

Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices

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I. INTRODUCTION

This Article is part of a broader research project designed to examine court-based mediation from a new vantage point. The objective of the project, which has two stages, is to promote greater understanding of the costs, benefits, and other implications of selecting particular mediation program design models.¹ The models chosen for the comparisons are:

1. In-house staff mediators;²
2. Court contracts with a nonprofit service provider;³
3. Private mediators paid by the court;⁴
4. Private mediators paid by the parties;⁵

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¹ The Western Justice Center Foundation, The Ohio State University College of Law, and state court alternative dispute resolution programs in five states are cooperating on an examination of the costs and benefits of the principal program models for delivering court-connected mediation services. The participating states are Colorado, Georgia, Hawai'i, Maine, and Ohio. The William and Flora Hewlett Foundation has provided the initial support for the research project through grants to the two sponsoring organizations.

² Judges refer parties to mediation conducted by court personnel who have been recruited and trained for their roles as neutrals. The neutrals are paid by the court and function under the court's supervision. No payment is required from the parties.

³ The court maintains a contract with a nonprofit organization, such as a community mediation center, which agrees to accept cases referred by judges. The parties receive services free of charge or at a nominal cost, and the mediators serve as volunteers.

⁴ The court refers cases to a pool of private mediators, who are compensated by the court for their time, usually on the basis of a fixed fee but sometimes based on a flexible range determined in part by the parties. The court may contract with individual mediators or with a for-profit mediation firm. The parties do not pay for the services of the mediators; services are paid either by the court or by their mediation firm.

⁵ The court refers cases to mediation, but parties make their own arrangements with private mediators who are paid by the parties directly. Typically the parties are able to make their own selection of a mediator (sometimes courts provide a list of

5. Volunteer mediators supervised by the court;⁶ and
6. Mixed programs.⁷

Five states, Colorado, Georgia, Hawai'i, Maine, and Ohio, were selected as the focus for our inquiry in the first stage of the project. All of the states have substantial experience with court-based mediation and strong leadership from statewide court-based dispute resolution offices.

Summaries of activities within the five states, with particular reference to the program models listed above, were provided by program directors from each state.⁸ Our initial inquiries will lay a foundation for a more detailed examination of selected programs within each state based upon what is learned from our preliminary inquiries and related research. Researchers⁹ have considered the information collected from the perspectives of different stakeholders in court-based mediation programs, including judges, court administrators, state policy makers, and litigants who are ordered to mediate their disputes before having access to a trial.

I will examine the models from the perspective of consumers—litigants who are referred to mediation. Due to the diversity of cases on state courts' civil dockets and the variations in approaches to using mediation, ranging from purely voluntary to mandatory, it is awkward and sometimes unproductive to deal with this topic generically.¹⁰ In this Article, I have

mediators from which parties may select), and if the parties are unable to agree on a mediator, the court assigns one. If the parties are unable to pay, the court will pay their share or the mediator will agree to provide services without fee.

⁶ The court organizes a pool of volunteers who are trained to provide mediation services under supervision by the court. Courts refer cases to the pool. Parties are not expected to pay for mediation services. The mediators are unpaid, but sometimes receive expenses.

⁷ The court may refer parties to mediation, but the parties may have a variety of choices about whether to use an "in-house" provider, an independent organization (nonprofit or fee-based), or a mediator from a roster maintained by the court of paid or volunteer mediators.

⁸ We are indebted to Ansley Boyd Barton, Director, Georgia Office of Dispute Resolution; Elizabeth Kent, Director, Center for Alternative Dispute Resolution, the Hawai'i State Judiciary; Diane E. Kenty, Director, Court Alternative Dispute Resolution Service, Maine Administrative Office of the Courts; C. Eileen Pruett, Coordinator of Dispute Resolution Programs, Supreme Court of Ohio; and Cynthia A. Savage, Director, Office of Dispute Resolution, Colorado Judicial Branch for their extraordinary efforts in providing comprehensive information regarding court-based mediation in their respective states.

⁹ The researchers are the Authors of the Articles in this Issue of the Journal.

¹⁰ The approaches to using court-based mediation can be placed in the following

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confined the discussion to mandatory programs for cases on the general civil docket, excluding domestic relations and small claims cases.¹¹ I assume that the intent of the programs is to channel all appropriate cases to mediation, as compared to pilot programs that have less ambitious objectives.

This Article reflects work in progress. It contains preliminary thoughts and conclusions intended to identify questions to be asked and answered when we move to the second stage of the project. I revisit familiar and persistent issues, attempting to profit from insights gained from over a

three general categories: voluntary referral; mandatory indoctrination, but voluntary referral; and mandatory referral. Mandatory referral has two subcategories—tracking of defined types of cases and referral by judicial order.

¹¹ Mandatory referral is often seen as a necessary feature of court based programs. The commentary to Rule 2 of the Georgia Supreme Court's Uniform Rules for Dispute Resolution Programs states:

Although the Georgia Supreme Court believes that mandatory participation is an essential element of an effective court-annexed or court-referred ADR program, this court recommends that parties be allowed input into the referral decision wherever possible. For example, if parties or attorneys believe that mediation would be more helpful than arbitration in a specific case, this option should be considered by the referring court.

GA. R. ALT. DISP. RESOL. APP. A, R. 2 cmt. (1999). A recent study sponsored by the Maine Judicial Department concluded:

Assuring participation in ADR as part of the required pre-trial processes is important to achieve an early focus on ADR choices. That, in many cases, will not occur without direction. It is also important because too many attorneys and parties tend to view a suggestion for voluntary ADR—if offered by them or their counsel—as a sign of weakness or less than zealous representation. Such concerns are avoided if ADR is a necessary part of the process.

REPORT AND RECOMMENDATIONS OF THE ADR PLANNING AND IMPLEMENTATION COMMITTEE OF THE MAINE JUDICIAL DEPARTMENT 11 (1998) [hereinafter MAINE REPORTS].

The Ohio Supreme Court's manual for establishing in-house civil mediation programs states:

A court mediation program is more effective when the court requires litigants to attempt mediation. Court programs that make mediation voluntary usually experience a very low number of cases mediated. Courts that order parties to attend and participate in a mediation discussion experience settlement of over half the cases mediated and a positive reaction to the mediation by lawyers and litigants.

OHIO SUPREME COURT, IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION 2-3 (1998).

decade of experience. To some extent, I temper idealism with reality regarding what can reasonably be accomplished by state courts when establishing mandatory mediation programs.

II. STATE COURT DOCKETS AND MEDIATION PROGRAMS

State courts handle a wide variety of civil and criminal cases often with courts of special jurisdiction. On the civil side of the docket, categories of cases that are typically differentiated for mediation programs are small claims, domestic relations, and general civil cases.¹² Planning considerations for establishing mediation programs for these three types of cases are quite different because of differences in subject matter, the likelihood that the parties will have legal representation, and the extent to which mandated mediation encroaches upon traditional case handling methods.

State legislatures and courts have had little difficulty recognizing the value of mediation for small claims cases, and such programs date back to the beginning of the "Alternative Dispute Resolution (ADR) movement."¹³ There was little resistance in legal circles because small claims cases, by definition, have relatively low dollar values, often involve interpersonal disputes, and the parties are typically not represented by lawyers.¹⁴ Courts could deal with these cases at little or no cost to the court or the parties by sending them to established community justice centers or using volunteer mediators.

Legislatures and courts were also quick to recognize the role that mediation might play in resolving domestic relations disputes, especially

¹² For ease of expression, I will hereafter refer to general civil cases as "civil cases." Accordingly, in the discussion I will differentiate among small claims, domestic relations, and civil case mediation programs.

¹³ See NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY & PRACTICE* § 5:02 (2d ed. 1994). Maine's small claims mediation initiatives date back to 1977. See MAINE REPORTS, *supra* note 11, at 26.

¹⁴ See Stevens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settlement: Court-Ordered Civil Case Mediation*, 19 JUST. SYS. J. 311, 316 (1997). The "vast majority" of small claims litigants in Hawai'i are pro se. See Letter from Elizabeth Kent, Director, Center for Alternative Dispute Resolution, the Hawai'i State Judiciary, to John McCrory, Author (Apr. 16, 1999) (on file with author); Memorandum from Elizabeth Kent, Director, Center for Alternative Dispute Resolution, the Hawai'i State Judiciary (Aug. 11, 1998) (on file with author); Telephone Interview with Elizabeth Kent, Director, Center for Alternative Dispute Resolution, the Hawai'i State Judiciary (Apr. 23, 1999).

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where child custody and visitation rights are at issue.¹⁵ Because lawyers were more likely to be involved in divorce cases, and mediators were often professionals from nonlegal disciplines, there was resistance to divorce mediation.¹⁶ Some states appear to have made an accommodation by assigning custody and visitation issues that focused on interpersonal considerations to mediators and property issues, which are more likely to involve legal considerations, to lawyers.¹⁷

Divorce mediation proved to be controversial for other reasons as well. Advocates for women's rights were, and remain, concerned that power imbalances disadvantage women in mediation and that mandating cases to mediation, especially those involving abusive relationships, is not appropriate.¹⁸ It was also necessary to take a hard look at the appropriate boundaries for confidentiality when mediation is used in a divorce setting.¹⁹

State legislatures and courts have been more guarded regarding the use

¹⁵ See ROGERS & MCEWEN, *supra* note 13, § 5:01; John P. McCrory, *Legal and Practical Issues in Divorce Mediation: An American Perspective*, in THE ROLE OF MEDIATION IN DIVORCE PROCEEDINGS: A COMPARATIVE PERSPECTIVE 144, 144 (1987). Maine's divorce mediation initiatives date back to 1977. See MAINE REPORTS, *supra* note 11, at 29.

¹⁶ It appears that the percentage of pro se litigants in divorce cases has risen in recent years. See *infra* note 36.

¹⁷ See McCrory, *supra* note 15, at 144 (citing Donald B. King, *Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, CAL. LAW., Jan. 1982, at 40, 40-41).

¹⁸ See Charlotte Germane et al., *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence*, 1 BERKELEY WOMEN'S L.J. 175, 188-189, 194 (1985); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549-1550 (1991); Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. J. 21, 22 (1984). But see Maggie Vincent, Note, *Mandatory Mediation of Custody Disputes: Criticism, Legislation, and Support*, 20 VT. L. REV. 255, 275-282 (1995) (arguing that empirical evidence indicates that criticism of mediation's use in domestic situations may be unfounded).

¹⁹ See ROGERS & MCEWEN, *supra* note 13, § 9:16; John P. McCrory, *Confidentiality in Mediation of Matrimonial Disputes*, 51 MOD. L. REV. 442, 464-465 (1988); McCrory, *supra* note 15, at 155-160.

Under Georgia's ADR Rule VII(B), "[c]onfidentiality does not extend to a situation in which a) there are threats of imminent violence to self or others; or b) the mediator believes that a child is abused or that the safety of any party or third person is in danger." GA. R. ALT. DISP. RESOL. VII(B) (1998). Kansas divorce mediators have a duty to report child abuse or neglect. See KAN. STAT. ANN. § 38-1522 (1998).

of mediation for civil cases.²⁰ Litigants are normally represented by attorneys²¹ and the cases fall within the mainstream of the litigation practice. Reasons offered for the reluctance of judges and lawyers to embrace mediation include the following: fear that it will alter the traditional attorney-client relationship, perhaps shifting a measure of responsibility for case control to the client;²² concern that mediation may lessen the need for traditional fee-generating work, such as extensive discovery prior to settlement negotiations;²³ lawyers may be apprehensive about negotiating in the presence of their clients;²⁴ and judges and lawyers lack experience with and understanding of mediation.²⁵ Another proffered

²⁰ For example, Maine has had legislative approval for court-based small claims mediation since 1980 and divorce mediation since 1983. Following a two-year civil case ADR conference pilot program (1995-1997), a court ADR planning committee has recommended adoption of a permanent ADR requirement using mediation as a presumptive process. See MAINE REPORTS, *supra* note 11, at 2, 11. Nevertheless, in fiscal year 1998 only eight civil cases were referred to court mediation (excluding pilot program cases). During the same period, 1000 small claims were mediated and 4000 domestic relations mediation sessions were held (not all in different cases). See Facsimile from Diane E. Kenty, Director, Court Alternative Dispute Resolution Service, Maine Administrative Office of the Courts, to John McCrory, Author (Apr. 21, 1999) (on file with author); Memorandum from Diane E. Kenty, Director, Court Alternative Dispute Resolution Service, Maine Administrative Office of the Courts (Aug. 11, 1998) (on file with author); Telephone Interview with Diane E. Kenty, Director, Court Alternative Dispute Resolution Service, Maine Administrative Office of the Courts (Apr. 21, 1999); see also James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 50-56 (1991) (noting that "pathbreaking 1987 legislation and supreme court rules . . . precipitated the third wave of interest in mediation" of civil cases; small claims and divorce mediation programs were well established).

²¹ See Clarke & Gordon, *supra* note 14, at 316.

²² See Eileen Pruett, *Children and the Law and Mediation: Can Families Survive the Fire Cycles?* (Oct. 15, 1998) (unpublished manuscript, on file with author).

²³ Avoiding or limiting discovery is a major factor in producing cost savings for litigants. See Hans U. Stucki, *Measuring the Merit of ADR*, 14 ALTERNATIVES TO HIGH COSTS LITIG. 81, 90 (1996); see also Craig McEwen, *Mediation in Context: New Questions for Research*, DISP. RESOL. MAG., Winter 1996, at 15, 16-17. ("Habits of practice and the nature of billing arrangements may also discourage early settlement."); Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 OHIO ST. J. ON DISP. RESOL. 287, 295-296 (1992) (suggesting that lawyers have an inherent conflict of interest, because more efficient dispute resolution will reduce legal fees).

²⁴ See Clarke & Gordon, *supra* note 14, at 334.

²⁵ See Judge Robert P. Murrian, *Mediation from the Court's Perspective*, TENN. B.J., Sept.-Oct. 1995, at 12, 14. Judge Murrian addressed this point of concern:

explanation is that “lawyers learn to be conservative about settlement by training and by fear of malpractice or ethical violation.”²⁶ Until recently courts have been inclined to use an adjudicatory process, nonbinding arbitration, as the ADR process of choice.²⁷ Other court-based ADR processes—early neutral evaluation and the summary jury trial—also emphasize skills, training, and behavior that are more familiar to lawyers.

Planning and implementation considerations for these three categories of cases—small claims, domestic relations, and civil—are quite different. Neutrals used for small claims mediation are generally recruited from the community at large and given basic mediation training.²⁸ Some courts

There is a compelling need to educate judges and trial lawyers about what the different processes can offer and what is available to the parties in the way of alternative dispute resolution. I have never met anyone who has been through mediation training who has come away from it saying that mediation is a bad thing. . . . I think that all trial lawyers and all trial judges should take a good mediation training course. First of all, it is a very different discipline than judging and trial lawyering. Secondly, lawyers who have had such training will be able to advise their clients as to whether or not mediation or perhaps other ADR processes would be appropriate in a particular case. Judges who have had the training will understand those cases that are appropriate for mediation and those cases that are not. From the trial judge's perspective mediation is a management tool that encourages nonbinding settlement without prejudicing any rights to an adversarial trial.

Id.

²⁶ McEwen, *supra* note 23, at 16.

²⁷ For example, Hawai'i has had a statewide mandatory nonbinding arbitration procedure for tort cases since 1987. In 1995 the supreme court adopted a pilot project under which parties can request that a mediator be appointed “to work with them to resolve the case prior to arbitration.” CENTER FOR ALTERNATIVE DISPUTE RESOLUTION, STATE OF HAWAI'I, ANNUAL REPORT 1995–1996 at 6 (1996). For a history of court-annexed arbitration in state courts, see Deborah R. Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270, 271–272 (1986).

²⁸ Volunteer mediators for community mediation centers in Hawai'i commit to forty hours of basic and advanced training and an apprenticeship. See Letter from Elizabeth Kent to John McCrory, *supra* note 14; Memorandum from Elizabeth Kent, Director, Center for Alternative Dispute Resolution, the Hawai'i State Judiciary (July 22, 1998) (on file with author); Telephone Interview with Elizabeth Kent, *supra* note 14.

Candidates for Maine's small claims mediation roster must have fifty hours of training and experience, including twenty hours of mediation training, fifteen hours of experience as a mediator or comediator, and three hours of training in consumer or debtor-creditor law. See ME. CT. ALT. DISP. RESOL. SERV. OPERATIONAL R., APP. B (1998). An eight hour annual continuing professional education requirement became effective on January 1, 1999. See *id.*

recruit the mediators for a court-sponsored panel, while others will refer cases to established programs in community justice centers.²⁹ Typically the mediators are recruited from the community at large and work as volunteers or receive a modest fee. Mediation sessions are usually held at the court shortly before the scheduled time for trial and the time available is short, likely fifteen to forty-five minutes, giving the parties limited time to speak and the mediator little time to engage them in problem solving.³⁰ Courts may rely upon mediation centers for day-to-day monitoring of mediators.³¹

The standards for the selection of divorce mediators are generally more rigorous, with respect to both threshold qualifications and training, than is the case for small claims mediators. Higher education and professional status may be required.³² Specialized training or experience, beyond basic

Small claims mediators in Florida are required to have twenty hours of training. See FLA. STAT. ANN. § 10.010(a)(1) (West Supp. 1999).

²⁹ The Maine Court Alternative Dispute Resolution Service maintains a statewide panel of mediators. See Facsimile from Diane E. Kenty to John McCrory, *supra* note 20; Memorandum from Diane E. Kenty, *supra* note 20; Telephone Interview with Diane E. Kenty, *supra* note 20. Community Justice Centers in Atlanta and Savannah serve courts in their respective metropolitan areas. See E-mail from Ansley Boyd Barton, Director, Georgia Office of Dispute Resolution, to John McCrory, Author (Oct. 14, 1998) (on file with author); Memorandum from Ansley Boyd Barton, Director, Georgia Office of Dispute Resolution (June 17, 1998) (on file with author). The Hawai'i Judiciary has a service contract with the umbrella organization for six community mediation centers. See Letter from Elizabeth Kent to John McCrory, *supra* note 14; Memorandum from Elizabeth Kent, *supra* note 28; Telephone Interview with Elizabeth Kent, *supra* note 14.

³⁰ See Letter from Elizabeth Kent to John McCrory, *supra* note 14; Memorandum from Elizabeth Kent, *supra* note 28; Telephone Interview with Elizabeth Kent, *supra* note 14; Facsimile from Diane E. Kenty to John McCrory, *supra* note 20; Memorandum from Diane E. Kenty, *supra* note 20; Telephone Interview with Diane E. Kenty, *supra* note 20; see also Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 16-18 (1984) (describing small claims mediation in Maine courts); Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 579 (1997) (describing small claims mediation in Boston area courts).

³¹ See Letter from Elizabeth Kent to John McCrory, *supra* note 14; Memorandum from Elizabeth Kent, *supra* note 28; Telephone Interview with Elizabeth Kent, *supra* note 14. Each of these sources discusses small claims mediation in Hawai'i, which is contracted out to community mediation centers.

³² See McCrory, *supra* note 15, at 148-150. See *infra* note 94 for Florida's requirements. The Georgia Commission on Dispute Resolution requires:

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mediation training, is also required because of the nature of domestic relations disputes, including factors that may influence the parties' relative bargaining power, circumstances that may make mediation inappropriate, and the interests of the parties' children.³³ The scheduling of mediation sessions and the time allotted allows the parties and the mediator to seek common ground in an unpressured atmosphere.³⁴ In short, concerns regarding process and outcome fairness are heightened when we move from small claims to divorce mediation. The expectations for mediator qualifications change and there is greater concern for process quality.

Cases on the general civil docket that are the most likely candidates for mediation include negligence suits, commercial contract disputes, construction disputes, and real estate disputes, with personal injury cases likely to be the most prevalent.³⁵ Lawyers representing parties may be inclined to handle cases in the traditional way when preparing for settlement negotiations or trial, including extensive discovery.³⁶ Thus, the

Mediators in divorce and custody cases shall have at least a baccalaureate degree from an accredited four-year college. An individual whose graduate degree was obtained after waiver of the requirement that the baccalaureate be completed shall be deemed to have completed the baccalaureate degree. Mediators in divorce and custody cases must satisfy the requirements for general mediators prior to taking domestic relations mediation training. The required domestic relations training is at least forty hours of training which substantially meets the standards of the Academy of Family Mediators. Mediators in divorce and custody cases shall receive special training in the subject of domestic violence. Mediators in divorce and custody cases must observe at least one mediation of a divorce or custody case and participate in at least two co-mediations of divorce or custody cases prior to mediating a divorce or custody case alone.

GA. CT. R. P. APP. B.I(A).

³³ See GA. CT. R. P. APP. B.I(A); see also ME. CT. ALT. DISP. RESOL. SERV. OPERATIONAL R., APP. A (1998) (requiring one hundred hours of training and experience, including at least ten hours of training or experience in the substance of domestic relations law and at least eight hours of training relating to domestic abuse issues); *supra* note 28.

³⁴ In Maine the parties pay a \$120 fee, which entitles them to two sessions of up to three hours duration. See Facsimile from Diane E. Kenty to John McCrory, *supra* note 20; Memorandum from Diane E. Kenty, *supra* note 20; Telephone Interview with Diane E. Kenty, *supra* note 20.

³⁵ See Alfini, *supra* note 20, at 60; Clarke & Gordon, *supra* note 14, at 317.

³⁶ Litigants in civil cases are more likely to be represented by lawyers than are those in divorce cases, where there is a high percentage of pro se parties. See Patricia Benelli, *Pro Se Litigants in the Family Court, 1995-1997*, in REPORT OF THE VERMONT BAR ASSOCIATION FAMILY COURT REVIEW COMMITTEE 11, 11-12 (1997) (noting that in Vermont, "the vast majority of Family Court litigants are not represented by counsel");

use of mediation for civil cases encroaches upon the traditional domain of lawyers to a greater degree than does small claims and domestic relations mediation. In addition, many civil cases are complex and involve multiple parties. As with divorce cases, adequate time must be allotted for mediation of civil disputes.³⁷

Experience shows that legislatures and courts establishing mediation programs for civil cases are inclined to choose lawyers, typically retired judges and experienced litigators, as mediators for court approved panels.³⁸ The expectation is that mediators for civil cases should have different qualifications than those required for small claims or divorce mediators, which generally translates into trial lawyers and retired judges with mediation training.³⁹

Paul D. Healey, *In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron*, 90 L. LIBR. J. 129, 132 (1998); Honorable Peter Houk, *Reflections*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 161, 163 (1998); Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective*, 32 FAM. L.Q. 95, 103 (1998); Chief Justice Michael D. Zimmerman, *Views from the Bench: State of the Judiciary*, UTAH B.J., Apr. 1998, at 49, 51. Pro se litigants raise delicate issues for court-based mediation programs. Those issues are beyond the scope of this Article.

³⁷ Studies show that the time spent mediating civil cases may range from one hour to ten hours or more. See Alfini, *supra* note 20, at 61; Clarke & Gordon, *supra* note 14, at 319.

³⁸ See Alfini, *supra* note 20, at 56. Mediators used for North Carolina's mediated settlement conference program were members of the bar with at least five years of experience. Although the requirement was changed to permit the use of nonattorneys, the change did not produce substantial use of nonattorney mediators. See STEVENS H. CLARKE ET AL., COURT-ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS 8 (1995).

The neutrals used for Maine's ADR pilot program were lawyers. The recommendations of Maine's Court ADR Planning Committee for a statewide court-connected civil case ADR program calls for a roster of neutrals with qualifications that have a clear bias for lawyers—"legal or other professional training" and "substantive expertise or experience, e.g., experience in personal injury, real estate, contract or employment law, etc." MAINE REPORTS, *supra* note 11, at 19. There would be a presumption for the use of mediation or neutral evaluation. See *id.* at 16.

Hawai'i has had an appellate mediation program since 1995. The initial mediators were retired judges and justices and retired and semi-retired lawyers (all volunteers) who were given 16 hours of mediation training. See CENTER FOR ALTERNATIVE DISPUTE RESOLUTION, STATE OF HAWAI'I, *supra* note 27, at 6; Letter from Elizabeth Kent to John McCrory, *supra* note 14; Memorandum from Elizabeth Kent, *supra* note 28; Telephone Interview with Elizabeth Kent, *supra* note 14.

³⁹ Lawyers are likely to be selected as mediators in civil mediation programs even if a law degree is not a threshold qualification. See CLARKE ET AL., *supra* note 38, at 8;

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The considerations discussed above demonstrate that we cannot generalize about the implementation of mediation programs in state courts, any more than we can generalize about the mediation process. The models used for mediation of small claims cases do not meet the needs of the general civil docket.⁴⁰ Similarly, there are differences between domestic relations cases and cases on the general civil docket which indicate that program models are not interchangeable. For example, an interest-based facilitative approach that is appropriate for a child custody and visitation dispute may not meet the needs of the parties in a personal injury case where the stakes are different.⁴¹ The differences in the nature of the cases

BOBBI MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT: THE IMPACT OF RULE 114 ON CIVIL LITIGATION PRACTICE IN MINNESOTA 37 (1997).

⁴⁰ See Clarke & Gordon, *supra* note 14, at 316. In their article on civil-case mediated settlement conferences (MSCs) in North Carolina, Stevens Clarke and Elizabeth Gordon make a comparison between small claims and civil case mediation:

Community programs generally deal with minor criminal and small-claims cases stemming from disputes involving persons with a previous or ongoing personal relationship In contrast, general civil cases usually involve parties with no previous relationship, as in the typical vehicular accident case. That lack of relationship may mean that there are no "underlying problems" to be solved—just personal injury, property damage, and a dispute about who is responsible. Most negotiations in MSCs that we have observed revolved around the payment of money.

Id. (citations omitted) (noting also that "contract cases may involve an ongoing business relationship, and some tort cases do involve prior interpersonal relationships").

⁴¹ See *id.* at 316 (stating that settlement negotiations in civil cases are more likely to revolve around the payment of money than maintaining continued relationships). Reporting on the results of their study the authors noted:

All civil cases were eligible for the pilot project except those involving actions for extraordinary writs and revocation of driver's licenses. A majority (56 percent) of cases subject to the program involved negligence suits (primarily motor vehicle negligence); other cases involved contractual disputes, collection on accounts, real property disputes, issues regarding wills, trusts, and estates, and other civil matters. Most plaintiffs (73 percent) and nearly half of defendants (48 percent) were private individuals; the rest represented businesses such as manufacturers, wholesalers, retailers, medical or other professional services, or governmental or public organizations. Thirty-nine percent of the parties reported having no relationship with each other before the lawsuit began, and another 37 percent reported a purely business relationship. Of those who reported having any type of previous relationship before the lawsuit arose, 74 percent said that it was not important to them to continue the relationship.

Id. at 317. But see Barbara McAadoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 *HAMLIN J. PUB. L. & POL'Y* 376, 387-388

mediated, including variations in types of cases handled by a program, leads to different considerations regarding the composition and versatility of the mediator panel.

The planning process for a mediation program should focus on the segment of the docket that it will serve. The most complex environment for implementing a mediation program is the general civil docket. That is where there is the greatest potential for friction between interests of the legal profession, including traditional methods for managing and settling cases, and the values and objectives of mediation.

III. LITIGANTS AS STAKEHOLDERS IN COURT-BASED MANDATORY MEDIATION

Who are the stakeholders in court-based mandatory mediation programs? The Society of Professionals in Dispute Resolution (SPIDR) Law and Policy Committee recommended: “[P]lans for mandated dispute resolution programs should be formed in consultation with judges, other court officials, lawyers, and other dispute resolution professionals, as well as representatives of the public.”⁴²

A related question is: What are the reasons for establishing court-based mediation programs? The answer to this question may depend upon who provides it. A judge or a court administrator may see the program as a way to cope with “ever expanding court dockets and limited judicial resources,” allowing courts “to devote those limited resources to fairly adjudicating those cases that do result in protracted litigation.”⁴³ In contrast, the Maine Judicial Branch’s ADR Planning and Implementation Committee recently

(1997) (noting that Minnesota lawyers “largely overlook some of the most salient, *non-monetary* benefits of mediation”).

⁴² Society of Prof’ls in Dispute Resolution, *Dispute Resolution as it Relates to the Courts: Mandated Participation and Settlement Coercion*, 46 *ARB. J.* 38–44 (1991).

⁴³ *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1177 (C.D. Cal. 1998) (stating a rationale for a federal mediation privilege). Wissler writes:

Proponents of mediation argue that the high costs and delays attributable to formal litigation burden many parties and are a complete barrier for others. Diverting cases to mediation would provide a faster and less expensive resolution for the parties and, by reducing the number of cases that go to trial, would permit courts to process cases more efficiently, conserve judicial resources, and allow judges to give more attention to cases requiring their expertise in resolving legal issues.

Wissler, *supra* note 30, at 567–568.

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acknowledged its obligation to support a mandatory ADR program that can “demonstrably save time, reduce costs and increase party satisfaction” in furtherance of the “judicial system’s ultimate goal to provide better service to the public.”⁴⁴ From either perspective, litigants have a significant stake in the manner in which mediation programs are planned and implemented. They will benefit either directly, from more efficient settlement of their cases, or indirectly, from the enhancement of judicial and other court resources that are made available for litigated cases.

Identifying the interests of litigants in civil case mediation programs to facilitate an inquiry as to how those interests can best be addressed is the central theme of this Article. While all participants in a planning process may be well intentioned, they are likely to focus on their own primary interests. Judges and court administrators, concerned with limited court resources and removing cases from over-crowded dockets, may wish to maximize the number of cases that are referred to mediation. Lawyers may be concerned about how programs will affect the way they practice law and the economics of practice.⁴⁵ Litigants, on the other hand, may be most concerned with the quality of mediation services provided, to ensure that the time and money spent participating in mandated mediation will maximize chances for fair and efficient settlement.

Who then can best represent litigants in a planning process? Looking at the SPIDR list of stakeholders, two candidate groups come to mind. The first group is lawyers, because, after all, they will represent the parties in the dispute that may be referred to mediation. This, however, may be problematic. There is an emerging discussion about real or perceived conflicting interests between lawyers and their clients relating to the use of court-based mediation. Concerns that fuel the discussion—e.g., concerns about altering the attorney-client relationship, loss of fee-generating work, and “shortcuts” that may lead to malpractice or ethical violations—were discussed in the previous section and will not be repeated here.⁴⁶ A full treatment of this subject is beyond the scope of this Article.

⁴⁴ MAINE REPORTS, *supra* note 11, at 10.

⁴⁵ See MAINE REPORTS, *supra* note 11, at 14 (noting that lawyers may not share their clients’ desire for early ADR intervention to move a case to efficient resolution); Elizabeth Delaney & Ellen Gordon, *Mediation Meets the Legal Establishment: Attorneys and Court-Ordered Mediation in North Carolina* 14 (1996) (unpublished Ph.D. dissertation, University of North Carolina) (on file with the University of North Carolina Library) (“Though licensed by the state, most lawyers are private professionals who practice law for profit.”).

⁴⁶ See *supra* notes 22–26 and accompanying text.

The second candidate group suggested by the SPIDR recommendation is public representatives. Whether this is a source of adequate representation will depend upon the selection process. Representatives for litigants should be fully conversant with the mediation process and the bank of experience that is available to assess factors that have contributed to the success and failure of court-based mediation programs. For example, in evaluating the quality of mediation programs, too much emphasis may be placed upon general conclusions drawn from litigants' answers to questions asked in exit surveys. The litigants may be ill equipped to give well informed and reliable responses to the questions asked,⁴⁷ and the conclusions may, therefore, be misinformed. Ideally, the representatives selected to represent litigants will have had actual experience with court-based mediation.

In the remainder of this Article, I attempt to identify important interests of litigants in mandatory civil mediation programs and conclude by raising questions regarding the ability of the six mediation program models⁴⁸ to address those interests. It should be understood that I am presenting ideas and proposed areas of inquiry, not conclusions or recommendations, which must await completion of phase two of our project.

IV. COSTS OF PARTICIPATION AND PROGRAM FUNDING

When courts mandate mediation, one of the first questions asked is: Who will pay the cost of administering the program and the cost of the mediation services? One view is that courts should not mandate an ADR process and then require that the litigants pay the cost of providing the

⁴⁷ See James Alfini et al., *What Happens When Mediation Is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307, 318 (1994). Michele Hermann describes the results of a study of small claims mediation in Albuquerque. The outcomes in mediation for minority disputants were dramatically worse than outcomes for comparable white disputants. Yet, the minority participants were dramatically more enthusiastic about mediation. The obvious question is: Would the minority satisfaction level have been as high if they had been aware of the disparity in outcomes? See generally MICHELE HERMANN ET AL., *THE METROCOURT PROJECT FINAL REPORT: A STUDY OF THE EFFECTS OF ETHNICITY AND GENDER IN MEDIATED AND ADJUDICATED SMALL CLAIM CASES AT THE METROPOLITAN COURT MEDIATION CENTER BERNALILLO COUNTY, ALBUQUERQUE, NEW MEXICO, CASES MEDIATED OR ADJUDICATED SEPTEMBER 1990-OCTOBER 1991* (1993).

⁴⁸ See *supra* notes 2-7.

services.⁴⁹ The SPIDR Law and Policy Committee recommended that: "Funding for mandatory dispute resolution programs should be provided on a basis comparable to funding for trials."⁵⁰ While arguments that courts or legislatures should provide funding to cover the cost of mandated mediation services has an obvious justification and appeal, as a practical matter, there are more important concerns for civil case litigants.

The cost of mediation services is likely to be only a fraction of the total costs to litigants participating in mandated mediation. In civil cases the parties will usually be represented by lawyers who may be expected to prepare a premediation submission for the mediator, spend time with their clients preparing for the mediation session, and represent the client during the mediation session. The time spent in mediation may range from one to ten or more hours,⁵¹ with a normal range being two or three hours. The hourly rate for legal services will likely range from \$150 to \$300.⁵² In addition, loss of work time and other inconveniences to the parties must be factored into the overall costs.⁵³ Thus, in a routine case, the litigants' cost of participation in the mandated process could easily reach fifteen hundred dollars to two thousand dollars or more, over and above any fee charged for mediation services.

Assuming that the user fee for court-mandated mediation is reasonable, a more important consideration for litigants is the quality of the program and the services provided. A high-quality program has the best chance of delivering time- and cost-saving results for the litigants. A poor quality

⁴⁹ See AMERICAN ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL: A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF CONSUMER DISPUTES 25 (1998); THE INST. OF JUDICIAL ADMIN., CENTER FOR DISPUTE SETTLEMENT, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS § 5 (1990); Kimberlee K. Kovach, *Costs of Mediation: Whose Responsibility?*, MEDIATION Q., Fall 1997, at 13 (raising broad issues regarding the costs of participation in and funding for mediation); Frank E.A. Sander, *Paying for ADR*, A.B.A. J., Feb. 1992, at 78, 105.

⁵⁰ Society of Prof'ls in Dispute Resolution, *supra* note 42, at Recommendation 2.

⁵¹ See *supra* note 37.

⁵² Information from the participating states indicates that hourly legal fees would likely be in the \$150 to \$300 range. See, e.g., E-mail from Ansley Boyd Barton to John McCrory, *supra* note 29 (indicating estimated ranges of \$150 to \$300 per hour in Georgia). See generally *Seidel v. Bradberry*, No. 3:94-CV-0147-G, 1998 WL 386161 (N.D. Tex. July 7, 1998) (awarding attorney's fees at the rate of \$200 per hour when imposing sanctions for failure to attend court-ordered mediation).

⁵³ See Clarke & Gordon, *supra* note 14, at 232 (noting that some of the litigants surveyed in North Carolina complained that participation in mediation disrupted their daily affairs).

program will waste the litigants' resources and place an expensive, time consuming, and ineffective step in the litigation process.⁵⁴ For many courts, there is tension between providing quality mediation services and finding resources that can be devoted to a mediation program. In many states, it is unlikely that legislatures will be willing to, or courts will be able to, fully fund high quality court-mandated programs. History shows that legislatures have created programs that are not funded,⁵⁵ or have withdrawn funding once provided in favor of user fees.⁵⁶ Some state programs are fully or partially funded with filing fees.⁵⁷ However, the politics of dedicating a portion of a filing fee for an ADR program may be difficult to overcome. There may be reluctance to earmarking increases for ADR because of competing demands for resources that are in short supply.⁵⁸

⁵⁴ Concern has been expressed that the cost of mediation may diminish a litigant's financial ability to pursue litigation. See Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 865, 865 (1998).

⁵⁵ See Alfini, *supra* note 20, at 56 (noting that the Florida legislature established court-based ADR programs, but did not appropriate the funds to pay for the services on a statewide basis).

⁵⁶ See, e.g., Jane Orbeton, *Domestic Relations Mediation in Maine*, in THE ROLE OF MEDIATION IN DIVORCE PROCEEDINGS: A COMPARATIVE PERSPECTIVE 51, 54 (1987). Initially, Maine's domestic relations mediation program was funded by legislative appropriation and mediation services were provided without charge. See *id.* at 53-54. The cost was greater than expected, so in 1986 the legislature imposed a user fee to fund the program. See *id.* at 54. Loss of legislative funding in 1990 has required that the Colorado Office of Dispute Resolution operate on a cash-funded model. See E-mail from Cynthia A. Savage, Director, Office of Dispute Resolution, Colorado Judicial Branch, to John McCrory, Author (Oct. 21, 1998) (on file with author); Memorandum from Cynthia A. Savage, Director, Office of Dispute Resolution, Colorado Judicial Branch (July 29, 1998) (on file with author).

Some legislatures want evidence that court ADR programs are cost effective. See generally SUPREME JUDICIAL COURT/TRIAL COURT STANDING COMM. ON DISPUTE RESOLUTION FOR THE CHIEF JUSTICE FOR ADMIN. AND MANAGEMENT OF THE TRIAL COURT, REPORT TO THE LEGISLATURE ON THE IMPACT OF ALTERNATIVE DISPUTE RESOLUTION ON THE MASSACHUSETTS TRIAL COURT (1998) (prepared for the Massachusetts legislature to support a funding request for court ADR programs).

⁵⁷ See SEMINAR ON ADR IN RURAL AND NONURBAN COURT SYSTEMS (EDITED TRANSCRIPT) 9-29 (Vermont Law School Dispute Resolution Project and American Bar Ass'n Standing Comm. on Dispute Resolution, June 1990) [hereinafter RURAL COURTS SEMINAR].

⁵⁸ See *id.*; Society of Prof'ls in Dispute Resolution, New England Chapter, A Symposium on Court ADR in New England: Program Models and Guidelines, attended

Preoccupation with demands for providing mediation services without a user fee may be unproductive and may divert attention from the more important question of how a high-quality program can be established with reasonable and affordable user fees. As a practical matter, planners may be left to decide which of the various program models has the greatest potential for providing a high-quality program with the least possible burden on the litigants who are mandated to mediation. There is evidence that litigants do not object to paying reasonable user fees for a quality program.⁵⁹ From a consumer standpoint, quality should be a paramount program planning objective.

V. MEDIATION PROCESS CONSIDERATIONS AND PROGRAM QUALITY

A. *Process Flexibility*

Mediation is a remarkably flexible process for which there are no fixed procedural rules.⁶⁰ While mediation may have defining characteristics,⁶¹ the form that it takes will vary significantly depending upon the context of the dispute for which it is used, the objective in using the process,⁶² and the

by John McCrory, Dec. 9, 1998 [hereinafter New England Symposium] (providing comments of participants concerning funding court ADR programs with filing fees).

⁵⁹ See Sharon Press, *Institutionalization: Savior or Saboteur of Mediation*, 24 FLA. ST. L. REV. 903, 908 (1997). However, even when user fees are reasonable, they should be reduced or waived for parties who cannot afford to pay. Failure to provide for a fee waiver could raise issues of equal access to timely and efficient dispute resolution. See THE INST. OF JUDICIAL ADMIN., CENTER FOR DISPUTE SETTLEMENT, *supra* note 49, § 13:1; Kovach, *supra* note 49, at 15; New England Symposium, *supra* note 58 (raising the concern of several participants that litigants who could not afford to pay a service fee would be denied access to mediation).

⁶⁰ See Lon L. Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971).

⁶¹ See John P. McCrory, *Environmental Mediation—Another Piece for the Puzzle*, 6 VT. L. REV. 49, 53–56 (1981). The author concluded that mediation has the following four fundamental characteristics that have sustained the process and made it adaptable for many different types of disputes: (1) the neutrality or impartiality of the mediator (both perceived and actual), (2) the voluntariness of the process, (3) the confidentiality of the relationship between the mediator and the parties, and (4) the procedural flexibility available to the mediator. See *id.* When mediation is institutionalized and mandated, voluntariness regarding its use is eliminated, but parties are not compelled to settle. Settlement remains voluntary.

⁶² Commentators and practitioners have used various terms to make distinctions between different uses and objectives of mediation skills—e.g., mediation, facilitation,

style employed by the mediator. Mediation of different types of disputes—e.g., labor, child custody and visitation, environmental, and personal injury—will in many ways appear to be dissimilar. Indeed, mediators practicing in different areas may disagree as to whether one or the other is really practicing mediation.⁶³

When planning a court-based civil mediation program, several things should be remembered. First, the parties will normally have attorneys and litigation will have been started. To some extent, positions and expectations will be fixed.⁶⁴ Second, commencement of litigation places a dispute in an arena that is the domain of lawyers who are likely to employ traditional litigation tools and strategies. Finally, the types of cases referred to mediation will vary and the needs of the parties, in terms of the assistance they need from a mediator to resolve their differences, will also vary.⁶⁵

There is concern in some quarters that the institutionalization of mediation in the courts will diminish party self-determination, result in mediation that is evaluative, and cause coerced settlements.⁶⁶ These concerns are related to a current debate about the distinction between facilitative mediation and evaluative mediation, and whether the latter really is mediation.⁶⁷ The debate is driven by a narrow vision of the

consensus building, and policy dialogue. *See* John Lande, *Stop Bickering! A Call for Collaboration*, 16 ALTERNATIVES TO HIGH COSTS LITIG. 1 (1998) (noting that the terminology of ADR is used by practitioners to define their services).

⁶³ *See* RURAL COURTS SEMINAR, *supra* note 57, at 104–105 (noting a discussion between a divorce mediator and a civil case mediator comparing their views on mediation and whether “settlement” or “resolution” should be the goal of the process).

⁶⁴ *See* Alfini et al., *supra* note 47, at 315.

⁶⁵ *See id.* at 321 (noting the comments of John Barkai who suggests that insufficient attention is given to the parties’ desires in providing mediation services where there are cultural differences); Nancy Kauffman & Barbara Davis, *What Type of Mediation Do You Need?*, DISP. RESOL. J., May 1998, at 8, 10; *see also* Jeffrey Krivis & Barbara McAdoo, *A Style Index for Mediators*, 15 ALTERNATIVES TO HIGH COSTS LITIG. 157, 165 (1997).

Understanding style is crucial to improving mediator performance. It allows a mediator to select from a spectrum of techniques that might be available depending on the nature of the issues presented. It also makes it simple for the mediator to explain to the disputants why a particular approach might be used in resolving the dispute.

Id.

⁶⁶ *See* Alfini et al., *supra* note 47, at 309–311.

⁶⁷ *See, e.g.,* John Bickerman, *An Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COSTS LITIG. 70 (1996); Kimberlee K. Kovach & Lela P.

mediation process held by some commentators who contend that facilitative mediation is "real mediation." They have a preference for a particular style of mediation and want to distance mediation from adjudication. The narrowness of this approach is at odds with the basic versatility of the process and the objectives of court-based civil mediation programs.⁶⁸ A broad vision of the process is needed to address the diversity and dynamics of disputes on civil dockets and the needs and desires of the litigants regarding the types of assistance they will receive from mediators.⁶⁹ Versatility in the role of mediators is one of the sustaining features of the process and the nature of the services provided should be dictated by the needs and desires of the parties, not philosophical preferences regarding styles of mediation. Professor Riskin's grid is a helpful benchmark for understanding the dimensions and utility of mediation.⁷⁰ A flexible approach to the role of mediators in civil mediation will best serve the interests of litigants.⁷¹

B. *Settlement as the Primary Objective*

Settlement as the primary objective of court-based civil mediation should not be viewed in a negative light. As noted by Professor Riskin, litigants are unlikely to embrace a process that promises transformation, rather than settlement.⁷² Settlement need not be the product of a narrow

Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOTIATION L. REV. 71 (1998); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 857-879 (1997); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 26-34 (1996); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 951-954 (1997).

⁶⁸ See generally Stempel, *supra* note 67.

⁶⁹ See Robin N. Amadei & Lillian S. Lehrburger, *The World of Mediation—A Spectrum of Styles*, DISP. RESOL. J., Oct. 1996, at 62, 62-63; Kauffman & Davis, *supra* note 65, at 10; Norman Brand, *Choosing the "Expert" Mediator* (visited Apr. 13, 1999) <<http://www.mediate.com/articles/nbrand.cfm#top>>.

⁷⁰ See Riskin, *supra* note 67, at 35.

⁷¹ See Lande, *supra* note 67, at 895-896; Stempel, *supra* note 67, at 970-973; see also Lande, *supra* note 62.

⁷² See Alfini et al., *supra* note 47, at 315; see also Roselle Wissler, *Evaluation of Pilot Mediation Program in Clinton and Stark Counties, August 1996 through March 1997*, at 7-8 (Sept. 1997) (unpublished manuscript, on file with author).

process or a coercive intervention. In civil cases, when the parties are represented by lawyers, the chances of coercion are remote. The best outcome is a mutually satisfactory, well-informed settlement, where the litigants are aware of their legal rights, the realistic possibilities for resolution short of trial, the costs and consequences of proceeding to trial, and their true interests, in light of all the circumstances. Improvement of the relationship between or among the parties and other nonmonetary considerations may well be part of the resolution.⁷³

The focus should also be on early settlement. The longer a case remains in the litigation process, the less likely the chances of achieving the time- and cost-saving goals of the mediation program. Delay may also inhibit the settlement efforts because of the parties' financial and psychological investment in a case.⁷⁴ Early settlement does not mean uninformed settlement. The appropriate time for mediation will vary on a case-by-case basis and, for that reason, rigid approaches to scheduling mediation have been criticized.⁷⁵ There must be a thoughtful balance between the parties' legitimate need for information and scheduling mediation sessions at times when settlement efficiency can be maximized. An approach that has been endorsed for a model mediation rule is to schedule mediation at a time when the parties have sufficient information to assess the "strengths and weaknesses" of their cases.⁷⁶

The parties' need for information is often equated to the need for discovery. A recent study of discovery in federal courts concluded that discovery is not a cost factor in over one-third of general civil cases, that discovery is not a significant cost factor in a majority of cases, and that any

The most favorable aspect of the Mediation Program most frequently listed by the parties focused on the opportunities that mediation provided, regardless of whether or not they were achieved: the opportunity to try to come to some agreement, to reduce time and/or costs, and to avoid trial. Parties valued being able to speak and to be heard, as well as to hear the other side and understand their position; and then to be able to discuss the case together and confront the issues.

Id. (reporting on civil mediation pilot programs in Ohio).

⁷³ *See id.*

⁷⁴ Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1305 n.72 (1998).

⁷⁵ *See* Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 905-906 (1998).

⁷⁶ *See id.* at 906.

problems that may exist with discovery are concentrated in a minority of cases.⁷⁷ Although these conclusions may not have universal application, they are instructive concerning timing issues. Some cases will not require discovery, which may mean that mediation can be scheduled very early in the life of the case. In cases in which the need for discovery is modest, that need may be satisfied by an information exchange during mediation. In more complex cases, in which discovery is a significant factor, there is evidence that lawyers who are experienced in mediation are comfortable participating with limited discovery.⁷⁸ The foregoing suggests possibilities for scheduling mediation at an early date without prejudicing the parties' need for information that is required for an informed and fair settlement.

C. Party Participation

The SPIDR Law and Policy Committee recommended that mandatory mediation should be used only when high-quality programs permit party participation.⁷⁹ Many courts require that parties be present at the mediation sessions, but attendance alone does not ensure effective participation. Providing parties with an opportunity to speak and be key participants in a relaxed and informal atmosphere should be a program objective.⁸⁰

If litigants are to participate in a significant way, they must have a fundamental understanding of the process, its objectives, and their role in the mediation sessions. It has been said that the responsibility for this education should reside with courts and mediators.⁸¹ While it is appropriate to place responsibility with courts and mediators, especially in cases in which the parties are not represented by counsel, this is too narrow an approach for mediation of civil cases. It does not account for significant players, the parties' lawyers. Lawyers influence clients' attitudes toward mediation, their level of preparation for mediation sessions, and the extent

⁷⁷ See James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 682 (1998).

⁷⁸ See MAINE REPORTS, *supra* note 11, at 8; 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. 831, 843 (1998).

⁷⁹ See Society of Prof'ls in Dispute Resolution, *supra* note 42, at Recommendation 2.

⁸⁰ See Wissler, *supra* note 72, at 8 (noting this to be an important factor in party satisfaction); see also McEwen & Williams, *supra* note 54, at 869 (noting that parties, not lawyers, should be the key participants in mediation).

⁸¹ See Guthrie & Levin, *supra* note 75, at 900.

to which they participate in the sessions.⁸² Lawyers' familiarity and experience with mediation are also likely to influence the outcomes.⁸³

Mediation program planners should be concerned about the "ADR literacy" of the attorneys who will represent litigants that are referred to mediation⁸⁴ and should take steps to ensure that the clients are adequately prepared for and involved in the process. Specific areas of concern include the following:

- lawyers' familiarity with mediation and the requirements of the court's program;
- information given to litigants about mediation and the nature and importance of their role in the sessions;
- the extent to which lawyers prepare their clients for mediation, including discussion of the process, the range of resolution options that might be presented, and the consequences of alternatives to settlement;
- whether litigants are encouraged to or discouraged from active participation; and
- lawyers' and litigants' awareness of different mediator styles.

In summary, if the objectives of mediation are to be realized, planners should focus on the nature and quality of party participation. Attention should be given to lawyer competency in using mediation and the interaction between lawyers and clients before and during the mediation sessions. Realistically, lawyers will have primary responsibility for the level and quality of their clients' participation. This does not diminish the role of courts and mediators to monitor the quality of party involvement. Rather, it recognizes the influence that lawyers have on their clients and the implication for a successful program. When programs are evaluated,

⁸² See Clarke & Gordon, *supra* note 14, at 319, 331, 334; McAdoo & Welsh, *supra* note 41, at 39-42.

⁸³ See Wissler, *supra* note 72, at 19.

⁸⁴ See Jeffrey G. Kichaven & Vicki Stone, *Preparing for Mediation*, 18 *LITIG.* 40, 40 (1991) (noting that "the role of lawyers in mediation is dramatically different from their role in trial or in a more traditional form of . . . ADR, such as arbitration"); see also THE INST. OF JUDICIAL ADMIN., CENTER FOR DISPUTE SETTLEMENT, *supra* note 49, § 10; Carrie Menkel-Meadow, *Ethics in ADR Representation: A Road Map of Critical Issues*, *DISP. RESOL. MAG.*, Winter 1997, at 3.

questions for lawyers and litigants should focus on factors that are likely to maximize the quality of party participation.⁸⁵

D. Time Allotted for Mediation

Mediation is not a quick fix. Time is required for a mediator to gain a sufficient understanding of a dispute to be helpful to the parties.⁸⁶ Time is needed for the parties to fully air their perspectives in an unhurried atmosphere.⁸⁷ Finally, time is required to develop and explore acceptable options for settlement.⁸⁸ If insufficient time is allotted, parties may believe they were not heard and understood, that settlement options were not clear, or that they were required to mediate in a coercive atmosphere.

Naturally, some civil cases require more mediation time than others. The time needed for a case can be anticipated with premediation assessment by the judge assigned to the case or the staff ADR administrator, in consultation with counsel for the parties. Planning should recognize the need for adequate time in mediation for all referred cases, including flexibility to accommodate complex cases that have extraordinary time requirements.

⁸⁵ See McEwen, *supra* note 23, at 17. The Participant Survey form used for the Ohio Court of Common Pleas court mediation project asks litigants to answer the following questions:

1. How much experience have you had with mediation?
2. Prior to the mediation, did your lawyer help you to prepare for the mediation process?
.....
4. How much chance did you have to tell your views of the dispute?
.....
7. In speaking for your side, how much of the time did your lawyer do the talking?
8. In speaking for your side, how much of the time did you do the talking?
.....
12. How much input did you have in determining the outcome?

Common Pleas Court Mediation Project, Supreme Court of Ohio, Participant Survey for Civil Mediation (Parties and Insurance Representatives) (unpublished report, on file with author).

⁸⁶ See Roselle L. Wissler, Evaluation of Settlement Week Mediation 18 (Oct. 1997) (unpublished paper prepared for the Supreme Court of Ohio Committee on Dispute Resolution, on file with author) (reporting that mediators commented that an hour for mediation was not sufficient).

⁸⁷ See *supra* notes 76, 84–85 and accompanying text.

⁸⁸ See Wissler, *supra* note 86, at 13 (noting that when sessions are too short, mediators may not have enough time to develop and pursue settlement options).

VI. MEDIATORS AND PROGRAM QUALITY

A key factor in the quality and success of a court-based program is the panel of mediators that is selected to provide mediation services. Where mediation is mandated, the court has a special responsibility to ensure that the mediators to whom cases are referred are competent.⁸⁹ In addition, it is important that the mediator panel is the following:

- diverse in gender, race, and ethnicity;
- diverse with respect to mediation styles;
- diverse with respect to subject matter familiarity;
- of sufficient size to provide equal access to all referred or eligible cases; and
- experienced.

This is a formidable task and there is much debate as to how it can be accomplished. It has been suggested, based in part upon exit surveys in two states, that too much emphasis may be placed upon typical statutory criteria such as hours of training and experience in the subject area of disputes.⁹⁰ The importance of a competent mediator has also been questioned.⁹¹ In fairness, it should be noted that these comments were made to make the valid point that courts may go too far in establishing mediator qualifications. However, there is danger in diminishing the importance of

⁸⁹ See THE INST. OF JUDICIAL ADMIN., CENTER FOR DISPUTE SETTLEMENT, *supra* note 49, § 6.3; MAINE REPORTS, *supra* note 11, at 18; W. Lee Dobbins, *The Debate over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?*, 7 U. FLA. J.L. & PUB. POL'Y 95, 97 n.13 (1995) (citing Jay Folberg et al., *Use of ADR in California Courts: Findings and Proposals*, 26 U.S.F. L. REV. 343, 378 (1992)); Norma Jeanne Hill, *Qualification Requirements of Mediators*, 1998 J. DISP. RESOL. 37, 38; Society of Prof'ls in Dispute Resolution, *supra* note 42, at 43-45. The Georgia Rules state:

Disputants outside of the court setting are always entitled to choose their own neutrals. Nothing in these rules will infringe upon the right of parties to choose any third party to assist in dispute resolution prior to filing a case with the court. However, when the parties have been referred to an ADR process by the court, the court is responsible for the integrity of the process. For this reason, neutrals in a court-annexed or court-referred ADR process will be chosen from neutrals registered by the Georgia Office of Dispute Resolution.

GA. R. ALT. DISP. RESOL. APP. A, R. 9.1 (1998).

⁹⁰ See Rogers & McEwen, *supra* note 78, at 856-857.

⁹¹ See *id.* at 855.

such fundamental selection criteria. If the goals of court programs are to be realized, mediators must provide efficient and competent services to litigants. While I would agree that care should be taken in fashioning mediator qualifications for a number of reasons, there is danger in generalizing from exit surveys. Training is a widely accepted criterion for mediator competence.⁹² In addition, some litigants may believe that a mediator with subject matter expertise is best suited for efficient resolution of their dispute.

Much of the discussion about mediator qualifications is general in nature, or places emphasis on small claims and divorce mediation. The variety of circumstances in which mediation is used is often not fully explored. In planning a mediation program it is critical to focus on, among other things, the occasion for the use of mediation and the types of cases that will be mediated.⁹³

The diversity of cases handled by state courts is great and it is generally recognized that generic mediation training does not qualify a person to mediate all types of cases. Expectations regarding who the mediation service providers should be will vary, depending upon which part of the

⁹² See Dobbins, *supra* note 89, at 99-100; Hill, *supra* note 89, at 40; Margaret L. Shaw, *Mediator Qualifications: Report of a Symposium on Critical Issues in Alternative Dispute Resolution*, 12 SETON HALL LEGIS. J. 125, 133 (1988).

⁹³ In its second report, the SPIDR Commission on Qualifications stated:

A practice appropriate in one context may be inappropriate or abhorrent in another. A careful examination of the context clarifies the underlying values and goals of all participants. The relative importance of values will be reflected in the way various dispute resolution processes are selected, administered, used by disputants, and in how competence, standards of practice and success are defined.

The context may include the nature of the dispute, the type of process available or used, the structure of the dispute resolution services—e.g. formal or informal, time-pressed or leisurely, etc.—and the social and cultural setting. Culture, broadly defined, is an important element in virtually every conflict, not just those that are obviously cross-cultural. Each of these factors influences what is required to provide “good quality” dispute resolution.

In establishing qualification standards, great awareness of, and commitment to, diversity is needed to avoid institutionalizing cultural biases and marginalizing valuable but “non-conventional” approaches and practitioners. Awareness and recognition of successful indigenous approaches will enrich the field and help to prevent adverse or less-than-optimal outcomes.

SPIDR COMM’N ON QUALIFICATIONS, SOCIETY OF PROF’LS IN DISPUTE RESOLUTION, ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE 9 (1995).

civil docket the program is designed for and the type of dispute at hand.⁹⁴ From the litigants' point of view, it is critical that the pool of mediators used by a court-based program is appropriate for the variety of cases that will be referred to mediation and the diversity of litigants.

A. *Training and Experience*

Both state and federal courts are inclined to favor retired judges and lawyers as the primary source of mediators for civil mediation programs. Although most American law schools offer courses in ADR,⁹⁵ the primary emphasis in legal education remains on training students to represent clients in an adversarial litigation setting, not representing clients in ADR.⁹⁶ In

⁹⁴ Florida's qualification requirements for court-appointed mediators are in three categories. County court (small claims) mediators are required to have twenty hours of training. See FLA. R. CERTIFIED & CT. APP. MEDIATORS 10.010(a)(1) (1998). Divorce mediators must complete:

[Forty hours of] family mediation training and have a master's degree or doctorate in social work, mental health, behavioral or social sciences; or be a physician certified to practice adult or child psychiatry; or be an attorney or a certified public accountant licensed to practice in any United States jurisdiction; and have at least 4 years practical experience in one of the aforementioned fields; or have 8 years family mediation experience with a minimum of 10 mediations per year.

See *id.* at 10.010(b)(1)-(2). Circuit court (civil cases) mediators must complete forty hours of "circuit court mediation training" and be a member in good standing of the Florida Bar with five years of Florida practice or a retired trial judge from any United States jurisdiction. See *id.* at 10.010(c)(1)-(2). See generally SOCIETY OF PROF'LS IN DISPUTE RESOLUTION, COMPETENCIES FOR MEDIATORS OF COMPLEX PUBLIC DISPUTES (1992).

The neutrals used for Maine's recent pilot ADR program were lawyers. See MAINE REPORTS, *supra* note 11, at 8 n.10. A law degree is not a requirement for divorce, small claims, or civil litigation mediators on panels maintained by Maine's Court Alternative Dispute Resolution Service (CADRES). See ME. CT. ALT. DISP. RESOL. SERV. OPERATIONAL R., APP. A, C, D (1998).

⁹⁵ See ABA SECTION OF DISPUTE RESOLUTION, DIRECTORY OF LAW SCHOOL ALTERNATIVE DISPUTE RESOLUTION COURSES AND PROGRAMS, (2d ed.1997); see also Symposium, *Dispute Resolution in the Law School Curriculum: Opportunities and Challenges, Part I*, 50 FLA. L. REV. 583, 583-760 (1998).

⁹⁶ See Kimberlee K. Kovach, *ADR Education: The Promise of Our Future*, DISP. RESOL. J., Sept. 1996, at 58-59.

As courts throughout the country, at both the state and federal levels, continue to integrate ADR processes into much of pre-trial procedure, it is imperative that lawyers are competent in these processes. Therefore, more concentration in

addition, many lawyers and judges who are regarded as prime mediator candidates attended law school before ADR courses were part of the curriculum.

Mediation and litigation are very different processes. The role of a mediator is vastly different from that of a judge, the process of mediation is unlike adjudication, the role of the parties is different, and lawyers representing clients in mediation should recognize those differences.⁹⁷ Lawyers representing clients in mediation must understand that the parties, not a judge, are the decisionmakers and adjust their representational style and behavior accordingly. The importance of mediation training for lawyers who are enlisted as mediators for court-based programs, with an emphasis on how the role of a mediator differs from that of a judge or an advocate, should not be underestimated. This is especially relevant when the parties are best served by a facilitative style of mediation.⁹⁸

If the current emphasis on performance-based standards for evaluating mediators is correct,⁹⁹ then surely experience is an important ingredient of mediator competency. Common sense and human experience dictate that mediators, like practitioners in other disciplines, enhance their competence

teaching should be placed on the lawyer as an advocate in the ADR proceeding. Of particular import is how the advocate's ADR role differs from that of the traditional lawyer's. This aspect of ADR practice has rarely been addressed, let alone emphasized.

Id.

⁹⁷ See Kichaven & Stone, *supra* note 84, at 40–41; Menkel-Meadow, *supra* note 84, at 4; Murrian, *supra* note 25, at 14; Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1377–1381 (1998) (discussing lawyer-client interactions in mediation). Addressing this issue Professor Carrie Menkel-Meadow stated:

I prefer to talk about “representation” in mediation, not mediation advocacy, to at least attempt a semantic distinction between the role of the lawyer in a decision-seeking (adjudicative) environment from a settlement seeking (problem-solving or negotiation) process in which a lawyer may still “represent” a client, but with different purposes, and presumably with a different audience (the “other side(s)” and its lawyers, not the mediator) in mind.

Menkel-Meadow, *supra* note 84, at 4.

⁹⁸ See Wissler, *supra* note 86, at 38 (noting that lawyer-mediators who do not have training tend to use an evaluative style of mediation).

⁹⁹ See THE INST. OF JUDICIAL ADMIN., CENTER FOR DISPUTE SETTLEMENT, *supra* note 49, § 6.1 (noting that mediator skill can be gained through training or experience); SPIDR COMM'N ON QUALIFICATIONS, SOCIETY OF PROF'LS IN DISPUTE RESOLUTION, *QUALIFYING NEUTRALS: THE BASIC PRINCIPLES* 15–20 (1989); Dobbins, *supra* note 89, at 103–106.

with experience and that their competence may be diminished by periods of inactivity.¹⁰⁰ While programs will need to bring in new mediators with limited experience, courts should strive to maintain a nucleus of experienced mediators. From a consumer standpoint, standards that diminish the importance of training and experience are difficult to justify.

B. Panel Diversity

Courts must be prepared to handle cases involving litigants who are diverse in terms of race, gender, and ethnicity. Parties with diverse backgrounds approach conflict differently and will have differing views as to the type of mediation that will be most beneficial.¹⁰¹ Unless mediators are equipped to deal with these differences, some litigants will be at a disadvantage in mediation, resulting in disparities in fairness of outcomes.¹⁰²

The proposition that a mediator pool should reflect the diversity of the community that is subject to a court's jurisdiction should not require further elaboration or justification. However, achieving that objective is another matter.¹⁰³ When threshold eligibility requirements are high, for example a

¹⁰⁰ See Tom Arnold, *Why Litigate? ADR Offers a Better Way*, in PATENT LITIGATION 727, 752 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. G-531, 1998) (stating that experienced mediators often achieve settlement in more than 90% of their cases while novice mediators achieve success in about 80%); Press, *supra* note 59, at 915 (noting that mediators on court panels who are not selected may not remember how to mediate); Wissler, *supra* note 86, at 18. See the discussion of experience as a measure of mediator qualification in Dobbins, *supra* note 89, at 105-106.

¹⁰¹ See Alfini et al., *supra* note 47, at 309-310, 321 (noting the comments of John Barkai about the experience in Hawai'i, which indicated that Asian parties prefer a directive style of mediation and expect opinions from mediators); see also Bruce E. Barnes, *Conflict Resolution Across Cultures: A Hawai'i Perspective and a Pacific Mediation Model*, 12 MEDIATION Q. 117 (1994).

¹⁰² See generally Gary LaFree & Chris Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC'Y REV. 767 (1996).

¹⁰³ Georgia's Dispute Resolution Rules provide that "[m]ediators should be drawn from a variety of disciplines and should reflect the racial, ethnic and cultural diversity of our society." GA. R. ALT. DISP. RESOL. APP. B, R. I(A) (1998). As of April 1, 1998, the register of neutrals for court ADR programs had the following demographics:

Education	Bachelors Degree or Higher	93.4%
	Law Degree	57.6%

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post graduate degree, there may be barriers to diversity. It will be necessary for courts to carefully monitor the effect of threshold requirements on diversity and, if necessary, relax them or develop affirmative action recruitment strategies to enlist mediators from under-represented segments of the community.¹⁰⁴

Diversity in mediator styles, subject matter expertise, and specialized process experience, e.g., complex multiparty disputes,¹⁰⁵ is also important. Elsewhere in this Article I have discussed the diversity of the civil docket

Ethnicity	American Indian/Alaskan	0.68%
	Asian	0.34%
	African-American	10.09%
	Hispanic	1.09%
	Caucasian	79.25%
	Unknown	8.62%
Gender	Female	43.88%
	Male	56.12%

See E-mail from Ansley Boyd Barton to John McCrory, *supra* note 29; Memorandum from Ansley Boyd Barton, *supra* note 29.

¹⁰⁴ See Society of Prof'ls in Dispute Resolution, *supra* note 42, at 45.

¹⁰⁵ See generally SOCIETY OF PROF'LS IN DISPUTE RESOLUTION, *supra* note 94; Gerald W. Cormick, *Strategic Issues in Structuring Multi-Party Public Policy Negotiations*, 5 NEGOTIATION J. 125 (1989). Maine has an environmental and land-use mediation program. Criteria for membership on the mediator roster are:

A. A combination of 110 hours of training and experience which shall include a minimum of:

1. At least 40 hours of mediation process training involving lectures, role plays, and mediation theory, with at least 15 hours completed within two years of application;

2. At least 20 hours of experience as a mediator, a facilitator of multi-party contested issues, or as a co-mediator with a CADRES mediator; and

3. At least 20 hours of work experience in a land use field, or 20 hours of substantive training in a land use field, or some combination of work experience and substantive training, the adequacy of which for fulfilling this requirement shall be subject to the final determination of the Director.

B. Successful completion of the land use mediation training offered by CADRES which shall include both process and substantive training.

C. Effective January 1, 1999, a minimum, annual level of continuing professional education and development of 15 hours in either mediation process training, land use issues or ethical standards of conduct in mediation is required to remain active on this Roster (see Part II, Section 2, Paragraph C).

ME. CT. ALT. DISP. RESOL. SERV. OPERATIONAL R., APP. C (1998).

in state courts.¹⁰⁶ Diversity occurs in the subject matter of cases, the number of parties, the nature of the issues in dispute, and the relationship between or among the parties. A court mediator panel must have the diversity to provide services that meet the needs of the litigants in this environment. One case may require a mediator who is capable of handling a complex multiparty dispute, another may require a mediator with subject matter experience or expertise, another may require a mediator who can help the parties understand the value of a disputed claim, and still another may benefit most from a mediator who can assist the parties in understanding their underlying interests. There are a variety of mediator styles and competencies that can be employed to give the parties the assistance they require.¹⁰⁷ A narrow approach to the delivery of services will not further the goals of court mediation programs and will not serve the interests of civil litigants.¹⁰⁸

C. Assignment of Mediators and Party Choice

Some commentators contend that the opportunity for party choice in selecting the mediator should be maximized.¹⁰⁹ The importance of party choice is two-fold. It permits parties to select a mediator whom they believe to be right for their particular dispute and it gives them a greater stake and degree of confidence in the mediation process.¹¹⁰ While these concerns are important, there are competing considerations. Experience has shown that when litigants are free to choose any mediator from a court panel, a relatively small number of panel members do most of the work.¹¹¹ This situation may have the effect of undermining the competence of the panel

¹⁰⁶ See *supra* notes 35, 37 and accompanying text.

¹⁰⁷ See Amadei & Lehrburger, *supra* note 69, at 63-69; Kauffman & Davis, *supra* note 65, at 10-14; Riskin, *supra* note 67, at 23-38; Brand, *supra* note 69.

¹⁰⁸ See Stempel, *supra* note 67, at 951-952.

¹⁰⁹ See THE INST. OF JUDICIAL ADMIN., CENTER FOR DISPUTE SETTLEMENT, *supra* note 49, § 7.1; Guthrie & Levin, *supra* note 75, at 902-904; Press, *supra* note 59, at 911; *supra* notes 60-66 and accompanying text.

¹¹⁰ See THE INST. OF JUDICIAL ADMIN., CENTER FOR DISPUTE SETTLEMENT, *supra* note 49, § 7.1; Nancy Welsh & Barbara McAdoo, *The ABCs of ADR: Making ADR Work in Your Court System*, THE JUDGES JOURNAL, Winter 1998, at 15, 44.

¹¹¹ See E-mail from Ansley Boyd Barton to John McCrory, *supra* note 29; Memorandum from Ansley Boyd Barton, *supra* note 29; E-mail from Cynthia A. Savage to John McCrory, *supra* note 56; Memorandum from Cynthia A. Savage, *supra* note 56; New England Symposium, *supra* note 58 (noting the concern raised by a court administrator).

as a whole and the commitment of the mediators who are selected only occasionally.¹¹²

Freedom of party choice might be used as a rationale for setting minimal qualification requirements for mediator panel membership and employing a caveat emptor approach to selection. This approach is problematic.¹¹³ The interests of some litigants may suffer because they are not knowledgeable regarding the importance of selecting a qualified mediator who is appropriate for their dispute. Conversely, experienced litigants will have an advantage.

From a consumer perspective, the following two competing factors must be balanced: the opportunity for party choice in the assignment of mediators and the overall experience and competence of the mediator panel. One way to "spread the work" would be to allow the parties to select a mediator from a limited list of panel members, rotating the mediators on the lists to encourage balance in assignments and experience.

D. Court Panels and the Private Sector

In some states there is concern and uncertainty regarding the relationship, and perhaps tension, between court-based mediation and private sector mediation providers. This is a consideration in Maine and Colorado, where a special study committee has been established.¹¹⁴ From the litigants' standpoint, program planners should define the relationship to the public sector in a way that will maximize access to qualified mediators. The location of the court—i.e., whether it is in an urban or rural area—and the prominence of a public sector will influence decisions. Where there is an active private sector, there is potential for both friction and cooperation. The private sector providers may see court mediation, using litigators trained to mediate, as competition for limited business¹¹⁵ or a development

¹¹² See *supra* notes 99–100 and accompanying text.

¹¹³ See Robert Dingwall, *Does Caveat Emptor Alone Help Potential Users of Mediation?*, 9 NEGOTIATION J. 331, 331 (1993); Welsh & McAdoo, *supra* note 110, at 44.

¹¹⁴ See Facsimile from Diane E. Kenty to John McCrory, *supra* note 20; Memorandum from Diane E. Kenty, *supra* note 20; Telephone Interview with Diane E. Kenty, *supra* note 20; E-mail from Cynthia A. Savage to John McCrory, *supra* note 56; Memorandum from Cynthia A. Savage, *supra* note 56. The primary area of concern in Colorado is divorce mediation.

¹¹⁵ See Alfini, *supra* note 20, at 56 (noting that court-based mediation has increased lawyers' interest in becoming service providers).

that will increase the awareness of mediation and enhance the demand for services. Program planners will have to consider if, or to what extent, the private sector can be an ally and an asset to their goal of providing quality mediation services.

VII. ENVIRONMENTAL CONSIDERATIONS AND PROGRAM QUALITY

An overarching concern is whether court mediation programs, whether statewide or local, will be implemented and administered in an environment that is conducive to acceptance by litigants as a fair, effective, and efficient vehicle for settlement. Many things can be, and are, done to provide guidance for mediators and encouragement for parties to confidently and fully participate. Examples include the following:

- qualification and training requirements for mediators;
- codes of conduct for mediators;
- complaint procedures for litigants who believe that a mediator has acted improperly and related disciplinary procedures;
- confidentiality rules or statutes to encourage candor and full participation in the mediation sessions; and
- immunity protection for mediators to encourage qualified individuals to serve.

However, a discerning consumer may look deeper and ask questions to explore the level of commitment to use mediation as part of a broader case management plan and to recognize and adopt the values of mediation as a settlement process. Answers to questions like those that follow may shed light on a program's "environment" and how it is seen by litigants and their lawyers.

- To what extent do the program sponsors encourage and facilitate the litigants' effective participation in mediation?
- How will the program sponsors deal with litigants who do not take mediation seriously, to protect the investment of time and resources of those who do?
- Is the approach of the program one of diversion of cases out of the court to a different venue or integration of mediation into the court process?

Each of these considerations will have an impact on the image and reputation of a program, the effectiveness of litigants' participation and the efficiency and quality of outcomes.

A. Facilitation of Litigant Participation

The quality of litigants' participation will be influenced by practical considerations that are foundational for a quality court-based program. Do judges and court administrative staff have mediation training, so that they will understand the values of mediation and the process to which they are referring litigants? Will lawyers be expected to have basic familiarity with mediation and the requirements of the court's program? Will lawyers be expected to advise their clients about mediation and to assist clients in maximizing their role and involvement in mediation sessions? Studies of the experience in North Carolina and Minnesota show that these are important questions.

A recent report on lawyers' reactions to experience with Minnesota's statewide ADR rule,¹¹⁶ which includes a popular mediation option, raises several questions regarding how well the versatility of mediation is understood and used in practice.¹¹⁷ First, Minnesota lawyers have a strong preference for using mediators who are litigators with subject matter expertise.¹¹⁸ Not surprisingly, evaluative mediation predominates. Second, the use of mediation appears to have caused little reduction in the use of discovery, because lawyers do not see its potential for changing traditional preparation for settlement efforts.¹¹⁹ Finally, some lawyers do not permit their clients to actively participate in mediation sessions.¹²⁰ One lawyer said that he discourages clients from talking for fear that they will "screw things up" by saying the wrong thing. Another orchestrates clients' participation, having them "vent" at advantageous times. The report recommends further education for lawyers and judges, specifically regarding the appropriate timing of ADR processes in relation to the timing and volume of discovery¹²¹ and that strategies be developed to ensure that lawyers, judges, and clients understand the differences between mediation and neutral

¹¹⁶ See MINN. GEN. R. PRAC. 114 (1999).

¹¹⁷ See generally McAadoo & Welsh, *supra* note 41.

¹¹⁸ See *id.* at 38.

¹¹⁹ See *id.* at 35.

¹²⁰ See *id.* at 40.

¹²¹ See *id.* at 47-49.

evaluation.¹²² With respect to the latter, concerns were expressed that the model of mediation being used in civil cases is narrower than was intended by Rule 114 and that lawyers seldom chose the process to increase potential for creative solutions, promote client satisfaction, or preserve parties' relationships.

A study of court-ordered mediated settlement conferences used for civil cases in North Carolina produced similar information.¹²³ The study revealed that the use of mediation had little effect upon the adversarial nature of settlement negotiations. A majority of lawyers surveyed reported that mediation did not change their approach to settlement.¹²⁴ In addition, although lawyers said that clients had greater control over outcomes in mediation, clients did not see it that way.¹²⁵ Almost two-thirds of participating litigants reported that they had no control over the handling of the mediation conference or the outcome, because lawyers did most of the talking.¹²⁶

¹²² See *id.* at 50–55.

¹²³ See Clarke & Gordon, *supra* note 14, at 316–326 (citing generally CLARKE ET AL., *supra* note 38).

¹²⁴ See *id.* at 332. The authors observe:

Another possible reason why lawyers continued to use conventional settlement is that mediation did not substantially alter the way they practiced law. Asked to compare mediated settlement with conventional settlement, most attorneys reported little or no change in these five aspects of practice: preparation of the case, relationship with clients, dealings with opposing parties, dealings with opposing counsel, and the discovery process . . . Remarkably, a majority (55 percent) reported that mediation did not change their approach to settlement negotiation.

Id.

¹²⁵ See *id.* at 324, 331.

¹²⁶ See *id.* at 319, 324. The authors summarized mediation procedures:

The attorneys did most of the negotiating, frequently caucusing (holding separate meetings) with the mediator and communicating with each other through the mediator, who shuttled back and forth between the two sides. Litigants did little direct negotiating themselves. Attorneys submitted possible settlement offers or demands to them for approval. Mediators explained the process to the litigants and gave them opportunities to express personal concerns that went beyond strictly legal issues.

Id. at 324.

B. *Enforcing the Mandate to Mediate*

When courts require litigants to mediate, questions regarding enforcing the mandate naturally follow. For some, both mandating mediation and regulating participation are foreign to the underlying premise that the process is voluntary. However, from a consumer's perspective, when mandatory court-based programs are put in place, the sponsors have an obligation to ensure that the litigants' time, money, and efforts are not wasted. A party who dutifully complies with the mandate and comes to mediation ready for serious negotiation should be justified in the belief that the other party will do the same. This sharpens the focus on issues regarding the responsibility of program sponsors to enforce the mandate by requiring a reasonable level of participation by all parties.

This question has sparked another lively debate centering on whether there should be a "good faith" requirement for participation in court-mandated mediation.¹²⁷ Proponents of the requirement contend that showing up for mediation and going through the motions is not enough. One commentator has proposed a framework for a model rule. The model rule, which is aimed at lawyers, outlines the meaning of good faith participation and specifies substantial monetary sanctions for failure to comply.¹²⁸ Critics appear to have no quarrel with good faith as an aspirational concept, but argue that a litigation setting is not appropriate for a mandate, the "good faith" standard is subjective and would be difficult to enforce, enforcement raises the specter of wasteful satellite enforcement

¹²⁷ See Alfini, *supra* note 20, at 62-67; Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 596 (1997) [hereinafter Kovach, *Good Faith in Mediation*]; Kimberlee K. Kovach, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith*, DISP. RESOL. MAG., Winter 1997, at 9, 9-13 [hereinafter Kovach, *Lawyer Ethics in Mediation*]; Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2089 (1993) [hereinafter Sherman, *Court-Mandated Alternative Dispute Resolution*]; Edward F. Sherman, "Good Faith" Participation in Mediation: Aspirational, Not Mandatory, DISP. RESOL. MAG., Winter 1997, at 14, 14-16 [hereinafter Sherman, "Good Faith"]; Tony Biller, Comment, *Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-Trial Process*, 18 CAMPBELL L. REV. 281, 287-288 (1996); Matthew A. Tenerowicz, Note, "Case Dismissed"—or Is It? Sanctions for Failure to Participate in Court-Mandated ADR, 13 OHIO ST. J. ON DISP. RESOL. 975, 984-989 (1998); David S. Winston, Note, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water . . ."*, 11 OHIO ST. J. ON DISP. RESOL. 187, 197-198 (1996).

¹²⁸ See Kovach, *Good Faith in Mediation*, *supra* note 127, at 622-623; Kovach, *Lawyer Ethics in Mediation*, *supra* note 127, at 12.

litigation, and confidentiality and the role of the mediator would be compromised.¹²⁹

Clearly, program planners must address this issue. Courts routinely sanction parties for failing to meet their obligations in other court proceedings, such as settlement conferences, and some courts and legislatures have adopted and enforced a good faith requirement for civil case mediation.¹³⁰ For litigants who take the mediation mandate seriously

¹²⁹ See Alfini, *supra* note 20, at 62-67; Sherman, "Good Faith," *supra* note 127, at 15; see also Kovach, *Good Faith in Mediation*, *supra* note 127, at 599-605 (responding to these arguments); Society of Prof'ls in Dispute Resolution, *supra* note 42, at 46 Recommendation 7(counseling against imposing a good faith requirement).

¹³⁰ Some Ohio courts with civil mediation programs have "good faith" participation requirements, and at least one has enforced the requirement with sanctions. See Facsimile from C. Eileen Pruett, Coordinator of Dispute Resolution Programs, Supreme Court of Ohio, to John McCrory, Author (Apr. 21, 1999) (on file with author); Memorandum from C. Eileen Pruett, Coordinator of Dispute Resolution Programs, Supreme Court of Ohio (Oct. 16, 1998) (on file with author); Telephone Interview with C. Eileen Pruett, Coordinator of Dispute Resolution Programs, Supreme Court of Ohio (Apr. 20, 1999).

Under the Georgia Rules a party who does not appear for a mediation conference is subject to a contempt citation and to the imposition of sanctions. See GA. R. ALT. DISP. RESOL. APP. B, R. 4 (1998).

The MAINE REPORTS contain a recommendation that:

The Code of Professional Responsibility would be amended to require counsel at an early stage of the representation to inform clients about alternative dispute resolution options and to attend and participate in good faith in the ADR Conference. Such an amendment would:

- (i) signal the importance of ADR as an available dispute resolution choice,
- (ii) assure both clients and counsel that good faith participation in ADR is not inconsistent with the obligation of zealous advocacy, and
- (iii) provide incentive to comply with ADR process, timing and reporting requirements without case-by-case prodding from clerks' offices.

MAINE REPORTS, *supra* note 11, at 12; see also *Seidel v. Bradberry*, No. 3:94-CV-0147-G, 1998 WL 386161, at *3 (N.D. Tex. July 7, 1998). Imposing sanctions on the defendant, the court said:

The conduct being punished in this case is Batten's refusal to attend court ordered mediation. . . .

However, the Court cannot overlook Batten's brazen disregard of the order to attend mediation. Not only did Batten fail to attend, but he has refused to communicate with Plaintiff or the Court either before or after the mediation. In fact, Batten's refusal to respond to the Court's show cause order is further evidence that Batten is intentionally thwarting the authority of the court and hampering the judicial process. Based upon the reasons listed above, the Court finds that sanctions against Batten are appropriate in this case.

and spend the time and resources necessary to fully participate, there is a legitimate expectation that their opponent will do the same. Program sponsors should honor and enforce that expectation. Sanctioning a party for failing to appear for mediation without cause should not raise serious issues. The difficult issues concern regulating the course of mediation and the quality of participation.¹³¹

C. Program Philosophy: Diversion or Integration

The philosophy of a mediation program and its image in the eyes of litigants and their lawyers will be an important factor in determining its success. Fundamentally, there is an option between two models, diversion and integration. A diversion model might resemble small claims mediation in which the court says, go to mediation and do not return unless you cannot settle. For practical reasons, this model may be appropriate for small claims mediation.¹³² However, for civil cases it has the appearance of creating another procedure—a new hoop—on the way to trial or conventional settlement. The commitment to accomplish more than removing cases from the docket may be questioned and there may be little incentive to take the process seriously.

The second model, integration, envisions incorporating mediation into case management and coordinating its use with other events, such as discovery. If the litigants are to take mediation seriously, it must be clear that judges and court administrators do the same. Mediation should have a clear relationship to other procedures and be timed to maximize its effectiveness. This will require vigilance on the part of judges and

Id. The court characterized the defendant's refusal to attend court-ordered mediation as a refusal to negotiate in good faith. *See id.* The court awarded the plaintiff \$1400 for mediation expenses and attorney's fees for preparing the motion for sanctions. Attorney's fees were calculated at an hourly rate of \$200. *See id.*

¹³¹ For a comprehensive discussion of sanctions, see Tenerowicz, *supra* note 127, at 990–1002.

¹³² In Hawai'i, small claims litigants have an option of mediation immediately before trial or mediation at a community justice center in a more relaxed atmosphere. Lack of use of the latter option suggests that litigants prefer the pretrial model. *See* Letter from Elizabeth Kent to John McCrory, *supra* note 14; Memorandum from Elizabeth Kent, *supra* note 14; Telephone Interview with Elizabeth Kent, *supra* note 14. Similarly, in Maine the parties can request mediation prior to the hearing date, but rarely do. *See* Facsimile from Diane E. Kenty to John McCrory, *supra* note 20; Memorandum from Diane E. Kenty, *supra* note 20; Telephone Interview with Diane E. Kenty, *supra* note 20.

administrators to ensure that appropriate cases are referred to mediation and that, once there, the parties comply with program deadlines and other requirements.¹³³ If judges and administrators are not committed to mediation and are unwilling to shoulder these responsibilities, there will be little incentive for litigants to do more than go through the motions. The mediation requirement will appear to be just another hoop, rather than an opportunity for efficient settlement.

VIII. PROGRAM MODELS AND THE INTERESTS OF LITIGANTS: QUESTIONS

In the foregoing discussion, I identified planning objectives for court-based civil mediation programs that address the interests of litigants who are required to mediate. Major themes that recur in the discussion are the importance of the following:

- reasonable cost;
- a vision of mediation that is appropriate for the diversity of litigants and disputes on the general civil docket, values party participation and has, as a primary objective, fair and efficient settlement of cases;
- mediators who have appropriate mediation training and experience and court panels that are sufficiently diverse to competently handle the diversity of litigants and disputes that are referred to mediation;
- judges, court administrators, and lawyers who are well informed about mediation and committed to effective integration of mediation into case processing procedures; and
- the responsibility of courts that mandate litigants to mediation to provide a high-quality mediation program.

These are objectives that apply to all models with equal force.

The major distinguishing features in comparing program models are the source of mediators and their relationship to the court. The options are the following: court employees, referral to community mediation centers, volunteer court panels, court panels of private practitioners who work for a fixed fee, and private practitioners selected and paid by the parties.

¹³³ See Clarke & Gordon, *supra* note 14, at 330. North Carolina judges have differing attitudes about ordering cases to mediation, their approaches to using mediation in case management, and in ensuring that critical mediation deadlines are met.

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Planners should consider how the selection of a particular model will influence a court's ability to effectively do the following:

- integrate mediation into case handling procedures and
- monitor the quality and consistency of mediation services.

Refining the inquiry, each model raises issues that warrant individual attention. The following are examples for each of the six models that are the subject of our project.

A. *In-House Staff Mediators*¹³⁴

Do courts have resources to hire mediators in sufficient numbers to handle the volume and variety of cases that could be referred to mediation?¹³⁵

Does the use of in-house mediators raise questions about the confidentiality of mediation¹³⁶ or foster the perception that mediators are under pressure to settle cases?¹³⁷

¹³⁴ See *supra* note 2.

¹³⁵ According to Eileen Pruett, in-house mediators in Ohio's civil mediation pilot program can effectively handle three or four cases per week (150 cases per year). They may be encouraged to mediate low dollar cases, in part, because complex cases take longer to mediate. Program guidelines suggest that complex cases may be appropriate for private mediations. See Facsimile from C. Eileen Pruett to John McCrory, *supra* note 130; Memorandum from C. Eileen Pruett, *supra* note 130; Telephone Interview with C. Eileen Pruett, *supra* note 130.

¹³⁶ Describing the experience in Ohio, Eileen Pruett noted:

A significant amount of education has been needed and is still needed to clarify for parties, mediators, judges and court staff the absolute necessity of confidentiality in mediation processes. There appears to be a particular danger of communication between judicial officers and mediators when staff mediators are within courts of general jurisdiction.

Facsimile from C. Eileen Pruett to John McCrory, *supra* note 130; see also Memorandum from C. Eileen Pruett, *supra* note 130; Telephone Interview with C. Eileen Pruett, *supra* note 130.

¹³⁷ See Alfini et al., *supra* note 47, at 309-310 (noting the comments of Robert Baruch Bush).

B. Referral to Community Mediation Centers¹³⁸

Do mediators used by community mediation centers have the qualifications, training, and experience needed for cases on the general civil docket?

C. Court Panel of Volunteer Mediators¹³⁹

Can courts recruit and retain volunteer mediators who have the qualifications, training, and experience needed for cases on the general civil docket?¹⁴⁰

D. Private Mediators Paid by the Court¹⁴¹

Can courts recruit and retain qualified private practitioners who are asked to provide services for fees that are less than the market rate?¹⁴²

E. Private Mediators Selected and Paid by the Parties¹⁴³

What is the effect of this model on the overall cost to litigants for participating in mandated mediation?

¹³⁸ See *supra* note 3.

¹³⁹ See *supra* note 6.

¹⁴⁰ After conferring with neutrals used for Maine's civil case ADR pilot project, the Court ADR Planning Committee concluded that it is not feasible to use volunteer neutrals for a statewide program. It noted: "Those lawyers who traveled long distances to undertake Conferences were especially burdened. Although generally enthusiastic about the project, there was some reluctance to continue to serve as volunteer neutrals in the long-term." MAINE REPORTS, *supra* note 11, at 8 n.10.

¹⁴¹ See *supra* note 4.

¹⁴² Eileen Pruett noted that many Ohio courts cannot generate funds to pay anything close to market value to the providers and over time this becomes unworkable. See Facsimile from C. Eileen Pruett to John McCrory, *supra* note 130; Memorandum from C. Eileen Pruett, *supra* note 130; Telephone Interview with C. Eileen Pruett, *supra* note 130.

¹⁴³ See *supra* note 5.

F. *Mixed Programs*¹⁴⁴

What criteria are used to select the mediation service provider? Does the cost of mediation services paid by litigants depend upon the venue for providing them?

In conclusion, I would like to restate that the analysis in this Article is work in progress. In fashioning a litigants' perspective regarding program models, I have emphasized the importance of clearly focusing on the particular needs of civil litigants and civil cases.

¹⁴⁴ See *supra* note 7.

