IN THE SUPREME COURT OF THE STATE OF ARIZONA

In The Matter Of:	)	
	)	
ADOPTING STANDARDS AND	)	
GUIDELINES FOR	)	Administrative Order
COURT-CONNECTED	)	No. 96-36
MEDIATION PROGRAMS	)	
	)	

This Court demonstrated its support for use and development of alternative dispute resolution (ADR) programs by adopting the recommendations of the Commission on the Courts' that courts establish innovative ADR programs, and by entry of Administrative Order No. 91-30 which created the ADR Advisory Committee. It is the intent of this Court to provide direction to justice courts regarding establishing, expanding, or improving court-connected mediation programs and to further inform all courts of the intent to expand application of the attached Standards and Guidelines for Court-Connected Mediation Programs in the future.

Now, therefore, pursuant to Article VI, Section 3, of the Arizona Constitution; A.R.S. §§ 12-134, 12-135.B, and 22-201(G); and Rule 16(g), Arizona Rules of Civil Procedure,

IT IS ORDERED that

1. The attached *Standards and Guidelines for Court-Connected Mediation Programs* are adopted for Arizona justice courts establishing, expanding, or improving court-connected mediation programs.

2. Mediation is approved as a method of dispute resolution for justice courts when the mediation program is established in accordance with the *Standards and Guidelines for Court-Connected Mediation Programs* as provided in this order. The *Standards* are mandatory and the *Guidelines* shall be considered when establishing or improving a court-connected mediation program.

3. The presiding superior court judge of each county shall work with justices of the peace in that county to adopt a local rule to establish procedures for court-connected mediation programs.

4. These *Standards and Guidelines for Court-Connected Mediation Programs*, while developed specifically for justice of the peace courts, are also relevant to municipal and superior courts, and shall be considered in operating existing programs and establishing new programs.

5. It is the intent of this Order that each presiding superior court judge shall work with courts in the county to make available, where feasible, court-connected mediation programs in the courts by June 30, 1999.

6. It is the intent of this Order to adopt these *Standards and Guidelines* for all courts in the future. Therefore, the attached *Standards and Guidelines for Court-Connected Mediation Programs* are hereby distributed for comment by judges and staff at the superior and municipal courts. Comments shall be sent to the Court Services Division of the Administrative Office of the Courts by September 15, 1996. The Administrative Office of the Courts shall provide any such comments to the Arizona Judicial Council when the matter is considered.

Dated this 31st day of July, 1996.

Stanley G. Feldman
Chief Justice

STANDARDS AND GUIDELINES FOR COURT-CONNECTED MEDIATION PROGRAMS

April 1996

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Introduction

These *Standards and Guidelines for Court-Connected Mediation Programs* are designed to assist and inform Arizona courts interested in establishing, expanding, or improving their mediation program(s). They are based on the *National Standards for Court-Connected Mediation Programs* developed by the Center for Dispute Settlement in Washington, D.C., and the Institute of Judicial Administration in New York City.

The first section of the document, entitled "*Standards*," contains the most fundamental program elements; these must be followed by justice courts that refer cases to mediation. The second section, entitled "*Guidelines*," contains policies that are recommended, but not required, for program operation.

This document was prepared by the Arizona Supreme Court's Alternative Dispute Resolution Committee at the request of the Arizona Judicial Council. The project was undertaken in response to Justice Court questions regarding authority to mandate attendance at ADR programs. Pursuant to A.R.S. § 22-201(G), "The justice of the peace may require arbitration or other dispute resolution methods approved by the Arizona supreme court...." Until now, however, no "approved" methods had been established.

The Administrative Order adopting these *Standards* provides that mediation is an "approved" method of dispute resolution. Therefore, Justices of the Peace, whose mediation programs must comply with these *Standards*, may now mandate attendance at mediation programs.

Although the *Standards and Guidelines* were developed for Justice of the Peace Courts, care was taken to use wording that is equally applicable for Municipal Court and Superior Court mediation programs, with the exception of Superior Court conciliation programs, which are currently regulated by specific statutes and rules. Therefore, Municipal Court and Superior Court mediation programs (except Conciliation Court programs) are encouraged to operate in accordance with these *Standards and Guidelines*.

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Standards and Guidelines for Court-Connected Mediation Programs

STANDARDS
FOR COURT-CONNECTED MEDIATION PROGRAMS

DEFINITION: Mediation is a process in which an impartial person (the "mediator") helps disputing parties to communicate and to make voluntary, informed choices aimed at resolving their dispute.

1.0 SELECTION OF CASES AND NOTICE TO PARTIES

1.1 Whenever possible, courts should make mediation programs available to the parties. When courts must choose between cases or categories of cases for which mediation is offered because of a shortage of resources, such choices shall be made on the basis of clearly articulated criteria. Such criteria should be in writing and should be available to the public upon request.

COMMENTARY: Available resources in the justice system are limited. Although ideally a full range of dispute resolution options should be made available to litigants in every case, the reality of limited funds and time to implement and monitor quality programs and services requires that choices be made between the kinds of programs that can be provided and the types of cases to which they will apply.

While these Standards do not recommend specific policies with respect to resource allocation, they do emphasize that choices should be made with thought and care, and should be guided by the premise of doing no harm. Examples of criteria that might be used by courts in allocating resources for court-connected mediation programs and services include the following:

a. Cases where there is an on-going relationship between the parties, e.g., neighbors;
b. Cases where the parties have expressed interest in participating in mediation;
c. Cases where non-monetary relief is requested; and/or
d. Certain categories of cases, e.g., small claims, contract cases, etc.

Whatever the criteria for choice, such criteria should be clearly articulated by the court to enhance thoughtful decision-making as well as understanding and acceptance by court personnel, users, and the public of the choices that are ultimately made.

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

a. There is a need for public sanctioning of conduct;

b. Repetitive violations of statutes or regulations need to be dealt with collectively and uniformly;

c. A party or parties are not able to negotiate effectively themselves or with assistance of counsel; and/or

d. Another available means of dispute resolution is more likely to satisfy the needs of the parties and the court.

COMMENTARY: Courts should consider carefully whether to exclude certain kinds of cases from mediation altogether, or to refer such cases to mediation only on a very selective, case-by-case basis.

For example, there is some conduct that the legislature has determined to be so intolerable to public health and welfare that criminal penalties should attach to its proven occurrence. While neighborhood justice centers typically mediate misdemeanor cases, and programs attached to prosecutors' offices mediate such cases as bad checks, serious criminal conduct may be inappropriate for mediation because of the potential for avoidance of sanctions the legislature has determined are important to deter future similar conduct and to protect the public. Other conduct that is similarly intolerable to public health and welfare, although penalties attached to its proven occurrence are civil in nature, also may not be suitable for referral to mediation, such as the intentional dumping of toxic waste.

Likewise, there are some situations that need to be dealt with collectively and uniformly, such as a recurring pattern of consumer fraud. For example, a manufacturer sued by numerous customers for supplying defective products should not be allowed to continue such conduct by reaching individual private settlements. Such recurring practices may require court intervention to establish a clear rule for future conduct.

Also, there are cases that courts may consider excluding from mediation because the parties are not able to negotiate effectively on their own behalf. One example is a case in which physical or psychological victimization has occurred that impairs the ability of one or both parties to protect their own interests during the process or to honor their agreements. It may be possible to introduce into the mediation process, on a case-by-case basis, a variety of special procedures to address this situation. At a minimum courts should, in consultation with representatives of all of the interests involved, develop special protocols to govern referrals to mediation of these kinds of cases. In counties with a Superior Court conciliation program, courts may wish to consult with the Conciliation Court regarding case screening and development of such protocols.

1.3 At the time of referring a case to mediation, courts should provide parties 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.

COMMENTARY: Notifying parties of a referral to mediation without any explanation of the process can create several problems. A party may spend unnecessary time and energy preparing for an adjudicatory process. Or, a party may perceive that the opportunity to advance the case to trial has been foreclosed. A court may delegate the obligation to educate the parties about the mediation to a service provider. [The Appendix contains sample "question and answer" sheets (Forms A-1 and A-2) and a sample informational letter (Form B).]

Inadequate information may also lead parties to believe that they must settle in mediation. In addition to providing written information prior to mediation, care should be taken to inform parties at the outset of the mediation session that the mediator has no authority to impose a solution, and that no adverse consequences will be imposed as a result of their failure to settle. Informing parties that the mediator has no authority to impose a solution may be particularly important if a retired judge is serving as the mediator, because of the likelihood, given a retired judge's status, that parties may assume otherwise. When mediation involves unrepresented or unsophisticated parties, who may be more susceptible to perceived pressure to settle, courts should provide even fuller information.

2.0 MANDATORY ATTENDANCE

2.1 Mandating attendance at a mediation session may be appropriate if the court adopts written mediation program procedures that:

a. Provide a procedure for the parties to seek exclusion from the mediation, with an articulated standard (e.g., "good cause") by which the request for exclusion will be determined;

b. Provide the parties with prior written notice of any sanction(s) that may be imposed for failure to appear; and

c. Permit lawyer participation in the mediation upon client request.

COMMENTARY: By its nature, mediation seems more suited to parties who voluntarily submit their dispute to the process. The efficient administration of the court, however, makes voluntary mediation impractical in some situations. Moreover, mandatory mediation may result in more parties arriving at solutions that better suit their needs and preferences than would court-imposed judgments. With proper safeguards, mandatory mediation programs can serve the interests of the parties, the public, and the court system.

Whether mandatory or voluntary, the mediation process itself should not be coercive. It should be a dispute resolution process, not a replacement for court adjudication. These Standards specify some minimal safeguards that can help balance the interests of maintaining access to the adjudicatory process and the efficient administration of court business.

1) Allowing the parties to seek exclusion from the mandated mediation - If mediation would not be appropriate in any given case, there is little benefit in forcing the parties to attend a "mandatory" session. Often, parties are in the best position to know when mediation is not a preferable way to address their dispute. On the other hand, mediation is still fairly new, and parties or their lawyers may seek to opt out because of their unfamiliarity with or misconception of the process. A broad or flexible standard for excusing parties from the process may best accommodate all interests. Whether a court has broad or narrow standards for excusing parties, information about those standards as well as the procedure for seeking to be excused should accompany the notice of referral to mandatory mediation.

2) Prior notice of potential sanctions - For fairness to the parties and to protect their due process rights, information about any potential sanctions in a mandatory mediation program should be given at the time the parties receive their initial notice of the mediation session.

3) Lawyer participation - Clients who wish their lawyers to participate or be present at a mediation session should be allowed to have representation. While mediation is a process which encourages direct participation by the disputants, no party should be asked to forego direct lawyer involvement when requested. If one party is not using legal counsel and the other party insists upon having counsel involved in a mediation session, this may be a case of "good cause" shown to be excused from mandatory mediation.

Note: Nothing in this Standard supersedes A.R.S. Section 25-381.09 et seq. or Section 22-512, Small Claims.

2.2 No cases involving violence, including domestic violence, shall be referred for mandatory mediation.

COMMENTARY: Requiring attendance at an initial mediation session risks creating inappropriate pressures to settle on some parties, such as those whose ability to protect their own interests has been impaired by psychological or physical victimization. The ability of some victims to provide truly informed consent, and the unreliability of commitments or agreements made by some perpetrators of violence make the use of mediation problematic in domestic violence cases. Also, there may be some cases in which mediation's process of empowering a victim might provoke or aggravate a dangerous response, particularly where the parties' relationship has been plagued by a history of violence.

Courts should use caution in referring parties to mediation in cases involving violence. When physical violence has occured, no party should be required to attend mediation. This, of course, does not preclude voluntary participation.

2.3 **Any system of mandatory referral to mediation shall be evaluated periodically 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.**

COMMENTARY: As the Society of Professionals in Dispute Resolution (SPIDR) has stated:

> During the early period of a mandatory program, it is especially important that data be collected to determine whether it is meeting the goals set by planners. As part of this process, it is important to examine the effect of the program on such matters as the parties' costs, interest, and satisfaction as well as the effect on court resources. During early stages, data should be gathered to determine whether a substantial number of the participants believe that mandated participation has been so burdensome for them to pursue a trial or so injurious to other interests that, in their view, the costs of the mandate outweigh the benefits.
>
> As quoted in National Standards for Court-Connected Mediation Programs, at 5.3.

Surveys of parties should be made part of the evaluation so that it addresses qualitative as well as quantitative measures. (See also Guideline 6.1 (Evaluation) and related commentary.) Evaluation data should be monitored carefully and used on an ongoing basis to correct any deficiencies identified in selection mechanisms.

3.0 CONFIDENTIALITY

3.1 **Verbal and written communications associated with mediation shall be confidential, consistent with A.R.S. Section 12-2238. [Included in Appendix.]**

COMMENTARY: The assurance of confidentiality encourages parties to be candid and to participate fully in the process. A mediator's ability to draw out the parties' underlying interests and concerns may require discussion -- and sometimes admissions -- of

facts that disputants would not otherwise concede. Further, because parties often speak in mediation without the expectation that they will later be bound in another forum by what they said, subsequent use of their communications could be unfairly prejudicial, particularly when the parties' levels of sophistication are unequal. Confidentiality also helps ensure the mediator's continued neutrality, since a mediator's subsequent testimony at trial would inevitably favor one side or another and destroy his or her role as an "impartial broker." Finally, confidentiality in mediation may enhance the use of mediation and optimize the settlement potential of a case. Many parties are concerned about protecting private information, such as trademarks and trade secrets, which are often difficult to protect in a court proceeding.

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

COMMENTARY: Communications between courts and mediators relating to the substance or recommended outcome of cases destroy confidentiality and impugn the integrity of the process either by discouraging open communication or allowing mediators to use information revealed in confidence against a party's interest.

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

COMMENTARY: Courts should strive to enhance the quality of their mediation programs and collect adequate information to fulfill this goal. Policies on confidentiality should accommodate this need.

Effective research, monitoring or program evaluation may require not only the collection of aggregate statistics, but also access to individual case files and/or observation of actual mediation sessions as well as interviews with parties, mediators, and mediation program personnel. Courts must balance the need for this kind of data with the need to protect confidentiality.

There are a number of ways to effect such an accommodation (1) data can be made available only to officially sanctioned research and evaluation efforts; (2) the researchers and evaluators themselves can be bound by courts' confidentiality policies; (3) protocols can be developed to ensure, for example, that names are replaced by numbers and that specific identifying data are altered to protect individual parties; and (4) procedures can be devised to provide that mediation sessions are observed only with the parties' permission.

Given the availability of such protocols and procedures and the courts' need for data to fulfill their obligation to monitor programs, provision of information for the purposes of program monitoring, evaluation, and research should not be construed as violating policies relating to confidentiality in mediation.

3.4 Before or during a mediation, the mediator may inform the judicial officer or program administrator of the following only:

a. The failure of a party to attend mandatory 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.

3.5 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.

COMMENTARY TO STANDARDS 3.4 and 3.5: In mediation programs where the parties are ordered to attend, it is appropriate for the mediator to report that a particular party did not attend. However, when a party does not appear for a voluntary program, it is appropriate to report only that the case is not appropriate for mediation. To say more might inadvertently influence the judge.

Although communications concerning what has occurred in the mediation are inappropriate between the mediator and any judge who may try the case, these Standards are not intended to preclude (1) discussions with administrative staff responsible for the mediation program, (2) reports to the court designed to permit monitoring of the quality of the mediation services being provided, or (3) communications with the judge assigned to try the case prior to mediation.

Mediation agreements should not be kept private per se, but should be treated as other court settlements. Parties may request that settlement terms be confidential as part of the mediated agreement. However, in those cases where the public interest demands otherwise, such as cases involving environmental or consumer protection issues, mediated agreements should not be made confidential.

3.6 There shall be no adverse response by courts to non-settlement by the parties in mediation.

COMMENTARY: The failure of mediation to produce a settlement should not adversely affect the parties' treatment by the court. Such treatment may manifest itself in a number of ways. For example, courts might place a case that has not settled in mediation on a long trial list; draw inferences concerning the reasons a case did not settle that are adverse to one of the parties; solicit a recommendation from the mediator as to the best outcome for a case; or, require parties who have not settled in mediation to participate subsequently in a judicial settlement conference where they are pressured to come to agreement. Because the consequences of such practices may lead parties to settle in mediation involuntarily, courts should take special care to avoid them.

GUIDELINES
FOR COURT-CONNECTED MEDIATION PROGRAMS

1.0 ACCESS TO MEDIATION

1.1 Mediation services should be made available on a basis comparable to other services offered by the court.

COMMENTARY: Access to court-connected mediation services should be provided as broadly as possible. Specifically, courts should not make mediation available based on whether the parties are able to pay, whether they are represented, whether they have a particular disability, or whether they might have difficulty speaking or understanding English.

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.

COMMENTARY: Precisely how this principle would be implemented by a specific court must be determined by the circumstances in which judicial officers and court administrators find themselves. At a minimum, however, judicial officers or court administrators seeking to create a new mediation service or modify existing programs should seek ways to involve the client community in the task.

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

COMMENTARY: Uniform policies, procedures, and criteria will minimize the risk that individual court personnel will refer certain categories of cases to mediation based on purely subjective criteria. (See Section 1 of the Standards regarding Selection of Cases for examples of screening considerations.)

1.4 Courts should take steps to enable unrepresented litigants to be fully informed about mediation and opportunities to engage in other forms of dispute resolution.

COMMENTARY: When parties to mediation have neither legal representation nor access to legal information, they are often vulnerable to pressure to settle and to accept unfair results. When parties are unrepresented, courts should make special efforts to alert them to settlement alternatives (possibly through pre-mediation education). Similarly, courts should be sensitive to practices that make the uninformed perceive that they must settle. For

example, courts could provide written information to parties containing answers to frequently asked questions. (See Appendix, Form A) Where the mediation program is non-mandatory, the parties should be advised that they may choose not to participate in the program.

2.0 COURT'S RESPONSIBILITY FOR MEDIATION

2.1 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 these goals are being met.

COMMENTARY: The court should ensure that program goals are clearly articulated and related to its specific needs. Given the variety of possible goals of referring cases to mediation, a court need not have a backlog of cases to institute a mediation program or refer cases to outside mediators. Clarity of goals is important to ensure that:

- a case or class of cases is referred to an appropriate mediator or program,
- the program is of high quality and suitable to the case or class of cases referred, and
- the court has clear objectives by which to monitor and evaluate the program's performance.

Among the possible goals are to:

- provide a broader range of dispute resolution options,
- increase the involvement of parties in the dispute resolution process,
- provide a mechanism to deal with the real issues in dispute,
- facilitate the early resolution of disputes,
- decrease the cost of resolving disputes,
- increase the parties' satisfaction and compliance with the results of dispute resolution,
- assist the parties in developing a wider range of outcomes than are available through adjudication,

-- provide access to a process that for many litigants is less formal and intimidating than the traditional adjudicatory process,

-- increase the court's ability to resolve cases with given resources, and/or

-- increase the parties' ability to resolve their own disputes without court intervention.

All too often courts implement programs based on models from other courts without evaluating their own particular operating environment and needs. This is likely to result not only in the court's failure to achieve the particular benefits it seeks, but also in fostering the litigants' confusion and dissatisfaction with the justice system as a whole. Even when a program is not initiated or operated by the court itself, the program's goals should be clear and relate directly to the court's rationale for referring individual cases or categories of cases to mediation. Clarity of goals will facilitate effective monitoring and evaluation. (See Guideline 6.1 on Evaluation.)

2.2 Program Management

a. The court should provide the following information to the mediator:

(1) That the court has no responsibility to provide any information to the mediator when parties choose to mediate outside the court's program.

(2) That the court is responsible for providing the mediator or mediation program with sufficient information to permit the mediator to deal with the case effectively when it refers parties to mediation, whether inside or outside the court.

b. The mediator or the parties should be required to provide the court with the following information for purposes of quality control and the court's exercise of responsibilities to manage its caseload:

(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 non-confidential 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.**

COMMENTARY: If the parties choose to use outside mediators, whether or not they are suggested by the court, the court should be able to rely on the parties to provide the mediator with whatever information is required. On the other hand, when the court requires the parties to participate in mediation, the Guidelines require the court to provide whatever information is needed. The precise information required will vary with the type of case and with whether the parties are represented. It includes such data as the case and parties' names; case type; dates of filing and referral to mediation; the amount of the claim and any counterclaim; any disputed motions, court orders, and/or trial date; and the stage of discovery, where applicable.

Although a mediator or program chosen without guidance from the court has no responsibility to provide the court with data, the court should require the parties to furnish the information in the case of mandatory mediation, or ask them to furnish it in the case of voluntary mediation, to the extent that the information is necessary for the court to manage its docket. Such information may include case name and type; the date the case was referred; the name of the mediator or mediation program; the names of the parties or party representatives attending mediation; the outcome of the mediation; and, if the parties agree, any further court action required.

2.3 Forms and Enforceability of Mediated Agreements

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

COMMENTARY: Because there is no reason to treat agreements that are mediated in court-connected programs any differently from other settlement agreements, courts should follow whatever their usual practices are in connection with settlement agreements. Courts should also inform mediators and parties of any specific requirements that must be met to transform their agreements into enforceable judgments.

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 required information should relate to the court's:

a. Objectives in establishing the program, and

b. Evaluation of the services provided.

COMMENTARY: In addition to case-specific information, programs to which the court refers cases should periodically provide the court with aggregate information that will permit the court to monitor the quality of the services provided. The precise type of information required should depend in part on the program's goals. For example, information about parties' costs per case and time to resolution is important if the primary goal of the program is to save litigants time and money, whereas such information might not be important if the primary goal is to provide a more appropriate mechanism for resolution.

In general, however, the information should be adequate to permit:

- effective case management by the court
- monitoring of the quality of service provided (the percentage of cases reaching agreement, for example, and the average time between referral and agreement)
- the determination of the parties' level of satisfaction with the agreements and the mediation process
- an evaluation of whether the program is meeting its goals over time and the needs of litigants and the court

Periodic reports from programs, containing aggregate information about cases referred, is necessary to enable the program administrator to determine whether the program is meeting its articulated goals, as well as the needs of the court, in referring individual cases or categories of cases to it. Such information should be evaluated regularly by the program administrator to identify any deficiencies in the dispute resolution system.

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

COMMENTARY: The presiding judge or the presiding judge's designee has the ultimate responsibility for the operation of court-connected mediation programs. For day-to-day administration, however, a member of the court staff should be designated to operate

court-based programs or to act as liaison with private, court-referred programs or mediators. This need not be a full-time or separate position in a small jurisdiction.

The administrator should be knowledgeable about the goals, process, and procedures of mediation, as well as about the court's process and procedures and its goals in referring individual cases or categories of cases to mediation. This individual should meet regularly with court administrators, groups of outside mediators who receive court referrals, and judges who refer cases to mediation in order to ensure that the program is functioning effectively.

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 mediation process.

COMMENTARY: While no specific level of formality is needed for a "complaint mechanism," the court should ensure that any party to mediation has an opportunity to complain to a neutral body. Where the complaint involves the procedure or integrity of the mediation service, the complaint mechanism should allow the party to file the complaint either directly with the court or with a specified neutral person or committee unaffiliated with the mediation service provider.

To promote consistency in processing complaints, specific, written directions for addressing a grievance should be established, regardless of the level of formality of the complaint mechanism itself.

In developing an appropriate complaint mechanism, a court may want to consider addressing the following issues:

a. How is a complaint filed?
b. What are the responsibilities of the person or committee responsible for receiving and processing the complaint?
c. To what extent may the parties or mediators participate in the process, particularly when they are the subjects of the complaint?
d. What sanctions or remedies are available?
e. Should there be a procedure for appeal or review of the action taken on the complaint?

3.0 INFORMATION FOR JUDICIAL OFFICERS, COURT PERSONNEL, AND USERS

3.1 Courts, in collaboration with the bar and professional organizations, should provide information to the public, the bar, judicial officers, and court personnel regarding the mediation process; the availability of programs; the differences between mediation, adjudication, and other dispute resolution processes; the potential savings in cost and time; and the benefits of participation.

COMMENTARY: Establishing court mediation programs involves a significant investment in time and resources. The investment is justified if the programs are used by a significant number of people, who find that the programs meet their needs.

Experience with court mediation programs has shown that voluntary programs often are under-utilized. In spite of the increasing number of programs in courts and communities, mediation remains a largely unfamiliar process to judicial officers, court administrators, citizens, and attorneys. Judicial officers, lawyers, and clients tend to do things in the way to which they are accustomed and may resist new processes with which they are unfamiliar.

Judicial officers and court administrators play a leadership role in the courts and their communities. Judicial officers in some courts are responsible for deciding which cases go to mediation, explaining the process to disputants, and helping to make program decisions regarding such issues as mandatory referral and choice of mediator. Their understanding and support of court mediation programs can make them powerful allies and help ensure a program's success.

Education of court administrators and judicial officers should focus on the differences between mediation and adjudication, the participatory nature of mediation, and the possibility of creative solutions that deal with future relationships. This information can help to ensure that they will be better advocates and planners of mediation programs, more able in selecting cases for mediation and adept at explaining mediation to parties and their attorneys.

Parties and attorneys may not choose mediation over adjudication because they are unfamiliar with the advantages of mediation, or because they do not know how to prepare for or participate in a mediation session. Mediators have found that when attorneys understand mediation, they can facilitate the process and increase the likelihood of settlement. It follows that, with increased familiarity with mediation, more people will choose it in voluntary programs, more people will feel comfortable with it in mandatory programs, and more people will be better able to participate in both voluntary and mandatory programs.

Not only do courts have an interest in maximizing the use of mediation programs, but they also have a responsibility to ensure that parties and attorneys who have a choice between mediation and other alternative processes have enough information to enable them to make an informed choice. Although courts do not normally assume the responsibility of educating

parties or attorneys, when they introduce new programs under their authority, they should provide information about them.

While the Guidelines endorse the principle that courts should educate and inform, they also support the role of the local bar and law schools in education. Courts can encourage local bars and law schools to offer courses and CLE credits for dispute resolution and encourage law schools to include mediation in particular and alternative dispute resolution in general in the curricula.

3.2 Courts should provide the following information:

a. To judicial officers, court personnel and the bar:

(1) the goals and limitations of the jurisdiction's program(s),
(2) the criteria 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 forms and enforcement of agreements, and
(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 or other types of dispute resolution;
(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, and contact person;
(6) the availability of special services for non-English speakers and persons who have communication, mobility, or other disabilities; and
(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) the forms and 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; and
(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 TIMING OF REFERRAL

4.1 Courts should encourage the use of mediation to resolve disputes prior to filing cases as well as after judgment, to address problems that otherwise might require litigation or re-litigation.

COMMENTARY: Court-connected mediation programs and services generally are designed and implemented to provide alternatives to the litigation process. What often is forgotten is the goal of litigation prevention. Courts can play an important role in promoting the availability of mediation before disputes are filed in court as well as after cases have been settled or judgment has been rendered. Such promotion can take the form of opening the caseloads of court-connected mediation programs and services to cases pre-filing and post-judgment, working directly with agencies and individuals in the community to encourage the provision of mediation, and advocating publicly through bar associations or otherwise for the increased availability of such services.

4.2 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.

5.0 QUALIFICATIONS OF MEDIATORS

5.1 Courts have a responsibility to monitor the quality of the mediators to whom they refer cases. No particular academic degree should be considered a prerequisite for service as a mediator in cases referred by the court.

COMMENTARY: Courts need not certify mediators or mediation training programs, but they should promote high quality mediation services. This may be accomplished by requiring that the mediators to whom they refer cases adhere to the guidelines established by the Arizona Dispute Resolution Association or similar, nationally accepted standards.

5.2 Courts should orient mediators to court procedures.

COMMENTARY: In addition to being trained in mediation skills and techniques, mediators to whom the court refers cases should be required to attend an orientation on court procedures. To be effective, mediators need to know the institutional context of the cases they are handling, including how the case was processed by the court before mediation, how it will be processed afterwards, and any time deadlines and reporting mechanisms that are in place. Mediators handling court-referred cases should also be informed routinely of any changes in court procedure. Dissemination of this information will promote smooth functioning of court-connected mediation programs.

6.0 EVALUATION

6.1 Courts should appropriately monitor and evaluate the mediation programs to which they refer cases.

COMMENTARY: Program monitoring is usually an internal function and involves ongoing assessment of how the program is operating and whether policies and procedures are being implemented as intended. Evaluation is often conducted by an external entity and involves periodic assessment to determine, from a policy perspective, whether the program is meeting the goals articulated for its implementation relative to other actual or potential programming efforts. For example, monitoring might answer the question "Are parties

settling cases early in mediation?", while evaluation might determine whether parties are settling cases earlier in mediation than in litigation.

While monitoring and evaluation are undertaken for different purposes, both are essential to permit courts to fulfill their responsibility for ensuring the quality of the programs to which they refer cases.

The process of evaluation can have a number of goals: (1) to determine whether a program should be continued or discontinued; (2) to garner public or funding support for a program; (3) to assist in adjusting and improving a program; (4) to meet the requirements of a granting agency; and (5) to advance general knowledge about dispute resolution. The goal of the evaluation should be to ensure that the courts' mediation programs are meeting the specific goals articulated for their implementation and that they are being operated at levels of consistently high quality. The level of evaluation conducted will depend upon program goals and resources and on the type of program being evaluated. For example, the newer and more experimental the program, the more rigorous should be the evaluation.

In this regard, disputants' perceptions of the legitimacy and fairness of the process are among the important elements of evaluation. Also among them are outcome measures, such as the extent to which mediated agreements maximize the parties' joint gains and/or endure over time. Exclusive focus on efficiency measures, such as time and numbers of settlements, can have deleterious effects, such as increasing inappropriate pressures to settle in mediation and creating inferior forms of justice.

For purposes of monitoring, the type of data collected should capture the timing and outcomes of key events, such as the date of referral, whether a mediation session was held, the date of the mediation session, whether agreement was reached, whether the agreement was a partial or complete resolution of the case, and the types of issues that were resolved (or unresolved?). The program's information system should be designed to permit the monitoring of cases as well as the evaluation of mediation both in the short-run (e.g., the rate of settlement, the number of days from referral to resolution for both successfully and unsuccessfully mediated cases) and in the long run (e.g., the rate of compliance, the rate of re-litigation). Programs also should be reminded that there are various sources of data for evaluation, including data that can be collected from the parties themselves (e.g., users' satisfaction with mediation, whether satisfaction varies by gender, area of law, or expectations). This data can be gathered through periodic surveys of participants, including the parties and their attorneys.

APPENDIX

COMMON QUESTIONS ABOUT MEDIATION

(Court-Connected Mandatory Mediation Programs in Justice Courts)

WHAT IS A MEDIATION?

Mediation is a process that allows the parties involved in a dispute to sit down with one or more neutral individuals ("mediators") to see if there is some agreeable way to resolve the dispute. During the mediation, each party has a chance to explain what happened and what they want done about it. The mediators help the parties explore solutions to the problem to see if they can reach an agreement that is acceptable to both sides.

AM I REQUIRED TO ATTEND THE MEDIATION SESSION?

Yes. This is a mandatory mediation program, and you are required to attend the mediation session. However, you are not required to reach an agreement during the mediation. If you fail to attend the mediation session, you will be violating a Court Order and are subject to the penalties for such violation.

DO I NEED TO BRING A LAWYER TO THE MEDIATION SESSION?

No. Lawyers are not required for mediation and usually do not participate. Most parties do not have lawyers at Justice Court mediation. A party may consult with his or her lawyer at any time, and has a right to have the lawyer review any agreement before signing it.

DO I NEED TO BRING MY WITNESSES AND EXHIBITS TO MEDIATION?

No. The purpose of mediation is not to prove which party's version of the facts is true. The purpose is to discuss the problems and potential solutions.

WHAT IF I DON'T LIKE ANY OF THE PROPOSED SOLUTIONS?

The mediators will not force you to agree to a solution that is not acceptable to you. If you reach an agreement, the mediators will help you put the agreement in writing and submit the agreement to the Court. If you don't reach an agreement, your case will be set for trial just as if the mediation never took place.

CAN THE OPPOSING PARTY USE THE STATEMENTS I MAKE DURING MEDIATION AGAINST ME?

No. At the beginning of mediation both parties will be asked to agree that all statements made during mediation must be kept strictly confidential. If the dispute is not resolved and the lawsuit goes forward, neither party can use the statements made during mediation against the other party.

COMMON QUESTIONS ABOUT MEDIATION

(Court-Connected Voluntary Mediation Programs in Justice Courts)

WHAT IS A MEDIATION?

Mediation is a process that allows the parties involved in a dispute to sit down with one or more neutral individuals ("mediators") to see if there is some agreeable way to resolve the dispute. During the mediation, each party has a chance to explain what happened and what they want done about it. The mediators help the parties explore solutions to the problem to see if they can reach an agreement that is acceptable to both sides.

AM I REQUIRED TO ATTEND THE MEDIATION SESSION?

This mediation program is voluntary, but if you choose to participate, you must attend the mediation session. The fact that you participate in mediation does not mean that you must reach an agreement. The Court believes that mediation may be helpful in resolving your case. However, if you do not want to participate, you may call the Court at least FIVE days prior to the scheduled mediation date shown on the attached notice to cancel the mediation. Your case will then be set for trial and you will be sent a notice of the trial date.

DO I NEED TO BRING A LAWYER TO THE MEDIATION SESSION?

No. Lawyers are not required for mediation and usually do not participate. Most parties do not have lawyers at Justice Court mediation. A party may consult with his or her lawyer at any time, and has a right to have the lawyer review any agreement before signing it.

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[LETTERHEAD]

September 19, 1994

[party name]
[party address]

RE: [case caption]

Dear [salutation]:

The [name of court] has referred your case to mediation by the [name of service provider]. A mediation session with trained mediator(s), and the other party to the dispute has been scheduled to begin at:

Time: [time]
Date: [date]
Place: [court name and address]

The session is expected to last approximately 1 to 2½ hours, so allow for the maximum time necessary. I will be calling you in a few days to answer any questions you may have about mediation and confirm that you are interested in participating in the session at the scheduled time.

The referral of your case to mediation does not affect how the court processes your case. If the mediation results in a settlement of the case, it will not be necessary to have a trial. If the mediation does not result in a settlement, you will be able to go to trial on a date scheduled by the court, and the mediation will not affect the trial.

Mediation is an informal process for the resolution of disputes. It will give you a chance to discuss the situation that gave rise to the lawsuit, and see if the dispute can be resolved in a way that satisfies both parties and the court. The service is free of charge and offers an opportunity to resolve the dispute without expensive and lengthy court procedures.

Witnesses and attorneys are neither required nor encouraged. The mediations are conducted by a totally neutral panel that does not represent the interest of any one party. The mediator is not a judge or a jury and solutions are not imposed on the parties. If an agreement is not reached, the complaining party may continue to pursue the matter through the court system.

Enclosed is a more detailed explanation of the mediation process, together with a sample copy of the Confidentiality Agreement that both parties will be asked to sign at the beginning of the session. If you need to re-schedule your mediation session, or if you have any questions, please call me at [PHONE #].

Sincerely,

case developer ~
Case Developer

/tcb

Enclosure

CASE NO._____

DATE:_____

CONFIDENTIALITY AGREEMENT

We the undersigned knowingly and voluntarily give our consent to submit our dispute to mediation facillitated by [name of mediation service provider].

We understand that mediation is not a court proceeding, and we agree that anything said in the mediation process, including statements to the program staff or mediator(s), will be considered confidential and will not be used by any party to this agreement, or their representatives, in any subsequent legal proceedings unless required by court order.

We agree not to subpoena or otherwise involve mediator(s), staff or records of the [name of mediation service provider] in any court proceedings, lawsuits or other legal actions whatsoever.

We understand it is not necessary to have a lawyer for mediation, however, each of us has the right to consult with a lawyer prior to signing any agreement prepared as a part of the mediation process. We also understand that the mediators do not provide legal advice, and the parties have the sole responsibility for the validity and enforcement of any agreement that is reached.

DISPUTANTS:

PRINTED NAME	SIGNATURE	DATE
_____	_____	_____
_____	_____	_____
_____	_____	_____

§ 12-2238. Mediation; privileged communications; exceptions; liability; definition

A. Before or after the filing of a complaint, mediation may occur pursuant to law, a court order or a voluntary decision of the parties.

B. The mediation process is confidential. Communications made, materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence unless:

1. All of the parties to the mediation agree to the disclosure.

2. The communication, material or act is relevant to a claim or defense made by a party to the mediation against the mediator or the mediation program arising out of a breach of a legal obligation owed by the mediator to the party.

3. The disclosure is required by statute.

4. The disclosure is necessary to enforce an agreement to mediate.

C. Except pursuant to subsection B, paragraph 2, 3 or 4, a mediator is not subject to service of process or a subpoena to produce evidence or to testify regarding any evidence or occurrence relating to the mediation proceedings. Evidence that exists independently of the mediation even if the evidence is used in connection with the mediation is subject to service of process or subpoena.

D. Notwithstanding subsection B, threatened or actual violence that occurs during a mediation is not a privileged communication. The mediator may inform the parties that threatened or actual violence is not privileged and may be disclosed.

E. A mediator is not subject to civil liability except for those acts or omissions that involve intentional misconduct or reckless disregard of a substantial risk of a significant injury to the rights of others.

F. For the purposes of this section, "mediation" means a process in which parties who are involved in a dispute enter into one or more private settlement discussions outside of a formal court proceeding with a neutral third party to try to resolve the dispute.

Added by Laws 1993, Ch. 101, § 2.