



Supreme Court of New Mexico

CHAMBERS OF
EDWARD L. CHÁVEZ
JUSTICE

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Dear Members of the Public, Bench, and Bar,

On behalf of the New Mexico Supreme Court and the ADR Commission, I am proud to submit for your review and comment these proposed Rules Governing Court-Connected Mediation Services. The rules were drafted by the Program and Practice Subcommittee of the ADR Commission, after extensive research into the rules that other state courts have adopted regarding their respective ADR programs. The State Bar of New Mexico ADR Committee, mediators from throughout New Mexico, and attorneys who are interested in mediation programs also contributed to the draft rules.

During a recent statewide summit regarding ADR, I witnessed the enthusiasm the courts have about the ADR Commission and the proposal to move ADR forward in all New Mexico courts. The proposed rules represent a significant step in that direction, and are intended to offer guidance as courts begin to develop and implement mediation programs capable of addressing the wide variety of circumstances that come before the judiciary. We hope that you will take a moment to review them and to share your comments—your feedback is critical as we strive to create an ADR program that can meet the diverse needs of the public, bench, and bar across the state.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward L. Chávez", written over a circular stamp or seal.

Justice Edward Chávez

PROPOSED RULES GOVERNING COURT-CONNECTED MEDIATION SERVICES

The ADR Commission has recommended the following proposed rules governing court-connected mediation services for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://nmsupremecourt.nmcourts.gov/> or sending your written comments to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received by the Clerk on or before Oct. 24, 2012, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

[NEW MATERIAL]

29-101. Court-connected mediation services. These rules shall be known as the Rules Governing Court-Connected Mediation Services and shall provide minimum standards to guide and inform courts interested in initiating, modifying, or improving court-connected mediation or settlement facilitation services and programs. For convenience, all such services are referred to in these rules as "mediation services." Nothing in these rules is intended to preempt any statutory provisions or other Supreme Court rules addressing mediation or settlement facilitation.

A. **Superintending control.** The Supreme Court retains superintending control to ensure that courts adopt appropriate rules, policies, and procedures for the implementation of these rules, and may as appropriate delegate this role to the ADR Commission.

B. **Availability of services.** Mediation services shall be available on the same basis as other services of the court and shall be provided as broadly as possible.

C. **Applicability.** Mediation is used in many different types of cases, from minor criminal cases, small claims cases, and domestic relations cases to complex civil matters. These rules are intended to apply to court-connected mediation services that handle all such cases. These rules are not intended to apply to settlement conferences held by the judge assigned to the case.

D. **Objectives.** The goal of these rules is to inspire court-connected mediation services of high quality. They are intended to be used by courts as guidelines to achieving that end. They recognize that court-connected mediation services need to be designed and implemented in ways that take account of local needs and circumstances. They shall not discourage courts from providing mediation services because current shortages of resources preclude immediate adherence to all of the provisions of the rules. Courts are also encouraged to exceed the minimum standards provided by these rules whenever possible.

E. **Parties retain discretion.** Party self-determination, in which the decision-making authority rests with the parties themselves, is the core value of court-connected mediation services or programs. Courts may mandate referral to mediation, but shall institute appropriate provisions to permit parties to opt out of mediation and

to ensure that there is no inappropriate pressure to settle.

F. **Scope of court's responsibility.** A court's responsibility for mediators or mediation programs depends on the circumstances of the mediation as follows:

(1) the court is fully responsible for mediators it employs, the services it provides, and the programs it operates;

(2) the court has the same responsibility for monitoring the quality of mediators, mediation services, and programs outside the court to which it refers cases as it has for its own services and programs; and

(3) the court has no responsibility for the quality or operation of outside services or programs chosen by the parties without guidance from the court.

G. **Screening.** A court shall establish procedures to ensure that each case to be referred to mediation services, regardless of the type of case, is screened for domestic abuse and other issues related to the capacity and competency of the parties to mediate before, during, and after mediation. A court that decides that some cases may be mediated regardless of actual or alleged domestic abuse shall comply with the following requirements:

(1) the court shall identify and require appropriate training for mediators to mediate such cases; and

(2) the court shall ensure that only mediators with appropriate training mediate such cases.

H. **Confidentiality.** Except as otherwise provided in the Mediation Procedures Act, Section 44-7B-1 through 44-7B-6 NMSA 1978, or by applicable court rules, all mediation communications are confidential, are not subject to disclosure, and shall not be used as evidence in any proceeding.

I. **National Standards.** Where not inconsistent with these rules, the National Standards for Court-Connected Mediation Programs, which are included in an appendix immediately following these rules, are adopted and incorporated by reference.

J. **Expected effect of rules.** It is expected that general acceptance and widespread implementation of these standards will enhance confidence in and satisfaction with our public justice system.

[Adopted by Supreme Court Order _____, effective _____.]

Committee commentary. — The National Standards for Court-Connected Mediation Programs, referred to in Paragraph I and referred to throughout these rules as the "National Standards," were developed in April of 1993 by the Center for Dispute Settlement in Washington, D.C., and the Institute of Judicial Administration in New York City, through a grant from the State Justice Institute. The National Standards are available at <http://courttadr.org/files/NationalStandardsADR.pdf>.

Paragraph B of this rule is adapted from Standard 1.1 of the National Standards. Paragraph C is adapted from the Introduction to the National Standards. Portions of Paragraph F are adapted from Standards 2.0 and 2.1 of the National Standards.

[Commentary adopted by Supreme Court Order _____, effective _____.]

[NEW MATERIAL]

29-102. Definitions. For purposes of these rules, the following definitions shall apply:

A. **Court-connected.** "Court-connected" means any program or service, including a program or 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 or any judicial agency, such as the Administrative Office of the Courts.

B. Domestic abuse. “Domestic abuse” means any of the following:

(1) an incident or pattern of behavior resulting in physical, emotional, or psychological harm, sexual or reproductive coercion, economic control, or interference with personal liberty that is directed toward a household member as defined in the Family Violence Protection Act, Subsection E of Section 40-13-2 NMSA 1978;

(2) domestic abuse as defined in the Family Violence Protection Act, Subsection D of Section 40-13-2 NMSA 1978;

(3) the enumerated crimes included in the Crimes Against Household Members Act, Sections 30-3-10 through 30-3-18 NMSA 1978;

(4) domestic violence as defined in Section 40-4-8 NMSA 1978 ;

(5) domestic violence as defined in the Violence Against Women Act, 42 U.S.C. Section 13925(a)(6); or

(6) any other definition of domestic abuse, domestic violence, intimate partner violence, or similar term as defined under New Mexico, federal, or tribal law.

C. Mediation. “Mediation” means a process in which a mediator

(1) facilitates communication and negotiation between mediation parties to assist them in reaching an agreement regarding their dispute; or

(2) promotes reconciliation, settlement, or understanding between and among parties.

D. Mediation communication. “Mediation communication” means a statement—whether oral, written, verbal, or nonverbal—that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

E. Mediation party. “Mediation party” means a person who participates in a mediation and whose agreement is necessary to resolve the dispute.

F. Mediation program. “Mediation program” means a program that provides mediation services and is created or administered by a court or court agency.

G. Mediator. “Mediator” means an individual who

(1) holds oneself out as a mediator and who conducts a mediation;

(2) the mediation parties agree to use as a mediator and who conducts a mediation;

(3) is designated by a mediation program as a mediator and who conducts a mediation; or

(4) is an observer who is permitted by the mediation parties to watch and listen to the mediation for educational or other administrative purposes.

H. Nonparty participant. “Nonparty participant” means a person, other than a mediation party or mediator, who participates in the mediation, is present during the mediation, or is a mediation program administrator, including a person consulted by a mediation party to assist the mediation party with evaluating, considering, or generating offers of settlement.

I. Person. “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency or instrumentality, public corporation, or any other legal or commercial entity.

J. Record. “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium

and is retrievable in perceivable form.

K. Sign. To “sign” means to do any of the following:

(1) to execute or adopt a tangible symbol with the present intent to authenticate a record or to ratify the agreement set forth in the record; or

(2) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record or to ratify the agreement set forth in the record.

[Adopted by Supreme Court Order _____, effective _____.]

Committee commentary. — Paragraph A is adapted from the Definitions Section of the National Standards. Paragraphs C through K are adapted from the Mediation Procedures Act, NMSA 1978, § 44-7B-2 (2007).

[Commentary adopted by Supreme Court Order _____, effective _____.]

[NEW MATERIAL]

29-103. Structure of mediation services and programs.

A. Goals. Each court shall specify its goals in establishing mediation services or programs or in referring cases to mediation programs or services outside the court.

B. Performance evaluation. Each court shall set performance expectations for mediators and establish a means of evaluating whether the services provided meet the specified goals.

C. Policies and procedures. Each court shall develop clearly stated written policies, procedures, and criteria establishing program structure, procedures, and the qualifications of those who serve as mediators. At a minimum, each court shall develop policies, procedures, and criteria that address the following:

(1) referring cases to mediation;

(2) determining qualifications of mediators;

(3) assigning a mediator to a case, including whether and how parties may select a mediator;

(4) replacing an assigned mediator;

(5) payment of fees (if any) by the parties, including provisions to make mediation available to parties regardless of the parties’ ability to pay, and provisions to make mediation available on a sliding fee scale based on ability to pay;

(6) evaluation of mediators by participants;

(7) removing from the roster of mediators those mediators who do not meet performance expectations;

(8) collecting data reflecting whether the program is meeting its goals;

(9) implementing a complaint mechanism to address any grievances about the mediation service or program, or mediators;

(10) screening for domestic abuse and other issues related to the capacity and competency of the parties to mediate before and during mediation; and

(11) determining whether a case should be removed from mediation.

D. Domestic abuse. A court shall, in each case to be referred to mediation, regardless of the type of case, determine whether a party asserts domestic abuse is present and whether it appears that domestic abuse is present. If the court determines that domestic abuse is present, the court shall halt or suspend mediation unless

(1) the court specifically finds that the following three conditions are satisfied:

(a) the mediator has substantial training concerning the effects of domestic abuse on victims;

(b) a party who is or alleges to be the victim of domestic abuse is capable of negotiating with the other party in the mediation,

either alone or with assistance, without suffering from an imbalance of power as a result of the alleged domestic abuse; and

(c) the mediation process contains appropriate provisions and conditions to protect against an imbalance of power between the parties resulting from the alleged domestic abuse; or

(2) the party who is or alleges to be the victim requests mediation and the mediator is informed of the alleged domestic abuse.

E. **Supervision of mediation services.** The court shall designate a particular person to be responsible for supervision, monitoring, and administration of its mediation services or programs, or to act as liaison with private, court-referred programs or mediators. At a minimum, this person shall understand and know court ADR processes and ADR program management, and shall be trained in mediation.

F. **Information for judges, court personnel, and users.**

(1) In a manner that complies with its Language Access Plan, a court shall provide information, education, and orientation to the public, the bar, judges, and court personnel regarding the availability of court-connected mediation services, court-connected mediation service procedures, and the mediation process.

(2) Courts shall adopt procedures describing the information about the case or the parties that is to be provided to the mediator upon a referral for mediation.

(3) Courts shall provide procedural information before, during, and after mediation to parties, including self-represented parties.

[Adopted by Supreme Court Order _____, effective _____.]

Committee commentary. — Paragraphs A and B are adapted from Standard 2.2 of the National Standards. Paragraph C is adapted from Standards 1.2, 1.3, and the comment to Standard 2.1 of the National Standards. Within Paragraph C, Subparagraph 1 is adapted from Standard 3.2(b) of the National Standards; Subparagraph 6 is adapted from Standard 6.5 of the National Standards; Subparagraph 7 is adapted from Standard 6.6 of the National Standards; Subparagraph 8 is adapted from Standard 2.2 of the National Standards; Subparagraph 9 is adapted from Standard 2.6 of the National Standards; Subparagraph 10 is adapted from NMSA 1978, Section 40-4-8(B)(1) (1993), Standard VI(B) of the Model Standards of Conduct for Mediators, and Standards IX and X of the Model Standards of Practice for Family and Divorce Mediation; and Subparagraph 11 is adapted from Standard XI of the Model Standards of Practice for Family and Divorce Mediation, and Standard VI(A)(10) and (C) of the Model Standards of Conduct for Mediators. Paragraph D is adapted from NMSA 1978, Section 40-4-8(B)(1). Paragraph E is adapted from Standard 2.5 of the National Standards. Paragraph F is adapted from Standards 3.0, 1.5, and 1.6 of the National Standards. [Commentary adopted by Supreme Court Order _____, effective _____.]

[NEW MATERIAL]

29-104. Qualifications of mediators. Courts have a continuing responsibility to ensure the quality of the mediators to whom they refer cases.

A. **Minimum qualifications.** Courts shall establish minimum qualifications for mediators to be included on the court's roster. Qualifications of mediators to whom the courts refer cases must be based on their skills. Different categories of cases may require different types and levels of skills. Skills can be acquired through training and experience.

B. **Performance.** Courts shall establish procedures to regularly monitor the performance of mediators to whom they refer cases

and ensure that their performance is of consistently high quality.

C. **Removal.** Courts shall adopt procedures for removing from their roster of mediators those mediators who do not meet their performance expectations and ensuring that those mediators do not receive further court referrals.

D. **Screening for qualifications.** Courts are responsible for determining that the mediators to whom they refer cases are qualified. The level of screening needed to determine qualifications will vary depending upon the type of case involved.

E. **Continuing education.** Courts shall require mediators to attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation. [Adopted by Supreme Court Order _____, effective _____.]

Committee commentary. — This rule is adapted from Standard 6.0 of the National Standards, Standard IV of the Model Standards of Conduct for Mediators, and Standard II of the Model Standards of Practice for Family and Divorce Mediation. Paragraph B is adapted from Standard 6.5 of the National Standards. Paragraph C is adapted from Standard 6.6 of the National Standards. Paragraph D is adapted from Standard 6.3 of the National Standards and Standard IV(A) of the Model Standards of Conduct for Mediators. Paragraph E is adapted from Standard IV(A)(2) of the Model Standards of Conduct for Mediators.

[Commentary adopted by Supreme Court Order _____, effective _____.]

[NEW MATERIAL]

29-105. Best practices for mediators.

A. **Impartiality.** Impartiality is at the heart of a mediator's ethical responsibilities. The mediator shall maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by appearance, word, or action, and a commitment to serve all parties as opposed to a single party. At a minimum, a mediator shall comply with the following:

(1) a mediator shall not accept or give a gift, request, favor, loan, or any other item of value to or from a party, attorney, or any other person involved in any pending or scheduled mediation process, except that a mediator may accept payment of fees for mediation services;

(2) a mediator shall not use information disclosed during the mediation process for private gain or advantage nor shall a mediator seek publicity from a mediation effort to enhance the mediator's position; and

(3) if a mediator finds that the mediator cannot maintain the requisite impartiality in a mediation, the mediator shall withdraw from the case.

B. **Conflict of interest.** A mediator shall disclose any known, significant current or past personal or professional relationship with any party or attorney involved in the mediation. If a mediator has represented, treated, or advised either party or their attorneys in any capacity, the mediator shall disclose that professional relationship. Disclosure shall also be made of any pertinent pecuniary interest in the matter to be mediated and shall conform with the following:

(1) after the mediator discloses the prior personal or professional relationship or pertinent pecuniary interest, the parties may choose to continue with the mediator; and

(2) the duty to disclose is a continuing obligation throughout the mediation process.

C. **Representations by mediator.** A mediator shall not make inaccurate statements about the mediation process, its costs and benefits, or the mediator's qualifications, including the following:

(1) a mediator shall not make claims of specific results or

promises which imply favor of one party over the other;

(2) a mediator shall not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications;

(3) a mediator shall refrain from promises and guarantees of results and shall not advertise statistical settlement data or settlement rates; and

(4) A mediator shall accurately represent the mediator's qualifications. A mediator shall only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it specifically grants such status to the mediator.

D. Disclosure of Fees. When costs and fees are paid by the parties directly to the mediator, the mediator shall provide written information to the parties that includes costs, fees, and time and manner of payment. The parties and the mediator shall enter into a written agreement that describes costs, fees, and time and manner of payment before beginning the mediation. This requirement applies even if the mediator's fees are set by court order. The assessment of fees shall comply with the following:

(1) no commissions, rebates, or other similar forms of remuneration shall be given or received by a mediator for the referral of clients; and

(2) fees shall not be based on the outcome of the mediation. A mediator shall not enter into a fee agreement which is contingent upon the result of the mediation or the amount of the settlement.

E. Confidentiality. In the absence of a statute to the contrary, the mediator shall treat information revealed in a mediation as confidential, except for the following:

(1) information that is statutorily mandated to be reported;

(2) information that, in the judgment of the mediator, reveals a danger of serious physical harm to a party or third person;

(3) information that the mediator informs the parties will not be protected, provided that the mediator informs the parties at the initial meeting of any limitations on confidentiality; and

(4) a mediator may inform the court of the following information regarding the mediation, subject to the requirements of a mediation program:

(a) whether the mediation parties and their attorneys, if any, appeared for mediation;

(b) whether a mediation occurred or has terminated;

(c) the date, time and place of a mediation;

(d) the persons in attendance at a mediation;

(e) whether a mediator received payment for the mediation;

(f) whether a written agreement was signed by the parties;

(g) the outcome of the mediation for program and mediator evaluation purposes, such as fully settled, partially settled, or no settlement, which do not reveal the content of the mediation or any agreements made during mediation; and

(h) other administrative facts which do not reveal the content of the mediation or any agreements made during mediation, except that a program may require any written agreements to be presented to the court.

F. Role of mediator in settlement. The mediator has the responsibility to see that the parties consider the terms of the settlement and to be sensitive to inappropriate pressures to settle. In adhering to this standard, the mediator may find it advisable to educate the parties or to refer one or more parties for specialized advice. A mediator also shall comply with the following:

(1) a mediator shall not make decisions for the parties, nor

shall a mediator give legal or professional advice;

(2) unless a rule otherwise provides, a mediator shall inform the parties of their right to withdraw from mediation at any time and for any reason;

(3) a mediator has a continuing responsibility to ensure that the parties retain the capacity to mediate and shall suspend or terminate the mediation and encourage the parties to seek other forms of assistance for the resolution of their dispute if the mediator believes either of the following circumstances are present:

(a) the participants are unable to participate meaningfully in the process; or

(b) a reasonable agreement is unlikely;

(4) if the participants reach a final impasse, a mediator shall not prolong unproductive discussions that would result in emotional or monetary costs to the participants; and

(5) at no time and in no way shall a mediator coerce any party into an agreement or make a substantive decision for any party. Depending on the program and model being utilized, a mediator may make suggestions for the parties' consideration, but all decisions shall be made voluntarily by the parties themselves.

G. Quality of the process. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, mediators shall distinguish between the roles. The role of a mediator is further defined as follows:

(1) a mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these rules and only if the mediation model being utilized does not prohibit the mediator from providing such information;

(2) a mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties and subject to the following:

(a) before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change; and

(b) a mediator who undertakes such a role assumes different duties and responsibilities that may be governed by other standards; and

(3) if the parties so desire, a mediator shall allow attorneys, counsel, or advocates for the parties to be present at the mediation session.

H. Written agreement. With the agreement of the participants, a mediator may document the parties' resolution of their dispute. These agreements shall be on forms approved by the court. The mediator shall inform the parties that any agreement should be reviewed by an independent attorney before it is signed. The confidentiality and enforceability of these agreements are governed by the Mediation Procedures Act, Section 44-7B-1 through 44-7B-6 NMSA 1978, and other applicable law.

I. Domestic abuse. A mediator shall recognize a situation involving domestic abuse and take appropriate steps to shape the mediation process in accordance with the following:

(1) a mediator has a continuing obligation to screen for domestic abuse and other issues related to the capacity and competency to mediate before and during mediation;

(2) a mediator shall, in each case, regardless of the type of case, determine whether a party asserts domestic abuse is present and whether it appears that domestic abuse is present; and

(3) if the mediator determines that domestic abuse is present, the mediator shall halt or suspend mediation unless

(a) the mediator specifically finds that the following

three conditions are satisfied:

- (i) the mediator has substantial training concerning the effects of domestic abuse on victims;
 - (ii) a party who is or alleges to be the victim of domestic abuse is capable of negotiating with the other party in mediation, either alone or with assistance, without suffering from an imbalance of power as a result of the alleged domestic abuse; and
 - (iii) the mediation process contains appropriate provisions and conditions to protect against an imbalance of power between the parties resulting from the alleged domestic abuse;
- or
- (b) the party who is or alleges to be the victim requests mediation.

J. Incorporation by reference. When not inconsistent with this rule, the Model Standards of Conduct for Mediators, developed in September 2005 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution, and the Model Standards of Practice for Family and Divorce Mediation developed in August 2000 by The Symposium of Standards of Practice, are adopted and incorporated by reference.

[Adopted by Supreme Court Order _____, effective _____.]
Committee commentary. — The Model Standards of Conduct for Mediators referred to in Paragraph J were developed in September of 2005 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution, and are available at http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf. The Model Standards of Practice for Family and Divorce Mediation, also referred to in Paragraph J, were developed in August of 2000 by the Symposium of Standards of Practice, and are available at <http://www.afccnet.org/ResourceCenter/CenterforExcellenceinFamilyCourtPractice/ctl/ViewCommittee/CommitteeID/17/mid/495>.

Standard 8.0 of the National Standards, entitled "Ethical Standards for Mediators," lists six (6) areas of concern: impartiality, conflict of interest, advertising by mediators, disclosure of fees, confidentiality, and role of mediators in settlement. The Model Standards of Conduct for Mediators list nine (9) standards which address those areas, except "role of mediator on settlement," and add self-determination, competence, quality of the process, and advancement of practice. The Model Standards of Practice for Family and Divorce Mediation list self-determination, qualifications of mediators, impartiality, fees, confidentiality, advertising, competence, as well as several other standards relating to the quality of process and families in particular. This rule draws from provisions in all of the above-referenced documents.

Paragraph E is adapted from Standard 8.1(e) of the National Standards, and from NMSA 1978, Sections 44-7B-4 and 44-7B-2(B). Paragraph F is adapted from Standard 8.1(f) of the National Standards and the associated commentary. Paragraph G is adapted from Standard VI of the Model Standards of Conduct for Mediators. Paragraph H is adapted from Standard VI(E) of the Model Standards of Practice for Family and Divorce Mediation. Paragraph I is adapted from Standard X of the Model Standards of Practice for Family and Divorce Mediation and NMSA 1978, Section 40-4-8(B) (1) (1993).

[Commentary adopted by Supreme Court Order _____, effective _____.]

[NEW MATERIAL]

Appendix to Rules Governing Court-Connected Mediation Services

NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS¹

1.0 Access to Mediation

1.1 Mediation services should be available on the same basis as are other services of the court.

1.2 Each court should develop policies and procedures that take into consideration the language and cultural diversity of its community at all stages of development, operation and evaluation of court-connected mediation services and programs.

1.3 To ensure that parties have equal access to mediation, non-judicial screeners should have clearly stated written policies, procedures and criteria to guide their discretion in referring cases to mediation.

1.4 Courts should take steps to ensure that *pro se* litigants make informed choices about mediation.

1.5 Courts should ensure that information about the availability of mediation services is widely disseminated in the languages used by the consumers of court services.

1.6 (a) Courts should provide orientation and training for attorneys, court personnel and others regarding the availability and use of mediation services.

(b) Prior to and at the filing of a case, courts should provide to the parties and their attorneys information regarding the availability of mediation.

1.7 In choosing the location and hours of operation of mediation services, courts should consider the effect on the ability of parties to use mediation effectively, and the safety of mediators and parties.

2.0 Courts' Responsibility for Mediation

2.1 The degree of a court's responsibility for mediators or mediation programs depends on whether a mediator or program is employed or operated by the court, receives referrals from the court, or is chosen by the parties themselves.

(a) The court is fully responsible for mediators it employs and programs it operates.

(b) The court has the same responsibility for monitoring the quality of mediators and/or mediation programs outside the court to which it refers cases as it has for its own programs.

(c) The court has no responsibility for the quality or operation of outside programs chosen by the parties without guidance from the court.

2.2 The court should specify its goals in establishing a mediation program or in referring cases to mediation programs or services outside the court and provide a means of evaluating whether or not these goals are being met.

2.3 Program Management

(a) Information provided by the court to the mediator

(1) When parties choose to go to mediation outside the court, the court should have no responsibility to provide any information to the mediator.

(2) When a court makes a mandatory referral of parties to mediation, whether inside or outside the court, it should be responsible for providing the mediator or mediation program sufficient information to permit the mediator to deal with the case effectively.

¹The commentary originally published with these standards has been omitted. For a full copy of the standards, go to <http://courtdr.org/files/NationalStandardsADR.pdf>.

(b) Information provided by the mediator or the parties to the court

(1) If the program is court-operated, or if the case is referred to an outside program or mediator by the court, the program or individual mediator should have the responsibility to report information to the court, in order to permit monitoring and evaluation.

(2) If the mediator or program is chosen by the parties without guidance from the court, the provider should have no responsibility to report to the court.

2.4 Aggregate Information

Court-operated mediation programs and programs to which the court refers cases should be required to provide periodic information to the court. The information required should be related to:

(a) The court's objectives in establishing the program; and

(b) The court's responsibility for ensuring the quality of the services provided.

2.5 The court should designate a particular individual to be responsible for supervision, monitoring and administration of court-connected mediation programs.

2.6 Complaint Mechanism

Parties referred by the court to a mediation program, whether or not it is operated by the court, should have access to a complaint mechanism to address any grievances about the process.

3.0 Information for Judges, Court Personnel and Users

3.1 Courts, in collaboration with the bar and professional organizations, are responsible for providing information to the public, the bar, judges and court personnel regarding the mediation process; the availability of programs; the differences between mediation, adjudication and other dispute resolution processes; the possibility of savings in cost and time; and the consequences of participation.

3.2 Courts should provide the following information:

(a) To judges, court personnel and the bar:
(1) the goals and limitations of the jurisdiction's program(s)

(2) the basis for selecting cases
(3) the way in which the program operates
(4) the information to be provided to lawyers and litigants in individual cases

(5) the way in which the legal and mediation processes interact

(6) the enforcement of agreements
(7) applicable laws and rules concerning mediation

(b) To users (parties and attorneys) in addition to the information in (a):

General Information:

(1) issues appropriate for mediation
(2) the possible mediators and how they will be selected

(3) party choice, if any, of mediators
(4) any fees
(5) program operation, including location, times of operation, intake procedures, contact person

(6) the availability of special services for non-English speakers, and persons who have communication, mobility or other disabilities

(7) the possibility of savings or additional expenditures of money or time

Information on process:

(1) the purpose of mediation
(2) confidentiality of process and records

(3) role of the parties and/or attorneys in mediation
(4) role of the mediator, including lack of authority to impose a solution

(5) voluntary acceptance of any resolution or agreement

(6) the advantages and disadvantages of participating in determining solutions

(7) enforcement of agreements

(8) availability of formal adjudication if a formal resolution or agreement is not achieved and implemented

(9) the way in which the legal and mediation processes interact, including permissible communications between mediators and the court

(10) the advantages and disadvantages of a lack of formal record.

3.3 The court should encourage attorneys to inform their clients of the availability of court connected mediation programs.

4.0 Selection of Cases and Timing of Referral

4.1 When courts must choose between cases or categories of cases for which mediation is offered because of a shortage of resources, such choices should be made on the basis of clearly articulated criteria. Such criteria should include the following:

(a) There is a high probability that mediation will be successful in the particular case or category of case, in terms of both the number and quality of settlements.

(b) Even if there is not a high probability that mediation will be successful in the particular case or category of cases, continuing litigation would harm non-parties, the dispute involves important continuing relationships, or the case, if not mediated, is likely to require continuing involvement by the court.

4.2 The following considerations may militate against the suitability of referring cases to mediation:

(a) when there is a need for public sanctioning of conduct;

(b) when repetitive violations of statutes or regulations need to be dealt with collectively and uniformly; and

(c) when a party or parties are not able to negotiate effectively themselves or with assistance of counsel.

4.3 Courts should make available or encourage the availability of mediation to disputants before they file their cases in court as well as after judgment to address problems that otherwise might require relitigation.

4.4 While the timing of a referral to mediation may vary depending upon the type of case involved and the needs of the particular case, referral should be made at the earliest possible time that the parties are able to make an informed choice about their participation in mediation.

4.5 Courts should provide the opportunity on a continuing basis for both the parties and the court to determine the timing of a referral to mediation.

4.6 If a referral to mediation is mandated, parties should have input on the question of when the case should be referred to mediation, but the court itself should determine timing.

4.7 Courts should establish presumptive deadlines for the mediation process, which may be extended by the court upon a showing by the parties that continuation of the process will assist in reaching resolution.

5.0 Mandatory Attendance

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

(a) the cost of mediation is publicly funded, consistent with Standard 13.0 on Funding;

(b) there is no inappropriate pressure to settle, in the form of reports to the trier of fact or financial disincentives to trial; and

(c) mediators or mediation programs of high quality (i) are easily accessible; (ii) permit party participation; (iii) permit lawyer participation when the parties wish it; and (iv) provide clear and complete information about the precise process and procedures that are being required.

5.2 Courts may use a variety of mechanisms to select cases for mandatory referral to mediation. Any mechanism chosen should provide for: individual assessment of each case to determine its appropriateness for mediation, which takes into account the parties' relative knowledge, experience and resources.

5.3 Any system of mandatory referral to mediation should be evaluated on a periodic basis, through surveys of parties and through other mechanisms, in order to correct deficiencies in the particular implementation mechanism selected and to determine whether the mandate is more likely to serve the interests of parties, the justice system and the public than would voluntary referral.

6.0 Qualifications of Mediators

6.1 Courts have a continuing responsibility to ensure the quality of the mediators to whom they refer cases. Qualifications of mediators to whom the courts refer cases should be based on their skills. Different categories of cases may require different types and levels of skills. Skills can be acquired through training and/or experience. No particular academic degree should be considered a prerequisite for service as a mediator in cases referred by the court.

6.2 Courts need not certify training programs but should ensure that the training received by the mediators to whom they refer cases includes role-playing with feedback.

6.3 Courts are responsible for determining that the mediators to whom they refer cases are qualified. The level of screening needed to determine qualifications will vary depending upon the type of case involved.

6.4 Courts should orient qualified mediators to court procedures.

6.5 Courts should continue to monitor the performance of mediators to whom they refer cases and ensure that their performance is of consistently high quality.

6.6 Courts should adopt procedures for removing from their roster of mediators those mediators who do not meet their performance expectations and/or ensuring that they do not receive further court referrals.

7.0 Selection of Mediators

7.1 To enhance party satisfaction and investment in the process of mediation, courts should maximize parties' choice of mediator, unless there are reasons why party choice may not be appropriate. Such reasons might include:

(a) there is a significant inequality in the knowledge or experience of the parties.

(b) the court has a particular public policy it is trying to achieve through mediation, which requires selection of a particular mediator or group of mediators.

(c) party choice would cause significant and undesirable delay.

7.2 When a court determines that it should refer the parties to a private mediator who will receive a fee, the court should permit the parties to choose from among a number of providers.

8.0 Ethical Standards for Mediators

8.1 Courts should adopt a code of ethical standards for mediators, together with procedures to handle violations of the code. Any

set of standards should include provisions that address the following concerns:

(a) Impartiality

The mediator should maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by appearance, word or action, and a commitment to serve all parties as opposed to a single party.

(b) Conflict of Interest

The mediator should refrain from entering or continuing in any dispute if he or she perceives that participation as a mediator would be a clear conflict of interest. The mediator also should disclose any circumstances that may create or give the appearance of a conflict of interest and any circumstances that may raise a question as to the mediator's impartiality.

The duty to disclose is a continuing obligation throughout the process. In addition, if a mediator has represented either party in any capacity, the mediator should disclose that representation.

After the mediator discloses the prior representation, the parties may choose to continue with the mediator.

A mediator should disclose any known, significant current or past personal or professional relationship with any party or attorney involved in the mediation and the mediator and parties should discuss on a case-by-case basis whether to continue.

(c) Advertising by Mediators

A mediator should not make exaggerated claims about the mediation process, its costs and benefits, its outcome or the mediator's qualifications.

(d) Disclosure of Fees

Where costs and fees are funded by the parties, the mediator should enter into a written agreement with the parties that includes costs, fees, and time and manner of payment before beginning the mediation.

No commissions, rebates or other similar forms of remuneration should be given or received by a neutral for the referral of clients. Fees should not be based on the outcome of the dispute.

(e) Confidentiality

In the absence of a statute to the contrary, the mediator should treat information revealed in a mediation as confidential, except for the following:

(1) Information that is statutorily mandated to be reported.

(2) Information that, in the judgment of the mediator, reveals a danger of serious physical harm either to a party or to a third person.

(3) Information that the mediator informs the parties will not be protected.

The mediator should inform the parties at the initial meeting of any limitations on confidentiality.

(f) Role of Mediators in Settlement

The mediator has the responsibility to see that the parties consider the terms of the settlement and be sensitive to inappropriate pressures to settle. In adhering to this standard, the mediator may find it advisable to educate the parties or to refer one or more parties for specialized advice.

9.0 Confidentiality

9.1 Courts should have clear written policies relating to the confidentiality of both written and oral communications in mediation consistent with the laws of the jurisdiction. Among the issues such a policy should address specifically are:

(a) the mediators and cases protected by confidentiality;

(b) the extent of the protection;

(c) who may assert or waive the protection; and

(d) exceptions to the protection.

9.2 Courts should ensure that their policies relating to confidentiality in mediation are communicated to and understood by mediators to whom they refer cases.

9.3 Courts should develop clear written policies concerning the way in which confidentiality protections and limitations are communicated to parties they refer to mediation.

9.4 Mediators should not make recommendations regarding the substance or recommended outcome of a case to the court.

9.5 Policies relating to confidentiality should not be construed to prohibit or limit effective monitoring, research or program evaluation.

10.0 The Role of Lawyers in Mediation

10.1 Courts should encourage attorneys to advise their clients on the advantages, disadvantages, and strategies for using mediation.

10.2 Parties, in consultation with their attorneys, should have the right to decide whether their attorneys should be present at mediation sessions.

10.3 Courts and mediators should work with the bar to educate lawyers about:

(a) the difference in the lawyer's role in mediation as compared with traditional representation; and

(b) the advantages and disadvantages of active participation by the parties and lawyers in mediation sessions.

11.0 Inappropriate Pressure to Settle

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

11.2 Courts should provide parties who are required to participate in mediation with full and accurate information about the process to which they are being referred, including the fact that they are not required to make offers and concessions or to settle.

11.3 Courts should not systematically exclude anyone from the mediation process. Lawyers never should be excluded if the parties want them to be present.

11.4 Settlement rates should not be the sole criterion for mediation program funding, mediator advancement, or program evaluation.

11.5 There should be no adverse response by courts to nonsettlement by the parties in mediation.

12.0 Communications Between Mediators and the Court

12.1 During a mediation the judge or other trier of fact should be informed only of the following:

(a) the failure of a party to comply with the order to attend mediation;

(b) any request by the parties for additional time to complete the mediation;

(c) if all parties agree, any procedural action by the court that would facilitate the mediation; and

(d) the mediator's assessment that the case is inappropriate for mediation.

12.2 When the mediation has been concluded, the court should be informed of the following:

(a) If the parties do not reach an agreement on any matter, the mediator should report the lack of an agreement to the court without comment or recommendation.

(b) If agreement is reached, any requirement that its terms be reported to the court should be consistent with the jurisdiction's policies governing settlements in general.

(c) With the consent of the parties, the mediators' report

also may identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

12.3 Whenever possible, all communications with the judge who will try the case should be made by the parties. Where the mediator must communicate with the trial judge, it is preferable for such communications to be made in writing or through administrative personnel.

13.0 Funding of Programs and Compensation of Mediators

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

(a) Where a court suggests (rather than orders) mediation, it should take steps to make mediation available to indigent litigants, through state funding or through encouraging mediators who receive referrals from the court to provide a portion of their services on a free or reduced fee basis.

(b) When parties are required to participate in mediation, the costs of mediation should be publicly funded unless in the view of the court the case is an exceptional one.

13.2 In allocating public funds to mediation, a court may give priority for funding to certain types of cases, such as family and minor criminal matters.

13.3 Where public funds are used, they may either: (a) support mediators employed by the court or (b) compensate private mediators. Where public funds are used to compensate private mediators, fee schedules should be set by the Court.

13.4 (a) Where courts offer publicly funded mediation services, courts should permit parties to substitute a private mediator of their own choosing except in those circumstances under which the court has decided that party choice is inappropriate.

(b) Where parties elect to pay a private mediator, they should be permitted to agree with the mediator on the appropriate fee.

14.0 Liability of Mediators

Courts should not develop rules for mediators to whom they refer cases that are designed to protect those mediators from liability. Legislatures and courts should provide the same indemnity or insurance for those mediators who volunteer their services or are employed by the court that they provide for non-judicial court employees.

15.0 The Enforceability of Mediated Agreements

15.1 Agreements that are reached through court-connected mediation should be enforceable to the same extent as agreements reached without a mediator.

16.0 Evaluation

16.1 Courts should ensure that the mediation programs to which they refer cases are monitored adequately on an ongoing basis, and evaluated on a periodic basis and that sufficient resources are earmarked for these purposes.

16.2 Programs should be required to collect sufficient, accurate information to permit adequate monitoring on an ongoing basis and evaluation on a periodic basis.

16.3 Courts should ensure that program evaluation is widely distributed and linked to decision-making about the program's policies and procedures.