Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment

Robert B. Moberly
University of Florida College of Law

Follow this and additional works at: http://ir.law.fsu.edu/lr

Part of the Law Commons

Recommended Citation
http://ir.law.fsu.edu/lr/vol21/iss3/1

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.
ETHICAL STANDARDS FOR COURT-APPOINTED MEDIATORS AND FLORIDA'S MANDATORY MEDIATION EXPERIMENT

ROBERT B. MOBERLY

I. BACKGROUND ...................................................... 702
II. MEDIATOR COVERAGE AND CHOICE ........................... 705
III. MEDIATOR STANDARDS OF PROFESSIONAL CONDUCT...... 706
  A. General Mediator Standards ............................... 706
  B. Responsibilities to Courts .................................. 707
  C. Mediation Process ......................................... 708
  D. Self-Determination ........................................ 711
  E. Impartiality ................................................ 712
  F. Confidentiality ............................................. 713
  G. Professional Advice ....................................... 714
  H. Fees and Expenses ......................................... 715
  I. Concluding Mediation ...................................... 716
  J. Training and Education .................................... 717
  K. Advertising and Soliciting ................................ 718
  L. Relationships With Other Professionals .................. 718
  M. Advancement of Mediation ................................ 719
IV. ENFORCEMENT OF MEDIATOR STANDARDS OF CONDUCT. 719
  A. Introduction ............................................... 719
  B. Mediator Qualifications Board: Divisions and Panels .............................................. 720
  C. Complaint Committee Process ............................ 720
  D. Hearing Procedure ....................................... 721
  E. Sanctions .................................................. 722
  F. Confidentiality ............................................ 722
  G. Appeals ...................................................... 723
V. ATTORNEY OBLIGATION TO ADVISE CLIENTS OF ALTERNATIVE DISPUTE RESOLUTIONS .................. 723
IV. CONCLUSION........................................................ 726
I. BACKGROUND

FLORIDA has a relatively long and rich history of experimentation with mediation in its judicial system.¹ The use of mediation developed for "minor" criminal and civil cases in the 1970s, for divorce cases in the late 1970s and early 1980s, and there was "an explosion of interest in the mediation of large civil cases" in the late 1980s.²

Court-sponsored mediation has become even more pervasive in Florida in the 1990s, and its use is increasing rapidly.³ In 1991, almost 50,000 reported cases went to mediation, compared to about 34,000 only two years earlier.⁴ The growth has been particularly explosive in the circuit courts, often involving large civil cases, with the reported mediation caseload nearly tripling in that same period.⁵ The Florida

---

² Id.
³ A compendium of Florida court-sponsored mediation and arbitration programs is contained in FLORIDA DISPUTE RESOLUTION CTR., FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM (1992) [hereinafter COMPENDIUM]. For detailed discussions of the extensive use of mediation in Florida, court-sponsored and otherwise, see generally THE FLA. BAR, ALTERNATIVE DISPUTE RESOLUTION IN FLA., VOL. II (1992).
⁴ COMPENDIUM, supra note 3, at viii and accompanying charts. This figure does not include unreported court cases, see infra note 5. This figure also does not include the large number of disputes in which the parties voluntarily agreed to mediation without a court order. This trend is rising as attorneys become more familiar with mediation and its benefits, and perhaps, at least in some circuits, of its inevitability.
⁵ Id. at viii and accompanying charts. Circuit court mediation cases numbered 5887 in 1989, 10,472 in 1990, and 16,960 in 1991. This does not include cases sent to mediation in circuits where no individual has been designated to administer the program, and so these statistics are underinclusive. The Florida Dispute Resolution Ctr. is developing a plan to collect accurate statistics on the level of circuit court mediators. Preliminary estimates indicate that the actual number of circuit mediations held in 1991 was 40,000. Id. at 5-2.
Mandatory Mediation Experiment

Supreme Court has certified more than 2300 mediators, and more than 4800 individuals have completed Supreme Court certified mediation training. The most significant empirical work, in a legislatively funded study, indicated that mediation is "faster, less expensive and fair to the parties and the attorneys." Moreover, Florida Supreme Court administrators believe that mediation has significantly reduced judicial workload. They point out that despite a steady rise in civil case filings, the number of jury trials is decreasing significantly as more cases are resolved through mediation.

Two additional developments are particularly notable for purposes of this Article. First, the Florida Legislature provided that "[t]he Supreme Court shall establish minimum standards and procedures for . . . professional conduct [and] discipline . . . for mediators . . . appointed pursuant to this chapter." Second, in 1989 Chief Justice Ehrlich established the Florida Supreme Court Standing Committee on Mediation and Arbitration Rules (Committee) and included in its charge the task of recommending appropriate mediator standards of conduct.

The Florida Dispute Resolution Center provided staff for the fifteen-person committee, which was comprised of mediators, judges, attorneys, and law professors. The Committee held public hearings and meetings across Florida between 1989 and 1991 and received written commentary. Eventually the Committee created two subcommittees, one to focus on standards of conduct and the other to focus on developing rules of discipline. Before each subcommittee began its work, the Florida Academy of Certified Mediators, the Flor-

---


11. Id. at 3. The final committee report noted the outstanding work by Sharon Press of the Florida Dispute Resolution Center and Mike Bridenback of the State Courts Administrator’s Office. Id. at 4.

12. The membership of the 1990-91 Standards Subcommittee included: Professor Robert B. Moberly, chair; Judge F. Dennis Alvarez; Sen. Helen Gordon Davis, Dem., Tampa; Judge William Green; William Lockhart; Linda Soud; and Bo Ward. Id. at 3.

13. The membership of the 1990-91 Rules Committee included: Professor James J. Alfini, chair; Judge Bob Andrews; Mary Caldwell; Jack Cook; Rep. John Cosgrove, Dem., Miami; Henry Latimer; and John Upchurch. Id. at 3.
ida Bar, and the Florida Association of Professional Family Mediators were invited to designate representatives to attend all working sessions and provide continuing input.\(^{14}\)

The subcommittees reviewed mediator standards of conduct established by other organizations and jurisdictions.\(^{15}\) Additionally, the subcommittees reviewed pertinent books\(^ {16}\) and articles\(^ {17}\) concerning mediation standards of conduct. The subcommittees and Committee reviewed several drafts of the standards. All individuals who had completed Supreme Court certified mediation training programs received a copy of the proposed standards and a survey of both the standards and the preferred type of disciplinary body.\(^ {18}\)

14. *Id.* at 2.


18. The survey results were as follows:

Approximately 53% of the individuals who applied for Supreme Court mediator certification returned the survey. Of those, 84% supported the adoption of the Proposed
After considering other jurisdictions’ standards of conduct, pertinent literature, and the survey results, the Committee submitted its full report to the court on November 1, 1991. The Court received testimony on the report and issued an opinion on May 28, 1992, substantially adopting the Committee proposals as the Florida Rules for Certified and Court-Appointed Mediators.

II. MEDIATOR COVERAGE AND CHOICE

The standards “apply to all mediators who are certified or participate in court-sponsored mediation.” Certification requirements vary, depending on whether the mediator will be conducting county, family, or circuit court mediations. Additionally, the parties are free to select a mediator who does not meet the certification requirements but who is qualified by training or experience to mediate all or some

Standards as drafted and another 14.5% were in substantial agreement with the Standards but recommended that there be some minor revision made prior to adoption. Only one individual selected “I am not in substantial agreement with the standards as drafted.” The remaining 1% did not answer the question. Space was provided for specific comments and many individuals did make substantive suggestions about the proposed standards. All comments were reviewed by the Committee and changes were made to the proposed standards.

The second question requested that the respondents select the disciplinary body which most closely reflected their preference. The choices were: a) an independent body appointed by the Florida Supreme Court; b) the Grievance Committee of the Florida Bar; c) the Department of Professional Regulation; or d) other. Approximately 60% of those responding chose an independent body appointed by the Supreme Court. Twenty percent selected the Florida Bar Grievance Committee and 14% selected the Department of Professional Regulation.


20. Proposed Standards of Professional Conduct for Certified and Court-Appointed Mediators, 604 So. 2d 764 (Fla. 1992). The order creates the Florida rules for certified and court-appointed mediators. Parts II and III of the rules are substantially the same as the committee proposal, but numbered in sequence as Florida Rules for Certified & Court-Appointed Mediators 10.020-10.290. Id. at 765-66. The court further repealed Florida Rules of Civil Procedure 1.760, regarding qualifications, and readopted it as Part I, Florida Rules for Certified & Court-Appointed Mediators 10.010. Id. at 764. In addition, the court omitted proposed standard III.D, regarding substitute mediators, and instead rewrote and added it as subdivision (f)(3) of Florida Rules of Civil Procedure 1.720. Id. See also text accompanying infra notes 60-63.

of the issues in the particular case. For example, mediators from outside the state are not likely to become certified in Florida, yet the parties may wish to select such a person for reasons of expertise or outside viewpoint. Similarly, the parties may wish to select a prominent person from within the state who has not sought or obtained certification. A national study recently concluded that parties should have "the greatest possible choice" in selecting such mediators. Where choice exists, it is not necessary to impose restrictive qualification (that is, certification) requirements. Rather, "a free market should be relied on," so long as the parties are provided with complete and accurate information about the mediator. Of course, it should be recognized that the standards of conduct discussed in this Article apply to all court-appointed mediators, whether or not they are certified, and regardless of whether they are selected by the parties or by the judge.

III. Mediator Standards of Professional Conduct

The overall structure of the standards emphasizes a mediator's duties to the public, to the parties, to the court, and to the mediation process. Some of the standards reflect a tension between a desire to set aspirational goals and the need for black-letter principles that can be easily understood and enforced. Moreover, the establishment of court-annexed mediation ethics is a new endeavor. For this reason, mediation standards should properly be considered as organic in nature, with a recognition that such standards are likely to change and evolve with the growth of court-sponsored mediation.

A. General Mediator Standards

A mediator holds a unique position of trust. For mediation to succeed, the mediator must maintain the parties' trust while moving them toward a suitable solution. This requires mediators to adhere to the highest standards of integrity, impartiality, and professional competence in their service.

23. Fla. R. Civ. P. 1.720(f)(1)(B). The parties' selection of a mediator is subject to review by the presiding judge. Id.
25. Id. at 16.
26. Id.
27. Fla. R. for Certified & Court-Appointed Mediators 10.020(a).
28. Id. at 10.030(a).
People of varying professions and personalities serve as mediators. For example, social workers, psychologists, and lawyers could be qualified to serve as mediators in Florida legal disputes, depending on the nature of the dispute. Generally, such persons can be skilled in mediation if they have appropriate training, a capacity to conduct an orderly meeting, the ability to identify issues, and the ability to deal with people. The skill and competence of mediators are important factors in the success and settlement rates of mediation.

Although competence of the mediator is a goal, it is relatively difficult to define. Mediator styles and theories of mediation differ so widely that it is hard to codify with any specificity what the reasonable mediator would do in any given situation. However, standards may help prevent what is clearly unacceptable conduct.

Because mediation is a relatively new phenomenon in court-annexed disputes, mediators of legal disputes will encounter new theories and information about mediation with some regularity. Thus, mediators must keep informed of all statutes, rules, and administrative orders, as well as other sources concerning professional competence. If a mediator finds that a mediation is beyond his or her competence, the mediator must withdraw or request technical assistance.

The mediator standards of conduct neither replace nor eliminate the relevant ethical standards of the mediator's profession. Rather, they run concurrently with other applicable standards which do not conflict with them. If a conflict arises between the mediator standards of conduct and another professional ethical code of conduct in Florida court-annexed mediation, the mediator standards will apply.

B. Responsibilities to Courts

Court-affiliated mediators, by definition, mediate pursuant to court appointment. Thus, the mediator is responsible to the court for the propriety of his or her activities as a mediator. The mediator must be "candid, accurate, and fully responsive to a court concerning the mediator's qualifications, availability, and all other pertinent matters."

29. Id. at 10.010; see also supra note 22.
30. McKay, supra note 17, at 22.
31. Tomain & Lutz, supra note 17 at 10.
32. See Chaykin, supra note 17, at 736; see also SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, COMPETENCIES FOR MEDIATORS OF COMPLEX PUBLIC DISPUTES (1992).
34. Id. at 10.030(a)(3).
35. Id. at 10.030(b).
36. Id.
37. Id.
38. Id. at 10.040.
The mediator also must agree to follow all administrative policies, rules, and statutes.\textsuperscript{39} Further, the mediator must refrain from activities that have "the appearance of improperly influencing a court to secure placement on a roster or appointment to a case, including gifts or other inducements to court personnel."\textsuperscript{40}

C. Mediation Process

Many mediation participants will be unfamiliar with the process, so the mediator should clarify several matters at the outset. The mediator should inform the parties that mediation is consensual, that the mediator is an impartial facilitator, and that the mediator may not impose or force any settlement on the parties.\textsuperscript{41} In addition, the mediator may need to establish some ground rules and explain the process. The mediator also should discuss at the outset such questions as whether there will be individual caucuses or whether all activity will take place in front of the other party; and whether the mediator will suggest alternatives or simply referee the parties' discussion.

Some actions may not be referred to mediation except upon petition of all parties. These include: appeals from rulings of administrative agencies; bond estreasures; forfeitures of seized property; habeas corpus and extraordinary writs; bond validation; declaratory relief; and other matters as may be specified by administrative order of the chief judge in the circuit.\textsuperscript{42}

\begin{itemize}
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id. at 10.050(a).}
\item \textsuperscript{42} \textit{FLA. R. CIV. P. 1.710(b).} However, the Florida Supreme Court Committee on Mediation and Arbitration Rules has recommended the elimination of certain of these exclusions.

\textit{Rule 1.710:} The Committee recommends that three categories of cases presently excluded from mediation by rule 1.710 should be made eligible for referral to court-ordered mediation processes. Specifically, it was the view of the Committee that appeals from rulings of administrative agencies, forfeitures of seized property, and petitions for declaratory relief, should be placed in the category of cases which could benefit, at the discretion of the discretion of the trial judge, from the mediation process.

The Committee also considered it appropriate to add one proceeding to those excluded from mediation in rule 1.710. Civil and criminal contempt proceedings are inherently judicial, and involve transactions solely between the court and a party. These proceedings were determined to be unsuitable for mediation. They are already exempted from arbitration. . . .

The Committee believes the proposed list of proceedings excluded from mediation and arbitration, as amended, reflect an appropriate philosophical premise that only those cases which involve a confrontation between the court and a party, and are purely judicial in nature, should be excluded from the process. Matters which essentially involve civil disputes between private parties or between private parties and the state should be subject to alternative dispute resolution procedures unless specifically excused.
Additionally, the mediator should help the parties determine if mediation is the best method to solve their problem by evaluating the benefits, risks, and costs of mediation, and other available methods of problem solving. The mediator should not prolong a mediation session if it becomes apparent that the case is unsuitable for mediation or that one of the parties cannot or will not meaningfully participate in mediation.

Mediation is a good alternative to litigation for parties who desire to preserve their relationship. The privacy of mediation may be welcomed for sensitive topics. Also, mediation is generally less expensive, less formalistic, and more responsive to the human element.

Just as some topics and some problems may not be appropriate for mediation, some parties may not be good candidates for mediation. The best candidates are those who are willing and able to act in good faith. The mediator must be satisfied that the parties can prudently and intelligently enter into negotiations. Generally, the perceptions and expectations of the parties will affect their eventual happiness with the settlement and their propensity to follow it. If the mediator has some doubt as to the ability of a party to participate, he or she may suggest alternatives to mediation. There also is a statutory prohibition against referring a family dispute to mediation if there is a significant history of domestic abuse that would compromise mediation.

One of the primary advantages of mediation is speed. Thus, mediators must avoid delays and fulfill commitments punctually. Particularly, issues in family mediation must be expedited. The mediator is responsible for accepting only mediations that his or her work schedule will allow to be completed in a timely fashion. Excessive delays must be avoided even if the mediator must rearrange his or her work schedule to do so. However, even though the mediator is under a duty to complete the mediation in a timely manner, he or she must not coerce the parties to conclude or settle.

43. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.050(b).
44. Id.
45. Note, Mandatory Mediation, supra note 17, at 1091.
46. McKay, supra note 17, at 16.
47. Riskin, supra note 17, at 330.
48. Hobbs, supra note 17, at 354.
49. Riskin, supra note 17, at 349.
50. Sato, supra note 17, at 512.
51. FLA. STAT. § 44.102(2)(b) (1991).
52. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.050(c).
53. FLA. R. CIV. P. 1.740(b).
54. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.050(c).
55. Note, The Sultans of Swap, supra note 17, at 1890.
If the mediator agreed upon by the parties or appointed by the court cannot serve, a substitute mediator may be selected in the same manner as the original. A mediator may not take a case assigned to another mediator without the parties’ agreement or the court’s approval. A substitute mediator must have the same qualifications as the original mediator.

Generally, the standards adopted by the court tracked those recommended by the Committee. In the area of substitute mediators, however, the standards adopted by the court differ somewhat from the Committee proposal. The Committee was concerned that last-minute mediator substitutions would make it difficult for the parties to decline the substitution because to do so would unreasonably delay the mediation that might be difficult to reschedule. The Committee also was concerned that substitutions for court-appointed mediators would take place without the knowledge of the court, thereby resulting in some loss in the integrity of the court order and in the court’s control over the mediation process. In light of these concerns, the Committee proposed that mediator substitution not be allowed “without the consent of the parties and if court appointed, approval of the court prior to the date of the mediation.”

The prior approval of substitute mediators was objected to by a mediation firm which was concerned that it would lead to inflexible scheduling and additional delays when last-minute changes were necessary. The final rule seems to allow eleventh-hour substitutions, provided that the substitute mediator is agreed upon or appointed in the same manner as the original mediator.

The court added the caveat that the substitute mediator must have the “same qualifications” as the original mediator, but did not offer a further definition. Obviously it would be difficult for two mediators to have exactly the same qualifications, such as years of service, number of cases, and educational background. Perhaps a “rule of reason” will prevail, although even this test leaves much uncertainty on the question.

56. FLA. R. CIV. P. 1.720(f)(3).
57. Id.
58. Id.
59. Hearings held by the Florida Supreme Court Committee on Mediation and Arbitration Rules (Apr. 6, 1992) (author’s recollection).
60. Id.
61. COMMITTEE REPORT, supra note 10, at Section III.D.
62. Hearing held by the Florida Supreme Court (Apr. 6, 1992) (videotape).
63. FLA. R. CIV. P. 1.720(f)(3).
D. Self-Determination

An important standard provides that "[a] mediator shall assist the parties in reaching an informed and voluntary settlement," but that "[d]ecisions are to be made voluntarily by the parties themselves." The Committee noted that while the mediator has no duty to specifically advise the parties about the legal consequences of a proposed agreement, the mediator does have a duty to advise the parties of the importance of understanding those legal consequences and to give the parties the opportunity to seek such legal advice if they desire.

To avoid any appearance of overreaching, the mediator should ensure that the parties are well-informed. This includes not only the obvious, quickly resolved issues, but also an inquiry into the areas that may have precipitated the conflict. Through this inquiry, the mediator will ensure that parties are solving a real dispute and not some substitute issue. This requires that the parties disclose a substantial amount of information, and the mediator should encourage free disclosure. If the mediator knows that some needed information is being withheld or is unavailable, the mediator should consider informing the parties that further investigation might be necessary. Only with a full set of facts can the parties come to a fully informed and final agreement.

Because the parties to a mediation have the right to decide their settlement, it follows that mediators are prohibited from coercing a settlement. Moreover, a mediator may not make any substantive decisions for a party.

However, the mediator is not simply a referee. Depending upon the problem and the parties involved, the mediator’s best course of conduct may fall in various places along a continuum ranging from passive neutrality to intervention. A passive mediator allows the parties to discuss everything on their own, rarely interrupting unless a party is clearly out of line. An interventionist mediator may argue each side and fashion possible results that seem appropriate. Reason would suggest that most participants do not want a totally uninvolved observer as a mediator. The decision to advance to mediation in itself indicates

64. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.060(a).
66. Chaykin, supra note 17, at 753.
68. Bush, supra note 17, at 278.
69. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.060(b).
70. Id.
71. Hobbs, supra note 17, at 371 (quoting Sydney E. Bernard et. al., The Neutral Mediator: Value Dilemmas in Divorce Mediation, 4 MEDIATION Q. 61 (1984)).
the need for some type of assistance. But the answer to how much assistance is "right" will depend on the personalities involved and the context of the dispute. However actively involved the mediator may be, under no circumstances may he or she intentionally or knowingly misrepresent material facts or circumstances.

Additionally, the standards direct the mediator to promote a balanced process and to encourage the parties to conduct the mediation sessions in a non-adversarial manner.

Occasionally, a settlement affects not only the lives of the mediating parties, but also the rights of third parties, such as children. The mediator has a responsibility to "promote consideration of the interests" of unrepresented persons who may be affected by an agreement. The mediator must also "promote mutual respect among the parties throughout the mediation process." Mutual respect, however, is a fairly intangible concept. Although the mediator's goal is not necessarily to create a friendship where there was none before, the mediator may want to consider emphasizing future relations and trust in a settlement. To accomplish this, a mediator may wish to create a recognitional debate, where parties state their wishes. Through this exchange, each party may begin to recognize the unrealized needs of the other side. This recognition may allow for more creative bargaining and an outcome that satisfies all parties.

E. Impartiality

A mediator must be impartial, which is defined as freedom from favoritism in word, action, and appearance. "Impartiality implies a commitment to aid all parties, as opposed to an individual party, in moving toward an agreement." Thus the impartiality requirement prohibits the mediator from accepting or from giving gifts or other items of value to persons involved in any mediation. Additionally, the mediator should withdraw "if the mediator believes the mediator can no longer be impartial."
Disclosure of any possible bias is prudent, but the standards mandates disclosure in two categories of cases. First, "any current, past, or possible future representation or consulting relationship with any party or attorney involved in the mediation' must be disclosed, as well as "any pertinent pecuniary interest." This disclosure requirement covers stock ownership, familial ties, membership on a board of directors, and any representational relationship a mediator's law firm may have with any of the parties.

The second category of cases where disclosure is required relates to close personal ties and other circumstances that may put the mediator's impartiality in question. The Committee notes accompanying the impartiality standards try to make clear that a mediator is not required to live in a vacuum; the mediator need disclose only those relationships that might reasonably appear to impair impartiality.

The burden to disclose any basis for impartiality rests with the mediator. After disclosure the mediator may serve if both parties agree, unless the mediator feels there is a clear conflict of interest.

Mediators also must maintain their impartiality by refraining from certain activities. A mediator may not provide counseling or therapy to any party during the mediation. Future counseling or representation is not expressly prohibited; however, in a limited effort to deal with this potential conflict, mediators are prohibited from using the mediation process to solicit or encourage future professional service with either party.

F. Confidentiality

Mediators obtain a significant amount of information about the dispute and the parties. Therefore, each party has a privilege to refuse to disclose communications made during a mediation. Such communications, other than an executed settlement agreement, are confidential and inadmissible, unless all parties agree otherwise. Mediators

83. Id. at 10.070(b)(1).
84. Note to Fla. R. for Certified & Court-Appointed Mediators 10.070.
86. Id.
87. Id. at 10.070(b)(3).
88. Id.
89. Id. at 10.070(b)(4).
90. Fla. R. for Certified & Court-Appointed Mediators 10.070(b)(5).
92. Id. In 1991, the Florida Supreme Court Committee on Mediation and Arbitration Rules proposed an amendment that would modify the privilege in mediator disciplinary proceedings. The Florida Legislature adopted the proposal. Ch. 93-161, § 2, 1993 Fla. Laws 941, 942.
are obliged to maintain this confidentiality, except where required by law to disclose information. The principle of confidentiality also applies to information obtained in individual caucuses, unless the party to the caucus permits disclosure. In addition, the mediator must maintain confidentiality in the storage and disposal of records, and must render anonymous all identifying information when materials are used for research, training, or statistical compilations.

G. Professional Advice

There may be times during mediation when the mediator is asked about such things as possible outcomes if the dispute went to trial. The pertinent distinction the mediator must make here is between giving legal information and giving legal advice. The mediator may give legal information, provided that he or she is qualified by training or experience to provide it. This allows the mediator to advise all parties of laws that are common knowledge and may be applicable to the dispute. For example, it would seem that an experienced family mediator would know of, and could provide, court-established child support guidelines. On the other hand, mediators should avoid giving legal advice, such as how an agreement might affect the participants' legal rights or obligations.

Allowing a mediator to give either legal information or advice is controversial. Some commentators believe that if a mediator is allowed to comment at all, personal bias may enter the process in deciding which laws to reveal. Other commentators believe that a mediator may inquire about legal issues, but should direct the parties to independent counsel for their resolution. Still other commentators are concerned that too many restraints will severely limit a mediator's ability to move the parties to an informed settlement. These commentators would allow a mediator to define all the legal issues without directly applying the law to the immediate facts.

Mediating parties are allowed, but not required, to retain independent counsel. The party may bring counsel to the mediation session,
but the counsel's attendance is not always required.103 Yet, if the mediator believes that either party does not understand or appreciate the legal repercussions of a proposed settlement, the mediator must advise the party to seek independent counsel.104 Some commentators believe that counsel is so important that all parties should retain counsel before mediation and consult them throughout the process, especially before any agreement is finalized.105 If the mediator is also an attorney, special attention should be paid to a Florida Bar ethics opinion that requires mediators to explain the risks of mediating without independent counsel and to advise consultation with counsel during mediation and before signing any settlement agreement.106

If it becomes apparent that a party is unable to participate in mediation for psychological or physical reasons, the mediator should postpone or cancel mediation.107 Mediation should continue only when all parties are able and willing to resume.108

One question that arises is how far a mediator may go in predicting the outcome of a case. Some mediators reported that they often feel comfortable discussing possible outcomes, given their experience as lawyers, judges, and mediators in similar cases. On the other hand, it was reported to the Committee that some mediators go so far as to predict how a particular judge will rule by making statements such as "I know this judge, I was appointed mediator by this judge, and I can predict how this judge will rule." The standards recognize that discussion of possible outcomes is a legitimate tool of mediation, but the standards prohibit tactics that imply some special knowledge of how a particular judge will rule.109 The standards state that "under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute."110

H. Fees and Expenses

The rules seek equitable billing by mediators. Mediators must maintain the same high degree of honor and integrity when billing clients

103. Id.
104. Fla. R. for Certified & Court-Appointed Mediators 10.090(b).
107. Fla. R. for Certified & Court-Appointed Mediators 10.090(c).
108. Id.
109. Id. at 10.090(d).
110. Id.
as they apply in all phases of their work. Furthermore, mediators must keep total charges for services reasonable and consistent with the nature of the case. If mediators abide by these principles, they will help preserve the trust placed in them by the public and court.

The standards also establish certain billing ground rules for mediators. Prior to mediation, a mediator must give all parties a written explanation of the fees and costs. The written explanation must contain the basis and amount of charges for the following: mediation sessions, preparation for sessions, travel time, postponement or cancellation of the mediation session by the parties, preparation of the written mediation agreement, and all other items to be charged by the mediator. The explanation also should include the parties' pro rata share of mediation fees and costs, if previously determined by the court or agreed to by the parties. Further, the mediator must keep adequate records to support charges for services and expenses, and make an accounting to the parties or the court upon request.

Some billing practices are impermissible. First, no commission, rebate or similar remuneration may be given or received by a mediator for referral of clients for mediation or related services. Second, a mediator may not be compensated on a contingency fee basis. Third, when calculating fees and costs, the mediator may not charge in excess of actual time spent or allocated, or costs incurred. The standards also provide additional guidelines that mediators should review to ensure complete compliance and proper billing practices.

I. Concluding Mediation

Under the mediation procedural rules, the parties are obliged to reduce any agreement to writing. The mediator must discuss with the participants how to formalize and implement the agreement, including “caus[ing] the terms . . . to be memorialized appropriately . . .”. However, mediators are not themselves required to write the agree-

111. Id. at 10.100(a).
112. Id.
113. Id.
114. Id. at 10.100(a)(1)A-F.
115. Id. at 10.100(a)(2).
116. Id. at 10.100(b).
117. Id. at 10.100(c).
118. Id. at 10.100(d). For a contrary view, see Roger Fisher, Why Not Contingency Mediation?, 2 NEG. J. 11 (1986).
119. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.100(e).
120. Id.
121. FLA. R. CIV. P. 1.730(b) and 1.740(f)(1).
122. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.110(a)(1).
ment. Even if the parties have not come to a full agreement, the mediator may advise the parties to formalize what has been agreed upon and direct the parties toward procedures available for resolving the remaining issues. A mediator must not knowingly assist in forming an agreement that would be denied judicial enforcement because of fraud, duress, overreaching, the absence of bargaining ability, or unconscionability.

Some mediations do not result in agreement. During public hearings, the Committee heard reports of mediators who told parties they could not leave until the mediator determined that the mediation was concluded. Such attitudes also were documented in a study that noted "many mediators believe that it is the mediator's prerogative to decide when the session is over." This approach goes against traditional practice of mediation, in which parties have a right to withdraw rather than be forced to continue. As a result, the standards make it clear that if either party desires to withdraw, the mediator may not require the parties to continue the mediation.

A mediator must conclude the mediation without agreement in several situations. First, if the mediator believes that either party has become unwilling or unable to meaningfully participate, mediation should be suspended or terminated. Likewise, a mediation should be terminated if it becomes unlikely that a settlement will be reached. Further, "[t]he mediator should not prolong unproductive discussions that would result in emotional and monetary costs to the participants," nor should the mediator "continue to provide mediation services where there is a complete absence of bargaining ability."

J. Training and Education

Mediators are obligated to acquire knowledge of the mediation process, including ethics, standards and responsibilities. Upon re-
quest, the mediator must disclose the extent and nature of his or her mediation training and experience. As with many professions, the practice of mediation changes and advances. Because of that, a mediator is encouraged to participate in continuing education activities to maintain professional competence. Further, an experienced mediator has a duty to "cooperate in the training of new mediators, including serving as a mentor." Under an administrative order of the Florida Supreme Court, every certified mediator must allow a minimum of two mediator trainees per year to observe mediation sessions.

K. Advertising and Soliciting

Mediators are not prohibited from advertising their services if the information in the advertisement honestly represents the services to be rendered. In addition to personal qualifications, the mediator must accurately represent in the advertisements the mediation process, as well as its costs and benefits. The mediator may not claim that settlements always will be reached, nor may the mediator make promises that imply favoritism to one side to obtain business.

L. Relationships With Other Professionals

A mediator should respect the professional integrity of other mediators. When more than one mediator is involved with the same dispute, each mediator has a duty to keep other participating mediators informed. "The wishes of the parties supersede the interests of the mediators." A mediator should not mediate any dispute that is assigned to another mediator without first consulting that person.

Mediation does not occur in a vacuum. There may be instances in which the expertise of a professional from another field is necessary to resolve a dispute. Thus, the mediator "should respect the relationship between mediation and other professional disciplines ... and should

133. Id.
134. Id. at 10.120(b).
135. Id. at 10.020(c).
137. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.130.
138. Id.
139. Id.
140. Id.
141. Id. at 10.140(a)(2).
142. Id.
143. Id. at 10.140(a)(1).
promote cooperation between mediators and other professionals."\textsuperscript{144} Finally, some mediation firms have attempted to restrict mediators who leave the firm from practicing mediation. In response, the standards provide that mediators may not make "a partnership or employment agreement that restricts the rights of a mediator to practice after termination of the relationship, except an agreement concerning benefits upon retirement."\textsuperscript{145}

\textbf{M. Advancement of Mediation}

Mediators "should support the advancement of mediation by encouraging and participating in research, evaluation, or other forms of professional development and public education."\textsuperscript{146} Further, mediators have a responsibility to render reduced rate or pro bono services to those in financial need.\textsuperscript{147}

\textbf{IV. Enforcement of Mediator Standards of Conduct}

\textbf{A. Introduction}

To enforce the mediator standards of conduct, the Florida Supreme Court adopted the disciplinary procedure recommended by the Committee.\textsuperscript{148} To the author's knowledge, Florida is the first state to adopt a procedure to enforce mediator standards of conduct. The procedure involves mediators, as well as judges and attorneys, in the discipline process.\textsuperscript{149}

The enforcement mechanism uses a Mediator Qualifications Board (Board), complaint committees, and the staff of the Florida Dispute Resolution Center (Center).\textsuperscript{150} In short, a complaint committee investigates complaints.\textsuperscript{151} If the committee finds probable cause, a panel of the Board will hear and decide the case.\textsuperscript{152} The mediator may appeal an adverse decision to the Florida Supreme Court.\textsuperscript{153} The Center provides staff support in processing complaints.\textsuperscript{154}

\textsuperscript{144} Id. at 10.140(b)(1).
\textsuperscript{145} Id. at 10.140(b)(2).
\textsuperscript{146} Id. at 10.150(b).
\textsuperscript{147} Id. at 10.150(a).
\textsuperscript{148} See id.; compare COMMITTEE REPORT, supra note 10, at ch. 2.
\textsuperscript{149} For a description of the disciplinary process, see Florida Rules for Certified & Court-Appointed Mediators Part III. To the author's knowledge, this procedure is unique in its involvement of mediators, as well as judges and attorneys, in the discipline process.
\textsuperscript{150} Id.
\textsuperscript{151} FLA.'R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS at 10.220(g).
\textsuperscript{152} Id. at 10.220(h).
\textsuperscript{153} Id. at 10.290(2).
\textsuperscript{154} Id. at 10.210.
B. Mediator Qualifications Board: Divisions and Panels

The Board is comprised of three divisions: north, south and central.\(^{155}\) Each of the three divisions has fifteen members, comprised of: three judges, three certified county mediators, three certified circuit mediators, three certified family mediators (at least two of whom are non-lawyers), and three Florida licensed attorneys with substantial trial experience who are neither mediators nor judicial officers.\(^{156}\) The Chief Justice of the Florida Supreme Court appoints board members, who serve for staggered four-year terms.\(^{157}\)

The fifteen-member divisions are further divided as needed into five-member panels to hear complaints.\(^{158}\) A judge chairs each panel, which includes an attorney and three certified mediators, at least one of whom shall be certified in the area of the complaint.\(^{159}\) Unlike the divisions, the panels are temporary bodies which cease to exist after disposing of their assigned cases.\(^{160}\)

The panel is an adjudicatory body only, and has no investigatory function.\(^{161}\) The panel has "such jurisdiction and powers as are necessary to conduct the proper and speedy disposition of any proceeding," including the power to compel witness attendance, to depose, to order production of documentary evidence, and to issue contempt orders.\(^{162}\)

C. Complaint Committee Process

Complaints alleging a mediator's violation of the standards must be in writing, under oath, and must specifically state the facts that form the basis of the complaint.\(^{163}\) Complaints are to be filed with the Center or with the office of the court administrator in the circuit where the case originated.\(^{164}\) If the complaint does not arise from a specific case, it must be filed in the circuit where the alleged misconduct occurred.\(^{165}\) Complaints filed with the court administrator are referred to the Center within five days after filing.\(^{166}\) The filing of a complaint begins the complaint committee process.\(^{167}\)

\(^{155}\) \textit{Id. at 10.190(a).}
\(^{156}\) \textit{Id. at 10.190(b).}
\(^{157}\) \textit{Id. at 10.190(c).}
\(^{158}\) \textit{Id. at 10.190(d).}
\(^{159}\) \textit{Id.}
\(^{160}\) \textit{Id.}
\(^{161}\) \textit{Id. at 10.200(b).}
\(^{162}\) \textit{Id. at 10.200(a).}
\(^{163}\) \textit{Id. at 10.220(a).}
\(^{164}\) \textit{Id. at 10.220(b).}
\(^{165}\) \textit{Id.}
\(^{166}\) \textit{Id. at 10.220(c).}
\(^{167}\) \textit{See generally id. at 10.220.}
Upon receiving a complaint, the Center sends a copy, along with a copy of the rules, to the mediator in question. The mediator has twenty days after receiving the complaint to respond in writing to the Center. If the mediator fails to respond in time, the allegations are deemed admitted. Whether or not the mediator responds, the Center assigns the complaint to a Complaint Committee no later than thirty days after the complaint was served on the mediator.

The Complaint Committee consists of three members: a judge or attorney, who serves as the chair of the committee; a mediator who is certified in the area of the complaint, and another certified mediator. The Complaint Committee reviews the complaint and the mediator's response, and determines whether there is probable cause that the alleged misconduct by the mediator violated the rules. If the Complaint Committee finds that there is no probable cause, it will dismiss the complaint with letters to the complainant(s) and the respondent mediator stating that the complaint does not allege a violation of the rules.

If the Complaint Committee determines that probable cause exists, it may either refer the complaint back to the Center for assignment to a Panel, or meet with the complainant and respondent mediator in an attempt to resolve the matter. The Complaint Committee may impose sanctions in this resolution, if agreed to by the respondent mediator. If no resolution is reached, the Complaint Committee refers the complaint back to the Center with formal charges, which include "a short and plain statement of the matters asserted in the complaint and references to the particular sections of the rules involved."

D. Hearing Procedure

If the Complaint Committee refers the complaint back to the Center, the Center assigns the matter to a Panel for hearing. The Center may appoint counsel to prosecute the complaint after "considering

168. Id. at 10.220(d). Service on the mediator must be by registered or certified mail addressed to the mediator's home or place of business. Id.
169. Id. at 10.220(e). The response must be sent by registered or certified mail. Id.
170. Id.
171. Id. at 10.220(f).
172. Id.
173. Id. at 10.220(g).
174. Id. at 10.220(j).
175. Id. at 10.220(h).
176. Id.
177. Id. at 10.220(j).
178. Id. at 10.230(a). The hearing date may not be more than 90 days nor less than 30 days from the date of notice of assignment of the matter to the panel. Id. at 10.230(c).
the circumstances of the complaint and the complexity of the issues to be heard.’”179 All five panel members must be present at all times.180 “The hearing may be conducted informally, but with decorum.”181 “The rules of evidence applicable to trial of civil actions apply but are to be liberally construed.”182 The Panel must assist any party not represented by an attorney on the proper procedures, presentation of evidence, and questions of law.183 The action may be dismissed for want of prosecution if the complainant fails to appear, absent a showing of good cause.184 Finally, the Panel may dismiss the formal charges and the complaint by filing a copy of the dismissal order with the Center.185

E. Sanctions

If a majority of the Panel “finds that there is clear and convincing evidence to support a violation of the rules,” it may impose one or more sanctions.186 Such sanctions may include costs of the proceeding, oral admonishment, written reprimand, additional training, case type restrictions, suspension of up to one year, decertification, or disbarment from service as a mediator.187 A mediator who has been suspended or decertified may seek reinstatement by petitioning the division.188 However, such a mediator may not apply for reinstatement for two years, unless otherwise provided in the Panel’s decision.189 If the Division finds the mediator fit to mediate, the Center will reinstate the mediator.190

F. Confidentiality

Once formal charges have been filed, the charges and all further proceedings are public.191 Until then, the proceedings are confidential.192

179. Id. at 10.230(b).
180. Id. at 10.230(e)(1).
181. Id. at 10.230(e)(2).
182. Id. at 10.230(e)(3).
183. Id. at 10.230(f).
184. Id. at 10.230(g).
185. Id. at 10.230(k).
186. Id. at 10.230(l).
187. Id. at 10.240(a).
188. Id. at 10.240(c).
189. Id.
190. Id. at 10.240(e)(4).
191. Id. at 10.260(2).
192. Id.
G. Appeals

All determinations of the division panels are subject to review by the Florida Supreme Court.193

V. ATTORNEY OBLIGATION TO ADVISE CLIENTS OF ALTERNATIVE DISPUTE RESOLUTIONS

Should attorneys be responsible for considering or advising clients of alternative dispute resolution procedures such as mediation? Professors Aronson and Weckstein note as follows:

Clearly the use of a more expeditious, less costly, and more accommodating dispute resolution process benefits clients, the courts, and the public. But what about the lawyers who stand to lose the legal fees that the client avoids and who give up some degree of client control? As a professional, the lawyer must subordinate his self-interests to those of the client. Moreover, lawyers can benefit by more efficiently disposing of their cases, by having fewer hassles over legal fees with clients who are likely to be more satisfied with both the fee and service, and by playing a professional role which is less antagonistic and, for many lawyers, more personally satisfying. Indeed, as more and more clients recognize the advantages of ADR, they may expect their lawyers to discuss the appropriateness of alternative procedures and use them when in the clients’ best interests. The failure of lawyers to do so may find the sophisticated client shopping for a new lawyer.

Another incentive for lawyers to explore the possible use of ADR with their clients is the avoidance of potential malpractice claims. Just as advocates may have an obligation to discuss settlement options with their clients—and pursue them when appropriate, lawyers should also consult with clients about processes, such as mediation, which may enhance the likelihood and fairness of settlement. Clients may be less likely to belatedly second-guess a settlement agreement when a mediator or advisory arbitrator has recommended it. Employment of ADR processes are almost always less costly—in dollars, time and emotions—than litigation, and lawyers who fail to consult with their clients on these alternatives may not be adequately representing the best interests of their clients.

Model Rule 1.2(a) [Model Rules of Professional Responsibility] requires a lawyer to consult with a client as to the means by which the client’s objectives are to be pursued. The Comments add that “the lawyer . . . should defer to the client regarding such questions as the expense to be incurred and concern for third persons who

193. Id. at 10.290(2).
might be adversely affected." Certainly, exploration of use of ADR procedures as a means of pursuing client objectives impacts on the expense to be incurred and may incorporate concern for third parties, for example, children in a marital dissolution matter.

In advising a client[,] a lawyer is not limited to strictly legal concerns. "Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations such as cost or effects on other people, are predominant." Consultation regarding ADR options can effectuate this broader advisory role of the lawyer.

For reasons of this nature, two experienced family lawyers and mediators have taken the position that: "the lawyer's duty to advise a [domestic relations] client about the option of private mediation is a key element of the family lawyer's ethical responsibility, and that the failure to do so could result in malpractice exposure. . . ."194

Recently, the American Academy of Matrimonial Lawyers released new recommended standards of conduct for family practitioners that emphasize knowledge of and potential use of alternative dispute mechanisms.195 In 1991, the World Arbitration & Mediation Report described the standards as follows:

"An attorney should be knowledgeable about alternative ways to resolve matrimonial disputes," according to Standard 1.4. "Matrimonial law is not simply a matter of winning and losing," the comment on the standard states. The aim is fair resolution for all parties, including children.

The comment emphasizes that an alternative to courtroom confrontation may result in a fair resolution, and that parties are more likely to abide by their own promises than by court-imposed outcomes. Although in some cases, ADR is inappropriate or unworkable, due to the nature of the dispute or the animosity of the parties, "a negotiated solution is desirable in most family law disputes."

The comment lists other advantages of ADR over court battles: a positive tone for post-divorce relations, less harm to children, and trade-offs that address the parties' individual needs and values. . . . Thus, the comment notes, lawyers should be sufficiently familiar with ADR to advise clients intelligently about the process and its costs.196

196. Id.
More than 150 major law firms across the nation have signed a statement promising to encourage the use of alternative dispute resolution by clients.197 These firms "promise that 'the responsible attorney will discuss with the client the availability of ADR procedures so the client can make an informed choice concerning resolution of the dispute.'"198

Some commentators have expressed concern about mandating a duty to advise clients of dispute resolution options, and about such an obligation being a basis for professional discipline or malpractice liability. For example, one author, Michael Prigoff, has argued that "the vast majority of clients prefer to pursue conventional litigation."199 Thus, he argued, requiring attorneys to "properly explain all options in every dispute," as well as document the explanation, "would add some cost to each representation."200 He concluded that the bar and public should be better informed about ADR, but that an explicit obligation on attorneys to provide this function is "overkill and unfair micromanagement of the practice of law."201

However, an explicit obligation is the best way to make sure that all potential litigants are aware of the mediation option. Though lawyers may view this option as one of strategy, clients should be involved in making the decision to mediate or litigate.202 Writing in favor of an obligation to inform of ADR options, another author makes an apt analogy that not discussing the mediation option with a client is like "a doctor suggesting surgery without exploring other possible choices."203 Even if, as Prigoff asserts, most clients ultimately choose to litigate,204 it should still be the client's choice to make. The obligation could be as simple as an explanation of the options with an acknowledgement signed by the clients that they have, in fact, been informed.205 Requiring attorneys to inform their clients so the client

198. Id.
200. Id.
201. Id.
203. Id.
204. Prigoff, supra note 199.
205. Colorado Adopts Ethics Rule, ALTERNATIVES, May 1992, at 70. While the Colorado rule does not explicitly discuss a signed acknowledgement, the possibility of malpractice liability makes signed acknowledgements an implicit part of the rule. Id.
may make an informed decision is not an unfair burden to place on attorneys.

The Colorado Supreme Court recently adopted, as part of its code of ethics for lawyers, the following provision: "In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."206

Florida has perhaps the most comprehensive system of statewide and state-controlled court mediation in the country. Thus it would seem incumbent upon Florida attorneys to advise their clients of the availability of mediation and its potential benefits. Failure to do so could result in charges of a violation of professional responsibility, malpractice, or both.

IV. CONCLUSION

Florida has a relatively long and rich history of experimentation with mediation in its judicial system. The state also has served as a role model for other jurisdictions developing mediation programs. Part of Florida’s experimentation has been in the area of standards of professional conduct for mediators. In fact, Florida is the first jurisdiction to develop mediator standards of conduct that include an enforcement procedure. One commentator recently noted that the Florida standards “addressed concerns about consumer protection” and that “[t]he most striking difference between these standards and those promulgated by the various [professional] organizations is the availability of disciplinary action.”207 The commentator added that “The Florida . . . Standards mark an important step in protecting the consumer and defining the parameters of ethical and professional behavior. By providing a governing body and a disciplinary procedure, the court adds teeth to the standards that the other standards lack.”208

The standards are enforceable against any mediator who is certified by the Florida Supreme Court or who participates in court-sponsored mediation. The standards are meant to emphasize the mediator’s varied duties: to the public, to the parties, to the court, and to the mediation process, while balancing the desire to set aspirational goals against the need for specific black-letter rules. The enforcement procedures are unique in that mediators, judges, and attorneys are all in-

206. Id.
208. Id. at 196.
volved in the process. Professionals in the area of mediation hope that the Florida program can be a useful model to other jurisdictions developing court-annexed mediation programs.