Building and Maintaining a Statewide Mediation Program: A View from the Field

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Abstract
Written in 1992, this article attempts to provide guidance to states seeking to improve the judicial system through increased use of alternative dispute resolution (“ADR”) mechanisms. The format most often selected is the establishment of statewide mediation offices. Part I of this article identifies the issues that should be addressed by any group wishing to establish a statewide court-connected mediation program. Part II presents an analysis of Florida’s experience in establishing a statewide court mediation program as an example of how these issues were resolved in practice by a state that has implemented a court-connected mediation program. This article concludes with a section that encourages the adoption and development of court-connection mediation programs throughout the country.

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Building and Maintaining a Statewide Mediation Program: A View from the Field

BY SHARON PRESS*

As more and more states¹ are seeking to improve the judicial system² through increased use of alternative dispute resolution ("ADR") mechanisms,³ a number of issues surrounding how to establish a court-connected⁴ mediation program are repeatedly encountered. The format most often selected is the establishment of statewide mediation offices.⁵ Part I of this Article identifies the issues that should be addressed by any group wishing to establish a statewide court-connected mediation

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¹ States that have enacted statewide ADR legislation or established task forces or commissions for statewide court-connected ADR program planning include: Arizona, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Maine, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Tennessee, Texas, Virginia, Wisconsin, and Washington, D.C.

² The rationales for adopting ADR programs vary greatly. The most common reasons include some combination of the following: reducing court backlog, handling certain cases more effectively, freeing judicial resources, providing litigants with more options or better results, saving litigants time and money, or as a response to political or legislative directives. See generally ELIZABETH PLAPINGER & MARGARET SHAW, COURT ADR: ELEMENTS OF PROGRAM DESIGN (1992); Robert A. Bush, Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation, 3 J. CONTEMP. LEGAL ISSUES 1 (1989).

³ The most notable of these approaches is mediation. For purposes of this Article, mediation is defined as: "[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." FLA. STAT. ANN. § 44.1011(2) (West Supp. 1993).

⁴ The exact nexus with the court varies in different mediation programs. For purposes of this Article, court-connected is "defined as any program or service, including a service provided by an individual, to which a court refers cases on a voluntary or mandatory basis, including any program or service operated by the court . . . ." CENTER FOR DISPUTE SETTLEMENT AND THE INSTITUTE OF JUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS iv [hereinafter CENTER FOR DISPUTE SETTLEMENT].

⁵ The following states have established statewide mediation (or ADR) offices to administer court-annexed mediation: California, Colorado, Florida, Massachusetts, Michigan, New York, Ohio, Oregon, Virginia. In addition, several other states have established statewide mediation offices that deal with public policy issues outside of the court system (e.g., Florida (separate office), Ohio, Massachusetts, Minnesota, New Jersey, Oregon). These will not be discussed in this Article.
program. Part II presents an analysis of Florida’s experience in establishing a statewide court mediation program as an example of how these issues were resolved in practice by a state that has implemented a court-connected mediation program. This Article concludes with a section that encourages the adoption and development of court-connected mediation programs throughout the country.

I. ESTABLISHMENT OF A STATEWIDE COURT-CONNECTED MEDIATION PROGRAM

A. Program Initiation Decisions

This Article answers the threshold question of whether one should establish a statewide program, as opposed to leaving to local circuits and jurisdictions the option of developing mediation programs. This Article will reveal that the establishment of a statewide program has many advantages, including: uniformity from jurisdiction to jurisdiction; known expectations; accessibility to mediation for all litigants; and economies of scale in the provision of technical assistance.

Merely reaching a consensus on establishment of a statewide program, however, does not adequately address all of the issues. The definition of “statewide” can vary as greatly as the definition of “court-connected.” For example, a statewide program may involve, on the most complete side, the creation of a state office to oversee the program with site offices and state employees in each local jurisdiction. It may also provide for the creation of a state office that is responsible for both the oversight of the entire program and the provision of technical assistance for the local jurisdictions where the staff is county funded. Finally, a statewide program may simply involve the adoption of a state statute or court rule that allows the trial courts to order cases to mediation without provision of staff on either the state or local level.

Obviously, each model has its advantages and disadvantages. From a purely fiscal standpoint, the establishment of both state funded central and local mediation offices is very costly. In light of recent fiscal difficulties confronted by all states, it seems unlikely that the establishment of such a program would be feasible. In addition, there are some benefits to private and public sector cooperation, such as the potential ability of the marketplace to regulate the field. On the other hand, merely

* Florida’s experience is meant to be illustrative rather than definitive of the best approach to take by an individual state.
providing the statutory mechanism for sending cases to mediation, without creating a central office to assist in the oversight of the program, may be an inappropriate delegation of court authority and could result in an inadequate method of overseeing the provision of justice.

B. Statewide Office Models

As an initial matter, it must be determined what the office should look like in terms of staffing and to whom the central office should report. Even within the confines of creating a state office, there are several models that can be followed. The office can be coordinated via the executive branch, the legislative branch, the judicial branch, within the state university system, or some combination thereof. If the focus of the program is to be the court system, it is most helpful for the office to establish an integral connection with the highest court. Strong support from the state supreme court's chief justice is essential in promoting acceptance among the state bar and individual judges.

As one might expect, the functions delegated to the mediation center will, in large measure, determine the staff make-up. At a minimum, the office should provide information and technical assistance to the local mediation programs during both the establishment phase and in the long-term development of the programs. The office should also act as the central location for the collection of statistics for the dual purposes of monitoring the program and making suggestions for improvement and modifications in the existing program. This is a critical role for mediation programs as a central theme of mediation is its ability to be a flexible and efficient process. Despite its use as a court-connected service, a mediation program must maintain the essential ability to modify itself based on new information.

7 For example, the Florida Dispute Resolution Center ("FDRC") is primarily an entity of the judicial branch but does have a connection to the university system as well. Both the Hawaii Center for ADR and the Virginia Dispute Resolution Office are part of the judiciary; the Massachusetts program is sponsored through the Department of Administration; the Ohio Commission for Dispute Resolution and Conflict Management is a combination of the executive, legislative and judicial branches of government; and the Oregon Dispute Resolution Commission is under the auspices of the governor.

8 See CENTER FOR DISPUTE SETTLEMENT, supra note 4, at 2-5.

9 See Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR," 19 FLA. ST. U. L. REV. 1 (1991) (describing the "ironic tale [of] 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 [and] has now developed a law of its own").

10 Although the process of mediation has been around for centuries, the use of mediation in the context of all civil cases, including those in which the parties have no prior or potential future
C. State Rules/Statutes

A statewide mediation program can be established by means of a state statute or court rule, although the relative authority vested in the judicial and legislative branches of government varies from state to state and must be assessed accordingly. In addition, the courts traditionally have been deemed to have broad discretion to make rules concerning those items deemed to be procedural, while the legislature retains the right to pass laws on all substantive areas.

Despite the theoretical ability for the courts to adopt comprehensive mediation programs via court rule, the reality is that no state court has taken this initiative. This lack of initiative may partially stem from the advantages of using a general grant of authority in a state statute, while providing the specific details pursuant to court rule. The primary advantage of using both statutes and court rules is that doubt regarding the program’s legitimacy is reduced, and through its rules the court is provided with the flexibility of making internal modifications. Thus, a program can be implemented without having to rely on the more cumbersome process involved in making amendments to the statute. The reason why some courts have not been acting solely under their inherent power to administer justice was summed up by Idaho Supreme Court Justice Bistline in a dissenting opinion in Stockwell v. Stockwell. The majority in this case, citing the California Code and mediation articles, remanded the case back to the trial court with instructions to order the relationship—particularly in cases involving more than $10,000-$15,000—is relatively new. As a result, the legal community is still learning which cases are most amenable to mediation and when the timing is appropriate for mediation. It may be at some future date that the use of statistics will not be as valuable, but in these initial stages it is critical.

\[\text{\textsuperscript{11}}\text{ While no state has adopted a comprehensive program via court rule, the federal courts have generally applied FED. R. CIV. P. 16, which states in pertinent part:}\]

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

\[\text{(5) facilitating the settlement of the case.}\]

\[\text{(c) Subjects to be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to}\]

\[\text{(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;}\]

\[\text{(11) such other matters as may aid in the disposition of the action.}\]

\[\text{\textsuperscript{12}}\text{ 775 P.2d 611, 616-27 (Idaho 1989) (Bistline, J., dissenting).}\]
custody case to mediation. Expressing that he was not opposed to the process of mediation in custody cases in general, Justice Bistline did express opposition to the "judicial tinkering and usurption of legislative powers" because "the Court, unlike the legislature, has no grass-roots connections with the people of Idaho. The legislature, by contrast, has representatives and senators from all over the state, and can and does truly represent its constituents."

Once the method of adoption is determined, the specific language must be considered. In particular, a decision must be reached regarding the degree of specificity that will be covered in the state law and rules and how much flexibility, if any, will be permitted at the local level. The dilemma is in ascertaining a balance between uniformity and predictability throughout the state versus the ability of the program to accommodate the needs of the individual circuits and counties. As the size and demographics of state populations differ, the demands on the court system often diverge. Therefore, it is important to note that the development of a uniform statewide system may result in a less comprehensive program for a jurisdiction that could actually handle and benefit from a more structured approach, while resulting in an overly bureaucratic or costly system in a small community that could benefit from a scaled down version.

D. Funding

In analyzing the issue of funding, a discussion of the financing of both the state office and the local components is appropriate. The funding of the two different areas can sometimes be linked. While most frequently the state office will be funded by the entity of which it is a part, it can also be funded through a local program, by, for example, the collection of filing and mediator certification fees. Often the state program will collect all fees centrally and then redistribute funds to the local programs.

Other sources of funds for the individual local programs include: local and state bar associations; individual practitioners; filing fee

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13 Id. at 614-15.
14 Id. at 626.
15 Id. at 626-27 (Bistline, J., dissenting).
16 See supra notes 7-10 and accompanying text.
17 For example, the Ohio Commission on Dispute Resolution and Conflict Management has made grants to community groups to build the capacity to deal with local conflicts and disputes. They have not yet funded a court-connected program in this manner, but have left this option open. THE OHIO COMMISSION ON DISPUTE RESOLUTION & CONFLICT MANAGEMENT, BROCHURE (April 1991).
additions; grants, and party-assessed mediation fees. The source of funds needs to be considered both in terms of initial seed money and identification of sources for long-term commitments. Important questions to consider in determining which type of funding sources to use are:

(1) How much money is available initially and is it enough to adequately and appropriately sustain a program?

(2) What is the reliability of receiving continued funding?

(3) Are there any restrictions attached to the grant of funds? What is being asked for or assumed in exchange for the money, and does it promote the goals of the program? Does acceptance of the money compromise the integrity of the program or lead to questions of impartiality or impact the autonomy of the program? Are constraints placed on the continued receipt of the funds?

(4) How secure is the money? Is it tied to the political climate or the influence of a single individual? Is it subject to reduction or withdrawal?

Since additions to the filing fees have been such a popular method of accruing revenues, a few words about this particular source are in order. The primary advantage of a filing fee addition is that it provides a steady, reliable source of revenue. Once adopted, it becomes an established cost of filing a case in court. Moreover, there is some appeal for the courts to legitimize the alternative processes by requiring everyone who uses the court to fund the program—even if all cases are not necessarily sent to mediation. This approach is further justified as parties whose cases never make direct use of the alternative dispute resolution system benefit by more timely access to the traditional tribunal. Additionally, in order to change the traditional view of the court system to recognize that litigation is just one service the courts can offer, adoption of a filing fee to fund alternative processes becomes both an appropriate and desirable source of funding.

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18 In the past, start-up grants were easier to obtain from entities such as the National Institute for Dispute Resolution ("NIDR") and the State Justice Institute. With the tightening of funds and the progress that has been made in the establishment and evaluation of ADR programs, it is more difficult to obtain funds for "traditional" programs. In 1988, NIDR created the Innovation Fund. Its stated purpose is "discovery," for example, "where dispute resolution efforts have yet to be applied." NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, INNOVATION FUND, PROGRAM ANNOUNCEMENT 2 (1988-89).


21 For a full discussion of the multi-door concept developed by Harvard Law Professor Frank E.A. Sander, see FRANK E.A. SANDER, VARIETIES OF DISPUTE PROCESSING 79 (1976). The original multi-door courthouses were established by the American Bar Association in Tulsa, Houston, and
There are, however, difficulties with this source of funding. Additional filing fees are a likely target for a variety of court programs at this time. As state budgets have become leaner, courts have increasingly been asked to establish independent sources of funding. With a limited ability to do that, a filing fee becomes one of the only sources. As filing fees continue to increase, concern has been raised that the filing fees alone might become an unreasonable bar of access to the court system. As a result, the notion that only individuals of wealth will be able to afford to use our court system must be considered in pursuing this option.

E. Goals of the Program

Identification of the goals of the program and establishing consensus around these goals is a crucial part in the successful development of a state program. The answers to funding, organizational, procedural and evaluation questions become much clearer once the goals are established. These possible goals include:

1. to decrease the court's docket;
2. to speed the pace of cases to resolution;
3. to decrease the cost of resolving conflict through the courts for both the litigants and the court system;
4. to decrease the demand on judges;
5. to increase litigant satisfaction with the court system;
6. to provide for a better means of justice;
7. to lower recidivism; and
8. to improve relationships between the disputing parties.

While these goals are not mutually exclusive and the promoters of a mediation program may express interest in all of them, some tension can exist between these goals. As a result, it should be noted that not all of these goals are compatible and the program must clearly specify what it is seeking to achieve.

In many cases, there is a temptation to place an emphasis on goals that are the most easily measured or have the most popular appeal. This is particularly true with respect to communications to the funding source.

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23 For a general discussion of filing fees and the right to access, see Christopher E. Austin, Due Process, Court Access Fees, and the Right to Litigate, 57 N.Y.U. L. Rev. 768 (1982).

24 For an excellent description of the various goals of mediation programs and how these goals are perceived from different perspectives, see generally Bush, supra note 2.
This, in turn, translates into a heavy reliance on the goals of cost savings and the speed of delivery. The danger of relying on these goals is that it may adversely affect the mediation process. If the articulated goal of the program is to quickly produce an abundance of settlements, the mediators may inappropriately become directive in an effort to assist the program in meeting this goal. Dependence on this goal may also be in direct conflict with the goals of providing parties with the opportunity to exercise self-determination or to improve the relationship between the parties.25

F. Qualifications of the Mediators

The qualifications of mediators have been a source of lively debate for many years. In February 1989, the Society for Professionals in Dispute Resolution ("SPIDR") published the first report of their Commission on Qualifications ("Commission").26 The Commission identified the following concerns that prompted the establishment of qualifications: (1) protection of the consumer of mediation services and (2) protection of the integrity of the process. While it is difficult to argue with either of these goals, the application of qualifications becomes much more problematic. The Commission identified three central principles in their report: (1) no single entity (rather a variety of organizations) should establish qualifications for neutrals; (2) the greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory should be the qualification requirements; and (3) qualification criteria should be based on performance, rather than paper credentials.27

In developing a court-mandated mediation program, the court wants to be mindful of its obligation to the public to ensure that mediators who

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25 See Menkel-Meadow, supra note 9, at 3, in which the author, a strong proponent of "the pursuit of 'quality'solutions' version of ADR, expressed her concern regarding the courts' 'co-opting' of ADR rather than the court system being changed by ADR. Id. See also Robert A. Bush, Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation, 41 Fla. L. Rev. 253 (1989) (discussing the impact selection of goals can have on the conception of the role of the mediator and ultimately on the standards of conduct for mediators).

26 The Commission, formed in 1987, did not deal exclusively with mediation, although clearly this was a major focus of the research and analysis. Linda Singer served as chair of the first commission. Other members included Gail Bingham, Daniel P. Dozier III, William Hartgening, Patrick Phear, Frank E.A. Sander, Margaret L. Shaw, Lamont E. Stallworth, Paul Wahrhaftig, and ex officio members Michael Lewis and George Nicolau. A second commission was established in 1992 with Bob Jones designated as chair.

receive referrals from the court are effective and appropriate. At the time of the first report, ten states had implemented, by statute or court rule, qualifications for practice as a mediator. Typically, one must meet some combination of the following requirements to become qualified: attend mediation training, take part in apprenticeships or mentorships, meet a specified educational background, and have previous experience in related fields. A recent development is in the area of performance-based testing. Each of these areas merits some individual discussion.

1. Training

Mediation training programs typically cover general dispute resolution theory and development of mediation skills and culminate in the participant conducting a role play simulation as a mediator. The programs vary in length from one day to one week depending either on the kind of cases the participants are being trained to handle or on the previous experience of the participants. In addition, continuing mediation education is becoming more widely available through associations and private providers.

2. Apprenticeships/Mentorships

After individuals complete training, some programs require an apprenticeship. These apprenticeships vary both in length and intensity. The advantage of this requirement is that it provides a service to both the public and the individual mediator. At the very least, the public is provided with a mediator who has seen a real mediation and perhaps has conducted a mediation under supervision, allowing for post-mediation feedback from a skilled mediator. Through this process, the new mediator can enter his or her first solo mediation with greater confidence. In addition, the apprenticeship gives individuals an opportunity to view mediation and make a determination of whether it is the right process for them.

California, Florida, Iowa, Michigan, Minnesota, New York, Oklahoma, Texas, Virginia, and Wisconsin have implemented such qualifications. See Qualifications, supra note 27, at 9 n.1. Since 1989, many other states have adopted statutes regulating mediators. These include: Kansas, Louisiana, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oregon, and Utah. In addition to state qualifications, some organizations have developed prerequisite criteria for association membership.

The Florida Supreme Court and the Academy of Family Mediators certify mediation programs. See The Academy of Family Mediators, FM Integrated Core Training Curriculum (1991); see also infra note 126 and accompanying text.
3. Educational Background/Professional Experience

The easiest criteria for new programs to rely on in establishing qualifications for mediators is educational background and licensure in other professions. The debate continues about the appropriateness of requiring paper credentials (advanced degrees) or licensure. At this point there is no research that would indicate that lawyers or judges make better or worse mediators than others. While the argument can be advanced that by their very nature, mediators who work in the context of court-connected programs must be, at the very least, comfortable working with lawyers and the law, some have made the intuitive argument that individuals who have had extensive litigation or judicial backgrounds may find it even more difficult than others to facilitate discussions without offering an opinion.  

4. Performance-Based Testing

A fast-growing movement within the mediation community focuses on the development of performance-based testing. Since the mediation community has not been satisfied that an advanced degree or previous professional experience necessarily translates into appropriate qualifications, developing the ability to observe and assess an individual’s mediation skills has become a priority. In an early article on this subject, Christopher Honeyman formed the following hypotheses from research conducted on the Wisconsin Employment Relations Commission:

1) For practical purposes, mediation can be divided into five skill based elements (investigation, empathy, persuasion, invention, distraction, [plus a sixth: substantive knowledge of the field in which the dispute takes place]);
2) Differences in style can be accounted for by differences in relative skill and knowledge among these five [six] elements;
3) It is possible to use this division of skills to develop a thorough training program, while obviating the problem of style;
4) Division of mediation skills into the elements listed above allows easy comparison to other professions, in which thorough approaches to skill development already exist;

5) It is possible to construct a reasonably reliable oral examination for selecting mediators.\footnote{Christopher Honeyman, \textit{Five Elements of Mediation}, 4 \textit{NEG. J.} 149, 155-59 (1988); see also Christopher Honeyman, \textit{On Evaluating Mediators}, 6 \textit{NEG. J.} 23 (1990); Christopher Honeyman, \textit{The Common Core of Mediation}, 8 \textit{MEDIATION} Q. 73 (1990).}

The Test Design Project, a research initiative of the Wisconsin Employment Relations Commission, was created in 1990 to improve competency testing in dispute resolution. The group has received funding from the National Institute for Dispute Resolution ("NIDR") and the Hewlett Foundation to pursue development of guidelines for performance-based selection of mediators with the assistance of the American Institutes for Research and the Human Resources Research Organization.\footnote{Memorandum from Christopher Honeyman, Director, Test Design Project, to Sharon Press, Director, Florida Dispute Resolution Center 1 (June 29, 1992) (on file with the \textit{Kentucky Law Journal}). See also \textit{INTERIM GUIDELINES FOR SELECTING MEDIATORS} (National Institute for Dispute Resolution, March 1993) (Draft for comment detailing how performance-based testing allows organizations to better develop the skills of mediators).} In a separate project, the members of a team responsible for selecting and training mediators for a newly established court mediation program in Suffolk County Superior Court, Massachusetts, decided to try Honeyman’s approach.\footnote{Brad Honoroff et al., \textit{Putting Mediation Skills to the Test}, 6 \textit{NEG. J.} 37 (1990).} The group reported favorably on the project in terms of providing a more reliable selection method, as well as providing a focus for program administrators to determine from a policy standpoint which skills are “appropriate, favored or only implicitly valued in a particular program.”\footnote{\textit{Id.} at 46. The skills considered include investigation abilities, empathy, inventiveness, persuasion and mediation management. \textit{Id.}}

G. Mediator Certification

Once qualifications are determined, the state must decide whether to pursue a formal certification process or allow the qualifications to be self-enforcing. If certification is pursued, the issue of how and where must be addressed. This issue includes the determination of whether certification will be handled on a statewide basis or through the local jurisdictions.

Some have argued that it is too early to “credential” mediators because the field is not sufficiently defined. In fact, consensus has not yet been reached as to whether mediation is a profession unto itself or whether it is merely an amalgam of several different professions.\footnote{Deborah R. Sundermann, \textit{The Dilemma of Regulating Mediation}, 22 \textit{HOUSE L. REV.} 841, 860 n.137 (1985) (noting that successful mediation draws upon a variety of skills).} Other
concerns regarding certification and development of standards include "1) creating inappropriate barriers to entry into the field, thus 2) hampering the innovative quality of the profession, and 3) limiting the broad dissemination of peacemaking skills in society."36

A further concern is that standards may have the unintentional effect of excluding ethnic or racial groups.37 If, however, statewide standards are adopted, a central certification process provides for the greatest amount of consistency and protection against uneven or different interpretations of the qualifications. Furthermore, the mediator is protected from the expense and trouble of becoming certified in every jurisdiction. If the state chooses to embark upon establishment of standards of conduct and rules of discipline for mediators, a central system becomes imperative.

H. Scope of Program

Establishment of a statewide program can be for all types or limited types of cases. For example, one can compare the scope of New York’s statewide community mediation program38 to that of California’s family mediation program.39 The program coordinators also need to decide if

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34 QUALIFICATIONS, supra note 27, at 9.
37 For example, a random survey conducted by the Florida Bar revealed that, as of December 1992, Florida Bar members were: 93% White; 3% Hispanic; 2% Black and 1.5% other.
38 Established by state statute in 1981, the Community Dispute Resolution Centers Program (“CDRCP”) is a unit of the New York State Unified Court System’s Office of Management Support. The CDRCP is a joint local and state effort. As of March 1992, there were community dispute settlement centers available to every citizen in the 62 counties in the state of New York. THE COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAM, TWO YEAR REPORT 6 (1990-92). The centers file quarterly progress reports, financial reconciliation reports, and daily case profile forms with the Office of Court Administration, which in turn provides the centers with a monthly management report on their program’s workload. Id. at 8-9. The centers are monitored by the Office of Court Administration through compliance with performance guidelines, on-site visits, and on-going technical assistance. Id. at 12-14. The centers rely mostly on volunteer mediators. This comprehensive system is limited to “community type” disputes. Currently, there is no statewide management for mediation of large civil cases or divorces.
39 California’s Statewide Office of Family Court Services is a unit within the Administrative Office of the Courts established in response to the legislative mandate of the Judicial Council to provide “statewide coordination of family mediation and conciliation services.” CAL. CIV. CODE §§ 5780-83 (West 1992). Established in 1984, the legislature identified five areas for statewide coordination and services: assisting counties in implementing mandatory mediation and custody laws; establishing and carrying out a uniform statistical reporting system; administering a program of grants to public and private agencies for research, study and demonstration projects in family law; managing a program for training court personnel involved in family law proceedings; and providing the legislature with evaluations of current law for the purpose of shaping future public policy. STATEWIDE OFFICE OF FAMILY COURT SERVICES CALIFORNIA FAMILY LAW DESK REFERENCE ix (1990). California does not presently have statewide coordination of court-connected mediation programs
all cases covered by the program will be eligible only for mediation, and thus mandated on a case-by-case basis after review either by a screening agent or the individual trial judge, or whether all cases of a particular category will be required to use mediation initially. Typical case categories are based on: monetary limits, court jurisdiction, case subject, and type of relief sought. Providing mandatory referral of categories of cases is simple to administer and provides for consistency; however, it does not allow for the court to consider additional factors that may be unique to the controversy, such as the relationship of the parties and the attitude of the parties toward ADR.40

The state might also consider whether all resources will be devoted to establishment of a mediation program or if mediation will be just one of the options available to the parties.41 The advantage of allowing for a variety of approaches is that different cases may benefit from different ADR processes. Providing more options to the parties and the court would encourage use of the most appropriate type. On the other hand, development of a single approach, such as mediation, would allow the court to focus its energy and resources. At a time when all courts are facing tough decisions about how best to allocate limited funds, it may make more sense to provide adequate support for a single program and develop it appropriately rather than divert funds to a variety of programs that collectively provide only an incomplete solution.42

II. THE FLORIDA EXPERIENCE IN ESTABLISHING A STATEWIDE COURT-CONNECTED MEDIATION PROGRAM

A. Program Initiation Decisions

The development of mediation programs in Florida predated the establishment of both Florida's mediation statutes and court rules, as well

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40 MINNESOTA SUPREME COURT/STATE BAR ASSOCIATION TASK FORCE ON ADR, FINAL REPORT (1990); see also CPR LEGAL PROGRAM; ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS (1987).

41 See N.H. SUP. CT. R. 170. In New Hampshire, Court Rule 170 assigns all civil cases to ADR and provides a procedure for parties to determine the appropriate process from the following: neutral evaluation, mediation, nonbinding arbitration and binding arbitration. Id.

42 In developing a comprehensive system, the program must consider the establishment of all the rules of procedure including: referral systems, opt-out provisions, provisions for disqualification of mediators, time frames for referral and completion of mediation, any exclusions from mediation, definitions of what the mandate includes and what constitutes appearance, role of counsel and others, appointment and compensation of the mediator, and procedures covering when an agreement is reached as well as when no agreement is reached. In addition, the program should consider the desirability of adopting special rules for different types of mediation, e.g., family or small claims cases. For a discussion of these considerations, see PLAFINGER & SHAW, supra note 2, at 19-37.
as its state office for dispute resolution. This information has tremendous significance in understanding the decisions that were made in each of the aforementioned substantive areas, and why the statewide program developed as it did. As a result, the following brief history of Florida's involvement with mediation is presented as a basis for the remainder of this Article.

Florida's first court-connected mediation programs began in the community area in 1975. By 1978, ten local citizen dispute settlement ("CDS") programs had been established and the Florida Supreme Court created a special committee on dispute resolution alternatives to assess the existing programs and to develop a comprehensive orientation and training plan for these programs. Through this effort, the groundwork was laid for state coordination of future mediation efforts.

In 1985, the legislature enacted statutory authority that provided for CDS centers. The legislation provided for the establishment of a council to adopt rules for the administration of the program and for the selection of the qualifications for, and the appointment of, a director. It also created a privilege for all parties to a CDS proceeding to prevent another party from disclosing communications made during such proceedings, provided confidentiality for any information relating to a dispute obtained by any person while performing duties for the center, and created a limited immunity section for officers, council members, employees, volunteers or agents of CDS centers. It did not, however,

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43 For a comprehensive review of the history and development of the Florida program, see James J. Alfini, "Trashing, Bashing, and Hashing it Out: Is This the End of "Good Mediation"?", 19 Fla. St. U. L. Rev. 1, 47-75 (1991).
45 There currently are 12 CDS programs, which serve 22 counties in Florida. Since 1988, eight of these CDS programs have expanded their jurisdiction to handle the county court referred cases authorized under Fla. Stat. Ann. § 44.102 (West 1990). An additional seven programs have been established which handle exclusively court-referred cases under Fla. Stat. Ann. § 44.201 (West 1990).
48 Id. § 44.201(2)(a).
49 Id. § 44.201(2)(b).
50 Id. § 44.201(5).
51 Id. § 44.201(6).
provide for any qualifications or training for the mediators in these programs.\textsuperscript{52}

During the period that the supreme court was focusing its attention on efforts to establish and oversee CDS centers, the next phase of mediation was beginning—family mediation.\textsuperscript{53} In 1978, a court-connected family mediation program began operation in Fort Lauderdale, in Broward County.\textsuperscript{54} Florida's development of family mediation reflected the national movement to establish alternatives to traditional methods of dissolving marriages and determining child related issues, which was gaining popularity for many reasons.\textsuperscript{55}

In 1984, the Florida Legislature created the Study Commission on Dispute Resolution.\textsuperscript{56} This commission published two reports.\textsuperscript{57} The first report contained ten recommendations including the establishment of a comprehensive mediation and arbitration program for Florida's trial courts.\textsuperscript{58}

\textsuperscript{52} Despite the lack of statutory mandate, the practice in Florida was for all CDS mediators to complete a packaged training program. See supra note 46 and accompanying text. This omission of a training requirement is noteworthy in light of the fact that mediation often involves individuals from a variety of backgrounds, as successful mediation often requires the use of a variety of talents. See supra note 35.

\textsuperscript{53} Family mediation as used here means the mediation of family disputes arising in dissolution of marriage cases. It does not, however, include parent-child mediation or juvenile mediation. While many jurisdictions refer to these cases as "divorce" mediation, it is not restricted to individuals who were married. See infra note 54 and accompanying text.

\textsuperscript{54} Legislation authorizing family mediation was adopted by the Florida Legislature during the 1982 session. FLA. STAT. ANN. § 44.101 (West 1982). In 1990, the chapter was reorganized and FLA. STAT. ANN. § 44.101 (West 1982) was incorporated into FLA. STAT. ANN. § 44.301 (West 1990). The entire chapter was renumbered in 1990, resulting in FLA. STAT. ANN. § 44.1011(d) (West 1990), which provides for family mediation. As of April 1993, there are 15 court-connected family mediation programs which provide service to 21 counties and 14 of Florida's 20 judicial circuits. The remaining six circuits utilize private family mediators.

\textsuperscript{55} These reasons include: dramatic increases in the divorce rate; more contested custody and visitation matters; dissatisfaction with the delay, formality and expense of judicial proceedings; increased judicial discretion in awarding child custody coupled with a retreat from sex-based criteria for determination and an increased focus on joint custody and continued involvement of both parents; dissemination of research relating child adjustment post-divorce to parental cooperation; and the early success of using ADR for other disputes. JESSICA PEARSON & NANCY THOENNES, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, Final Report of the Divorce Mediation Research Project 1 (1984).

\textsuperscript{56} The commission, chaired by Florida attorney David Strawn, consisted of nine members. Three of these members were appointed by the President of the Florida Bar, two by the Chief Justice of the Florida Supreme Court, two by the Speaker of the Florida House of Representatives, and two by the President of the Florida Senate. The Office of the State Courts Administrator provided staff support to the Commission. See Florida House Bill No. 1223 (effective Oct. 1, 1984).


\textsuperscript{58} Recommendation 1: "Comprehensive court-annexed mediation and arbitration services, consolidated under court dispute resolution centers should be established in each judicial circuit by statute."
The second report included proposed legislation for a comprehensive court mediation and arbitration program.

In January 1986, the Florida Dispute Resolution Center ("FDRC") was created as a joint program of the Florida Supreme Court and the Florida State University College of Law. The stated purposes of the FDRC were: to encourage and assess experimentation with various ADR methods in the State of Florida; to serve as a research institute and information clearinghouse on ADR; to conduct educational programs for members of the bar, the bench, and the general public; and to provide technical assistance to new and established programs. Mike

Recommendation 2: "Each circuit should prescribe local rules of procedure for the operation of each component of the court dispute resolution centers in conformance with rules established by the Supreme Court.'"

Recommendation 3: "The alternative mechanisms for resolving disputes set forth in Recommendation 1 should adhere to the following principles: 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 . . . ; 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 . . . must be competent, well-trained and responsible.'"

Recommendation 4: "Minimum qualifications and training standards for mediators and arbitrators should be established.'"

Recommendation 5: "Each person involved in a court-annexed mediation proceeding has a privilege to refuse to disclose, and to prevent another from disclosing, communications made during such proceedings. . . ."

Recommendation 6: "The court dispute resolution centers (as described in Recommendation 1) should be funded by state appropriations included in the budget of the Supreme Court. . . ."

Recommendation 7: "Each judicial circuit should establish a juvenile alternatives program. . . ."

Recommendation 8: "A continuing Commission on Alternative Dispute Resolution should be established [to set guidelines for operations of the centers, establish training standards and a comprehensive training program]."

Recommendations 9 and 10 focus on the jurisdiction of the courts and the appointment of traffic infraction hearing officers. Final Report 1985, supra note 57, at 5-20.

The second Commission was once again chaired by Florida attorney David Strawn and consisted of nine members (six who had served on the first commission plus three new members). Fla. Senate Bill No. 44, ch. 85-228.


The Florida Center was the first ADR center to combine an academic institution with a state's highest court.


See also Final Report 1985, supra note 57, at 18, in which the commission recommended that the commission be continued and provided staff to conduct the following activities:

1) [Assist] jurisdictions interested in establishing court dispute resolution centers. 2) [A]ct as a clearinghouse for information on court dispute resolution services. 3) [A]dminister funds appropriated for the court dispute resolution centers. 4) [D]evelop and administer a statewide court dispute resolution service information network, compile data and statistics and prepare annual reports. . . . 5) [C]onduct research, evaluations and cost
Bridenback, Director of the Judicial Management and Coordination section of the Office of the State Courts Administrator, was named Director of the Center, and Professor James J. Alfini was named Director of Education and Research. With the creation of the FDRC, the ADR movement in Florida was recognized and supported by the legislature (through their study commissions), the state’s highest court (through early CDS efforts and the commitment to the FDRC), and an academic institution located in the state’s capital. The state bar association did not take an active role in working for ADR initiatives, although the chair of the legislative study commission and two other members were Florida Bar appointees, but even more importantly, the bar did not take an active role in attempting to defeat the initiatives.

The comprehensive ADR legislation proposed by the study commission passed during the final moments of the 1987 legislative session. In addition, state funds were appropriated to establish an Alternative Dispute Resolution Demonstration Project to implement and evaluate the new legislation. The original intention was that the state would fund centers throughout the state if the initial pilot project proved to be successful. Although the project was deemed to be successful, there was no incentive for the state to fund the mediators because the rules of procedure adopted by the Florida Supreme Court allowed the mediator

analyses of dispute resolution mechanisms.

Id.

Mike Bridenback has been instrumental in coordinating the CDS Centers and has served as staff to the legislative study commissions. He served as Director of the FDRC until 1990. He currently serves as senior adviser to the FDRC in addition to being the Chief of Court Services for the Office of the State Courts Administrator (“OSCA”).

Professor James J. Alfini served as Director of Education and Research for the FDRC until August 1991. He currently serves as Dean of Northern Illinois University College of Law.

The 13th Judicial Circuit (Hillsborough County) was chosen as the site. The money was used to establish a circuit mediation and arbitration program with the hiring of a staff attorney to oversee the project, and case evaluators to assist the judges in assessing the appropriate ADR process for each circuit case. I. Hoskins, Supreme Court Chooses 13th Judicial Circuit As Alternative Dispute Demonstration Site, 1 FDRC Newsletter (Summer 1988) at 8. The jurisdiction of the Florida circuit courts at the time of the legislation included cases above $5000. The jurisdiction of the circuit courts now includes those cases above $15,000. The 13th Circuit already had a well-established program for family and small claims mediation. For an evaluation of this project, see Karl D. Schultz, Florida’s Alternative Dispute Resolution Demonstration Project: An Empirical Assessment (1990). A follow-up evaluation is due to be published later this year.

The initial legislation expressed a preference for volunteer mediators. In the words of the statute, “[w]henever possible, qualified individuals who have volunteered their time to serve as mediators shall be appointed.” Fla. Stat. Ann. § 44.302(3) (West 1988).
to be compensated by the parties. Private circuit mediators throughout the state worked with individual judges to assist them in identifying cases appropriate for mediation. Initially, mediator services were volunteered, but shortly thereafter, the judges began to order circuit cases to mediation and to order the parties to pay for the mediator. Thus, the program initiation questions were answered in large measure by the ADR history in the state and the fiscal circumstances at the time of initiation.

B. Statewide Office Model

The creation of the FDRC as a joint program of an academic institution and the state's highest court has proven to be both beneficial and problematic. Combining the court's administrative capabilities through the administrative offices of the court with the educational and research expertise of the law school has been profitable. This has resulted in more practical research based on realities rather than theories and more innovations based on experimentation that oftentimes is not possible in a bureaucratic setting. In addition, operating under the auspices of the state's highest court has provided more credibility and accessibility to the local courts. Furthermore, affiliation with the law school has provided a link to the legal community that is so important to the success of any court-connected program.

In contrast, the FDRC was informally established between then Florida State University College of Law Dean Talbot "Sandy" D'Alemberte and Chief Justice Joe Boyd of the Florida Supreme Court. Since that handshake agreement, D'Alemberte left to become President of the American Bar Association and Justice Boyd retired from the court. With no written understanding, each change in administration has invited new interpretations as to the respective roles and obligations of the "parent" institutions. This has resulted in a continual self-evaluation of

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69 Fla. R. Civ. P. 1.720(g), as amended by In re: Amendment to Fla. R. Civ. P. 1.700-1.780 (Mediation), 563 So. 2d 85, 88 (Fla. 1990).

70 Parties whose cases were referred to county court mediation, which initially consisted exclusively of small claims cases (below $2500), were never required to pay for mediator services. See Jennifer L. Mason & Sharon Press, Florida Mediation/Arbitration Programs: A Compendium 2-1 (1992) [hereinafter Mason & Press I]. In most jurisdictions, the mediators were volunteers; in some, the county paid the mediators a small stipend. Id. at 2-14. Parties referred to family mediation had the option in most jurisdictions of choosing the county funded family mediation program for which no fees were charged to the parties. Id. at 4-1 to 4-2. In those circuits in which a family mediation program had been established, the mediators were salaried employees of the county. Id. at 4-15.

71 Furthermore, since the departure of Dean D'Alemberte and Justice Boyd from the program, there have been two more deans and four chief justices of the state's supreme court.
the FDRC, with revisions in direction and changes in the means of achieving goals.

The decision to create a joint program had a significant influence on staffing decisions. As a joint program, the supreme court, through the Office of the State Courts Administrator, designates and funds the Director of the FDRC, and the dean of the law school designates and funds the Director of Education and Research. The court has provided the administrative and additional professional support while the law school has provided students to serve as graduate fellows to assist in research and other FDRC related projects.

The FDRC continues to serve the functions articulated when it was formed. In addition, the growth of the program since the FDRC's inception has necessitated the provision of additional services. These include: the certification and recertification of individual mediators and of mediation and arbitration training programs, provision of staff support to the two supreme court committees on mediation and arbitration, and the Mediator Qualifications Board. As part of its original mandate, the center: (1) provides mediation and arbitration training—both initial and advanced continuing education; (2) provides information by way of speeches to judicial conferences, local bar associations and mediator groups; (3) provides technical assistance to new and already established court-connected programs; (4) publishes an annual compendium of

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71 See Introducing the Florida Dispute Resolution Center, 1 FLA. DISPUTE RESOLUTION CENTER NEWSL. 2 (undated). The initial Director of the FDRC had duties that extended beyond the ADR area. As the responsibilities of the FDRC grew, the Director's duties were focused strictly on ADR.

72 Id.

73 The current staff make-up of the FDRC consists of a Director (employed by the OSCA), a Director of Education and Research (employed by the College of Law), a Senior Court Analyst and a Senior Court Program Specialist (employed by the OSCA), an administrative assistant and secretary (employed by the OSCA), and two law student fellows (paid by the College of Law).

74 Id.


76 See MASON & PRESS I, supra note 70, at v-vii.

77 The supreme court appointed a Committee on Mediation and Arbitration Training in 1988 to recommend policies and procedures concerning the certification of mediator and arbitrator training programs and to assist the supreme court by making recommendations relating to implementation of the provisions of the new rules governing mediator and arbitrator qualifications and training, as necessary. See Fla. Admin. Order (April 19, 1988) (on file with Clerk, Florida Supreme Court).

The supreme court appointed a Committee on Mediation and Arbitration Rules in 1989 to evaluate the rules relating to mediation and arbitration and to make recommendations regarding revisions, standards of conduct for mediators and arbitrators, the need for legislative changes, and such other recommendations as would improve the use of mediation or arbitration, as deemed appropriate. Fla. Admin. Order (July 26, 1989) (on file with Clerk, Florida Supreme Court).

78 The Mediator Qualifications Board was appointed in order to implement the grievance portion of the standards of conduct and rules of discipline adopted by the Florida Supreme Court in May 1992. See In re Florida Rules for Certified and Court-Appointed Mediators—Mediator Qualifications Board Appointments, Fla. Admin. Order (Nov. 10, 1992) (on file with Clerk, Florida Supreme Court).
statistics from the local court-connected programs, a quarterly newsletter and evaluation monographs; and (5) maintains a library of ADR materials including books, journals, newsletters and videotapes.79

C. State Rules/Statute

Florida's program is grounded in both state statute and court rule. The initial statutory language establishing the comprehensive program defined mediation and arbitration,59 authorized the referral to mediation of contested civil actions in county or circuit court,60 provided a privilege to protect information discussed in mediation,61 authorized the chief judge of each circuit to certify mediators who met the qualifications established by the supreme court,62 and authorized the supreme court to adopt rules of practice and procedure for mediation,63 establish minimum standards for qualifications, and establish rules of professional conduct and training standards.64 Specifications on the set-up and administration of the program were to be established by the supreme court. This has provided great flexibility for the program and allowed the court to be responsive to changes necessitated by experience.65 In addition, the Florida Rules of Civil Procedure provide a general framework for the operation of the mediation programs, while allowing discretion for local programs to establish individual procedures that reflect the unique needs of each circuit.66

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79 See generally Mason & Press I, supra note 70.
59 Fla. Stat. Ann. § 44.1011 (West Supp. 1992). Specifically, the statute defines mediation and arbitration as follows:
(1) "Mediation" means a process whereby a neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable agreement.
(2) "Arbitration" means a process whereby a neutral third party or panel listens to the facts and arguments presented by the parties and renders a decision which may be binding or nonbinding.
Id.
60 Id. § 44.102(1) - (2) (West 1990).
61 Id. § 44.102(3).
62 Id. § 44.102(4).
63 Id. § 44.102(1).
64 Id. § 44.106.
65 By its very nature, the process for effectuating statutory amendments is difficult and time consuming. Since 1987, Chapter 44 of the Florida statutes has been amended twice. The Florida Rules of Civil Procedure were amended twice, a new set of rules were created—the Florida Rules for Certified and Court Appointed Mediators, see supra note 84 and accompanying text, and the court adopted several administrative orders establishing policy regarding certification of training programs, certification of mediators, and establishing the Mediator Qualifications Board. See supra notes 77-78 and accompanying text.
66 Specific examples of local discretion provided for in the rules include: Fla. R. Civ. P.
D. Funding

The Dispute Resolution Center initially was funded through the general revenue of the supreme court and the Florida State University College of Law. The actual division of the costs was done in a somewhat ad hoc manner; the entity with the most available resources provided the needed revenue.

The local programs initially were funded through the county's budget for the court system. While the 1986 family mediation legislation contained a provision that allowed the board of county commissioners to support the program by levying a service charge of up to two dollars on each circuit court proceeding, the CDS legislation of 1985 and the comprehensive ADR legislation of 1987 did not contain any provisions for funding local programs statewide. Between 1988 and 1990, the local county court programs relied heavily on volunteers, the family programs continued to be funded through the counties or by the parties paying the mediator's fee, and the circuit programs relied almost exclusively on private mediators paid for by the parties.

1.700(a)(1); FLA. R. CIV. P. 1.740(e); FLA. R. CIV. P. 1.750(b); FLA. R. CIV. P. 1.710(b)(7) (under which the exclusions from mediation include "[o]ther matters as may be specified by administrative order of the chief judge in the circuit"); FLA. R. CIV. P. 1.720(f)(2) (under which the parties have 10 days to select a mediator, and if they are unable to do so, the court "shall 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 action is pending"); FLA. R. CIV. P. 1.720(g) ("When the mediator is compensated in whole or part by the parties, the presiding judge may determine the reasonableness of the fees charged by the mediator. In the absence of a written agreement providing for the mediator's compensation, the mediator shall be compensated at the hourly rate set by the presiding judge in the referral order.").

See supra notes 73-74 and accompanying text (discussing personnel).

FLA. STAT. ANN. § 44.101(4) (1986), repealed by Fla. Laws ch. 90-188.


MASON & PRESS I, supra note 70, at 4-1 to 4-11. In addition to the 13th judicial circuit pilot project which was funded by the state, only three other judicial circuits established a circuit mediation program. These were the 6th, 11th and 20th judicial circuits. MASON & PRESS I, supra, at 5-7. A circuit was counted as having a "program" if at a minimum an individual was designated to collect statistics on cases referred to mediation. Some circuits also employed personnel to assist the court with mediation referrals and scheduling.

Id. at 5-12. Only the 11th judicial circuit's program provided staff mediators for circuit cases. Id. at 5-5. During the 11th judicial circuit mediation program's initial year of operation, circuit mediation was offered at no charge to the parties. After the first year, the program expanded the number of staff and private contractual mediators and began to levy a fee for mediation. As of 1991, there were ten circuit civil mediation programs representing eight judicial circuits. Id. at 5-5 to 5-6.
In 1990, the Florida Legislature amended Chapter 44 to provide for a secure source of funding for both the local programs and the state office. The legislation expanded the provision of the statute that had originally authorized the local option for the county commission to collect additional filing fees on circuit cases for the purpose of funding family mediation programs. Under the new law, the board of county commissioners may levy a service charge of no more than five dollars on any circuit court proceeding to fund any mediation or arbitration program under the supervision of the chief judge of the circuit in which the county is located, up to five dollars on any county court proceeding to fund county civil mediation services under the supervision of the chief judge of the circuit in which the county is located, and up to forty-five dollars on any petition for a modification of a final judgment of dissolution to be used to fund family mediation services under the supervision of the chief judge of the circuit in which the county is located. If the county commission adopts any of the additional filing fees, one dollar of each charge must be forwarded to the Office of the State Courts Administrator for deposit into the state mediation and arbitration trust account to "be used by the Supreme Court to carry out its responsibilities set forth in section 44.106."

The proposal was able to gain support because it was discretionary on the part of the local jurisdiction. Since the adoption of this statute, twenty-seven of Florida's sixty-seven counties have adopted one or more of the additional filing fees. This, along with the certification fees paid by mediators described below, has provided sufficient revenue for the state office to operate and fulfill all of its mandates.

The fees paid by mediators who apply for supreme court certification provide the other source of revenue on which the state office operates. During the same legislative session at which the filing fees were authorized, the method of certification was also amended, and the supreme court was

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93 Fla. Stat. Ann. § 44.108 (West 1990). The legislature did consider adding additional fees on marriage licenses, but this was rejected in the Senate Judiciary Committee.

94 Id. § 44.101(4) (West 1986), repealed by Fla. Laws ch. 90-188. The expanded funding provision is now found at Fla. Stat. Ann. § 44.108 (West 1990).

95 Id. § 44.108(1).

96 Id. § 44.108(2).

97 Id. § 44.108(3).

98 Id. § 44.108(4).

99 See Mason & Press I, supra note 70, at 2-9 to 2-10, 3-8, 4-10 to 4-11, 5-7. Some circuits are concerned that the circuits that adopted the fees are supporting ADR programs for the state, while others who use the state office resources are not providing any financial assistance through additional filing fees. To date, the provision of services by the state office has not been tied to the amount of money contributed by the individual circuits.

given authorization to "set fees to be charged to applicants for certification and renewal of certification."\(^{101}\) Initially, while the qualifications were established by state supreme court rule, the certification of mediators was handled locally by the chief judge of each circuit.\(^{102}\) This meant that individuals who met the qualifications\(^{103}\) and wished to mediate in all judicial circuits had to apply to be certified twenty times.\(^{104}\) Since the chief judges were not given discretion on certification, if the mediator were found to have met the qualifications of the state rule, the certification process was purely administrative. As such, both the mediators and the chief judges requested that the administrator's office of the state assume the responsibility for certification.\(^{105}\)

Under current procedure, individuals apply for certification to the Florida Supreme Court through the Dispute Resolution Center.\(^{106}\) Individuals meeting the requirements of the rule\(^{107}\) are certified statewide for a two-year period.\(^{108}\) In addition, the mediator may specify the circuits in which the mediator wishes to be placed on the rotation list.\(^{109}\) Mediator certification fees are deposited into the court's mediation/arbitration trust account to fund these ADR programs.\(^{110}\)

\(^{101}\) Id. § 44.106.
\(^{102}\) Id. § 44.102(3).
\(^{103}\) FLA. RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.010-.150 (reprinted in Proposed Standards of Professional Conduct for Certified and Court-Appointed Mediators, 604 So. 2d 764 (Fla. 1992)) [hereinafter FLORIDA RULES].
\(^{104}\) The application process varied greatly from circuit to circuit. In some judicial circuits, one only needed to write a letter and the chief judge would place the individual on the list. In other circuits, e.g., the 15th, a lengthy application was required including fingerprints and letters of reference.
\(^{105}\) Transcript of Supreme Court Committee on Mediation/Arbitration Rules Public Hearing, September 13, 1989, pp. 9, 10, 13, 14, 17, 18, 19, 24, 61, 63, 68.
\(^{106}\) See In re Rules Governing Certification of Mediators, Fla. Admin. Ord. (Dec. 1, 1990) (on file with Clerk, Florida Supreme Court). The fee structure established calls for initial fees set at: $10 (nonrefundable) application fee, $15 certification fee for county mediators (this was waived for county mediators who were currently serving in county programs), $100 certification fee for family mediators, and $100 certification fee for circuit mediators. A discount is provided to individuals who were applying for more than one type of certification. Id.
\(^{107}\) FLORIDA RULES 10.010(a)-(c), reprinted in 604 So. 2d 764 (1992).
\(^{108}\) See Application for Supreme Court Mediator Certification 5 (1992) (on file with Kentucky Law Journal). Individuals can choose none, all, or any combination of judicial circuits for rotation purposes.
\(^{109}\) FLA. STAT. ANN. § 44.108(4) (West 1992).
E. Goals of the Program

The legislative study commission reports provide the most reliable historical data as to the goals behind the initial implementation of Florida’s statewide mediation program. In the 1985 report, the study commission cited the cost benefits that would inure to the state if a comprehensive court-annexed mediation and arbitration service were established. Specifically, the commission stated the benefits would be “in terms of lessening the need for additional judicial resources” and providing the citizens of Florida with “access to a convenient, inexpensive and effective means of resolving their disputes.”

In the 1986 Legislative Study Commission Report, the Commission expanded their goals to the following:

1. Increased flexibility for the judicial branch in providing dispute resolution services;
2. Increased access to the services offered by the judiciary for individuals and entities;
3. Reduction of the time presently required of judges to process cases which will ultimately settle;
4. Reduced cost per dispute resolved by the judicial branch of government over time;
5. Provide for the maximum possible use of existing community resources for dispute resolution purposes.

The program continues to maintain the dual goals of saving both time and money for the court and litigants, as well as increasing access to the system and providing a better form of justice for the litigants. In the evaluation of the 13th Circuit pilot project, the research was designed to ascertain the impact of mediation on the pace, cost and quality of case processing, as well as the effect of mediation on the workload of judges. Specific questions were designed to ascertain the quality of the mediation agreements. While the research program in Florida has

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111 Id. at 6.
114 Id. at 2. The methodology included the following questions relating to quality:
1. Is there a difference in compliance rates between mediation cases and those settled in court?
2. Do the participants feel the mediation process provides them with greater access to justice?
3. Do the participants feel mediation cases are as “fair” as cases decided by a judge?

Id.
not been exhaustive, initial studies and anecdotal stories indicate that Florida has been able to achieve both goals—increased efficiency and quality agreements through mediation.\textsuperscript{116}

\textbf{F. Qualifications of Mediators}

Under the first mediation statutes in Florida, which governed CDS and family mediation,\textsuperscript{117} there was no mention of the individual mediators in terms of duties or qualifications. In practice, the CDS mediators were from varied backgrounds and the family mediators tended to have advanced degrees.\textsuperscript{118} The commentary to the recommendations of the Legislative Study Commission's 1985 report states very clearly the objective that the "high standards for excellence be pursued in recruiting and maintaining a qualified panel of mediators and arbitrators,"\textsuperscript{119} and the 1987 legislation included the provision that "[t]he Supreme Court shall establish minimum standards for qualifications . . . for mediators . . . who are appointed pursuant to this act."\textsuperscript{120}

Upon passage of the statute, Chief Justice McDonald appointed an ad hoc committee of the supreme court to make recommendations to the court on appropriate mediation and arbitration rules to adopt.\textsuperscript{121} The nine-member committee, carrying forward the recommendation of the 1985 Legislative Study Commission, recommended to the court that mediation qualifications should be dependent on the type of mediation that one was pursuing.\textsuperscript{122} The committee recommended that there be separate qualifications for county mediators, family mediators and circuit mediators.\textsuperscript{123} In addition, the committee recommended, and the court

\begin{itemize}
\item \textsuperscript{116} Id. at 23.
\item \textsuperscript{117} See Fla. Stat. Ann. § 44.101 (West 1985), repealed by Fla. Laws ch. 90-188; see also Fla. Stat. Ann. § 44.201 (West 1985).
\item \textsuperscript{118} See James J. Alfini, Florida's Court Sponsored Mediation Programs: A Statistical Profile, Fla. Disp. Resol. Center NewsL. (Fla. Dispute Resolution Ctr.), Summer 1987, at 2-3. A survey conducted by the FDRC during 1986-87 revealed that 92% of the family mediators had advanced degrees. Sixty-one percent possessed law degrees and 31% possessed other graduate degrees. Id.
\item \textsuperscript{119} See Final Report 1985, supra note 57, at 11.
\item \textsuperscript{120} Fla. Stat. Ann. § 44.306 (West 1987).
\item \textsuperscript{121} Fla. Admin. Ord. (July 24, 1987) (on file with Clerk, Florida Supreme Court).
\item \textsuperscript{122} See Final Report 1985, supra note 57, at 11.
\item \textsuperscript{123} Id. Specifically, the new rules state the following qualifications.
\begin{itemize}
\item \textsuperscript{(a)} County Court Mediators. For certification by the Supreme Court, a mediator of county court matters must:
\begin{itemize}
\item (1) complete a minimum of 20 hours in a training program certified by the Supreme Court;
\item (2) observe a minimum of 4 county court mediation conferences conducted by a court certified mediator and conduct four . . . mediation conferences under the
\end{itemize}
\end{itemize}}
adopted, a "grandfather provision," which enabled any individual who had been mediating court cases prior to the adoption of the rules to continue to mediate even if the individual did not meet the new educational and experiential qualifications. Despite reports to the contrary, no one in Florida who had been mediating prior to the adoption of the rules was prohibited from continuing to mediate.

supervision and observation of a court certified mediator; and

(3) be of good moral character; or

(4) be certified as a circuit court mediator or family mediator.

(b) Family Mediators. For certification a mediator of family and dissolution of marriage issues must:

(1) complete a minimum of 40 hours in a family mediation training program certified by the Supreme Court;

(2) 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 . . . ; 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;

(3) observe 2 family mediations conducted by a certified family mediator and conduct 2 family mediations under the supervision and observation of 2 certified family mediators; and

(4) be of good moral character.

(c) Circuit Court Mediators. For certification a mediator of circuit court matters, other than family matters, must:

(1) complete a minimum of 40 hours in a circuit court mediation training program certified by the Supreme Court;

(2) be a member in good standing of the Florida Bar with at least 5 years of Florida practice and be an active member of the Florida Bar within one year of application for certification. . . . (or be) a retired judge who was a member of the bar in the state in which the judge presided . . . ;

(3) observe 2 circuit court mediations conducted by a certified circuit mediator and conduct 2 circuit mediations under the supervision and observation of a certified court mediator; and

(4) be of good moral character.

FLA. RULES 10.010(a)-(c), reprinted in 604 So. 2d 764, 765 (1992).

124 FLA. RULES 10.010(d), reprinted in 604 So. 2d 764, 765 (1992). This section provides that "[m]ediators who have been duly certified as circuit court or family mediators before July 1, 1990, shall be deemed qualified as circuit court or family mediators pursuant to these rules." Id.

125 In an interview with NIDR Forum, SPIRDR Commission on Qualifications Chair Linda Singer was posed the following question: "Has there been any instance of a dispute resolver being stopped from practicing because of new laws?" Her response was, "Yes. In Florida, for example, many county court mediators who wished to be trained to mediate civil or family court referrals were precluded under new legislation from doing so by their lack of professional credentials as lawyers, therapists, or accountants." Producing Principles that Guide Standards, DISPUTE RESOLUTION FORUM (National Institute for Dispute Resolution) May 27, 1989, at 11. However, this was not accurate in the following ways: (1) the question specifically addressed individuals who were stopped from practicing. Under the "grandfather" provision, anyone who had previously been mediating was permitted to continue to mediate and was eligible for certification. (2) There has never been a prohibition on individuals from completing Supreme Court certified training programs even if they do not meet the qualifications for certification. Thus anyone, including "county mediators," who wished to be trained as family or circuit mediators is permitted to do so. See FLA. RULES 10.010(d).
The cornerstone of each set of qualifications was a non-waivable training requirement, which ranged from a minimum of a twenty-hour course certified by the Florida Supreme Court for county mediators, to a minimum of a forty-hour course certified by the Florida Supreme Court for family and circuit mediators. During the summer of 1988, the Dispute Resolution Center sponsored three regional mediation training programs to provide the requisite training for individuals who were currently mediating for the courts. The supreme court adopted training program standards for each type of mediation in 1989.

In addition to training, the rules require special educational and experiential background for family and circuit mediators. Once again,
the requirements vary based on the type of mediation to be conducted. For county mediators, no specific educational or experiential qualifications are required.\textsuperscript{122}

For family mediators, the current educational requirements are that a mediator have a masters 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 certified public accountant licensed to practice in any United States jurisdiction.\textsuperscript{123} At the time these rules were initially adopted by the court, there were no other states that had established these types of qualifications. The rationale for the selection of these professions is clear. First, persons educated in the mental health/behavioral science area were representative of many of the initial mediators for family matters. Similarly, attorneys were deemed to have the educational training that is useful with respect to the legal issues that are involved. Finally, CPAs were included because divorces often involve disputes concerning the financial division of the marital property. As this division can have significant financial and tax-related consequences, a CPA may be an effective mediator in these types of cases.\textsuperscript{124} The additional experiential requirement of at least four years of practical experience in one of the above mentioned fields was also included in the original rules.\textsuperscript{125} In 1990, however, the supreme court amended the rules to allow eight years of family mediation experience, with a minimum of ten mediations per year, to substitute for the educational and experiential requirements.\textsuperscript{126}

In addition to completion of mediation training, circuit mediators must either be members of the Florida Bar with five years of Florida practice or retired judges who were members of the bar in the state in which the judge presided.\textsuperscript{127} In 1989-90, the Supreme Court Committee

\begin{flushright}
\textit{mediate all or some of the issues in the particular case.}" \textit{Id.} at R. 1.720(f)(1)(B).
\end{flushright}

\textsuperscript{122} \textit{Fla. Rules} 10.010(a), \textit{reprinted in} 604 So. 2d 764, 764-65 (1992).

\textsuperscript{123} \textit{Id.} at R. 10.010(b)(2).

\textsuperscript{124} It should be noted that the original qualifications were meant to be inclusionary rather than exclusionary. Potentially effective professions were included as possible backgrounds. Any profession not listed was excluded from potential mediator service.

\textsuperscript{125} \textit{Fla. Rules} 10.010(b)(2), \textit{reprinted in} 604 So. 2d 764, 764 (1992).

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} For certification under \textit{Fla. Rules} 10.010(c)(2), a mediator of circuit court matters, other than family matters, must:

\begin{enumerate}
\item[(2)] Be a member in good standing of the Florida Bar with at least five years of Florida practice and be an active member of the Florida Bar within one year of application for certification. This paragraph notwithstanding, the chief judge, upon written request setting forth reasonable and sufficient grounds, may certify as a circuit court mediator a retired judge who was a member of the bar in the state in which the judge presided. The judge must have been a member in good standing of the bar of another state for at least
on Mediation and Arbitration Rules\textsuperscript{138} studied the qualification requirements—specifically the appropriateness of designating that retired judges as a class were necessarily qualified to be mediators.\textsuperscript{139} A minority report filed with the committee’s petition recommended that the rule be expanded to enable non-Florida lawyers to become certified circuit mediators based on the rationale that permitting the certification of non-Florida judges, but excluding non-Florida lawyers, was both illogical and unnecessarily restrictive.\textsuperscript{140}

A second minority report, which later became a majority committee opinion, recommended that the rules be revised to allow the parties greater freedom in the selection of their mediator.\textsuperscript{141} The court adopted this recommendation and created what has come to be known as the “ten-

\[\text{five years immediately preceding the year certification is sought and must meet the training requirements of (c)(1).}\]

\textit{Id.}

\textsuperscript{140} In July 1989, Chief Justice Ehrlich appointed a special committee on mediation and arbitration rules to: evaluate the rules of civil procedure and make recommendations for revisions; to recommend a standard of conduct for mediators and arbitrators; to recommend necessary statutory revisions; and to make such other recommendations as would improve the use of mediation or arbitration to supplement the judicial process. \textit{See In re Special Committee on Mediation and Arbitration Rules, Fla. Admin. Ord. (July 26, 1989) (on file with Clerk, Florida Supreme Court).}

\textsuperscript{141} In 1990, the rule on qualifications for circuit mediators was amended and reorganized to reflect the preference for Florida attorneys to serve as circuit mediators. The rule allows for the chief judge to certify retired judges upon written request setting forth reasonable and sufficient grounds. \textit{Fla. Rules 10.010(c)(2), reprinted in 604 So. 2d 764, 765 (1992).} According to the committee’s report to the court, the rationale for the rule amendment was that experience has shown retired, out-of-state judges, after appropriate training, have experienced success as mediators in certain circuits where they have been certified. The decision to certify these individuals despite their absence of legal training in Florida, however, is left to the chief judges of each circuit who would have an opportunity to review specific applications. \textit{FLORIDA SUPREME COURT STANDING COMMITTEE ON MEDIATION AND ARBITRATION RULES, FINAL REPORT F-12 (1989) [hereinafter STANDING COMMITTEE].} It must be noted that despite the adoption of this rule, the statute was amended at the same time and the chief judge no longer certifies any mediators. In practice, this rule is implemented by the requirement that retired judges include with their application for state certification to the supreme court a letter from the chief judge of any judicial circuit. This letter must express the chief judge’s support for the certification of the retired judge.

\textsuperscript{141} The original recommendation of the committee would have created a ten-day window for the parties to select a mediator, but would have limited the selection to a certified mediator. Although the report was submitted as a minority opinion, it had received the endorsement of a majority of the committee prior to oral arguments on the rules recommending the current language of \textit{Fla. R. Civ. P. 1.720(4) (1990). STANDING COMMITTEE, supra note 139, at F-4 to F-5.} The recommendation was based on the rationale that since the requirements for certification as a circuit mediator are so restrictive, the parties are left with an unnecessarily narrow pool of individuals from which to choose. The committee was particularly concerned about those cases in which the parties may wish to have a technical expert or nationally prominent mediator who may not be a retired judge or Florida attorney. \textit{Id.} at F-4 to F-5.
day rule” under which parties have ten days, from the order of referral to mediation, to agree on a mediator—a mediator that may be a certified or non-certified mediator. The theory of this approach is that if the court is not designating the mediator, then the court need not be as concerned about the qualifications of the mediator. Presumably, requiring that the parties mutually agree upon their mediator will provide a sufficient safeguard.\footnote{If the parties are unable to agree on a mediator, the court will appoint a certified mediator by rotation or some other manner adopted by administrative order of the chief judge of the circuit.}\footnote{The 1990 rule revisions relating to the qualifications of mediators also included the expansion of the mentorship requirement.\footnote{Under the 1988 rules, only the county mediators were required to observe and conduct mediations under observation and supervision prior to their certification.\footnote{Based on the two years of experience under the rules, the Supreme Court Committee on Mediation Training recommended to the Supreme Court Committee on Mediation and Arbitration Rules that individuals seeking certification as family and circuit mediators should also be required to satisfy this criterion.\footnote{In addition, the committee recommended that for county cases the co-mediation requirement was not satisfied.}}}}

The initial reports from the circuits indicate that parties are selecting their mediators in greater than 90% of all circuit cases.\footnote{MASON & PRESS I, supra note 70, at 5-1. The rule does not have direct impact on the county cases since under\footnote{FLA. R. CIV. P. 1.750 (1990), the court can appoint the county mediator immediately after pretrial. The percentages for family mediator selection are undoubtedly lower because of the proliferation of court programs and the fact that cases may automatically be referred to these programs pursuant to local administrative order.}}\footnote{FLA. R. CIV. P. 1.720(f) (1990). Rotation lists are prepared at the FDRC from the information provided on the mediator’s application for certification. These lists are provided to the circuits every four to six weeks. In addition to the chronological rotation list updates broken down by type—county, family, and circuit—each circuit also receives an alphabetical comprehensive list of all certified mediators.\footnote{MASON & PRESS I, supra note 70, at 5-1.}} The requirement is called a “mentorship” rather than an apprenticeship since the expectation is that individuals will not be as rigorously supervised as one would expect from the traditional apprenticeship model.\footnote{FLA. R. CIV. P. 1.760 (1988).}\footnote{Retired Judge Frank Orlando, Chairperson of the Supreme Court’s Committee on Mediation and Arbitration Training, made the following recommendations, inter alia, to the rules committee at the public hearing: 1) an apprenticeship requirement should be added for family and circuit mediators; 2) there should be a statewide system for certification and decertification of mediators through the Florida Supreme Court and an imposition of registration fees to support the FDRC; 3) continuing education for mediators should be mandated; 4) the grandfather provision of 1.760(d) should be sunset; 5) an objective exam should be instituted to test the mediator’s knowledge of the rules, statute, and standards; and 6) retired judges should not mediate in areas in which they sit as senior judges. SUPREME COURT STANDING COMMITTEE ON MEDIATION AND ARBITRATION RULES, SUMMARY OF PUBLIC HEARING C-1 (September 13, 1989) (on file with the Kentucky Law Journal).}
proving to be a workable solution.¹⁴⁷ A more effective mentorship would involve both observing four mediators and conducting an additional four mediations under observation and supervision. After the adoption of the mentorship requirement, The Dispute Resolution Center convened a meeting of national experts to assist in the development of policies to implement this proposed requirement.¹⁴⁸

The final 1990 addition to the qualifications was the specification that all mediators seeking certification must be "of good moral character."¹⁴⁹ In practice this has translated into the requirement that all applicants for certification submit two letters of reference attesting to the applicant's moral character.¹⁵⁰

The final component relating to qualifications was incorporated in May 1992 when the supreme court adopted the Rules for Certified and Court-Appointed Mediators.¹⁵¹ These rules are divided into three parts. Part I contains the qualifications to be certified for each type of court mediation;¹⁵² Part II contains the standards of conduct for mediators;¹⁵³ and Part III contains the rules of discipline.¹⁵⁴ The 1988 legislation authorized the supreme court to promulgate the standards of conduct and rules of discipline, and the Standing Committee on Mediation and Arbitration Rules, when appointed in 1989, was directed to make recommendations to the supreme court on a code of conduct. During the 1989 session, the legislature adopted a judicial immunity provision for all mediators who were appointed pursuant to court-order, which became effective October 1, 1990.¹⁵⁵ This law made the need for supreme court action even more apparent. The committee submitted a recommended code of conduct in its 1989 report, but was unable to reach a consensus on the rules of discipline. Because the court decided not to adopt the standards until an enforcement mechanism could be formulated, the

¹⁴⁷ STANDING COMMITTEE, supra note 139, at F-11.
¹⁴⁸ Joseph Stulberg chaired the group consisting of Baruch Bush, Lela Love, Tim Salis, and several Florida mediators. The recommendations were instrumental in shaping the administrative order that adopted the new criteria. In re Rules Governing Certification of Mediators, Fla. Admin. Ord. (Dec. 1, 1990) (on file with Clerk, Florida Supreme Court).
¹⁵⁰ In re Rules Governing Certification of Mediators, Fla. Admin. Ord., at 2-3 (December 1, 1990) (on file with Clerk, Florida Supreme Court).
¹⁵¹ See PROPOSED STANDARDS OF PROFESSIONAL CONDUCT FOR CERTIFIED AND COURT APPOINTED MEDIATORS, reprinted in 604 So. 2d 764, 764 (1992) (court adopts proposed changes to procedural rules for mediation and arbitration).
¹⁵² FLA. RULES 10.010, reprinted in 604 So. 2d 764, 764 (1992) (court adopts proposed changes to procedural rules for mediation and arbitration).
¹⁵³ Id. at R. 10.020.
¹⁵⁴ Id. at R. 10.160.
¹⁵⁵ "A mediator appointed pursuant to § 44.102 shall have judicial immunity in the same manner and to the same extent as a judge." FLA. STAT. ANN. § 44.107 (West 1990).
committee continued to work on the standards and rules. In 1991, the committee’s recommendations were submitted to the court. The code of conduct adopted by the court includes standards on the mediation process, self determination, impartiality, confidentiality, professional advice, fees and expenses, training and education, advertising, and relationship with other professionals.

G. Scope of the Program

Florida took an early initiative and made a commitment to a comprehensive civil mediation program that allowed the presiding judge, pursuant to rules adopted by the supreme court, to refer to mediation all or any part of a filed civil action. Despite this broad grant, there are some limitations on the scope of the program. Under the 1988 rules of civil procedure, parties were allowed to move to dispense with mediation “if the issue to be considered had been previously mediated or arbitrated between the same parties pursuant to Florida law.” The grounds for moving to dispense were expanded in 1990 to include issues that are strictly questions of law or violations of the exclusions under the rules of civil procedure, or where other good cause is shown.

The general rules governing mediation also contain specific exclusions from referral. These include appeals from rulings of administrative agencies, bond estreatures, forfeitures of seized property, habeas corpus and extraordinary writs, bond validations, declaratory relief, and other matters as may be specified by administrative order of the chief judge in the circuit.

157 Id. at R. 10.060.
158 Id. at R. 10.070.
159 Id. at R. 10.080.
160 Id. at R. 10.090.
161 Id. at R. 10.100.
162 Id. at R. 10.120.
163 Id. at R. 10.130.
164 Id. at R. 10.140.
168 Id. at R. 1.700(b).
169 Id. at R. 1.710(b). The 1988 version of the rules contained an additional exclusion: any litigation expedited by statute or rule, except issues of parental responsibility. Fla. R. Civ. P. 1.710(b)(7) (1988). The Supreme Court Standing Committee on Mediation and Arbitration Rules will be recommending to the Court that the exclusion list be amended in the following manner: subject to the following exceptions, any civil case may be ordered or referred to mediation upon motion or
The most controversial issue that Florida faced regarding the scope of the program related to family mediation cases that involve allegations of domestic violence. Neither the 1982 family mediation statute nor the 1988 comprehensive mediation statute addressed the issue of referral of these cases to mediation. The 1982 statute provided that "[t]he court on its own motion or on motion of a party may refer the parties to [family mediation or conciliation] service[s]." The 1988 statute allowed for the referral of any contested civil action, if an appropriate mediation program has been established in the circuit or county over which the court has jurisdiction.

During the 1989 legislative session, Senator Helen Gordon Davis, on behalf of the Supreme Court Committee on Mediation and Arbitration Rules, of which she was a member, filed a bill to amend Chapter 44 to make referral to mediation of family issues mandatory upon the establishment of an appropriate mediation program. This legislation provided an exemption from mandatory referral for those cases in which there was a history of domestic violence. On the floor of the house the bill was amended from a mandatory referral to a discretionary referral, but the language involving the exception for domestic violence was retained as originally stated. The language that became law was the following:

stipulation of the parties, sua sponte, as an alternative to arbitration, or in conjunction with arbitration, if the judge or the parties determine the case to be of such a nature as to provide benefit to the litigants or the court. The exceptions are: (1) bond estreatures; (2) habeas corpus and extraordinary writs; (3) bond validations; (4) civil or criminal contempt; or (5) other matters as may be specified by administrative order of the chief judge in the circuit. Rules Committee Readies Revision Recommendations, FLA. DISP. RES. CENTER NEWSL. (Florida Dispute Resolution Center) Spring 1993, at 1-2. This will provide consistency with the arbitration exclusions and better represent the appropriate exclusions.

170 FLA. STAT. ANN. § 25.385(2)(a) (West 1992) defines domestic violence as any assault, battery, sexual assault, sexual battery, or any criminal offense resulting in physical injury or death of one family or household member by another, who is or was residing in the same single dwelling unit. For a more complete discussion of the issues relating to domestic violence see Special Issue on Mediation and Spouse Abuse, 7 MEDIATION Q. 4 (Summer 1990).

171 See infra notes 172-73 and accompanying text.

172 FLA. STAT. ANN. § 44.302(1) (West 1988). Establishment of an appropriate mediation program was interpreted to mean that mediators were available, rather than that the court had established a program where mediators were employed by the court.

173 The proposed amendment, Senate Bill 237 (1989), provided:
    (1) Except as provided in rules promulgated by the Supreme Court, a court:
        . . . .
    (e) shall refer all issues relating to custody, visitation or child support with the exception of those cases where there is any history of domestic violence, to mediation, if an appropriate mediation program has been established in the circuit or county over which the court has jurisdiction [emphasis added].

174 Id.

(1) Except as provided by rules promulgated by the Supreme Court, a court:

\[ \ldots \]

(c) May refer all issues relating to custody, visitation, or child support with the exception of those cases where there is any history of domestic violence, to mediation, if an appropriate mediation program has been established \ldots .^{177}

This language created great confusion among both the judges referring cases to mediation and the mediators. The amended language seemed to suggest that where there was a history of domestic violence, the court was prohibited from sending that case to mediation. There was, however, no definition provided for what constituted a "history of domestic violence." Many circuit judges were cautious about their referrals to mediation, which resulted in a dramatic decrease in court-ordered mediation.\(^\text{178}\) The legislation that was intended to increase the use of family mediation was in practice having the opposite effect.

In order to reverse the trend that was unwittingly created during the 1989 legislative session, a second amendment to the provision was offered during the 1990 legislative session.\(^\text{179}\) The proposed language was signed into law with an effective date of October 1, 1990. The new language provided that if a family mediation program had been established, cases were to be referred to mediation unless the court finds that "there has been a significant history of domestic abuse which would compromise the mediation process."\(^\text{180}\) This language has proven to be effective in striking a balance between allowing mediation to proceed where it would be beneficial,\(^\text{181}\) while not mandating mediation in cases where it would not be advisable.

H. Policies and Mechanics

Florida's mediation referral system is based upon trial judge discretion rather than state mandate. This approach is founded on the premise that the presiding trial judge, together with the parties, is in the best position


\(^{178}\) The Sixth Judicial Circuit reported that more than 90% of their petitions for divorce contained some allegation of domestic violence.


\(^{181}\) See Linda K. Girdner, Mediation Triage: Screening for Spouse Abuse in Divorce Mediation, 7 Mediation Q. 365, 365-76 (Summer 1990).
to determine if a case is appropriate for referral to mediation. Once the trial judge orders the case to mediation, the state rules regarding time frames for scheduling mediation conferences and for the completion of mediation are triggered. These state rules provide a general parameter, but throughout the rules the judge and parties are provided with the option of extending time frames or changing the requirements to fit the needs of their individual cases.

Once mediation is ordered, a mediation conference is held subject to an established set of procedures. Under the Florida rules, the mediator is given the authority to adjourn the mediation conference at any time and to meet privately with any party or counsel, and is to "be in control of the mediation and procedures to be followed" at all times. While counsel are permitted to communicate privately with their clients, mediation may proceed in the absence of counsel, at the discretion of the mediator and by agreement of the parties, unless otherwise ordered by the court.

At the conclusion of the mediation, the mediator may, with consent of the parties, identify for the court any pending motions or outstanding legal issues, discovery or other action, which if resolved or completed, would facilitate the possibility of a settlement. Mediators have no duty to write the agreement themselves, but the standards of conduct require the mediator to ensure that the agreement is appropriately memorialized. Mediators have a duty to discuss with the participants the process for formalization and implementation of the agreement.

The rules unequivocally state that if the parties do not reach an agreement, the mediator shall report the lack of agreement without any comment or recommendation. The rationale behind this rule is to

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183 The rules indicate a preference for an expedited mediation process wherein the first conference will be held within 60 days of the order of referral. See Fla. R. Civ. P. 1.700(a)(1) (1990). Motions to dispense with or defer mediation must be filed within 15 days of the order of referral. Id. at R. 1.700(b)-(c). Also, mediation is to be completed within 45 days of the first mediation conference. Id. at R. 1.710(a). In addition, the referral to mediation is not to interfere with discovery, which is permitted to continue throughout mediation, id. at R. 1.710(c), and a party may move for interim or emergency relief at any time. Id. at R. 1.720(a). For family cases, mediation is to be completed within 75 days of the first conference, id. at R. 1.740(c), and in no event shall small claims mediation conferences be held more than 14 days after the pretrial conference. Id. at R. 1.750(b).
184 Id. at R. 1.720(c).
185 Id. at R. 1.720(c).
186 Id. at R. 1.720(d).
187 Id.
188 Id. at R. 1.730(a). But see infra note 190 and accompanying text.
preserve the benefits of mediation by encouraging the uninhibited exchange of information in an effort to reach mutually acceptable agreements.

While the cornerstone of Florida's court-connected mediation procedures is the parties' appearance at mediation conferences, it is clear the participation of the parties is encouraged and expected. While it is tempting to require the parties to negotiate in good faith during mediation, such a requirement would contain numerous pitfalls. Instead of requiring this good faith participation during mediation, Florida's approach has been to provide, via the mediation conference, the opportunity for the major players in the case to be present at the same time, in the same place, while focused on the case at a point in time prior to having the case set for trial. The 1990 revisions to the rules illustrate the importance of having the necessary parties present if mediation is to be successful. Based on the judiciary's experience under the original rules, the parties, counsel of record (if any), and, where applicable, insurance representative with full authority to settle, were considered to be critical to the effectiveness of court-ordered mediation. Furthermore, the committee made clear the distinction between

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10 See Avril v. Civilmar, 605 So. 2d 988, 990 (Fla. Dist. Ct. App. 1992), in which the court held that there was no basis to impose sanctions or punishment connected with the mediation process because "[i]t 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.

11 The vast majority of cases settle before trial, but often not until they are "on the courthouse steps." See Stephen Landsman et al., What to Do Until the Lawyer Comes 139-40 (1977).

12 The rule was changed from: "The court, upon written notice from the mediator that any party has failed to appear after receiving written notice and without good cause, may apply appropriate sanctions . . . ." Fla. R. Civ. P. 1.720(b) (1988), to:

If a party fails to appear at a duly noticed mediation conference without good cause, the court upon motion shall impose sanctions . . . . Unless stipulated by the parties, 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 consultation; and
(2) The party's counsel of record, if any; and
(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 without further consultation.

Fla. R. Civ. P. 1.720(b) (1990). Note that the general rules do not apply to family or small claims mediation in which a party to family mediation is deemed to appear at a mediation conference if the named party is physically present. Id. R. 1.740(d). Furthermore, if a party to a small claims mediation gives counsel or another representative authority to settle the matter, the party need not appear in person. Id. R. 1.750(c).

13 An exemption was carved out for public entities that are required to conduct business under Fla. Stat. ch. 286 (Florida's open government law), under which such entities were deemed to appear by the physical presence of a representative with full authority to negotiate and recommend
mandating attendance as opposed to mandating settlement. Thus, attendance is required, while settlement is not.\textsuperscript{195}

An additional, albeit unintended, benefit of the attendance requirement for court-ordered mediation is that the parties must be present. While it is true that the vast majority of cases will settle without going to trial, the settlements often occur during negotiations between the attorneys—outside the presence of the parties to the dispute.\textsuperscript{196} By the actual presence of the parties, even without their active participation in the mediation, it can be hoped that the disputants will achieve a greater understanding of their case, and as a result will be more satisfied with the ultimate agreement.

\textbf{Conclusion}

Court-connected mediation programs are revolutionizing the traditional legal system of litigation. As the court systems reach out to embrace these programs, it is important that the policy and procedural details described above are considered, developed, evaluated and continually revised. By tradition, mediation is a flexible process. When properly implemented, a court-connected mediation program, established via a statewide office, provides this flexibility.

\footnotesize{\textsuperscript{195} The committee's explanation for the recommended change includes the following language: "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 a mediation directly vested with the ability to resolve the dispute." \textit{Standing Committee}, \textit{supra} note 139, at F-4.}

\footnotesize{\textsuperscript{196} See \textit{Donald Gifford, Legal Negotiation: Theory and Applications}, 82 (1989).}