2003

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Publication Information

Repository Citation
http://open.mitchellhamline.edu/facsch/269

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Abstract
In this article, Press identifies some of the positive and negative impacts of institutionalization on mediation by reviewing some of the intended and unintended consequences of Florida's court-connected mediation experience. While institutionalization has had many positive impacts, there also are potential reasons for concern.

In this article, the author provides an overview of the historical development of mediation in Florida, describes the current status of mediation within the Florida court system, and details some of the positive and negative consequences of the institutionalization of mediation drawn from the Florida experience. The article concludes with initial reflections on what this means for the future of mediation.

Keywords
Mediation, Arbitration, Negotiation, ADR, Alternative dispute resolution

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Institutionalization of Mediation in Florida: At the Crossroads

Sharon Press*

I. Introduction

In this article, I identify some of the positive and negative impacts of institutionalization on mediation by reviewing some of the intended and unintended consequences of Florida’s court-connected mediation experience. Since joining the staff of the Florida Dispute Resolution Center in 1988,1 I have been both a beneficiary and a major proponent of the institutionalization of mediation in Florida. While institutionalization has had many positive impacts,2 there also are potential reasons for concern.3

* Chief of Dispute Resolution Services for the Florida Office of the State Courts Administrator. The author expresses deep appreciation to: Gary Gill-Austern who reviewed earlier drafts of this article and provided invaluable suggestions along with support; Barry Kantrowitz for research assistance and immeasurable understanding; Jim Alfini, Mike Bridenback, and Josh Stulberg for being there at the beginning and providing such a solid foundation for the program. The author also wishes to thank: Chris Honeyman, Nancy Welsh, and Bob Ackerman for inviting her to participate in the Dispute Resolution Symposium, titled Dispute Resolution and Capitulation to the Routine: Is There A Way Out? (“Symposium”), sponsored by the Pennsylvania State University Dickinson School of Law, the Broad Field Project, and the Association for Conflict Resolution’s Research Section; student editor Sonya Kivisto; and finally, special thanks to the participants in the discussion who provided useful commentary on the talk that formed the basis of this article.

1. I was hired in 1988 as the Associate Director of the Dispute Resolution Center, which was the same year that the comprehensive legislation creating court-ordered mediation became effective. In 1991, I became the Director of the Center.


3. In fact, the premise of the Symposium for which this paper was written was encapsulated by the following introduction to the Symposium’s agenda:

This symposium will examine how a profession or field that starts out with high aspirations may gradually slip into “routinization” and drift away from practices embodying those aspirations; whether there are telling examples of fields that have resisted these pressures over a long period, so that we might learn from their experience; and what strategies might be devised.

ROBERT ACKERMAN, DISPUTE RESOLUTION SYMPOSIUM AGENDA (2003) (on file with the
The answer to the question of whether institutionalization ultimately will be seen as positive or negative is particularly important now in Florida because of the impending implementation of an amendment to the Florida Constitution which will revise the way the judicial branch is funded. A primary goal of this revision is to create parity among the sixty-seven counties for core services. To effectuate the constitutional revision, the first step was the identification of the "core functions" or "essential elements" that the state would be obligated to fund. Among the elements identified by the Trial Court Budget Commission, subsequently endorsed by the Supreme Court and now codified, were

Penn State Law Review).

4. The Ballot Title for Constitutional Revision No. 7 was "Local Option for Selection of Judges and Funding of State Courts." The title of Section 14 was changed from "judicial salaries" to "Funding" and contained the following new language:

(a) . . . Funding for the state courts system, state attorneys' offices, public defenders offices, and court-appointed counsel, except as otherwise provided in subsection (c), shall be provided from state revenues appropriated by general law . . . .

(c) . . . Counties shall be required to fund the cost of communications services, existing radio systems, existing multi-agency criminal justice information systems, and the cost of construction or lease, maintenance, utilities, and security of facilities for . . . performing court-related functions. Counties shall also pay reasonable and necessary salaries and costs and expenses of the state courts system to meet local requirements as determined by general law.


The Statement of Intent by the chairs of the 1998 Constitution Revision Commission included the following clarifying language:

Section 14(a) . . . requires the state to: (1) Provide all funding for the state courts system, except as provided in subsection (c). As used in section 14, it is the intent of the proposers that the term "state courts system" be construed to mean the supreme district, district courts of appeal, circuit courts, county courts as well as any additional courts hereafter constitutionally created . . . . The state's obligation includes, but is not limited to, funding all core functions and requirements of the state courts system and all other court-related functions and requirements which are statewide in nature.

Id. (emphasis added).

5. Because the counties and not the state currently fund much of the court system, there is wide disparity between the counties corresponding to their respective economic states.

6. In a brochure published by the Office of the State Courts Administrator listing the essential elements, "ADR/Mediation" was described as "providing efficient and cost effective options to adversarial litigation. Mediation optimizes litigant participation in the resolution of disputes, resulting in more effective use of judicial resources." OFFICE OF THE STATE COURTS ADMINISTRATOR, ESSENTIAL ELEMENTS BROCHURE (2003) (on file with author).

7. The complete list of essential elements is:

1. judges appointed or elected . . . .;
2. juror compensation and expenses;
3. reasonable court reporting and transcription services . . . .;
4. construction or lease of facilities . . . for the district courts of appeal and the Supreme Court;
"mediation and arbitration."\textsuperscript{8} The inclusion of mediation on this list of "core" or "essential" elements of the state court system speaks volumes as to the important place that mediation holds. The implications, however, are enormous. How Florida implements this legislation will in large measure determine whether the grand experiment to institutionalize mediation ultimately is a success or a failure.

To better understand what the future may hold, it is important to understand the context in which the mediation program in Florida developed.\textsuperscript{9} In Part II, therefore, I provide an overview of the historical development of mediation in Florida. In Part III, I describe the current status of mediation within the Florida court system. Parts IV and V detail some of the positive and negative consequences of the institutionalization of mediation drawn from the Florida experience. I conclude with initial reflections on what this means for the future of mediation.\textsuperscript{10}

II. Roots\textsuperscript{11}

The use of mediation in Florida began, as it did in many other places, with community mediation,\textsuperscript{12} which was premised on the use of

\begin{itemize}
  \item court foreign language and sign language interpreters and translators . . . ;
  \item expert witnesses . . . ;
  \item judicial assistants, law clerks, and resource materials;
  \item masters and hearing officers;
  \item court administration;
  \item case management . . . ;
  \item mediation and arbitration . . . ;
  \item basic legal materials reasonably accessible to the public . . . ;
  \item the Judicial Qualifications Commission; and
  \item offices of the appellate clerks and marshals and appellate law libraries.
\end{itemize}


8. The essential element of mediation and arbitration was limited to "court-ordered" procedures as opposed to voluntary mediation, which presumably would be funded by the individual parties or some other means. See id.

9. Nancy Welsh encouraged me to develop this concept by inviting me to participate in a session at the 2003 American Bar Association Section on Dispute Resolution Conference, entitled \textit{It's the Context Stupid! Why the Context Matters in Institutionalizing Mediation}.

10. The thoughts presented here, in keeping with the spirit of the Symposium to generate creative discussion in the field, are preliminary musings. They will need to be re-examined iteratively as the constitutional revision is implemented.


12. Carrie Menkel-Meadow observes:

In the 1960s, as part of several other social movements advocating more democratic participation in our social institutions, a variety of groups urged that dispute resolution should more fully involve the participants in disputes. This would allow individuals to make their own decisions about what should happen
volunteer mediators. The first community mediation centers opened in 1975 in Miami and Jacksonville. The significance of this date was highlighted by Gary L. Gill-Austern in *Faithful*, in which he noted that the Pound Conference, which admittedly had a significant role in advancing modern day ADR by focusing on the "efficiency or quantity" side of mediation, did not take place until 1976. In fact, the decision to call these centers "Citizen Dispute Settlement" ("CDS") programs highlights the interest in what Gill-Austern referred to as the "access/qualitative" side.

... to them. Thus, a model of community empowerment, party participation, and access to justice was championed by those concerned with substantive justice and democratic process. This "movement" resulted in the funding and support of "neighborhood justice centers" and a variety of more indigenous community dispute resolution centers—many of these justified on the grounds of increased participation and access to justice.


13. In an effort to orient volunteer mediators as to the purpose of CDS Centers, the following reasons are given for why a party would use mediation:

1. Some parties do not want to "make criminals" of their neighbors by lodging formal complaints against them. But they are frustrated by the situation and they want something to be done to correct it . . . .

2. A case will be heard more rapidly in CDS than if it were scheduled for a traditional court hearing . . . .

3. CDS is flexible with regard to the scheduling of hearings (for example, hearings can be conducted during the evening, thereby enabling some persons to attend without missing time from work) . . . .

4. Parties can tell their own stories in their own words; although parties are entitled to have lawyers accompany them, most persons appear by themselves, tell their story in their own words; and try to define a solution that is workable for them.

5. Finally, the mediator is not a judge . . . the mediator is a citizen . . . there is a closeness—an ability to identify more readily with a mediator—than is the case in more formal proceedings.


16. Id. For an excellent discussion of the various ideologies as to the appropriate use of mediation and the rationale for doing so, see Robert A. Baruch Bush, *Mediation and Adjudication: Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989).

The training manual for Florida Citizen Dispute Settlement ("CDS") Center mediators contained the following description of the purpose of the CDS Center:

CDS serves other purposes as well: by taking cases on a referral basis from the courts, it reduces the crushing burden the courts would otherwise have to assume; by using trained citizen volunteers as mediators who can spend more time with each case than could a judge faced with crowded court calendars, the justice process becomes less alienated and threatening to the persons it is designed to serve; by using mediation to resolve these programs, the parties are forced to take responsibility for creating; and compliance with the resolution that is designed and accepted by the parties is frequently higher than would be
One of the unique aspects of the development of community mediation in Florida was the involvement and strong support provided by the judiciary. In 1977, the Florida Supreme Court received a federal grant to establish a state-level office responsible for providing technical assistance, research, and training to the courts relating to CDS and other dispute resolution alternatives. The Chief Justice also took the initiative to establish a Supreme Court Committee on Dispute Resolution Alternatives, which was chaired by a Justice of the Court. This committee was very active, meeting eighteen times before concluding its work in 1981. During this time, legislation was introduced for CDS centers and family mediation, a *Citizens Dispute Settlement Guidelines Manual* was published, a statewide conference on Dispute Resolution Alternatives was held, a public information film on citizen dispute settlement was produced, empirical evaluations were published, and a “packaged” training program was created and offered, all with the goal of reducing the rate of recidivism or reappearance by the same parties on related problems.

Stulberg, supra note 16.

17. It was clear, however, that the major impetus for creating these programs and supporting their development was grounded in empowerment rhetoric, despite a strong connection to the Florida Supreme Court. For example, the CDS Manual summed up the introductory chapter describing CDS mediation with the following:

CDS should be viewed . . . as a systematic effort to help citizens in our community, on a case-by-case basis, restore trust in one another. Each of you, by agreeing to serve as a mediator, assumes an important role in helping to fashion the “contemporary common law” of your community. It is a meaningful and active way by which you can discharge your responsibilities of citizenship in a democratic society.

18. See Kosch, supra note 14, at 402.

19. *Id.*


21. The CDS Manual that accompanied the training package, which was prepared for the Supreme Court of Florida under a contract financed through a grant from the Bureau of Criminal Justice Assistance, Department of Community Affairs, and the Law Enforcement Assistance Administration, contained the following description of the CDS process:

Mediation is a process in which a neutral third-party listens to the complaints and concerns of all parties to a dispute and then tries to assist those parties to reach an agreement that resolves those concerns. The mediator, unlike a judge, has no authority to impose a decision on the parties. The parties must agree to the outcome . . . .

Urban living has brought us into closer, consistent interaction with our neighbors . . . . [Urban living situations] are the seed of tension; that tension can rapidly escalate into serious physical battery, threats of harm, or constant acts of harassment that can seriously disrupt how one leads his daily life.

In previous times, persons might have resolved such problems by turning for assistance from their family, the local pastor or rabbi, the schools or a friendly...
support of the Florida Supreme Court. Some of the early advocates of community mediation were less inclined to see "government" or the "judiciary" play a significant role in the establishment of programs; Bridenback summed up Florida's contrary belief:

Our concept was that the court system is the dispute resolution mechanism which was designated in our constitution and so why shouldn't it play a role in determining how people resolve their disputes—that's what it's there for. It doesn't matter if it is the adversary system or some other system but the courts have a responsibility to develop options for citizens. It is one of the primary reasons we have a judicial branch.

 Shortly after the introduction of community mediation in Florida, family mediation also emerged as an option. As early as 1978, pilot family mediation programs were associated with some trial courts. Here, too, the Florida Supreme Court took the lead by sponsoring the first family mediation training in 1981. In addition, the Supreme Court's Matrimonial Law Commission recommended mandatory mediation for all custody and visitation issues in dissolution of marriage proceedings in its 1983 report.

Stulberg, supra note 16, at 4-5 (emphasis added).
22. See Kosch, supra note 14, at 402-403.
23. See Bridenback, supra note 20, at 4.
24. See Kosch, supra note 14, at 402.
25. Id.
26. Id. at 403.
27. A continuing theme for the Supreme Court of Florida in developing family courts is better service to litigants. Most recently, the Supreme Court of Florida included the following statement in its opinion adopting the Report of the Family Courts Steering Committee: "We also stress the importance of embracing methods of resolving disputes that do not cause additional emotional harm to the children and families who are required to interact with the judicial system." In re Report of the Family Court Steering Committee, 794 So. 2d 518, 520 (Fla. 2001). In the same opinion, the Court concluded:

By identifying and providing families access to appropriate court and community services and by offering a variety of dispute resolution forums where families can resolve conflict without exacerbating emotional trauma, the judicial system will promote the resolution of conflict and not facilitate
Due in large measure to the success of these community and family mediation programs, the Florida Legislature created a Study Commission on Alternative Dispute Resolution. The nine member Study Commission was charged with studying "the feasibility of trial court administered alternative means for dispute resolution, and [determining] whether legislation and court rules are necessary to implement its recommendations..." Its final report, published on March 1, 1985, contained ten recommendations, eight of which related to alternative dispute resolution. The recommendations warrant discussion because they are significant in setting the foundation of that with which we are now wrestling.

The first recommendation called for the establishment of "comprehensive court-annexed mediation and arbitration services, consolidated under court dispute resolution centers" in each judicial circuit. Each center, operating under the supervision of the chief judge, would include:

1. mandatory mediation (except for good cause shown with respect to all or part of a case or by agreement of the parties to submit all or part of the case to arbitration) of contested civil cases, including post judgment matters;

2. voluntary, binding arbitration of contested civil cases not resolved through mediation or submitted by agreement of the parties;

3. mediation of civil disputes upon an agreement by disputing parties where no lawsuit has been filed; and

4. mediation of minor criminal and other complaints as presently

conflict. If the judicial system encourages alternatives to the adversarial process, empowers litigants to reach their own solutions, and assists in crafting solutions that promote long-term stability in matters involving children and families, the likelihood of future court intervention in the family should be decreased—whether this be through minimizing post-judgment litigation or preventing the dependent child of today from becoming the delinquent child of tomorrow. Our ultimate goal remains to facilitate the resolution of disputes involving children and families in a fair, timely, effective, and cost-efficient manner.

Id. at 535-36.

28. STUDY COMM'N ON ALTERNATIVE DISPUTE RESOLUTION, FINAL REPORT 5 (1985) [hereinafter FINAL REPORT].
30. Id.
31. FINAL REPORT, supra note 28.
32. Id. at 5.
handled by citizen dispute settlement programs.33

In the commentary explaining the rationale for the recommendation, the Commission highlighted the cost effectiveness of mediation programs,34 but also referenced "effective" and "appropriate" use.35 Specifically, the Commission noted: "Not only will the expansion of such services be cost beneficial to the state in terms of lessening the need for additional judicial resources, the citizens of Florida will benefit by having access to a convenient, inexpensive and effective means of resolving their disputes."36 The Commission also recognized that there may be cases in which mediation would not be the most appropriate or effective method of handling the cases because of the issues in dispute, the number of litigants, the relationship among the litigants, or the complexity of the case.37

The second recommendation focused on the development of rules of procedure.38 The third laid out principles for the suggested alternatives.39 While several of the remaining principles tracked efficiency arguments, it is important to note that these principles were intended to govern a package of alternative processes, not merely mediation.40 Of particular significance in understanding the thinking at the time, however, was the inclusion of the following principle:

They should give expression to the community's sense of justice through the creation and dissemination of norms and guidelines so

33. Id.
34. "The primary benefit to the state resulting from this recommendation would be to allow for better and more efficient allocation of judges, particularly at the county court level." Id. at 8-9.
35. Id. at 6.
36. Id.
37. Id.
38. Id. at 9-10.
39. Id.
40. The other principles were:
   1. They must be accessible and affordable to disputants.
   2. They must protect the rights of disputants.
   3. They should be efficient in terms of cost and time.
   4. They must be fair and just to the disputants, to the nature of the dispute and when measured against society's expectations of justice.
   5. They must be credible in that the parties, their lawyers, and other representatives recognize the forum as part of a legitimate system of justice.
   6. They should give expression to the community's sense of justice through the creation and dissemination of norms and guidelines so that future disputes are prevented, violators deterred, and disputants encouraged to reach resolution on their own.
   7. The people who practice the alternatives, especially as mediators, arbitrators, or judicial adjuncts, must be competent, well-trained and responsible.
Id.
that future disputes are prevented, violators deterred and disputants encouraged to reach resolution on their own.  

Recommendations four through six included: the establishment of minimum qualification and training standards for mediators and arbitrators; the creation of a confidentiality privilege for court-annexed mediation; and a state funding plan. Recommendation seven related to the establishment of a juvenile alternatives program. The final ADR-related recommendation called for the continuation of a Commission on Alternative Dispute Resolution, along with staff to support the Commission's work.

The Study Commission on Alternative Dispute Resolution, with slightly revised membership, continued for another year and issued its final report on February 1, 1986. This report contained the proposed legislation, which became the report's foundation for what has become Florida's comprehensive mediation program. The conclusions highlight the following expected "beneficial results":

1. The need for additional judicial appointments at the trial level should be abated for the near future.

2. The per capita cost of handling disputes referred to the courts for resolution will decrease.

41.  Id. at 10-11.
42.  Id. at 11.
43.  Id. at 11-12.
44.  Id. at 12-13. Here again, the Commission makes the point that alternative dispute resolution will be cost effective in the long run. Id. In the commentary to this recommendation, the Commission noted: "Cost justification of our proposals can only be demonstrated in two ways: (1) a future reduction in the rate of creation of judgeships; (2) a reduction in the cost, per case, of handling disputes." Id.
45.  Id. at 14-15.
46.  The final two recommendations related to the use of traffic infraction hearing officers and the jurisdiction of the courts, where no change was suggested pending implementation of the ADR recommendations and an opportunity to assess their effects. Id. at 18-22.
47.  Id. at 17. The suggested duties of the Commission included oversight of and staff to fulfill the following functions: establishing written guidelines for the operation of the court dispute resolution centers; establishing minimum training standards; developing comprehensive training for mediators, arbitrators, judges, other court personnel, attorneys, and law students; providing assistance to jurisdictions interested in establishing court dispute resolution centers; acting as a clearinghouse; administration of funds appropriated for court dispute resolution centers; development of a statewide network; conduct research, evaluations, cost analyses, and compile data. Id.
49.  Id.
3. Citizens will enjoy greater access to the dispute resolution services of the courts through the provision of alternative forms of dispute resolution.

4. Disputes reaching the courts will achieve faster resolutions...

5. The system will provide personnel trained in... the techniques and procedures of effective mediation, binding arbitration, and non-binding arbitration... 50

The Dispute Resolution Center was created as a joint program of the Florida Supreme Court and the Florida State University College of Law in 1986,51 and comprehensive civil court-connected mediation legislation was adopted in 1987.52 These were turning points in the first era of institutionalization of mediation because they raised the stakes to include a comprehensive program for court-connected mediation in Florida.53 The legislation set the stage for Florida to become the pioneer in institutionalizing mediation.54 Significantly, the legislation authorized referral to mediation of civil cases in Florida’s county and circuit courts and also contained provisions that mandated the Supreme Court to adopt procedural rules, ethical standards, and a grievance procedure.57

50. Id.
51. For a more thorough discussion of the creation of the Dispute Resolution Center, see Sharon Press, Building and Maintaining a Statewide Mediation Program: A View from the Field, 81 KY. L.J. 4 (1992-93). See also Press, supra note 2, at 916. The article highlights the commitment of the DRC to maintaining a “‘good’ bureaucracy.” Id. The decision to hire as the director of the DRC someone who was trained and served as a mediator has impacted positively the way the office is run. Id.
52. 1987 Fla. Sess. Law Serv. 87-173 (West).
53. Session law 87-173 also established court-ordered and voluntary binding arbitration through the courts. Id. This article will not discuss this aspect of ADR institutionalization. It is interesting to note however, that despite the simultaneous creation of these programs, arbitration cases handled through the courts are only 0.1% of the yearly total of cases mediated through the courts.
54. Because of Florida’s significant role in creating court-connected mediation programs, I have had the opportunity to work with the numerous state judiciary systems including: Georgia, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, South Carolina, South Dakota, and Virginia. I also have worked with several federal courts throughout the United States and a number of foreign countries interested in developing their own court-connected mediation programs.
55. FLA. STAT. ch. 44.102(1) (2003).
56. Id. at ch. 44.106. The qualifications for Florida Supreme Court certified mediators were initially adopted in the Florida Rules of Civil Procedure and were later moved to Part I of the Florida Rules for Certified and Court-Appointed Mediators. See FLA. R. FOR CERTIFIED & COURT APPOINTED MEDIATORS R. 10.100 (2003).
57. FLA. STAT. ch. 44.106 (2003). The code of conduct and the disciplinary procedure for mediators was initially adopted in 1992 in the Florida Rules for Certified and Court-Appointed Mediators. It has undergone several revisions since then, most
It is clear from this history that community mediation in Florida developed from the same foundation as other community programs, and that the court-connected mediation program in Florida can trace its roots back to community mediation. One need only look at the legislative reports that led to the adoption of the "comprehensive court-connected" mediation statute to see the major effect community mediation programs had on the development of the court programs. As we look at the current picture in Part III and the areas of hope and concern in Parts IV and V, it is critical to consider these roots as we attempt to glean lessons for the future.

III. Current Picture—2003

Florida's court-connected mediation program includes mediation of civil cases ranging from small to multi-million dollar claims. The enabling statute explicitly defines mediation and provides authority for court-ordered mediation of county court, family, dependency, circuit, appellate, and children in need of services or family in need of

58. "Mediation" means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision-making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives." *Id.* at ch. 44.1011.

59. *Id.* at ch. 44.102(2).

60. "[M]ediation of civil cases with the jurisdiction of county courts, including small claims. Negotiations in county mediation are primarily conducted by the parties . . . ." *Id.* at ch. 44.1011(2)(c).

61. "[M]ediation of family matters, including married and unmarried persons, before and after judgments involving dissolution of marriage; property division; shared or sole parental responsibility; or child support, custody, and visitation involving emotional or financial considerations not usually present in other civil cases. Negotiations in family mediation are primarily conducted by the parties." *Id.* at ch. 44.1011(2)(d).

62. Dependency mediation includes proceedings arising under Part III (Dependency Cases), Part V (Children in Foster Care), and Part VI (Termination of Parental Rights). *Id.* at ch. 8.290(a)(1).

63. Circuit court jurisdiction includes "...all actions at law not cognizable by the county courts." *Id.* at ch. 26.012(2)(a). County court jurisdiction includes "all actions at law in which the matter in controversy does not exceed the sum of $15,000 . . . ." *Id.* at ch. 34.01(1)(c).

64. A definition of appellate mediation is included in the statute authorizing court-connected mediation, namely, "mediation that occurs during the pendency of an appeal of a civil case." *Id.* at ch. 44.1011(2)(a). However, there currently are no state appellate rules of procedure for mediation nor state-certification of appellate mediators. While several of the appellate courts have experimented with the use of appellate mediation, at the present time, an appellate mediation program is only operational in the 5th District Court of Appeal.
services mediation. When I describe the Florida program, I often say that the program "may not be the best, but it probably is the most." What I mean by this is that the Florida court-connected mediation program is quantitatively large. The program encompasses a wide range of cases and is implemented statewide. This also means there are many implementing layers, including procedural rules for court-ordered mediation, qualification standards for certified mediators, and a process for certifying the mediators, which includes completing an initial Supreme Court of Florida certified mediation training program and obtaining the appropriate amount of continuing mediator education credits every two years. The fact that there are certified mediation training programs means that there also are rules governing the content and delivery of such mediation training programs and a procedure for filing a grievance or complaint against a certified training program. In addition, there are ethical standards for certified and court-appointed mediators, a grievance procedure to enforce these ethical rules, and an ethics advisory committee charged with providing advisory opinions to mediators who are subject to the rules. Along with the Mediator Qualifications Board (which handles the grievances against individual mediators), the Mediation Training Review Board (which handles the complaints against certified training programs), and the Mediator Ethics Advisory Committee, the Florida Supreme Court also has a

65. "In need of services" mediation was included along with the definition of dependency mediation; however, the development of procedural rules and qualifications for such mediators has not followed. Id. at 44.1011(2)(c).
66. See Press, supra note 2.
67. FLA. R. CIV. P. 1.700-1.750.
68. FLA. R. FOR CERTIFIED & COURT APPOINTED MEDIATORS R. 10.100.
69. Supreme Court of Florida Administrative Order AOSC00-8 (1998).
70. FLA. R. FOR CERTIFIED & COURT APPOINTED MEDIATORS R. 10.100(a)(1), (b)(1), (c)(1), (d)(1).
71. Supreme Court of Florida Administrative Order AOSC00-8 (1998).
72. MEDIATION TRAINING STANDARDS AND PROCEDURES (Mar. 27, 1998) (on file with author) [hereinafter MEDIATION TRAINING]. The standards specify: the "Training Program Responsibilities"; the "Training Parameters," including the length and span of the training; the course content requirements, including specific learning objectives which must be covered in each certified training program; the training methodology; the trainer qualifications; advertising of the program; and renewal of certification. Id.
73. Part IV of the Mediation Training Standards and Procedures created a Mediation Training Review Board to "provide a means for enforcing the Mediation Training Standards and Procedures adopted by the Supreme Court of Florida." Id. at 42.
74. FLA. R. FOR CERTIFIED & COURT APPOINTED MEDIATORS R. 10.200-10.690.
75. FLA. R. FOR CERTIFIED & COURT APPOINTED MEDIATORS R. 10.700-10.880.
77. FLA. R. FOR CERTIFIED & COURT APPOINTED MEDIATORS R. 10.730.
78. See MEDIATION TRAINING, supra note 72, at 43.
standing committee on ADR, the Supreme Court Committee on ADR Rules and Policy.\textsuperscript{80} The existence of this committee ensures that the Florida mediation program engages in a process of continuous review and assessment for improvements.

In terms of numbers, there are over five thousand Supreme Court of Florida certified mediators.\textsuperscript{81} We have documented over seventy-six thousand cases mediated in court-connected cases in 2002.\textsuperscript{82} County mediation services are available in all twenty judicial circuits;\textsuperscript{83} family mediation is available in eighteen of the twenty judicial circuits;\textsuperscript{84} and dependency mediation is available in seventeen of the twenty judicial circuits.\textsuperscript{85} Only eleven judicial circuits collect statistics on circuit mediation, but circuit mediation is available statewide because many mediators will travel to where they are needed. In fact, the "official" statistics only tell part of the story because court supported mediators and mediation programs exist alongside a thriving private mediator sector.\textsuperscript{86}

\textsuperscript{80} Supreme Court of Florida Administrative Order AOSC03-32 (2002). The Chief Justice of the Supreme Court of Florida merged the ADR Rules Committee and the ADR Policy Committee in 2003 because "[t]he judicial branch’s experience has shown that alternative dispute resolution policy impacts on the rules, and alternative dispute resolution rules likewise impact on policy. Consolidation of those two functions under one advisory body will result in the development of more efficient, effective, consistent, and expedited recommendations to the Supreme Court regarding mediation, arbitration, and other forms of alternative dispute resolution." \textit{Id.}

\textsuperscript{81} The actual number of mediators certified by the Florida Supreme Court as of June 3, 2003 is 5,370. This includes: 2,917 individuals certified as county mediators; 1,883 individuals certified as family mediators; 2,387 individuals certified as circuit mediators; and 144 individuals certified as dependency mediators. (Some mediators are certified in more than one area of certification.) In addition to this number, an additional 10,866 individuals have completed a Florida Supreme Court certified mediation training program. Some of these individuals have lapsed certifications, some are deceased, some are in the process of becoming certified and some concluded that they did not wish to become a mediator certified by the Florida Supreme Court.

\textsuperscript{82} KIMBERLY KOSCH, \textsc{Florida Mediation and Arbitration Programs: A Compendium} (16th ed. 2003) (forthcoming). Anecdotally, we know that this number is a gross underestimate because of the extensive use of private mediators across the state, even for court-ordered cases. Pursuant to Florida Rule of Civil Procedure 1.720(f), Florida Rule of Juvenile Procedure 8.290(e), and Florida Family Law Rule of Civil Procedure 12.741(b)(6)(A), the parties who have been ordered to mediation have ten days from the order of referral to agree upon a mediator. If they cannot agree, then the court will appoint one. The result of this rule is that when parties have the financial ability to pay for the mediator’s services, they most often select their own mediator and mediate the case without any assistance from or connection to the court. As a result, most of these cases are not counted in any type of the statistics maintained by the court programs.

\textsuperscript{83} KOSCH, \textit{supra} note 14, at 2-4. While county mediation is available in at least one county in every circuit, there still are some rural counties in which county mediation services are not available.

\textsuperscript{84} \textit{Id.}

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} Of the 1,883 certified family mediators, only thirty are staff mediators, and an additional 196 are on contract with the court. Of the 2,387 certified circuit mediators,
IV. The Positive Aspects

On the ten-year anniversary of the creation of the Dispute Resolution Center, the Florida State University Law Review published a symposium on mediation.87 In an article entitled, Institutionalization: Savior or Saboteur of Mediation?,88 I highlighted some of the advances in the acceptance and growth of ADR, including "increased usage of ADR terminology in the press and popular magazines . . . "89 I noted: "The President of the United States routinely deploys mediators to assist with international crises . . . and students nationwide, some as young as elementary school age, participate in peer mediation programs."90 In the five years since that article was published, the trend has continued, particularly as it relates to mediation.91

In 1994 there was an extensive "mediation" in the movie Disclosure,92 and it is now not uncommon for a television show to feature a mediation of a dispute.93 I will save for another article the question of whether these "made for television" and Hollywood mediations are accurate portrayals of mediation. My point here is that the term "mediation" and the visual image of people in dispute sitting down with an intermediary has now entered popular culture. The pioneers in mediation all have stories of times when people confused mediation with meditation and even medication. Given the increased usage of the term "mediation," this type of confusion is much less likely, and this must be seen as a positive outcome.

In recent years, there also has been an impressive development in mediation course offerings. Law school classes, masters degree, and Ph.D. degree programs in dispute resolution are proliferating.94 U.S.

only five are formally connected to the court. The rest are private sector mediators who handle both court-ordered and voluntary mediations. Id. at 2-4, 112-15, 132-33.
88. See Press, supra note 2.
89. Id. at 903.
91. DISCLOSURE (Warner Brothers 1994).
News and World Report now includes a ranking of dispute resolution programs in its list of "America’s Best Graduate Schools."95

In Florida, the level of understanding has advanced not only via popular culture but also by the sheer numbers of mediators and mediations.96 Because there is so much mediation available, a significant number of individuals have been able to become full time mediators.97 The debate as to whether mediation is a profession or not and whether this is a good or bad development, while interesting, is beyond the scope of this article. Suffice it to say that given the number of mediations available and the number of people who are providing this service full time, it is being treated as a profession. On the positive side, this means that individuals are investing both time and money in developing their skills and concentrating on mediation. In Florida, unlike many other places that have developed mediation strictly as a volunteer endeavor, mediators can get paid to provide this service.

In 2000, the Supreme Court of Florida adopted continuing mediator education requirements for all certified mediators:

[A]ll certified mediators must complete a minimum of 16 hours of CME, which shall include a minimum four hours of mediator ethics, in each two year renewal cycle, including the two years following initial certification. For family and dependency mediators four hours of the required 16 hours must be in domestic violence training per


96. At the Symposium, the question was raised as to how the number of mediations relate to the total case filings for the trial courts. The statistics of trial court filings for the fiscal year 2001-02, as gathered by the Office of the State Courts Administrator as part of Summary Reporting System are as follows: 186,218 civil filings in the circuit courts; 280,457 domestic relations filings; and 16,354 juvenile dependency filings. OFFICE OF THE STATE COURTS ADMIN’R, STATISTICAL REFERENCE GUIDE: FLORIDA’S TRIAL COURTS (2002) (on file with author). County civil filings (not including civil traffic) for that same period were 220,019 small claims; 84,228 civil cases above small claims; 130,970 evictions; and 9,486 “other civil,” which includes replevins. Id. It is important to note that 62,162 (approximately 32.8%) of the total number of small claims cases that were disposed were dismissed prior to hearing or because of a default. Id.

97. While I am unable to provide exact statistics on the number of full-time mediators, the initial application for certification by the Supreme Court of Florida and each renewal application contain a question regarding current employment status. The choices include: retired from your primary occupation, employed full-time in your primary occupation, employed full-time as a mediator, employed part-time in your primary occupation, and other. A not insubstantial number of mediators report full-time work as a mediator. This includes many attorneys who have given up law practice entirely and now work strictly as mediators.
each renewal cycle.98

Creating a need for continuing mediator education programs has had the positive effect of upgrading the offerings available.99 Another positive trend nationally is the work being done on theory to practice100 and an increased emphasis on reflective practice.101

In an earlier article, I stated that if one believes that the use of mediation is something to be supported, one can only be pleased by its increased availability and use.102 Increasingly, though, I have become concerned that this analysis is too superficial. For example, does not one need to first define mediation? Does merely calling something mediation necessarily mean that it is mediation?103 If the process does not embody

98. Supreme Court of Florida Administrative Order AOSCO0-8 (2000).

99. In Florida alone, the DRC maintains a two-page list of Continuing Mediator Education Contact Organizations that regularly sponsor programs. The list includes: local associations such as the Association of Broward County Mediators, which holds monthly luncheon meetings; state-wide groups such as the Florida Academy of Professional Mediators and the Florida Chapter of the Association of Family and Conciliation Courts, which hold annual conferences; national groups such as the Association for Conflict Resolution; and private groups such as the Mediation Training Group, Mediation Services, Inc., and the Mediation Center of Tampa Bay, Inc., which hold training programs on a regular basis throughout the year.

100. The William and Flora Hewlett Foundation, which has been the leading funder of conflict resolution for the past several years, listed in their 2001 Annual Report six categories for grants. WILLIAM AND FLORA HEWLETT FOUND., ANNUAL REPORT (2001), available at http://www.hewlett.org/guidelines/conflict%20resolution/conflict_top_frm.htm. The first was Theory Development, which included the following description: “The Foundation is particularly interested in university-based centers that demonstrate both a strong commitment to systematic, interdisciplinary research on conflict resolution and an ability to contribute to the improvement of conflict resolution practice. The Foundation also supports collaborations of institutions and scholars in extended research undertakings of relevance to practitioners and policy makers.” Id. In 2001, nearly two million dollars was awarded in this category. Id.

101. The Symposium at which this paper was presented is a perfect example of the type of reflective practice that is increasingly happening. See Sharon Press, Presentation at the Pennsylvania State University Dickinson School of Law Dispute Resolution Symposium (Apr. 10, 2003) (transcript on file with the Penn State Law Review).

102. Menkel-Meadow, supra note 12, at 907.

103. The Association for Conflict Resolution Task Force on the Unauthorized Practice of Law released a draft report in August 2002 for comment. ASS’N FOR CONFLICT RESOLUTION TASK FORCE ON THE UNAUTHORIZED PRACTICE OF LAW, DRAFT REPORT (2002) (on file with author). The Task Force reached consensus on much of the report, including the following definition of mediation:

Mediation is a party-driven process in which disputants seek an impartial person to assist them in deciding whether and how to discuss and resolve their difference(s). Mediation is built on the principles of voluntariness, informed consent, confidentiality and self-determination, which are to be understood in the broadest manner possible. These principles mean that the mediator may assist the parties in clarifying and defining issues, shaping the process, identifying and exploring alternatives and options, and articulating resolution
the true foundational elements of mediation, should we celebrate its expansion, and is it by definition "good" for its use to be expanded? Because the answers to these questions are critical to the analysis, Part V will highlight some of the danger signs that suggest that everything might not be positive.

V. The Negative Aspects

Procedurally, mediation is becoming increasingly more legal. In 1991, Carrie Menkel-Meadow foreshadowed what was to come. She began with the following:

In this article I tell a tale of legal innovation co-opted. Put another way, this is a story of the persistence and strength of our adversary system in the face of attempts to change and reform some legal institutions and practices. In sociological terms, it is an ironic tale of the unintended consequences of social change and legal reform. A field that was developed, in part, to release us from some—if not all—of the limitations and rigidities of law and formal legal institutions has now developed a law of its own. We are beginning to see the development of case and statutory law and, dare I say, a "common law" or "jurisprudence" of ADR.

While Menkel-Meadow's article covered all aspects of ADR, in Florida we have seen the development of a common law of mediation. The Resolution Report features a regular column, entitled Case and Comment, which features a discussion of recent caselaw on mediation. Nationally, one can subscribe to an Internet organization that features (if any). In those situations where the parties determine that they require substantive area or outcome expertise to assist them in their participation in the mediation, the mediator and the parties will craft the process to ensure the parties the opportunity to obtain such supplemental professional services as a prerequisite to their further participation in the mediation. 104

Id. at 10. The Task Force was unable to reach consensus that the following activities, while possibly appropriate for other forms of dispute resolution, were not appropriate mediation activities: providing an evaluation of the merits of the case; recommending a specific course of action; predicting court results with respect to the case; or applying legal principles to concrete facts. Id. at 27-28. This inability to reach consensus on what I believe are defining elements of what makes the conflict resolution process mediation, highlights the danger in accepting as mediation whatever one wants to call mediation.

104. See Carrie Menkel-Meadow, supra note 12, at 9.

105. Id. at 1-2.

106. The Dispute Resolution Center publishes a quarterly newsletter entitled The Resolution Report. Beginning approximately two and a half years ago, the DRC initiated a feature entitled Case and Comment written by Perry S. Itkin. In the introduction to this feature, the purpose was described as "... to keep you advised of appellate cases, as well as trial court orders, and rule and statutory changes, for you will be a more informed and thoughtful practitioner." 15 RESOL. REP. 4, 12-15 (2000-2001).
“daily summaries and full text of court opinions related to ADR.”

In an excellent article on emerging ADR caselaw, James J. Alfini and Catherine G. McCabe analyze cases dealing with the requirement to mediate in good faith and the enforcement of mediation agreements. In particular, the authors focus on the tension between mediation’s core values and principles and the general principles favoring settlement. The authors conclude with this caution:

In general, the courts have demonstrated an understanding of the mediation process, a sensitivity to the core values and principles of mediation, and a clear desire to further the general policy favoring settlement in deciding cases involving mediation process issues . . . .

On the other hand, the general policy favoring settlement, while advancing the goal of judicial economy, may not always be consistent with mediation principles and values. In particular, allegations of settlement coercion raise troubling issues relating to mediation’s core values of party self-determination, voluntariness, and mediator impartiality that may not be easily discerned or correctable through the judge process.

Another example of mediation’s coming of age is the creation of a Uniform Mediation Act. At the time that this article was drafted, the Act had been adopted by only two states; however, regardless of the extent of the adoption, the mere fact that mediation rose to a level to attract the attention of the National Conference of Commissioners on Uniform State Laws says something about the important place mediation now occupies on the national scene.

Since the comprehensive court-connected mediation program was adopted in 1988, attorneys have become increasingly more comfortable with mediation and are participating in mediation in increasing numbers, both as neutrals and as participants in mediation. The role of the attorney

112. Illinois and Nebraska have enacted the Uniform Mediation Act and it has been introduced in eight other states. See Act Search Results, at http://www.nccusl.org/nccusl/ActSearchResults.aspx (last visited Aug. 1, 2003).
in mediation is significantly different than what was expected. In the 1988 oral arguments on the initial set of procedural mediation rules, Justice Barkett gave voice to the sentiment that the attorney, while allowed to be present at a mediation, was intended to play a very limited role. In today’s practice, when parties are represented, the attorney will often play a major role in the mediation. This has led to substantial differences in the practice of mediation. For example, family mediation in the early days would typically be conducted over the course of several sessions. Now, mediation begins later in the process (due to the fact that attorneys prefer to have much more discovery complete) and is often conducted in a single session (even family/divorce mediation).

Many of the procedural rules that govern mediation include provisions that allow “the parties to agree otherwise.” The policy behind the flexibility built into the procedural rules was an attempt to honor the self-determination of the parties and to build flexibility in to the process. This directly responded to the concern raised by Carrie Menkel-Meadow as to which process would change when one brought the flexible process of mediation into the rigid process of the traditional court system. Procedurally, Florida codified flexibility.

However, the flexibility provided in the rules combined with the strong influence by attorneys has led in practice to some unintended consequences. For example, Florida Rule of Civil Procedure 1.720 contains the rule regarding who must appear at a mediation and establishes sanctions for failure to appear without good cause. Given

113. Videotape: Oral Arguments Before the Supreme Court of Florida, held by Florida State University (1987) (on file with the Florida Dispute Resolution Center). In fact, the statutory definition of county and family mediation specifically contains the sentence: “negotiations... are primarily conducted by the parties.” FLA. STAT. ch. 44.1011(c)-(d) (2003).
115. KOSCH, supra note 14.
116. “Mediation shall be completed within 45 days of the first mediation conference unless extended... by stipulation of the parties,” and “(c) Unless stipulated by the parties... , the mediation process shall not suspend discovery.” FLA. R. CIV. P. 1.710(a) (emphasis added). See also FLA. R. CIV. P. 1.720(b),(f).
117. See RULE AMENDMENT REPORT (1990) (on file with author).
118. See Carrie Menkel-Meadow, supra note 12, at 9.
119. See supra note 116 and accompanying text.
120. Rule 1.720(b) reads in pertinent part:
Sanctions for Failure to Appear. If a party fails to appear at a duly noticed mediation conference without good cause, the court upon motion shall impose sanctions, including an award of mediator and attorneys’ fees and other costs, against the party failing to appear... Otherwise, unless stipulated by the parties or changed by order of the court, a party is deemed to appear at a mediation conference if the following persons are physically present:
1. The party or its representative having full authority to settle without further
that Florida has rejected the notion of "mediation in good faith" and instead relies on "appearance." This rule is critical to the success of the program. In order to prevent the rule from being rigidly applied and to allow for the flexible process of mediation to work, the rule contains the provision, "unless stipulated by the parties." Because an attorney speaks on behalf of the client, this can be read, appropriately, as "unless stipulated by the attorneys." While I do not have hard data to support this trend, I have been told by mediators that there is a trend for the attorneys to agree that one or more party need not be present at the mediation. It is not uncommon for attorneys in personal injury cases to make the argument that the defendant is not needed at the mediation because the insurance company is really the one paying the bill. Sometimes the individual will be present via telephone and sometimes excused entirely from participating. From a strict legal analysis, this might make sense. But from the standpoint of mediation and the potential benefits that can be achieved from in-person contact (for consultation.

2. The party's counsel of record, if any.

3. A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

FLA. R. CIV. P. 1.720(b).

121. See Avril v. Civilmar, 605 So. 2d 988 (Fla. Dist. Ct. App. 4th 1992). In Avril, the court reversed an imposition of sanctions against a party for failing to "negotiate in good faith" during a court-ordered mediation. Id. The court held that it is "clearly not the intent to force parties to settle cases they want to submit to trial before a jury. There is no requirement that a party even make an offer at mediation, let alone offer what the opposition wants to settle." Id. at 990. This holding was consistent with the 1989 Final Report from the Florida Supreme Court Standing Committee on Mediation and Arbitration Rules, which stated as the "reason for change" to rule 1.720(b): "While there is no intent in this rule to mandate any party to settle any case in mediation, it is the intent to have each party participating in mediation directly vested with the ability to resolve the dispute." FLA. SUPREME COURT STANDING COMMITTEE ON MEDIATION & ARBITRATION RULES, FINAL REPORT F4 (1989) (on file with author).

122. A recent Mediator Ethics Advisory Committee Opinion amplified the rationale for the 1989 Supreme Court Committee on Mediation and Arbitration Rules' proposed rule change to clarify the appearance rule. FLA. MEDIATOR ETHICS ADVISORY COMMITTEE, Op. 2002-001 (2002). The Committee's petition contained the following "Reason for Change" to rule 1.720(b): "Defines 'failure to appear' in light of experience from the field as to parties who must necessarily be present to make settlement possible . . . While there is no intent in the rule to mandate any party to settle any case in mediation, it is the intent to have each party participating in mediation directly vested with the ability to resolve the dispute." Id.

123. See In re Florida Rules of Civil Procedure, 641 So. 2d 343 (Fla. 1994). The Florida Supreme Court stated: "Because the mediation process has proven to be most successful when the parties are physically present and fully prepared to settle, we adopt the Committee's amendment to rule 1.720(b)." Id.

124. See supra note 116 and accompanying text.
example, apologies),125 excusing the person who allegedly committed the wrong makes no sense at all. It also is inconsistent with the foundation of mediation and the intent of the Florida court rules.

Another place where flexibility was included in the rule, and a surprising unintended consequence is emerging, is in the selection of the mediator. Florida Rule of Civil Procedure 1.720(f) provides that within ten days of the order of referral to mediation, the parties may agree upon a certified mediator or “a mediator who does not meet the certification requirements of these rules, but who, in the opinion of the parties and upon review by the presiding judge, is otherwise qualified by training or experience to mediate all or some of the issues in the particular case.”126 If the parties are unable to agree upon a mediator, the court will appoint a certified mediator selected by rotation or “by such other procedures as may be adopted by administrative order of the chief judge in the circuit in which the case is pending.”127 Based on information shared informally by mediators and court administrators, the mediator is selected most often by agreement of the parties. Given that most parties are not as comfortable with judicial procedures as their attorneys, one would expect that the selection of the mediator is routinely made by the attorney rather than the party. Again, anecdotally, non-attorney certified mediators increasingly report that they are not selected in the initial ten-day period. Thus, the unintended consequence of providing flexibility is the decrease in the use of non-attorney mediators.128

VI. Conclusion

Florida has reached another crossroads in the institutionalization of mediation. With the implementation of the Constitutional Revision, we


126. FLA. R. Civ. P. 1.720(f)(1)(B). The reason for change in this rule was stated as “perserv[ing] the consensual nature of the mediation process [by] allowing the 'free market' forces to develop . . . by giving the parties, in the first instance, an opportunity to choose their mediator.” FLA. SUPREME COURT STANDING COMMITTEE ON MEDIATION & ARBITRATION RULES, FINAL REPORT F4 (1989) (on file with author). When the revision to this rule was first submitted, the Committee initially proposed that the parties only be permitted to agree upon a certified mediator. Id. A minority report was also filed suggesting that the proposed rule did not go far enough because of the “restrictive requirements for certification of circuit civil mediators under the present rules [which offered] the parties an unnecessarily narrow pool of individuals from which to choose.” Id. at F6. The minority report was circulated to the rest of the Committee at the time of submission and became the majority report.


128. There is no data to support that attorney mediators are more effective mediators than non-attorney mediators.
have the challenge, and as a mediator I know, an opportunity to reconnect the program to its foundation.

Achieving recognition as a critical element in the way that our justice system operates is a double-edged sword. Now that the elements have been identified, the legislature will be responsible for determining the level of funding for each of those elements. For mediation in the trial courts, this means the identification of what should be funded. None of this sounds bad in the abstract, but as stated in the introduction to the 2002 Florida Compendium of Mediation and Arbitration Programs: “The court-connected mediation... programs represented in this Compendium are as diverse as the state itself. Programs have been organized based on the needs of the courts, the availability of volunteers and the accessibility of funding sources.”

Personally, I believe that one of the strengths of the Florida mediation program has been its diversity. Although the state has established a broad array of rules and procedures, the local court programs retain the flexibility to organize in the way that makes the most sense for them. When one reads through the descriptions of the individual court-connected mediation programs in the Compendium, one will find many different operational models, from use of staff mediators, to contract mediators, to volunteers, to reliance on the private sector.

In preparation for implementation of Revision 7/Article V, the Dispute Resolution Center commissioned a benchmarking study by Joseph P. Folger, Dorothy J. Della Noce, and James R. Antes. In addition to the different operational models utilized by the court mediation programs, the authors found that the programs exhibited different ways of connecting to the court, namely assimilative, autonomous, and synergistic.

Assimilative programs were marked by practices that imbue mediation with the authority and formality of the courts, the mapping of legal language onto mediation, and an emphasis on case processing. The implication of this approach, as articulated by the researchers, is “a

129. KOSCH, supra note 14, at vii.
130. Id. at 22-34 (county mediation), 90-97 (family mediation), 122-25 (circuit mediation), 141-47 (dependency mediation programs).
131. JOSEPH P. FOLGER, DOROTHY J. DELLA NOCE, & JAMES R. ANTES, A BENCHMARKING STUDY OF FAMILY, CIVIL AND CITIZEN DISPUTE MEDIATION PROGRAMS IN FLORIDA (June 2001) [hereinafter BENCHMARKING STUDY]. One of the goals of the study was to “establish the overall value these programs have for the Florida court system, its clients and users and the public at large.” Id. at 3.
132. While my hope was that the research would serve to highlight the intangible benefits of mediation, beyond mere settlement data, the study instead proved useful in identifying three different approaches to court affiliation: assimilative, autonomous, and synergistic. Id.
133. Id. at 102-03.
clear message that the court is in charge of the conflict and thereby detract from mediation's character as an alternative to the judicial system, by working against party voice and party choice."134

The autonomous approach called for program operation with a separate identity from the court that was resistant to assimilation of the values and norms of the judicial system.135 The program practices that the researches identified as the hallmarks of an "autonomous" program were: "practices that establish a separate identity for the mediation program; flexibility in process design; and a focus on conflict interaction [rather than the case, as the unit of analysis]."136 The implication of this approach was "a message that mediation is a meaningful alternative to the judicial system—a place where the parties (and not the courts) are in control."137

In the synergistic approach, "mediation is not maintained as a separate physical institution per se. The benefits of a court connection are valued; yet the constraints of the court context are acknowledged and respected. Every effort is made to honor the historical vision and values underlying the mediation process, by preserving party voice and choice as must as possible within the context of the court system."138 The characteristics of the synergistic approach are program leadership with a synergistic vision; partnering with community members; and practices that show an emphasis on the mediation process itself.139

The challenge facing the Dispute Resolution Center will be to "identify and develop standardized processes and 'best practices' for funding, managing, and using court-connected mediation."140 In order to justify general revenue funding from the state, we also will need to identify "performance measures." This may be the most important aspect of everything we do for, in a way, we will be given the opportunity to set out clearly the expected goals for the program.141 As

134. Id.
135. Id.
136. Id.
137. Id. at 105.
138. Id.
139. Id. at 106.
141. The following implications for the nature of mediation practice were identified by Folger, Della Noce, and Antes: (1) mediation program goals shape the nature of mediation practice in any given program; (2) mediation practice will remain largely under-funded, and most notably a volunteer effort or the part-time occupation of a privileged few, if mediation is built primarily on goals of efficient case management; (3) mediation programs will struggle with diversifying their mediator pools if the mediation program is built primarily on goals of efficient case management; and (4) mediation programs built primarily on goals of efficient case management, and especially those
the authors of the Benchmarking Study point out, if we base our mediation programs on the same values and assumptions as traditional court processes, we will reinforce the notion that the courts are the place to resolve disputes that serve those in power in the judicial system, i.e., lawyers, judges, and administrators, but not those without power.\textsuperscript{142}

I hope that we will be able to provide sufficient information to enable the legislature to see the wisdom in funding a range of approaches, to provide the “essential” mediation services, and to clearly articulate and receive confirmation that the success of the mediation program has as much to do with party satisfaction and the intangible benefits of participation in the discussion of one’s own dispute as it does with resolutions reached.\textsuperscript{143} Given the extremely limited amount of money to cover the state’s budget needs, there will be strong impetus to rely on efficiency arguments.\textsuperscript{144} My sincere hope is that we are able to remember the “promise of mediation,”\textsuperscript{145} and use this opportunity to return to our roots as we make our way through these crossroads.

\begin{footnotesize}
\textsuperscript{142} “If mediation is viewed as a substitute for court processes, the risk is that... mediation clients may be offered quasi-judicial processes in the guise of mediation, with “justice” being determined and meted out by mediators who are not trained to administer justice, and not subject to judicial review and oversight.” \textit{Id.} at 108.

\textsuperscript{143} Folger, Della Noce, and Antes refer to this as “the opportunity for people to talk to each other, in their own voices, and make their own decisions about how to proceed.” \textit{Id.} at 109.

\textsuperscript{144} Folger, Della Noce, and Antes point out the fallacy in this type of argument being used to support the development of mediation programs. \textit{Id.} at 108. In their research they found that “[p]rograms that assert their primary value in terms of how little resources they need to accomplish a job may actually defeat their own claims to a larger portion of those resources... Unless mediators and mediation programs can articulate a value they bring to the citizens of the state beyond efficiency, they will remain in the position of having little legitimate claim on resources.” \textit{Id.}

\textsuperscript{145} With grateful acknowledgment to Robert Baruch Bush and Joseph Folger whose writing, thinking, and development on the theories of mediation have challenged me to examine and re-examine my fundamental beliefs on mediation and its place in the traditional court system.
\end{footnotesize}