of mediation as it was initially presented. They believe that, if the role of

²³⁷ *Id.* at 20.

²³⁸ *Id.*

²³⁹ Joseph B. Stulberg, *The Theory and Practice of Mediation: a Reply to Professor Susskind*, 6 VT. L. REV. 85, 85 (1981).

the mediator is defined as an evaluative one, the mediation session will turn into a persuasive struggle to convince the mediator that each party's perception of the issues is correct.²⁴⁰ Other scholars accept the "reorienting of party perspectives" as a useful mediation tool if done in a manner to promote "the settlement-building process" and "as part of consensual decision-making processes."²⁴¹

Law professor Leonard Riskin created a mediator-style grid which frames the different styles that a mediator can apply in mediation as well as a list of questions that would be asked of the parties in the distinct approaches.²⁴² Riskin concludes that mediators in most instances will tailor their style to meet the needs of the parties as expressed during the course of the mediation.²⁴³ Hence, mediators may be difficult to categorize in the sense that both facilitative and evaluative techniques are used to promote successful mediations, even in instances where the mediation does not reach a settlement. Some scholars subscribe to the view that "therapeutic" mediation requires that the mediator be able to use both facilitative and evaluative techniques to help the parties understand the dispute and attempt to work through the issues.²⁴⁴

²⁴⁰ Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOTIATION L. REV. 71, 109 (1998).

²⁴¹ Joseph B. Stulberg, *The Theory and Practice of Mediation: a Reply to Professor Susskind*, 6 VT. L. REV. 1004 (1981).

²⁴² Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994).

²⁴³ *Id.* at 114.

²⁴⁴ Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ L. REV. 155, 167

If the court understands the differing views on mediator style, then it can attempt to steer its mediators to the style that adequately meets the needs of the parties. Also, even if the style of the mediator does not determine a successful mediator, it can affect how the parties and their lawyers view the mediation program. The court's decision on the issue of style may depend on its goals for the mediation program.

V. Training

After considering mediator qualifications and mediator style, the court will need to consider the type of training that it will require of or provide for its mediators. If the mediator who is appointed lacks formal mediation training, or if the mediator's training does not include civil mediation training, then the court should consider providing basic civil mediation training for the mediator.²⁴⁵

(1998).

²⁴⁵ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

A. MEDIATION TRAINING

The benefits of civil mediation training include awareness of current legal issues, familiarity with statutory provisions and an understanding of mediation techniques and theories.²⁴⁶ Courts may consider meeting with courts in other counties that have implemented a court-connected mediation program in order to share ideas about training mediators and making educated training decisions.²⁴⁷ Basic civil mediation training programs are available throughout Ohio.²⁴⁸ Courts may also consult with the Ohio Supreme Court about other programs that may be available. The three-pilot courts also provided advanced training for their mediators. Several training programs offer advanced training.²⁴⁹ Advanced mediation training topics include overcoming resistance and intake, opening the session, mastering communication, overcoming impasse, dealing with cultural issues, and ethical dilemmas.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

If the court is considering adding support staff to the program, either by hiring an additional support person or assigning the task to existing court personnel, training for these individuals is also available. A list of basic mediation training programs for support staff and contact names and numbers are found at the Supreme Court of Ohio website (www.sconet.state.oh.us).

B. GENERAL TRAINING RECOMMENDATIONS

To ensure that the program’s mediators receive the highest quality of training, SPIDR recommends that “programs or services offering training for neutral practitioners should establish clearly articulated qualifications for their trainers.”²⁵⁰ SPIDR also recommends that:

[T]rainers should provide appropriate feedback to both the trainee and the staff of the program or service for which the training is conducted, and where training is required as a condition of practice, programs have an obligation to ensure that there is adequate training to meet the program’s goals and sufficient evaluation of the performance ability of each individual trained to permit screening.²⁵¹

These recommendations are designed to provide some guidelines as to what a court should focus on with respect to the type and quality of training. The court should consider the following criteria in evaluating a training program.²⁵²

²⁵⁰Qualifying Neutrals: The Basic Principles, The Report of the SPIDR Commission on Qualifications, Report #1 (1989).

²⁵¹*Id.*

²⁵²*Id.* See also CONSUMER’S GUIDE TO SELECTING MEDITATION TRAINERS, Ohio Commission on Dispute Resolution and Conflict Management.

Does it meet the qualifications required to practice as a neutral in the area for which the training is offered?

Do the trainers communicate clearly?

Are the trainers skilled at evaluating the performance of others working in simulated situations?

As mentioned in the preceding section, the training that the mediator receives may affect the style that the mediator adopts. In Ohio, the research suggests that mediators with less than 20 hours of training were more likely to evaluate the merits of a case than those mediators with more than 20 hours of training.²⁵³ Mediators with 60 hours or more of training were more likely to suggest possible settlement options than the mediators with less training.²⁵⁴ In considering the effect that role-play experience had on the mediator's actions, the Ohio Settlement Week study indicates that mediators were less likely to evaluate the case merits and more likely to recommend particular settlements if role playing had been an aspect of their training.²⁵⁵

In considering the effects of training on a mediator's actions and how the mediator's actions in turn affect the likelihood of settlement, the court should note that a considerable amount of training may indirectly increase the proportion

²⁵³ See Roselle L. Wissler, *EVALUATION OF SETTLEMENT WEEK MEDIATION*, 20 (The Supreme Court of Ohio Committee on Dispute Resolution, (1997)).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

of cases the mediator settles. Training should be closely considered in conjunction with a variety of other characteristics.²⁵⁶

A training program that not only presents ethics, practice and theory issues, but that also engages the individual in practical role-playing experience with feedback can enhance the mediator's skills,²⁵⁷ but research suggests that training will not necessarily improve a mediator's ability to promote settlement.

In addition to these issues, the court should ensure that the training received addresses important cultural issues involved in mediation.²⁵⁸ The mediator should be sensitive to other cultures and possess the skills necessary to resolve cross-cultural disputes.²⁵⁹ Research in New Mexico indicates that minority parties obtained less favorable outcomes from mediation than they would have received from litigating their dispute.²⁶⁰ Hence, ensuring that a mediator possesses at least an awareness of the disparities in the outcomes may serve to promote a procedurally fair mediation process. Courts should note that this study was conducted in a small claims court environment where parties are more likely to represent themselves and therefore lack the advice of counsel during the course of the mediation. In the common peac curt arena, parties are

²⁵⁶Ensuring Competence and Quality in Dispute Resolution Practice, Report #2 of the SPIDR Commission on Qualifications (1995).

²⁵⁷*Id.*

²⁵⁸*Id.*

²⁵⁹*Id.*

²⁶⁰The Metro Court Project Final Report, A Study of the Effects of Ethnicity and Gender in Mediated and Adjudicated Small Claims Cases (January 1993). The study addressed whether women and minorites achieved worse results than males and non-minorities on both adjudicated and mediated small claims cases, whether that disparity was greater in mediated than in adjudicated cases, and whether that disparity was reduced or eliminated when the mediators were women and/or minorities.

likely to come to the mediation table with an attorney who could advise them of the possibility that the litigation outcome might be more favorable.

VI. Selecting and Interviewing a Mediator

This section will provide the court with the necessary tools to implement the interview and selection process. The tools found in this section may be adapted to the court's chosen program structure.

A. THE MEDIATOR POOL

The first question the court may ask is “Where can I find a mediator?” One of the purposes for compiling a list of mediators is to provide the parties with a variety of mediators from which to choose if the court were to propose a “party choice” approach to mediator selection. If the court were to hire a court mediator, thereby providing the parties with access to a mediator, a list of possible places to begin an initial mediator search would be useful. Here are a few examples:

MEDIATOR POOL RESOURCES

Local Mediation Organizations
Community Dispute Resolution Programs
State Bar Associations
Martindale-Hubbel National Dispute Resolution Directory
Ohio Directory for Non-Profit Dispute Resolution and Conflict Referral Services
Ohio Mediation Association
National Mediation Organizations
Academy of Family Mediators
Association of Family and Conciliation Courts
Society of Professionals in Dispute Resolution
American Arbitration Association

B. THE CHARACTERISTICS CONSIDERED IN SELECTING A MEDIATOR

As has been stated numerous times, empirical research indicates that the only mediator characteristic that impacts the success of the mediator is whether the mediator has past experience in mediating cases.²⁶¹ With this in mind, the court should attempt to consider a variety of characteristics in selecting a mediator, giving more weight, as discussed above, to the mediator's past mediation experience. The following is a list of all of the characteristics that a court could consider during the interviewing and selection process.

- interpersonal skills
 - being well-respected in the community
 - being able to earn party and attorney trust
 - staying neutral
 - being sensitive to signals from the parties
- expertise in a particular area of the law
- ability to resolve cross-cultural disputes
- training experience and quality of training program attended
- civil litigation experience

²⁶¹Qualifying Neutrals: The Basic Principles, The Report of the SPIDR Commission on Qualification, Report #1 (1989).

C. HIRING THE MEDIATOR: STEP BY STEP

The list below provides a suggested structural framework for selecting a mediator. The court should recognize that designing a selection structure is part of the planning process and should be tailored to the court's goals and vision statement.

1. Conducting the initial screening

- mediator training
- mediation experience
- civil litigation experience

2. Interviewing

- interpersonal and professional skills
- verbal and non-verbal communication skills
- listening skills
- ability to define and clarify issues
- problem solving skills
- organization

3. Selecting the final candidate

VII. Mediator Involvement in Complex Cases: Special Considerations

Some courts may choose to integrate an alternative form of mediation by selecting special masters to play a role in mediating disputes. The use of special masters may arise in complex cases such as mass torts, environmental disputes and employment discrimination claims. If the court already appoints special masters in certain cases, then implementing this framework would not be difficult. For courts that have not considered this option, this will serve as an introduction. The following section presents a brief description of how some courts have made use of these roles and the issues involved in selecting this framework.

A. SPECIAL MASTERS

In most cases, a special master is a private attorney whom the court appoints to conduct settlement conferences and negotiations while the court is preparing to hear the case.²⁶² Cases in which special masters have been used include the Agent Orange product liability litigation and the Brooklyn Naval Shipyard asbestos litigation.²⁶³ Judge

²⁶²Wayne Brazil, *SPECIAL MASTERS IN PRETRIAL DEVELOPMENT OF BIG CASES: POTENTIAL AND PROBLEMS IN MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS*, 5 (1983).

²⁶³Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1620 (1995); Ira Pilchen, *Asbestos, The Magic Mineral., Creates Toxic Tort 'Avalanche'*, 75 JUDICATURE 320 (1992).

Weinstein states that the responsibility of a special master is to serve as “a buffer between the court and the parties” and as “a conduit between the court and the parties and the parties and the community.”²⁶⁴

In selecting a special master to appoint to a specific case, some scholars indicate that having subject-matter expertise should not be the sole criterion. Instead, they argue that a successful master should possess negotiation and mediation skills and litigation experience.²⁶⁵ Other scholars, in contrast, place heavy weight on subject matter expertise and do not advise appointing a special master without the technical knowledge that is necessary.²⁶⁶

C. IMPORTANT CONSIDERATIONS

In appointing a special master to conduct settlement negotiations in complex cases, the court should be aware of ethical considerations that can arise under this framework. First, there are confidentiality concerns. If the special master communicates the content of the settlement discussions to the judge, then the parties may lose trust in the special master and any appearance of neutrality will be eliminated.²⁶⁷ Second, in order to avoid any appearance of coercion on

²⁶⁴Jack B. Weinstein, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION*, 145 (1995).

²⁶⁵Kenneth R. Feinberg, *Creative Use of ADR: the Court-Appointed Special Settlement Master*, 59 *ALB. L. REV.* 881, 893 (1996).

²⁶⁶Erika S. Fine, *SPECIAL MASTERS AND COURT-APPOINTED EXPERTS: A DIALOGUE*, IN *ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS* 217 (1987).

²⁶⁷*See* Chapter 9, *Ensuring Confidentiality*. Eric R. Max, *United States District Court for the District of New Jersey Bench Manual for Appointment of a Mediator*, 136 *F.R.D.* 499, 505 (1991).

the part of the special master, a court should consider prohibiting the special master from communicating with the judge or the jury.²⁶⁸ In doing this, the court will effectively use the special master as a mediator, and in turn this will lead to the more efficient resolution of these complex cases.

²⁶⁸ *Id.*

Courts in Ohio and in other states commonly refer cases to mediation by court rule or general order. The Supreme Court of Ohio Committee on Dispute Resolution as well as nationally known dispute resolution groups recommend that courts wishing to initiate a court-connected mediation program implement a mandatory program. Mandatory mediation offers substantial benefits, including high litigant and attorney satisfaction, as well as high settlement rates. But it also presents concerns such as those relating to settlement pressures, access and fairness. Issues of what constitutes non-compliance and whether sanctions can or should be imposed often need to be addressed, as well as other policy questions relating to whether parties can opt out and whether *pro se* parties should be able to participate. Nonetheless, courts of common pleas are well within their legal authority to order cases to mediation, and judges should not doubt the effectiveness of using such a mandated referral system.

CHAPTER SEVEN ~ IMPLEMENTING A MANDATORY REFERRAL SYSTEM

By Glenda D. Gelzleichter

“As a lawyer, former city attorney and retired common pleas court judge, I know firsthand how important it is to change this culture’s attitude concerning litigation. For most people, change is intimidating. Still, we sometimes have to make that change. When we ask lawyers and parties to participate in the court’s mediation program, we are teaching them about the process. We are showing them how to change their approach to resolving their dispute. Of course, the court must always be sensitive to some of the concerns of requiring their participation, but we are learning. And so the next time the lawyers see clients, they’ll think of this process.”

~ Harry Klide
Retired Judge, Stark County Court of Common Pleas



- I. Introduction** **7 - 3**
This section explains why requiring litigants’ participation in mediation is important to achieving the many substantial benefits associated with mediation. This section also provides a general road map of the entire chapter.
- II. An Overview of Practices in Mandatory Mediation** **7 - 6**
This section provides an overview of case referral practices and policies for non-compliance followed by Ohio courts and courts in other jurisdictions. Key policy recommendations by the Supreme Court of Ohio Committee on Dispute Resolution and other national groups are provided. This section also addresses the developing case law on the issue of “good faith participation” in court-ordered mediation.
- III. Benefits and Concerns of Mandatory Mediation** **7 - 28**
This section provides the many substantial benefits associated with utilizing a mandatory referral system and addresses the various concerns related with requiring litigants to participate in mediation

continued

IV. The Court’s Legal Authority to Order Mediation	7 - 39
<i>This section provides the state and federal statutory authority for Ohio courts to order cases to mediation. A new federal statute now makes this authority explicit in federal courts.</i>	
V. Charging User Fees	7 - 42
<i>This section addresses those concerns associated with requiring participants to pay fees under a mandatory program. An overview of practices and key policy recommendations are also presented.</i>	
VI. Opting Out of Mandatory Mediation	7 - 45
<i>This section addresses those concerns associated with disallowing party-requested exemptions from mediation. An overview of practices and key policy recommendations are also presented.</i>	
VII. Pro Se Cases	7 - 49
<i>This section addresses those concerns associated with barring participation by pro se parties under a mandatory program. An overview of practices and key policy recommendations are also presented.</i>	
VIII. Conclusion	7 - 53

I. Introduction

A. THE IMPORTANCE OF USING A MANDATORY²⁶⁹ REFERRAL SYSTEM

Courts that implement mandatory mediation programs derive a variety of benefits.²⁷⁰ Even when compared to voluntary programs, such benefits are substantial. For example, research shows that requiring participation in court programs increases the use of mediation.²⁷¹ Other research also indicates that participation in mandatory compared to voluntary programs is substantially higher.²⁷² Levels of satisfaction and rates of settlement reported by participants remain as high as in voluntary programs.²⁷³ And compelling new research of corporate disputing and of Ohio lawyers indicate that expanding lawyers' experience in mediation by requiring their participation can increase their referrals of

²⁶⁹ The term “mandatory” is used in this chapter to mean that parties and their lawyers are required to participate in mediation when ordered by the court. While courts are often authorized by statute or court rule to refer a case to mediation, the term does not mean judges are necessarily required to do so.

²⁷⁰ A more detailed discussion of the benefits of mandatory mediation is provided in Part III of this chapter.

²⁷¹ Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 99, 848 (1998); Society of Professionals in Dispute Resolution (SPIDR), *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts*, 12 (1991)(on file with authors).

²⁷² Elizabeth Plapinger & Margaret Shaw, Center for Pub. Resources Legal Program, *COURT ADR: ELEMENTS OF PROGRAM DESIGN* 1-13 (1992); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2084-2089 (1993); Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 426-49 (1982).

²⁷³ National Symposium on Court-Connected Dispute Resolution Research: A REPORT ON RECENT RESEARCH FINDINGS—IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS 74-75 (1993).

clients to mediation.²⁷⁴ These kinds of benefits bring a welcome change from the conventional litigation experience of lawyers and parties alike. The importance of mandating participation in order to effect this change is clear. Thus, despite the debate among commentators regarding mandatory mediation,²⁷⁵ more courts around the country are implementing mandatory mediation programs.²⁷⁶ Today, a court wishing to implement an effective mandatory referral system can draw from a significant number of empirical data sources, legislative authorities²⁷⁷ and collective practical experience. Ohio judges need not doubt the substantial benefits of implementing a mandatory program as they take a leadership role in the institutionalization of mediation throughout the state.

²⁷⁴ Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 99, 840-48 (1998).

²⁷⁵ See generally Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE*, Ch. 7 (2nd ed. 1994 & 1997 Supp.). Discussion on the concerns raised by mandatory mediation is provided in Part III of this chapter.

²⁷⁶ See Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 99, 831 (1998); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 59 (1996).

²⁷⁷ For a state by state listing of significant mandatory mediation legislation, see Appendix B in Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* (2nd ed. 1994 & 1997 Supp.). In 1995, there were over 2,000 statutes that authorized courts to refer cases to mediation.

B. CHAPTER APPROACH

This chapter offers judges a distinct view of mediation: that implementing a mandatory over a voluntary program is more effective in terms of increasing usage, stimulating more voluntary participation and thus changing this culture's prevailing perspective on resolving disputes. While voluntary programs provide similar significant benefits to mandatory mediation, it also suffers substantially from low usage.²⁷⁸ Thus, this chapter will provide an overview of mandatory referral practices in Ohio and in other states. In addition, it will explore the implications of non-compliance and sanctions while presenting the benefits and concerns of using a mandated referral system. While the Supreme Court of Ohio Committee on Dispute Resolution recommends that each division of the court of common pleas implement a mandatory mediation program, such a position still raises questions for judges. This chapter will address those questions and other critical policy issues, including not charging fees to parties ordered to mediate, the need for an "opt-out" mechanism and participation by *pro se* litigants. These kinds of challenges associated with mandatory mediation will inevitably face judges and their designated court administrators as they structure and implement an effective case referral system.

²⁷⁸ Society of Professionals in Dispute Resolution (SPIDR), *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts*, 12 (1991)(on file with authors).

II. An Overview of Practices in Mandatory Mediation

Courts in Ohio and in other states commonly refer cases to mediation by court rule or general order. Under this method, participation in mediation is mandated on a case-by-case referral through a court intake screening, selection by the mediator or at the discretion of the judge. An overview of these practices is outlined below along with key policy recommendations by the Supreme Court of Ohio Committee on Dispute Resolution and other national mediation groups. Later, this section addresses the question of non-compliance and sanctions and highlights the developing case law regarding a “good faith” participation requirement. Notably, Ohio’s mediation privilege statute would preclude enforcement of such a requirement (see chapter 10).

A. METHODS OF CASE REFERRAL

1. Ohio

Three Pilot Courts.²⁷⁹ All three pilot courts refer cases to mediation either through local court rule (Clinton and Stark counties) or by general order (Montgomery County). Referrals in the three pilot court programs occur at the initial pre-trial or status hearing scheduled within 90 days of the filing of the case, allowing for an initial mediation session to occur within seven months of the filing of the answer.²⁸⁰ All three pilot courts have had much success with establishing such a timetable.²⁸¹ The benefits of timing referrals this early in the litigation process are discussed in the following chapter (see chapter 8). Thus, the development of a local court rule or a general order of referral is a critical preliminary requirement prior to implementing a mandated referral system. Selected text from the pilot courts' local rules or general order is presented below.

²⁷⁹ Clinton, Montgomery and Stark counties received pilot project funding from the Supreme Court of Ohio from 1996-1998 to test the impact of staff mediators in three common pleas courts civil and victim-offender mediation programs. Each of the three selected counties have had mediators providing services beginning in the summer of 1996. Each court has since provided monthly reports to the Supreme Court that indicate high levels of attendance, progress in cases, early settlements, high participant and attorney satisfaction and perceptions of fairness. See C. Eileen Pruett, Request for Proposals Number 97-14, In-House Mediator Project for 12 Ohio Courts (January 1997) (on file with authors).

²⁸⁰ *Id.*

²⁸¹ *Id.*

THE THREE PILOT COURTS

Clinton County Rule 28. “Cases may be referred to mediation by court order or by agreement of the parties. ... If counsel or a party fails to attend a duly ordered mediation without good cause, the court may impose sanctions, including an award of attorneys’ fees and other costs, contempt or other appropriate sanction.”²⁸²

Stark County Rule 16. “The Court may refer a case to [mediation]. ... In the event the parties and/or their attorneys do not attend the [mediation] session, or do not meaningfully participate in the process, the [mediator] shall recommend to the judge appropriate sanctions, including but not limited to dismissal, default judgment, attorney fees and/or costs.”²⁸³

Montgomery County General Order of Referral. “Parties or party representatives with authority to settle must be present at the initial mediation session. Each party shall be accompanied by the lawyer expected to be primarily responsible for handling the trial of the case. In the event parties or their attorneys do not attend mediation or make a good faith effort to participate in the program, the court may impose appropriate sanctions.”²⁸⁴

²⁸² Ohio C.P. R. Local Prac., (Clinton Cty.) R. 28.

²⁸³ Ohio C.P. R. Local Prac., (Stark Cty.) R. 16.

²⁸⁴ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

Other Ohio Courts. Among the 12 common pleas courts currently participating in the 12-Court Pilot Program, half of the courts in this program also order cases to mediation either through local court rule or by general order.²⁸⁵ All of them, like Clinton, Stark and Montgomery, mandate attendance by the parties and their lawyers. Other non-pilot counties order cases to mediation in similar fashion. For example, Lucas County by local rule authorizes the judge to refer any civil case to mediation where the amount in controversy is under \$50,000.²⁸⁶ Likewise, Franklin County by local rule authorizes the judge to refer to a mandatory mediation conference “all [civil] cases, regardless of the amount in controversy, in which the chances of settlement would be improved with mediation.”²⁸⁷

Some state and federal appellate courts, after a case has been appealed, offer mediation services to help the parties achieve a settlement before the appellate decision is reached. This allows parties who were unhappy with the lower court’s decision but who dread a potentially long and expensive appellate process to come to a

²⁸⁵ Interview with Crevon Tarrance, Program Manager, The Supreme Court of Ohio Office of Dispute Resolution Programs, Columbus, Ohio (March 16, 1999 & April 21, 1999).

²⁸⁶ Ohio C.P. Gen. R., (Lucas Cty.) R. 6.01 (“The judge assigned to a civil case may, at or following an initial pre-trial, refer for case evaluation or mediation any civil action where the amount in controversy, regardless of the prayer of the complaint, appears to be less than \$50,000 ... The parties and their attorneys, and a representative of any insurance carrier involved shall take part in the case evaluation or mediation session. The participants shall have full authority to settle the case, and the attorney representing each side shall be the lawyer primarily responsible for handling the trial of the matter. ... Any participant who fails to take part in a session without being excused by the assigned judge will be subject to sanctions.”).

²⁸⁷ Ohio C.P. Gen. R., (Franklin Cty.) R. 105 (“The following cases, upon completion of necessary pleadings or motions, may be referred by the trial judge to a court referee for a mandatory mediation conference: ... All cases, regardless of the amount in controversy, in which the chances of settlement would be improved with mediation.”).

mutually agreeable solution through mediation. In the United States Court of Appeals for the Tenth Circuit, parties and their attorneys in any civil and administrative appeal can be ordered to a pre-hearing mediation conference through Appellate Rule 20 and Local Rule 4. The court, upon request of only one of the parties, can order an appeal to mediation.²⁸⁸ In practice, the mediator for the Tenth District Court of Appeals will often not reveal to the other party that mediation was requested by a party to prevent perceptions of weakness in an opponent's case.²⁸⁹ The mediator for the United States Court of Appeals for the Sixth Circuit, which provides similar appellate mediation services for federal litigants, also follows this practice.²⁹⁰

²⁸⁸ Local Rule 4 states in part: “[T]he attorneys and the parties, if requested, shall attend a pre-hearing conference before a judge, or the conference attorney. ... If a party or attorney fails to comply with the provisions of the rule or the provisions of the pre-hearing conference order, the court may assess reasonable expenses caused by the failure, including attorney fees; assess all or a portion of the appellate costs; or dismiss the appeal.”

²⁸⁹ Interview with David A. Doyle, Conference Attorney & Mediator for the Tenth District Court of Appeals, Columbus, Ohio (March 31, 1999).

²⁹⁰ Interview with Robert W. Rack, Jr., Senior Conference Attorney & Mediator for the Sixth Circuit Court of Appeals, Columbus, Ohio (March 31, 1999).

2. Other states

Civil litigants in other states are often ordered to mediation through state statute, local court rules or judicially issued rulings.²⁹¹ Most states authorize compulsory participation in mediation for some types of cases.²⁹² Participation in mediation may be mandated by blanket or categorical requirements for particular cases, such as for civil matters under \$50,000 and medical malpractice cases.²⁹³ Statutes and rules implementing mandatory mediation also employ a variety of formats: some targeting specific complex cases,²⁹⁴ others selecting simpler cases.²⁹⁵ Some statutes mandate participation in mediation as a prerequisite to filing an action, such as all farm mortgage cases in which mediation is not waived by the farmer²⁹⁶ or voter registration litigation.²⁹⁷ Other jurisdictions like Ohio simply order parties to mediation in individual cases under a case-by-

²⁹¹ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 7:02 & App. B (2nd ed. 1994 & 1998 Supp.).

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *See, e.g.*, GA. Code Ann. §§ 19-5-1, 19-7-3(d) and 25-5-7 (mediation mandated for firefighter collective bargaining disputes); ME Rev Stat Ann 5 § 12004-B (mediation mandated for agricultural producer-distributor bargaining disputes); Haw Rev Stat § 205-5.1 (mediation mandated for geothermal energy development disputes).

²⁹⁵ *See, e.g.*, Cal. Food & Agric. Code § 13127(c)(1) (West 1994); *see also generally* Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* App. B (2nd ed. 1994 & 1998 Supp.) (listing state-by-state legislation).

²⁹⁶ *See, e.g.*, Iowa Code § 654A.6 (1996).

²⁹⁷ *See, e.g.*, Fla. Stat. Ann. § 97.023(3)(West 1990).

case referral method.²⁹⁸ One of the parties may also request mediation or the mediator may intervene and initiate the referral.²⁹⁹ In some instances, statutes and court rules do not require participation at the mediation session but instead require attendance at a conference to discuss the possibility of using mediation.³⁰⁰ It is most common for a statute or rule of procedure to authorize courts to require mediation by local court rule or court order.³⁰¹ A number of state statutes or procedural rules, including Rule 16 of the Ohio Rules of Civil Procedure,³⁰² provide this authority.

3. Policy recommendations

The Supreme Court of Ohio Committee on Dispute Resolution takes a similar position to that of the National Standards for Court-Connected Mediation Programs task force³⁰³ and the Society of Professionals in

²⁹⁸ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 7:02 & App. B (2nd ed. 1994 & 1997 Supp.).

²⁹⁹ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 7:02 & nn.15-17 (2nd ed. 1994 & 1997 Supp.).

³⁰⁰ *See, e.g.*, Minn. Gen. R. of Prac. § 114.07 (West 1998).

³⁰¹ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 7:02 & n.19 (2nd ed. 1994 & 1997 Supp.). For a survey of state rules regarding court-mandated mediation, see Chantilis, *Alternative Dispute Resolution Symposium*, 16 U. MEMPHIS L.REV. 1031 (1996).

³⁰² This point is discussed in more detail later in this chapter.

³⁰³ In 1992, a national task force issued National Standards for Court-Connected Mediation Programs, 6-7 (Center for Dispute Settlement and Institute of Judicial Administration, 1992) to guide and inform courts interested in implementing court-connected mediation programs. This task force was comprised of judges, state and local court administrators, mediators and mediation program administrators, attorneys, academics, evaluators and officers of professional court and mediation programs.

Dispute Resolution³⁰⁴ in recognizing that mandatory participation in mediation by the parties and their lawyers is appropriate and should be required. Also like these national groups, the Supreme Court of Ohio Committee on Dispute Resolution approves of implementing a mandated referral system when there is an absence of coercion to settle, when funding issues have been resolved and when a high-quality, easily accessible program is assured.

The National Standards for Court-Connected Mediation Programs places special emphasis on public funding of the cost of mediation, prevention of inappropriate pressures to settle in the forms of reports to the trier of fact or financial disincentives to trial and ensuring a high-quality, easily accessible program.³⁰⁵ Moreover, the National Standards take the stance that by referring parties to mediation on a mandatory basis, a court should require only that they attend an initial mediation session. Parties should be given clear information about the process, including that they are not required to settle, in order to make an informed choice about their continued participation in the mediation program. Lastly, the National Standards endorse encouragement of

³⁰⁴ In 1991, the 1,600-member Society of Professionals in Dispute Resolution issued a policy report entitled: *Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts*, which discusses the various issues raised by mandatory mediation and makes specific recommendations for courts wishing to implement a court-connected mediation program (on file with authors).

³⁰⁵ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 5-1 (Center for Dispute Settlement and Institute of Judicial Administration, 1992).

lawyer attendance for fairness reasons.³⁰⁶

NATIONAL STANDARDS FOR COURT CONNECTED MEDIATION PROGRAMS

5.0 Mandatory Attendance

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

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

The Society of Professionals in Dispute Resolution (SPIDR) also took the position that mandatory mediation is appropriate. However, even though appropriate, mandatory programs should be carefully designed to reflect a variety of important concerns. Their recommendations stress public funding of mediation programs on a basis comparable to funding for trials, safeguarding against coercion to settle and ensuring a high-quality, easily accessible program. (see Page 7-15). On this last recommendation, SPIDR emphasized the importance of

³⁰⁶ *Id.* at 10-3 (noting that lawyers act as a “crucial check against uninformed and pressured settlement, particularly when they are knowledgeable about the dispute resolution process.”).

preserving accessibility of the program so that it is readily available for quick use, not unduly time-consuming and affordable for the parties.³⁰⁷

SPIDR POLICY REPORT
MANDATED PARTICIPATION AND SETTLEMENT COERCION:
DISPUTE RESOLUTION AS IT RELATES TO THE COURT

Recommendation 1. Mandating participation in non-binding dispute resolution processes often is appropriate. However, compulsory programs should be carefully designed to reflect a variety of important concerns. These concerns include the monetary and emotional costs for the parties, as well as the interests of the parties in achieving results that will suit their needs and will last; the justice system's ability to deliver results that do not harm the interests of those groups that have historically operated at a disadvantage in this society; the need to have courts that function efficiently and effectively; the importance of the public's trust in the justice system; the interests of non-parties whose lives are affected and sometimes disrupted by litigation; the importance of the courts' development of legal precedent; and the general interest in maximizing party choice. In weighing these valid and sometimes competing concerns, policymakers should be cautious not to give undue emphasis to the desire to facilitate the efficient administration of court business and thereby subordinate other interests. Participation should be mandated only when the compulsory program is more likely to serve these broad interests of the parties, the justice system and the public than would procedures that would be used absent mandatory dispute resolution.

Recommendation 2. Funding for mandatory dispute resolution programs should be provided on a basis comparable to funding for trials.

Recommendation 3. Coercion to settle in the form of reports to the trier of fact and of financial disincentives to trial should not be used in connection with mandated mediation.

Recommendation 4. Mandatory participation should be used only when a high-quality program (a) is readily accessible, (b) permits party participation, (c) permits lawyer participation when the parties wish it, and (d) provides clarity about the precise procedures that are being required.

³⁰⁷ See Recommendation 4 in Society of Professionals in Dispute Resolution (SPIDR), *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts* (1991) (on file with authors).

B. NON-COMPLIANCE AND SANCTIONS

While states have increasingly passed statutes that enable courts to order parties to participate in a mediation session, one problem with implementation of these statutes remains: There is no consistency in public authorities or judicial opinion regarding the proper level of party participation to satisfy the court's order. Where participation requirements have been indicated, they have often been defined in various ways; some, for example, requiring "good faith participation"³⁰⁸ or "meaningful participation."³⁰⁹ Generally, courts have imposed costs and/or attorney fees to penalize non-compliance.³¹⁰ But such vague terms as "good faith," in a mandatory program, raise serious concerns regarding confidentiality and satellite litigation as evidenced by increased motions and hearings challenging the other party's failure to comply. These concerns are discussed at length below.

The Question of "Good Faith" Participation. Mandatory mediation is on the increase. As such, courts wishing to implement a mandatory mediation program should expect that issues of participation in mediation, particularly good faith participation, have been and will continue to be inevitably intertwined with mandatory participation.³¹¹ The policy

³⁰⁸ See, e.g., ME Rev. Stat. Ann. 19-A, §§ 251 and 1804.

³⁰⁹ See, e.g., Ohio C.P. R. Local Prac, (Stark Cty.) R. 16.

³¹⁰ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 7:06 & n. 33 (2nd ed. 1994 & 1997 Supp.) (providing extensive list of cases where sanctions were imposed by courts).

³¹¹ Kimberlee K. Kovach, *Good Faith in Mediation - Requested, Recommended or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 582 (1997); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2085-

concerns are significant: Should participation in mediation include a good faith requirement? If so, should good faith participation always be mandated? And is such a requirement appropriate?

Ohio has not directly addressed this issue. Indeed, concerns relating to enforcement of a good faith requirement, or any other similar participation requirement, have serious implications for Ohio's mediation privilege statute [see Chapter 10]. Nonetheless, courts in other states have increasingly begun to grapple with a good faith standard³¹² as the use of mediation has increased.

Development of court-annexed or court-connected mediation programs has resulted in some case law on the issue of good faith. But such case law has been sparse.³¹³ Moreover, it has provided no clear policy guidance on the question of what should be required in terms of good faith participation.³¹⁴ One commentator has suggested that

86 (1993); David S. Winston, *Comment, Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water..."*, 11 OHIO ST. J. ON DISP. RESOL. 187,188 (1996).

³¹² This good faith standard first appeared in the 1983 amendment to Rule 16 of the Federal Rules of Civil Procedure. This rule is often used as authority for ordering pre-trial conferences or mediation. Under Rule 16(f), if parties or their lawyers fail to comply with the terms of a court order, attend the mediation "substantially unprepared to participate," or attend but fail to "participate in good faith," sanctions may be imposed. *See* Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2086-89 (1993).

³¹³ Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2089 (1993).

³¹⁴ *Id.* at 2090; Kimberlee K. Kovach, *Good Faith in Mediation — Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 585-86 (1997).

defining a participation standard in terms of good faith is inherently ambiguous.³¹⁵ Indeed, where courts have addressed the issue, in most of the cases they have relied on Federal Rule of Civil Procedure Rule 16(f) or its state equivalent, or on an inherent judicial authority for the power to impose sanctions for non-compliance.³¹⁶

The leading cases from Texas, Florida and Colorado focused not on whether good faith *should* be required, but rather on whether courts can force parties to negotiate in good faith.³¹⁷ Notably, in these cases the courts consistently refused to recognize a court's power even to require good faith. While these courts did recognize a court's authority to require parties to attend the mediation session, they did not see any absence of good faith in conduct such as refusing to make a settlement offer, refusing to mediate or offering an "insufficient" amount at mediation.³¹⁸

³¹⁵ Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2093 (1993).

³¹⁶ *Id.* at 2090.

³¹⁷ *Decker v. Lindsey*, 824 S.W.2d 247 (Tex. App. - Houston [1st Dist.] 1992, no writ) (recognizing court's authority to order parties to mediation but striking down part of court order which required good faith participation). *Avril v. Civilmar*, 605 So. 2d 988 (Fla. Dist. Ct. App. 1992) (quashing trial court's sanctions against a defendant who refused to make a settlement on the basis that while the relevant statute allowed sanctions for failure to attend as required, the statute did not allow such sanctions for failure to negotiate in good faith: "There is no requirement that a party even make an offer at mediation, let alone offer what the opposition wants to settle."); *Halaby, McCrea & Cross v. Hoffman*, 831 P.2d 902, 908 (Colo. 1992)(en banc) (holding that where the defendant, who was explicitly required to participate in good faith, failed to disclose at the pre-trial settlement conference that his maximum offer to the plaintiff would be only \$300, trial judge abused his discretion by imposing sanctions on defendant because the offer of an "insufficient" amount did not show absence of good faith). Furthermore, in 1998, two Texas appellate courts reaffirmed the holding in *Decker* that courts have the authority to order parties into mediation, but they cannot force them to negotiate a settlement in good faith.

³¹⁸ *Id.*

Earlier cases had taken similar approaches. The Iowa Supreme Court in *Graham v. Baker*³¹⁹ acknowledged the statutory authority to order parties to the farmer-lender mediation session, but disapproved of the mediator's refusal to issue a mediation release on the basis that the creditor's attorney refused to cooperate with the mediator and essentially thwarted the process.³²⁰ Likewise, the Georgia Supreme Court recognized a court's authority to order mediation, but not its order to do so under penalty of contempt should the parties fail to settle.³²¹

The Recent Trend to Require Good Faith. Contrary to these decisions, a recent and growing trend has been to include in statutes or rules an explicit requirement of good faith in mediation.³²² Both Stark and Montgomery counties, for example, include such a requirement in each of their local rules. Other jurisdictions make similar requirements.³²³

³¹⁹ 447 N.W.2d 397 (Iowa 1989).

³²⁰ *Id.* Indeed, the court held that the presence of that attorney satisfied the minimal participation required by the statute, noting that the mediator did not have the power in this case to compel either party to negotiate.

³²¹ *Department of Transp. v. City of Atlanta*, 380 S.E.2d 265 (Ga. 1989).

³²² Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 7:06 (2nd ed. 1994 & 1997 Supp.); Kimberlee K. Kovach, *Good Faith in Mediation - Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 588-91 (1997).

³²³ *See, e.g.*, Ind. Code Ann. 34, App. On ADR, Rule 2.1 & 2.11 (West 1996)(requiring good faith and providing a procedure for imposing sanctions for non-compliance); Wash Rev. Code § 59.20.080(2)(1996)(requiring good faith in mobile home mediation); Fla Stat. § 627.745(d)(West 1996)(requiring good faith in insurance claims mediation); Kan Stat. Ann. § 72-5427, 72-5430(c)(4)(1992)(requiring good faith in mediation of labor matters for education).

Still others have amended their mandatory domestic mediation statutes and impose a good faith standard.³²⁴ Where sanctions can be imposed by statute in some states, they can be costly, including, for example, default judgment and attorney's fees.³²⁵

The Problems that May Arise when Good Faith is Required. Determination of whether good faith has been satisfied can create two serious potential problems: satellite litigation and loss of confidentiality. The problem of satellite litigation may be seen in the increase of motions and hearings challenging the other party's failure to mediate in good faith. In Ohio, testimony by the mediator or disclosures of mediation communications made in session in order to determine non-compliance would be prohibited by Ohio's mediation privilege statute [see Chapter 10].³²⁶ Nonetheless, some of the cases discussed earlier in this section illustrate the additional litigation that may result from enforcement of a good faith standard.

The other serious problem that can result from requiring good faith involves the risk of loss of confidentiality. In Ohio, this would involve a direct violation of the mediation privilege statute.³²⁷ The promise of complete

³²⁴ ME Rev. Stat. Ann. 19-A, §§ 251 and 1804 (West 1998); Wash Rev. Code § 59.20.080(2)(1996); Fla Stat. § 627.745(d) (West 1996); Kan Stat. Ann. § 72-5430(c)(4)(1992).

³²⁵ ME Rev. Stat. Ann. 19-A, §§ 251(West 1998).

³²⁶ Ohio Rev. Code § 2317.023 (1998).

³²⁷ *Id.*

confidentiality fosters the open discussion necessary for effective mediations. To enhance the likelihood of agreement, parties are often assured that their communications in session will be kept confidential. But where mediators are forced to testify about those communications, such a situation would present a substantial conflict with both any privilege and the public policy that favors confidentiality. Such disclosures would also damage the integrity of the mediator and of the process itself [see Chapter 10].

The Problems that May Arise when Good Faith is Not Required. Several problems may result when a good faith standard is not required. Primary among them is that some of the benefits of mediation may not develop fully where participants lack good faith. For example, cooperative problem solving and empowerment may not be experienced by parties whose opponent is merely required to appear but not participate in good faith.³²⁸ In addition, there is a concern that if lawyers are aware that no good faith is required, mediation can become just another routine and expected step in the litigation process, open to all the usual adversarial tactics³²⁹ and vulnerable to abuse by lawyers.³³⁰ Likewise, there is a concern that consistent employment of such tactics in mediation sessions, unhampered

³²⁸ Kimberlee K. Kovach, *Good Faith in Mediation - Requested, Recommended or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 600-602 (1997).

³²⁹ John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U.L. REV. 839, 3-4 (1997).

³³⁰ Process abuse fears include requests for mediation solely for discovery purposes, to assess the strength of the other side and to wear down the party with fewer resources. Fraud, misrepresentation and outright deception may occur with more regularity as well. While some may argue that these abuses are part of legal negotiations, an absence of good faith cannot be good for the process in the long run. The mediator cannot facilitate agreement when the parties refuse to cooperate or provide sufficient or even non-deceptive information. Kimberlee K. Kovach, *Good Faith in Mediation - Requested, Recommended or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 593-95 (1997).

by any good faith requirement, will frustrate the process and waste the participants' time and efforts.³³¹

1. Ohio

The three pilot courts all require physical attendance of parties with settlement authority and their lawyers. Clinton requires mere physical attendance of these parties. Stark and Montgomery, however, go further and require “meaningful” or “good faith participation” by the parties. Regardless of these participation standards, all three courts have high settlement rates and receive high satisfaction reports from litigants and attorneys. (See discussion of these benefits later in Part III of this chapter.)

In all three pilot courts, a failure to comply with the court order of referral, which can include a requirement of good faith participation, can be addressed by the aggrieved party filing a motion to show cause.³³² However, such “show cause” hearings would appear to violate Ohio’s mediation privilege statute.³³³ And while all three pilot courts’ rules or orders generally authorize imposing “appropriate” sanctions for non-

³³¹ David S. Winston, comment, Participation Standards in Mandatory Mediation Statutes: “You can lead a horse to water ...,” OHIO ST. J. ON DISP. RESOL. 187, 194 (1996)..

³³² IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

³³³ Ohio Rev. Code § 2317.023 (1998) (unless it fits within the statute’s “manifest injustice” provision).

compliance, such as awards of attorney’s fees and other costs against the non-compliant party,³³⁴ under the privilege statute a good faith requirement would be effectively unenforceable [see Chapter 10].³³⁵

THE THREE PILOT COURTS

Clark County Rule 28: “The following persons shall physically attend mediation: (a) all individual parties or an officer, director or employee having authority to settle the claim for a corporate party or in the case of a governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and to recommend settlement to the appropriate decision-making body of the agency; (b) the party’s counsel of record, if any; and (c) a representative of the insurance carrier for any insured party who is not such carrier’s outside counsel and who has full authority to settle without further consultation.”³³⁶

Stark County Rule 16: “Party representatives with authority to negotiate a settlement and all other persons necessary to negotiate a settlement, including insurance carriers, must attend the [mediation] session. In the event the parties and/or their attorneys do not attend the [mediation] session, or do not *meaningfully participate* in the process, the [mediator] shall recommend to the judge appropriate sanctions, including but not limited to dismissal, default judgment, attorney fees and/or costs.”³³⁷

Montgomery County General Order of Referral: “Parties or party representatives with authority to settle must be present at the initial mediation session. Each party shall be accompanied by the lawyer expected to be primarily responsible for handling the trial of the case. In the event parties or their attorneys do not attend mediation or make

³³⁴ *Id.*; interview with Frank Motz, Consultant for the Supreme Court of Ohio, Columbus, Ohio (February 10, 1999).

³³⁵ The alleged non-compliant party can simply assert the privilege and prohibit the disclosure or admission of any mediation communication. Thus, the court loses any evidentiary basis upon which to impose sanctions. For a more detailed discussion of this, see Chapter 10 on Confidentiality.

³³⁶ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

³³⁷ Ohio C.P.R. Local Prac., (Stark Cty.) R. 16.

a *good faith effort to participate* in the program, the court may impose appropriate sanctions.”³³⁸

2. Other States

When participation is required by statutes, court rules or orders, the specific requirements for participation are not always clearly defined.³³⁹ Where participation requirements have been indicated, however, they have been defined in a variety of ways.³⁴⁰ In some jurisdictions, the parties must simply attend a mediation “orientation.”³⁴¹ In others, they may be required to do any of the following: attend the initial mediation session, exchange information, stay a period of time if not excused by the third-party neutral or come with settlement authority.³⁴² Others require “good faith participation.”³⁴³ Still others require parties to participate in a “meaningful” way.³⁴⁴ In a few jurisdictions, the parties

³³⁸ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

³³⁹ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 7:06 (2nd ed. 1994 & 1997 Supp.).

³⁴⁰ Stephen B. Goldberg *et al.*, *Dispute Resolution: Negotiation, Mediation, and Other Processes*, 263 (2d ed. 1992).

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *See, e.g.*, ME Rev. Stat. Ann. 19-A, §§ 251 and 1804.

³⁴⁴ *See, e.g.*, Ohio C.P. R. Local Prac., (Stark Cty.) R. 16.

required to mediate must also pay for the service, either to the court or, in some cases, to a private provider.³⁴⁵ Moreover, SPIDR has recognized a risk that in some programs, the court staff may pressure the parties to participate even though the referrals are completely voluntary.³⁴⁶

Generally, courts have imposed costs and/or attorney's fees to penalize non-compliance with pre-trial orders or local rules.³⁴⁷ In addition, courts have penalized non-compliance by excluding evidence, denying a trial *de novo* and, in egregious cases, entering a default judgment or dismissing a case.³⁴⁸ Contempt sanctions have also been imposed by courts.³⁴⁹ These have been normally used, however, to penalize willful violations of explicit court orders and have been often affirmed.³⁵⁰

³⁴⁵ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 7:06 (2nd ed. 1994 & 1997 Supp.).

³⁴⁶ See Comment in Society of Professionals in Dispute Resolution (SPIDR), *Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts* (1991)(on file with authors).

³⁴⁷ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 7:06 & n.33 (2d. 1994 & 1997 Supp.) (providing extensive list of cases where sanctions were imposed by courts).

³⁴⁸ *Id.*

³⁴⁹ *Id.* at § 7:06 & n. 34.

³⁵⁰ *Id.*

3. Policy Recommendations

The Supreme Court of Ohio Committee on Dispute Resolution³⁵¹ takes a similar stance to SPIDR and the National Standards for Court Connected Mediation Programs in recognizing that requirements for compliance be clear and that parties ordered into mediation be given full and accurate information about the process. This may include giving participants clear information that, although ordered to mediate, they are not required to make offers and concessions or to settle.

The National Standards for Court Connected Mediation Programs take a strong position that full and accurate information be given to parties about the process to which they are being referred. The National Standards warn that inadequate information about the program may result in parties believing that in order to comply with a court order, they must settle in mediation. Courts who mandate attendance have the responsibility of ensuring that parties are required to attend only the initial mediation session and know enough about the process to make an informed choice about continued participation. Finally, the National Standards recommend against any adverse response by courts, such as sanctions imposed on parties for not making settlement offers or not settling.³⁵²

³⁵¹ Fax memorandum from Robert W. Rack Jr., Chair of the Institutionalization Steering Subcommittee, Supreme Court of Ohio Committee on Dispute Resolution, 2 (April 27, 1999)(on file with authors).

³⁵² NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (Center for Dispute Settlement and Institute of Judicial Administration, 1992).

NATIONAL STANDARDS FOR COURT CONNECTED MEDIATION PROGRAMS

- 11.2** Courts should provide parties who are required to participate in mediation with full and accurate information about the process to which they are being referred, including the fact that they are not required to make offers and concessions or to settle.
- 11.5** There should be no adverse response by courts to non-settlement by the parties in mediation.

SPIDR strongly disapproves of courts requiring “good faith bargaining” or “meaningful participation.” Likewise, it rejects required makings of offers or concessions or other similarly vague provisions. While it recognizes that most parties will participate in a mandatory mediation program even when the court rule requires only mere physical attendance, SPIDR recommends, nonetheless, that requirements for compliance be clear. This would apply as well to defining sanctions that may be imposed for non-compliance.³⁵³

SPIDR POLICY REPORT

Recommendation 7. Requirements for participation and sanctions for non compliance should be clearly defined.

³⁵³ See Recommendation 7 in Society of Professionals in Dispute Resolution (SPIDR), *Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts* (1991) (on file with authors).

III. Benefits and Concerns of Mandatory Mediation

A. BENEFITS OF MANDATORY MEDIATION

The benefits of implementing a mandatory mediation program are substantial, even when compared to voluntary programs. Powerful arguments can be made for courts to create and implement such programs and for states to continue their use through statutes authorizing such mandates. Some of these substantial benefits are discussed below.

High Litigant and Attorney Satisfaction. Statistical data and surveys from the pilot courts clearly demonstrate that litigants' satisfaction with the mediation process is extremely high when compared with their experience with the trial process.³⁵⁴ Additionally, those advocates who understand and effectively participate in the mediation process share their clients' highly favorable reactions to mediation and would use mediation again or recommend it to other clients.³⁵⁵ In a study comparing cases mediated in two of the pilot courts (Clinton and Stark) with cases mediated in Settlement Week among four counties,³⁵⁶ party and attorney assessments of mediation in both

³⁵⁴ See THE MEDIATION PROCESS IN OHIO, WINNING OUTSIDE THE COURTROOM, 2.1 (Ohio CLE Institute, 1997). In fact, over 90 percent of respondents in one early survey of all three Ohio pilot courts reported that their satisfaction with the process meant they would use mediation again and recommend it to others.

³⁵⁵ *Id.*

³⁵⁶ Franklin, Hamilton, Lucas and Richland counties.

programs were extremely favorable.³⁵⁷ This research showed no significant differences between assessments by parties and by their lawyers in terms of fairness of the process and satisfaction with the outcome.³⁵⁸ Indeed, the vast majority of participants who were required to mediate provided favorable evaluations of the mediator, the process and the outcome, even if they did not settle.³⁵⁹ These findings comport with studies of mandatory mediation in other states.³⁶⁰

High Settlement Rates. The evidence from Ohio's three pilot courts is compelling: Over 69 percent of the cases mediated achieved settlement.³⁶¹ Coupled with the strong evidence of parties' and lawyers' high satisfaction with the process, such findings showing the substantial benefits for participants in a mandated program cannot be dismissed. Indeed, empirical research comparing mandatory and voluntary mediation programs reports that settlement rates in mandatory programs are as high as in voluntary programs.³⁶² Settlement rates of civil cases remain high.³⁶³ Requiring

³⁵⁷ Roselle L. Wissler, *Common Pleas Mediation: Comparing the Pilot Mediation Program and Settlement Week Studies (1997)*(on file with authors).

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 7:03 & nn. 3-5 (2nd ed. 1994 & 1997 Supp.).

³⁶¹ *IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION* (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

³⁶² *National Symposium on Court-Connected Dispute Resolution Research: A REPORT ON RECENT RESEARCH FINDINGS - IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS*, 74-75 (1993).

³⁶³ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 2:02 & nn. 48-49 (2nd ed. 1994 & 1997 Supp.).

participation also does not seem to reduce settlement rates, and in fact, research indicates it may increase the number of settlements, or it may produce earlier settlements.³⁶⁴ Moreover, such mandates are still well-received by those ordered into mediation.³⁶⁵

Decreased Costs for Parties. Evidence from the pilot court mediations suggests that parties are experiencing savings of money and time.³⁶⁶ A majority of parties and their attorneys in this study reported that mediation resulted in cost and time savings.³⁶⁷ Reports from those who reached settlement are even more compelling. In cases that settled, 93 percent of parties and attorneys reported that mediation reduced their cost and time involvement.³⁶⁸ Attorneys in cases that did not settle reported greater time savings if they had not taken depositions than if they already had.³⁶⁹ In addition, evidence from civil mediation in other states suggests that savings of money and time for parties may be more

³⁶⁴ *Id.* at § 7:03.

³⁶⁵ *Id.*

³⁶⁶ Roselle L. Wissler, Evaluation of the Pilot Mediation Program in Clinton and Stark counties 3 (1997) (on file with authors). This runs counter to the much criticized Rand Corporation report on mediation and neutral evaluation in the federal courts which concluded that there was “no strong statistical evidence that time to disposition (or lawyer work hours) were significantly affected by mediation or neutral evaluation in any of the six programs studied.” James S. Kakalik, *et al.*, An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act (1996).

³⁶⁷ Roselle L. Wissler, Evaluation of the Pilot Mediation Program in Clinton and Stark Counties, 3 (1997) (on file with authors).

³⁶⁸ *Id.*

³⁶⁹ *Id.*

likely than savings of money or time for courts.³⁷⁰

Increased Use and the “Spillover Effect.” Mandating attendance by participants increases the use of mediation and creates a positive “spillover effect,” i.e., an increased voluntary usage of the process by participants in their subsequent disputes.³⁷¹ Simply put, parties that have experienced mediation are more likely to take advantage of its cost savings and efficiency in the future, even when it is not a result of a court order. Such “spillover effects” are shared by both the parties and their lawyers, increasing both voluntary self-referrals and referrals of others to mediation.³⁷² One survey of over 2,000 Ohio lawyers reported a strong correlation between lawyers’ previous experience with mediation as counsel for the parties during mediation and their advising later clients to use mediation.³⁷³ Thus, experience with mediation was the strongest predictor of whether lawyers would refer clients to

³⁷⁰ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 2:03 & n.10 (2nd ed. 1994 & 1997 Supp.) (citing several civil mediation studies).

³⁷¹ Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 99, 848 (1998).

³⁷² IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999) (presenting preliminary data regarding surveys of parties and lawyers in the three pilot courts). *See also* Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 99, 853 (1998) (reporting that research from corporate disputing and from among Ohio lawyers indicates that compulsory participation in mediation creates the spillover effect of encouraging lawyers to refer clients to mediation and to include clients in negotiations without a mediator).

³⁷³ Roselle L. Wissler, *Ohio Attorneys’ Experience with and Views of Alternative Dispute Resolution Procedures*, 3-4 (March 1996)(on file with authors).

mediation, much stronger than simply having attended courses in dispute resolution.³⁷⁴

Increased Court Efficiency. Increased settlements and early resolution of cases through a mandated referral system may mean case processing can be expedited and judicial involvement in a dispute can be decreased. This seems to answer the central efficiency concerns of courts which relate to the movement of the docket and to minimizing claims on scarce judicial time through motion hearings and trials.³⁷⁵ While the statistical data from the pilot courts have not yet been completed, as discussed previously, compelling research of corporate disputing and from among Ohio lawyers demonstrates that lawyers' expanded experience resulting from mandatory mediation indirectly increases referrals by lawyers to mediation.³⁷⁶ This can lead to more voluntary agreement making by parties and less judicial decision making.³⁷⁷

Cost-Effective Program Administration. Mandating attendance by participants increases the use of mediation.³⁷⁸ The increased mediation caseloads resulting from mandated attendance allow more cost-effective

³⁷⁴ *Id.*

³⁷⁵ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 2:03 (2nd ed. 1994 & 1997 Supp.).

³⁷⁶ Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 99, 848 (1998).

³⁷⁷ *Id.* at 834-40.

³⁷⁸ *Id.* at 848.

administration of the court's mediation program and services.³⁷⁹ More settlements through mediation may also mean more trials are averted and the numbers of post-judgment motions are reduced, thus freeing up more court resources for other cases on the docket or other involvement in the mediation program. Increased use of mediation could help broaden the court's dispute resolution services while meeting an increasingly growing litigant demand for facilitated settlement assistance.³⁸⁰

B. CONCERNS OF MANDATORY MEDIATION

While mandatory mediation offers substantial benefits, courts that utilize a voluntary program are not often faced with those concerns associated with a mandatory program. Such concerns include potential and inappropriate pressures to settle that parties may experience, fairness to parties, potential access, costs and efficiency to parties and inappropriate referrals. These concerns are discussed in further detail below.

Pressures to Settle. A common concern of mandatory mediation relates to courts' and mediators' protection of the parties' ability to make free and informed choices about whether or not to settle while in mediation.³⁸¹ The concern

³⁷⁹ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 5-1 (Center for Dispute Settlement and Institute of Judicial Administration, 1992).

³⁸⁰ JUDGE'S DESKBOOK ON COURT ADR, 7 (Center for Public Resources, 1993).

³⁸¹ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 11-1 (Center for Dispute Settlement and Institute of Judicial Administration, 1992).

here is with coercion *in* mediation as opposed to coercion *into* mediation.³⁸² Mandating referral can often be appropriate, as recommended by the Ohio Supreme Court Committee on Dispute Resolution and other national mediation organizations. However, other pressures to settle within the process itself can add considerably to the pressure inherent in the expense and uncertainty of litigation, the dynamics of the negotiation process and the burdens imposed by compulsory attendance itself.³⁸³ These kinds of pressures should be distinguished from inappropriate practices and procedures which in fact result in inappropriate pressures to settle.³⁸⁴ For example, SPIDR's position is that coercion to settle in the form of mediator reports to the trier of fact and of financial disincentives to trial³⁸⁵ can be inappropriate and should never be used in connection with mandated mediation.³⁸⁶ However, mandatory mediation is still a voluntary process in terms of the outcome despite the fact that the parties are required to participate. The right to decline settlement preserves the fundamental fairness and voluntariness of the process.³⁸⁷

³⁸² Frank E. Sander et al., *Judicial (Mis)use of ADR? A Debate*, 27 U. TOL. L. REV. 885, 886 (1996).

³⁸³ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 11-1 (Center for Dispute Settlement and Institute of Judicial Administration, 1992).

³⁸⁴ *Id.*

³⁸⁵ *E.g.*, financial penalties for failing to improve at trial on a rejected settlement or payment of a relatively substantial fee in order to obtain a trial *de novo*. See Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 7:04 (2nd ed. 1994 & 1997 Supp.).

³⁸⁶ See Comment in Society of Professionals in Dispute Resolution (SPIDR), *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts* (1991)(on file with authors).

³⁸⁷ Stephen B. Goldberg et al., *Dispute Resolution: Negotiation, Mediation and Other Processes*, 186-188 (3rd ed. 1999).

Fairness Concerns. Some critics of mediation consider the process to be unfair, particularly when it is mandatory, based on the view that mediation does not compare well with the trial process or with an adjudicated outcome.³⁸⁸ Thus, adjudication's procedural formality, required legal representation and substantive standards imposed by law are superior to the presumed informal process, lack of lawyers³⁸⁹ and absence of substantive legal standards of mediation.³⁹⁰ Likewise, other critics define fairness in mediation as the approximation of a judgment after adjudication - simply, that settlements must look like judgments.³⁹¹ Thus, a comparison of mediated results and likely jury awards or amounts may appear to be a disadvantage to a party who may well have settled for less in mediation in return for certain non-monetary trade-offs.

Access to Justice Concerns. Concerns of mandatory mediation relating to access have two bases: its impact on the poor and the effect of cultural differences. A growing concern of access to a court-connected service revolves around the availability of mediation especially to low- and moderate-income disputants.³⁹² In this respect, costs to

³⁸⁸ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 2:02 (2nd ed. 1994 & 1997 Supp.).

³⁸⁹ A relatively pervasive absence of lawyers in mediation is seen primarily in divorce mediation, where even when encouraged to attend, lawyers do not attend. Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1351 (1995). Lawyers are also absent in the vast majority of small claims court mediations.

³⁹⁰ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 2:02 (2nd ed. 1994 & 1997 Supp.).

³⁹¹ *Id.* (citing various commentary).

³⁹² Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 865, 868 (1998); see also Kimberlee K. Kovach, *Costs of Mediation: Whose Responsibility?* 15 *MEDIATION Q.* 5, 23 (1997).

parties desiring mediation but having limited means pose a definite barrier to access to mediation. Such cost barriers are significantly heightened by parties' reliance on the private marketplace for mediation services if no public funding is available.³⁹³ And when courts do require the parties to pay for court-mandated mediation, deep concerns about access are raised. Mediation becomes in effect inaccessible for these parties.

Cultural Differences. There is a concern that variations in mediation programs may impact the diversity of mediator pools.³⁹⁴ For example, restrictive qualifications standards for mediators may effectively narrow the cultural and linguistic backgrounds available to parties from a program's roster of mediators.³⁹⁵ Similarly, these variations may not also take into account cultural differences in disputing and in dispute resolution styles and preferences of diverse and unrepresented parties.³⁹⁶ Thus diversity and specialized mediator training in cultural differences must be considered when creating a court mediation program [see Chapter 6].

³⁹³ *Id.*

³⁹⁴ *Id.* at 877.

³⁹⁵ *Id.*

³⁹⁶ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 6:09 (2nd ed. 1994 & 1997 Supp.). Research in New Mexico of mediated and adjudicated civil and small claims cases suggests that both the ethnicity of the mediator and the ethnicity of the parties influenced the results reached in mediation. See Michele Hermann *et al.*, *The Metro Court Project Final Report: a Study of the Effects of Ethnicity and Gender in Mediated and Adjudicated Small Claims Cases at the Metropolitan Court Mediation Center, Bernalillo County, Albuquerque, New Mexico* (1993); Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 *L. & SOC'Y REV.* 767 (1996).

Adds to Litigants' Costs and Time. One concern of mandatory mediation is that it merely adds an additional layer to the pre-trial process and increases litigation costs.³⁹⁷ SPIDR warns that if a court's mandatory referral system is not designed or administered well, such a program may simply pose an unnecessary and costly hurdle for parties who will resolve their case by trial or settlement in any event.³⁹⁸ Likewise, there has been some concern that unsuccessful mediation followed by litigation adds substantially to the costs of the litigation process by forcing parties to double their efforts and spend additional time in settling a case.³⁹⁹ This may mean much wasted time and effort spent on the mediation itself.

Inappropriate Referrals. Mandatory referral poses a concern that parties may be forced into mediation when the process is inappropriate or, at the least, not the preferred process.⁴⁰⁰ One source for this concern is the fear that judges may refer a case into mediation in order to divert either undesirable parties or troublesome cases out of their dockets.⁴⁰¹ For one reason or another, these parties and their disputes may have been better served in the trial process

³⁹⁷ JUDGE'S DESKBOOK ON COURT ADR, 7 (Center for Public Resources, 1993).

³⁹⁸ Society of Professionals in Dispute Resolution (SPIDR), *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts at 12* (1991) (on file with authors).

³⁹⁹ Steven Shavell, *Alternative Dispute Resolution: an Economic Analysis*, 24 J. LEGAL STUD. 1, 19 (1995).

⁴⁰⁰ Society of Professionals in Dispute Resolution (SPIDR), *Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts*, 12 (1991) (on file with authors).

⁴⁰¹ JUDGE'S DESKBOOK ON COURT ADR, 7 (Center for Public Resources, 1993).

rather than in the mediation process.

Concern that Public is Not Served. One of the more commonly voiced concerns of the mediation process, whatever its form, is that the public or social order is not served by its use⁴⁰² and that issues of public significance are resolved without public visibility or accountability.⁴⁰³ The concern is that if cases settle, then important issues will not be litigated. Consequently, new public policies cannot be made. Some fear that minorities are particularly disadvantaged in this way.⁴⁰⁴ Moreover, some critics have argued that the courtroom is the preferred site for dispute resolution since imbalances between parties can be mitigated by judges.⁴⁰⁵

⁴⁰² Kimberlee K. Kovach, *MEDIATION: PRINCIPLES AND PRACTICE*, 228 (1994).

⁴⁰³ Steven Shavell, *Alternative Dispute Resolution: an Economic Analysis*, 24 *J. LEGAL STUD.* 1, 19 (1995).

⁴⁰³ *JUDGE'S DESKBOOK ON COURT ADR*, 7 (Center for Public Resources, 1993).

⁴⁰⁴ Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 *WIS. L. REV.* 1359 (1985).

⁴⁰⁵ Owen Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1075 (1984).

IV. The Court's Legal Authority to Order Mediation

A. OHIO CIVIL PROCEDURE RULE 16

The Ohio Rules of Civil Procedure provides the legal authority for Ohio courts to order parties and their counsel to participate in mediation. Specifically, Civil Procedure Rule 16, which pertains to pre-trial procedure, states that “the court may require that parties, or their representatives or insurers, attend a conference or otherwise participate in pre-trial proceedings, in which case the court shall give reasonable advance notice to the parties of the conference or proceedings.”⁴⁰⁶ This new paragraph was added to Rule 16 by a 1993 amendment. The corresponding staff note to that amendment states “with reference to conferences and other pre-trial proceedings, the additional paragraph authorizes courts, in appropriate cases, to direct parties and counsel to engage in settlement discussion, *mediation*, mini-trials, summary jury trials and the like.”⁴⁰⁷ This makes clear, therefore, the statutory authority given to judges in Ohio to order cases out of their dockets into mediation.

⁴⁰⁶ Ohio R. Civ. P. 16.

⁴⁰⁷ Ohio R. Civ. P. 16.

B. FEDERAL CIVIL PROCEDURE RULE 16 AND THE FEDERAL DISPUTE RESOLUTION ACT

Rule 16 of the Federal Rules of Civil Procedure is also often used as the authority for ordering pre-trial conferences or mediation.⁴⁰⁸ In 1983, Rule 16 was amended so as to include among the possible subjects for discussion at pre-trial conference “the possibility of settlement or the use of extrajudicial procedures to resolve the dispute.”⁴⁰⁹

Local rules or court orders mandating mediation, as opposed to statutes or procedural rules, have been attacked on constitutional and statutory grounds. Reasons given to challenge these rules include that they exceeded the court’s authority under civil procedure rules.⁴¹⁰ Reasons given for constitutional challenges include claims that mediation mandates as embodied in local rules or orders denied due process or jury trial rights.⁴¹¹ Courts, however, have generally enforced court rules and orders, as well as upholding mandatory mediation statutes.⁴¹²

⁴⁰⁸ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 7:06 (2nd ed. 1994 & 1997 Supp.).

⁴⁰⁹ Fed. R. Civ. P. 16(f)(7).

⁴¹⁰ See John F. Wagner, Annotation, *Validity and Effect of Local District Court Rules Providing for Use of Alternative Dispute Resolution Procedures as Pre-trial Settlement Mechanisms*, 86 A.L.R. FED. 211 (1988 & 1998 Supp.)

⁴¹¹ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 7:06 (2nd ed. 1994 & 1997 Supp.).

⁴¹² *Id.* A dissenter in the Seventh Circuit case of *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 657 (7th Cir. 1989), put great weight on the policy concerns of how “burdensome” it is for a party, here a cabinet member designee, to attend a settlement conference on the day of his Senate confirmation hearings.

The new Federal Dispute Resolution Act of 1998 explicitly authorizes federal courts to refer cases to mediation and other dispute resolution processes.⁴¹³ The statute states in part that district courts are given “authorization to refer appropriate cases to alternative dispute resolution programs that the court may make available, including mediation, mini-trial and summary jury trial.”⁴¹⁴ While the term “refer” is not defined, the term “reference” as used in Federal Rules of Civil Procedure Rule 53 has been construed as being mandatory.⁴¹⁵ And as used in the new federal act, the term “refer” read in context with “authorization” certainly implies that more than a mere suggestion is authorized.⁴¹⁶ Thus, even in federal courts, judges have a clear statutory authority to order parties into mediation.

⁴¹³ 28 U.S.C. § 473(a)(6) (1998).

⁴¹⁴ 28 U.S.C. § 473(a)(6)(1998).

⁴¹⁵ *See* Fed. R. Civ. Pro. 53.

⁴¹⁶ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 7:06 (2nd ed. 1994 & 1997 Supp.).

V. Charging User Fees

A. CONCERNS UNDER A MANDATORY REFERRAL SYSTEM

Charging mediation fees to those who are ordered to mediate raises concerns under a mandatory referral system.

Parties with very limited resources may be especially impacted. For example, charging substantial user fees over and above litigation costs may result in an undesirable coercion to settle.⁴¹⁷ This may also impact parties whose payment of substantial user fees greatly exceeds the filing fee or is unreasonably disproportionate to the amount at stake.⁴¹⁸

Moreover, choosing a structure of public funding may also affect the program's quality.⁴¹⁹ For example, if the program receives payments based on the number of settlements, the mediators may prioritize settling many cases rather than ensuring fairness in each session.

⁴¹⁷ See Recommendation 3 in Society of Professionals in Dispute Resolution (SPIDR), *Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts* (1991) (on file with authors).

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

B. OHIO AND OTHER STATES

None of the three pilot courts currently charge user fees to parties ordered to mediation. Pursuant to Ohio Rev. Code 2303.201, the pilot courts added to the filing fees collected for criminal or civil actions or proceedings.⁴²⁰ For example, Montgomery County added \$35 and Stark and Clinton counties added \$25.

C. POLICY RECOMMENDATIONS

The Supreme Court of Ohio Committee on Dispute Resolution has long taken the same position as that of the National Standards for Court-Connected Mediation Programs task force and the Society of Professionals in Dispute Resolution. When mandated, mediation should be available to parties without charging them any fees and also should be publicly funded.

The National Standards take the position that mediation should be available to parties at no charge and that the cost of mediation should be publicly funded. The National Standards view mediation as a basic dispute resolution service that should be a part of the regular court budget and that should thus be funded by the public to the same extent as adjudication and other court services. Specifically, the National Standards take no position on the questions of whether a court can properly charge fees to litigants for the use of other court services, such as transcripts, or whether filing fees should be increased to help pay for the mediation program. They do, however, clearly warn against requiring

⁴²⁰ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

parties to pay user fees, especially where such payment may act as a disincentive to using the program.⁴²¹

NATIONAL STANDARDS FOR COURT CONNECTED MEDIATION PROGRAMS

5.0 Mandatory Attendance

5.1 [C]ourts should impose mandatory attendance only when ... the cost of mediation is publicly funded.

13.0 Funding of Programs

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

- a. Where a court suggests (rather than orders) mediation, it should take steps to make mediation available to indigent litigants, through state funding or through encouraging mediators who receive referrals from the court to provide a portion of their services on a free or reduced fee basis;
- b. When parties are required to participate in mediation, the costs of mediation should be publicly funded unless the amount at stake or the nature of the parties make participants' payments appropriate.

SPIDR similarly recommends against charging user fees to parties ordered to mediation. Parties ordered to use a process simply should not also be ordered to pay the cost of that process. SPIDR also recognizes that mediation should be a part of the regular court budget and should thus be funded by the public to the same extent as trials.

⁴²¹ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 13-1 (Center for Dispute Settlement and Institute of Judicial Administration 1992).

SPIDR POLICY REPORT

Recommendation 2. Funding for mandatory dispute resolution programs should be provided on a basis comparable to funding for trials.

VI. Opting Out of Mandatory Mediation

A. CONCERNS UNDER A MANDATORY REFERRAL SYSTEM

Categorically barring parties forced into mediation from requesting an exemption because for them mediation is inappropriate or, at the least, not the preferred process, raises concerns under a mandatory referral system. While an effective mandatory referral system will reduce as much as possible the inclusion of cases for which mediation is inappropriate or unlikely to be useful, improper referrals may still be made. Such mistakes may compel participation by parties who are unable to participate effectively in mediation. Similarly, other concerns are raised regarding whether the interests of justice or the public are served by such a mandated referral.⁴²²

⁴²² See Recommendation 6 in Society of Professionals in Dispute Resolution (SPIDR), *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts* (1991) (on file with authors).

B. Ohio and Other States

Of the three pilot courts, only Montgomery County by general order allows parties to request to opt out of mediation where good cause can be demonstrated for doing so.⁴²³ Montgomery County requires all requests to be in letter form, directed to the mediator and provide detailed reasons for the request to opt out. The mediator has discretion to grant or deny the request, and appeals from a mediator's decision, while discouraged, may be made by written motion to the trial judge.⁴²⁴

In the appellate mediation program of the Sixth District Court of Appeals, the mediator uses a more pragmatic approach to situations where one party has requested mediation and the other party requests to opt out. The requesting party is subtly discouraged from rejecting mediation and is often persuaded to at least try the process. Phone conferences and rescheduling of meetings are sometimes arranged for the recalcitrant party's convenience. Indeed, those instances where parties have succeeded in their opt-out request are rare in the federal appellate program because of these practices by the mediator.⁴²⁵

⁴²³ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

⁴²⁴ *Id.*

⁴²⁵ Interview with Robert W. Rack Jr., Senior Conference Attorney & Mediator for the Sixth District Court of Appeals, Columbus, Ohio (March 31, 1999).

C. POLICY RECOMMENDATIONS

The two national mediation groups recommend that courts always provide parties with appropriate provisions to opt out of mediation. The National Standards goes further than SPIDR in recommending that a court's mandatory referral system include liberal opt-out provisions.⁴²⁶ Such provisions are necessary when a mandated referral places additional costs on parties, such as financial, time, travel or other costs, associated with attending a mediation, and these costs result in some instances in inappropriate pressures to settle. While mediation is generally helpful even with these costs, sometimes a means out of the program is justified.

NATIONAL STANDARDS

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

⁴²⁶ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 13-1 (Center for Dispute Settlement and Institute of Judicial Administration, 1992).

SPIDR recommends that courts provide parties a means to mitigate the consequences of an inappropriate referral of their case into mediation. All mandatory programs should include specific procedures for exempting cases that are demonstrably inappropriate for the mandatory program. SPIDR recommends that the courts hear motions to be excused on the grounds that the interests of justice would not be served by a mandatory referral. Other important considerations in ruling on motions include the interest of the public in the outcome, the presence of novel issues of law and the ability of the parties to participate effectively in the process to which they have been referred.⁴²⁷

SPIDR POLICY REPORT

Recommendation 6. Procedures for compulsory referrals should include, to the extent feasible, case assessment by a person knowledgeable about dispute resolution procedures and should provide for timely consideration of motions for exclusion.

⁴²⁷ See Recommendation 6 in Society of Professionals in Dispute Resolution (SPIDR), *Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts* (1991) (on file with authors).

VII. *Pro Se* Cases

A. CONCERNS UNDER A MANDATORY REFERRAL SYSTEM

The greatest concern raised when a mandatory mediation program allows required participation by unrepresented parties or *pro se* litigants is that such parties are likely to be most susceptible to pressures to settle.⁴²⁸ Such parties may not be aware of nor informed enough about the alternatives to settling in mediation.⁴²⁹ If a program is not high-quality, the risk is that inadequate information may lead these parties to feel that they must settle because they were ordered to mediate.⁴³⁰ For these reasons, *pro se* litigants should be either categorically excluded from a court's mediation program⁴³¹ or if included, they should be fully and clearly told what they are and are not required to do in mediation.

⁴²⁸ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 11-2 (Center for Dispute Settlement and Institute of Judicial Administration, 1992).

⁴²⁹ See Recommendation 4 in Society of Professionals in Dispute Resolution (SPIDR), Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts (1991)(on file with authors).

⁴³⁰ *Id.*

⁴³¹ Both Clinton and Montgomery counties exclude *pro se* cases as discussed later in this section.

B. OHIO AND OTHER STATES

Both Clinton and Montgomery counties exclude *pro se* cases from their mediation programs. Their corresponding local rule or general order makes this categorical exclusion.⁴³² Moreover, both counties made this decision at their programs' inception.⁴³³ In contrast, Stark County includes *pro se* cases in its mediation program and has reported success in doing so.⁴³⁴ Stark County allows *pro se* litigants' participation because it believes that if such litigants are able to present a case to court without counsel, they should be able to participate in mediation to discuss settlement without counsel.⁴³⁵ In practice, however, Stark County mediators will terminate a session if they believe a litigant lacks sufficient knowledge to make an informed decision about settlement.⁴³⁶ [See Chapter 8.]

⁴³² IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

⁴³³ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

⁴³⁴ *Id.* at 4-10.

⁴³⁵ *Id.*

⁴³⁶ *Id.*

C. POLICY RECOMMENDATIONS

Ensuring broad access to all of a court's dispute resolution services is the basis for the two national mediation groups' recommendation against categorical exclusion of *pro se* parties from a court-connected mediation program. Simply put, *pro se* parties who are entitled to litigate should be able to mediate. Accordingly, the National Standards emphasize that access to court-connected services be as broad as possible.⁴³⁷ Mediation should be readily accessible to parties whether or not they are represented. *Pro se* parties, however, are seen as being often vulnerable to pressures to settle and to acceptance of unfair settlements. The National Standards direct courts to be especially sensitive to these parties and to guide them through the process through education or other written information. In particular, *pro se* litigants should be provided full and accurate information about the process, including that the mediator has no authority to impose a solution, and that they will not be treated adversely by the court should they fail to settle.

Moreover, the National Standards discourage exclusion of *pro se* litigants because they may often be individuals who could most benefit from the lower costs and lack of legal and procedural complexity of mediation. In addition, some *pro se* litigants may be disadvantaged by exclusion because they may have been able to represent themselves in the more informal mediation setting.⁴³⁸

⁴³⁷ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 1-3 (Center for Dispute Settlement and Institute of Judicial Administration, 1992).

⁴³⁸ *Id.*

NATIONAL STANDARDS

1.0 Access to Mediation

- 1.1 Mediation services should be available on the same basis as are other services of the court.
- 1.4 Courts should take steps to ensure that *pro se* litigants make informed choices about mediation.

SPIDR similarly recommends broad access like the National Standards. In particular, SPIDR recommends full participation by any party wishing to attend. When the parties are unrepresented, SPIDR directs courts to make special efforts to ensure that the parties are aware of alternatives to settlement and to avoid any practices that make these *pro se* litigants feel that they must settle in mediation.

SPIDR POLICY REPORT

Recommendation 4. Mandatory participation should be used only when a high-quality program (i) is readily accessible, (ii) permits party participation, (iii) permits lawyer participation when the parties wish it, and (iv) provides clarity about the precise procedures that are being required.

VIII. Conclusion

Courts that decide to implement a mandatory mediation program can derive substantial benefits generally associated with mandatory mediation. And such courts are not alone in mandating mediation among courts in Ohio and in other states. While this decision may have broad consequences in having to deal with mandatory mediation's common concerns and having to resolve critical policy issues, courts are well within their legal authority to decide to indeed utilize a mandatory referral system. Although still controversial, that decision can be a rewarding one and is entirely consistent with the judicial commitment to the delivery of justice.

For those cases that ultimately settle before trial, settlement often occurs on the eve of trial or on the courthouse steps on the day of trial. Frequently settlements that occur late in the litigation process are a result of parties failing to focus realistically on their cases early enough in the litigation process. Early selection and referral of cases to mediation create a meaningful event in the life of a case, which in turn speeds up the progress made toward settlement. The benefits flowing from early mediation referrals potentially can provide cost and time savings to both the court and the parties involved in the dispute.

CHAPTER EIGHT ~ SELECTING THE CASES AND THE TIME FOR MEDIATION

By Tanya Johnston

“I am continually surprised by the kinds of cases that can be resolved through mediation.”

~Judge James L. DeWeese
Richland County Common Pleas Court



I. Introduction	8 - 2
II. Selecting Cases for Mediation	8 - 3
A. Approaches to case selection <i>This section discusses individual case screening and categorical selection of cases as well as the choices commonly made by Ohio courts.</i>	
B. Case selection methods <i>This section focuses on the advantages and disadvantages of judicial, random, mediator and party selection of cases.</i>	
C. Policy considerations involving <i>pro se</i> cases <i>This section includes practices and issues raised by parties without counsel.</i>	
III. Selecting the Time for Mediation	8 - 23
A. Benefits of early mediation referral <i>This section focuses on the relationship between timing, cost and settlement.</i>	
B. The importance of sufficient information <i>This section relates mediation to formal and informal discovery.</i>	
IV. Conclusion	8 - 27

I. Introduction

Early selection and referral to mediation creates a meaningful event in the life of a case, which in turn speeds up progress toward settlement. However, in order for mediation to be meaningful it must occur at that point in the litigation process when parties are able to make well-informed decisions. This chapter will discuss the ways in which cases can be identified and referred to mediation on a case-by-case basis or categorically. In addition, this chapter highlights the critical issue of mediation timing and considering the benefits of early mediation referrals, as well as explaining the need to delay mediation long enough to allow parties to gather sufficient information about their dispute.

II. Selecting Cases for Mediation

For mandatory mediation programs, courts are authorized to make choices regarding what types of disputes to channel through the mediation process. Yet, often this channeling is performed intuitively, leaving the precise criteria used for selecting cases for mediation unarticulated. One reason for selecting cases intuitively may be due to the fact that research offers little empirical evidence on what case characteristics make a particular dispute suitable for mediation. For example, Ohio research from the three pilot court mediation programs concluded that none of the following five case characteristics increased the likelihood that full settlement was reached during mediation: type of dispute; trial date within three months; level of discovery completed; number of depositions taken; and status of pending motions including motions to dismiss or for summary jury trial.⁴³⁹ At the same time, court personnel, attorneys and parties may be less likely to understand and accept the mediation process if case selection criteria are not specified. For that reason, the National Standards for Court-Connected Mediation Programs suggest that when courts must choose between cases or categories of cases for which mediation is offered, such choices should be made on the basis of clearly articulated criteria.⁴⁴⁰

⁴³⁹ Roselle L. Wissler, *EVALUATION OF THE PILOT MEDIATION PROGRAM IN CLINTON AND STARK COUNTIES*, 11 (The Supreme Court of Ohio, 1997) (concluding that none of the following case characteristics increased the likelihood that a full settlement was reached: discovery completed, number of depositions taken, status of pending motions including motions to dismiss or for summary judgement). *See also*, Roselle L. Wissler, *AN EVALUATION OF THE COMMON PLEAS COURT CIVIL MEDIATION PROJECT*, 53-55 (The Supreme Court of Ohio, 2000) (concluding that case types, status of motions, and number of motions did not affect settlement; and cases were more likely to settle if one or both sides had completed discovery than if neither side had completed discovery).

⁴⁴⁰ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 4-1 (Center for Dispute Settlement and Institute of Judicial Administration, 1992).

The criteria used to select cases for mediation often are based on the likelihood that settlement will be reached by the intervention of mediation in certain categories of disputes. It is important to note that some mediation experts de-emphasize the utility of a case selection process which focuses solely on the settle-ability of categories of cases. The reason for the opposition is the belief that some elements of a dispute favoring the intervention of mediation will not be apparent from case type alone. One such view was expressed by Robert Rack, who from his experience concludes, “It’s hard to figure out what kinds of cases are likely to settle because settle-ability depends largely on the parties’ motives .”⁴⁴¹ Similarly, other commentators caution that “people issues” such as the personalities of the parties, the needs of the parties to tell their stories and the attitudes of the parties to one another cannot be separated from legal, factual and procedural issues when analyzing individual cases for mediation.⁴⁴² Likewise, research from the Ohio three court pilot mediation programs reveals that both attorneys and parties said that an unfavorable aspect of the mediation was that the other side was “unreasonable, unrealistic, unprepared, or uninterested in reaching a resolution”.⁴⁴³ All of these “people issues” are not apparent from case type. Thus, settle-ability that focuses solely on the legal nature of a dispute may be only partially effective in identifying suitable cases for mediation because it fails to consider such variables as the party motivations, which also play a role in the resolution of disputes.

⁴⁴¹ Interview with Robert W. Rack Jr, Chair of the Supreme Court Committee on Dispute Resolution, Conference Attorney for the Sixth Circuit Court of Appeals (1999).

⁴⁴² Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 6-6 (2d ed. 1994 & 1998 Supp.).

⁴⁴³ Roselle L. Wissler, *EVALUATION OF THE PILOT MEDIATION PROGRAM IN CLINTON AND STARK COUNTIES*, 2 (The Supreme Court of Ohio, 1997).

Still others discredit the focus on settle-ability when selecting cases for mediation, advancing that settlement is not everything. Instead, they encourage a case selection process that provides an opportunity for a wide range of cases to go through the mediation process. For example, Eileen Pruett, Coordinator, Dispute Resolution Programs for the Supreme Court of Ohio, advocates the use of mediation in all case types as a case management tool, reasoning, “mediation can be used as a service in every case.⁴⁴⁴” Likewise, Frank Motz, consultant for the three pilot projects, encourages courts to “make mediation available to all case types.⁴⁴⁵” However, despite the idea that a wide range of cases could potentially benefit from mediation intervention, the reality is that limited judicial resources often require the court to make choices among the types of cases in which mediation will be available. The dilemma becomes where to look for guidance when deciding what disputes to channel through the mediation process, given that empirical research is limited and that consensus has not emerged on this issue.

⁴⁴⁴ Interview with Eileen Pruett, Coordinator, Dispute Resolution Programs, Supreme Court of Ohio, January 27, 1999.

⁴⁴⁵ Interview with Frank Motz, Consultant, Supreme Court of Ohio, February 10, 1999.

Although there is little empirical evidence available, a variety of case selection models in use by other courts appear to be effective. Further comfort comes from the realization that initial decisions regarding case selection are preliminary and can be adjusted. For example, a mediation can be postponed or terminated after a few minutes.⁴⁴⁶ Also, a court's ability to identify the kinds of cases in which the mediation procedure is likely to contribute to achieving the individual goals established for its mediation program will be enhanced by that court's own experience over time.

Before exploring how the courts have approached case selection, it is important to note that an effective case selection process should address the following procedural questions:

- What cases are eligible for mediation?
- How will eligible cases be selected for mediation?
- At what point in the litigation process will the mediation session be scheduled?

⁴⁴⁶ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

A. APPROACHES TO CASE SELECTION

Court-based mediation programs select cases for mediation in one of two ways. First, some courts select cases for mediation by screening cases on an individual basis. Second, some courts select cases for mediation by categorizing disputes by subject matter or the amount in controversy. This section will provide an overview of each of these case selection approaches beginning first with individual case screening.

1. Individual case screening

Individual case selection criteria are frequently used by courts offering a “multi-door program⁴⁴⁷”. The multi-door⁴⁴⁸ concept arose out of the idea that the traditional courthouse offers only “one door” for resolving disputes - the litigation process.⁴⁴⁹ Under the multi-door concept, it is thought that, instead, the parties should be offered a range of dispute resolution alternatives to aid them in resolving their disputes. Thus, in addition to the litigation “door,” the public is offered the choice of multiple processes to resolve their disputes, such as mediation, arbitration, case evaluation, summary jury trials and mini-trials.⁴⁵⁰ Under a multi-door program, the

⁴⁴⁷ Multi-door programs exist in several federal courts as well as in state courts such as New Jersey, Texas and Massachusetts. *See* Tom Stipanowich, *The Multi-door Courthouse and Other Possibilities* 13 OHIO ST. J. ON DISP. RESOL., 303 (1998).

⁴⁴⁸ The concept of the multi-door courthouse was first suggested in 1976 by Harvard Law Professor Frank Sander, who proposed assigning certain cases to alternative dispute resolution processes or a sequence of processes after screening those cases in a Dispute Resolution Center.

⁴⁴⁹ For further discussion, *see* Kenneth Stuart and Cynthia Savage, *The Multi-Door Courthouse: How it's Working*, 26 COLO. LAWYER, 13 (October 1997).

⁴⁵⁰ *Id.* at 303 (noting that it is not uncommon to see at least two ADR (alternative dispute resolution) processes offered within one court system).

task is to analyze individual cases and match those cases to the most appropriate ADR mechanism being offered based upon criteria that include both subjective and objective factors. The matching process of one multi-door courthouse is described below.

Upon filing, litigants in this court are required to complete a case classification form. In part, the form lists two sets of brief statements; the litigants are asked to check the statements that apply in their case. In turn, the ADR processes offered by the court (mediation, arbitration and neutral case evaluation) are given a relative point value for each statement checked. This type of matching process rests on the notion that the inherent qualities of mediation, arbitration and neutral case evaluation allow predictions to be made about the elements of a case that are conducive to success in one of the given processes.⁴⁵¹

⁴⁵¹ For a more detailed explanation of this process, *see* Stephen Goldberg, Frank Sander & Nancy H. Rogers, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES*, 439-440 (2d ed. 1992).

The first set of statements contained on the case classification form can be described as objective factors.

Those objective factors weighing in favor of a mediation match included the following statements:

- multiple defendants,
- *pro se* party,
- more than monetary issue is involved,
- multiple issues, and
- contract case.

The second set of statements contained on the case classification form can be described as subjective factors. From these statements, the litigants are asked to rank, in order of importance, three goal that describe the outcome hoped for by the party. Those subjective factors weighing in favor of mediation included the following statements:

- having say in outcome,
- preserving relationships with other parties, and
- keeping outcome private.

In the final step of the matching process, the overall objective score for each ADR mechanism is multiplied by the subjective factors according to the weight given to each in order of rank. Thus the recommended process becomes the one with the highest total score.⁴⁵² Through this process, consideration may be given not only to the factual and legal factors of a dispute but also to the motivational and relational factors among the parties of the dispute. For example, sometimes parties are motivated by an interest in promptly and inexpensively resolving their dispute, while at the same time maintaining a business or social relationship.⁴⁵³ In contrast, sometimes a party seeks a specific result that can only come about by a legal ruling by the court. Relational and motivational factors are important because those factors often impede the potential progress parties can make toward resolving their disputes without court intervention. However, impediments to settlement that flow from motivational and relational factors should not be viewed as counter-indications to mediation intervention. Instead, the presence of certain impediments to settlement may actually be the precise reason a particular dispute should be referred to mediation.

⁴⁵² Multi-door programs exist in several federal courts as well as state courts such as New Jersey, Texas and Massachusetts. *See* Tom Stipanowich, *The Multi-Door Courthouse and Other Possibilities*, 13, OHIO ST. J. ON DISP. RESOL., 303 (1998) (noting that most multi-door programs are located in large metropolitan areas with large, diverse volumes of cases, a fact which seems to justify the economic and human investment required for such a complex matching process).

⁴⁵³ *Id.* at 295-296.

a. Impediments to settlement that mediation may help parties overcome⁴⁵⁴

Impediments to settlement are those factors that prevent parties from resolving their disputes on their own. This section will briefly highlight some typical impediments to settlement that mediation can potentially help parties to overcome by refocusing their attention on ways to resolve their dispute.

Poor communication: Many times poor communication results when parties hold feelings of animosity toward other parties in the dispute. It could be that neither party believes the other side or believes that the other side is motivated by a hidden agenda or insincere purpose. Poor communication often flows from a poor relationship. If feelings of animosity exist among the parties, efforts to communicate are likely to impede effective negotiations. Through the use of mediation, poor communication among the parties can be overcome by the use of a neutral third party who would focus the parties on their dispute rather than on their individual personalities, thus “separating the people from the fuss.⁴⁵⁵” In turn, this facilitates a meaningful discussion that the parties otherwise would not engage in on their own.

⁴⁵⁴ For a more detailed discussion of these and other impediments to settlement, *see* Stephen Goldberg, Frank Sander & Nancy H. Rogers, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES*, 290 (2nd ed. 1992).

⁴⁵⁵ *Id.* at 298.

Need to express emotions: Sometimes progress toward settlement will be hampered until the parties have a chance to express their views about the dispute and the other side's conduct. Mediation provides an informal atmosphere that encourages party participation by creating a safe harbor for parties to express their emotions in the presence of all those involved in the dispute. After this, the mediator may be able to focus the parties' attention on resolving their dispute.

Different view of the facts: Frequently, parties disagree on whose version of the facts is more accurate. Mediation can help overcome this impediment by focusing the parties' attention on a resolution rather than on what facts are likely to be found persuasive to a jury or judge. However, the greater the parties' disagreement on the facts, the more likely some adjudication will be required.

Different view of the law: Similarly, if parties disagree on the legal implications of the facts, settlement is likely to be difficult. A legitimate dispute over the likely outcome could be overcome through mediation if the mediator is able to focus the parties on resolution as opposed to whose position is right.

Constituent pressure: At times, parties won't have the flexibility to change positions because one party may represent an institution or group. In those instances, different departments within the institution may have different interests in the dispute, or the party may have an investment in a particular outcome based upon political or employment concerns. Such constituency pressures could be dealt with effectively in mediation by allowing the party to seek input from constituents so that informed decisions can be made.

Multiple parties: Cases involving multiple parties are generally harder to settle because of the various interests of the multiple parties involved. Mediation may help to overcome this type of impediment by encouraging parties to consider creative solutions that are likely to satisfy all parties involved in the dispute. Additionally, the mediator can serve as an organizing force for the scattered interests of the parties.

2. Category of case approach

In contrast to the individual case analysis approach, a number of Ohio courts select cases for mediation categorically. Under the category of case approach, cases are either specifically included or specifically excluded from mediation based upon the legal classification of the case. Despite the limitations of a category of case approach, a potential benefit of this approach is its administrative simplicity. The main reason for its simplicity is that it requires no individual screening process beyond classification of the dispute. This section will highlight examples of the categorical approach used by Ohio courts.

a. Inclusive provisions

Inclusive case eligibility provisions target specific cases for mediation referrals based upon subject matter or the amount in controversy.⁴⁵⁶ For example, Cuyahoga County's local rules provide that any business case⁴⁵⁷ can be referred to mediation. Similarly, Franklin County, through its local rules of practice, specifically authorizes judges to refer the following categories of cases to mediation: replevin,

⁴⁵⁶ For example, Lucas County Common Pleas Court General Rule 6.01 establishes a civil case referral program which is described as "a court sponsored program for compromise negotiations within the meaning of EVID RULE 408." In this program, a judge may refer for mediation any civil action where the amount in controversy appears to be less than \$50,000. *See* Lucas County Common Pleas General Rules General Rule 6.01 Civil Case Referral Program.

⁴⁵⁷ "Business Case" is defined to include any case primarily involving one or more of the following areas of law: contract law, matters arising under/governed by Uniform Commercial Code, commercial and business torts, corporate, securities, trade secrets, employment relations, unfair competition, covenants not to compete, construction, maritime, international business, real estate (except foreclosure), and statutory rights that are purely economic in nature. Cuyahoga County Court of Common Pleas, General Rule 21.2 Alternative Dispute Resolution (1998).

attachment before judgment, garnishment before judgment, forcible entry and detainer and motions for relief from judgment after cognovit and default judgments.⁴⁵⁸ Finally, Hamilton County categorically allows judges to refer any civil case to mediation.⁴⁵⁹

⁴⁵⁸ As is typical of most local rules, Franklin County does not provide specific reasons for inclusion of these categories of cases. Franklin County Court of Common Pleas General Rule 105.01 (A)(2) Reference to Mediation.

⁴⁵⁹ Hamilton County Common Pleas Rule 31 Mediation.

b. Exclusive provisions

In contrast, exclusive case eligibility provisions enumerate categories of cases not included within the scope of the mediation program. Under this approach, the focus switches to categories of cases that are thought to be unsuitable for mediation. Examples of categories of cases specifically excluded from common pleas mediation programs can be found in Montgomery County, where the following categories of cases are specifically excluded:

- habeas corpus,
- administrative appeals,
- forcible entry and detainer,
- *pro se* cases,⁴⁶⁰
- declaratory judgment,
- injunction,
- default on loans,
- quiet title,
- on account,
- forfeiture of property, and
- non-payment of school loans.

⁴⁶⁰ Stark County chose not to exclude *pro se* litigants from mediation. The pros and cons of excluding *pro se* litigants from mediation is discussed in detail later in this chapter

Similarly, Clinton County presumptively excludes the following cases from mediation except upon mutual request by all parties:

- *pro se* cases,
- habeas corpus,
- extraordinary writs,
- declaratory relief,
- replevin actions,
- petitions to perpetuate testimony,
- quit title actions, and
- other matters specified by the court.

Other matters specified by the court have included cases that judges excluded because the nature of the relief sought in the dispute resolution required a legal ruling, or cases of this legal nature seldom went to trial. Lastly, Summit County excludes many of the same categories of cases as Montgomery and Clinton counties in addition to discovery actions.⁴⁶¹

⁴⁶¹ Summit County Court of Common Pleas Rule 22 .01- 22.03 Mediation Procedures

3. Typical categories of cases mediated in Ohio

In practice, the categories of cases most commonly mediated in the three pilot court mediation programs in Ohio⁴⁶² include the following categories of disputes:

- automobile cases,
- non-automobile personal injury cases,
- business cases,
- workers' compensation appeals,
- complex litigation,
- professional torts, and
- product liability.

⁴⁶² Roselle L. Wissler, Evaluation of the Pilot Mediation Program in Clinton and Stark Counties (1997).

B. CASE SELECTION METHODS

The methods a court uses to select cases for mediation will depend largely on a court's resources, in addition to the local culture and preferences of the judges. Under a mandatory mediation program, judges may play a central role in selecting cases for mediation.

This section will outline case selection methods available to help judges perform the task of assessing cases for mediation. These methods include allowing cases to be selected randomly, by the mediator, or by the parties in addition to the judges' own discretion to select cases.

Judicial selection: Nearly all mandatory mediation programs permit judges to evaluate and select cases in addition to the other methods discussed in this section. One retired common pleas court judge, Harry Klide, recalls that he selected for mediation commonly litigated matters such as car accidents. In addition, Judge Klide also considered the attorneys involved in the dispute in an effort to gauge their receptivity to a mediation referral. Other examples of criteria used by judges in the Ohio three court pilot mediation programs included:

- one or both parties request mediation,
- parties have an ongoing relationship,
- a small amount of money is at issue, and
- potential cost savings to the parties with the use of mediation.

Random selection: under this method, cases are selected randomly for mediation without any evaluation process. There are two models of the random selection method found in the Ohio pilot court programs.⁴⁶³ First, the court in Clinton County used a simple version - every other case filed is referred to mediation. A second, more complex version was used in Montgomery and Stark counties: A computer program randomly assigned two equal groups of cases to each individual judge per month. One group of cases served as the control group; these cases were excluded from mediation. The second group of cases formed the test group and were referred to mediation.⁴⁶⁴

Mediator selection: this method allows the mediator to evaluate cases on the basis of the mediator's criteria. This method is favored by those who encourage courts to "share the power to select cases with the mediator". Others argue, however, that a mediator's time is best spent mediating cases and not selecting cases.⁴⁶⁵ In practice, however, none of the pilot court mediation programs used this case selection method.

Party selection: allows parties or their attorneys to request mediation. In addition to the other methods discussed in this section, the party selection approach was used by the court in Stark County. Under this approach parties make a request for mediation on a cover sheet that is completed at the time a party files a complaint.

⁴⁶³ IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

⁴⁶⁴ Interview with Eileen Pruett, Dispute Resolution Coordinator, Supreme Court of Ohio, January 27, 1999.

⁴⁶⁵ Interview with Frank Motz, Consultant, Supreme Court of Ohio, February 10, 1999.

C. POLICY CONSIDERATIONS INVOLVING *PRO SE* LITIGANTS

Pro se litigants may fare well in mediation in comparison to the alternatives of unmonitored negotiated settlements and trial.⁴⁶⁶ Given that most civil cases are not resolved at trial, the likely alternative to mediation for a *pro se* litigant is unmonitored negotiated settlements. In either negotiation or trial, the power imbalances described in criticism of the use of mediation for *pro se* litigants also has the potential to have an adverse impact on the *pro se* litigant.

An imbalance in power appears when one party is more skilled or has a better sense of the actual legal implications surrounding the particular dispute. Great disparities in bargaining power, as can be expected when a *pro se* litigant negotiates with a represented party, can result in coercion and an unjust settlement for the *pro se* litigant, if these imbalances are unchecked. Arguably, power imbalances have a greater impact in unmonitored negotiations that take place between a *pro se* litigant and an attorney because there is no third person to counter the imbalance.

Should *pro se* parties be precluded from participating in mediation? Some mediation professionals argue that allowing *pro se* litigants to participate in mediation puts the mediator in an untenable position of looking out for the underrepresented party.⁴⁶⁷ Yet others advocate that if a *pro se* party is permitted to proceed to trial, that same *pro se* litigant ought to be able to participate in the less formal mediation process. Negotiations that take place in the

⁴⁶⁶ For a detailed discussion, see Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law* 53 J. ON DISP. RESOL. (1997).

⁴⁶⁷ Interview with Eileen Pruett, Dispute Resolution Coordinator, Supreme Court of Ohio, January 27, 1999.

courthouse hallway may leave the unschooled *pro se* litigant particularly susceptible to an overreaching attorney who is skilled in the art of persuasion.

Should *pro se* parties be especially encouraged to participate in mediation? Some mediation programs use the fact that one party is *pro se* as a factor favoring referral to mediation. Given the options available to a *pro se* litigant who is excluded from mediation, the inclusion of those kinds of cases arguably may decrease the unfair use of coercive tactics that could occur during unassisted negotiations. Obviously, the debate about the appropriate role for *pro se* parties in mediation remains unresolved.

III. Selecting the Time for Mediation

Ideally, the time selected for mediation should be early enough in the litigation process to prevent the parties from hardening their positions and incurring substantial cost, yet late enough in the process to allow parties to gather sufficient information about their dispute, thus enabling them to participate in meaningful negotiations during mediation.⁴⁶⁸

The optimal time may vary depending upon the complexity or simplicity of the dispute. In a study of federal court-annexed ADR by the RAND Institute for Civil Justice, the two problems with federal mediation most frequently cited by the surveyed participants were the parties' lack of readiness and the parties' associated need for more discovery to inform negotiations.⁴⁶⁹ Hence, the timing selected for the mediation session could be a major factor in the utility of a court's mediation program.

This section will discuss the potential benefits of early mediation referrals and the importance of delaying mediation long enough to allow the parties to gather sufficient information about their dispute.

⁴⁶⁸ NATIONAL STANDARDS FOR COURT -CONNECTED MEDIATION PROGRAMS, 4-1 (Center for Dispute Settlement and Institute of Judicial Administration, 1992).

⁴⁶⁹ See James S. Kakalik et al., AN EVALUATION OF MEDIATION AND EARLY NEURAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (Rand Inst. for Civil Justice, 1996).

A. BENEFITS OF EARLY MEDIATION

Mediation early in the case can prove beneficial in helping parties to:

- move toward an ultimate settlement,
- narrow issues that need to be resolved,
- gain insight into the strengths and weaknesses of the other side,
- focus future discovery strategies, and
- focus on subsequent settlement possibilities.

Even when parties are not able to reach a full agreement, instead agreeing only on certain aspects of their dispute, the above listed benefits may still be realized. Research done in Ohio which assessed the views of attorneys toward mediation indicates that a common theme noted by attorneys participating in mediation is that “mediation is more productive early in litigation⁴⁷⁰”.

1. Potential time and cost savings of early mediation

In addition, early mediation referral can maximize the amount of time and resources that both litigants and the court may save. In research on the Ohio three court pilot mediation programs, over half the participants in the mediation program surveyed reported that mediation resulted in cost and time savings. Reports of time

⁴⁷⁰ Roselle L. Wissler, OHIO ATTORNEYS’ EXPERIENCE WITH AND VIEWS OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES, 13 (March 1996).

and cost savings were even greater in those cases where full settlement was reached during mediation.⁴⁷¹

Settlement Week data from four Ohio County Common Pleas courts indicates that over 40 percent of attorneys reported that mediation resulted in both cost and time savings, and 49 percent of the attorneys surveyed reported that their cost and time involvement was the same.⁴⁷² In both studies, attorneys were more likely to report cost savings when mediation was scheduled early in the case.

2. Increased likelihood of successful intervention

Another benefit of early mediation is that early in the dispute, parties are not likely to have solidified their positions. Polarization of positions increases with the passage of time. Once positions are solidified, negotiations become more difficult, making successful intervention of mediation more unlikely. In fact, research from Ohio indicates that from an attorney perspective, the success of mediation is affected by *inter alia*, the parties' willingness to discuss the issues and compromise.⁴⁷³

⁴⁷¹ Roselle L. Wissler, EVALUATION OF THE PILOT MEDIATION PROGRAM IN CLINTON AND STARK COUNTIES, 8 (Supreme Court of Ohio Committee on Dispute Resolution, 1997).

⁴⁷² Roselle L. Wissler, EVALUATION OF SETTLEMENT WEEK MEDIATION, 14 (Supreme Court of Ohio, 1997) (evaluating mediation during "Settlement Week" held between July 1992 and December 1994 in the following four Ohio Courts of Common Pleas: Franklin, Hamilton, Lucas and Richland).

⁴⁷³ Roselle L. Wissler, OHIO ATTORNEYS' EXPERIENCE WITH AND VIEWS OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES, 14 (March 1996).

B. THE IMPORTANCE OF SUFFICIENT INFORMATION

A meaningful exchange of information before mediation occurs allows the parties to know the basic position of opposing parties. In order to discuss settlement, it is helpful for the parties to know the facts alleged, the basic documents at issue and a list of persons believed to have pertinent information in connection with the dispute. Mediation may produce settlement, however, well in advance of a full investigation.⁴⁷⁴ Lawyers may be surprised to learn that discovery does not have to be completed before mediation can be productive.⁴⁷⁵ Research from Ohio indicates that neither the likelihood of settlement nor progress toward settlement was affected by the level of discovery completed.⁴⁷⁶ Gaps in information may be filled during the mediation session. For example, research from Ohio reveals that attorneys who had not yet taken depositions found mediation to be helpful in prompting early definition of the issues. Even so, the informational needs of the parties before mediation are important. Pre-mediation discovery should allow the parties a chance to uncover basic information that enables them to understand the others side's position. This basic information will vary depending on the complexity of the dispute. The more complex the dispute, the greater the potential becomes for discovery to become tedious, expensive and time-consuming. In those instances, discovery can be wasteful, counterproductive and the primary source of cost to litigants. Judge Klide reflects on his

⁴⁷⁴ Interview with Frank Motz, Consultant, Supreme Court of Ohio, February 10, 1999.

⁴⁷⁵ Telephone interview with Judge James L. DeWeese, Richland County Common Pleas Court, February 17, 1999.

⁴⁷⁶ Roselle L. Wissler, EVALUATION OF SETTLEMENT WEEK MEDIATION, 13 (Supreme Court of Ohio Committee on Dispute Resolution, 1997).

experience as a common pleas court judge, remarking, “Under the current trend, discovery practices have taken on a life of their own. Most discovery is totally unnecessary. As a result, discovery has become a horrendous and obstructive process⁴⁷⁷”.

For these reasons, judicial intervention may be necessary to assure that mediation is scheduled before unnecessary discovery. The basic information that will enable parties to be well-informed of the other parties’ position is knowledge of the basic facts, documents and people involved in the dispute. With this basic information, the parties will be able to know what they need to know to participate in a meaningful discussion with a view toward resolution of their dispute.

IV. Conclusion

Mediation can be a valuable case management tool in a court’s overall case management system. If cases are identified, selected and referred to mediation early in the litigation process, parties are focused to consider settlement possibilities early. In turn, parties and the courts can potentially save both time and resources. The process for identifying eligible cases need not be complex in order to be effective.

⁴⁷⁷ Telephone interview with Harry Klide, Retired Judge of Stark County Common Pleas Court, April 14, 1999.

Court-connected mediation programs must maintain an appropriate level of confidentiality for statements made in the course of a mediation session. All mediation – whether court-connected or not – is much less likely to work if the participants believe that what they say might inappropriately come back to haunt them. In addition to this threat to the mediation program’s effectiveness, the fact that the court sponsors the program raises the stakes even higher. If the program fails because the court tolerates inappropriate leaks, then the court’s appearance of integrity is tainted.

This chapter identifies the appropriate level of confidentiality for a court-connected mediation program and discusses the legal tools available in Ohio to help a program maintain that level of confidentiality. The analysis draws a sharp distinction between disclosures of mediation communications offered as evidence and disclosures, such as a conversation between a judge and a mediator, that are not offered as evidence, because wholly different standards apply to each group of disclosures. One unifying theme transcends this distinction: Inappropriate disclosures in any form damage the program and the court.

CHAPTER NINE ~ ENSURING CONFIDENTIALITY

By Timothy G. Pepper

“If participants cannot rely on the confidential treatment of everything that transpires during these sessions, then counsel, of necessity, will feel constrained to conduct themselves in a cautious, tight-lipped, noncommittal manner more suitable to poker players in a high-stakes game than adversaries attempting to arrive at a just solution of a civil dispute.”

~Lake Utopia Paper, Ltd. v. Connelly Containers, Inc.
608 F.2d 928, 930 (2nd Cir. 1979) (regarding mediation-like appellate pre-argument conferences conducted by staff counsel)



I. The Importance of Confidentiality in Mediation

9 - 3

This section discusses the integral part that confidentiality plays in the mediation of disputes and explains why court-connected mediation programs will be less likely to succeed if confidentiality is not maintained.

- A. Confidentiality for settlement negotiations is not a new idea.
- B. Mediation's less inhibited disclosures require even greater confidentiality than that required of unassisted settlement negotiations.
- C. Court-connected mediation programs have an even greater need for confidentiality than that required of purely private mediation programs.
- D. Leaks to the media and others can also be a serious concern.

II. Disclosures Not Offered as Evidence in Judicial or Administrative Proceedings

9 - 13

This section discusses the limited situations in which statements made in the course of a mediation session may be disclosed outside the courtroom to judges, the police and others. This group of disclosures includes any disclosure to anyone unless the speaker is testifying at the time of the disclosure. This section also addresses the effect of Ohio's public records and open meetings requirements on the confidentiality of mediation sessions.

- A. Routine disclosures
- B. Reports of a felony
- C. Reports of child abuse or neglect
- D. Written settlement agreements that are public records
- E. Disclosures made by a mediation session participant to a third party

III. Disclosures Offered as Evidence in Judicial or Administrative Proceedings

9 -30

This section discusses the mechanics of Ohio's mediation privilege and Evidence Rule 408, which are the two principal sources of law protecting mediation confidentiality in the course of judicial and administrative proceedings. The group of disclosures covered by this section only includes disclosures made while testifying.

- A. Overview of Ohio's mediation privilege
- B. Overview of Ohio's Evidence Rule 408
- C. Who may assert the mediation privilege
- D. Who may object to the admission of evidence of a mediation communication on Evidence Rule 408 grounds
- E. When mediation session participants may be compelled to testify
- F. Information not protected prior to its use in the mediation process

G. Written settlement agreements

I. The Importance of Confidentiality in Mediation

The trust of the bar is necessary both for the success of the mediation program and for the continued good reputation of the court. Inappropriate disclosures of mediation communications can be fatal to the mediation program simply because mediation does not work if attorneys cannot trust the mediator (and other parties) to keep mediation communications confidential. Furthermore, the court's reputation for fairness will suffer if confidential mediation communications are leaked from the program to the court. Simply put, information leaks between the mediation program and the court corrupts both entities. The court's appearance of impartiality and fairness is compromised by the *ex parte* communication between the judge and the mediator; these inappropriate *ex parte* communications, in turn, cause the bar not to trust the mediation process. Without the parties' trust, the mediation process cannot work. Thus, to preserve the integrity of the court and to enable the program to succeed, every court-connected mediation program should make confidentiality a top priority.

This chapter will identify the appropriate level of confidentiality for a court-connected mediation program and will discuss the legal tools available in Ohio to help a program maintain that level of confidentiality. The applicable legal principles will be discussed in two distinct groups – one for disclosures offered as evidence in judicial or administrative proceedings, and the other for disclosures not offered as evidence in judicial or administrative proceedings – because wholly different standards apply to each group of disclosures. Disclosures offered as evidence in the course of civil or administrative

proceedings are addressed by the mediation privilege and Ohio Evidence Rule 408, neither of which is applicable to disclosures not offered as evidence in such proceedings. Likewise, various other sources of law address disclosures made outside civil or administrative proceedings, but these standards are not applicable to disclosures offered as evidence in the course of such proceedings. Drawing this sharp distinction between disclosures offered as evidence in judicial or administrative proceedings and those not made in such proceedings helps to clarify the limited reach of any particular source of law; in particular, this distinction clearly illustrates the limited reach of the mediation privilege.

The reader should keep in mind that these legal tools work best when viewed as more than just technical requirements with which to comply. Once a court-connected mediation program gains a reputation for leaks, the damage will be extremely difficult to repair. The most effective way to convince the bar that confidentiality is not a problem is to prevent leaks from occurring in the first place. The best way to prevent leaks is to educate all program participants about the need for confidentiality and motivate them to meet that need. Thus, the legal requirements discussed in this chapter will most effectively ensure confidentiality when program participants understand their basis and actively seek to comply both in letter and in spirit.

A. CONFIDENTIALITY FOR SETTLEMENT NEGOTIATIONS IS NOT A NEW IDEA

The common law of evidence held some settlement communications to be inadmissible long before modern evidence codes were drafted.⁴⁷⁸ Ohio’s Evidence Rule 408, which is identical to the federal version, is the modern codification of this principle.⁴⁷⁹ Although several policy rationales have been offered in support of the rule, the predominate reason for the rule – both past and present – has been the social policy of promoting dispute resolution without litigation.⁴⁸⁰ If an offer to compromise was admissible as evidence of weakness in the offering party’s case, then litigants could not negotiate settlements without running a significant risk of damaging their case if it was to go to trial.⁴⁸¹ For this reason the law has long been willing to keep such communications from the fact-finder in order to promote settlement.

⁴⁷⁸ 4 WIGMORE ON EVIDENCE § 1061 (3rd ed. 1940) (explaining that “expeditious and extrajudicial settlements are to be encouraged and that privacy of communication is necessary in order to encourage them”).

⁴⁷⁹ Note that the Ohio rule actually expands the common law rule to include factual statements made in the course of negotiations. For further discussion of Rule 408, *see infra parts III(B) & III(D)*.

⁴⁸⁰ Fed. R. Evid. 408 Advisory Committee Note (explaining that, among other rationales for the rule, “[a] more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes”); Ohio R. Evid. 408 Staff Notes (citing to the Federal Rule 408 Advisory Committee Notes); WEISSENBERGER’S OHIO EVIDENCE § 408.2 (1998) (discussing the policies supporting Rule 408).

⁴⁸¹ MCCORMICK ON EVIDENCE § 266 (4th ed. 1992) (discussing the damaging effects of settlement offers introduced at trial as evidence of weakness in a party’s case).

B. MEDIATION’S LESS INHIBITED DISCLOSURES REQUIRE EVEN GREATER CONFIDENTIALITY THAN THAT REQUIRED OF UNASSISTED SETTLEMENT NEGOTIATIONS

Mediation is essentially assisted negotiation.⁴⁸² One of the tools commonly used by mediators to assist the parties in their negotiation is the private caucus between the mediator and a party. The purpose of these caucuses is to give the mediator access to vital information that the parties cannot reveal in unassisted negotiations for tactical reasons.⁴⁸³ Examples of sensitive information typically revealed to the mediator in a caucus session include the following:

- a party’s candid evaluation of the strength of the case;
- a party’s minimum settlement requirements; and
- a party’s financial, emotional or political willingness to take the case all the way through trial and appeal.⁴⁸⁴

Once the mediator knows what is actually motivating the parties, the mediator is in a position to help the parties find common ground and arrive at a settlement.

⁴⁸² Charles B. Craver, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT*, 339 (3rd ed. 1997) (“Advocates should recognize that mediation is essentially assisted negotiation.”); Ohio Rev. Code § 2317.023(A)(1)(a) (1998) (defining mediation, in part, as a process in which “[a] person who is not a party to the dispute serves as mediator to assist the parties to the dispute in negotiating contested issues”).

⁴⁸³ NATIONAL STANDARDS FOR COURT CONNECTED MEDIATION PROGRAMS, § 9.1 (Center for Dispute Settlement and Institute of Judicial Administration, 1992). (“The assurance of confidentiality encourages parties to be candid and to participate fully in the process. A mediator’s ability to draw out the parties’ underlying interests and concerns may require discussion – and sometimes admissions – of facts that disputants would not otherwise concede.”).

⁴⁸⁴ Leonard L. Riskin, *UNDERSTANDING MEDIATORS’ ORIENTATIONS, STRATEGIES AND TECHNIQUES: A GRID FOR THE PERPLEXED*, 1 HARV. NEGOTIATION L. REV. 7, 28-30 & n. 82 (1996) (discussing the sensitive information received by both evaluative and facilitative mediators).

The parties' ability to make uninhibited disclosures to the mediator – and the mediator's skillful use of this information – can be the impetus that reopens deadlocked settlement talks and allows for an agreement. As the New Jersey Supreme Court Task Force on Dispute Resolution has stated:

[S]uccess of the mediation process requires strict confidentiality so that the parties participating feel that they may be open and honest among themselves. In order to create a climate of trust, participants must be assured that revelations made during the mediation process will be held in strictest confidence by the mediator. Without such assurances, disputants may be unwilling to reveal relevant information and may be hesitant to disclose potential accommodations that might appear to compromise the positions they have taken.⁴⁸⁵

The New Jersey Supreme Court Task Force accurately noted that this benefit comes with a certain amount of risk, though, because these candid disclosures can do enormous damage to a party's position if inappropriately used. For example, if one party were to learn of the other's "bottom line," then the mediation – and all future negotiation, for that matter – would effectively be over because the compromised party would have absolutely no bargaining leverage left. Candid disclosures are necessary for effective mediation, but they will not be made if a leak is likely.⁴⁸⁶

⁴⁸⁵ New Jersey Supreme Court Task Force on Dispute Resolution, Final Report, 23 (1990), cited in Elizabeth Plapinger & Margaret Shaw, COURT ADR: ELEMENTS OF PROGRAM DESIGN § 7.03 (1992).

⁴⁸⁶ ETHICAL STANDARDS FOR PROFESSIONAL RESPONSIBILITY, § 3 (Society for Professionals in Dispute Resolution, 1991). (explaining that "[c]onfidentiality encourages candor . . . and a neutral's acceptability"). The Second Circuit has commented that "[i]f participants cannot rely on the confidential treatment of everything that transpires during these sessions, then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, noncommittal manner more suitable to poker players in a high-stakes game than adversaries attempting to arrive at a just solution of a civil dispute." *Lake Utopia Paper, Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979) (regarding mediation-like appellate pre-argument conferences).

Thus, the need for confidentiality in mediation is even greater than the need for confidentiality in unassisted negotiation.⁴⁸⁷ The evidentiary exclusion of certain settlement communications is sufficient for unassisted negotiations because these communications are already known to all of the parties. An evidentiary exclusion simply will not suffice for mediation communications, though, because the inappropriate disclosure of a confidential mediation communication causes immediate and irreparable harm whether the case eventually goes to trial or not.⁴⁸⁸

⁴⁸⁷ There has been some debate nationally over whether absolute confidentiality in mediation is always worth the price. In a nutshell, the argument in favor of openness is that there is no empirical evidence supporting a need for strict confidentiality; therefore, strict confidentiality requirements impose burdens without benefits. The Ohio General Assembly resolved the issue for Ohio in 1996 with the passage of Ohio's mediation privilege statute, which includes various exceptions and qualifications designed to alleviate the reasonable concerns of those who oppose absolute confidentiality. Ohio's mediation privilege is discussed extensively *infra*. For a general discussion of the pros and cons of confidentiality in mediation, *see* Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY AND PRACTICE* § 9:02 (2nd ed. 1994); *DISPUTE RESOLUTION* magazine, Winter 1998 (special issue devoted entirely to confidentiality in mediation).

⁴⁸⁸ In fact, Wigmore argued as early as 1940 – long before the widespread use of formal mediation as an alternative to litigation – that communications made to conciliators for the purpose of fostering settlement should be privileged. 8 *WIGMORE ON EVIDENCE* § 2376(4) (3rd ed. 1940). *See also* Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 9:10 (2nd ed. 1994) (observing that “implicit in the creation of privileges is a decision that mere exclusion from evidence under established compromise discussion rules is insufficient to foster mediation”).

C. COURT-CONNECTED MEDIATION PROGRAMS HAVE AN EVEN GREATER NEED FOR CONFIDENTIALITY THAN THAT REQUIRED OF PURELY PRIVATE MEDIATION PROGRAMS

The connection between a court and its mediation program greatly magnifies the importance of confidentiality in mediation. The “official” status of a court-connected mediation program has two problematic effects: It can cause considerable pressure to be exerted on the mediator to leak information to the court, and it ensures that any such leak will have ramifications beyond the mere compromise of a party’s negotiation position.

The former of these two problematic effects – the increased pressure on the mediator to leak confidential information – is a product of the court’s natural desire to make the most fully informed decisions possible. The mediator’s position in a court-connected mediation program places him or her in a tight spot. The mediator needs to receive confidential communications from the parties, but the judge assigned to the case may have a strong desire to learn about the case from the mediator. After all, the judge’s job is to guide cases to a speedy and just resolution, and the mediator’s inside information may seem to be just the ticket. The mediator’s status as an employee of the court can only add to the pressure to acquiesce to a judge’s request for information. Examples of the types of information that a judge may naturally be inclined to seek from the mediator include the mediator’s evaluation of the merits of the case, the mediator’s opinion as to which party (if any) is unreasonably refusing to settle and the mediator’s opinion as to whether the case is likely to settle before trial.

The latter of these two problematic effects – the increased significance of breaches of confidentiality – is addressed below (see Part II [A][1]). If a court-connected mediation program leaks inappropriate information to the court, then the consequences for both the program and the court will endure long after any particular case has been cleared from the docket. The court’s integrity will be impugned, and the mediation program will be ineffective because of the bar’s distrust.⁴⁸⁹

Judges are aware of the general problems with *ex parte* communications by parties and seek to avoid them. Most judges, though, are probably less familiar with the analogous problems inherent in the disclosure of confidential mediation communications to judges by mediators. Part II (A)(1) below more fully addresses this issue in the context of the Code of Judicial Conduct’s prohibition of these types of disclosures by mediators; for now, suffice it to say that a court-connected mediation program’s proximity to the court itself enhances both the likelihood of an inappropriate disclosure by the mediator to the judge and the harm that any such leak would cause.

⁴⁸⁹ NATIONAL STANDARDS FOR COURT CONNECTED MEDIATION PROGRAMS, § 9.4 Commentary (Center for Dispute Settlement and Institute of Judicial Administration, 1992). (“Communications between courts and mediators relating to the substance or recommended outcome of cases destroy confidentiality and impugn the integrity of the process . . .”).

D. LEAKS TO THE MEDIA AND OTHERS CAN ALSO BE A SERIOUS CONCERN

Not all pressure to leak comes from the court. Leaks to the media are another major concern.⁴⁹⁰ The media often takes a keen interest in litigation involving governmental units, and even some high-profile litigation between private parties can generate considerable pressure on media outlets to “scoop” the competition by reporting “inside information.” Common examples of these types of cases include:

- landfill siting disputes;⁴⁹¹
- environmental pollution suits;⁴⁹²
- civil rights suits brought against local employers;⁴⁹³ and
- class action litigation.⁴⁹⁴

⁴⁹⁰ See, e.g., Jane E. Kirtley, *No Place for Secrecy*, DISPUTE RESOLUTION MAGAZINE, Winter 1998, 21 (writing on the behalf of The Reporters Committee for Freedom of the Press that “[a]s long as we do continue to call ourselves a democracy, certain methods of problem solving – like secret mediation for public policy issues – must be denied to instrumentalities of government”).

⁴⁹¹ See, e.g., Michael D. Clark, “Landfill Battle Gets Murkier; Sides Disagree Over ‘Deal’ Offer”, *The Cincinnati Enquirer*, C3 (March 30, 1999) (discussing lawsuits pending over new or expanding landfills in Warren and Morrow counties, and reporting a disagreement over what exactly was said during settlement negotiations).

⁴⁹² See, e.g., Keith Schneider, “Toxic Waste Solution Foes Increasing: Rural America Upset Over Cement Kiln Disposal Risk”, *The Plain Dealer*, 9B (July 11, 1993) (reporting on concerns about burning toxic waste in cement kilns, including one in Fairborn, Ohio, and the states’ investigations in response).

⁴⁹³ See, e.g., Robert Ruth, “Witnesses Tell Judge They Were Targets,” *The Columbus Dispatch*, E3 (March 23, 1999) (reporting on the latest hearing in a highly public race discrimination suit brought against United Dairy Farmers).

A good example of this phenomenon recently occurred in Virginia. The Virginia Department of Transportation faced opposition from 15 community groups in its efforts to build a parkway through residential communities. The dispute attracted intense media coverage, but mediation behind closed doors – with no damaging leaks to the press – resulted in a settlement. The media fought a spirited battle for access to the sessions, but the court recognized that the effectiveness of the mediation sessions would be seriously undermined if the community group leaders could not speak frankly.⁴⁹⁵ These leaders could have felt “locked in” by the public disclosure of initial bargaining positions, and they could have felt pressure to avoid compromise in order to placate an unreasonable faction within their constituency. Faithful adherence to confidentiality standards alleviated these pressures and fostered a settlement without protracted litigation.

⁴⁹⁴ See, e.g., Christopher Evans, “Every Fan Meets Howard Beder, A Father Trying to Teach His Son, and Art Modell, A Lesson About Lying”, *The Plain Dealer Sunday Magazine* (March 21, 1999) (reporting in detail on the multimillion dollar class action suit brought in the Cuyahoga County Court of Common Pleas against Art Modell for moving the Browns).

⁴⁹⁵ For a discussion of this case and similar cases see Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 9:29 (2nd ed. 1994); Lawrence H. Hoover, Jr., *A Place for Privacy*, *DISPUTE RESOLUTION MAGAZINE*, Winter 1998, 20 (arguing in favor of mediation confidentiality in certain cases involving the public interest); Jane E. Kirtley, *No Place for Secrecy*, *DISPUTE RESOLUTION MAGAZINE*, Winter 1998, 21 (arguing against mediation confidentiality in cases involving the public interest).

II. Disclosures Not Offered As Evidence in Judicial or Administrative Proceedings

A variety of sources of law apply to the disclosure of mediation communications that are not offered as evidence in the course of judicial or administrative proceedings. This category of disclosures includes *any* disclosure made to a judge when the disclosure is not offered into evidence. Some sources of law, such as the Ohio Code of Judicial Conduct and tort law, restrict what may be disclosed. Other sources, such as Ohio's felony and child abuse reporting statutes, require that certain mediation communications be disclosed. Finally, contractual arrangements between the parties, if consistent with Ohio's public record statute, may permit or prohibit certain disclosures.

The sections below address how each of these sources of law affects the disclosure of mediation communications that are not offered as evidence in judicial or administrative proceedings. The Code of Judicial Conduct is addressed in the context of an especially important issue for all court-connected mediation programs: the extent to which confidential mediation communications leak from the mediation program to the court.

A. ROUTINE DISCLOSURES

Mediators may make the following routine disclosures to the judge:

- who attended the mediation session;
- when the mediation session(s) took place;
- whether agreement was reached; and
- any other information that all parties wish the mediator to disclose to the judge, such as the existence of any motions pending before the court that need to be decided before settlement can occur.⁴⁹⁶

Although this short list may appear unduly restrictive at first glance, there are three independent reasons for limiting the routine disclosures to these four items.⁴⁹⁷ Simply put, the court’s reputation, the mediation program’s effectiveness and the mediator’s personal integrity all suffer if disclosures beyond these four items are made. Each concern is addressed in detail below.

⁴⁹⁶ NATIONAL STANDARDS FOR COURT CONNECTED MEDIATION PROGRAMS, § 2.3(b)(2) Commentary (Center for Dispute Settlement and Institute of Judicial Administration, 1992). (providing for the routine disclosure of “the date the case was referred . . . the names of the parties or party representatives attending mediation, the outcome of the mediation, and, if the parties agree, any further court action required”); *id.* at §§ 12.1 and 12.2 (further discussion of same).

⁴⁹⁷ NATIONAL STANDARDS FOR COURT CONNECTED MEDIATION PROGRAMS, § 9.5 Commentary (Center for Dispute Settlement and Institute of Judicial Administration, 1992). Throughout this chapter, the term “routine disclosure” refers to disclosures that identify the particular dispute to which they pertain. Thus, aggregate information about the mediation program’s operation that does not identify specific cases poses no confidentiality concerns whatsoever and is not addressed by this chapter. (“Given the availability of [protocols and procedures to ensure anonymity] and courts’ need for data to fulfill its responsibility for ensuring quality, provision of information for the purposes of program monitoring, evaluation and research should not be construed as violating policies relating to confidentiality in mediation.”) For discussion of monitoring and evaluating techniques, see Chapter 9 of this book.

1. The court's reputation suffers and the Code of Judicial Conduct is violated if more information is routinely disclosed

Part I of this chapter discussed the harmful effects of inappropriate disclosures made by the mediator to the judge. The discussion focused on the general need for candid disclosures in mediation caucuses and the harmful effects on the court, the mediation program and the parties if those confidential communications are leaked. Given the fact that some disclosures must be made in order to assure the judge that the mediation program is operating properly,⁴⁹⁸ though, there must be some way to draw the line between appropriate administrative disclosures and inappropriate leaks. The Code of Judicial Conduct provides a means of drawing this line.⁴⁹⁹ This use of the Code of Judicial Conduct is more than just a convenient way out of a difficult line-drawing problem; the Code of Judicial Conduct's rules seek to preserve the exact state (and appearance) of judicial integrity and fairness that is jeopardized by inappropriate leaks. Thus, because the policy concerns driving the Code of Judicial Conduct are exactly the same as those driving the need for confidentiality in court-connected mediation programs, the Code of Judicial Conduct is a distinctly suitable source of guidance.

Aside from discussions with other judges and law clerks, the Code of Judicial Conduct permits a judge to

⁴⁹⁸ NATIONAL STANDARDS FOR COURT CONNECTED MEDIATION PROGRAMS, § 2.3(b) Commentary (Center for Dispute Settlement and Institute of Judicial Administration, 1992). (providing that mediators have the responsibility of keeping the court informed about the mediation program's operation so that the court may fulfill its supervisory duties).

have *ex parte* communication with a party or other person, including a mediator, only if each of the following conditions is met:

- the circumstances require the judge to communicate with one side or a third party only;
- the communication concerns an emergency, scheduling or administrative matter as distinct from a substantive matter affecting the merits of the case;
- the judge believes that no party will gain a tactical or procedural advantage from the communication; and
- the judge notifies the lawyers for all of the parties of the essence of the communication and gives them an opportunity to respond.⁵⁰⁰

⁴⁹⁹ Note that the mediation privilege, which is a testimonial privilege, does not apply to any disclosure made by a mediator to a judge unless such disclosure was made in the course of a civil or administrative proceeding. Thus, the mediation privilege does not prevent mediators from informally discussing the mediation session with the judge, though ethical and contractual obligations may preclude these discussions.

⁵⁰⁰ See Ohio Code of Judicial Conduct Canon 3(B)(7) (1997), which provides in relevant part as follows:

A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges. . . . The most significant part of this provision is 3(B)(7)(c), which only permits routine

Note that the Code of Judicial Conduct does not permit *ex parte* contact with just any member of the court staff; unless each of these four conditions is met, only law clerks and other judges may have *ex parte* communications about a matter with the judge hearing the matter.⁵⁰¹ The routine disclosure of who attended, when the session took place, whether agreement was reached and any disclosures made with universal consent satisfy these criteria for appropriate *ex parte* communications. Each routine disclosure is addressed below in turn, with the assumption that the parties are informed of all routine disclosures and may comment if they wish.

a. Who attended

The mediator may disclose the identities of those who attended the mediation session(s) to the judge. First, efficiency considerations make it utterly impracticable for the judge to receive this information in a non-*ex parte* fashion. Thus, because of the excessive burden of doing it any other way, the circumstances require the disclosure of this information to be by *ex parte* communication from the

ex parte communications with other judges and “court personnel whose function is to aid the judge in carrying out the judge’s adjudicative responsibilities” This provision refers to law clerks and similar staff; it most definitely does not include mediators. Mediation, by definition, is not an adjudicative function. Ohio Rev. Code § 2317.023(A)(1)(a) (1998) (defining mediation, in part, as a process intended “to assist the parties to the dispute in negotiating contested issues”).

⁵⁰¹ These rules are not merely hortatory; they use the phrase “shall not,” and the Code of Judicial Conduct Preamble provides that “[w]hen the text uses ‘shall’ or ‘shall not,’ it is intended to impose binding obligations, the violation of which can result in disciplinary action.” Furthermore, the Commentary to Canon 3(B)(7) states that “a judge must discourage *ex parte* communication and allow it only if all the criteria stated in Canon 3(B)(7) are clearly met” (emphasis added).

mediator. Second, this information is fairly classified as an “administrative” matter as distinct from a substantive matter affecting the merits of the case. Third, it is highly improbable that a party would gain any procedural or tactical advantage from the disclosure of this information.⁵⁰² Therefore, with all elements of the Code of Judicial Conduct’s test met, this disclosure is appropriate.

b. When the session(s) occurred

The mediator may also tell the judge when the mediation session(s) occurred. First, as with the participants’ identities, the circumstances effectively rule out any economically or administratively feasible way of communicating this information to the judge except in an *ex parte* fashion. Second, this information is obviously an administrative matter that does not affect the merits of the case. Third, because the parties usually agree on the date and time of the session(s), there is little concern that a party might gain a tactical advantage by the disclosure of this information. Thus, with all elements of the Code of Judicial Conduct’s test met, this disclosure is also appropriate.

⁵⁰² Chapter 7 of this book recommends that the court require the attendance of both parties and their counsel at the mediation session. The “procedural or tactical advantage” discussed above refers to an unwarranted advantage; that is, an advantage not affirmatively provided for by law. Thus, if a party violates the attendance requirement, the court could properly sanction the violator to the benefit of the aggrieved party. Strictly speaking, such a “make whole” remedy does not even advantage the aggrieved party; it merely compensates it for any loss, such as attorney’s fees, incurred as a result of the sanctioned party’s misconduct. Furthermore, the sanctions benefiting the aggrieved party are arguably not even the result of the *ex parte* communication, because the sanctions would be the result of a sanction hearing and not the *ex parte* communication itself.

c. Whether agreement was reached

The mediator may, obviously, disclose to the judge whether the mediation was successful in whole or in part. The judge must know which issues or parties, if any, have settled out. The mediator can report this information without assuming the additional burden of ascertaining and reporting the actual terms of the agreement. If any party wishes to reveal the terms of an agreement to the court or challenge the validity of the agreement, then this disclosure⁵⁰³ or challenge⁵⁰⁴ will be by motion, and no *ex parte* communication need be made.

⁵⁰³ See, e.g., OHIO R. CIV. P. 23(E) (requiring the approval of the court before a class action may be dismissed or settled); OHIO R. CIV. P. 66 (requiring the approval of the court before a receiver may be appointed). Note that the mediation privilege expressly permits these disclosures. OHIO REV. CODE § 2317.023(D) (1998) (providing that the mediation privilege “does not affect the admissibility of a written settlement agreement signed by the parties to the mediation”).

⁵⁰⁴ See, e.g., *Mack v. Polson Rubber Co.*, 14 Ohio St.3d 34 (1984) (syllabus) (holding that “allegations of fraud, duress, undue influence or of any factual dispute concerning the existence or the terms of a settlement agreement” may entitle a party to an evidentiary hearing prior to judicial enforcement of the agreement). Note that the mediation privilege may not block the disclosure of mediation communications in such an evidentiary hearing because of the “exceptional need” provision in the privilege statute. See *infra* part III(E)(2) and footnote 63 for additional discussion of the privilege’s “exceptional need” escape clause and its applicability to contract defenses such as fraud, duress, etc.

d. Any other information that all parties wish the mediator to disclose to the judge, such as the existence of a motion pending before the court that must be decided before settlement is possible

This routine disclosure is different from the others in that it is not even an *ex parte* communication. By consenting to the disclosure, the parties have authorized the mediator to act as their spokesperson or representative for the limited purpose of making that disclosure to the judge. Therefore, because this disclosure is not being made outside the presence of the parties' representative, there is no *ex parte* communication. Without the consent requirement, of course, a party that was expecting a favorable ruling on a pending motion could easily gain an advantage by informing the judge (via the mediator) that settlement would be facilitated by a decision on the motion.

Routine Disclosures

Appropriate Disclosures to the Judge	Inappropriate Disclosures to the Judge
Who attended the mediation session	The mediator's evaluation of the merits of the case
When the mediation session(s) took place	The mediator's opinion as to which party, if any, is unreasonably refusing to settle
Whether agreement was reached	The mediator's opinion as to whether the case is likely to settle before trial
Any other information that all parties wish the mediator to disclose to the judge, such as the existence of any motions pending before the court that need to be decided before settlement can occur	Any statements made by the mediation participants or the mediator during the session, unless all participants affirmatively wish the mediator to make this disclosure

e. Most other desired disclosures would impermissibly affect the merits or give one party a tactical advantage

Note that the types of sensitive information that judges would most probably like to know – the types listed above in part I (C) – are not appropriate *ex parte* communications under the Code of Judicial Conduct because each either concerns the merits of the case or could give one party a tactical advantage. The mediator’s evaluation of the merits of the case obviously would be an *ex parte* communication affecting the merits of the case.⁵⁰⁵ The mediator’s opinion as to which party is unreasonably holding out implicitly reveals the mediator’s opinion on the merits of the case as well, because a party could not be acting “unreasonably” if the mediator agreed with its position on the merits. Finally, the mediator’s opinion as to whether a case is likely to settle without a trial may affect the judge’s willingness to grant continuances or decide pre-trial motions that could give one party a tactical advantage in the ongoing negotiations. Thus, the Code of Judicial Conduct’s restrictions on *ex parte* communications provide direct guidance on which disclosures by the mediator to the judge are permissible and which are not; in so doing, the Code of Judicial Conduct indirectly provides guidance on which disclosures may routinely be made without damaging the court’s integrity and reputation for fairness.

⁵⁰⁵ NATIONAL STANDARDS FOR COURT CONNECTED MEDIATION PROGRAMS, § 9.4 Commentary (Center for Dispute Settlement and Institute of Judicial Administration, 1992). (expressing the rather obvious principle that “[m]ediators should not make recommendations regarding the substance or recommended outcome of a case to the court”).

2. The mediation program's effectiveness suffers if more information is routinely disclosed

In addition to the court's reputation suffering, the routine disclosures articulated above provide enough information to assure the judge that court-ordered mediation has been performed,⁵⁰⁶ but they do not reveal anything that the parties would reasonably consider to be sensitive. Thus, if the bar is aware of the mediation program's practice of routinely making only these disclosures, then attorneys will feel free to make the confidential caucus communications that are often necessary for a successful mediation. On the other hand, if the mediation program routinely leaks information beyond these routine disclosures, then the bar will not trust the program and its effectiveness will be seriously diminished.

3. The mediator's personal ethical standards are also breached and the mediator may face tort liability if more information is routinely disclosed

Professional mediators are governed by a non-binding set of ethical standards, which restrict the mediator's ability to disclose mediation communications. Furthermore, mediators may be liable in tort for breaching a party's reasonable expectation of privacy for mediation communications. These methods of holding a mediator accountable for inappropriate disclosures are discussed in Chapter 10.

⁵⁰⁶ See Chapter 7 of this book for a discussion of mandated attendance, and footnote 526 of this chapter for a discussion of the mediation privilege's application to sanctions proceedings.

4. A more direct and visible legal basis is needed to articulate which administrative disclosures may routinely be made

Given the critical importance of limiting the routine disclosures from the mediator to the judge to those administrative disclosures articulated above, it is unfortunate that there is not a more direct and visible legal basis for the line that this chapter draws.⁵⁰⁷ The sections above draw this line so as to preserve the court's reputation for fairness (by ensuring compliance with the Code of Judicial Conduct), to preserve the mediation program's effectiveness and to preserve the mediator's compliance with his or her ethical standards. The practicing bar probably has little familiarity with these principles. Thus, in order to communicate the seriousness with which the court and the mediation program take their confidentiality responsibilities, and in order to communicate which administrative disclosures will routinely be made, it would be helpful to have a more direct and visible legal standard that clearly permits the routine disclosures articulated above and clearly prohibits all others. A local court rule is just the ticket.⁵⁰⁸ Such a rule would be easily promulgated, would

⁵⁰⁷ NATIONAL STANDARDS FOR COURT CONNECTED MEDIATION PROGRAMS, § 3.2(b)(2) Commentary (Center for Dispute Settlement and Institute of Judicial Administration, 1992). (stating that courts should provide judges, court personnel, the bar and parties with information on the "confidentiality of process and records"); *id.* at § 9.1 (stating that "[c]ourts should have clear written policies relating to the confidentiality of both written and oral communications in mediation consistent with the laws of the jurisdiction"); *id.* at § 9.2 (stating that "[c]ourts should ensure that their policies relating to confidentiality in mediation are communicated to and understood by mediators to whom they refer cases"); Elizabeth Plapinger & Margaret Shaw, COURT ADR: ELEMENTS OF PROGRAM DESIGN § 7.04 (1992) (discussing how many courts address the tension between confidentiality and the need to monitor the program by expressly articulating permissible communications between mediators and the court).

come directly from the court in question, and would speak directly to the bar.

5. Other strategies can help to limit leaks from the mediation program to the court

The legal doctrines and policy rationales discussed above act as post-hoc sanctions for inappropriate disclosures. While this deterrent effect will help to ensure confidentiality, courts can also take affirmative steps to prevent leaks before they occur. The most useful of these affirmative steps is to educate everyone involved in the program about the need for confidentiality and motivate them to conscientiously avoid making inappropriate disclosures.

Courts can also adopt procedures to limit the possibility of an inadvertent disclosure by the mediator to the judge. For example, courts can require that the routine disclosures discussed above in Part II (A) be made in writing on standardized forms. This reduces the chances that a mediator will make an inappropriate slip-up during an otherwise appropriate conversation with the judge. In addition, courts can require that the mediation program's case files be maintained apart from the court's case files and forbid mediators from making any notations on, or inserting any material in, the court's case file. These techniques should help to limit the opportunities for inadvertent disclosures.

⁵⁰⁸ Such a rule would easily conform to the standards for local court rules. *See* OHIO CONST. ART. IV, § 5(B) (providing that “[c]ourts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court”); Rule of Superintendence of the Courts of Ohio 5(A)(1) (authorizing “any local rule of practice that promotes the use of any device or procedure to facilitate the expeditious disposition of cases”).

B. REPORTS OF A FELONY

Ohio law requires any person who knows that a felony has been or is being committed to report this knowledge to the police.⁵⁰⁹ These reports are expressly exempted from the coverage of Ohio's mediation privilege statute.⁵¹⁰

C. REPORTS OF CHILD ABUSE OR NEGLECT

With some exceptions, Ohio law requires attorneys and certain other individuals to report any actual or suspected instance of child abuse or neglect if that knowledge was obtained in that person's official or professional capacity.⁵¹¹ An attorney acting as a mediator in a court-connected program may well be acting in an official or

⁵⁰⁹ OHIO REV. CODE § 2921.22 (1998) (providing that “[n]o person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities”).

⁵¹⁰ OHIO REV. CODE § 2317.023(C)(3) (1998). This is somewhat anomalous, given that the privilege statute would not even be applicable to reports made to law enforcement authorities. *See infra* part III(E) (discussing the privilege statute's application to disclosures made in civil and administrative proceedings only); *see also* OHIO REV. CODE § 2921.22(H) (1998) (providing that “[n]o disclosure of information pursuant to [the felony reporting requirement] gives rise to any liability or recrimination for a breach of privilege or confidence”).

⁵¹¹ OHIO REV. CODE § 2151.421(A)(1)(a) (1998) provides in relevant part that no attorney or other specified individual who is acting in an official or professional capacity and knows or suspects that a child under 18 years of age or a mentally retarded, developmentally disabled or physically impaired child under 21 years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. In addition to an attorney, this requirement applies to professionals in health care, childcare, education, social work and religion. *See* OHIO REV. CODE § 2151.421(A)(1)(b) (1998) for a complete listing. These other professionals are not likely to be acting in their “official or professional capacity” in the event that they serve as mediators in a court-connected mediation program. These excerpts represent only a small portion of the statute; any mediator who believes that he or she may have a duty to report under this statute would be well-advised to conduct further research beyond the scope of this book.

professional capacity.⁵¹² A mediator who is not an attorney or one of the other individuals addressed by this statute is permitted, but not required, to make such a report.

D. WRITTEN SETTLEMENT AGREEMENTS THAT ARE PUBLIC RECORDS

Written settlement agreements which would otherwise be considered to be public records are still public records (subject to disclosure) despite their generation or use in a mediation session.⁵¹³

⁵¹² This issue has yet to be addressed, even indirectly, in Ohio.

⁵¹³ OHIO REV. CODE § 2317.023(D) (1998) (providing that the mediation privilege “does not affect . . . the status of a written settlement agreement as a public record . . .”). Note also that any confidentiality agreement entered into by the parties to a mediation will not prevent the disclosure of a mediation document or settlement agreement if such a document or agreement is a public record for the purposes of Ohio’s public record statute. OHIO REV. CODE § 149.43 (1998) (detailing Ohio’s public records requirements); State *ex rel.* Dwyer v. City of Middletown, 52 Ohio App.3d 87, 95 (1988) (holding that parties may not contract in derogation of Ohio’s public records statute).

1. Related issue – other potentially public records

The enactment of Ohio’s mediation privilege statute was followed by the amendment of Ohio’s public records statute. Except for written settlement agreements, no document which was made in the course of and is related to the subject matter of a mediation is a “public record” subject to disclosure under Ohio’s public records statute.⁵¹⁴ Thus, one common concern regarding court-connected mediation programs – that the government’s involvement will expose the mediation documents to mandatory disclosure – is not a problem in Ohio. This is true whether the government’s participation is as a party to litigation or as the sponsoring court.

2. Related issue – open meeting requirements

A similar concern is that mediation sessions involving governmental litigants will be subject to statutory open meeting requirements. Fortunately, this is also not a problem in Ohio. Ohio’s open meeting statute generally requires that “meetings” of public bodies be open to the public.⁵¹⁵ Under the definitions of these terms in the statute, though, a mediation session attended by a representative of a public body does not constitute a “meeting” sufficient to trigger the

⁵¹⁴ OHIO REV. CODE § 149.43(A)(1)(i) (1998) (defining “public record” not to include “[r]ecords containing information that is confidential under” Ohio’s mediation privilege statute). The mediation privilege statute, in turn, makes confidential “a communication made in the course of and relating to the subject matter of a mediation.” OHIO REV. CODE § 2317.023(A)(2) (1998).

⁵¹⁵ *See generally* OHIO REV. CODE § 121.22 (1998).

openness requirement.⁵¹⁶ A mediation session must be open only if a majority of the members of a public body attend the session to discuss the public business of that body.

E. DISCLOSURES MADE BY A MEDIATION SESSION PARTICIPANT TO A THIRD PARTY

Out-of-court disclosures of mediation communications by a participant to a third party are not prohibited by law,⁵¹⁷ unless they are subject to a gag order or a protective order. Some mediators advise mediation participants to enter into confidentiality agreements that would prohibit such disclosures, but other mediators do not believe such agreements to be necessary or even desirable. Although confidentiality agreements might serve to deter disclosures, these agreements have limited enforceability⁵¹⁸ and may mislead unrepresented parties as to the extent of protection.⁵¹⁹ This book makes no recommendation on whether mediators should encourage participants to enter into confidentiality agreements.

⁵¹⁶ A “meeting” is defined as “any prearranged discussion of the public business of the public body by a majority of its members.” OHIO REV. CODE § 121.22(B)(2) (1998) (emphasis added).

⁵¹⁷ Note, though, that a mediator who breaches a party’s reasonable expectation of privacy may be liable in tort. *See* Chapter 10 of this book for a discussion of this aspect of mediator accountability.

⁵¹⁸ Agreements to keep evidence from a tribunal are not effective against a subpoena for the evidence. Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* §§ 9:24 (2nd ed. 1994) (discussing the public policy rationale).

⁵¹⁹ The question of whether to advise mediation participants to enter into a confidentiality agreement is fact-sensitive and complex. For an extended discussion of the issues, *see* Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* §§ 9:23-9:25 (2nd ed. 1994).

III. Disclosures Offered as Evidence in Judicial or Administrative Proceedings

Ohio’s mediation privilege statute and Ohio Evidence Rule 408 are the primary sources of law applicable to the disclosure of mediation communications in the course of judicial and administrative proceedings, which potentially includes affidavits, depositions and other pre-trial discovery. Local rules do not play a major role because they may not create, modify or abridge a privilege.⁵²⁰ Judicial decisions do not provide much guidance either, because to date there has been no significant common law treatment of the confidentiality of mediation communications in Ohio.

This section will discuss the disclosure of mediation communications offered as evidence in judicial or administrative proceedings by analyzing the mediation privilege and Evidence Rule 408. A brief overview of each is set out below, followed by a discussion of when these sources permit the compelled testimony of a mediation participant, who may assert the privilege or make the evidentiary objection, how these sources affect the disclosure of information which was not protected from disclosure prior to the mediation session, and how these sources affect the disclosure of written settlement agreements.

⁵²⁰ Ohio Evidence Rule 501 provides that “[t]he privilege of a witness, person, state or political subdivision thereof shall be governed by statute enacted by the General Assembly or by principles of common law as interpreted by the courts of this state in light of reason and experience” (emphasis added). *See also* State v. Smorgala, 50 Ohio St.3d 222 (1990) (syl. para. 2) (holding that, because “the law of privilege is substantive in nature,” the court was not free to promulgate an evidence rule in conflict with a statutory privilege); OHIO CONST. ART. IV, § 5(B) (authorizing local rules of procedure only); Ohio Rule of Superintendence of the Courts 5(A)(1) (same).

A. OVERVIEW OF OHIO’S MEDIATION PRIVILEGE⁵²¹

Ohio’s mediation privilege statute creates a qualified privilege for communications made in the course of and relating to the subject matter of a mediation.⁵²² The privilege attaches if the mediation in question has all of the following characteristics:

⁵²¹ Note that this mediation privilege statute applies to all mediations, whereas Ohio has other statutes addressing domestic relations court-connected mediation programs. *See* OHIO REV. CODE § 3109.052(C) (1998) and OHIO REV. CODE § 2317.02(H)(1998). A more detailed treatment of the confidentiality of mediation communications made in court-connected programs other than court of common pleas programs in the civil division is beyond the scope of this chapter.

⁵²² OHIO REV. CODE § 2317.023(A)(2) (1998). The statute is fairly specific and coherent in shaping the contours of the privilege, but it does contain one statement of questionable utility. Section (B) of the statute – which sets forth the basic prohibition against the disclosure of specified communications – begins by stating that “[a] mediation communication is confidential.” The word “confidential” is not defined in the statute, but this vague declaration is immediately followed by a detailed explication of the privilege’s reach. Thus, this declaration of confidentiality is probably best interpreted as hortatory language that does not add anything of substance to the privilege’s features. In the only Ohio Supreme Court case to interpret the privilege statute, the court made a broad statement with respect to this language. The court stated, without qualification, that this language meant that “[m]ediation communications are confidential and may not be disclosed.” *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 207 (1998). Despite this rather overbroad generalization, the court’s statement must be read in the context of the case. *Schneider* was a mandamus action seeking the disclosure of a mediation communication pursuant to Ohio’s Public Records Act, and the court merely held that the Public Records Act did not require the disclosure of this mediation communication. Thus, the court’s use of the word “confidential” meant that, with respect to the Public Records Act, the mediation communication was not a “public record” subject to disclosure. Nothing in the opinion holds that the mediation privilege is anything other than a testimonial privilege. (This case was published without a syllabus, further complicating its interpretation.)

- the mediation was a non-binding process for the resolution of a dispute;⁵²³
- a person who was not a party to the dispute served as a mediator; and
- one of the following applies:
 - a court, administrative agency, not-for-profit community mediation provider or other public body appointed the mediator or referred the dispute to the mediator, or
 - the parties themselves engaged the mediator.

Once the privilege attaches,⁵²⁴ it expressly burdens everyone in a position to disclose a mediation communication.⁵²⁵ The statute provides that the privilege may be asserted in civil proceedings and administrative

⁵²³ The statute does not define the term “dispute.” It is questionable whether the victim-offender mediation discussed in Chapter 12 of this book is actually a mediation under this definition, because in many instances there is no real dispute to be settled. A purely healing process would, perhaps, not qualify as a “mediation” for the purposes of the privilege statute. This will be relevant when a civil or administrative proceeding, in which the privilege may be asserted, follows a victim-offender mediation.

⁵²⁴ The statute does not expressly state when the privilege attaches. It obviously attaches at the time of the session, but it is not clear if it may attach prior to the session. For example, suppose the mediator calls the defense attorney to schedule a session, and the attorney – who thinks that all communications made to a mediator are privileged – states that the only real issue is damages because liability is clear. Is this statement privileged? Although the statute is unclear, a strong argument can be made that it is covered. The privilege attaches to communications made “in the course of . . . a mediation,” and a mediation is defined as a “process” – not merely a “session.” OHIO REV. CODE § 2317.023(A)(1) (1998). Thus, if the “process” of mediation begins with that very first phone call, then the privilege attaches at that time. Indeed, some mediators convince reluctant parties to mediate by beginning the mediation under the guise of telephone discussions ostensibly aimed at learning why the reluctant party does not want to mediate. Other mediators hold individual caucuses with the disputants before convening a joint meeting, and these caucuses should also fall within the mediation “process.”

⁵²⁵ OHIO REV. CODE § 2317.023(B)(1998) (providing that “no person” shall disclose a mediation communication except under specified circumstances). This broad language includes mediation program staff other than the mediator, as well as the mediator and the parties.

proceedings.⁵²⁶ The conspicuous absence of criminal proceedings in this list compels the conclusion that the privilege may not be asserted in those proceedings.⁵²⁷

The privilege expressly does not apply in four circumstances:

- to the disclosure by any person of a mediation communication made by a mediator if all parties to the mediation, and the mediator, consent;⁵²⁸
- to the disclosure by a person other than the mediator of a mediation communication made by a person other than the mediator if all parties consent to the disclosure;⁵²⁹
- to the disclosure of a mediation communication if that disclosure is required by Ohio’s felony reporting statute;⁵³⁰ and
- to the disclosure of a mediation communication if the court determines that an exceptional need exists which trumps the general policies underlying the privilege.⁵³¹

⁵²⁶ Note that “show cause” hearings are proceedings within the scope of the privilege. Thus, any requirement that parties exert a good faith effort in the mediation session is effectively unenforceable. The alleged wrongdoer may simply assert the privilege and prohibit the disclosure or admission of any mediation communications; this, in turn, will deprive the court of an evidentiary basis upon which to impose sanctions. *Ford Motor Credit Co. v. Potts*, 28 Ohio App.3d 93 (1986) (holding that due process requires notice and a hearing before the court may impose sanctions for misconduct). Sanctions could be imposed for failure to attend, though, because the identities of those who attended the mediation session may be disclosed without disclosing a protected mediation communication.

⁵²⁷ For further discussion of criminal proceedings, *see infra* part E(1).

⁵²⁸ *See infra* part III(C)(1) for further discussion of this exception.

⁵²⁹ *See infra* part III(C)(2) for further discussion of this exception.

⁵³⁰ *See supra* part II(B) for further discussion of this exception.

⁵³¹ *See infra* part III(E)(2) for further discussion of this exception.

The application of the privilege in specific circumstances is addressed further below.

B. OVERVIEW OF OHIO'S EVIDENCE RULE 408

Ohio's Evidence Rule 408 reads as follows:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The significant differences between this rule and the mediation privilege illustrate the rule's operation:

- Rule 408 applies to all settlement negotiations, but the privilege only applies to statutorily defined mediations.
- Rule 408 offers no protection against the compulsory disclosure of the mediator's own statements or information gained by the mediator during the mediation, while such disclosures are covered by the privilege.

- Rule 408 offers no protection in pre-trial proceedings (including discovery)⁵³² or administrative proceedings⁵³³ in which the rules of evidence do not apply, while the privilege applies in such proceedings.⁵³⁴
- Rule 408 may offer no protection in a criminal proceeding, depending on the jurisdiction, while the privilege may never be asserted in criminal proceedings.
- Rule 408 protects only statements that are sufficiently related to settlement, while the privilege protects mediation communications regardless of their topic.⁵³⁵
- Rule 408 protects only statements made when the claim is disputed as to validity or amount, while the privilege applies to mediation communications even if the claim is not disputed as to validity or amount.⁵³⁶

⁵³² Ohio Rule of Civil Procedure 26(b)(1) provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at the trial . . .”.

⁵³³ Board of Educ. v. Cuyahoga County Board of Revision, 74 Ohio St.3d 415, 417 (1996) (holding that unless a statute provides otherwise, the Rules of Evidence do not strictly apply to administrative proceedings).

⁵³⁴ WEISSENBERGER’S OHIO EVIDENCE § 501.3 (stating that “a privilege may involve a refusal to testify, a refusal to disclose a matter during the discovery stage, a refusal to produce real proof or the right to prevent other people from doing any of the foregoing. A privilege allows a person to resist any judicial or governmental process aimed at eliciting protected information”); Ohio R. Evid. 101(B) (providing that “[t]he rule with respect to privileges applies to all stages of all actions, cases and proceedings conducted under these rules”); Ohio R. Evid. 101(C) (providing that the rules of privilege apply even in proceedings in which the Rules of Evidence do not apply).

⁵³⁵ Thomas v. Resort Health Related Facility, 539 F. Supp. 630, 638 (E.D.N.Y. 1982) (holding that an unconditional offer to reinstate the plaintiff was outside Rule 408’s scope because it was not contingent on any compromise by the plaintiff); United States v. 320.0 Acres of Land, 605 F.2d 762, 824-25 (5th Cir. 1979) (holding that a government letter offering to pay for condemned property was a statement of the amount believed reasonable, and thus was not a compromise discussion).

⁵³⁶ Tindal v. Mills, 265 N.C. 716, 717, 144 S.E.2d 902, 903 (1965) (holding that an offer to settle a suit with installment payments was admissible because the defendant did not dispute the validity or amount of the claim).

C. WHO MAY ASSERT THE MEDIATION PRIVILEGE

Ohio's mediation privilege is a bifurcated privilege; that is, it is actually two privileges. One set of persons holds the privilege with respect to communications made by the mediator, while another set of persons holds the privilege with respect to communications made by session participants other than the mediator.

1. Mediation communications made by the mediator

Mediation communications made by the mediator may not be testified to unless all parties to the mediation and the mediator consent to the disclosure.⁵³⁷ Thus, with respect to such communications, all parties and the mediator jointly hold the privilege. The policy behind the inclusion of the mediator as a holder is that mediator testimony would harm the program's reputation for impartiality.⁵³⁸

Like all other holders of the mediation privilege, the mediator may still be compelled to testify in

⁵³⁷ OHIO REV. CODE § 2317.023(C)(1) (1998). By its own terms, this provision does not apply to mediation communications made by mediators acting under a mediation order issued in any proceeding for divorce, dissolution, legal separation, annulment or the allocation of parental rights and responsibilities for the care of children. The general confidentiality provisions for domestic relations court-connected mediation programs are set forth in OHIO REV. CODE § 3109.052(C) (1998) and OHIO REV. CODE § 2317.02(H)(1998). A more detailed treatment of the confidentiality of mediation communications made in court-connected programs other than court of common pleas programs in the civil division is beyond the scope of this chapter.

⁵³⁸ NATIONAL STANDARDS FOR COURT CONNECTED MEDIATION PROGRAMS, § 9.1 (Center for Dispute Settlement and Institute of Judicial Administration, 1992 d). Commentary (noting that “a mediator’s subsequent testimony at trial would inevitably favor one side or another and destroy his or her role as an ‘impartial broker’”); Supreme Court of Ohio Committee on Dispute Resolution, PRELIMINARY REPORT OF THE COMMITTEE TO THE SUPREME COURT OF OHIO, 32-33 (1991) (noting that a mediator may not wish to testify regarding the mediation process in order to maintain “the public perception of confidentiality in a court-sponsored program”); NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 55-56 (9th Cir. 1980) (recognizing that if mediators were compelled to testify, then “not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. The inevitable result would be that the usefulness of the [mediation] in the settlement of future disputes would be seriously impaired, if not destroyed”).

subsequent civil proceedings if the court determines that an exceptional need exists that trumps the general policies underlying the privilege. This “exceptional need” escape clause is discussed further in Part III(E)(2) below, but two situations in particular merit discussion here. First, if a tort action is brought against the mediator by a mediation participant, then the court may conclude that the policy articulated above – protecting the mediation program from the appearance of unfairness – does not favor the exclusion of critical evidence in a suit alleging improper behavior on the part of the mediator.⁵³⁹ Second, in some situations an exceptional need may exist for evidence of the mediator’s statements in order to establish a contract defense to the formation of an enforceable settlement agreement.⁵⁴⁰

⁵³⁹ WEISSEBERGER’S OHIO EVIDENCE § 501.3 (discussing the policy reasons why “in an action between the holder and the confidante, the privilege does not apply” because of the special need for disclosure in that situation); *Surovec v. LaCouture*, 82 Ohio App.3d 416 (1992) (holding that a client who sues his attorney for malpractice waives his privilege as to any subject pertinent to his claim).

⁵⁴⁰ For example, consider the recent situation in Texas’s court-connected mediation program in which a party complained of chest pains during a session. The mediator threatened to make an adverse report to the judge if the party left the session. The party then signed a settlement agreement and later sought to have it set aside during an action for specific performance. The court created a judicial exception to Texas’s absolute privilege statute in order to allow evidence supporting the party’s duress defense. *Randle v. Mid Gulf, Inc.*, No. 14-95-01292, 1996 WL 447954 (Tex. App. [14 Dist.] August 8, 1996) (unreported). This situation would clearly fall within the exceptional need provision of Ohio’s mediation privilege.

2. Mediation communications made by participants other than the mediator

Mediation communications made by mediation session participants other than the mediator may be testified to if all parties consent to the disclosure.⁵⁴¹ Note that the mediator's consent is not required for this disclosure. The policy rationale for requiring the consent of all parties is the same as the policy rationale for including communications from the attorney to the client within the coverage of the attorney-client privilege:⁵⁴² As McCormick phrased it, "only rarely will the attorney's words be relevant for any purpose other than to show the client's communications circumstantially . . ." ⁵⁴³ Similarly, a party's statement of "I reject your offer of \$100,000 to settle this suit" would circumstantially reveal the other party's confidential mediation communication.

D. WHO MAY OBJECT TO THE ADMISSION OF EVIDENCE OF A MEDIATION COMMUNICATION ON EVIDENCE RULE 408 GROUNDS

Unlike the mediation privilege, the protection afforded by Rule 408 is not necessarily under the control of the mediation session participants. Rule 408 is simply a rule of evidence: It may be invoked in a proceeding by any party to the proceeding, but it may not be invoked by a mediation session participant in a proceeding to which the participant is not a party.

⁵⁴¹ OHIO REV. CODE § 2317.023(C)(2) (1998).

⁵⁴² OHIO REV. CODE § 2317.02(A) (1998) (including an "attorney's advice to a client" within the protection of the attorney-client privilege).

E. WHEN MEDIATION SESSION PARTICIPANTS MAY BE COMPELLED TO TESTIFY

Mediation session participants may be compelled to testify in criminal proceedings or in certain situations of extreme need. Each is addressed below.

1. Criminal proceedings

Ohio's mediation privilege statute provides that, with certain exceptions, "no person shall disclose a mediation communication in a civil or in an administrative proceeding."⁵⁴⁴ The express mention of civil and administrative proceedings strongly implies that criminal proceedings are not within the coverage of the privilege.⁵⁴⁵ Although this issue has not been decided by the courts, the statute can only logically be read to mean that the privilege may not be asserted in criminal proceedings. The policy rationale for excluding criminal proceedings is simply that the need for evidence to establish or defend against criminal charges outweighs the need for confidentiality in mediation.⁵⁴⁶ Furthermore, the criminal defendant's constitutional right to confront

⁵⁴³ MCCORMICK ON EVIDENCE § 89(a) (4th ed. 1992).

⁵⁴⁴ OHIO REV. CODE § 2317.023(B) (1998).

⁵⁴⁵ See *State v. Droste*, 83 Ohio St.3d 36, 39 (1998) ("Under the general rule of statutory construction *expressio unius est exclusio alterius*, the expression of one or more items of a class implies that those not identified are to be excluded.").

⁵⁴⁶ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 9:15 (2nd ed. 1994).

witnesses significantly limits the application of privileges in criminal proceedings.⁵⁴⁷

2. Situations of exceptional need

Ohio's mediation privilege is not an absolute privilege. That is, the privilege may only be asserted if the social benefit of maintaining the confidentiality of a specific mediation communication outweighs the need for that communication's use in a proceeding. The court may, after a hearing, decline to recognize the privilege as to a specific disclosure if the following three conditions are met:

- the disclosure does not circumvent Evidence Rule 408;
- the disclosure is necessary to prevent a "manifest injustice" in the particular case; and
- the necessity for disclosure sufficiently outweighs the need to protect the general requirement of confidentiality for mediation communications.⁵⁴⁸

⁵⁴⁷ *Davis v. Alaska*, 415 U.S. 308, 319-21 (1974) (holding that a privilege for juvenile records must yield to a defendant's constitutional right to confront witnesses); Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* §§ 9:15 – 9:19 (2ND ed. 1994) (discussing constitutional limitations on the application of privileges in criminal proceedings).

⁵⁴⁸ OHIO REV. CODE § 2317.023(C)(4) (1998).

These criteria are not easily satisfied. In particular, the “manifest injustice” necessary to defeat the privilege is usually found only in situations that the drafters did not foresee when drafting the mediation privilege statute.⁵⁴⁹ Thus, given the fact that the statute’s drafters obviously gave careful thought to which situations called for exceptions,⁵⁵⁰ there will probably be few situations presenting the exceptional circumstances necessary for this escape clause to apply.⁵⁵¹

⁵⁴⁹ For example, the Ohio Supreme Court has defined “manifest injustice” to mean a “clear or openly unjust act,” and has held that the possibility of future litigation concerning the general subject matter of the mediation does not require disclosure of the mediator’s written recommendations to the judge under this exception. *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203 (1998).

⁵⁵⁰ The statute already provides exceptions for felony reporting, testimony in criminal proceedings, information not protected prior to the mediation session and written settlement agreements.

⁵⁵¹ *See supra* part III.C.1. for the application of the escape clause in actions between the mediator and a program participant and in certain actions to set aside a settlement agreement.

F. INFORMATION NOT PROTECTED PRIOR TO ITS USE IN THE MEDIATION PROCESS

Litigants in civil proceedings have broad authority to compel the disclosure of information in pre-trial discovery.⁵⁵² Any information that was discoverable prior to the mediation session remains discoverable despite its use in the mediation session.⁵⁵³ This exception to the mediation privilege is analogous to the exception to the attorney-client privilege that prevents the concealment of tangible evidence by “laundering” it through the privilege.⁵⁵⁴ Similarly, Evidence Rule 408 poses no barrier to the admission of information that was not protected prior to its use in the mediation process.⁵⁵⁵

⁵⁵² OHIO R. CIV. P. 26(b)(1) (permitting “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action”).

⁵⁵³ OHIO REV. CODE § 2317.023(D) (1998) (providing that the mediation privilege “does not prevent or inhibit the disclosure, discovery or admission into evidence of a statement, document, or other matter that is a mediation communication but that, prior to its use in a mediation proceeding, was subject to discovery or admission under law or a rule of evidence or was subject to disclosure as a public record”).

⁵⁵⁴ The general principle with respect to the attorney-client privilege is that “if a document would be subject to an order for production if it were in the hands of the client, it will be equally subject to such an order if it is in the hands of his attorney.” MCCORMICK ON EVIDENCE § 89 (4th ed. 1992).

⁵⁵⁵ By its own terms, Ohio Evidence Rule 408 “does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.”

G. WRITTEN SETTLEMENT AGREEMENTS

Written settlement agreements signed by the parties to a mediation are freely admissible. First, the privilege statute creates an explicit exception for written settlement agreements.⁵⁵⁶ Second, although an offer to compromise itself is not ordinarily admissible to prove liability or the amount of the claim under Evidence Rule 408, an accepted offer becomes an enforceable contract. Rule 408 does not prohibit the admission of evidence of the terms of the contract, because these terms are not offered to prove the settling party's liability on the original claim. Thus, the terms of this contract may be proved in any subsequent proceeding on the contract; furthermore, if one party repudiates the contract, the other party may choose to sue on the original cause of action.⁵⁵⁷ The rationale for all of this is simple: The protections offered by the mediation privilege and Evidence Rule 408 are not meant to shield those who would breach the agreement that those protections are designed to facilitate.⁵⁵⁸

⁵⁵⁶ OHIO REV. CODE § 2317.023(D) (1998) (providing that the mediation privilege “does not affect the admissibility of a written settlement agreement signed by the parties to a mediation”).

⁵⁵⁷ Parties may wish to present the agreement to the court for entry as a consent decree, which is immediately enforceable through post-judgment remedies. OHIO R. CIV. P. 69 (addressing execution to enforce monetary judgments); OHIO R. CIV. P. 70 (addressing the enforcement of judgments for specific acts).

⁵⁵⁸ MCCORMICK ON EVIDENCE § 266 (4th ed. 1992).

Ensuring quality mediation is a crucial aspect of any mediation program. No system can be expected to survive if its participants have reason to doubt its efficacy or integrity. In addition, because a court-connected mediation program necessarily carries the imprimatur of the court, the impression that program participants take away from their mediation experience will also serve as their impression of the court itself. Thus, regardless of how a court decides to monitor its mediators, it must recognize that their performance ultimately reflects its ability to manage the community's conflicts.

CHAPTER TEN ~ PROMOTING ETHICAL MEDIATION

By Jonathan Goodman

“Standards of conduct for mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.”

Society of Professionals in Dispute Resolution/
American Arbitration Association/American Bar Association
Model Standards of Conduct for Mediators



- | | |
|---|----------------|
| I. Introduction | 10 - 3 |
| II. Ethical Codes
<i>A list of the elements common to existing ethical codes is provided with commentary on each element, including self-determination, impartiality, conflicts of interest, competence, and confidentiality.</i> | 10 - 4 |
| III. Why Adopt an Ethical Code?
<i>Four rationales supporting the adoption of an ethical code are set forth with a focus on benefits to the mediation program and to the public.</i> | 10 - 8 |
| IV. Adopting an Ethical Code
<i>A brief discussion of the ways in which states have implemented ethical codes is provided. Examples run from statutory directives to informal program guidelines.</i> | 10 - 10 |

continued

V. Enforcing the Ethical Code	10- 11
<i>A brief introduction to the types of extant code enforcement schemes is provided.</i>	
VI. Benefits and Concerns of Ethical Code Enforcement	10 - 12
<i>The pros and cons of code enforcement are described with reference to the experience of states with enforcement procedures in place.</i>	
VII. Enforcement Alternatives	10 - 18
<i>Suggestions for less formal enforcement techniques are provided</i>	
VIII. Mediator Exposure to Liability	10 - 19
<i>The theories and realities of mediator liability are discussed.</i>	
IX. Mediator Ethics and <i>Pro Se</i> Parties	10 - 21
<i>A brief discussion of the unique ethical challenges posed by pro se parties is provided.</i>	
X. Employment Status of Court-Appointed Mediators	10 - 22
<i>Civil employee or independent contractor?</i>	
XI. Malpractice Coverage for Mediators	10 - 23
<i>A brief discussion of available insurance products is provided</i>	

I. Introduction

Courts that have implemented mediation programs have monitored mediator behavior in widely disparate ways. The continuum stretches from the adoption of formal ethical codes and grievance procedures to no official guidelines at all. In the few states that have ethical codes and grievance procedures, few complaints are filed and even fewer disciplinary actions are taken.⁵⁵⁹ Still, several dispute resolution groups have issued model ethical codes with the hope of encouraging courts to adopt mediator standards.⁵⁶⁰

Because the Ohio common pleas courts that have implemented mediation programs⁵⁶¹ have not employed ethical codes or grievance procedures,⁵⁶² this chapter will deal primarily with mediator monitoring systems developed in other states. The goal is not to advocate adoption of any particular system or any system at all; rather, the intention is to provide a general overview of extant enactments to aid those Ohio courts that desire to monitor mediator performance.

⁵⁵⁹ Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 913 (1997).

⁵⁶⁰ NATIONAL STANDARDS FOR COURT-CONNECTED PROGRAMS, 8-1 — 8-10 (Center for Dispute Settlement and Institute of Judicial Administration, 1992); MODEL STANDARDS OF CONDUCT FOR MEDIATORS, I (Society of Professionals in Dispute Resolution/American Arbitration Association/American Bar Association, 1992);

⁵⁶¹ The common pleas courts in Clinton, Montgomery and Stark counties implemented mediation programs as part of a pilot program sponsored by the Ohio Supreme Court.

⁵⁶² Interview with Frank Motz, Consultant for Ohio Supreme Court's Mediation Pilot Project, Columbus, Ohio (February 10, 1999). *See also* Rules for the Superintendence for the Courts of Ohio, September 1992 Commentary to Rule 16, paragraph H (dealing with qualifications for domestic

II. Ethical Codes

Several states have adopted formal ethical codes as part of their mediation programs. The following list identifies and briefly explains the standards typically found in existing ethical codes. As one mediation task force has commented, the standards set forth below are those that no ethical code should be without:⁵⁶³

- **Self-determination** - This standard reflects that mediation is designed to foster party autonomy and assist the parties in reaching an agreement of their own design. While the mediator may provide information regarding process and explore settlement proposals, the parties to the dispute control the destiny of the mediation session.⁵⁶⁴
- **Impartiality** - A cornerstone of mediator efficacy is the ability to be evenhanded in dealing with the parties. If this characteristic is compromised in any way, the mediator and the mediation process can and should suffer irreparable

mediators).

⁵⁶³ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 8-1 (Center for Dispute Settlement and Institute of Judicial Administration, 1992).

⁵⁶⁴ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, I (Society of Professionals in Dispute Resolution/American Arbitration Association/American Bar Association, 1992); Colorado Mediators Revised Code of Professional Conduct, Rule I; Robert A. Baruch Bush, THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS, 35 (1992); Florida Mediator Rule 10.060 (1992); North Carolina Standards of Professional Conduct for Mediators, V (1996); Colorado Mediators Revised Code of Professional Conduct, Rule I.

harm. The mediator should avoid even the appearance of impropriety and recuse himself or herself immediately if his or her ability to remain impartial is threatened.⁵⁶⁵

- **Conflicts of Interest** - Conflicts of interest may arise from professional and/or personal relationships between the mediator and a party to the mediation. Such conflicts can occur both before and after the mediation process. If the mediator or any party doubts the mediator's ability to remain impartial due to such a conflict, the mediator should disclose the conflict to all parties immediately and recuse himself or herself if necessary.⁵⁶⁶
- **Competence** - The mediator must be familiar with the mediation process itself and the operation of the mediation program in which he or she is serving. If the mediation requires knowledge of a particular subject matter in order to provide the parties with a quality, impartial experience, the mediator may desire to recuse himself or herself if he or she lacks the requisite knowledge.⁵⁶⁷

⁵⁶⁵ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, I (Society of Professionals in Dispute Resolution/American Arbitration Association/American Bar Association, 1992); Colorado Mediators Revised Code of Professional Conduct, Rule II; Robert A. Baruch Bush, THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS 34 (1992); Florida Mediator Rule 10.070 (1992); North Carolina Standards of Professional Conduct for Mediators, II (1996); Oklahoma Code of Professional Conduct for Mediators(B)(2)(c) (1993); NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 8-2 (Center for Dispute Settlement and Institute of Judicial Administration, 1992); Colorado Mediators Revised Code of Professional Conduct, Rule II.

⁵⁶⁶ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, I (Society of Professionals in Dispute Resolution/American Arbitration Association/American Bar Association, 1992); Robert A. Baruch Bush, THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS, 36 (1992); North Carolina Standards of Professional Conduct for Mediators, VI (1996); Florida Mediator Rule 10.090 (1992).

⁵⁶⁷ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, I (Society of Professionals in Dispute Resolution/American Arbitration Association/American Bar Association, 1992); Robert A. Baruch Bush, THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS, 34 (1992); North Carolina Standards of Professional Conduct for Mediators, I (1996); Colorado Mediators Revised Code of

- **Confidentiality** - Mediation fosters settlement because parties can be more open about their concerns and positions than they can be in more formal dispute resolution environments. The secrecy of mediation discussions must be maintained for the parties to have confidence in the process and the program, regardless of who seeks information from the mediator or from the parties (see Chapter 9 for a detailed discussion of confidentiality).⁵⁶⁸

The list of standards provided above is illustrative of the most common elements contained in existing ethical codes. However, some codes include more controversial provisions such as those governing the extent to which mediators should provide the parties with legal information or advice.⁵⁶⁹ Others touch upon whether the mediator should employ facilitative or evaluative techniques when conducting mediation.⁵⁷⁰ It must be recognized that these topics are hotly debated, and there is

Professional Conduct, Rule IV. The Ohio Supreme Court Committee on Dispute Resolution has, however, stated that reported mediation satisfaction rates do not vary significantly between mediators with higher educational levels and mediation training and those with no higher education and mediation training and experience. Rules for the Superintendence for the Courts of Ohio, 1997 Committee Comments for 16, paragraph C (dealing with qualifications for domestic mediators).

⁵⁶⁸ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, I (Society of Professionals in Dispute Resolution/American Arbitration Association/American Bar Association, 1992); Rule V; Robert A. Baruch Bush, THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS, 36 (1992); North Carolina Standards of Professional Conduct for Mediators, III (1996); Florida Mediator Rule 10.080 (1992); National Standards For Court Mediated Programs 8-8 — 8-7; Hawaii Appellate Conference Program Rules, Rule 8.

⁵⁶⁹ Robert A. Baruch Bush, The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas And Policy Implications, 36 (1992); North Carolina Standards of Professional Conduct for Mediators, VI (1996); Florida Mediator Rule 10.090 (1992).

⁵⁷⁰ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 8-9 (Center for Dispute Settlement and Institute of Judicial Administration, 1992); MODEL STANDARDS OF CONDUCT FOR MEDIATORS, VI (Society of Professionals in Dispute Resolution/American Arbitration Association/American Bar Association, 1992).

little, if any, consensus as to whether they should be included as objective standards (see Chapter 6).⁵⁷¹ If such standards are included in an ethical code, the unsettled state of these issues should, at the very least, be brought to the attention of those who are bound by and those who enforce the code.

Finally, if the mediator also happens to be an attorney, he or she will be subject to the Ohio Code of Professional Responsibility. This code governs legal ethics in Ohio and explicitly extends its controls and consequences to attorneys when they serve as mediators.⁵⁷²

⁵⁷¹ For a discussion of the acrimony surrounding the legal advice/information debate, see Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principal for Truly Educated Decision Making*, 74 NOTRE DAME L. REV. 755 (1999).

⁵⁷² Ohio Model Code of Professional Responsibility, EC 5-20.

III. Why Adopt an Ethical Code?

Courts that have adopted ethical codes for mediators and groups that promote the adoption of such codes have articulated several rationales for their implementation:

- **To provide objective standards for mediators** - Just as other professional groups depend upon accepted standards for gauging their behavior, so, too, do mediators require a compass to help them navigate their way through challenging situations. As stated by one task force, ethical standards “serve as a general framework for the practice of mediation and a tool to assist practitioners in it.”⁵⁷³
- **To help evaluate mediator performance** - An ethical code provides a starting point from which behavior can be measured. Rather than judging mediator performance on a subjective basis, a standardized statement of appropriate behavior fosters fairness by letting mediators and those responsible for the quality of the mediation program know what is acceptable and what is not.

⁵⁷³ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, I (Society of Professionals in Dispute Resolution/American Arbitration Association/American Bar Association, 1992).

- **To protect program participants and the public** - Many groups have touted ethical standards as a way to protect mediating parties and to create confidence in mediation programs.⁵⁷⁴ An ethical code informs parties that their mediators are bound by objective standards that ensure quality and fairness in the process. This assurance is particularly important in programs that mandate mediation and/or charge participants for mediation services.⁵⁷⁵ Other groups focus on building trust in mediation programs: “Rules are intended to instill and promote public confidence in the mediation process. As with other forms of dispute resolution, mediation must be built on public understanding and confidence.”⁵⁷⁶
- **To aid the growth of the mediation process** - The Institute of Judicial Administration asserts that “ethical codes serve to promote honesty, integrity and impartiality in mediation and the effective operation of a mediation program.”⁵⁷⁷ Others have focused on the present paucity of ethical standards for mediators and the need for standardization of acceptable conduct as the use of mediation expands nationwide.⁵⁷⁸

⁵⁷⁴ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 8-1 (Center for Dispute Settlement and Institute of Judicial Administration, 1992).

⁵⁷⁵ Rules for the Superintendence for the Courts of Ohio, September 1992 Commentary to Rule 16, paragraph C (dealing with qualifications for domestic mediators).

⁵⁷⁶ Florida Mediator Rules, Preamble (1992).

⁵⁷⁷ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 8-1 (Center for Dispute Settlement and Institute of Judicial Administration, 1992).

⁵⁷⁸ Robert A. Baruch Bush, THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS, 3 (1992);

IV. Adopting an Ethical Code

In several states, ethical codes have been adopted by legislative fiat.⁵⁷⁹ Other states have enacted ethical codes through the rule-making powers of their highest courts.⁵⁸⁰ Because The General Assembly and Supreme Court of Ohio have not officially adopted an ethical code, Ohio courts may implement a code by local rule or through an informal mediation program policy.⁵⁸¹ Alternatives include distributing the code to program mediators during the certification process or posting the code at program headquarters. Regardless of the method of dissemination, the mediators should be made to understand that compliance with the code is a job duty and a way to earn the respect and trust of the program's participants, managers and evaluators.

Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA ST. U. L. REV. 253 (1989).

⁵⁷⁹ Examples include Oklahoma: OKLA. STAT. ANN. 12 § 37 (1993) and Minnesota: MINN. STAT. § 572.31.

⁵⁸⁰ Florida Mediator Rules 10.010, *et seq.*; California Rules of Court, Rule 1257.1.

⁵⁸¹ The Supreme Court of Ohio Committee on Dispute Resolution has, however, strongly urged family law mediators “to [adhere] to the ethical considerations provided in the accredited domestic mediation training,” Rules for the Superintendence for the Courts of Ohio, 1997 Committee Comments for 16, paragraph H (dealing with qualifications for domestic mediators).

V. Enforcing the Ethical Code

Once an ethical code is adopted, the next logical question is how and whether or not to enforce the standards it contains. The approaches implemented by courts vary widely, and the most common approaches fall on opposite ends of the spectrum. For instance, some jurisdictions simply use their ethical codes as advisory pieces. In other words, a code exists, but there is no formal procedure in place to enforce its provisions.⁵⁸² By contrast, other states employ very formal grievance procedures complete with investigations, ethics committees, hearings and rights of review.⁵⁸³

Because the existing methods differ so diametrically, the following section provides a list of the benefits and concerns associated with enforcing ethical codes. Although the list is not intended to set forth an exhaustive survey of pros and cons, the issues enumerated will help courts weigh their options before committing to a particular process.

⁵⁸² Colorado's Ethical Code, The Colorado Mediators Revised Code of Professional Conduct, is of the advisory/educational species.

⁵⁸³ Ethical Procedures of the Georgia Commission on Dispute Resolution (1997); Florida Mediator Rule 10.190 (1992).

VI. Benefits and Concerns of Ethical Code Enforcement

A. BENEFITS

1. **Protection of program participants** - Providing parties with the ability to comment on the quality of their mediation experiences may make them more willing to participate in the mediation process. Particularly when mediation is mandatory (see Chapter 7) and/or parties must pay to participate, a general sense of equity dictates that program participants should have some recourse in the event that their mediation experience is substandard.⁵⁸⁴ For this reason, many states have a grievance process in place whereby parties can file a complaint regarding a particular mediator or the mediation program in general.⁵⁸⁵ In addition to pacifying parties, providing a grievance process may help improve the efficiency and quality of the program since problems will not go unnoticed.

2. **Appeal to the public** - The public may look upon a mediation program more favorably if a process exists whereby problems can be rectified. Particularly in situations where funding of the mediation program becomes an issue, it may prove difficult to sell a program that does not have some protocol for righting wrongs.

⁵⁸⁴ The same quality concerns for court-connected mediators apply if the court refers parties to private mediators or mediation groups. See Rules for the Superintendence for the Courts of Ohio, September 1992 Commentary to Rule 16, paragraph C (dealing with qualifications for domestic mediators).

⁵⁸⁵ Oklahoma Dispute Resolution Rule 14(A); Florida Mediator Rule 10.220 (1992); North Carolina Dispute Resolution Rule VIII.

3. Ensuring quality mediation - Even if program mediators are aware of the existence of an ethical code, they may heed its directives more intently if they know that its standards will be enforced if they are violated. Similarly, if mediators know that objectionable behavior will elicit complaints from program participants, there is an incentive to avoid such behavior in the first place. Finally, should a complaint lead to disciplinary or other action, the mediator may emerge from the experience better prepared to provide quality services in the future.

B. CONCERNS

1. Enforcement may be redundant - As mentioned above, several professional groups have drafted model ethical rules for mediators, and the rules governing legal conduct in Ohio apply to attorneys when they act as mediators.⁵⁸⁶ Therefore, if the mediator is an attorney or a member of another profession with its own ethical standards and protocol for enforcing them, any disciplinary proceedings on the part of the mediation program may be duplicative.

⁵⁸⁶ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 8-2 (Center for Dispute Settlement and Institute of Judicial Administration, 1992); MODEL STANDARDS OF CONDUCT FOR MEDIATORS, EC 5-20 (Society of Professionals in Dispute Resolution/American Arbitration Association/American Bar Association, 1992).

2. Too much process - In those states that have formal grievance procedures, additional processes are also included. For instance, where a complaint may be filed, there must be a chance for the mediator to respond to the charges against him or her.⁵⁸⁷ When such charges are filed, there must be an investigation conducted into the veracity of the allegations.⁵⁸⁸ When the investigation is complete, a hearing must be held at which the parties can be heard and the evidence reviewed.⁵⁸⁹ After the hearing, a decision must be reached⁵⁹⁰ and discipline meted out.⁵⁹¹ At least one state allows for judicial review of the grievance decision.⁵⁹² The obvious

⁵⁸⁷ Oklahoma Dispute Resolution Rule 14(A); Florida Mediator Rule 10.220 (1992); North Carolina Dispute Resolution Commission Rule VIII; Ethical Procedures of the Georgia Commission on Dispute Resolution (1997).

⁵⁸⁸ Oklahoma Dispute Resolution Rule 14(B); North Carolina Dispute Resolution Commission Rule VIII; Ethical Procedures of the Georgia Commission on Dispute Resolution (1997).

⁵⁸⁹ Florida Mediator Rule 10.230; North Carolina Dispute Resolution Committee Rule VIII; Ethical Procedures of the Georgia Commission on Dispute Resolution (1997).

⁵⁹⁰ Florida Mediator Rule 10.230 (1992) (a grievance committee renders the decision); Oklahoma Dispute Resolution Rule 14(C) (state supreme court renders the decision).

⁵⁹¹ The typical discipline range runs from retraining to revocation of mediator certification. Oklahoma Code of Professional Conduct for Mediators (certification may be revoked or not renewed upon a finding that an ethical standard was breached); Ethical Procedures of the Georgia Commission on Dispute Resolution (1997).

⁵⁹² Florida Mediator Rule 10.240 (1992).

result is that once the door is opened to enforcement procedures, the dictates of due process and common fairness may spawn extremely complex grievance procedures.⁵⁹³

3. Large cost of a complex enforcement process - Once a complicated enforcement process is in place, it takes time, personnel and money to operate it. Where the mediation program's budget is tight, it may not make fiscal sense to fund a code enforcement scheme while the actual mediation aspects of the program go without financial support.

4. Even with complex enforcement processes, few complaints are actually filed - Data from states with highly developed enforcement schemes show that few complaints are filed and fewer disciplinary actions are taken. For instance, Florida has reported only 35 complaints from 1992 through September of 1998 despite having over 4,000 certified mediators.⁵⁹⁴ Similarly, Virginia's court-connected mediation program has received only 10 complaints in its five-year history, and only two grievances have been filed in Georgia with no

⁵⁹³ At least one jurisdiction has published mediator ethics advisory opinions due to the complexity of its ethical code enforcement procedures. Ethical Procedures of the Georgia Commission on Dispute Resolution (1997).

⁵⁹⁴ THE RESOLUTION REPORT, 14 (Florida Dispute Resolution Center, Tallahassee, Florida), September 1998. Although some retraining has been necessary, no mediator has had his or her certification revoked. The results are similar in several other states with only a handful of complaints filed and little or no disciplinary action taken. Kristen Whitmer, Who's in Charge of Justice?, 14, unpublished manuscript on file with the Ohio State University College of Law (citing phone conversations with program directors and e-mail surveys conducted in the fall of 1998).

disciplinary action taken.⁵⁹⁵ Further, evidence shows that in the rare case where discipline is actually warranted, the corrective measure usually calls only for retraining of the mediator.⁵⁹⁶ One must wonder whether it is worth the time and money to develop and operate a complex code enforcement scheme when it may be used so sparingly.⁵⁹⁷

5. Ohio's programs report high participant satisfaction without an ethical code or enforcement process in place - Despite having no ethical code or code enforcement scheme, Ohio's mediation pilot programs have operated to the satisfaction of the vast majority of their participants.⁵⁹⁸ In addition, although no formal grievance process is in place, an estimated three complaints have been received regarding Ohio's mediators with disciplinary action taken on only one occasion.⁵⁹⁹

⁵⁹⁵ Kristen Whitmer, *Who's in Charge of Justice?*, 14, unpublished manuscript on file with the Ohio State University College of Law (citing phone conversations with program directors and e-mail surveys conducted in the fall of 1998).

⁵⁹⁶ *Id.*

⁵⁹⁷ For example, such procedures might be rarely invoked because the quality and integrity of the mediation is excellent and/or parties are unaware of the existence of a grievance process.

⁵⁹⁸ Roselle L. Wissler, *EVALUATION OF THE PILOT MEDIATION PROGRAM IN CLINTON AND STARK COUNTIES*, August 1996 through March 1997 (September 1997).

⁵⁹⁹ Kristen Whitmer, *Who's in Charge of Justice?*, 14, unpublished manuscript on file with the Ohio State University College of Law.

6. Ohio’s mediator privilege statute may make an enforcement system untenable - Ohio Revised Code 2317.023 codifies a mediator privilege statute designed to ensure that mediation discussions remain confidential in all but a few situations (see Chapter 9). However, no exception is made for investigations following a complaint by a mediation program participant. Thus, it would be futile for an Ohio court to attempt to enforce an ethical code through an investigative process, at least as the claim relates to what occurred during the session, since the mediator would be barred by statute from discussing the mediation session in question. The only exception to this rule is if the failure to investigate and/or discipline would constitute a “manifest injustice” under the circumstances (see Chapter 9).⁶⁰⁰

The benefits and concerns listed are by no means exhaustive. However, those enumerated should play a role in the court’s determination of whether a code enforcement scheme is necessary, and, if so, to what extent.

⁶⁰⁰ See also Ohio Revised Code 2317.023; State *ex rel.* Schneider v. Kreiner 83 Ohio St. 203 (1998) (interpreting the manifest injustice exception to Ohio’s mediation privilege statute).

VII. Enforcement Alternatives

Although many states employ advisory ethical codes or complex grievance procedures to monitor their mediators, there are other ways in which to ensure a quality program. For instance, a mediation committee could be formed to evaluate mediator performance (see Chapter 3). Peer review sessions could be conducted to enforce an informal code of ethics. Another option already in place in Ohio's pilot programs is to monitor mediator performance with questionnaires filled out by program participants after their mediation sessions. A committee could scrutinize such reports to assure that mediators were performing to the satisfaction of parties (see Chapter 11).

The suggestions listed above are by no means exhaustive. Variations on these or other schemes may allow a court to monitor its mediators efficiently, inexpensively and without the complexity encountered in those states with formal ethical codes and highly developed enforcement processes.

VIII. Mediator Exposure to Liability

Outside the realm of code enforcement procedures, one may wonder whether a program's mediators could be subject to civil liability. Several states grant absolute immunity to certified mediators;⁶⁰¹ others extend qualified immunity to mediators so long as their behavior does not rise to the level of gross negligence or willful disregard of parties' rights.⁶⁰²

In addition to statutory protections, court-connected mediators are assumed to be protected as a matter of common law for two reasons. First, it is well-established that judges are immune from liability for actions within the scope of their judicial function.⁶⁰³ Because court-appointed and court-employed mediators are performing activities typically performed by judges (i.e., settlement conferences), judicial immunity will probably be extended to such mediators.⁶⁰⁴ Ohio precedent addressing the topic of judicial immunity is not explicit on this point but is in harmony with this view.⁶⁰⁵

⁶⁰¹ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 14-1 - 14-3 (Center for Dispute Settlement and Institute of Judicial Administration, 1992) (citing numerous statutes).

⁶⁰² *Id.*

⁶⁰³ Stump v. Sparkman 435 U.S. 349 (1978).

⁶⁰⁴ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* 11:03 (2d ed. 1994 & 1998 Supp.) (providing a comprehensive review of mediator liability, drawing parallels to accountability in other professions).

⁶⁰⁵ State ex rel. Fisher v. Burkhardt, 66 Ohio St. 3d 189 (1993); Wilson v. Neu, 12 Ohio St. 3d 102 (1984).

Second, several sources champion mediator immunity, at least to some degree, to encourage mediators to participate in programs and to aid the development of the mediation process in general.⁶⁰⁶ For these reasons, “mediator liability to the parties for malfeasance has not assumed a major role as a means of quality control.”⁶⁰⁷ Indeed, one task force notes that “no court, to date, has upheld a finding of mediator liability.”⁶⁰⁸

That is not to say, however, that there are not dissenters on the matter of mediator liability.⁶⁰⁹ On the contrary, an appreciable number of scholars have rejected or criticized extending immunity to court-appointed or court-employed mediators.⁶¹⁰ These commentators state that a lack of recourse against mediators will abandon those damaged by mediator incompetence and mar public confidence in the mediation process.⁶¹¹ While dissenting views exist, it is nonetheless wise to

⁶⁰⁶ THE FUTURE OF ARIZONA COURTS, Commission on the Courts, 42 (1991); Joshua Stulberg, *Mediator Immunity*, 2 OH. ST. J. ON DISP. RESOL. 85 (1986).

⁶⁰⁷ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 11:03 (2d ed. 1994 & 1998 Supp.).

⁶⁰⁸ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 14-3 (Center for Dispute Settlement and Institute of Judicial Administration, 1992). *See also* Rules for the Superintendence for the Courts of Ohio, 1997 Committee Comments for 16, paragraph I (dealing with qualifications for domestic mediators).

⁶⁰⁹ Rules for the Superintendence for the Courts of Ohio, 1997 Committee Comments for 16, paragraph I (dealing with qualifications for domestic mediators).

⁶¹⁰ Chaykin, *The Liabilities of Mediators: A Hostile Environment for Model Legislation*, 2 OH. ST. J. ON DISP. RESOL. 47 (1986); NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 14-2 (Center for Dispute Settlement and Institute of Judicial Administration, 1992).

⁶¹¹ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, 14-1 (Center for Dispute Settlement and Institute of Judicial Administration, 1992); THE FUTURE OF ARIZONA COURTS, Commission on the Courts, 42 (1991).

consider the possibility that “[a]s mediation use grows, it is likely that some mediators will be held liable for acts that would subject other service providers to liability as well.”⁶¹²

IX. Mediator Ethics and *Pro Se* Parties

Mediating disputes involving *pro se* parties can create tension between a mediator’s ethical obligations to the process and his or her personal inclinations to provide extra assistance to less knowledgeable or powerful parties.

It is for this reason that some courts exclude cases involving *pro se* parties from mediation. However, as one Ohio authority has commented, it makes little sense to bar *pro se* parties from mediation (a self-determinative process) when *pro se* parties are entitled to represent themselves in litigation.⁶¹³ The issue of *pro se* parties and mediation is discussed in greater detail in Chapter 8 of this text.

⁶¹² Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* § 11:03 (2d ed. 1994 & 1998 Supp.).

⁶¹³ Interview with Frank Motz, Consultant for Ohio Supreme Court’s Mediation Pilot Project, Columbus, Ohio (February 10, 1999).

X. Employment Status of Court-Appointed Mediators

While several alternatives exist, including the independent contractor option, mediators in Ohio's pilot mediation programs have been court employees. According to the consultant for the pilot project, classifying mediators as civil employees provides courts with greater control over the mediation program while attracting mediators to the program through the benefits of state employment.⁶¹⁴

⁶¹⁴ *Id.*

XI. Malpractice Coverage for Mediators

As noted above, court-appointed mediators will probably be shielded from civil liability through an extension of judicial immunity.⁶¹⁵ However, mediator liability coverage is available and can be purchased by the court or by the mediator.⁶¹⁶ As the Supreme Court of Ohio Committee on Dispute Resolution has stated, “The committee encourages flexibility for local courts which may wish to consider the issue and retain the insurance requirement for their individual programs.”⁶¹⁷

⁶¹⁵ Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* 11:03 (2d ed. 1994 & 1997 Supp.); Rules for the Superintendence for the Courts of Ohio, 1997 Committee Comments for 16, paragraph I (dealing with qualifications for domestic mediators).

⁶¹⁶ Interview with Frank Motz, Consultant for Ohio Supreme Court’s Mediation Pilot Project, Columbus, Ohio (February 10, 1999). Information regarding liability coverage for mediators can be obtained by calling the Society of Professionals in Dispute Resolution at (202) 667-9700, via mail at 1527 New Hampshire Avenue, NW, Suite 300, Washington, D.C. 20036, or via the internet at <http://www.spidr.org>.

⁶¹⁷ Rules for the Superintendence for the Courts of Ohio, 1997 Committee Comments for 16, paragraph I (dealing with qualifications for domestic mediators).

Courts are constantly looking for ways to improve the efficiency and effectiveness of their mediation programs. In both the public and private sectors, a central point of court management is informed decision making. Without accurate information to guide them, judges and court administrators risk depleting court resources, loss of performance and loss of credibility. Efficient collection of information and use of that information in the decision-making process is essential and, therefore, proper evaluation of its mediation program is a key concern for any common pleas court. This chapter will provide courts with monitoring and evaluating strategies to address these concerns. Courts can then proceed to identify systematically the strengths and weaknesses of their mediation programs.

CHAPTER ELEVEN ~ MONITORING AND EVALUATING COURT-CONNECTED MEDIATION PROGRAMS

By Jason T. Noel

“Citizens bring their disputes to our courts to obtain resolutions in a peaceful, fair forum. Most expect that their disputes will be subject to an adversary process of determining who wins and who loses. One alternative to the traditional system is mediation. For those exposed to mediation in a court setting, the belief is that mediation is an integral part of the judicial system. They should therefore be confident in the fact that the justice system is vouching for the integrity of the mediation process, i.e., the court would refer disputants only to qualified mediators or mediation programs that meet minimum standards. Without routine monitoring and periodic evaluation of program performances, courts cannot carry through on their obligation to provide quality resolution to the people who use the justice system.”

~ Chief Justice Thomas Moyer, Supreme Court of Ohio
Quoted from Melinda Ostermeyer & Susan Keilitz,
*Monitoring and Evaluating Court-Based Dispute Resolution Programs:
A Guide for Judges and Court Managers*



I.	Introduction	11 - 3
II.	Monitoring and Evaluation: Applications	11 - 7
	A. Monitoring	
	B. Evaluation	
	C. Advantages and Risks of Monitoring and Evaluation	
III.	Planning and Implementation	11-15
	A. Develop a Profile of the Program	
	B. Secure Program Planners	
	C. Set Program Goals	
	D. Establish Monitoring or Evaluation Objectives	
	E. Set up an Implementation Plan	
	F. Assess the Monitoring or Evaluation System	

continued

IV. Identifying Data for Evaluation Purposes	11 - 25
V. Data Collection	11 - 26
A. Data Sources	
B. Data Collection Methods/Developing Database for Tracking Reports	
C. Confidentiality	
VI. Analyzing Available Data	11 - 32
A. Providing Descriptions	
B. Determining Correlations and Relationships	
C. Making Comparisons between Programs	
1. Comparisons within groups of cases referred to mediation	
2. Comparisons between groups of mediated and non-mediated cases	
VII. Evaluator Selection	11 - 36
VIII. Reporting	11 - 38
A. Report Format	
B. Distribution of Findings	

I. Introduction

Courts are continually striving to improve the efficiency and effectiveness of their mediation programs. To ensure improvements in program operations, courts need to base any changes on data that are systematically collected and analyzed – in other words, through proper evaluation and monitoring procedures in their programs.⁶¹⁸ Evaluation is key in determining whether a mediation program is successful in meeting its goals. Taking time at the outset to plan and design an evaluation of the program will help ensure that relevant information will be available to court managers and decision makers to assess the effectiveness of the mediation program and to determine whether the program needs adjustment or should be canceled.⁶¹⁹

State courts must be responsive to the forces that are demanding more efficient and effective performance.⁶²⁰ Shrinking budgets pose a strong challenge to today's judges and court managers. Courts must be accountable for their programs, because the public sector is particularly vulnerable to scrutiny, criticism and withdrawal of support for ineffective and financially

⁶¹⁸ See Melinda Ostermeyer & Susan L. Keilitz, *MONITORING AND EVALUATING COURT-BASED DISPUTE RESOLUTION PROGRAMS: A GUIDE FOR JUDGES AND COURT MANAGER*, 4 (National Center for State Courts, 1997).

⁶¹⁹ See *THE PERFORMANCE INDICATORS FOR ADR PROGRAM EVALUATION*, 1-2 (Dispute Systems Design Working Group Administrative Conference of the United States, November 1993).

⁶²⁰ See Ostermeyer & Keilitz, *supra note 1*, 4. See also Craig A. McEwen, *EVALUATING ADR IN ADMINISTRATIVE AGENCIES*, 4-5 (1993) (stating that there are many possible uses for empirical research about mediation: to meet the requirements of a granting agency; to advance knowledge about dispute resolution; to persuade skeptics to fund or support such programs; and to assist in adjusting and improving mediation programs).

wasteful policies and programs.⁶²¹ Ensuring the quality of justice during a period of fiscal constraints, growing responsibilities and decreasing confidence in the justice system is a complex management undertaking.⁶²² It requires meaningful information about the court's business, not only to manage daily operations but also to assess how well the court is performing its functions and planning effectively for the future. Therefore, efficient collection of information in the decision-making process is vital to court management.⁶²³

⁶²¹ *See id.* *See also* McEwen, *supra* note 3, 6-7 (Governmental, foundational and granting agencies require empirical evaluations to encourage accountability and increase understanding of mediation. The interests and judgments of important groups such as administrators, advocacy and interest groups or legislators shape policy choices. Evidence from evaluation research may be used to improve the quality of work-life, have anecdotal and political support, increase scarce resources and embody central public values. In sum, circumstances surrounding evaluation research can serve to justify or defend a program based on systematic data).

⁶²² *See id.* at 4.

⁶²³ *See id.*

Program monitoring or evaluation efforts are often directed at determining the following:⁶²⁴

- The extent to which mediation is utilized by the appropriate target populations or caseloads;
- Whether or not mediation services are provided in accordance with program goals, policies, procedures and standards, and within legal requirements;
- Whether administrative and policy changes should be made to improve delivery of services;
- The perception of litigants, judges, attorneys and administrators about the effectiveness of mediation techniques and the efficiency of program operations;
- Whether mediation results in higher-quality resolution of disputes; and
- The extent to which resources are expended and/or saved through the use of mediation processes.

Evaluations conducted in court-connected mediation programs are sometimes used to demonstrate the program's effectiveness to an outside audience or to identify ways to improve the effectiveness of the program.⁶²⁵ The purpose of an evaluation is to determine whether or not, or the extent to which, a program is achieving its underlying goals.⁶²⁶

⁶²⁴ See *id.* at 4-5.

⁶²⁵ See EVALUATING ADR PROGRAMS, A HANDBOOK FOR FEDERAL AGENCIES 2 (Administrative Conference of the United States, Dispute Systems Design Working Group, 1995); For further discussion, see THE PERFORMANCE INDICATORS FOR ADR PROGRAM EVALUATION (November 1993) (describing some of the more common goals of ADR programs, as well as indicators of success measures used to determine whether program goals have been met).

⁶²⁶ See Bureau of Justice Assistance (1997) (Recognizing that state court systems were being strained beyond their capabilities, the Bureau of Justice Assistance (BJA), U.S. Department of Justice and the National Center for State Courts (NCSC) initiated an ambitious program, the Trial Court Performance Standards Project. The objective of the program was to increase the capacity of the nation's trial courts to provide fair and efficient adjudication and disposition of cases. The program's goals included the development of a set of standards and a measurement system that would define

Moreover, programs often depend on unique designs and function in varying contexts.⁶²⁷ Therefore, learning about the nature and role of these factors in the performance of a program helps give evaluators insights about how a program can be modified to improve performance. Evaluating mediation programs can determine whether to further pursue that program or how to most efficiently implement such a program.⁶²⁸ Routine monitoring through collection and reporting of data about cases or case flow allows assessment of court-connected mediation practices and the opportunity to make changes in response to the findings.⁶²⁹ Many court administrators are in the market for some research about their mediation programs. Consequently, evaluation costs weigh heavily into their decisions about which model or program to pursue. This chapter helps court-connected mediation programs sort through the myriad of issues and choose the evaluation criteria that best fit their needs and finances.

and measure effective trial court performance. Endorsed by the Conference of Chief Justices, the Conference of State Court Administrators and the National Association for Court Management and incorporated into the standards of the National College of Probate Judges, the system's performance standards are now widely viewed as a blueprint for improving the administration of justice in state trial courts).

⁶²⁷ See Ostermeyer & Keilitz, *supra* note 1, 7.

⁶²⁸ See EVALUATING ADR IN ADMINISTRATIVE AGENCIES, *supra* note 8, 3.

⁶²⁹ See Ostermeyer & Keilitz, *supra* note 1, 4.

II. Monitoring and Evaluation: Applications

Monitoring refers to collecting and analyzing data in order to assess ongoing mediation program operations. Evaluating or Evaluation refers to the comparison of cases, typically the comparison of cases referred to mediation with similar cases not referred to mediation. Monitoring can be initiated at the start of the program operation and continue throughout the life of the program. Procedures put in place for monitoring can serve as the basis for evaluation initiatives that should be undertaken periodically.⁶³⁰

Monitoring and evaluating have common characteristics. Both allow judges and court managers to make judgments about how the mediation program is performing and what changes might be necessary to improve performance. Information derived from evaluation can be used to refine monitoring processes, while information derived from monitoring can provide a foundation for evaluation projects to proceed more efficiently and at less cost.⁶³¹

⁶³⁰ See *id.* at 9-10.

⁶³¹ See *id.* at 9.

A. MONITORING

Data from monitoring systems helps identify whether a mediation program is working effectively so that courts can make appropriate decisions about the continued use of its programs. Monitoring helps identify which aspects of a program contribute to its success and provides evidence of success that can be used in public awareness efforts.

Moreover, monitoring promotes continuous improvement of program operations by providing vital information about practices and policy issues and by requiring program planners to focus on the original goals set out for the mediation program.

Monitoring also serves a case management purpose. It can provide information about the volume of cases referred to mediation, the types of cases and parties that are using mediation, the time cases are pending in mediation and the proportion of cases that are resolved through mediation. This information helps to answer various questions about day-to-day program operations. Such answers to these questions can be used to screen cases more effectively and to detect barriers to the mediation process that could be alleviated by revising procedures or recruiting mediation providers.⁶³²

⁶³² *See id.*

Another important purpose of monitoring is measuring the quality of a mediation process. Are litigants and attorneys satisfied with mediation? Do they believe that mediation is a fair process? Is the mediation practice what the court expects it to be, or are providers substituting it for another process? Information on these issues might point to the need for more effective recruitment and training of mediation providers.

Managers of statewide programs can monitor for consistency across local jurisdictions. Information about consistencies and variations can be utilized to make improvements in underperforming programs, and valuable advice gained in individual programs can be shared with others.⁶³³ The monitoring system should provide information on when essential elements of quality are missing, should document some of the successes and should also provide some information on how to improve the program.⁶³⁴

⁶³³ *See id.* at 10.

⁶³⁴ *See* MONITORING THE QUALITY OF COURT-CONNECTED MEDIATION PROGRAMS, THE TENTATIVE PLAN, Sponsored by the Socio-Legal Program on Dispute Resolution at The Ohio State University, 1 (1996).

B. EVALUATION

Evaluation differs from monitoring in that evaluation can be used to draw inferences about the reasons for particular outcomes. It may be aimed at: (1) determining whether the outcomes of a program are consistent with the program's declared goals; (2) determining whether the program is running the way it was intended to; and/or (3) determining whether changes in the program would improve its usefulness.⁶³⁵ The reasons and specifics for which an evaluation is conducted and the form it takes depend on evaluation needs and constraints and include budgetary conditions and each court's particular mission or goals.

On one end of the continuum, evaluations may be comprehensive in nature, rely on a significant degree of professional evaluation expertise, involve a great deal of planning and take a rather lengthy time to complete. At the other extreme, evaluations can provide merely a "snapshot" of where a program is at, examine a particular area within a program or capture the impact of specific changes in program coverage and administration. Such evaluations may involve less planning and outside evaluation expertise and take a relatively short period of time to complete. Or, the nature and form of an evaluation can fall somewhere in between these two ends. Evaluating the effectiveness of having a mediation program consists of comparing mediated and non-mediated cases. Evaluation is used to determine if mediation has particular advantages over the existing process and whether it achieves the goals the court has set for it.

⁶³⁵ See THE PERFORMANCE INDICATORS FOR ADR PROGRAM EVALUATION, *supra* note 8, 3.

C. ADVANTAGES AND RISKS OF MONITORING AND EVALUATION

Information gathered from monitoring and evaluation usually causes changes, whether positive or negative.

Courts need to consider the potential positive and negative ramifications that might result from such findings.⁶³⁶

1. Advantages

There are several advantages to monitoring and evaluating mediation performance:⁶³⁷

- It helps to identify the need for program improvements and offer the opportunity to turn an unsuccessful program into a successful one;
- Systematic information from evaluation is more reliable than isolated conclusions; consequently, the probability of success is higher in resolving identified problems using such procedures;
- Consistency of information gathered facilitates comparisons among different jurisdictions and within a statewide program; and
- The credibility for evaluation findings is crucial for public and political support for such programs.

⁶³⁶ See Ostermeyer & Keilitz, *supra* note 1, at 10-11.

⁶³⁷ See *id.* at 11.

2. Risks and/or disadvantages⁶³⁸

Judges and court managers need to be aware of the potential for negative consequences as a result of monitoring and evaluation. Possible risks include:⁶³⁹

- Relying only on a few factors will offer a distorted picture of the program;
- Current methods used to measure cost savings for the court and litigants are inadequate and overstate possible unfavorable findings;
- Programs favored by the court may lose support or funding sources; and
- There may be scant political support for addressing identified needs or problems from key stakeholders.

Additionally, and perhaps most importantly, budget and resource constraints can dampen the optimism of many evaluation programs.⁶⁴⁰ Therefore, the court and its evaluation team will need to develop strategies for dealing with these concerns. In addition to budget and resource concerns, organizational opposition and operational difficulties need to be addressed.⁶⁴¹ Successful evaluation requires the cooperation and support of policy-makers, court managers and staff and those from whom data will be obtained. Any anticipated lack of cooperation along these lines will need to be identified and

⁶³⁸ *See id.* at 11.

⁶³⁹ *See id.*

⁶⁴⁰ *See* EVALUATING ADR PROGRAMS, A HANDBOOK FOR FEDERAL AGENCIES, *supra* note 8, 5.

⁶⁴¹ *See id.*

addressed.⁶⁴²

Users of evaluation research should not expect that the data gathered will make policy decisions for them.⁶⁴³

While policy questions undoubtedly motivate evaluation research, the research itself will not answer them. Such questions may profit from the evidence attained, but they require complex political and value judgments using multiple and sometimes inconsistent criteria.⁶⁴⁴ Evaluation research does not evaluate; program decision makers have that job. Instead, evaluation research is used to make evaluative decisions based on the evidence gathered.

Evaluation research by itself will not provide all the information needed about the degree to which a mediation program is delivering high-quality dispute resolution.⁶⁴⁵ There are reasons for that limitation. First, not everyone will agree as to what high quality means. There might be disagreement about what to measure. For instance, while some argue that participant satisfaction is a major indicator of the quality of justice, others disagree. A second limitation in

⁶⁴² *See id.* at 4-5.

⁶⁴³ *See id.*

⁶⁴⁴ *See id.*

⁶⁴⁵ *See* MONITORING THE QUALITY OF COURT-CONNECTED MEDIATION PROGRAMS, THE TENTATIVE PLAN, *supra* note 18 (concerning the Court Mediation Database Project, a cooperative effort by the Supreme Court of Ohio Dispute Resolution Committee and the Socio-Legal Program on Dispute Resolution at The Ohio State University College of Law). In many instances, the indicators that are measured in monitoring initiatives may only roughly approximate the quality criterion of a mediation program. For instance, parties' and lawyers' perceptions of fairness in exit surveys may not accurately reflect the fairness of the process. Additionally, no practical and reliable method is available to monitor some aspects of quality. For instance, it is hard to secure data on judicial timesavings, judicial satisfaction with the mediation programs and changes in public perceptions of the justice system as a result of the mediation programs).

assessing program quality is the kinds of data collected through empirical research limit the angles of vision of the program.⁶⁴⁶ For example, questionnaires completed by disputants and observations of mediation sessions tell us nothing about the extent of mediator training or of the ethical standards for mediators.⁶⁴⁷

It is up to each court to decide how its evaluation should be designed to address significant issues, and this may be done through picking and choosing those measurements that are most appropriate to its program. Those who seek evaluation research should expect it to answer clearly mostly narrow, factual questions (e.g., Do mediation participants see the process as fair or not? How long does it take for cases in mediation to reach conclusion?). Additionally, care should be taken to introduce comparisons and assertions of causation into the findings (e.g., Do mediation cases take less time than those cases following the regular administrative track? Does the addition of mediation cause the agency backlog to decrease?). The difficulty or ease of answering these questions depends on the design of the court's research project. Moreover, the degree of confidence courts want to have in these comparisons and causal claims affects substantially the costs and complexity of the research.⁶⁴⁸

⁶⁴⁶ *See id.*

⁶⁴⁷ *See id.*

⁶⁴⁸ *See* McEwen, *supra* note 4, 10-11.

III. Planning and Implementation

Implementing a monitoring and evaluation project requires planning and cooperation among those involved in the project, from court initiative and leadership, to participation from the bar and citizens in the community. The following outlines the necessary steps of a monitoring or evaluation project. First, a small group of key participants is essential. This ensures that decisions are made based on diverse perspectives and that necessary resources and information are secured. Once the court establishes the goals of the program and the objectives for the monitoring and evaluation project (see Chapter 3), specific measures of performance and sources from which data will be derived can be identified. An implementation plan will keep the collection and analysis of data. The final steps include preparing a report, disseminating the findings, implementing recommendations to improve the mediation program and assessing and revising the procedures for continued monitoring and evaluation.⁶⁴⁹

The timing of program evaluation depends on two central issues: *program maturity* and *baseline data*. Evaluations need to be responsive to the maturity of the program considered. This is due to the fact that programs typically go through an unsettled early-implementation phase, and outcomes that are measured during this period are very likely to be different from those of the mature program.⁶⁵⁰ To learn about its long-term potential, a program must be evaluated in its mature state. In fact,

⁶⁴⁹ See Ostermeyer & Keilitz, *supra* note 1, 24.

⁶⁵⁰ See Elizabeth Rolph & Erik Moller, *EVALUATING AGENCY ADR PROGRAMS: A USER'S GUIDE TO DATA COLLECTION AND USE*, 2 (1994).

some judges have given support for the idea that, in order for a program to be considered mature, it must be in existence for at least three years.⁶⁵¹ In sum, program evaluators must give proper judgment to the maturity of a program.

Evaluations depend on some point of comparison. For example, is this program better than the old way of doing the job, or is it better than an alternative program?⁶⁵² For this point of comparison, it is necessary to collect baseline data before such a program is implemented.⁶⁵³ Therefore, it is important that evaluation planning begin before the program is implemented, and at this time baseline data for the evaluation should also be collected.⁶⁵⁴

⁶⁵¹ Interview with Robert W. Rack, Jr. Chairman, Supreme Court Committee on Dispute Resolution Committee, Senior Conference Attorney, Sixth Circuit U.S. Court of Appeals (1999).

⁶⁵² See Ostermeyer & Keilitz, *supra* note 1, 4.

⁶⁵³ See *id.*

⁶⁵⁴ See *id.*

Planning Steps for a Prototypical Monitoring or Evaluation Program:

1. Develop a profile of the program
2. Secure program planners
3. Identify program goals
4. Establish monitoring or evaluation objectives
5. Determine general sources for data
6. Set up an implementation plan
7. Develop and identify performance measures
8. Decide on form used in data collection
9. Collect data
10. Analyze and interpret data obtained
11. Discuss conclusions and recommendations
12. Prepare a final report and disseminate findings
13. Implement recommendations

A. DEVELOP A PROFILE OF THE PROGRAM

A profile of the program should include a history of the development of mediation in the court, the administrative procedures used and the philosophical approach for providing such services. A program profile assists planners in identifying issues related to the administration and delivery of services that a court might need to monitor. Developing a profile assists program planners in identifying issues that are not readily apparent to someone working with the program on a daily basis. Especially in statewide systems, the program profile helps to identify the specific level of mediation activity occurring throughout the state. The profile also helps courts to focus on a ‘systems approach’ to improving operations, rather than concentrating on narrow issues that might interest only a select few.⁶⁵⁵

B. SECURE PROGRAM PLANNERS

The evaluation program should have primary planners who undertake the initial steps, including developing the monitoring or evaluation goals, selecting measures for assessing performance and identifying the basic resources through which data can be collected. Additionally, it may be necessary to secure individuals who will be involved in the actual day-to-day implementation of monitoring and evaluation. These individuals can assist the court in addressing essential questions, identifying the best methods for data collection and analysis and in writing the report. Additionally, there needs to be a group of planning participants who are influential enough to shape policy and to secure necessary

⁶⁵⁵ *See id.* at 67-69.

funding for the program, as well as those individuals who are knowledgeable about the daily operations of the court and the mediation program.

C. SET PROGRAM GOALS

Judges and court managers need to define the goals of the program, because the greater the consideration given to program goals from the start, the more efficient and effective monitoring or evaluation will be.⁶⁵⁶ Understanding the program's goals is essential for determining what information will be required to assess the program's performance. For example, if a goal of mediation is to reduce case disposition time, the court should track dates for case filing, mediation referral, various judicial conferences and disposition. If it is to encourage citizens to resolve their own disputes, the court will need to survey the opinions of litigants. If a program goal is to resolve through mediation a given number of cases or a particular proportion of the case load, the court must track the number of cases referred to and disposed by mediation.

Moreover, the court may, and usually does, have more than a single goal that it desires to achieve through the use of mediation. While some goals are relatively straightforward and are easily measured, others are complex and are more difficult to assess. The following are commonly adopted goals of mediation:⁶⁵⁷

⁶⁵⁶ *See id.* at 16.

⁶⁵⁷ *See id.* at 16-18.

- Reduce backlog of older cases;
- Reduce case disposition time;
- Expedite particular categories of cases;
- Save judicial resources (i.e., time spent on motions, hearings and trials);
- Reduce litigant costs;
- Produce high litigant satisfaction;
- Produce high attorney satisfaction;
- Produce high judicial satisfaction;
- Increase “pre-event” dispositions (i.e., prior to judicial intervention, etc.);
- Streamline litigation;
- Find the best forum for resolving the presented and underlying issues;
- Empower citizens to resolve their own disputes while developing conflict resolution skills to reduce future conflict;
- Produce better outcomes; and
- Involve the bar and the public in effective problem solving and the administration of justice.

Example

Developing Program Goals:

Furthering the Efficiency and Effectiveness of Monitoring and Evaluation

- Reducing case disposition time: Track dates for case filing, ADR referral, and final disposition
- Empowering citizens to resolve their own disputes: conduct surveys of the opinions of litigants
- Resolving through mediation a given number of cases or a particular proportion of the caseload: Track the number of cases referred to and settled through mediation

D. ESTABLISH MONITORING OR EVALUATION OBJECTIVES

Judges and court managers should define the objectives or reasons before engaging in any monitoring or evaluation initiative. Specifically, what does the court hope to achieve through monitoring or evaluation? It is rare that a single monitoring or evaluation project effectively accomplishes a large number of objectives. Therefore, it is important for a court to establish the monitoring or evaluation objectives before undertaking any large data collection and analysis effort. Possible objectives can include:⁶⁵⁸

- Assessing whether mediation is fulfilling its programmatic goals;
- Rating mediator and/or administrative performance;
- Learning the opinions of mediation participants about the mediator or the mediation process, policies or procedures;
- Identifying whether the use of mediation has had a positive impact on the way mediation participants deal with other conflicts;
- Isolating the impact of specific procedures and policies or comparing administrative procedures;
- Determining cost and time reduction/avoidance figures;
- Deciding future resource allocation;
- Securing input from key participants about current or future operations;
- Educating judges, attorneys and citizens about current operations; and
- Fulfilling funding or legislative mandates.

⁶⁵⁸ See *id.* at 18.

E. SET UP AN IMPLEMENTATION PLAN

Once the framework for the evaluation project has been identified, a time line for the project's implementation will need to be devised. Courts will need to develop time frames for collecting and analyzing the data. A variety of tasks will need to be completed, and unless a detailed plan exists to keep the project on track, it can stray from its original objectives.

After designating the objectives of the monitoring or evaluation project, a planning group should focus on key questions that it hopes will be answered by an analysis of the data. These key questions serve as the basis for determining more detailed information that must be collected, such as dates, case characteristics and case activity. The specific sources from which the information will be derived (e.g., case files, litigants), and the manner in which data will be collected (e.g., case reporting forms, interviews) should be mapped out for each key question.

The implementation plan also establishes time frames for collecting and analyzing the data. Data collection forms and procedures will have to be developed, as well as specialized database and/or statistical software used for data analysis.

Finally, the plan should allow time for writing a draft report and for revising the draft based on feedback. Discussions about the findings and recommendations with individuals involved in the mediation program will assist in accurate interpretation of the data. Soliciting the views of several individuals will shed light on differing interpretations of the data. These diverse interpretations should be included in the final report, as well as recommendations for program improvement.

F. ASSESS THE MONITORING OR EVALUATION SYSTEM

After program recommendations are implemented, there needs to be an assessment of changes in the monitoring system, along with ongoing monitoring or evaluation of the retooled program. It is important to periodically assess whether the evaluation system devised continues to meet the court's needs. Periodic updates to the system will also generate renewed interest by decision makers and by other individuals participating in monitoring or evaluation.

IV. Identifying Data for Evaluation Purposes

In determining whether mediation is successful, courts need to look at various measures of success. Relying only on a few measures can be misleading and could ignore other equally important effects.⁶⁵⁹ At a minimum, courts need to measure the basic information on case disposition time, court and litigant costs, fairness and user satisfaction. Other relevant measures include disposition rates and performance of mediators. In choosing information to be measured, courts should consider:

- Type of dispute;
- Amount of claims;
- Final amount of award/settlement;
- Disposition time;
- Disposition rates;
- Litigant costs;
- Court costs;
- Perceptions of fairness;
- Participant satisfaction; and
- Mediator performance.

⁶⁵⁹ See McEwen, *supra* note 4, 10-11, 18.

V. Data Collection

Systematic data collection is essential to obtain relevant and accurate information for program monitoring and evaluation. Information needs to be consistently collected and uniformly analyzed before conclusions can be made about program operations or effectiveness. Two types of data are used to measure performance: quantitative data and qualitative data. Quantitative data is information to which a numerical value can be applied in order that the data can be counted and calculated. Examples include the number of cases settled, the number of days a case is pending and the number of motions filed. Qualitative data is information that cannot be quantified or counted. Examples include information gathered from observations of mediation sessions, interviews with program administrators and open-ended survey questions. Because qualitative data cannot be assigned a numerical value, it cannot be used to produce statistical comparisons like quantitative data. Qualitative data is extremely useful to clarify responses and is helpful when interpreting quantitative data.

A. DATA SOURCES

Quantitative and qualitative data are usually gathered from the following sources:⁶⁶⁰

- Mediators;
- Mediation program participants, litigants and attorneys;
- Judges and court personnel;
- Records of court case files, mediation documents, MIS data; and
- Non-court groups, such as local bar mediation committees, citizen groups, insurance companies, legal aid societies, special awareness associations, oversight committees, and funding sources.

B. DATA COLLECTION METHODS/ DEVELOPING DATABASE FOR TRACKING REPORTS

Several methods can be used for collecting data from these sources. Before that, courts have to consider a number of issues when determining the most effective data collection approach. For example, which approach is the most expedient? Which provides the most reliable and consistent data? Which is the most appropriate for the mediation process being monitored and evaluated? Ultimately, however, cost is a great consideration courts face when choosing data collection methods.

⁶⁶⁰ See Ostermeyer & Keilitz, *supra* note 1, 34-35.

For most of the data collection methods and sources, data elements should be assigned a numerical code. Coding allows for more efficient collection, maintenance and analysis of the data. It is also integral for statistical analysis and for maintaining anonymity of individuals and cases.⁶⁶¹ Types of sources include:

- Written surveys;
- In-person survey distribution;
- Survey distribution through the mail;
- Interviews;
- Observation;
- Case file review;
- Data collection forms; and
- MIS and mediation database systems.

⁶⁶¹ *See id.* at 55-56.

C. CONFIDENTIALITY

Since monitoring and evaluating entails collecting data from a variety of sources, parties and attorneys expect that mediation proceedings, information derived from non-court mediation files and responses to surveys and interviews will remain confidential. Parties may wish to limit public scrutiny of official case files that will later become part of the public record. Therefore, it is essential that courts develop and implement policies and procedures to safeguard the anonymity of individuals and the confidentiality of information that they provide, both during the data collection process and after the reporting of evaluation findings.⁶⁶²

Courts need to consider the following issues when developing policies about confidentiality relating to mediation data collection, analysis and reporting.⁶⁶³

- Are there legislative or other safeguards ensuring the anonymity of participants in monitoring or evaluation projects and the confidentiality of the information that they provide?
- What monitoring or evaluation information is a matter of public record and what information is not available for public review?

⁶⁶² *See id.* at 62.

⁶⁶³ *See id.* at 45.

- Is it necessary to link monitoring or evaluation information to a specific case? For instance, if the mediation program is monitoring the individual performance of mediators through user surveys, both the mediator and program participants should be identified so that follow-up inquiries can be performed if the participants expressed negative reactions to the specific mediator or process. However, if only the general trends in mediator performance are being evaluated, then only aggregate data are needed and it is not necessary to track who participates in evaluations.
- How sensitive is the information being collected, and to what extent would it be of interest to the media or other groups? Additionally, what steps or procedures would be taken to safeguard the data if an outside entity requested access to it?

Regardless of the policies a court establishes, procedures should be decided upon before the actual data collection has begun. Additionally, participants in the study should be made aware of the policies. Courts should make every effort to maintain the confidentiality of evaluation information so that evaluation participants will be more willing to engage openly and honestly in the data collection endeavor.⁶⁶⁴

⁶⁶⁴ *See id.* at 45

Confidentiality of mediation communications must be strictly adhered to and supported by all involved judges, court personnel and mediators, as breach of that trust will lead to fear and distrust of the process on the part of litigants and their counsel. Judges, mediator and mediation staff need to agree on a policy concerning confidentiality. The policy adopted by the pilot courts was that no mediation communication would be reported to or discussed with the judge or any other person except as to the following:⁶⁶⁵

- When the mediation occurred;
- Whether an agreement was reached; and
- The terms of the agreement.

The Ohio Mediator Privilege Statute, O.R.C. § 2317.023 (B), states in part (see Chapter 9): “A mediation communication is confidential. Except as provided in division (C) of this section, no person shall disclose a mediation communication in a civil proceeding or in an administrative proceeding.”⁶⁶⁶

⁶⁶⁵ See IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

⁶⁶⁶ See *id.* at 7-2.

VI. Analyzing Available Data

Analyzing data can be as simple as recording the number of cases referred to mediation, or as complex as determining cause-and-effect relationships.⁶⁶⁷ However, complex data analysis is often not necessary for program monitoring, and, moreover, courts can do this type of analysis on their own. For instance, knowledge of the number of cases referred to mediation in a typical year and the number that actually participated in a mediation process can help a court determine how many mediators are needed the following year if the caseload remains steady.

On occasion, other, more advanced evaluative methods will need to be conducted by experts more familiar with analytical equations and statistical software packages.⁶⁶⁸ The following is intended to give judges and court managers an understanding of the types of simple and complex data analysis that might be conducted.

⁶⁶⁷ *See id.* at 49.

⁶⁶⁸ *See id.*

A. PROVIDING DESCRIPTIONS

In analyzing data, courts should provide descriptions of the compositions of caseloads and the types of litigants included in the studies. For instance, the number of cases referred to mediation; whether litigants were individuals, businesses, or governmental entities. Additionally, results of the data can be described in numbers and percentages, i.e., How many cases were settled through mediation? What was the average disposition time of cases referred? What were the satisfaction rates of attorneys and litigants? Monitoring and evaluation programs should always include periodic assessment of descriptive information in order to detect changes and program needs.

B. DETERMINING CORRELATIONS AND RELATIONSHIPS

It can be helpful to determine if specific factors are related to other factors. For example, does the area of expertise of the mediation provider have an impact on the level of satisfaction of attorneys participating in mediation? Or, does the type of case referred to mediation have a significant impact on case disposition rates? Such correlations can provide courts with important information, such as the most appropriate allocation of program resources and successful mediators for certain cases.⁶⁶⁹

⁶⁶⁹ *See id.* at 74-75.

C. MAKING COMPARISONS BETWEEN PROGRAMS

Comparisons can be between groups of cases or among cases in the same group. Additionally, mediated and non-mediated cases can be compared to determine whether mediation has advantages over the traditional litigation process.⁶⁷⁰ To compare different types of cases referred to mediation, the court will need to establish subgroups of cases referred to mediation.

1. Comparisons within groups of cases referred to mediation

Data collected through most monitoring systems can be used to compare outcomes and characteristics within the group of cases referred to mediation. These comparisons can be extremely useful in evaluating how well mediation performs for particular cases or under different conditions. For example, outcomes in cases can vary depending on the litigation stage at which the mediation process took place. Alternatively, variation in the performance of individual mediators and whether their approach was facilitative or evaluative might influence outcomes and participant satisfaction. Courts need to compare all of these dimensions within the group of mediation cases.

⁶⁷⁰ *See id.*

In many cases, a court may not have the resources to examine all of the cases in mediation. In that situation, a sample of the cases is sufficient to display trends or variations among cases, especially if the mediation caseload is about 500 cases or more.⁶⁷¹ A sampling of cases may be necessary for time-consuming activities, such as surveys of litigants, attorneys and mediators. The greater the detail in the subgroups, the better the examination of variations can be. For example, if the court wants a detailed picture of which types of cases fare better or worse in mediation, factors that might be examined include the case type, the amount claimed, the number of parties, the type of party, the age of case at referral and the litigation stage at referral.⁶⁷²

2. Comparisons between groups of mediated and non-mediated cases

Sampling a smaller group of cases or creating subgroups of cases can also be useful when comparing cases referred to mediation and cases not referred to mediation. Each group, mediation and non-mediation, should have the same overall composition. To ensure that the two groups of cases are sufficiently similar on both case characteristics and litigation conditions, courts need to assign similar cases either to the mediation process or to the traditional process.

⁶⁷¹ *See id.* at 51.

⁶⁷² *See id.*

However, in some situations, be it for practical or political reasons, a court cannot establish contemporaneous groups of mediated and non-mediated cases through random assignment. For instance, if a court desires to begin monitoring or evaluating an existing mediation program, it does not make sense to interrupt the existing process by randomly referring cases to mediation. This would cause great confusion. However, it may still be possible to establish a comparison group of non-mediated cases. A non-mediated group could be composed of cases that are similar to the cases in the mediation program but were filed in a period before the mediation program was initiated. Alternatively, a non-mediated group could be composed of cases that are like the cases in the mediation program but are filed in another jurisdiction or in another similar court that does not offer mediation services. A statewide systems approach might use this method to assess mediation in another jurisdiction.

VII. Evaluator Selection

Evaluation projects can be financially burdensome and time-consuming. Since courts may lack the expertise or the time needed to engage in in-depth evaluation and monitoring, it may be necessary to have a professional evaluator conduct such data analysis. Therefore, it is necessary for courts to make an informed decision when choosing an evaluator.

The following is a recommended checklist:⁶⁷³

- Check whether the evaluator is familiar with the terminology;
- Define clearly the scope of the work;
- Request a tentative evaluation proposal from potential evaluators;
- Request a detailed resume;
- Request a list of prior evaluation projects;
- Review recent written products by the evaluator;
- Check references of potential evaluators; and
- Engage in specific contracts with the selected evaluator.

In selecting an evaluator, or evaluators, the objectivity of such an evaluator is a critical qualification.⁶⁷⁴ Experience in conducting program evaluations is also helpful. Sufficient technical expertise is especially important in designing the data collection process and analyzing the data. Finally, an understanding of the organization or the context in which the program operates is also helpful to the evaluator, as are good interpersonal and management skills.⁶⁷⁵

⁶⁷³ *See id.*

⁶⁷⁴ *See* EVALUATING ADR PROGRAMS, A HANDBOOK FOR FEDERAL AGENCIES, *supra* note 8, 2.

⁶⁷⁵ *See* Ostermeyer & Keilitz, *supra* note 1, 4.

VIII. Reporting⁶⁷⁶

A. REPORTING FORMAT

The court may want to seek a comprehensive report that includes a full description of the mediation program, its goals, the reasons for engaging in the monitoring or evaluation effort, the purposes of the study, the methodology of the study and the findings, conclusions and recommendations. This comprehensive report can serve as a basis for tailoring other reports for distribution to certain audiences, such as the legislature, bar, community organizations, business community and other national organizations with an expressed interest in judicial administration and dispute resolution.

B. DISTRIBUTION OF FINDINGS

Courts will need to devise a plan for disseminating the findings of the monitoring or evaluation project. Consideration should be given to target audiences. Additionally, it is important to inform individuals outside the court's jurisdiction about court-based mediation monitoring and evaluation projects. Submitting articles to national judicial administration or mediation-related journals and other national organizations can help reach these groups.⁶⁷⁷

⁶⁷⁶ *See id.* at 20-21.

⁶⁷⁷ *See id.* at 52.

This chapter presents victim-offender mediation as another option to the courts of common pleas that are considering implementing alternative services. Those who question whether victim-offender mediation is even mediation at all may ask why this chapter is included in this guide. The answer may depend upon one's definition of mediation. If one accepts a more narrow definition such as "mediation is settling disputes and compromise," then victim-offender is certainly not mediation. However, if one adopts a more broad and flexible definition such as mediation is "a dialogue facilitated by a neutral third party which enables people to confront troubling issues in a private setting," then victim-offender is clearly mediation. Although not everyone agrees that victim-offender mediation should be labeled "mediation," no one can dispute that it is a process that, since its inception in the 1970s, has grown tremendously as a means of dealing directly with crime in both the private and public sectors. Victim-offender mediation is based upon integrating restorative approaches to dealing with crime into our justice system, in order that victims may be made whole, offenders may be held directly and personally accountable for their actions and the community can become actively involved in fighting crime.⁶⁷⁸

"We've been sentenced to prison for 12 years, and it's time for us to be free ... it's going to help me close a chapter and hopefully get on with my life.

~ Paula Kurland
mother of murder victim participating in victim-offender mediation

"It's the hardest thing I've ever done in my life."

~ Jonathan Wayne Nobles
murderer on death row participating in victim-offender mediation

⁶⁷⁸Mark Maurer, "The Sentencing Project, Americans Behind Bars: One Year Later," 6-7 (1992) (cited in Harry Mika, *The Practice and Prospect of Victim-Offender Programs*, 46 S.M.U. L. REV. 2191, 2193 (1993).

CHAPTER TWELVE ~ CONSIDERING THE ADOPTION OF A VICTIM-OFFENDER MEDIATION PROGRAM

By Kristen Whitmer



I. Introduction	12 - 2
<i>This section includes a historic description of victim-offender mediation, including existing programs in Ohio and sets the groundwork for what the remaining portion of the chapter will cover.</i>	
II. Understanding Victim-Offender Mediation	12 - 7
<i>This section provides examples of the characteristics which make this process unique in comparison with other types of civil mediation and describes the potential impacts that victim-offender mediation may have on victims, offenders, courts and communities.</i>	
III. Basic Program Models	12 - 22
<i>This section describes both the VORP and the “pure mediation” models and analyzes them with regard to common benefits and concerns of each.</i>	
IV. Common Concerns	12 - 32
<i>This section presents issues that are commonly expressed as concerns relating to victim-offender mediation including issues relating to participation, mediator training, case selection, timing, funding a program and confidentiality.</i>	
V. Conclusion	12 – 54

I. Introduction

A. DEVELOPMENT OF VICTIM-OFFENDER MEDIATION

Victim-offender mediation is a voluntary, face-to-face meeting between a crime victim and the offender.⁶⁷⁹ The first documented victim-offender mediation occurred in 1974 in Kitchener, Ontario, and was an experiment conducted by probation department volunteers and the Mennonite Central Committee.⁶⁸⁰ The situation arose when two young men vandalized an entire community,⁶⁸¹ and experimenters hoped that mediation between each victim and the offenders would result in restitution. The offenders paid restitution in full, and the program continued. The success of this program is credited with encouraging others to implement similar strategies to institutionalize victim-offender mediation.⁶⁸²

⁶⁷⁹ See Mark S. Umbreit, Ph.D., *CRIME & RECONCILIATION*, 98 (1985). Mark S. Umbreit, Ph.D., is currently the director of the Center for Restorative Justice and Mediation at the University of Minnesota. He has completed a bulk of the current research on victim-offender mediation in the United States, and is a very well-respected professional and author in the field.

⁶⁸⁰ See Harry Mika, *The Practice and Prospect of Victim-Offender Programs*, 46 S.M.U. L. REV. 2191, 2195 (1993).

⁶⁸¹ See *id.*

⁶⁸² See *id.*

The development of victim-offender mediation stems primarily from the restorative justice movement.⁶⁸³ This movement is believed to be, in part, a response to general dissatisfaction with the criminal justice system, including practical problems such as prison overcrowding, increasing crime rates and the alienation of victims.⁶⁸⁴ Although sometimes characterized as a radical response to crime, supporters articulate that VOM is a transformative process that focuses on victims and the need to compensate their losses as well as punish and rehabilitate the criminal, a theme that occupies a long history in western civilization.⁶⁸⁵

Since its inception in the 1970s, victim-offender mediation has grown tremendously, both in the United States and internationally.⁶⁸⁶ In a study conducted in 1996-1997, 289 victim-offender programs were identified within the United States alone.⁶⁸⁷ This number continues to grow in both the private and public sectors, including the introduction

⁶⁸³ *See id.*

⁶⁸⁴ *See id.* (Commentators have argued strongly against placing the emphasis on the crime committed against the state rather than against individuals).

⁶⁸⁵ *See id.* *See also* Mark S. Umbreit, Ph.D. & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 *MEDIATION QUARTERLY* 235, 245 (Spring 1999) (explaining that the goals of VOM are generally not settlement driven, but rather for the purpose of transformation).

⁶⁸⁶ *See* Henry J. Reske, *Victim-Offender Mediation Catching On*, 81 *A.B.A. J.* 14 (February 1995).

⁶⁸⁷ *See* Mark S. Umbreit, Ph.D. & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 *MEDIATION QUARTERLY* 235 (Spring 1999).

of victim-offender mediation into existing institutions, such as in the courts. In August of 1994, the American Bar Association approved an endorsement of victim-offender mediation/dialogue programs which reads as follows:

BE IT RESOLVED, that the American Bar Association urges federal, state, territorial and local governments to incorporate publicly or privately operated victim-offender mediation/dialogue programs into their criminal justice processes.⁶⁸⁸

B. VICTIM-OFFENDER MEDIATION IN OHIO

Victim-offender mediation has been implemented by various organizations in the state, including the common pleas courts in Richland, Stark and Montgomery counties.⁶⁸⁹ In Ohio, courts have the authority to mandate felony offenders who are not required to serve a mandatory sentence to participate in mediation as a non-residential sanction.⁶⁹⁰ Although victim-offender mediation in Ohio courts is a relatively new concept, there are many other institutions in Ohio that have hosted this process for a number of years.

There are currently well over 30 institutions in Ohio that provide such services to victims, and the public attention given to these programs appears to be consistently increasing. In 1996, the Ohio Office of the Attorney

⁶⁸⁸ See American Bar Association, Endorsement of: Victim-Offender Mediation/Dialogue Programs, reprinted in AMERICAN BAR ASSOCIATION ENDORSEMENT OF: VICTIM-OFFENDER MEDIATION DIALOGUE PROGRAMS (Victim-Offender Reconciliation Program Information and Resource Center) <http://www.vorp.com/articles/abaendors.html>. (visited February 5, 1999). The recommendation also includes requirements for programs to follow when implementing a program as well as a recommendation to support research regarding victim-offender mediation/dialogue.

⁶⁸⁹ This chapter will address only those cases that have been filed with the court. It will not discuss programs such as the Night Prosecutors Program in Franklin County that mediates cases pre-filing. It will also focus on adult felony mediation with only minor references to juvenile programs.

⁶⁹⁰ See OHIO REV. CODE 2929.17 (1996 and Supp.). See Section IV of this chapter for more details.

General awarded Judge James DeWeese of Richland County and the “Face-2-Face Program” a Special Achievement Award for assisting victims of crimes.⁶⁹¹ The national and local media may also be credited with increasing public awareness of these programs and possibly sparking growth within Ohio.⁶⁹² Existing programs in Ohio range from mediation in community organizations such as Community Mediation Services of Central Ohio to face-to-face meetings of victims and inmates facilitated by the Ohio Department of Rehabilitation and Correction.⁶⁹³ The programs vary in terms of inclusion of juvenile or adult offenders, types of crimes and stage in the criminal justice process.⁶⁹⁴ Irrespective of the details of the individual programs, victim-offender mediation is not novel to Ohio and has been publicly recognized as a service to victims of crime in Ohio.

⁶⁹¹ See Richland County Court Of Common Pleas, 1996 Annual Report, Face-2-Face: A Victim Participation Sentencing Program (1996).

⁶⁹² Examples of recent attention by the media include: a CBS *48 Hours* on February 4, 1999, which followed a mediation in the Texas Victim-Offender Mediation/Dialogue Program; a *20/20* news broadcast on April 26, 1999, which focused on a case study completed in Washington state; and a broadcast by Ohio Public Radio on April 26, 1999, regarding the mediation services offered by the Ohio Department of Rehabilitation and Correction. The popularity of the program in the Ohio Department of Correction has led to the training of over 30 volunteers to help facilitate the dialogue between victims and inmates. This program relies strictly on victim initiation and is only one of several community justice initiatives that the department offers. See Reginald A. Wilkinson, Director of the Ohio Department of Rehabilitation and Correction, FRONTIERS OF JUSTICE: VOLUME 2: CODDLING OR COMMON SENSE? <<http://www.drc.ohio.gov/web/Articles/article34.htm>> (visited February 17, 1999).

⁶⁹³ For a list of some of the victim-offender programs in Ohio, see DIRECTORY OF VICTIM-OFFENDER MEDIATION PROGRAMS IN THE UNITED STATES: OHIO (Center for Restorative Justice & Mediation) <<http://ssw.che.umn.edu/ctr4rjm/Resources/VOMSurv/Ohio.htm>> (last modified Dec. 29, 1998).

⁶⁹⁴ This chapter will focus primarily on court-connected mediation programs that would occur under a common pleas jurisdiction. Thus, juvenile victim-offender mediation as well as pre-plea mediation will not be discussed in detail.

C. CHAPTER APPROACH

This chapter begins with an example of how victim-offender mediation (hereinafter VOM) may occur in a case within the jurisdiction of a common pleas court. Second, it presents the process of victim-offender mediation and its differences from civil mediation. The chapter will move, third, to address the potential impacts that a VOM program could have on members of a community, including victims, offenders, the courts and others. A background of basic program models that are currently being utilized in the United States will be discussed in the fourth section. Finally, the chapter will close with a look at common concerns that have been raised about implementing victim-offender mediation.

II. Understanding Victim-Offender Mediation

A Senseless Killing⁶⁹⁵

Suzanne's son was killed in a random, senseless shooting in downtown Providence, Rhode Island. She not only lost her son, but suffered other adverse effects: Her emotional trauma jeopardized other family ties, her job status, her friendships and her health. Because the defendant pled no contest, Suzanne received few details concerning the crime. The system failed to recognize or respond to her needs. Yet, after a year of preparation for mediation, she met with the man who murdered her son. By expressing her thoughts and feelings, she was able to release some of the pain of her son's death. Although she couldn't forgive the man, the two left the mediated setting with a handshake.

⁶⁹⁵ Excerpted from Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C.L. REV. 1479 (1994).

A. UNIQUENESS OF MEDIATION IN CRIMINAL CASES

1. VOM: purpose and proces

Victim-offender mediation is distinguished from civil mediation in many ways.⁶⁹⁶ VOM programs provide a service to the members of the community who are impacted by criminal actions. Rather than focusing on settling a dispute between parties, VOM purports to break down stereotypes, relieve fears and humanize the criminal justice process.⁶⁹⁷ In attempting to accomplish such goals, distinctions from the civil mediation process must be recognized and addressed.

There are a variety of considerations and concerns with regard to participation in VOM. A first issue relates to voluntariness. Most programs make participation in the process voluntary for the victims of crimes.⁶⁹⁸

Although some also advocate voluntary participation for the offender, in reality offender participation is often not viewed as completely voluntary, and in some programs may be mandatory⁶⁹⁹ (see section IV [A] in this

⁶⁹⁶ See Mark S. Umbreit, *MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE*, 145-148 (1995).

⁶⁹⁷ See *id.* at 148.

⁶⁹⁸ In a survey completed on 116 victim-offender programs in the United States, 100 percent reported that victim participation is completely voluntary. Mark S. Umbreit, Ph.D. & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 *MEDIATION QUARTERLY* 235, 239 (1999).

⁶⁹⁹ See *id.* (79 percent of the programs reported that offender participation was voluntary, while 21 percent of the programs require offender participation if the victim is interested).

chapter for more information on voluntary participation).⁷⁰⁰ Second, most participants are meeting with a complete stranger during mediation, as opposed to many instances in civil mediation where there is often a long-standing relationship or history between the participants, which may have a significant impact on the mediation.⁷⁰¹ In addition, it is much more likely that there will be a generation gap between victim-offender participants than between parties to a civil mediation.⁷⁰² Third, issues in criminal cases are, for the most part, already clearly delineated, and the roles of the victim and admittedly guilty offender are obvious.⁷⁰³ Last, there are concerns specific to VOM that may not be present or not as prevalent during a civil mediation. Those concerns often arise when services to victims, including addressing victims' special emotional and safety needs, conflict with maintaining an effective and fair criminal justice process.⁷⁰⁴ These differences from civil mediation must be recognized and considered carefully before planning and implementing a program, a point made throughout this chapter.

⁷⁰⁰ See Mark S. Umbreit, Ph.D., *MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE*, 145-148 (1995).

⁷⁰¹ *See id.*

⁷⁰² *See id.*

⁷⁰³ *See id.*

⁷⁰⁴ *See id.*

2. Distinctions among types of offenses

A distinction often is made between mediation of property offenses and mediation of more serious and even violent crimes. Although mediation is more common in property crimes, it is increasingly being found to be helpful to victims of violent crimes as well.⁷⁰⁵ Martha Green, Mediation Coordinator in the Richland County Court of Common Pleas, suggests that the legalistic distinctions among levels of crimes become artificial when dealing with victims. She believes that cases are better distinguished on a case-by-case basis according to the amount of trauma perceived by the victim, as crime affects people in various ways.⁷⁰⁶ Regardless of the type of crime, the dialogue between the participants has been found to be the most important aspect of victim-offender mediation.⁷⁰⁷

⁷⁰⁵ See *id.* at 149. See also Mark S. Umbreit, Ph.D. & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 *MEDIATION QUARTERLY* 235, 239 (1999) (Although vandalism, minor assaults, theft and burglary made up the vast majority of offenses commonly mediated, a surprising number of programs stated that they occasionally handle such cases as assault with a deadly weapon, assault with bodily damage, sexual assault, domestic violence, negligent homicide, attempted murder and murder).

⁷⁰⁶ Telephone interview with Martha Green, Mediation Coordinator, Richland County Court of Common Pleas (May 3, 1999). See also Mark S. Umbreit, Ph.D. & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 *MEDIATION QUARTERLY* 235, 243-244 (1999) (recognizing that some believe that there is little trauma associated with property offenses while others believe that victims may be traumatized and feel personally violated as a result of a property crime).

⁷⁰⁷ See John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, *WESTERN CRIMINOLOGY REVIEW* 1, 13 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 5, 1999).

In certain cases, restitution may also result from a mediation session.⁷⁰⁸ For example, the offender may agree to make payments to the victim to reimburse for the property that was stolen or destroyed. An agreement may also contain community service to be completed while the offender is on probation. In cases of personal violence, offenders may offer restitution to pay for things such as counseling, medical expenses and even funeral expenses.⁷⁰⁹ Although restitution in property crimes seems to be more common, the resolution may depend more on what the victim is seeking from mediation rather than the legal distinction made between types of crimes.⁷¹⁰ Despite these differences in programs, there is consensus on the propositions that mediation of severely violent crimes should not be a replacement for incarceration, should occur only after the determination of guilt and should occur after sentencing for violent and sometimes other serious crimes (see Section IV D).⁷¹¹ A combination of the dialogue and restitution that may occur during any type of victim-offender mediation may have significant impacts on the victim, the offender, the courts and the community.

⁷⁰⁸ See Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C.L. REV. 1479, 1497-98 (1994).

⁷⁰⁹ Telephone interview with Martha Green, Mediation Coordinator, Richland County Court of Common Pleas (May 3, 1999).

⁷¹⁰ *See id.*

⁷¹¹ See Mark S. Umbreit, Ph.D., *MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE*, 149 (1995).

B. ANALYSIS OF THE POTENTIAL IMPACTS OF VOM

1. Impacts on victim

VOM allows victims the opportunity to be directly involved in the criminal justice process.⁷¹² In the United States, victims have not traditionally been involved in any significant way in the process, as crime is legally characterized as action against the state rather than against individuals.⁷¹³ In fact, VOM is only one of various activities that have been sparked by recent concerns about crime and victims' rights in the United States today.⁷¹⁴ The concerns arise out of a movement for recognition and treatment of victims' special needs.⁷¹⁵ VOM embraces the theory that courts can help accomplish this by offering a process through which victims can have a meaningful dialogue with their offenders.

Through mediation, a victim has the opportunity to release anxiety by expressing how the offender impacted his or her life. In addition, the victim might ask questions of the offender, an opportunity that he or she probably would otherwise not have. Through this process, both victims and offenders are humanized. This

⁷¹² *See id.*

⁷¹³ *See id.*

⁷¹⁴ A national public opinion poll, *America Speaks Out: Citizens' Attitudes About Victims' Rights and Violence*, indicates that Americans support these types of activities. Results of interviews demonstrate that 70 percent of those interviewed were probably or definitely willing to pay higher taxes to support such programs in the community: <<http://www.ojp.usdoj.gov/ovc/help/impact/impact.html>> (visited February 17, 1999).

⁷¹⁵ *See* Mark S. Umbreit, *MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE*, 100 (1995).

aspect, coupled with the information gained during the dialogue, is credited with making victims feel more safe and secure that the offender will not victimize them again.⁷¹⁶ It is often termed a “sense-making process” and can be very effective in bringing greater closure to the incident.⁷¹⁷ Although supporters of VOM do not suggest that it is a replacement for therapy, they do propose that it can provide the victim with additional information, which may be an integral part of the healing process.⁷¹⁸

VOM is also an attempt to eliminate double victimization, once by the offender, and then once more through the alienation of the criminal justice system.⁷¹⁹ Researchers report that over 90 percent of mediated restitution agreements are completed by the offender, as opposed to 20-30 percent compliance with court-ordered restitution.⁷²⁰ Despite this evidence that victims more often receive restitution, there are concerns that the process could potentially re-victimize a willing participant who attends a mediation and has his or her

⁷¹⁶ *See id.*

⁷¹⁷ *See id.*

⁷¹⁸ *See* John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, WESTERN CRIMINOLOGY REVIEW 1, 11 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 5, 1999). *See also* Mark S. Umbreit, Ph.D., *MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE*, 153 (1995).

⁷¹⁹ *See id.* at 139.

⁷²⁰ *See* Marty Price, *CAN MEDIATION PRODUCE JUSTICE? A RESTORATIVE JUSTICE DISCUSSION FOR MEDIATORS*, 3 <<http://www.vorp.com/articles/justice.html>> (visited February 5, 1999).

anxiety aroused yet again.⁷²¹ Although it may be counter-intuitive to believe that a victim would want to meet with an offender, irrespective of the type of case, many participants have reported high levels of satisfaction and considered VOM to be well worth their time.⁷²² In the words of a burglary victim who experienced VOM in Richland County Court of Common Pleas:

I was slightly hesitant to come because I thought the boys would be hostile, which they weren't, and might retaliate in some way when they got out. Looking back, I suppose they probably thought the victims to be hostile. The experience was very humanizing, as well as fascinating. I'm glad I came.⁷²³

⁷²¹ See Phelan A. Wyrick & Mark A. Costanzo, *Predictors of Client Participation in Victim-Offender Mediation*, 16 *MEDIATION QUARTERLY* 253, 255 (1999) (noting that although these concerns may be present, due to the amount of voluntary participation in VOM, it does not appear to preclude all victims from facing their offenders).

⁷²² See John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, *WESTERN CRIMINOLOGY REVIEW* 1, 7-10 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 17, 1999).

⁷²³ Telephone interview with Martha Green, Mediation Coordinator, Richland County Court of Common Pleas (May 3, 1999) (reciting quotes from an exit survey).

2. Impacts on the offender

Mediation may also have critical impacts on the offender that translate into potential benefits for society.

Mediation can be very difficult for an offender, as he or she is confronted and held accountable for the human costs of his or her actions and how those actions affected another.⁷²⁴ Through this process, offenders may learn about the hardship that they place on others, which they may not have understood without mediation.⁷²⁵ Being held accountable for those actions may also translate into the victim receiving restitution for what was lost, or into the community receiving service from the offender. There is also evidence that offenders who participate in mediation felt as if they were more fairly dealt with and had more respect for the criminal justice system.⁷²⁶ This evidence is perhaps captured best in the following quote from a theft offender: “In mediation, I was a human being, not just a criminal.”⁷²⁷

⁷²⁴ *See id.*

⁷²⁵ *See id.*

⁷²⁶ *See* Martin Wright, Introduction, in *Mediation And Criminal Justice*, 1, 6 (Martin Wright and Burt Gallway, eds., 1989).

⁷²⁷ Telephone interview with Martha Green, Mediation Coordinator, Richland County Court of Common Pleas (May 3, 1999) (reciting quotes from an exit survey completed by a theft offender who attended a mediation in Richland County Court of Common Pleas).

In effect, supporters of VOM believe that it is not an easy way out of the system for the offender; rather it is a step in the criminal justice process that may go a long way in rehabilitating criminals.⁷²⁸ This may be due in part to evidence in America and Europe that recidivism rates decrease with participation.⁷²⁹ While some of this evidence is not considered statistically significant,⁷³⁰ it is perhaps more important to note that there is no evidence that participation in VOM, including different terms of incarceration, increases recidivism. Although there is preliminary evidence that indicates offenders who participate in VOM tend to serve time in jail rather than in state prison and serve shorter sentences in the long run,⁷³¹ supporters reject the notion that mediation is “soft on crime” and will create further problems in the community. Among scholars, offering lesser sentences

⁷²⁸ See Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C.L. REV. 1479, 1498-1500 (1994).

⁷²⁹ See *id.* (There is convincing evidence, however, that recidivism rates are less for juveniles who participate in VOM). See also Mark S. Umbreit, Ph.D. & Robert B. Coates, VICTIM OFFENDER MEDIATION: AN ANALYSIS OF PROGRAMS IN FOUR STATES OF THE UNITED STATES, 3 (1992) (Considerably fewer and less serious additional crimes were committed within a one-year period by juvenile offenders in victim-offender mediation programs, when compared to similar offenders who did not participate in mediation. Consistent with two recent English studies [Marhsal & Merry, 1990; Digman, 1990]. However, they note that their findings are not statistically significant in this particular study, as they could not rule out chance as contributing to the difference in recidivism rates).

⁷³⁰ See Mark S. Umbreit, Ph.D. & Robert B. Coates, VICTIM OFFENDER MEDIATION: AN ANALYSIS OF PROGRAMS IN FOUR STATES OF THE UNITED STATES, 20 (1992).

⁷³¹ See *id.* at 12. This evidence is not completely convincing, as only a small sample was studied, and there was a lack of multivariate analysis. However, it does indicate that the criminals who participated served approximately 7.2 years less in jail than did those who did not participate.

to mediation participants seems to spark broader concerns regarding voluntary participation (see Section IV[A]) rather than concerns of being “soft on crime.”

Regardless of the effects on sentencing, VOM supporters believe that holding an offender personally accountable for his or her actions will go a long way toward rehabilitating criminals. Although studies have been mixed as to how much of an effect mediation really has on criminals, one scholar notes:

One should not expect exposure to a VORP (Victim-Offender Reconciliation Program) by itself to have a major impact on offenders, whose lives are typically beset by countless personal problems and repeated instances of failure and antisocial behavior. For some, participating in VORP may be the first socially approved act they have successfully performed. Any program that shows evidence of even slight improvement in the outlook and conduct of offenders, however, is welcome.⁷³²

⁷³² See Phelan A. Wyrick & Mark A. Costanzo, *Predictors of Client Participation in Victim-Offender Mediation*, 16 *MEDIATION QUARTERLY* 253, 255 (1999) (quoting S. Woolpert).

3. Potential benefits for the community

Another goal of VOM may be that a meeting between victims and offenders will spill over to benefit the community as a whole because victim-offender mediation will provide a more efficient delivery of service to society.⁷³³ For example, mediation may reduce the amount of money spent on incarceration and on the criminal process, and most importantly, may lower future monetary and social costs due to lower recidivism rates.⁷³⁴ Community members arguably also directly benefit when community service is included in the restitution agreement.⁷³⁵ Mediation can also integrate community involvement in the process through the use of volunteer mediators, who may spark a greater understanding of and appreciation for the criminal justice process.⁷³⁶ Last, and perhaps most important, supporters hope that the humanizing aspect of victim-offender mediation will be

⁷³³ See Mark S. Umbreit, Ph.D., “Mediating Victim-Offender Conflict: From Single-Site To Multi-Site Analysis in the United States,” in *Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation International Research Perspectives*, 431, 438 (Heinz Messmer and Hans-Uwe Otto, eds., 1992).

⁷³⁴ See *id.*

⁷³⁵ See *id.* See also Mark S. Umbreit, Ph.D., *CRIME AND RECONCILIATION*, 98, 107 (1985) (noting that in 1983, Porter City, Indiana, realized an economic benefit of \$300,000 from 40,000 hours of free work that was completed by offenders who participated in community service sentencing).

⁷³⁶ See *id.*

effective in rehabilitating both the victim and the offender so that they may become productive members of the community.⁷³⁷

4. Potential benefits for the courts

The restorative justice process was implemented in large part to provide an additional service to society while maintaining the fundamental goals of the criminal justice system.⁷³⁸ It is a response to a system that continues to receive much criticism concerning overcrowded institutions, high costs of incarceration, increasing incarceration rates and high recidivism.⁷³⁹ Victim-offender mediation is a process that developed in part to address these concerns while retaining the traditional goals of criminal law.⁷⁴⁰ Victim-offender mediation, because it actively includes both victims and offenders, has proven to raise awareness and respect for the criminal justice process as a whole by the parties who participate.⁷⁴¹ Although VOM of serious and particularly

⁷³⁷ See Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C.L. REV. 1479, 1503 (1994).

⁷³⁸ See Marty Price, PUNISHMENT: WHAT'S IN IT FOR THE VICTIM? A RESTORATIVE JUSTICE DISCUSSION FOR CRIME VICTIMS AND THEIR ADVOCATES <<http://www.vorp.com/articles/justice.html>> (visited March 5, 1999).

⁷³⁹ See Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C.L. REV. 1479, 1491-1493 (1994).

⁷⁴⁰ See *id.*

⁷⁴¹ See John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, WESTERN CRIMINOLOGY REVIEW 1, 6 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 17, 1999).

violent offenses does not purport to produce short-term time or money savings with regard to lower incarceration rates and will add an extra step to the process, many believe that the extra costs and time spent with the victims and offenders is an investment that is well worth the effort.⁷⁴²

5. Summary of general empirical data on the potential benefits of VOM

Victim-offender mediation, although a fairly recent addition to the criminal justice system, has been the subject of various studies in the United States as well as in other countries.⁷⁴³ Both quantitative and qualitative data on victim-offender mediation may be particularly helpful due to the controversial nature of dealing with crime victims and offenders in a non-traditional way. Studies on victim-offender mediation have revealed the following benefits of VOM:⁷⁴⁴

⁷⁴² See Harry Mika, *The Practice and Prospect of Victim-Offender Programs*, 46 SMU L. REV. 2191, 2203 (1993).

⁷⁴³ See Mark S. Umbreit, Ph.D., *MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE*, 155 (1995).

⁷⁴⁴ See *id.*

- There are high levels of satisfaction and perceptions of fairness with the process for both victims and offenders.
- Victims indicate that being able to discuss what happened is more satisfying than receiving restitution, and the discussions are also satisfying to the offenders.
- The process has a “strong effect in humanizing the justice system’s response to crime for both victims and juvenile offenders.”
- The process yields a significant reduction in fear and anxiety for victims of juvenile crime.
- Victims who participate are much more likely to view the justice system as fair, in contrast to those who do not participate.
- Many programs report successful restitution rates in the range of 79-98 percent, which is far higher than court-administered restitution that was not a product of mediation.
- Considerably fewer and less serious additional crimes were committed within a one-year period by juvenile offenders in victim-offender mediation programs in three states of the United States, when compared to similar offenders who did not participate in mediation. Consistent with two recent English studies, this important finding, however, is not statistically significant in one of the studies.
- A larger portion of victims of violent crimes than originally believed are interested in meeting their offender.

III. Basic Program Models

If a court decides to implement a victim-offender mediation program, there are existing program models from which to choose. This section gives an overview of the two most popular models. However, as outlined in Chapter 3, each court is unique and may wish to adapt the preferred program model to best meet the needs of the court and the community.

A. VORP MODEL

Currently, the most commonly used model for VOM is the Victim-Offender Reconciliation Program (VORP) model.⁷⁴⁵ This model involves extensive preparatory work and communication with the individual parties before the actual face-to-face mediation and is known as a “social work case development approach.”⁷⁴⁶ The model was first formed with minor property offenses in mind, but has been frequently adapted to mediate violent offenses as well.⁷⁴⁷

Although there are many variations of the model, depending upon the program’s needs and resources,⁷⁴⁸ the basic

⁷⁴⁵ See *Comparing Victim Offender Mediation Program Models*, VOMA QUARTERLY (Victim-Offender Mediation Association, New Smyrna Beach, Fla.), Summer 1995, 1.

⁷⁴⁶ *Id.*

⁷⁴⁷ See Table 7.1 in Mark S. Umbreit, Ph.D., “Violent Offenders and their Victims”, in *Mediation And Criminal Justice*, 99, 111 (Martin Wright and Burt Galaway, eds., 1989).

⁷⁴⁸ See Stephanie A. Beauregard, *Court-Connected Juvenile Victim-Offender Mediation: An Appealing Alternative for Ohio’s Juvenile Delinquents*, 13 OHIO ST. J. ON DISP. RESOL. 1005, 1014 (1998). (The National Standards for Court-Connected Mediation Programs do not promote using a universal model for all courts. Because resources and system designs vary, they believe that it is important to maintain flexibility in a program).

framework is fairly standard and has been implemented in various settings. The basic framework for the VORP model includes four basic steps that include intake or referral, case preparation, meeting and follow-up.⁷⁴⁹

1. Intake

This stage in the process consists of getting referrals to mediation and conducting an initial screening of those cases.⁷⁵⁰ Case referrals may come from various sources including, but not limited to, judges, members of the prosecutor's office, police, victims, offenders, mediators and other organizations within the community.⁷⁵¹

Mark Umbreit, who has been very active in studying referrals to victim-offender mediation, suggests taking a pro-active and assertive case referral approach. This approach advocates actively increasing support for the program with members of the community, in order to increase the number of referrals to mediation.⁷⁵²

Nevertheless, building support within the community and getting referrals have been reported as common challenges for victim-offender mediation programs across the country.⁷⁵³

⁷⁴⁹ See Harry Mika, *The Practice and Prospect of Victim-Offender Programs*, 46 SMU L. REV. 2191, 2197-2198 (1993).

⁷⁵⁰ See Mark Chupp, "Reconciliation Procedures and Rationale", in *Mediation and Criminal Justice*, 56 (Martin Wright and Burt Galaway, eds., 1989).

⁷⁵¹ See *National Survey of Victim Offender Mediation Programs in the United States*, VOMA CONNECTIONS (Victim-Offender Mediation Association, New Smyrna Beach, Fla.), Winter 1998, 1 (primary referral sources found in this study were probation officers, judges and prosecutors).

⁷⁵² More information on referrals can be located in Mark S. Umbreit, Ph.D., *HOW TO INCREASE REFERRALS TO VICTIM-OFFENDER MEDIATION PROGRAMS* (1993).

⁷⁵³ Mark S. Umbreit, Ph.D. & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 *MEDIATION*

Many adult victim-offender mediation programs, especially those that deal with serious felony offenses, only take referrals after a determination of guilt is made.⁷⁵⁴ This acts as a procedural safeguard to eliminate further harm to the victim as well as eliminate the possibility of self-incrimination by the offender.⁷⁵⁵ Once a referral is made, program staff performs the necessary intake procedures and completes an initial screening regarding the appropriateness of the case for mediation (see Section IV[C] in this chapter entitled Case Selection).⁷⁵⁶ Once the case is initially determined to be appropriate for mediation, it is assigned to a mediator who will begin the next stage in the process.

QUARTERLY 235, 248 (1999).

⁷⁵⁴ See Mark Chupp, "Reconciliation Procedures and Rationale," in *Mediation and Criminal Justice*, 56, 57 (Martin Wright and Burt Galaway, eds., 1989); See also *National Survey of Victim Offender Mediation Programs in the United States*, VOMA CONNECTIONS (Victim-Offender Mediation Association, New Smyrna Beach, Fla.), Winter 1998, 7 (reporting that in 65 percent of the programs studied, offenders are expected to admit guilt prior to participation while other programs only expect the offender to accept some personal responsibility for the crime).

⁷⁵⁵ See Mark Chupp, "Reconciliation Procedures and Rationale", in *Mediation and Criminal Justice*, 56, 57 (Martin Wright and Burt Galaway, eds., 1989).

⁷⁵⁶ See *id.*

2. Case preparation

a. Case assessment

Case preparation primarily involves the mediator contacting both the victim and the offender, individually, to explain the process and ensure the appropriateness of the case.⁷⁵⁷ Other goals of the initial contacts are to gain understanding of the crime and the emotional status of the parties and to solicit participation in the process.⁷⁵⁸ If the victim and offender are interested in mediation, then the mediator may proceed to make proper arrangements and to explore initial reparation or restitution possibilities.⁷⁵⁹ The offender is often the first party contacted so that the mediator can assess the ability of the offender to make restitution or to deal with the victim in a meaningful and constructive manner.⁷⁶⁰ It may also be important to get the offender's agreement to meet first, so that an offender who refuses to meet does not disappoint the victim.⁷⁶¹

⁷⁵⁷ *See id*

⁷⁵⁸ *See id.*

⁷⁵⁹ *See id.*

⁷⁶⁰ *See id.* at 59.

⁷⁶¹ *See id.* Note that this may not apply for programs that mandate participation by the offender or when victims initiate the mediation process irrespective of any referral process.

After the offender is contacted and agrees or is mandated to participate, the victim is contacted. These initial contacts allow the victim and the offender to tell their stories individually and express their feelings to the mediator. These contacts allow the parties to become comfortable and gain trust in the mediator and the process.⁷⁶² In fact, the mediator often begins the reconciliation process during these initial contacts by demonstrating support and encouragement for both parties.⁷⁶³ By demonstrating that the community, represented by the mediator, has an interest in and wishes to reconcile with both parties, the mediator begins the healing process.⁷⁶⁴ Some program directors believe that the initial contacts and preparation are not necessary, particularly in lower-level property offenses.⁷⁶⁵ Nevertheless, most programs have staff prepare both parties for the mediation and place great emphasis on the importance of this stage in the process.⁷⁶⁶

⁷⁶² *See id.*

⁷⁶³ *See id.* at 61.

⁷⁶⁴ *See id.*

⁷⁶⁵ Mark S. Umbreit, Ph.D. & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 *MEDIATION QUARTERLY*, 235, 243 (1999).

⁷⁶⁶ *See id.* at 239-240, 243 (reporting that 99 percent of programs surveyed call the parties prior to the meeting and 78 percent of programs hold separate meetings with each party prior to a mediation).

3. Meeting

The meeting with all parties present, including a mediator, generally mirrors the basic structure of a civil mediation. However, the substance of a VOM meeting is very different. The American Bar Association has made an effort to distinguish victim-offender as a non-settlement-driven process and clearly states that the losses experienced by the victim are not open to negotiation, even though the manner in which those losses are restored can be negotiated.⁷⁶⁷

The meeting typically involves fact sharing, the expression of emotions and questions and answers, the latter of which has proven to be the most satisfying aspect in the reconciliation process for victims.⁷⁶⁸ A restitution agreement may also be completed as a result of the meeting. An agreement may include monetary payments, return of stolen goods, community service or future promises.⁷⁶⁹ If the mediation takes place pre-sentencing, an agreement may result in a sentencing recommendation that can be considered by the court.

Another variation may occur when mediation takes place subsequent to, and possibly a long time after, a very

⁷⁶⁷ See Mark S. Umbreit, Ph.D. & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 *MEDIATION QUARTERLY*, 235, 239 (1999).

⁷⁶⁸ See John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, *WESTERN CRIMINOLOGY REVIEW*, 1, 13 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 17, 1999).

⁷⁶⁹ See Mark Chupp, "Reconciliation Procedures and Rationale", in *Mediation and Criminal Justice*, 56, 62 (Martin Wright and Burt Galaway, eds., 1989).

serious and violent offense has occurred. In those instances, sentencing recommendations and restitution may not be a goal of the mediation. However, restitution may be a possibility if there is a loss for which the victim seeks reasonable compensation.⁷⁷⁰ Generally, in most violent cases, the mediation is focused completely on an information exchange.⁷⁷¹ Whatever the circumstances, this mediation process has been found to be very satisfying and educational for many victims and offenders who have participated.⁷⁷²

4. Follow-up

a. Monitoring compliance

Follow-up to a mediation session may include monitoring compliance with the agreement, provided one is made, and evaluating the session(s).⁷⁷³ These processes can be performed in a similar fashion to that of civil mediation programs (see Chapter 11), and are considered by many to be very

⁷⁷⁰ See Mark S. Umbreit, Ph.D., "Violent Offenders and their Victims", in *Mediation And Criminal Justice*, 99, 111 (Martin Wright and Burt Galaway, eds., 1989).

⁷⁷¹ See Mark S. Umbreit, Ph.D., *MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE*, 153 (1995).

⁷⁷² See John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, *WESTERN CRIMINOLOGY REVIEW*, 1, 6 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>>.

⁷⁷³ See Mark Chupp, "Reconciliation Procedures and Rationale," in *Mediation and Criminal Justice*, 56, 64 (Martin Wright and Burt Galaway, eds., 1989).

important in victim-offender mediation, but are often lacking in existing programs.⁷⁷⁴ Even though program administrators admit to a lack of adequate follow-up, it has been found that compliance with victim-offender mediated agreements is extremely high (over 90 percent), especially compared to the very low rate of compliance with court-ordered restitution (20-30 percent).⁷⁷⁵

b. Evaluating the program

Although evaluations of a program are very important for the reasons identified in Chapter 9, different approaches may have to be taken in monitoring the success of VOM due to the different concerns and goals of the process. For instance, evaluation procedures may be limited to measuring satisfaction with the process, as settlement rates are not generally considered to be a primary goal of VOM.⁷⁷⁶ It may also be very difficult and extremely expensive to monitor long-term effects such as

⁷⁷⁴ See Mark S. Umbreit, Ph.D. & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 *MEDIATION QUARTERLY*, 235, 247 (1999).

⁷⁷⁵ See Victim-Offender Reconciliation Program (VORP) Information and Resource Center, About Victim-Offender Mediation and Reconciliation³, (last visited Feb. 5, 1999) <http://www.vorp.com/>; See also John R. Gehm, Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks, *Western Criminology Review* 1, 6 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 17, 1999).

⁷⁷⁶ See Mark S. Umbreit, Ph.D. & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 *MEDIATION QUARTERLY* 235, 245 (1999).

recidivism rates and effects on sentencing.⁷⁷⁷ These higher costs should be considered against the use for such data before endeavoring to study the long-term effects of VOM.

Martha Green, coordinator and mediator for Richland County Common Pleas Court, stated that even if ample quantitative data was available on a VOM program, it would not even begin to describe the effects of the process on participants as well as qualitative data.⁷⁷⁸ The quantitative data may be an easier means of convincing funding sources to support a program, however, especially if the sources are not completely familiar with, or comfortable with, the process. Regardless of how an evaluation is performed, it has been recommended that a program send mediator reports illustrating the accomplishments of the session to the referral sources and other involved staff in order to keep them linked to the process.⁷⁷⁹

As mentioned previously, the VORP model is very popular and has been adapted to meet the needs of various programs. However, there are other options for institutions that are interested in

⁷⁷⁷ This is evident from the very limited studies that have been completed on recidivism rates and sentencing to date, which are not statistically significant due to small sample sizes and lack of multivariate analysis. See John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, WESTERN CRIMINOLOGY REVIEW 1, 9 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 17, 1999).

⁷⁷⁸ Telephone interview with Martha Green, Mediation Coordinator, Richland County Court of Common Pleas (March 3, 1999).

⁷⁷⁹ See Mark Chupp, "Reconciliation Procedures and Rationale," in *Mediation and Criminal Justice*, 56, 65 (Martin Wright and Burt Galaway, eds., 1989).

implementing VOM, but cannot afford to spend as much time or money on the process as the VORP model requires. Regardless of the model that is selected, it is important to weigh what a program will gain against what will be lost with each of the models in order to effectively plan a good program. The next model described may save some time and money, but presents some controversy, especially when used in felony cases.

B. “PURE MEDIATION” MODEL⁷⁸⁰

This model is similar to a civil mediation model in that no preliminary contacts are made to the victim and offender. After a referral is made, a letter is sent to the potential participants explaining the process and what time they will be expected at the mediation. It is designed to be less costly and time-intensive and has been characterized as a more “settlement-driven” approach.⁷⁸¹ Some believe that this model is more suitable, because they feel that it is inappropriate for the mediator to develop a relationship with the parties prior to the mediation. Others believe that it ignores the important healing process and sparks other vital concerns, such as limited screening of cases and high “no-

⁷⁸⁰ This model and its strengths and shortcomings are described in detail in Marty Price, *COMPARING VICTIM-OFFENDER MEDIATION PROGRAM MODELS* <<http://www.igc.org/voma/docs/mpcomp.html>> (last modified February 15, 1997).

⁷⁸¹ *See id.*(quoting Mark S. Umbreit, Ph.D.).

show” rates. These concerns may lead to further victimization, which some believe make this approach only viable in very minor offenses.⁷⁸²

IV. Common Concerns

No matter which mediation model a court chooses, concerns have been raised about its use for victims and offenders. Although the breadth of the concerns may vary with design, it is important to note that these concerns may exist at some level in any VOM program.

A. SECURING PARTICIPATION IN THE PROGRAM

1. Offender participation

Although participation is completely voluntary for the victim, the participation of the offender is often influenced by the incentive to please the referral source.⁷⁸³ The fear that non-participation results in negative

⁷⁸² *See id.*

⁷⁸³ *See* John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, WESTERN CRIMINOLOGY REVIEW, 1, 12 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 17, 1999). There are some studies which demonstrate that with mediation, although incarceration rates changed very little, the offenders may experience less time in a state prison, and may serve shorter jail sentences.

consequences may lead to due process concerns if criminals are essentially being treated differently when they participate.⁷⁸⁴

Participation by the offender in mediation may be mandatory in some instances.⁷⁸⁵ As previously mentioned, courts in Ohio can mandate offenders to participate in mediation as a non-residential sanction.⁷⁸⁶ If participation is mandatory for the offender, the mediator may have to assess the situation even more carefully to ensure that the mediation will be beneficial for the victim. The mediator may schedule a face-to-face meeting only after soliciting participation from both parties and deciding that both are prepared to have a meaningful and constructive dialogue.

⁷⁸⁴ Scholars have noted the possible concern that because victims are more likely to agree to mediate when the offender is of the same race, due process issues may arise when offender participation is not completely voluntary. See John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, WESTERN CRIMINOLOGY REVIEW, 1, 13 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 17, 1999).

⁷⁸⁵ See *National Survey of Victim Offender Mediation Programs in the United States*, VOMA CONNECTIONS (Victim-Offender Mediation Association, New Smyrna Beach, Fla.), Winter 1998, 7 (reporting that that 21 percent of the programs surveyed require the offender to meet with the victim, if the victim agrees to mediate).

⁷⁸⁶ See OHIO REV. CODE 2929.17 (1996 and Supp.).

2. Victim participation

A challenge that has been reported by many programs across the United States is securing participation by victims.⁷⁸⁷ Although there has been a wide range of participation rates among programs, the most common range reported is 40 to 60 percent of those invited to participate in VOM.⁷⁸⁸ Unfortunately, there is only limited research available with regard to what factors affect participation.⁷⁸⁹ Nevertheless, a well-trained mediator may be able to elicit participation by explaining how the process can meet that particular victim's needs, if the mediator believes that the victim will gain from attending the process.⁷⁹⁰ Yet there are certain circumstances that have been found to make certain victims predisposed to participate in VOM.

The research that has been conducted indicates that participation is higher when the victim is an organization, the victim is the same race as the offender, the offender is a male, the offender is young and the case involves a misdemeanor rather than a felony (though the latter may be due in part to the smaller number of

⁷⁸⁷ See Mark S. Umbreit, Ph.D. & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 *MEDIATION QUARTERLY* 235, 249 (1999).

⁷⁸⁸ See John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, *WESTERN CRIMINOLOGY REVIEW*, 1, 7 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 17, 1999).

⁷⁸⁹ See *id.* at 9.

⁷⁹⁰ Telephone interview with Martha Green, Mediation Coordinator, Richland County Court of Common Pleas (May 3, 1999) (reciting quotes from an exit survey completed by a theft offender who attended a mediation in Richland County Court of Common Pleas).

felony cases studied).⁷⁹¹ However, rates do not seem to be related to characteristics specific to the victim, such as gender, age, religiosity, level of education, economic status or occupation.⁷⁹² The research seems to suggest, in contrast, that some offenders are much more likely to have an opportunity to participate in VOM, while others do not get a chance to participate in the process. This may again lead to due process concerns if offenders who participate are in fact treated differently from those who do not participate.

3. Paradox of forgiveness

“Before either victim, offender or community can experience any of the particular benefits associated with participation, [each] must be persuaded to overcome a natural skepticism and hesitancy to confront the person who injured him or her initially.”⁷⁹³ Persuading the parties to participate may be a very delicate task that involves employing what some scholars have labeled the “paradox of forgiveness.”⁷⁹⁴ The paradox suggests

⁷⁹¹ See John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, WESTERN CRIMINOLOGY REVIEW 1, 9 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 17, 1999). See also Phelan A. Wyrick & Mark A. Costanzo, *Predictors of Client Participation in Victim-Offender Mediation*, 16 MEDIATION QUARTERLY, 253, 261 (1999) (quoting S. Woolpert).

⁷⁹² See *id.* at 8.

⁷⁹³ See John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, WESTERN CRIMINOLOGY REVIEW, 1, 7 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 17, 1999).

⁷⁹⁴ *Id.*

that the more one talks about forgiveness and reconciliation while encouraging parties to participate, the less likely it is that victims will participate and have the opportunity to experience elements of forgiveness.⁷⁹⁵

Not everyone is convinced that avoiding a conversation about forgiveness is the most constructive route to take when speaking with victims. Some point out that it is not acceptable to pressure a victim into forgiving or feeling as if he or she must forgive an offender during a mediation session.⁷⁹⁶ At the same time, Martha Green, a mediator in the Richland County Court of Common Pleas, contends that it is the mediator's job to discuss mediation-related issues that are forefront in a victim's mind.⁷⁹⁷ She reasons that the issue of forgiveness is sometimes an issue that needs to be addressed in a neutral way, just as any other issue important to the participants. Forgiveness also often means different things to different people, which may become an important issue, particularly in a context where there are cultural differences between the participants.⁷⁹⁸ Thus, some who practice in the field have rejected the seemingly hands-off approach that is suggested under the paradox theory. With little agreement and much debate, forgiveness may be a sensitive issue that courts may want to consider when dealing with participants.

⁷⁹⁵ *Id* (citing Mark S. Umbreit, *MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE*, 154 [1995]).

⁷⁹⁶ Telephone interview with Martha Green, Mediation Coordinator, Richland County Court of Common Pleas (May 3, 1999).

⁷⁹⁷ *See id.*

⁷⁹⁸ *See id.*

B. CHOOSING AND TRAINING MEDIATORS

1. Options for staffing a program

There are many considerations that may arise when choosing a mediator for a VOM. Most traditional VORP programs use trained community volunteers to conduct the mediation sessions.⁷⁹⁹ Although the amount of time the volunteers may potentially invest in the program can be very great, recruiting volunteers has not been documented as a major difficulty in implementing a program. In cases involving serious, and particularly violent crimes, however, mediators are most often highly trained staff members.⁸⁰⁰ Some programs prefer to use full-time staff, including mediators, or a combination of staff with volunteers to mediate.⁸⁰¹ The theory behind using a full-time staff person is based upon the premise that there will be a mediator available at all times, as time demanded of the mediator may be more unpredictable and more extensive than with civil cases.⁸⁰²

⁷⁹⁹ See Mike Niemeyer & David Shichor, *A Preliminary Study of a Large Victim/Offender Reconciliation Program*, 60-SEP FED. PROBATION 30, 31 (1996) (noting that volunteers are “best able to mediate between the victims and offenders and to provide them the time, energy and cultural sensitivity required”). For more information about the potential benefits and drawbacks of using volunteer mediators, *please see* Chapter 13.

⁸⁰⁰ See Mark S. Umbreit, Ph.D., “Violent Offenders and their Victims”, in *Mediation And Criminal Justice*, 99, 111 (Martin Wright and Burt Galaway, eds., 1989).

⁸⁰¹ See Mark S. Umbreit, Ph.D. & William Bradshaw, *Victim Experience of Meeting Adult vs. Juvenile Offenders: A Cross-National Comparison*, 61-DEC FED. PROBATION 33, 35.

⁸⁰² See Michael Wandry, “Organizational Demands on Mediation Programs: Problem of Realization”, in *Mediation and Criminal Justice*, 491, 492-493 (Martin Wright and Burt Galaway, eds., 1989).

2. Co-mediation

According to a national survey, most programs also routinely use co-mediation models as opposed to a single mediator.⁸⁰³ The justifications offered for this trend include training new mediators, quality control, teamwork, case processing and debriefing, safety, balancing racial/ethnic/gender/age diversity and involving more community volunteers.⁸⁰⁴ The survey also revealed that the average training period for victim-offender mediators was 31 hours, not including apprenticeship requirements.⁸⁰⁵

⁸⁰³ See *National Survey of Victim Offender Mediation Programs in the United States*, VOMA CONNECTIONS (Victim-Offender Mediation Association, New Smyrna Beach, Fla.), Winter 1998, 9. (finding that 70 percent used co-mediation model routinely, 23 percent used co-mediation occasionally, and 7 percent used solo mediators).

⁸⁰⁴ *Id.*

⁸⁰⁵ *See id.*

3. Advanced training

Mediator training and experience are particularly important in victim-offender situations.⁸⁰⁶ Although training on the basics of mediation will be similar to that of civil mediation, the mediator is often required to have additional training in areas such as attending to the needs of victims and offenders and familiarity with the criminal justice process, especially when addressing violent crimes.⁸⁰⁷ Courts may also wish to hire people with special training, like social workers, who are already trained to deal with trauma and mental anguish. However, that person must be trained in how to identify with the role of a mediator, rather than act as counselor, to the victim and the offender.⁸⁰⁸

⁸⁰⁶ See Mark S. Umbreit, *Mediating Interpersonal Conflicts: A Pathway to Peace*, 152 (1995). Michael Wandry, “Organizational Demands on Mediation Programs: Problem of Realization”, in *Mediation and Criminal Justice*, 491, 497-498 (Martin Wright and Burt Galaway, eds., 1989). See also Mark S. Umbreit, Ph.D. & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 *MEDIATION QUARTERLY* 235, 249 (1999).

⁸⁰⁷ See *id.* See also Marty Price, *Can Mediation Produce Justice? A Restorative Discussion for Mediators*, ADR REPORT (Victim-Offender Reconciliation Program Information and Resource Center, Camas, Wash.) 5, also online at <<http://www.vorp.com/articles/justice.html>> (last modified October 29, 1997).

⁸⁰⁸ See Mark S. Umbreit, Ph.D., *MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE*, 152 (1995).

It is important that the mediator know how to relate effectively with the parties in order to facilitate a discussion which will be constructive and satisfying.⁸⁰⁹ For the victim, it may be important that the mediator have the following:

- An understanding of how to deal with victimization experience and phases;
- Experience in dealing with grief and loss;
- A good understanding of post-traumatic stress; and
- Access to collaboration with psychotherapists if necessary.⁸¹⁰

For an effective mediation with the offender, it may be important that the mediator have the following:

- An understanding of the criminal justice and corrections process;
- An understanding of the experience of incarceration;
- The ability to communicate effectively with offenders without being judgmental; and
- The ability to communicate with high-level correctional officials.⁸¹¹

⁸⁰⁹ *See id.* at 152.

⁸¹⁰ *See id.*

⁸¹¹ *See id.*

Thus, in addition to the technical mediation skills that a skilled mediator should possess, a mediator who works with victims and offenders should also have a basic understanding of trauma and its effects and be familiar with the criminal justice process and how to communicate effectively with those who are involved in the process.⁸¹² This training is particularly necessary for programs that use a mediation model which promotes pre-mediation contacts with the individual parties. The mediator may have to communicate effectively in order to persuade the parties to participate in the program and to prepare them adequately for the experience. These initial contacts may also include coaching the offender on victim sensitivity.⁸¹³

C. CASE SELECTION

1. Cases suited for mediation

The types of cases selected for VOM can vary depending upon the goals of the program, the jurisdiction of the court and the needs of the community. The three most common offenses referred to victim-offender mediation are vandalism, minor assaults and thefts.⁸¹⁴ However, the VOMA survey also reported that

⁸¹² *See id.*

⁸¹³ *See id.* at 147 (The mediator may even have to coach the offender on the proper language to use, if the offender is inarticulate).

⁸¹⁴ *See National Survey of Victim Offender Mediation Programs in the United States, VOMA Connections (Victim-Offender Mediation Association, New Smyrna Beach, Fla.), Winter 1998, 1.*

mediations are being conducted where severe violence occurred,⁸¹⁵ and some programs even allow mediation to occur with prisoners who are currently on death row.⁸¹⁶ In the instances of severe violence, restitution may not be a popular option, but reconciliation in these cases may be critical to the victims and their family members.⁸¹⁷ Research consistently shows that mediation brings about a reduction in fear and anxiety and allows the victims to tell their story and then get on with their lives without lingering questions and fears.⁸¹⁸ It is even suggested that a biological change occurs when individuals are permitted to speak about instances that carry great emotional significance.⁸¹⁹ Thus, the most severely harmed victims and their families may benefit remarkably from meeting with their offenders.

⁸¹⁵ *See id.*

⁸¹⁶ *48 Hours* (CBS television broadcast, February 4, 1999) (broadcasting an actual mediation between a death row inmate and the mother of a murder victim in the Texas Mediation/Dialogue Program).

⁸¹⁷ *See id.*

⁸¹⁸ *See* John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, WESTERN CRIMINOLOGY REVIEW, 1, 20 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 17, 1999).

⁸¹⁹ *See id.*

2. Cases not suited for mediation

It may, perhaps, be most helpful to note which types of cases may not be suited for VOM. According to commentators, the cases to avoid do not generally fall into a certain crime classification, but rather are dependent upon individual circumstances. An inappropriate case may be one in which there is extreme hostility between the parties, when the offender has not accepted responsibility for his or her actions, or does not show any remorse.⁸²⁰ Another circumstance is one in which the offender or victim is predisposed to threaten, assault or retaliate.⁸²¹ Lastly, if the victim is only interested in a meeting in order to express vengeance or to shame the offender, VOM would not be an appropriate option.⁸²²

A primary function of the referral mechanisms and the initial contacts is to screen those types of cases that may lead to a re-victimization or otherwise have harmful effects on either participant.⁸²³ Thus, these initial stages are often taken very seriously and handled by those qualified to make determinations about the possibilities of those potential problems. Thus, if the initial screening is handled appropriately, concerns about harming the victim again or degrading the offender should significantly decrease.

⁸²⁰ *See id.*

⁸²¹ *Id.*

⁸²² Telephone interview with Martha Green, Mediation Coordinator, Richland County Court of Common Pleas (May 3, 1999).

⁸²³ *See id.*

D. TIMING

There are two different concerns with regard to timing in victim-offender mediation. One is when a case should be mediated, and the other is how long it should take to process a case. Obviously, both depend largely upon what types of cases are selected and what the goals of the program are. Some general considerations may include gaining a better understanding of the victim's and offender's roles (primarily a determination of guilt) and the state's interest in prosecution (including a particular sentence), and giving the victim time to recover from a very violent and serious incident.⁸²⁴

1. When should the mediation occur?

The timing of the referral may potentially have a significant impact on the effect on the offender, the justice system, the community and also participation rates of victims. Victim-offender mediations have taken place prior to any court involvement, prior to sentencing with the result of a sentencing recommendation, while the offender is in prison, and when the offender is going to be or has been released from prison.⁸²⁵ However,

⁸²⁴ See Phelan A. Wyrick & Mark A. Costanzo, *Predictors of Client Participation in Victim-Offender Mediation*, 16 *MEDIATION QUARTERLY*, 253, 264 (1999) (finding that participation in VOM can be maximized by delaying the processing of cases involving personal offenses which is consistent with coping stages and also with Umbreit's findings in 1989 from case studies on violent offenses).

⁸²⁵ See Marty Price, *CAN MEDIATION PRODUCE JUSTICE? A RESTORATIVE JUSTICE DISCUSSION FOR MEDIATORS*, 5 <<http://www.vorp.com/articles/justice.html>> (visited 2/5/99).

most meetings occur between sentencing and disposition.⁸²⁶ It is also clear that mediation in serious, and especially in violent cases, does not take the place of prosecution or sentencing.⁸²⁷

Some community programs may also hold victim-offender mediation before a case is processed by a court or at least prior to a formal admission of guilt. These situations present more controversy, as many recommend that VOM, particularly in serious crimes, should occur only after a clear determination of guilt.⁸²⁸ The arguments given are that there is great potential for a victim to be “re-victimized” by the offender if the offender has not admitted guilt or accepted any responsibility for his or her actions. In addition, there may be concerns about self-incrimination, as admission of guilt to a crime during mediation is not protected by any confidentiality statute (see Chapter 9). Programs that offer mediation post-determination but pre-sentencing do not bring as much criticism, yet there are those who believe that the mediation should have no effect on sentencing criminals whatsoever, even if the sentencing recommendations are carefully reviewed and approved by a judge.

⁸²⁶ See John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, WESTERN CRIMINOLOGY REVIEW, 1, 12 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 17, 1999).

⁸²⁷ See *id.*

⁸²⁸ See Marty Price, COMPARING VICTIM OFFENDER MEDIATION PROGRAM MODELS (last modified February 15, 1997) <<http://www.igc.org/voma/docs/mpcomp.html>>.

A recent study has also found that the timing of a referral may also have a significant impact on the likeliness of victims to participate in VOM.⁸²⁹ The study found that victims of property crimes are more likely to participate in a VOM when less time had passed between the crime and the referral. It also found the opposite to be true with personal crimes, for which participation increases as more time passes between the offense and the referral. Thus, “as time passes the probability of participation increases for personal offenses and decreases for property offenses.”⁸³⁰ This evidence is consistent with earlier studies regarding the motivations of participants to attend victim-offender mediation.⁸³¹ Those studies have found that victims of property offenses are generally more interested in recovering their losses through prompt restitution.⁸³² Conversely, victims of personal crimes may not have the same motivation for prompt restitution and may progress through stages of coping that include anger and fear early on, but may develop into a desire to make contact with the offender at a later point.⁸³³

⁸²⁹ See Phelan A. Wyrick & Mark A. Costanzo, *Predictors of Client Participation in Victim-Offender Mediation*, 16 *MEDIATION QUARTERLY*, 253 (1999).

⁸³⁰ *See id.* at 264.

⁸³¹ *See id.*

⁸³² *See id.*

⁸³³ *See id.*

The timing of a case may be a critical decision to make when planning a VOM program. Due to the significant impacts and types of effects that it may have, good planning may help to alleviate other common concerns such as violations of due process, gaining community support and eliciting participation in the program. The length of time spent processing cases in victim-offender mediation may also be a consideration when planning a program.

2. How long will it take to mediate a case?

The time involved in the process can range from one hour on average for the actual meeting⁸³⁴ to 10 to 20 hours of involved preparation, mediation and follow-up.⁸³⁵ The total average time spent mediating minor property offenses is 4 to 6 hours, while the average time spent mediating violent offenses ranges from 15 to 20 hours, with some cases demanding up to 100 hours.⁸³⁶ The timing component may be extremely influential in deciding what types of mediators to use, depending on such factors as the time that volunteers have to

⁸³⁴ See John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, WESTERN CRIMINOLOGY REVIEW, 1, 2 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 17, 1999).

⁸³⁵ See Michael Wandry, "Organizational Demands on Mediation Programs: Problem of Realization", in *Mediation and Criminal Justice*, 491, 492-493 (Martin Wright and Burt Galaway, eds., 1989).

⁸³⁶ See Mark S. Umbreit, "Violent Offenders and their Victims", in *Mediation And Criminal Justice*, 99, 111 (Martin Wright and Burt Galaway, eds., 1989).

participate and whether full-time staff people are needed to support the program. The time and resources spent on this program may also reflect how much this program is needed in the community.

Obviously, having a VOM available may take time, effort and money to implement, and does not promise any short-term money or timesaving to the court, although there is potential for savings (see Martha Green's comments in Section IV [E] [1]). On the other hand, with the very high rates of victim and offender satisfaction with the program,⁸³⁷ this added service may be considered a valuable addition to the community and especially to the participants. However, the community context in which the program is located may be very influential in how much time and how many resources are spent on a program, or even whether a program has enough support to exist.⁸³⁸

⁸³⁷ See John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, WESTERN CRIMINOLOGY REVIEW, 1, 6 (1998) available online at <<http://wcr.sonoma.edu/v1n1/gehm.html>> (visited February 17, 1999).

⁸³⁸ See Mark S. Umbreit, Ph.D. & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 MEDIATION QUARTERLY 235, 242 (1999).

E. FUNDING

Although the principles of locating funding for a VOM are basically similar to those of a civil mediation program (see Chapter 5), there may be different budgets for these programs and additional funding sources which may be available. Once again, the community context of where the program is located may be crucial to what type of funding will be available for this type of program.⁸³⁹

1. Budget for a VOM

In many mediation programs, particularly in smaller communities, budgets are a primary concern and may determine the success and even the existence of a program.⁸⁴⁰ Unfortunately, adult victim offender mediation may not be cheap, especially when a court chooses to hire personnel to run the program, rather than rely on volunteers. The national survey referenced earlier in this chapter revealed that the average budget of 116 programs interviewed by telephone was \$55,077.⁸⁴¹ However, there was quite a range of costs from total voluntary programs (\$1) to costs exceeding \$400,000.⁸⁴² Although the details of these programs are not

⁸³⁹ *See id.*

⁸⁴⁰ *See Harry Mika, The Practice and Prospect of Victim-Offender Programs*, 46 SMU L. REV. 2191, 2201 (1993).

⁸⁴¹ *See Mark S. Umbreit, Ph.D. & Jean Greenwood, National Survey of Victim-Offender Mediation Programs in the United States*, 16 MEDIATION QUARTERLY 235, 238 (1999).

⁸⁴² *See id.*

outlined in the report, it does reveal that the average number of full time staff members reported was 2.3 and the average number of volunteers per program was 37.⁸⁴³

Martha Green, mediator in the Face-to-Face Program for Adult Offenders, estimates that the budget used to operate the VOM in the Court of Common Pleas in Richland County is approximately \$10,000 per year.⁸⁴⁴

She believes it is important to consider the expenses of the program together with the cost savings that may occur as a result of the meetings:

For example, on the Early Release Hearings (Shock Probation), victims are much more comfortable having an offender released back into the community when they have had an opportunity to personally assess the offender's change of heart and attitude and to have input into the terms of the probation. Imagine the cost savings to the community for not holding an offender in prison (especially when probation requires offenders to be productive members of the community through maintaining employment, paying child support and perhaps community service)! Additionally, probation officers have testified that probationers who have had VORP meetings are much more likely to comply with the terms of their probation and complete restitution payments.⁸⁴⁵

⁸⁴³ *See id.*

⁸⁴⁴ Letter from Martha Green, Mediation Coordinator, Richland County Court of Common Pleas (March 4, 1999) (on file with the author) (this number represents a portion of her salary according to how much of her time is dedicated to the program [approximately 8 hours per week]).

⁸⁴⁵ *See id.*

2. Funding sources

If an existing framework does not have a budget that will support a victim-offender mediation program and is not able to strictly utilize volunteers, getting funding from other sources may be an option in some communities. Although securing funding for a VOM program is a common concern for institutions, there may be a variety of funding options available within each individual community, particularly if one is resourceful. A national survey revealed that state or local governments were the primary sources for funding the programs identified in the survey.⁸⁴⁶ However, because VOM is a relatively new concept that is not nearly as well-recognized or understood as civil mediation,⁸⁴⁷ it may be much more difficult to obtain funding from entities such as state legislatures or other constituent-based sources. Ultimately, as VOM becomes more popular, it may become more acceptable and viewed as a legitimate public expense.⁸⁴⁸

It may also be possible to get funding from particular community members or existing organizations that have an interest in promoting this type of service to victims of the community. Foundations, churches, individual contributions and the federal government were also identified as sources of funding for programs

⁸⁴⁶ See Mark S. Umbreit, Ph.D. & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 *MEDIATION QUARTERLY* 235, 238 (1999).

⁸⁴⁷ See Harry Mika, *The Practice and Prospect of Victim-Offender Programs*, 46 *SMU L. REV.* 2191, 2201 (1993).

⁸⁴⁸ See *id.*

around the state.⁸⁴⁹ In Ohio, a grant from the Office of Criminal Justice Services (OCJS) supported initiation of a Victim-Offender Mediation Training Project for courts in Ohio interested in instituting juvenile programs.⁸⁵⁰

Three courts of common pleas in Ohio have also managed to fund their own victim-offender mediation programs.⁸⁵¹ Funding for some programs in the Ohio trial courts, including civil, criminal, juvenile and domestic relations divisions, was a result of a grant given by the Ohio Supreme Court.⁸⁵² The Court has funded two and three year projects with budgets of up to \$145,000 per year.⁸⁵³ These programs may be encouraging to those who fear that finding funding for these types of programs is an impossible task.

⁸⁴⁹ *See id.*

⁸⁵⁰ *See* Stephanie A. Beauregard, *Court-Connected Juvenile Victim-Offender Mediation: An Appealing Alternative for Ohio's Juvenile Delinquents*, 13 OHIO ST. J. ON DISP. RESOL. 1005, 1023 (1998).

⁸⁵¹ The three counties include Montgomery, Stark and Richland.

⁸⁵² *See* Ann N. Mack, "New Mediator Seeks Peace Outside Court", *News Journal*, December 17, 1997, 1A.

⁸⁵³ *See id.*

C. CONFIDENTIALITY

Another concern that may arise is that of whether confidentiality applies to victim-offender mediation. Ohio Rev. Code 2317.023 (A) protects the confidentiality of mediation communication in civil cases (see Chapter 9), yet it is unclear as to whether that same privilege would protect communication during a victim-offender mediation. The lack of clarity arises out of the word “dispute”, which is one of the requirements for the privilege to attach.⁸⁵⁴ Because it is not clear that VOM fits clearly into the definition of mediation, the communications that occur during a VOM may not be confidential in Ohio. Also, the statute does not preclude use of mediation communications in criminal proceedings.

In addition, there is a lack of uniformity across the nation as some states have confidentiality provisions for VOM and some do not.⁸⁵⁵ Thus, concerns may arise if participants are misinformed about the mediation process, such as whether communication during the VOM will be confidential in their particular state.⁸⁵⁶ However, these concerns have not been documented in any actual controversies to date in Ohio. Issues of confidentiality, along with the other concerns, may also vary greatly according to the structure of the program. Thus, as previously mentioned, many of the concerns may be addressed and alleviated simply by making informed choices during the planning process.

⁸⁵⁴ See Ohio Rev. Code 2317.023 (A) (1996 and Supp.).

⁸⁵⁵ See Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1288 (1994).

⁸⁵⁶ See *id.*

V. Conclusion

Victim-offender mediation continues to gain popularity in Ohio, nationally and even internationally. Although there are valid concerns about the process and how to successfully implement a program, initial studies have found that this process can be very satisfying to both victim and offender. Long-term effects of victim-offender mediation are uncertain at this point. However, many are hopeful that it will eventually have very positive and quantifiable impacts on crime and the criminal justice system. In the meantime, adding a victim-offender mediation program may seem like a radical idea that is not worth the time or money it would take to implement such a program. Nonetheless, if it were up to past participants to decide if programs should be implemented in communities across the country, the result would appear to be an overwhelming “yes!” With this in mind, along with information about the growth of victim-offender mediation, the adoption of a victim-offender mediation program may not be quite as implausible an idea as one might have imagined.

The proper consideration and preparation of a volunteer program can maximize positive impacts and minimize negative ones. Use of a volunteer program affects the management and monitoring of mediators, as well as the public perception and fairness of the mediation process. Volunteers can have a positive influence on your mediation program as long as the volunteer program is effectively managed. Statistics collected from four of Ohio's "Settlement Weeks" show that the perception of the quality of volunteer mediators is high. Statistics collected from a random sample of Ohio attorneys show that attorney involvement with mediation as a third-party neutral makes them a significantly more likely to suggest mediation to their clients.

CHAPTER THIRTEEN ~ IMPLEMENTING A VOLUNTEER PROGRAM

By Paul Garver

“Success of programs like Settlement Week and the data that we have been able to collect from these programs illustrates how effectively volunteer mediators can be used.”

~Roselle Wissler
Research Psychologist



- | | |
|--|---------------|
| I. Introduction | 13 - 3 |
| II. Management Issues
<i>By planning for the roles that volunteers will fill, how they will be selected and trained, and how cases will be procedurally tracked, a court can maximize the effectiveness of a volunteer program.</i> | 13 - 4 |
| III. Monitoring Volunteers
<i>It is important to monitor volunteers to ensure that they are maintaining a desirable level of quality. Statistical data from Ohio’s “Settlement Week” shows that volunteer quality in these programs is viewed very highly.</i> | 13 - 9 |

continued

IV. Public Perception of the Mediation Program	13 - 11
<i>The usage of a volunteer program may cause the public to form certain perceptions about the mediation program. The court needs to be able to address these perceptions.</i>	
V. Maintaining Fairness within the Mediation Process	13 - 13
<i>There should be no real or perceived conflicts of interest within the mediation process so that fairness is maintained. Confidentiality is also important to maintaining fairness.</i>	
VI. Conclusion	13 - 14

I. Introduction

The utilization of a volunteer program can have a number of both positive and negative impacts. Proper consideration and preparation of a volunteer program can maximize these positive effects and minimize the negative ones. The successful use of volunteer programs like “Settlement Weeks” in some courts shows the potential of these programs.⁸⁵⁷ Before developing and implementing a volunteer program, it is important to consider these impacts and to effectively prepare for them in advance.

The special considerations related to instituting a volunteer program can be classified as follows: management issues (including determining the role of volunteers, selecting and training volunteers and tracking the cases procedurally); monitoring volunteers; dealing with the public perception of the mediation program; and maintaining fairness within the mediation process (including conflicts of interest and confidentiality concerns). If these decisions are made appropriately, a volunteer program can be highly beneficial for a mediation program.

⁸⁵⁷ See Harrold Paddock, *SETTLEMENT WEEK: A PRACTICAL MANUAL FOR RESOLVING CIVIL CASES THROUGH MEDIATION* (1990).

II. Management Issues

Management issues for a volunteer program include determining the role of the volunteers, selecting the volunteers and training them, balancing the tension between the quality of mediation services and the desire to offer mediation services to the largest possible number of litigants and tracking cases procedurally. Recommendations regarding each of these issues can be made by the advisory committee and then carried out by the appointed court personnel.

There are many different roles that volunteers can fill in a volunteer program. College students in communications or statistics could be utilized to research and compile data regarding mediations. Law students could be used as assistants to the mediators and to perform any research that might need to be done ahead of time. College interns could be used to help with case management and scheduling. Local attorneys could be utilized as volunteer mediators in “settlement weeks,” volunteer mediators throughout the year or volunteer co-mediators with expertise in a certain area of dispute. This chapter focuses on the use of local attorneys as volunteer mediators, although much of what is discussed can be applied directly to the other uses of volunteers (see Chapter 3 for a more extensive listing of possible volunteer activities).

After determining a role for the volunteers, the court needs to select volunteers to fill these roles. Magistrate Harold Paddock, an organizer and administrator of Settlement Week, points out that many attorneys already possess the characteristics of a good mediator: patience, objectivity, integrity, ability to listen to both sides of the case without forming a conclusion, impartiality and the ability to frame good questions to bring out significant information.⁸⁵⁸ He suggests that the court and the local bar take an equal role in selection of attorney volunteers so that those who are chosen have the confidence of their peers.⁸⁵⁹ The court could then form a bench-bar selection committee. This committee could either decide whom they would ask to serve and then send them invitations or put out a general solicitation and then select from the individuals who respond.⁸⁶⁰ Either way, the committee should be small enough to move quickly and should compile a list of candidates, with more names than are necessary in case an attorney cannot attend because of personal or professional commitments. This list could then be reviewed by all of the judges on the local court to ensure that the attorneys have the confidence of the judges.⁸⁶¹

It is also important to develop a broadly diverse and representative panel of neutrals. This can be done to insure that the pool of neutrals does not disproportionately reflect the views of only one part of the client base that the program will serve. It

⁸⁵⁸ *See id.* at 39.

⁸⁵⁹ *See id.* at 40.

⁸⁶⁰ *See id.* at 40.

⁸⁶¹ *See id.* at 40.

may be difficult to develop this diversity when the pool of neutrals is small. By utilizing a volunteer program, the court has the opportunity to establish a pool of neutrals with a broad range of diversity that is representative of the client base it will serve.⁸⁶²

After selecting the mediators for the volunteer program, the mediators should be trained. Training also improves selection of mediators. The designation as a volunteer court mediator is conditioned on the successful completion of a court-run or monitored training program that weeds out unsuitable applicants.⁸⁶³ Magistrate Paddock asserts that mediation training needs to be “practical, down-to-earth, and ‘how-to’ oriented.”⁸⁶⁴ The training should be a mixture of lectures, practice exercises, viewing of actual mediations and question-and-answer time. Trainees should be given reference materials to review and study as well as a list of resources that they can either purchase or check out of the local library.

There are various sources for trainers or for information on trainers: local law schools, local dispute resolution programs, the American Bar Association Section on Dispute Resolution, the Society of Professionals in Dispute Resolution and the Supreme Court of Ohio Committee on Dispute Resolution (see Chapter 4).

Ohio attorneys have a continuing and constant need for continuing legal education (CLE) credits. By offering attorneys CLE credits for attending the training, the court helps to assure that the training session will be well-attended.

⁸⁶² See Wayne Brazil, *Comparing Structures for the Delivery of ADR Services By Courts: Critical Values and Concerns* 14 OHIO ST. J. ON DISP. RESOL. 772 (1999).

⁸⁶³ See *id.* at 84.

⁸⁶⁴ See Harrold Paddock, *SETTLEMENT WEEK: A PRACTICAL MANUAL FOR RESOLVING CIVIL CASES THROUGH MEDIATION* 65 (1990).

Balancing the tension between the quality of mediation services and the desire to offer mediation services to the largest possible number of litigants can be an important element in public perception of the fairness of a mediation program. The public is more likely to regard the mediation process as fair if parties are not frozen out of the mediation process because they cannot pay, if the procedural path of access is straightforward and if there are fewer occasions to feel intimidated.⁸⁶⁵ Volunteer mediators increase the number of referrals and cases that can be taken by a court-connected mediation program at no cost to the participants. Also, courts that utilize a large pool of volunteer mediators appear to be much more successful at spreading the “culture” of mediation. This makes the community more accepting of mediation services.⁸⁶⁶ In a random sample of 2,330 registered attorneys in the state of Ohio, attorneys were significantly more likely to refer a client to mediation if they: served as a mediator, had a CLE in dispute resolution or had mediation training.⁸⁶⁷ This research suggests that involving attorneys as volunteer mediators helps to spread the use of mediation.

There is a danger that a mediator who spends most of each day mediating cases will begin to suffer from fatigue. This fatigue can affect their performance within the mediations. By having a pool of volunteer mediators that the court can utilize,

⁸⁶⁵ See Wayne Brazil, *Comparing Structures for the Delivery of ADR Services By Courts: Critical Values and Concerns* 14 OHIO ST. J. ON DISP. RESOL. 772 (1999).

⁸⁶⁶ See *id.* at 763.

⁸⁶⁷ See Roselle Wissler, OHIO ATTORNEYS’ EXPERIENCE WITH AND VIEWS OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES, The Supreme Court of Ohio Committee on Dispute Resolution, 27) (1996).

this pressure can be taken off the full-time mediator. The volunteer mediators would help by sharing the number of cases that come through the program.⁸⁶⁸

The court's capacity to maintain procedural track and time control over the cases that participate in mediation is essential. The court must be careful that by utilizing a volunteer program it does not give up any of its procedural tracking and time-control abilities. If the court loses procedural track or time control over a case, more time will be wasted by the mediation referral. The court, therefore, should institute tight record-keeping and reporting processes for volunteers to follow. These processes can be coordinated so that full-time court personnel always know the status of the case.⁸⁶⁹

⁸⁶⁸ See Wayne Brazil, *Comparing Structures for the Delivery of ADR Services By Courts: Critical Values and Concerns* 14 OHIO ST. J. ON DISP. RESOL. 772 (1999).

⁸⁶⁹ See *id.*

III. Monitoring Volunteers

Monitoring volunteer mediators is especially critical for those mediators whom the court utilizes frequently, and is feasible, even in the volunteer context. Monitoring might focus on the participants' satisfaction with the process, the settlement rates and other pertinent information (see Chapter 11). Monitoring might also be accomplished through co-mediation by a new mediator and a "veteran." The veteran can observe the mediation and intervene if necessary. The veteran can also provide the new mediator with feedback on performance and provide the mediator with tips for the next time they mediate.

In order to further the evaluation and education of volunteer mediators, informal breakfasts and lunch meetings can be set up for volunteers to share their insights and experiences.⁸⁷⁰ Individual feedback helps to promote high quality, but is difficult and expensive. And, because the people who serve as volunteer mediators usually are accomplished professionals and private citizens, not court employees, at least some of them may not react well to being monitored or debriefed on a regular basis.⁸⁷¹ Therefore, it is important to institute monitoring procedures, if they are to be used, at the beginning of the program, to inform all volunteer mediators of this practice before they begin to mediate, and to limit the burden on the mediators.

⁸⁷⁰ *See id.* at 801.

⁸⁷¹ *See id.* at 804.

Monitoring efforts during “Settlement Week” held in the general division of four courts of common pleas (Franklin, Hamilton, Lucas and Richland counties) have yielded very favorable results in regards to the use of volunteer mediators. These results document that, of the attorneys who participated and completed survey responses, 88 percent believed the process was very fair, and 96 percent believed the role played by the mediator was every effective.⁸⁷² Virtually all of the parties to the mediation felt that the mediator was neutral and even-handed (96 percent), and a majority felt the mediation process was very fair.⁸⁷³ For example, the analysis of the “Settlement Week” data pointed to the effectiveness of setting the mediation early in the case.⁸⁷⁴ Not only do these results substantiate the program’s effectiveness, but they also identify areas for improvement.

⁸⁷² See Roselle Wissler, EVALUATION OF SETTLEMENT WEEK MEDIATION, 12 (The Supreme Court of Ohio Committee on Dispute Resolution, 1997).

⁸⁷³ See *id.* at 13.

⁸⁷⁴ See *id.*

IV. Public Perception of the Mediation Program

Money is a major factor that may affect the public's perception of the motives that underlie a court's mediation program, and how much a court values that program.⁸⁷⁵ When courts utilize their own resources to pay the full costs of providing a mediation program, the public is less likely to infer that the purpose of the program is to reduce demands for the court's services or to dump work the court should be doing off to the private sector. Instead, the public could perceive that the court believes these services to represent a real added value for the parties and community. Courts instituting a volunteer mediator program may need to combat this public association of spending and value with repeated affirmations of the court's confidence in the quality and value of the volunteers' work.⁸⁷⁶

There is also a slight risk that the parties will perceive a volunteer mediator as not fully committed to work as a neutral.⁸⁷⁷ It is important for the court to discourage this belief by recognizing the efforts of volunteer mediators publicly. By showing appreciation to all the volunteer mediators, instead of recognizing individuals, the court will not give the perception that the court favors someone who may appear in the courtroom as counsel at a later date. This will help to combat the public's belief that the volunteer mediators do not devote their full resources to the work.

⁸⁷⁵ See Wayne Brazil, *Comparing Structures for the Delivery of ADR Services By Courts: Critical Values and Concerns* 14 OHIO ST. J. ON DISP. RESOL. 772 (1999).

⁸⁷⁶ See *id.* at 752.

The utilization of a volunteer mediator program contributes to the acknowledgment that what is best for society is an ongoing, cooperative, dialectical relationship between the public and private sectors, each teaching and enriching the other, and meeting needs that the other cannot. This provides strengthened ties within the community and increased public awareness, results that are more difficult to obtain for courts using a staff mediator and no volunteers.⁸⁷⁸

⁸⁷⁷ *See id.*

⁸⁷⁸ *See id.* at 753.

V. Maintaining Fairness within the Mediation Process

In order to maintain perceived and actual fairness, the volunteer mediator should have no perceived or actual conflicts of interest. Developing conflict of interest and disclosure rules for volunteer mediators, though needed, takes time.⁸⁷⁹ The court should communicate these procedures to the participants and attorneys involved so that they have confidence that the mediators are neutral (see Chapter 10).

Confidentiality is essential to fairness within the process of mediation. The closer the mediator's connection to the court, the more likely participants are to assume that the mediator will disclose confidential information to the judge.⁸⁸⁰ Participants are probably more likely to think that a full-time court mediator would breach their confidentiality than would a volunteer mediator.⁸⁸¹ Courts can help to convince participants that their confidentiality is kept by utilizing volunteer mediators (see Chapter 9).

⁸⁷⁹ *See id.* at 770.

⁸⁸⁰ *See id.* at 775.

⁸⁸¹ *See id.*

VI. Conclusion

A volunteer program can be highly beneficial for a court's mediation program if the court handles adeptly these special issues. The success of volunteer programs has been shown by various "Settlement Weeks" that have been instituted in a number of Ohio's courts. These programs also receive a large amount of media attention and help to generate public support for the mediation program. Overall, effectively managed volunteer programs help mediation programs to become more efficient and more successful.