Take it or Leave it. Lump it or Grieve it: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field,

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I. Introduction

On a Findlaw message board, Clare Smith posted the following plea for help following a Kentucky divorce-related mediation she thought the mediator had handled poorly. In this short posting, dated February 15, 2004, she identified problems dealing with at least two core values of mediation—impartiality and party self-determination. Her posting reflects badly on mediators, referring courts, attorneys who represent parties in the process, and the process itself. Do we, as the mediation community, owe her more than just the opportunity to plea for help on an internet website? She wrote:

What exactly is entailed in making a complaint on an unethical mediator?

The mediator held an obvious bias and was allowed to create the divorce property agreement.

The only thing concrete is that the agreement, which I was coerced to sign, was written with “his interpretation” of marital assets. In one such instance he wrote a value as being 6K when the actual value was 60K. For what it’s worth, during the mediation, the mediator made comments to my attorney including, “She’s young enough to get married before the alimony runs out, don’t you think so?” as a reason for me being okay with what was presented! And also: “[S]ure, she's pretty enough to get married again in 4 years.” I refused to sign several times, my attorney then began yelling at me to “shut-up and sign the damn thing.” I wasn't allowed to leave until it was signed. The words, “NO I can't sign this,” fell on deaf ears. I was so unfamiliar with the process of it all and what it meant and what the outcome entailed.

Maybe a complaint won't help me. But it might help someone else. How do I distinguish myself seriously to the parties that handle such things? If other attorneys are reviewing and investigating, why would that be fair? Do I have to offer proof and cite law of ethics in a complaint for it to be valid? What exactly can I prove?

. . .

Clare

PS - . . . I do not know how this mediator was chosen, likely by the ex's attorney.

*723 A day later, Martin Cassman responded, saying that Clare should contact the bar association “of the state in which the mediator was licensed and/or the court from which he receives assignments.” He advised her to file a complaint. This advice
assumes that the mediator was also a licensed attorney. He next analyzed possible tort claims against her attorney. Then he dismissed her perspective of the situation as unbelievable because she had not “report[ed] this to the police, did not sue civilly, did not seek a legal malpractice attorney or take any steps to investigate the timely vindication of substantial rights which existed separately . . . from the divorce action . . . .” He concluded by saying: “In sum, with no proof of misconduct [and not having filed] a police report . . . it would be a miscarriage of justice for such an allegation to be given anything other than short shrift.” He suggested that this tough love approach to her complaint would help her fashion one with greater credibility if she decided to file one with the bar.

What neither Clare nor Martin realized, however, was that at the time of the mediation, and even at the time of her posting, Kentucky had no standards of ethics governing mediators. It had no formalized training program for mediators or other barriers to entry to the field. It did not attempt to discover if prospective mediators had good moral character. It had no licensing, registration, certification, or recertification process. It did not require mediators to get continuing mediator education. It had no mediation confidentiality statute. It had no immunity statute for mediators. It had no ethics advisory panel that could help mediators resolve the inevitable ethical dilemmas they face. It had no easily accessible analysis of or guidelines on the unauthorized practice of law in the context of mediation.

Instead, in 2004, Kentucky had an obscure statute authorizing and encouraging courts and state agencies to refer disputing parties to mediation. Another statute defined mediation as: “[A] nonadversarial process in which a neutral third party encourages and helps disputing parties reach a mutually acceptable agreement. Recommendations of mediators are not binding on the parties unless the parties enter into a settlement agreement incorporating the recommendations.”

Since February 2004, when Clare posted her message, the regulatory situation in Kentucky has changed. In April 2005, the Supreme Court of Kentucky approved an amendment to its rules of administrative procedure suggesting “minimum standards for training, experience, education, and ethical conduct” for mediators practicing in court-connected mediation situations. But, the ethical guidelines are just that. They are not mandatory and they do not apply to all mediators, even on a voluntary basis. The state still has no grievance system by which dissatisfied parties can describe their perceptions of a mediation gone wrong, feel genuinely heard and validated, and know that a carefully chosen group of people will conduct an unbiased investigation of the complaint and provide a remedy for both the grieving party and accused mediator.

Kentucky, however, is not unique in having no or only a rudimentary system for regulating mediators. Only 17 states have mandatory codes of ethics and none of them apply to all mediators practicing within their states. Thus, most mediators in most states, unless they wish to work in court-connected programs, can hang up a shingle without meeting any licensing or training requirements or agreeing to be bound by any ethical guidelines. Most mediators are beyond any state-sponsored sanctioning process.

II. This Article

Section III of this article briefly summarizes some of the components of an integrated system of mediator regulation. It also briefly discusses the current debate about whether the mediation field requires more regulation and, if so, what kind of regulation the field should create. Section IV discusses the research on mediation party satisfaction and malpractice lawsuits filed against mediators in courts. While eight states have created mediator grievance systems, this article summarizes the number and nature of complaints filed against mediators with program administrators in the five states with well-developed, state-sponsored grievance systems. The appendices to the article, however, include data for seven state grievance systems. In addition, this article does not discuss the South Carolina grievance system, which the courts have not fully implemented.
*727 Section V considers the advantages of developing complaint handling systems. It identifies the problems created when states do not provide effective mechanisms for dissatisfied mediation parties to file claims against mediators.

Section VI of the article compares the regulatory systems in place in Florida, Virginia, Georgia, Minnesota, and Maine, with a particular focus on the procedures followed in handling complaints filed against mediators. It also considers the revised grievance system in North Carolina and the proposed system in Maryland. In addition, this section considers other regulatory infrastructure that a state or court may first need to provide before it can successfully implement a grievance system. It also describes the components of a well-designed system. It considers issues of public access to grievance related information, the process for filing grievances, and any time limitations or restrictions the designers should consider. It discusses who should determine whether a formal complaint has any merit, who should investigate the complaint, informal procedures for handling complaints, formal hearing requirements, and appeals. It also considers the disciplinary approaches the grievance system can take when it resolves a complaint with merit. It discusses concerns about confidentiality of the complaint process and information about complaints and their resolution. Finally, it looks at the legal protections states have provided for persons handling complaints. This section shows that the complaint systems in these five states are only one part of a highly-structured system of mediator regulation.

Section VII discusses the factors designers may want to consider when designing a complaint handling system for a court-connected mediation program. It also considers the procedural justice and due process concerns that arise in the complaint processing context.

*728 III. Overview: Regulating Mediators

Over the past several years, ADR practitioners and scholars have increasingly considered whether mediators are engaged in a profession and, if so, whether the regulation of those professionals requires greater attention and concern. This conversation leads to a discussion of the type of regulation states, ADR organizations, and courts should consider imposing on mediators. Many people express concerns that even well-intentioned regulation of mediators and the mediation field will make mediation unduly rigid, expensive, and less accessible to the public. 16

A recent issue of Dispute Resolution Magazine, 17 the publication of the American Bar Association's Section of Dispute Resolution, identified many of the issues and elements of the debate about imposing greater indicia of professionalism on mediators, including tighter barriers to entry and mandatory codes of ethics. It captured several competing views. Craig McEwen urges the field to consider proposals for certifying mediators as a part of the wider strategies we could adopt to build collegial control of the field in which mediators work in a variety of practice types. 18 He describes some of those strategies. They include certifying mediators, certifying training programs, building local organizations that reinforce professional standards and expectations, creating professional standards for specific mediation programs, adopting formal rules of ethics, creating informal fora for peer discussion of those rules, designing formal complaint systems with admittedly limited practical reach, and enhancing informal peer controls and intervention when a colleague's conduct falls short of the professional standards. 19

Sarah Cole summarizes recent efforts by the American Bar Association, the Association for Conflict Resolution, Florida, and the Federal Mediation 20 and Conciliation Service to design mediator certification standards. She also analyzes the goals of certification, the definition of a quality mediator, 21 and the efficacy of certification standards in reaching those goals. She also discusses the link between training and mediator quality. The goals, largely symbolic, include “protecting and assisting
consumers, improving overall mediator quality, and enhancing the credibility of ‘good’ mediators in the marketplace.”  

Finally, she questions whether currently proposed certification systems will enhance diversity in the mediator pool.  

In the same issue of Dispute Resolution Magazine, Nancy Welsh and Bobbi McAdoo note the distinction between professions and occupations: “Professions . . . are characterized by a distinct knowledge system that serves as a conceptual map binding together the members of the profession and framing the way in which they think about, reason through, and act upon problems.”  

They suggest that mediators do not substantially agree that their work is based on a “systematic body of esoteric, abstract knowledge.”  

Thus, mediators cannot agree on the “approach, skills or ethics mediators should share.”  

Welsh and McAdoo conclude that the mediation field is not as professional as we would like to believe, as evidenced by research and “alarming” anecdotes that many mediators fail to know of and adhere to professional standards of conduct and the core values of mediation.  

Judith Filner, in an earlier issue of the magazine, also questioned whether mediation was a profession. She acknowledged in the introduction to her interview of Juliana Birkoff and Robert Rack that “[s]ome say [the field] is growing into a profession and that regulation is appropriate, necessary, and the responsible thing to do now.”  

Persons holding this view express concern that if the field does not begin to regulate itself, “less knowledgeable groups and legislators will.”  

Rack agrees that the field is becoming a profession based on his research showing that mediators think about power in similar ways and use power concepts to plan interventions in mediation. Rack, however, argues that mediation is “bigger than a profession and . . . resist[s] the temptation to try to capture and contain it.”  

He would characterize the field as a broad social movement.  

Charles Pou, Jr. has firsthand experience in designing systems that enhance quality in the mediation field. His recent article covers the debate about how best to assure mediator competence and ethical practice.  

He recommends a conceptual grid for talking about the barriers to entering and staying in the field. He surveys some approaches taken so far by states, courts, and mediator organizations and questions their efficacy in reaching their stated goals. He also cites the limited research available on topics relating to quality assurance through credentialing and other efforts.  

Expanding on his thoughts published in an earlier article, he suggests that the field should be skeptical of efforts to impose mandatory quality assurance protocols. Instead, he prefers an informal system that enhances mediation ethics by encouraging the discussion of the relationship between ethics and good practice, by providing a hotline or other real-time ethics feedback for mediators, by creating ethics websites and other informational sources, by developing case studies for use in mediator ethics training, by fostering peer or expert discussion groups that could focus on ethical issues, and by allocating more time to ethics in mediator training programs.  

No agreement therefore exists about whether mediation is a profession. Even among those who agree that it is, strong disagreement exists about how it should be regulated. For purposes of this article, I side-step both issues, except that I believe a mandatory ethics code-applicable especially in court-connected mediation contexts-and a well-designed grievance system are essential to the field. These aspects of a regulatory system do not, however, preclude the adoption of more informal systems, like peer discussion groups, recommended by McEwen and Pou.  

While many scholars and practitioners have supported ethics codes and grievance systems because they protect parties and the reputation of mediation as a process, I look at the issue from four additional perspectives. First, the systems protect the reputations and legitimacy of referring courts and the judicial system as a whole. Second, they encourage the use of better skills in mediation, give mediators greater self-awareness of the choices they make in mediation, encourage mediators to get additional
training in dispute resolution theory, skills, and ethics, and help mediators with poor skills to improve them or agree to get out of the field. They therefore help mediators avoid conduct that may give rise to a professional complaint or malpractice suit.

Third, I also believe that ethics codes and grievance systems help protect mediators from frivolous complaints and malpractice lawsuits filed by dissatisfied parties. Finally, I believe they protect lawyers representing clients in mediation from malpractice lawsuits and other forms of client dissatisfaction.

A comprehensive regulatory system typically consists of several components. First, the regulatory system creates barriers of entry to the field consisting of several possible components: (a) training requirements that vary depending on the type of mediations the mediator intends to conduct, (b) ethics training, (c) moral character reviews, (d) minimum degree or professional license requirements, (e) written tests, and (f) *732 performance-based testing or evaluation. The system may also grant official recognition that the mediator has passed these barriers to entry by certifying, registering, or rostering the mediator. The regulatory system may regulate or approve mediation training programs. The system may also require mediators who have successfully passed the barriers of entry to prove at a later date-through a recertification or re-registration process—that they are committed to the mediation field and to their skill development. The system may require continuing mediation education, including additional ethics training, or proof that the mediator has completed a specified number of mediations in a specified time period. The regulatory system may also support mediators by providing ethics information, encouraging compliance with aspirational ethics guidelines, creating a mandatory ethics code, and issuing ethics advisory opinions. The regulatory system may further provide rules or guidelines for interacting in the legal world on issues of mediation confidentiality, the unauthorized practice of law (UPL), and mediator immunity. It should offer public oversight through well-designed grievance systems. Finally, a comprehensively designed regulatory system will grant the state supreme court or its ADR administrator the power to sanction mediators for ethical violations or other misconduct. Those sanctions would at least include the ability to remove mediators from court-approved mediator rosters.

While this article could focus on any one of the components of an integrated system for regulating mediators, it will focus on the need for and design of an effective grievance system based primarily on procedural justice values. It also questions whether a grievance system can operate in a state without an ethical code of conduct for mediators.

Only seven states have implemented most or all of these components of a comprehensive mediator regulatory system. Florida's more mature system reflects its 30 year experience with court-connected mediation. Virginia modeled its system on Florida's system, and Georgia in turn modeled its system on Virginia's system. Minnesota designed its grievance rules the same year Virginia adopted its grievance system. Maine, the most recently designed regulatory system, has the least formal grievance process. Section VI of this article examines these systems in detail. This section also discusses the revised system in North Carolina and the proposed system in Maryland.

IV. Where Do All the Unhappy Mediation Participants Go? What Do They Do?

A. Satisfaction of Mediation Participants

Clare Smith is not unique in her dissatisfaction with her mediator or the mediation process. Satisfaction studies show that 65 to 82 percent of parties to family mediation viewed their mediators as “warm, sympathetic, and sensitive to feelings.” They found them “helpful in standing up for their rights in disagreements with spouses; staying focused on the important issues;
and having clear and sufficient information for decisionmaking.”  But 18 to 35 percent of parties did not feel this way after the mediation.

A majority of parties participating in court-connected civil mediations felt that the mediation process was fair and gave the parties sufficient opportunity to present their cases. A majority of parties felt they had control over the process or had input in determining the outcome. Most parties thought the mediator was neutral, did not pressure them to settle, understood their views and issues, and treated them with respect. A majority of parties felt the mediation resulted in a fair agreement. Most attorney-advocates shared the same feelings. But some minority of parties and attorneys did not have these feelings about the experience.

Sixty-one percent of disputants in 54 waste management mediations were satisfied with the mediation process and the outcome. But 39 percent of mediation-disputants were not. Another survey found higher levels of satisfaction in a Pennsylvania special education mediation program. There, 82 percent of clients were “very satisfied” or “satisfied” with the actions of the mediator and the process. Yet, 18 percent of participants were neutral or dissatisfied with the mediator or the process.

In short, studies suggest that perhaps a third of mediating parties are unhappy with the process or the mediator. However, the statistics on grievances and malpractice claims filed against mediators indicate that dissatisfied parties simply “lump it.”

B. Malpractice Suits Filed Against Mediators in Courts

Twenty years ago, Jay Folberg and Alison Taylor's research indicated that “[t]here are very few claims against mediators and no reported cases in which a mediator has been successfully sued for damages regarding mediation services.” A few years later, in one of the leading ADR textbooks, Len Riskin and James Westbrook reassured new mediators that “[t]he risk of a successful lawsuit for professional negligence (malpractice) is extremely remote. Plaintiffs would have difficulty establishing not only the standard of care but also causation and damages.”

As recently as 1999, Stephen B. Goldberg, Frank E. A. Sander and Nancy H. Rogers stated:

More frequently, no remedy has been specified for a breach of the mediator’s duty. Where no remedy is provided, the laws presumably would be enforced through civil actions, filed by those harmed if the mediator fails to comply. However, there are no reported judgments against mediators and few reports of suits.

Michael Moffitt, in the most thoroughly researched work to date, found the following:

As an empirical matter, mediators have enjoyed almost absolute freedom from lawsuits alleging injury stemming from mediation conduct. Reported cases in U.S. federal courts, in U.S. state courts, and in the court systems of Canada, Britain, Australia, and New Zealand include only one case in which a mediator was found liable to a party for mediation conduct. [In that case,] the defendant mediator successfully appealed the jury award . . . [M]ediation association newsletters, academic journals, and on-line resources reveal no [mediator malpractice] cases. Even malpractice insurers, who do an apparently healthy business providing insurance to mediators annually, report very few claims against those policies.

In a paragraph that helps frame my thinking on the subject, Moffitt continued:
The lack of successful suits against mediators, however, does not mean that mediators never injure their clients through substandard mediation practices . . . [In most states, few] quality control mechanisms exist to deter substandard practices. There are no licensure systems, no stringent barriers to entry into the practice, and little public insight into the mediation process . . . . We must assume that mediators are making mistakes. 67

He continues by noting that the favorable statistics fail to provide the kind of comfort experienced mediators seek.

Mediators are increasingly concerned about liability. In mediation trainings, for example, participants demand to spend an increasing percentage of time considering the possibility of liability. The interest in liability is even more pronounced among experienced practitioners . . . . Mediators still seem to experience the prospect of liability more as a terrible lottery than a specific deterrent. 68

In short, we know that mediators commit malpractice, engage in conduct inconsistent with standards of practice, or violate core values of mediation. Yet, the majority of states do not help mediators to “name” the misconduct or aggrieved parties to claim it. 69

I have asked experienced mediators why they, of all mediators, may be more concerned about the remote, but nonetheless real, prospect that a dissatisfied party will file a professional grievance or malpractice claim against them. They offer several explanations. First, experienced mediators have found themselves in situations raising serious ethical issues that they were not certain how to handle. Simply by being in the field for some time, they know how often they face ethical dilemmas. Experienced mediators have also gained enough familiarity with general ethical principles by that point in their careers that they can more easily recognize when they are facing an ethical dilemma. 70

Second, therapist-mediators admit that many litigated conflicts involve narcissists and borderline personalities. 71 These parties actually enjoy conflict and hold grudges. They put people into friend and enemy camps. Therefore, it is easy for the mediator to slip into the enemy camp. 72 Therapist-mediators reasonably expect highly litigious persons with personality disorders to target the mediator in their next lawsuits. 73

Third, mediators often practice with parties who are participating in the mediation without lawyers. In Florida, Mel Rubin asserts that pro se parties file 50 percent of the cases. 74 Thus, mediators will see many of these unrepresented parties in court-ordered mediation. 75 Greg Firestone has heard that 80 percent of people in family related mediations are appearing pro se. 76 Pro se parties, these mediators suggest, may have a more difficult time analyzing the fairness of the settlement outcome. They may also have a more difficult time analyzing the integrity of the mediation process. Without the analytical skills and professional experience of lawyers, pro se parties may feel less satisfied with the outcome or the process and so more inclined to sue the mediator or file a professional grievance or complaint. 77

Fourth, experienced mediators know the pressures of the marketplace. Mel Rubin describes the typical situation. 78 The mediator gets a call from a lawyer who says he wants a case evaluation. The mediator knows that the type of neutral service the lawyer expects may (or does) violate the ethical code of conduct for mediators in that state. The mediator says he cannot
(or will not) provide that particular service in the context of mediation. The lawyer responds: “But Donna down the road does it all the time for us. I guess I need to call her.” It becomes increasingly more difficult for mediators trying to make a living to resist these invitations. Rubin calls this the point where “ethics meet the marketplace.”

In short, despite the data, mediators increasingly feel the risk of malpractice suits or of grievances filed with mediation program administrators, state bar associations, or the entities regulating a mediator's profession of origin. Effective and well-designed grievance systems can divert some potential mediator malpractice suits into grievance processes that may satisfy both the unhappy party and the mediator, will enhance mediator skill, will allow for de-rostering of incompetent mediators, will protect the mediation process, and will protect the reputation of the field and of referring courts. As Sharon Press, Director of the Florida Dispute Resolution Center (DRC), recently said: “It is irresponsible to divert parties into court-connected mediation programs without providing a process by which they can get help if the process is handled improperly.”

C. Complaints Filed Against Mediators Working in Court-Connected Programs

Only seven states operate mediator grievance systems. Depending on the system, they apply to civil and family mediators operating in court-connected mediation programs or to mediators that the courts or their program administrators have certified, registered, or rostered. The systems vary in their level of formality, the complaint intake, review, and investigation procedures, the structure of the hearing and appeal process, the composition of the reviewing panels, the discretion of the directors of the programs to determine the facial sufficiency of informal and formal complaints filed against mediators, the ability of the reviewing bodies to compel testimony and the appearance of witnesses, the nature of the possible sanctions, and the process for imposing sanctions.

1. Complaints Filed Against Florida Mediators

Florida’s 2000 census data show a population of nearly 16 million people, making it the most populous state analyzed. As of December 2005, over 18,000 people had completed certified mediation training programs. In August 2005, 1,391 county mediators, 1,682 family mediators, 2,166 circuit mediators, and 138 dependency mediators operated as certified mediators in the state. Sharon Press, the Director of Florida’s DRC, estimates that courts refer over 100,000 cases a year to mediation. From May 1992 to April 2005, the DRC processed 74 grievances against certified mediators. Accordingly, an individual mediator’s risk that he or she will have to defend a grievance complaint in Florida remains extremely low.

In 13 of the 74 complaints, the complaint committees found that the complaint was facially insufficient. They determined that the facts, even if taken as true, did not state an ethical violation under the Florida Rules for Certified and Court-Appointed Mediators. Complaint committees dismissed another 21 complaints for lack of probable cause. A hearing panel heard and dismissed one complaint. The complainants dismissed three of the grievances, typically after meeting with the mediator and the complaint committee members. The complaint committees dismissed the remaining complaints for various reasons, such as lack of jurisdiction (3 complaints), non-compliance of the complaint with the filing requirements (1 complaint), or after the parties successfully resolved the matter in an informal meeting (11 complaints). Florida regulators imposed sanctions on 12 mediators. Another six mediators agreed to remedial measures that included making an apology, accepting oral reprimands or admonishments, agreeing to attend additional training programs, gaining experience by working with a supervising mediator, and accepting a written reprimand. As of April 2005, complaint committees were handling five pending complaints. Thus, of the 69 complaints the DRC had processed through April 2005, about 25 percent of them resulted
in a sanction or remedial action against the mediator. In 20 complaints handled, the complaint committees have imposed no sanctions, finding instead that the complaints were facially insufficient, finding no probable cause to take the next step in the process, or dismissing the complaints for other reasons.

Florida parties most often alleged that a mediator interfered with the party's self-determination. Twenty-four of the complaints claimed that a mediator interfered with the parties' self-determination and another 25 complaints alleged that mediators gave improper professional advice or opinions. The second most common allegation asserted that a mediator was not impartial. Thirty of the grievances specified this violation. Parties alleged improper continuation, adjournment, or termination of the mediation in 14 complaints. Complainants alleged lack of mediator integrity in 11 complaints. In eight grievances, complainants stated that the mediator failed to conduct an appropriate orientation session before beginning the main sessions. Other alleged violations included: conflicts of interest (five complaints), excessive fees and expenses (four complaints), failure to maintain confidentiality (four complaints), demeanor not befitting a mediator (three complaints), improper advertising practices (two complaints), lack of professional competence (two complaints), and unfair scheduling practices (two complaints).

The complaint committees most frequently imposed, in 11 of 17 cases, a sanction requiring the mediator to get further training. The sanction included requirements for advanced mediation training, attendance at a dispute resolution conference, communications sensitivity training, communication and listening training, family mediation training, domestic violence training, and ethics training. Three mediators also accepted sanctions requiring them to observe mediations conducted by certified mediators. Three mediators agreed to mediate or co-mediate under the observation and supervision of a certified mediator. In eight cases, the complaint committees suspended the mediators from conducting mediations or certain types of mediations until they had completed the imposed sanction. When one mediator failed to satisfy the agreed sanction, the mediator was de-certified subject to reinstatement by petition no earlier than two years after the date of the imposed sanction. In five cases, the complaint committees required mediators to adjust their fees by waiving them or forgiving unpaid fees or refunding fees charged in the mediation in which the violation occurred. They gave oral reprimands or admonishments to three mediators and a written reprimand to one mediator. Mediators also provided apologies in three cases. One sanction imposed by a complaint committee required the mediator to pay the cost of the complaint committee's investigation. Another sanction required the mediator to write an article on confidentiality and good faith in mediation and on the limitations the ethics rules imposed on reports to judges about the mediation. In one case, as follow-up to the imposed sanction, the DRC required the mediator, before mediating again, to submit a copy of the mediator's engagement letter along with its explanation of the fees charged.

2. Complaints Filed Against Virginia Mediators

Virginia, with less than half the population of Florida, has approximately 1000 certified mediators providing services to its citizens. Geetha Ravindra, the Director of the Virginia Department of Dispute Resolution Services (DRS), estimates that the Virginia courts refer 10,000 cases to mediation each year. Since 1992, her office has received 68 informal grievance complaints against mediators. In 55 of those situations, the complaining party did not file a formal complaint. Of the remaining 13 complaints, 4 fell outside the jurisdiction of DRS because the alleged conduct did not fall within the role of a certified mediator. The Mediator Complaint Panel dismissed three complaints for failure to state a claim under the Standards of Ethics and Professional Responsibility for Certified Mediators (SOEs). The Complaint Panel dismissed another three complaints, but with a recommendation that the mediator obtain additional training or mentorship from a more
experienced mediator. The Mediator Review Committee heard two complaints. It dismissed one complaint, again with a recommendation that the mediator obtain additional training or supervised mediation experience. In the other case, it sanctioned the mediator. As of April 2005, the Virginia Supreme Court has not taken any mediator off its certified mediator roster based on a grievance complaint.

Parties filing informal or formal complaints in Virginia most often complain that the mediator was partial to the other party or lawyer. Thirty-five of the 68 informal and formal complaints involved this ethical allegation. A mediator’s efforts to undermine party self-determination served as the basis for another 18 complaints. Persons also lodged ten complaints asserting that the mediator had improperly or incorrectly provided professional information or advice. Ten more complaints involved allegations about the poor quality of the process. The complaints also raised issues about the mediator’s poor assessment of the appropriateness of mediation for the case and parties (asserted in 5 complaints), initiation of the process (asserted in 11 complaints), breaches of confidentiality (asserted in 5 complaints), drafting or reaching the agreement (asserted in 4 complaints), and advertising (asserted in 2 complaints).

3. Complaints Filed Against Georgia Mediators.

Georgia, with a million more people in the state than Virginia, has 1,400 registered mediators serving the people of its state. Georgia courts referred 28,681 cases to mediation in fiscal year 2005. That number of referrals has increased every year. Yet, the Georgia Committee on Ethics has processed only four formal complaints against mediators since 2002 under its Ethical Standards. Most of the parties complaining about a mediator do not convert an informal complaint into a formal complaint that complies with the rule. As noted below, the Director of the Georgia Office of Dispute Resolution (GODR) has referred all formal complaints to the Committee on Ethics as facially sufficient. The Committee on Ethics, however, issued a sanction in response to only one of the four complaints it has handled since 2002.

Of the four formal complaints received, two of the complaints involved allegations of impartiality. Two complaints alleged mediator coercion. Two complaints alleged that the mediator improperly gave legal advice or a case evaluation. One complaint alleged breach of confidentiality. One complaint also alleged that the mediator had not properly convened a caucus and had failed to handle the case properly when one party was the victim of domestic violence.

In one complaint in which the Committee on Ethics ruled against the mediator after a full hearing, it issued a private letter of reprimand and published an opinion without identifying the names of the complaining party or the mediator. In the other complaints, the Committee on Ethics ruled in favor of the mediator based on the evidence in the complaint, the response to the complaint, the investigatory summary, and the surrounding circumstances.

4. Complaints Filed Against Minnesota Mediators

Minnesota has a population of approximately 4.9 million people. About 1,000 mediators serve this population, covering a statewide docket of approximately 49,000 family cases and 35,000 major civil cases. Rule 114 of the Minnesota General Rules of Practice requires the parties to participate in ADR for all civil cases, except certain cases expressly exempted.
The Minnesota A.D.R. Review Board (ADR Review Board) \(^{151}\) has received 33 complaints against neutrals, one of which was not converted by the complaining party to a formal complaint. \(^{152}\) Parties lodged complaints \(^{767}\) against 14 “parenting time expeditors,” 8 complaints against mediators, 7 complaints against “parenting consultants,” 1 complaint against a financial neutral, 1 complaint against an arbitrator, and 1 complaint against a neutral conducting a summary jury trial.

The complaints raised issues under nine sections of the Code of Ethics. The most frequent complaint raised by unhappy participants concerned the “Quality of the Process” under Rule V of the Code of Ethics. \(^{153}\) Twenty-six complaints questioned whether the neutral had shown the “require[d] [ ] commitment . . . to diligence and procedural fairness.” \(^{154}\) Complaining parties expressed concerns about confidentiality of the process in 12 complaints. \(^{155}\) The next most frequently made complaints involved the \(^{768}\) mediator’s impartiality (nine complaints), \(^{156}\) conflicts of interest (nine complaints), \(^{157}\) and mediator interventions or actions that affected party self-determination (eight complaints). \(^{158}\) Five complaints raised issues about the neutral’s competence. \(^{159}\) Five complaints raised issues about fees. \(^{160}\) One complainant expressed concern about the neutral’s advertising. \(^{161}\) Two other \(^{770}\) complaints generally questioned whether the neutral had overstepped his or her authority. \(^{162}\)

As of June 11, 2005, the ADR Review Board had three pending complaints in investigation, planned to review another three complaints at its next meeting, dismissed eight complaints for failure to state a claim under the Code of Ethics, \(^{163}\) and referred one complaint, about a lawyer who was not acting as a neutral, to the Lawyers Professional Review Board (LPRB). \(^{164}\) The ADR Review Board dismissed five complaints after the investigation revealed no violation of the Code of Ethics. In eight cases, it imposed sanctions on the mediator. In two of those cases, the neutral unsuccessfully appealed the sanctions. In three early cases, the ADR Review Board had no easily accessed record of the disposition of the complaint. \(^{165}\) One complainant filed the complaint before the Minnesota Supreme Court had adopted the Code of Ethics. The ADR Review Board asked permission to use the information stated in the complaint in future training sessions. \(^{166}\)

The ADR Review Board imposed four types of sanctions. In two cases, it notified the appointing court and the court ADR administrator of the complaint and its resolution. In another two cases, the ADR Review Board issued a private reprimand. In two more cases, the ADR Review Board instructed the neutral to obtain additional training. In one of those cases, it also required the neutral to work with an established parenting consultant who could serve as a mentor. In the last two cases, the ADR Review Board required the neutrals to modify their Parenting Time Expeditor Agreements \(^{771}\) to “be clearer about confidentiality expectations of parties,” by allowing parties to give a knowing waiver of the rights created under Rule 114. \(^{167}\)

5. Complaints Filed Against Maine Mediators

Maine has approximately 140 rostered mediators \(^{168}\) that serve a state-wide population of approximately 1.27 million people. \(^{169}\) The Director of the Office of Court ADR for Maine (ADR Director) has received or raised \(^{170}\) 29 complaints against mediators since 1997. \(^{171}\) The summary of the nature of the complaints is not tied to the Code of Conduct for Maine Judicial Branch ADR Neutrals. \(^{172}\) Unlike the other states studied, the Code of Conduct is not \(^{772}\) organized in the traditional format around the core values of mediation-impartiality, party self-determination, and confidentiality. Instead, its focus tends to be on issues of impartiality, conflicts of interest, and public trust in the legal or judicial system. \(^{173}\)
As a result, the Director has captured the nature of complaints in the following categories with the number of times a person raised the complaint appearing in parenthesis following the nature of the complaint: lacked impartiality (7); had an ineffective style of mediation (6); had insufficient knowledge or competence to conduct the mediation (5); was ineffective in working with attorneys (2); was insensitive to domestic violence issues in the divorce context (3); was rude (3); was confrontational (1); had professional role confusion (1); acted unprofessionally (1); and was arrogant (1). The summary also notes complaints that the mediator offered a solution (1), opinion (2), legal advice (2), or recommended settlement (3). In two complaints, the mediator pressed for settlement. Mediators also left the mediation prematurely (1), failed to appear (1), and failed to accurately write the points of agreement (1). One party complained about the poor appearance of the mediator. The Director recently explained that the system is intended to have sufficient flexibility to “address a full range of complaints, from the frivolous or minor end of the spectrum all the way to . . . [the] serious and egregious breach of ethical standards.”

The data provided by Maine does not indicate the number of complaints dismissed for lack of jurisdiction, as facially insufficient, or as unsupported by the factual investigation.

The Code of Conduct does not specify sanctions the ADR Director or the Maine Supreme Judicial Court may impose for violations of the code. The ADR Director, however, has imposed a number of sanctions focused on improving the mediator's skills and understanding of mediation theory and practice. Most frequently-in 23 complaints-the ADR Director planned to observe and supervise the mediator in one or more future mediations. She has also discussed the nature of the complaint with the mediator in nine complaints. In five situations, the mediator voluntarily resigned from the roster or agreed not to mediate cases. In one situation, the ADR Director also de-rostered a mediator for breaching confidentiality, but that sanction does not appear on the Maine CADRES Complaint Log because it did not arise from a formal complaint. In three complaints, the ADR Director instructed the mediator to observe other mediators and to obtain additional training. Other interventions, applied only one time each, included meeting with the complainant, meeting with the mediator, changing the mediator's court assignments, and sending a letter. Thus, despite the low number of rostered mediators in Maine, the complaint process has led to the voluntary or involuntary removal from the court's roster of more mediators than any state analyzed in this article.

6. Summary and Analysis of Complaints

Three types of mediator conduct most frequently trigger complaints against mediators. Conduct which makes a party believe that the mediator has lost his or her impartiality is the most frequently cited reason for filing a complaint in Virginia and Maine. It appears as the second most frequently raised allegation in Florida, Georgia, and Minnesota. Interference with a party's self-determination, by offering legal advice, by giving legal opinions, by recommending settlement, or by engaging in more overt acts of coercion formed the most frequent allegation in Florida and Georgia and the second most frequent allegation in Virginia. Poor quality of the process or an ineffective mediator style formed the most frequent allegation in Minnesota, the second most frequent allegation in Maine, and the third most frequent allegation in Virginia. Surprisingly, breaches of confidentiality got traction only in Minnesota as a basis for a complaint. These complaints arise apparently because some parenting consultants misunderstand how much confidential information they may reveal to the appointing court.

As a sanction, regulators are most likely to require a mediator to take additional training or to learn from experienced mediators by observing them, working under their supervision, or co-mediating with them. As noted above, only six mediators have been forced or agreed to get off the state supreme court's roster of mediators, with five of those sanctions occurring in Maine. Only Florida has the power to impose economic sanctions. Virginia and Maine may recommend that a mediator get additional training or supervised experience even if the mediator has not violated an ethics rule.
Of the nearly 9,000 mediators regulated by the states analyzed in this article, less than 100 mediators have received any type of sanction, remedial recommendation, or intervention for conduct inconsistent with ethical standards. Florida, with the most rostered mediators, applied 40 interventions or sanctions against mediators. Maine, with the least number of rostered mediators, applied 43 interventions or sanctions against mediators. In both situations, regulators imposed more than one intervention or sanction on a single mediator or the mediator may have accepted more than one intervention or sanction. One can conclude, however, that Maine has an aggressive grievance process that more frequently results in an intervention or sanction against one of the members of its shorter list of rostered mediators.

The number of claims dismissed by the regulators in these states provides the bigger story. In the states reporting dismissal data, the regulators dismissed 67 formal complaints for lack of jurisdiction, for failure to state a claim, and as a matter of probable cause when the factual investigation did not support the allegations in the complaint. Not every state keeps records of the number of informal complaints received. However, the directors of these court-connected mediation programs believe that their grievance systems offer parties a place to express their concerns about a mediator or mediation even if those persons do not wish to take the next step to formalize the complaint. For instance, in Virginia, persons did not pursue 55 of the 68 informal complaints. Thus, the complaint processes in these states may protect mediators from frivolous claims that might otherwise result in malpractice suits or grievances filed with other professional organizations. Data supplied by Complete Equity Markets, Inc., the leading insurer of mediators, show that the few malpractice suits brought against mediators arose from ADR proceedings in states without a mediator complaint process, except for two malpractice suits filed in Florida.

V. Why Provide A Grievance System Allowing Complaints Against Mediators Working in Court-Connected Programs?

Mediator complaint systems would seem to protect the reputations and legitimacy of referring courts. They reinforce the core values of the field of mediation and so protect the reputation of the process. They better ensure that mediators understand their ethical obligations and provide parties quality mediation services. They also provide—depending on the design of the system—unhappy parties with procedural fairness that extends beyond the formal end of the mediation session. The grievance systems potentially protect lawyers and mediators from frivolous claims of malpractice or misconduct.

Nancy Welsh has suggested that as court-connected ADR programs gained successful institutionalization, a call came out from courts, mediators, and users of the services for better information about why they should use the processes, what happened in the processes, and what types of interventions neutrals could and would make. The Uniform Mediation Act represents one response to those requests for clarity and predictability. “Other attempts to respond, however, have been markedly unsuccessful. Mediators have been unable to develop field-wide standards for mediator certification, a uniform mechanism for mediator evaluation or even clear ethical boundaries regarding mediators’ provisions of advice.” In addition, as the earlier discussion in this article shows, few courts have responded to the need to assure quality in their mediator pools through complaint and sanctioning systems.

A. Protecting the Reputations and Legitimacy of Referring Courts

Magistrate Judge Wayne D. Brazil, a judge with the United States District Court for the Northern District of California, states several reasons for designing an effective system to monitor, evaluate, and sanction mediators working in court-connected programs. First, he expresses concern that legislators and the public may “blur ethically unassailable court ADR programs with perceived corporate abuses of [private] ADR processes.” Lawmakers and the public may suspect that even court-connected
ADR processes are designed to “hide from the public not only dangerous products, conditions, or substandard professional services, but also possible corruption in the private neutral community . . . .”

At the same time, lawmakers funding court-connected programs may pay inappropriate attention to settlement rates and docket clearing procedures. Courts, subject to these funding pressures, may in turn “permit only the most assertive lawyers or process professionals to serve as neutrals in their ADR program[s], or only those who appear to have the most clout with certain types of parties or lawyers.” More assertive interventions can lead parties to perceive that the mediator has pressured them to settle.

In court-referred mediations, parties may already feel pressure to settle, says Brazil. Taken together, parties may resent mediation and infer “that the court’s real purpose in making the referral to ADR was not to provide the parties with a service, but to get rid of them.” Brazil fears the risk of inviting parties to see courts as institutionally selfish.

Professor Nancy Welsh further analyzes these themes in the context of the procedural justice afforded to mediation parties. Her research indicates that parties' perceptions of procedural justice-voice, consideration, even-handedness, and dignity-influence their perceptions of the legitimacy of legal authority, including courts. She quotes Brazil as saying that the courts’ “most precious asset is the public's trust.” That trust is based on the public's belief “that the aspect of justice for which [the courts] are primarily responsible is process fairness [and] process integrity. It follows that the characteristic of our ADR programs about which we must be most sensitive is fairness, especially process fairness.” She explains: “[S]eeking out and listening to the voices of individual disputants should be particularly important in a democracy that proclaims the value and dignity of the individual and in a field that names disputants' self-determination as its fundamental underlying principle. Indeed, seeking out and listening to the voices of individual disputants is essential for the maintenance of the legitimacy of the various public institutions that now embrace mediation.” Judge Wade McCree of the United States Court of Appeals for the Sixth Circuit reminded participants at the Pound Conference of the importance of a continued focus on justice. He said: “The courts must not improve efficiency in ways that endanger justice, [or] that endanger the appearance of justice . . . .”

Mindful of these dynamics, an 18 member Advisory Board composed of judges, state and local court administrators, mediators, mediation program administrators, attorneys, corporate representatives, academics, evaluators, and officers of professional mediation organizations with diverse viewpoints developed the National Standards for Court-Connected Mediation Programs (National Standards). The National Standards, if adopted, should “enhance confidence in and satisfaction with our public justice system.” The Advisory Board expressed concern that: “The dearth of generally accepted principles to guide courts in designing, implementing and improving such programs risks . . . confusion and dissatisfaction on the part of individual users as well as the public at large, who come to view these programs as a form of second-class justice.” It acknowledged that for some disputants, court-connected mediation programs may be their only contact with the public justice system.

The National Standards Advisory Board recommended that courts monitor the quality of mediators working in court-connected programs and provide mediation participants access to a complaint mechanism designed to handle any grievance about a mediator or the process. It suggested courts should evaluate the program on a periodic basis through participant surveys and other forms of feedback to permit the court to correct any deficiencies in the process and to monitor the performance of mediators. Courts should also remove from their rosters mediators who performed below expected skill levels or outside ethical constraints. The Advisory Board further recommended that courts adopt a code of ethics, protect mediators from civil liability, and provide sufficient resources for these functions.

Similarly, the CPR-Georgetown Commission on Ethics and Standards in ADR recognized in its Principles for ADR Provider Organizations that “[t]he growth and increasing importance of ADR Provider Organizations, coupled with the
absence of broadly-recognized standards to guide responsible practice, propel [led] this effort . . . to develop the following Principles . . . .“200 It suggested that a provider “take all reasonable steps to maximize the quality and competence of its services” and take all reasonable steps to monitor the quality and competence of affiliated neutrals. These steps could include soliciting mediator evaluations, debriefing mediation participants, making follow-up calls, conducting periodic performance reviews, offering processes for receiving complaints filed against neutrals,201 and disciplining or removing neutrals who failed to meet ethical or other standards.202 It also suggested that ADR providers “should require affiliated neutrals to subscribe to a reputable internal or external ADR code of ethics, absent or in addition to a controlling statutory or professional code of ethics.”203 In addition, it recommended that the ADR provider dedicate staff and resources to meet these suggested obligations to ADR users, the courts, and the public.204

In connection with complaint procedures, the National Standards Advisory Board explained in comments to the standards that “widespread” agreement existed about the need for courts to implement “specific, written complaint mechanisms” that were “based upon a clear code of ethical conduct by mediators.”205 While the Advisory Board did not recommend that the courts require unhappy participants to mediate their complaints against mediators, it did recommend that the courts offer this option. Similarly, the CPR-Georgetown Commission urged ADR providers to adopt ethical guidelines to “help insure that neutrals . . . are familiar with and conduct themselves according to prevailing norms of ethical conduct in ADR.”206

Thus, both sets of guidelines set high expectations about the court's role in ensuring the quality of the services provided by mediators. The guidelines expect courts to encourage mediators to engage in ethical conduct and responsible practice. They also expect courts to monitor mediator compliance with ethics and best practices. Both sets of guidelines respond to the “greater scrutiny in the marketplace, in the courts, and among regulators, commentators and policy makers” of ADR services.207 They both seek to create fair ADR processes.208 The guidelines “reflect the best thinking currently about what constitutes quality in court-connected mediation programming efforts.”209 These thinkers express the concern that courts must assume more responsibility for the ADR programs they offer.

Leila Taaffe, the Director of the Georgia Office of Dispute Resolution, sees it this way: In the court context we're very concerned about protecting the public. We say to the courts, “You should send certain cases to us . . . .” And there's a quid pro quo . . . . If we're saying to the courts . . . “Send [us] your poor, your tired, your depressed, what[ever] . . . to mediation,” and we don't guarantee [the courts] some kind of minimal quality in terms of performance [of the mediator] . . . [the courts are] putting themselves into a very precarious position. Because [we are] . . . taking people who have availed themselves of the courtroom. Who have followed the process that we acknowledge in this country for settling disputes and [the courts are] saying, “Well, try this [mediation], this is going to enhance the civil justice system, or this is going to give you control over resolving the dispute.” But unless we can guarantee them some quality and some consistency in that practice, [the courts are] putting themselves on the line. And most of these people are elected officials, and they care what their community thinks. And they should care.210

Welsh summarizes this thinking, perhaps, when she states that as “the degree of party autonomy decreased [through mandatory referrals to mediation], the need for court oversight increased.”211 As Welsh notes: “[C]ourts are delegating one of their judicial functions to court-connected mediators. The courts ultimately should remain accountable for their delegates' performance. Therefore, effective monitoring and evaluation, including ethical requirements and grievance procedures, should always accompany court-connected mediation programs.”212 Another commentator sums up the situation by saying: “Mediation has yet to confront and to discipline the power it distributes [to mediators].”213
B. Protecting Parties, the Process, and the Field by Protecting Procedural Fairness in the Mediation Process and the Grievance Process

In several articles, Welsh summarizes the research and thinking about procedural justice by analyzing its components and offering several theories to explain why disputants perceive it as important in the mediation context. Research on procedural justice has found that it has essentially four parts. First, parties need to feel that they have sufficient time and opportunity to tell their stories about the dispute, voice their concerns, and offer evidence in support of their views. They need to have some control over the presentation of this information. The literature has called this component of procedural justice “voice.” Second, parties need to feel that the third-party—whether a judge, an arbitrator, or a mediator—has considered those stories, concerns, and the evidence. Third, disputing parties need to feel that the third-party has treated the parties even-handedly. Finally, parties must feel that the third-party treated them politely and with respect and dignity.

No research explains why parties look for these elements of procedural fairness. Three hypotheses—the “social exchange” hypothesis, the “group values” hypothesis, and the “fairness heuristic” hypothesis—may explain the importance of procedural justice. The first hypothesis suggests that procedural justice, especially adequate voice, serves the disputants’ goals of reaching favorable outcomes by enhancing the likelihood of getting a favorable outcome. The second hypothesis posits that procedural justice gives disputants the message that they are valuable members of society. It conveys to them messages about their status in society, which, in turn, bolsters their self-esteem and self-respect. Procedural justice may demonstrate to disputants that courts “recognize their own role as that of ‘public servants and [recognize] . . . the role of citizens as clients who have a legitimate right to certain services.” The last hypothesis asserts that people fear being exploited by authoritative decision-makers. Their positive evaluations of procedural justice provide a mental shortcut reassuring them that they have not been exploited.

The research also shows that procedural justice affects parties’ perceptions about the justice of the substantive outcome. It also affects their compliance with those outcomes. And it affects their perceptions of the legitimacy of the authorities producing those outcomes. Welsh explains:

> If disputants perceive that the third party is treating them and their dispute in a procedurally just manner, then it becomes somewhat easier to trust that the third party’s decision will be based on all relevant information and that the third party will attempt to make a substantively just decision.

Welsh’s work over the last four years shows that these aspects of procedural justice apply in mediation even though the parties retain control over the outcome. Thus, when a party has perceived that he or she has not gotten procedural justice in the mediation, that party’s belief in the legitimacy of the court or entity that referred the case to mediation suffers. The party is also unlikely to say anything positive about the mediator or the process of mediation, thereby damaging the reputation of both and potentially undermining the use of mediation long-term. If we do not offer that party a meaningful grievance process, then we permit these negative perceptions to linger. If we offer a grievance process that also fails to provide elements of procedural justice, we risk victimizing the party twice.

While Welsh and Brazil have applied the concept of procedural justice to the mediation process itself, I assert that we must also consider it as a reason for creating mediator complaint systems. We must also consider it in the design of those systems if we want to ensure that parties perceive the mediation process as procedurally fair, from beginning to end, and then some.
On a more practical note, Charles Pou, Jr., a system designer who resists formal regulation in the field, nonetheless has written:

Meaningful options for handling grievances, and occasionally sanctioning misbehavior, are important to the quality and credibility of a mediation system. Such a system should include continuing ethics education, feedback, and a complaint procedure. . . . [Quality Assurance] systems should be more proactive in addressing complaints, lest the market or legislatures drive decision making in this area. 225

Thus, while little consensus may exist in the field about barriers to entry and other aspects of the regulation of mediators, much more consensus exists about the need to design and implement grievance systems.

C. Enhancing Mediator Skills and Ethics

I speculate, based on my own experience, that grievance systems designed to reinforce ethical standards encourage the use of better skills in mediation. They force persons in the field to learn more about ethics, especially when combined with a requirement that mediators take continuing mediator education on a regular basis. Enhanced knowledge of applicable ethics codes and standards of practice give mediators greater self-awareness of the choices they make in mediation and help them see when they may need to get additional training in dispute resolution theory, skills, and ethics. The grievance systems also help mediators with poor skills to improve them or to agree to get out of the field. As a system, ethics codes and grievance processes help mediators avoid conduct that may give rise to a professional complaint or malpractice suit. Empirical research may eventually support these hypotheses.

Leila Taaffe, the Director of the Georgia Office of Dispute Resolution, acknowledged the unique situation in which mediators typically work. “A lot of mediators sit alone in little tiny rooms. In our state it’s little tiny windowless, mostly airless, rooms in courthouses. And a lot of mediators *786 actually welcome much more feedback and discussion, and I think it’s important that a process allows for that.” 226 She could also mention that mediators work under strict rules of confidentiality that in many states would preclude them from discussing with their peers any dilemmas they faced in mediated cases. The opportunity for specific feedback from experienced peers in actual cases remains limited.

Grievance systems, with confidentiality rules that permit a careful and open consideration of the events that occurred in mediation, can be an extremely valuable source of feedback and information for mediators. Maryland's Grievance Process Committee expressly recognizes in its proposal to create a grievance system that “mediators must see the program . . . as one of many resources for them to improve their skills and sharpen their practice.” 227 Sharon Press, the Director of the Florida DRC, remarked: “I've learned a lot based on the grievances that have come in . . . And I think as a consequence, I've become a better mediator and more sensitive to things just having read the grievances and worked with that process.” 228

D. Protecting Mediators from Frivolous Claims

As noted above, regulators dismissed 67 formal complaints for lack of jurisdiction, failure to state a claim, and as a matter of probable cause following a factual investigation. In Virginia, mediation participants did not pursue 55 of the 68 informal complaints made to the DRS Director. However, these numbers do not capture the complete story. Several of the states analyzed do not report informal complaints, nor do they report formal complaints that do not result in a sanction.

The discussion in this article about the types of claims filed against mediators reveals that many of them lack merit. Recall Clare's concern about the mediator's impartiality: “PS - I do not know how this mediator was chosen, likely by the ex's attorney.” 229
While an investigation may have revealed a conflict of interest between the mediator and her former spouse’s attorney, it is more likely that Clare did not understand how the mediator had been chosen or what his or her disclosures about actual or potential conflicts of interest may have meant or revealed. Thus, many claims may represent a misunderstanding of the ethical duties owed mediating parties. The early steps in a grievance system may have resolved Clare’s suspicions about the ethical conduct of the mediator, and if not, she would have had an easy way to get them resolved by a third-party decision maker. Her mediator would undoubtedly appreciate the opportunity to explain his or her perspective on the situation. Moreover, he or she would no doubt learn something from the process that would improve his or her practice in future mediations. At the same time, neither party would have had to make a significant investment of time or money to reach resolution of the claim.

Some claims may represent generalized dissatisfaction with the mediator, the process, or the outcome. They may simply represent a party’s sense that the mediator denied him or her procedural justice. It should come as no surprise that the leading claim filed in several states analyzed in this article concerned mediator interventions that undermined party self-determination. In the other states, the leading claim involved mediator neutrality. The first type of claim may relate to the “voice” given parties in mediation and perhaps to the respect shown parties by the neutral. The second leading claim relates to the perception of the mediator’s ability to consider the party’s views, concerns, and evidence in an even-handed way.

Anecdotally, the directors of the court-connected mediation programs in the states analyzed believe that the mediator complaint system provides unhappy parties a “voice,” and for many, that seems to be all the parties need. Many of the informal and formal complaints lodged in these states are resolved without intervention from any third-party decision maker in a timely, cost effective way that supports the procedural justice values of mediation. Too many other factors—difficulties of proof, mediator immunity, and limited damage recoveries—may better explain the paucity of malpractice claims. But we cannot easily dismiss the role grievance systems may play in protecting mediators from frivolous claims that they might otherwise have to defend in civil suits or in grievance proceedings before regulators of lawyers, therapists, and other professions of origin.

Leila Taaffe, the Director of the Georgia Office of Dispute Resolution, recently explained: “[A]s this profession grows. . . . there will be lawsuits against mediators. . . . And a complaint procedure. . . . can be a . . . first level [for resolving disputes] with the consumer so that they don’t want to go further, and it’s a signal to the community that we take what happens in mediation seriously.”

E. Protecting the Lawyers Who Represent Parties in Mediation

Four of 21 claims filed against mediators that the leading insurance carrier handled alleged that the mediation led to a bad result. Mel Rubin calls these situations the “settle and sue” cases. He argues that they are on the rise. He also suggests that if a client is unhappy with the outcome of mediation, he or she is more likely to sue his or her attorney for malpractice. The attorney, in turn, is likely to bring the mediator into the suit as a co-defendant.

Recall Clare’s concern about the pressure her attorney put on her:
I refused to sign several times. My attorney then began yelling at me to “shut-up and sign the damn thing” I wasn’t allowed to leave until it was signed. The words, “NO I can’t sign this,” fell on deaf ears. I was so unfamiliar with the process of it all and what it meant and what the outcome entailed.

To the extent the procedural justice research indicates that parties who perceive they have received procedural justice in mediation also perceive that the negotiated outcome in mediation is fair, we would expect that these parties are not likely to later sue their attorneys for malpractice. Even when the client has little trust in his or her attorney, a mediation process that
*789 enhances procedural justice allows the party to assess directly whether he or she feels exploited or mistreated in the process. 237 Even if the mediation process itself lacks procedural justice and the client accordingly remains dissatisfied and suspicious, a well-designed grievance system, emphasizing procedural justice from the client’s perspective, may give the client the reassurances he or she needs. A client who suspects collusion between his or her lawyer and the neutral could seek the informed opinion of the regulatory body, without ever having to file a legal malpractice law suit.

Clearly, most of the benefits cited here have no direct empirical support. But that should not keep us, as a field, from fully implementing court-connected mediation programs, a component of which is a grievance system that offers parties the procedural justice the empirical research clearly suggests they expect.

VI. Comparison of Existing State Sponsored Systems Regulating Mediators Working in Court-Connected Programs in Five States

A. Introduction

Courts providing court-connected mediation services should ensure that mediators receiving court referrals deliver a high quality service consistent with ethical guidelines or rules. 238 This section of the article discusses how *790 five states meet that responsibility. 239

B. Florida’s System of Regulation

1. History of Mediation Programs and the Regulatory System

In 1975, the Florida court system established the first Citizen Dispute Settlement (CDS) Center for court-ordered ADR. 240 In the 31 years following the creation of that center, the state has created “one of the most comprehensive court-connected mediation programs in the country.” 241 Currently, the state has 9 CDS programs, 49 county mediation programs (serving all 20 circuits), 45 family mediation programs, 13 circuit civil mediation programs, 40 dependency mediation programs, 3 arbitration programs, and 1 appellate mediation program. 242

*791 In 1986, the Supreme Court of Florida and the Florida State University College of Law established the Dispute Resolution Center (DRC) as Florida’s “first state wide center for education, training, and research in the field of alternative dispute resolution.” 243 The DRC also provides assistance to the state courts in developing alternatives to the traditional court system. It sponsors an annual conference for mediators and arbitrators, publishes a newsletter for neutrals in the state, provides training for neutrals, and assists the local courts as needed. 244 In 1988, the Florida Supreme Court created the Committee on Mediation and Arbitration Training, and a year later it created the Committee on Mediation and Arbitration Rules. 245 The rules committee drafted the initial standards of conduct and the grievance process after engaging in a collaborative process that involved a series of state-wide public hearings. During the hearings, practicing mediators and other persons with a stake in the rules provided information to the committee. 246 In addition, the committee looked to the ethics codes developed by other state supreme courts or professional organizations. In May 1992, the Florida Supreme Court adopted two sets of rules resulting from that effort—rules governing qualifications, ethics, and discipline. 247 It also moved the qualifications rules from the Florida Rules of Civil Procedure to the DRC Rules for Mediators. 248 Since that time, the Florida mediation community has continued to revise the ethics rules. The standards adopted in 2000 reflected the information gathered in additional public hearings and through a nation-
*792 wide effort to collect drafts of other ethics codes, to elicit comments to the drafts, and to engage in an extensive re-drafting process. 249 Florida is now engaged in yet another revision process, primarily focused on the certification requirements. 250

2. Organizational Structure of the Regulatory Entities

Six volunteer bodies and the Florida Supreme Court perform the duties arising under the qualifications, ethics, and disciplinary rules of the Florida Supreme Court. 251 First, three divisions-located in north, central, and south Florida-make-up the Mediator Qualifications Board (MQB). 252 Each division of the MQB consists of three circuit or county judges, three certified county mediators, three certified circuit mediators, three certified family mediators at least (two of which are non-lawyers), at least one, but not more than three certified dependency mediators, and three attorneys licensed to practice in Florida who are not certified mediators. 253 The chief justice of the Florida Supreme Court makes appointments to the un-paid MBQ positions for staggered four-year terms. 254

The MQB is the umbrella organization primarily responsible, through committees or hearing panels formed from its membership, for responding to matters involving mediator qualifications, ethics, or moral character. It is a *793 large body consisting of 51 members drawn from the state's judges, lawyers, and mediators in the three regions of Florida. The MQB responds directly to referrals from the DRC staff when the staff has information reflecting negatively on an applicant's or a certified mediator's good moral character. 255 It conducts an investigation which may result in the approval of the applicant or the dismissal of the complaint against the certified mediator. 256 Alternatively, it may refer the matter to a hearing panel. 257 The situations typically leading to a hearing panel review include the suspension or revocation of a mediator's certification, or when the mediator receives professional discipline from an organization to which the mediator belongs. 258 The hearing panel may dismiss the complaint, approve the application for certification, or sanction the mediator. 259

Second, the Mediation Training Review Board considers complaints against certified mediation training programs. 260 Members include judges and mediators. 261 The members meet in complaint committees and hearing panels. 262

Third, one member from each MBQ division serves as a member of the Qualifications Complaint Committee (QCC) for a one-year period. The QCC is composed of one judge or attorney, who serves as chair, and two certified mediators. 263 The QCC handles complaints relating to a mediator's moral character in the context of the initial application to the roster, ongoing certification, or re-certification. 264 Complaints about an applicant's or mediator's moral character may arise during the application process when the staff of the DRC suspects the good moral character of the applicant. The complaints may also pertain to certified mediators when the staff receives information suggesting a lack or lapse of good moral character. 265 Finally, this committee may receive a complaint that relates to the professional *794 discipline of a mediator by his or her profession of origin or other professional organization. 266

Fourth, Florida is the only state analyzed in this article that has created a Mediator Ethics Advisory Committee (MEAC). 267 The MEAC writes and publishes ethics opinions in response to questions posed by practicing mediators, lawyers, judges, and the public. It interprets the standards of conduct and issues opinions “consistent with supreme court decision on mediator discipline.” 268 The members of the MEAC are distinct from the members of the MQB to ensure that its members will not also be asked to handle formal complaints filed against mediators. 269 Its opinions, some 96 to date, appear at the easily accessible “Florida State Courts” website. 270
Nine people serve on the MEAC, with three coming from each region served by the MQB. One county mediator, one family mediator, and one circuit mediator from each MQB division also sit on the MEAC. The chief justice of the Florida Supreme Court appoints its unpaid members. At least one of the nine mediators must be a dependency mediator. Members serve four-year terms. No member may serve more than two consecutive terms.

Fifth, the DRC uses the MBQ pool of volunteers to create complaint committees that handle the ethics complaints received by the DRC against mediators. Each complaint committee consists of three members: one judge or attorney, who acts as the chair and the due process watch dog; one mediator who is certified in the area to which the complaint refers; and one other certified mediator. A complaint committee ceases to exist after it disposes of the complaints assigned to it.

Sixth, complaint committees may refer complaints against mediators to a hearing panel composed of five members: one circuit or county judge, who serves as the chair and the due process watch dog; three certified mediators, at least one of whom must be certified in the practice area in which the complaint arises; and one attorney. Like the complaint committees, the hearing panels cease to exist after disposing of all assigned cases. Persons cannot serve on both the complaint committee and the hearing panel in the same mediator complaint case. The hearing panels provide an adjudicatory function and cannot conduct investigations of complaints.

The DRC provides staff support to these entities. A dedicated court filing fee, held in trust, supports all the DRC's responsibilities and functions. The trust account includes mediator certification fees, which only cover a third or less of the costs of the program administration.

None of the members of these regulatory entities are lay persons. The entities do include members who represent “consumers” of mediation services, because they include lawyers and judges.

3. Barriers of Entry to the Field

The Florida DRC Rules for Certified and Court Appointed Mediators set qualifications for four categories of mediators: county court mediators, family mediators, circuit court mediators, and dependency mediators. Persons completing the training requirements become “certified” and may join the roster for court-appointed mediation referrals. The training hours currently required for certification in all the categories are similar to training requirements in most states and represent reasonably low barriers of entry to the field. Florida, unlike most other states in the United States, requires professional degrees or advanced professional training for three of the mediation certifications. In addition, like Virginia, it imposes both an observation requirement and a supervised mediation or co-mediation requirement for all four types of certifications. Taken together, Florida imposes stricter barriers of entry than most other states for mediators seeking to work in the court-connected programs.

The Supreme Court of Florida is currently considering a revision of the rules governing mediator qualification. The Supreme Court Committee on ADR Rules and Policy has proposed a point system, which allows mediators to accrue points towards the qualification requirements in a number of ways. Applicants for each type of certification would have to accrue 100 points. For county court mediators, an applicant would need 30 training points, 10 points reflecting the applicant's prior education, and 60 mentorship points that accrue at 10 points for each fully, completed supervised mediation and 5 points for each observation. The other certifications will also require 100 points, but the points accrue in different ways depending on the type of certification an applicant seeks. Mediators can accrue additional points for holding other professional licenses, having the ability to speak a
foreign language, and completing a graduate level program in a conflict resolution certificate program. The proposed rules, however, do not require persons to have particular professional backgrounds as currently required for some certifications. This point system approach to certification no doubt reflects Florida's long experience with the certification process. It will no doubt generate a great deal of conversation in the mediation field.

The Florida rules impose yet another barrier to entry not required in most states. It requires that all applicants and any certified mediators show evidence of good moral character. The rules' drafters intend that the “good moral character” requirement will protect the participants in mediation and the public. The requirement also “safeguard[s] the justice system.” In determining good moral character, the DRC considers prior felony convictions until restoration of civil rights and probation sentences until termination of the probation period. In reviewing an applicant's disclosures, the MBQ also considers the following factors:

- The extent to which the conduct would interfere with a mediator's duties and responsibilities;
- The area of mediation in which certification is sought;
- The factors underlying the conduct;
- The applicant's age at the time of conduct;
- The recency of the conduct;
- The reliability of the information concerning the conduct;
- The seriousness of the conduct as it relates to mediator qualifications;
- The cumulative effect of the conduct or information;
- Any evidence of rehabilitation;
- The applicant's candor during the application process;
- And disbarment or suspension from any profession.

The proposed revisions to the qualification rules retain the good moral character requirement.

By Administrative Order, the Florida Supreme Court has imposed continuing mediator education (CME) requirements on all certified mediators. It requires certified mediators to complete 16 hours of CME, including 4 hours of ethics training, each two-year certification renewal cycle. Family and dependency mediators must include four hours of domestic violence training in that minimum requirement. Mediators certified in more than one area must satisfy the CME requirements for each certification. Renewing mediators may double count CME hours if they relate to any other certification sought. Mediators may also count continuing education hours required by their profession of origin, except ethics hours, if the training “directly bears” on the mediator's practice. Under the proposed qualification rules, renewing mediators will need two hours of domestic violence training and one hour of diversity/cultural awareness training, except for family and dependency mediators, who will still need four hours of domestic violence training.

In summary, Florida currently imposes relatively low barriers of entry to the field, but requires certified mediators to commit to the field and their skill development by requiring them to renew every two years after satisfying additional training requirements.

4. Ethics Code and Advisory Opinions

Florida has had an ethics code for certified mediators since 1992. The Florida Supreme Court Standing Committee on ADR Rules explained that the field's experience with the rules led to a revision process beginning in 1998. The Committee Notes explain:

By 1998, several other states and dispute resolution organizations initiated research into ethical standards for mediation which also became instructive to the Committee. In addition, Florida's Mediator Qualifications Advisory Panel [now the MEAC], created to field ethical questions from practicing mediators, gained a wealth of pragmatic experience in the application of ethical concepts to actual practice that became available to the Committee. Finally, the Florida Mediator Qualifications Board, the
disciplinatory body for mediators, developed specific data from actual grievances filed against mediators over the past several years, which also added to the available body of knowledge.

Using this new body of information and experience, the Committee undertook a year long study program to determine if Florida's ethical rules for mediators would benefit from review and revision.

304 The efforts of the Standing Committee on ADR Rules resulted in the 2000 revision of the Florida Standards of Conduct. The drafters intended that the rules guide mediators and instill public confidence in the mediation process. The first rule states: “The public's use, understanding, and satisfaction with mediation can only be achieved if mediators embrace the highest ethical principles.” The rules apply to certified and court-appointed mediators.

305 The Supreme Court Committee on ADR Rules and Policy recommended in May 2005 only minor revisions to the Florida Standards of Conduct that affect the rules on confidentiality and immunity.

As noted above, a completely separate committee—the MEAC—provides written advisory opinions consistent with the Florida Supreme Court decisions on mediator discipline that respond to mediators’ ethical questions. The public may easily access these opinions at the Florida State Court's website. The MEAC thus provides valuable interpretations of the Standards of Conduct.

308 As noted above, its membership is distinct from the members of the MQB. The Florida Supreme Court did not want members of the advisory panel also serving in an investigatory or adjudicatory role in the complaint process. By bifurcating the roles, mediators need not fear that a question posed to the MEAC could result in an ethics complaint against the mediator.

5. Guidelines for Interacting with the Legal World

i. Confidentiality in Mediation

Confidentiality of mediation communications exists by statute and is reinforced by the Florida Standards of Conduct. The statutory protection applies to a broad category of mediation communications, unless the parties agree in writing to waive the coverage provided in whole or part. Unlike most states, the definition of a mediation communication includes nonverbal conduct, as well as oral and written communications. It requires mediation participants to keep communications confidential except between the parties or between a party and his or her counsel. It creates an evidentiary privilege by precluding mediation participants from testifying or requiring the mediator to testify at a subsequent adjudicatory proceeding. The statute sets out six exceptions to confidentiality, including any mediation communication...
Thus, the confidentiality statute contemplates the possibility that unhappy parties may file a complaint against a mediator and that the party and the mediator will need to disclose confidences to support or defend a claim of unethical conduct. The statute also creates penalties for the knowing or willful disclosure of mediation communications in violation of the statute. 311

*802 The MEAC has issued 22 ethics advisory opinions answering questions about confidentiality in mediation. They cover disclosures to mediating parties of caucus communications and income data appearing on intake forms; disclosures to parties outside the mediation of threats to do harm to them; disclosures to the Florida Bar of the unethical behavior of attorneys who participate in mediation; or calls during the mediation to attorneys or other support persons who are not attending the mediation. They also cover the testimony of the mediator in subsequent proceedings or the disclosure of his or her notes. One opinion discusses, but fails to resolve, the mediator's duty to advise parties about possible exceptions to confidentiality. Finally, the advisory opinions cover permitted disclosures to the court about the outcome of or progress in a mediation, a party's bad faith participation, or a party's appearance without full settlement authority. 312

ii. Unauthorized Practice of Law Guidelines and Mediator Immunity

The DRC Director believes that mediators, who strictly comply with the Florida Standards of Conduct, will not face the problem of the unauthorized practice of law, because the standards emphasize party self-determination and mediator impartiality. 313 Accordingly, the DRC has not attempted, as has Virginia and North Carolina, to outline the scope of the unauthorized practice of law under Florida law and legal ethics opinions. 314 The MEAC, however, has issued ten advisory ethics opinions relating to practices that could be deemed the unauthorized practice of law. Mediators have posed questions to the MEAC about giving legal advice in mediation, predicting how a specific judge would rule in the case, preparing for divorcing parties forms and pleadings the parties could then file with family courts, drafting the parties' settlement agreement, and the role of non-lawyers assisting pro se parties in mediation. 315 These opinions provide very specific and helpful advice. They also highlight how the question of the unauthorized practice of law may implicate other concurrently applicable professional rules. 316

The state legislature has also decided to create two types of immunity for mediators. A statute confers judicial immunity to the same extent as a judge on mediators serving in court-connected mediations and trainees meeting their observation and supervised mediation requirements. However, mediators serving in privately referred mediations have more limited immunity. The statute protects them from liability arising from the performance of the mediator's duties, so long as the mediators do not act in “bad faith, with a malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.” 317 Thus, even if the disciplinary process results in a sanction against a mediator, a mediator *804 would still have complete or partial immunity to a negligence suit or other effort to hold him or her civilly liable for his or her misconduct. 318

6. Public Oversight of Florida Mediators Through a Complaint System

i. Introduction

Florida was the first state to implement a process allowing unhappy mediation parties to file and pursue complaints against mediators for practices that violated the Florida Standards of Professional Conduct. The Florida Disciplinary Rules 319 therefore create one more way for the Florida Supreme Court to ensure the quality of service provided by certified mediators. The Florida Disciplinary Rules allow the investigation of complaints, create informal and formal processes for resolving complaints, and
permit the imposition of sanctions against mediators, including their removal from the certified court list, if they do not meet the standards of skill or professionalism expected by the court. Florida has evolved a disciplinary process, based on its experience with filed complaints that provides more due process protections for mediators than any other state system. In fact, the fourth complaint filed against a mediator led to the development of the probable cause step in the process, described below. While the description of the process suggests that it is linear in nature, the parties involved may loop back to early steps in the process to resolve a complaint.

The Florida Disciplinary Rules apply to certified mediators doing either court-ordered or privately-referred cases and to non-certified mediators doing court-ordered mediations.

ii. Staff Function: Complaint Intake Process

In Florida, any person wishing to make a complaint alleging a violation of the Florida Standards of Conduct may do so in writing under oath. The complaint must state specific facts that form a basis for the violation. Mediation participants may file these complaints with the DRC or in the office of the court administrator in the circuit where the alleged misconduct occurred. When an unhappy party files a complaint in the office of the court administrator, the administrator refers the case to the DRC within five days of its filing. If the unhappy party files the complaint in a form acceptable under the Florida Disciplinary Rules, the DRC assigns the complaint to a complaint committee within ten days. Unhappy parties, however, may have difficulty finding the Florida Disciplinary Rules and other information about filing a complaint. As of August 2005, the Florida State Courts' website did not dedicate a tab to disciplinary matters. The Florida Disciplinary Rules appear as the third part of the rules described on the webpage as “Rules for Mediators.” Thus, an unhappy party could easily overlook them. And, unlike Virginia, Georgia and Minnesota, the DRC did not make complaint forms available on the webpage. Finally, while the DRC posts ethics advisory opinions at a dedicated tab on the webpage, it makes the summary of grievances against mediators available in electronic format on request. Taken together, however, the public has access to more ethics related material at the court's website than any other state analyzed, except Virginia.

iii. Complaint Committee Function: Facial Sufficiency Analysis of the Complaint

The Florida Disciplinary Rules provide several steps in the grievance process that protect mediators from frivolous claims. One step requires the complaint committee to meet in person or by conference call to determine whether the allegations, if true, would constitute a violation of the rules. In other words, the committee evaluates the facial sufficiency of the complaint based solely on the allegations in the complaint. If the complaint committee finds that a complaint against a certified mediator is facially insufficient, the complaint committee dismisses the complaint without prejudice. The DRC staff notifies the complainant and the mediator of the dismissal.

iv. Complaint Committee or Investigator Functions: Investigation, Dismissal, or Informal Resolution of the Complaint

If the complaint committee finds the complaint facially sufficient, the committee then prepares a list of any rules that the mediator may have violated. It submits the list to the DRC. The DRC then sends a copy of the committee's list of rule violations, a copy of the complaint, a copy of the Florida Standards of Conduct, and the Florida Disciplinary Rules to the
mediator. As the DRC Director has explained, “[Y]ou can't think about . . . grievances in the abstract. They relate to standards of conduct . . . .” She further explained:

[T]hat's one of the lessons we learned over time [when] the complaint just went out [to the mediator] as written. And that's why we added in the step that it goes first to the complaint committee. [Its members] identify which rules were violated. Because what was happening [was] the mediator would get . . . some complaints [that were] like way all over the map . . . . [The mediator would say:] ‘I'm not even sure what I should be responding to,’ and what they responded to turn[ed] out [not to be the concern of the complaint committee]. So now we identify the rules . . . we would like [the mediator] to respond to . . . .”

The Florida Disciplinary Rules require the mediator to respond to the complaint and the list of rule violations within 20 days of the receipt of the mailing from the DRC. The mediator must supply a sworn written response. If the mediator fails to respond, the complaint committee considers the allegations in the complaint admitted. The complaint committee then reviews the complaint and response. Based on the additional information, it may dismiss the complaint if it finds no violation of the Florida Standards of Conduct. The complaint committee can also hire an investigator, who will investigate the complaint and advise the committee on whether “probable cause” exists that the mediator has violated the Standards of Conduct. The Florida Disciplinary Rules define an investigator as a “certified mediator, or attorney, or other qualified individual . . . .” The complaint committee may also have one of its unpaid members investigate the allegations if the issues are less complex or required less time consuming investigation. However, in ten cases, the complaint committees have hired an independent investigator. After reviewing the additional information in the investigation report, the complaint committee can find that no probable cause exists to suggest a violation of the Standards of Conduct. It may then dismiss the complaint and notify the complainant and mediator of its decision in writing.

At any time in this process, the complaint committee may meet with the complainant and the mediator to attempt an informal resolution of the matter. This meeting provides the parties an opportunity to exchange additional information and lets the complaint committee and the mediator better understand why the complainant has filed the complaint. It also offers the mediator a chance to give an apology and agree to sanctions that may improve the mediator's skills or lead him or her to use better practices in the future. The complaint committees highly recommend these informal meetings because they may resolve the matter without having to resort to a costly, time consuming hearing that imposes a higher burden of proof on the complainant. In addition, the meetings may provide the complainant with the outcome he or she seeks, which is often an admission by the accused mediator that “he gets it.” Also, at any time in the process, the complaint committee may dismiss a complaint at the request of the complaining party, if it believes dismissal appropriate.

If the complaint committee finds that a mediator has likely violated a provision of the Florida Standards of Conduct, the complaint committee may draft formal charges and forward them to the DRC. The DRC will then assemble a hearing panel. However, the complaint committee can also decide not to refer the case to a hearing panel when the violation may be de minimis or a technical violation of the ethics rules. The complaint committee will then file with the DRC a statement of the reason for its decision. The DRC will notify the complainant and mediator in writing of that decision. This portion of the process again illustrates that several steps exist to protect mediators against frivolous claims or claims based on conduct involving less serious or technical violations of the Florida Standards of Conduct.

If the complaint committee believes that the allegations of the complaint deserve a full adjudicatory hearing, it will refer to a hearing panel the formal charges in a short and plain statement with references to the particular sections of the Florida Standards of Conduct that its investigation indicates the mediator violated. Unlike any other state analyzed in this article, the complaint committee also asks the DRC to appoint a member of the Florida Bar to prosecute the complaints involving more complex or important issues.

The DRC assembles the hearing panel from members of the MQB who have not served on the complaint committee handling that particular complaint. The hearing panel schedules a hearing within 90 days from the date of the notice assigning the matter to the panel. It conducts the hearing informally. It applies, but liberally construes, the rules of evidence. Parties may give testimony by telephone if they show good cause for this approach. A mediator has the right to defend against all charges and to be represented by an attorney. The DRC will produce, upon written request of a mediator or his or her counsel, the names and addresses of witnesses, copies of written statements, and transcripts of testimony. The mediator or his or her counsel must supply the same information to the DRC upon request. The Florida Disciplinary Rules grant the chair of any complaint committee or hearing panel the right to subpoena the appearance of witnesses and the production of documentary evidence.

*811 Should a complainant fail to appear at a hearing, the panel may dismiss the complaint for want of prosecution. If a mediator does not appear, the hearing will proceed. In both situations of non-appearance, the complainant or mediator can show good cause for postponing or rescheduling the hearing.

After a hearing, the hearing panel decides whether clear and convincing evidence supports a finding that the mediator has violated the Standards of Conduct. If a majority of the panel finds that the evidence supports a violation, the panel imposes appropriate sanctions. It reports its decision to the DRC. The mediator may petition for rehearing, for good cause, within ten days of the date of the hearing. If the hearing panel finds that the evidence does not indicate a violation and dismisses the case, it must promptly file a copy of the dismissal order with the DRC.

vi. Possible Sanctions

The hearing panel may impose one or more of the following sanctions:

1. Imposition of the costs of the proceeding.

2. Oral admonishment.

3. Written reprimand.

4. Additional training, which may include the observation of mediations.

5. Restriction on types of cases which can be mediated in the future.

6. Suspension for a period of up to [one] year.
TAKE IT OR LEAVE IT. LUMP IT OR GRIEVE IT:..., 21 Ohio St. J. on...

(7) Decertification or, if the mediator is not certified, bar from service as Mediator . . . .

(8) Such other sanctions as agreed to by the mediator and the panel. 364

As noted above, the regulators most often required the mediator to get additional training or skills. The DRC Director recently explained that “our philosophy is . . . rehabilitation of the mediator, not retribution. So we try as *812 much as possible to bring the mediator back into the fold.” 365 However, Florida is unique in also imposing economic sanctions on mediators. 366

The hearing panel will file a written sanctions decision with the DRC. The DRC then mails a copy of the decision to all parties. 367 The DRC also notifies the circuit courts of any decertified or suspended mediator, unless otherwise ordered by the Florida Supreme Court. 368 The mediator must timely comply with the sanctions imposed. If the mediator fails to comply with the sanctions, the hearing panel convenes another hearing for the purpose of determining the ramifications of the mediator's non-compliance as soon as the DRC learns about it. If the hearing panel finds that the mediator has willfully failed to comply with the sanctions, the hearing panel will decertify the mediator. 369

If the hearing panel suspends or decertifies a mediator, the mediator may seek reinstatement under certain circumstances at least two years after the date of decertification. The DRC refers the petition to a hearing panel for review. The hearing panel controls the fate of the mediator by deciding whether he or she is fit to mediate. If fit, the panel notifies the DRC, and the DRC reinstates the petitioner as a certified mediator. The hearing panel can condition a mediator's reinstatement on the completion of a certified training course if the mediator has been decertified for more than three years. 370

vii. Florida Supreme Court Function: Appeals

Under the current Florida Disciplinary Rules, a mediator, whom the hearing panel has sanctioned, has a right of review before the Florida Supreme Court. However, mediators who agree to sanctions have no right of review. 371 Under the proposed changes to the Florida Disciplinary Rules, the Chief Justice of the Florida Supreme Court will hear the request for review under the Florida Rules of Appellate Procedure. 372

*813 viii. Confidentiality in the Complaint Process

As noted above, the Florida confidentiality statute exempts from confidentiality any mediation communication . . . (4) [o]ffered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding [and] . . . (6) [o]ffered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct. 373

Thus, unhappy parties and mediators may disclose communications necessary to prove or defend a grievance.

Until a hearing panel imposes or a mediator accepts sanctions, the disciplinary proceedings are confidential. 374 After a panel imposes sanctions or the mediator accepts them, the DRC considers all documentation relating to the complaint public, unless otherwise confidential pursuant to law. 375 Even when a mediator is not sanctioned, the DRC makes public information about
the complaint and its resolution without disclosing the name of the mediator. When the hearing panel imposes sanctions, the DRC publishes the name of the mediator, along with a short summary of the rule violation, the circumstances of that violation, and any sanctions imposed. Because of these public disclosures, the complaints filed against mediators serve a highly educational function. They have led, in part, to better mediator training and the revision of the Florida Standards of Conduct and Florida Disciplinary Rules.

*814 ix. Immunity for Persons Handling Complaints

In a section again showing the increased experience of Florida with mediator complaints, a statute grants absolute immunity to “[a] person serving under s. 44.106 to assist the Supreme Court in performing its disciplinary function . . . while acting within the scope of that person's appointed function.” Unlike Virginia, Florida protects persons handling complaints filed against mediators. And, like Maine, it provides a high degree of protection.

C. Virginia's System of Regulation

1. History of Programs and the Regulatory System

Virginia's grievance system is part of a highly structured and well-developed system for regulating mediators who wish to join the Virginia Supreme Court's roster of certified mediators. One scholar has called it “an elaborate ADR regulatory scheme.” Its designers looked to Florida's more fully developed system as the model. It developed as an outgrowth of the Virginia Supreme Court's 1989 effort to introduce court-connected ADR in the state and to create a central office for management of the ADR program. The regulatory system has moved from one creating awareness about the use and availability of ADR in the courts to one more focused on quality assurance. It has benefited from consistent and persistent support from the Chief Justice of the Virginia Supreme Court and the widespread participation of judges, court clerks, lawyers, and mediators in its overall design.

The effort to build a regulatory infrastructure in Virginia began in June 1986 with the formation of a Joint Committee on Alternative Dispute Resolution (Joint Committee) consisting of members from the Virginia Bar Association and the Virginia State Bar. This group helped develop the first clearinghouse ADR center. That center gathered information about the 50 ADR programs existing in the state. It also offered training. A year later, Virginia Supreme Court Chief Justice Carrico appointed a 34 member Commission on the Future of Virginia's Judicial System. The commission recommended in May 1989 that the state create an Office of Alternative Dispute Resolution Services. The Virginia General Assembly funded the office in early 1991 under the supervision of the administrative office of the Virginia Supreme Court. The commission also recommended legislation that would allow courts to refer cases to ADR processes and would define the available processes. In 1993, the Virginia General Assembly passed the recommended legislation after reflecting the concerns of Virginia trial lawyers and the state bar's Family Law Section.

2. Barriers of Entry to the Field

The relatively higher barriers of entry to the field and the relatively higher requirements to stay in the field are hallmarks of the system regulating mediators in Virginia. Only certified mediators may participate in court-connected mediation programs. However, the regulatory structure applies to certified mediators even when a mediator conducts a privately, rather than court, referred mediation. That regulatory system imposes on aspiring mediators a more rigorous training and mentoring program.
when compared to most states. The Director of DRS\textsuperscript{386} certifies mediators in four designations-General District Court, Juvenile and Domestic Relations District Court, Circuit Court-Civil, and Circuit Court-Family-but only after the mediator has satisfied the requirements for each designation.\textsuperscript{387} The Guidelines for the Training and Certification of Court-Referred Mediators *\textsuperscript{816} also impose good moral character requirements on mediators seeking certification to join the Virginia Supreme Court's roster of mediators.\textsuperscript{388}

Virginia's regulation of mediators includes several procedures designed to give the Director of DRS early and continuing assessments of the quality of certified mediators. First, to become a certified mediator, the trainee must complete a minimum number of hours of training.\textsuperscript{389} Trainers must certify that the trainee has completed the approved course.\textsuperscript{390}

Second, unlike any other state regulatory system analyzed in this article, Virginia requires trainees to complete observations\textsuperscript{391} and co-mediations\textsuperscript{392} *\textsuperscript{817} with a mentor certified by the DRS as trained and sufficiently experienced to mentor new mediators.\textsuperscript{393} Mentors may recommend to the Director of DRS that an applicant should join the roster, receive additional training, or choose another career path.\textsuperscript{394}

Third, the Virginia Supreme Court requires mediators to obtain recertification for each certified designation every two years. Mediators seeking recertification in all designations must complete a minimum of 5 mediations or 15 hours of mediation during the prior two-year period.\textsuperscript{395} They must also complete an additional eight hours of training related to their designation, including two hours of mediation ethics instruction.\textsuperscript{396} The Director of DRS may consider party evaluations or any other written communications about the performance of the mediator seeking recertification.\textsuperscript{397} Persons denied recertification cannot hold themselves out as certified mediators. They cannot mentor applicants and they cannot train *\textsuperscript{818} applicants who seek certified status.\textsuperscript{398} About 200 rostered mediators do not recertify each year.\textsuperscript{399}

The frequent recertification process also discourages persons only casually interested in mediation from staying on the court's roster. The process requires truly dedicated mediators to show they are “sharpening the saw” on a regular basis by conducting mediations\textsuperscript{400}

The Executive Secretary of the Supreme Court (Executive Secretary)\textsuperscript{401} may de-certify mediators who engage in conduct that reflects adversely on their impartiality or mediation skills, or prejudices the proper administration of justice.\textsuperscript{402} Certified mediators also have an affirmative duty to advise the Executive Secretary of any felony convictions, convictions involving moral turpitude, or the loss of a professional license.\textsuperscript{403} The Executive Secretary may also deny certification to an applicant who has any history of these events.\textsuperscript{404}

3. Ethics Code and Advisory Opinions

Virginia has also developed a code of ethics that imposes mandatory requirements on certified mediators. The requirements consist of the Standard of Ethics (SOEs)\textsuperscript{405} adopted by the Judicial Council of Virginia\textsuperscript{406} *\textsuperscript{819} and four Virginia Supreme Court rules governing the professional conduct of lawyers or lawyer-mediators.\textsuperscript{407} The legislature has passed a number of statutes governing court-referred dispute resolution and mediation programs,\textsuperscript{408} with specific statutes governing the qualification of neutrals,\textsuperscript{409} the standards and duties of neutrals,\textsuperscript{410} the effect of a mediated settlement agreement,\textsuperscript{411} and grounds for vacating settlement agreements.\textsuperscript{412}
The Virginia Supreme Court has considered establishing an ethics advisory panel, but has not done so to date. In the past, the DRS’s newsletter Resolutions in its “Reader’s Response” column framed an ethical issue and sought analysis of the issue from certified mediators who read the *820 newsletter. The Virginia Supreme Court also publishes at its ADR website two legal ethics opinions on the unauthorized practice of law issued by the Standing Committee on Legal Ethics of the Virginia State Bar.  

4. Guidelines for Interacting with the Legal World

i. Confidentiality in Mediation

The regulatory infrastructure also provides substantial guidance to mediators as they interact with the legal world. Virginia has statutes governing confidentiality that create an evidentiary privilege with reasonably certain boundaries. The statutes set out clear exemptions to mediation confidentiality. One exception allows disclosure of communications “to the extent necessary for the complainant to prove [mediator] misconduct and the neutral to defend against such complaint.”  

ii. Unauthorized Practice of Law Guidelines and Mediator Immunity

Virginia is one of three states discussed in this article that offers guidance to mediators about the unauthorized practice of law. The Director of DRS researched and wrote the discussion found at the Virginia Supreme Court’s website in consultation with members of the bar and the mediation community. The State Justice Institute provided the grant money used to support her 18 month project.

*821 Virginia statutes confer on certified mediators a qualified immunity that applies even in the private referral context.  

5. Public Oversight of Virginia Mediators Through a Complaint System

i. Introduction

The regulatory infrastructure not only gives the Virginia Supreme Court significant control over who enters the profession, but the infrastructure also gives the court significant control through its grievance system over the quality of the services provided by those mediators. It also gives the court the ultimate ability to remove poorly trained, unskillful, or morally unfit mediators from the roster of certified mediators.  

ii. Staff Function: Complaint Intake Process

DRS encourages mediation parties and participants to submit evaluations of their mediations on the Client Evaluation Form. The party evaluates whether the case was appropriate for mediation, the total number of hours he or she spent in the mediation session, and the number of sessions. The party also evaluates whether the process was helpful, whether it ended in an agreement, whether the party would use mediation again, and whether he or she would recommend the mediator to others. The evaluation form also provides a five-point scale ranking system that covers the skills and attributes of the mediator.
last eight years, DRS has received 25,000 participant evaluations, all of which the Director of DRS or her staff have read. The Director of DRS has reported that, overall, the feedback about mediator performance is positive.

When an evaluation raises a potential ethical issue, the Director of DRS contacts the mediator. At this time, the Director of DRS will initiate a conversation about the lessons the mediator may have learned as a result of the mediation or the evaluation. They may also discuss better practice approaches. That conversation will also lead in one of two directions. First, the Director of DRS may conclude that the matter does not state a claim under the SOEs. Alternatively, the Director of DRS will decide that an ethical breach may have occurred. She will then forward to the dissatisfied participant information about filing a formal complaint.

DRS accepts complaints only after the parties have completed the mediation. According to the Director of DRS, this ensures that the pending complaint cannot influence the ongoing mediation or be used impossibly to try to change the outcome of mediation. Any person with personal knowledge of the mediator’s actions or behaviors may file a formal complaint. Complaints come from a number of sources: parties, co-mediators, mentors, trainees, or the referring court. Persons have filed complaints against co-mediators, mentors, trainers, mediators, and mediation organizations.

iii. Staff and MCP Functions: Facial Sufficiency Analysis and Investigation of Formal Complaints

The Mediator Complaint Panel (MCP) reviews only formal complaints. The Complaint Procedures define the MCP as composed of “two members of the Dispute Resolution Services Advisory Council (who are not members of the Mediator Review Committee) and the Director of the DRS . . . .” The panel members currently include the Director of DRS and two non-lawyer certified mediators. The Executive Secretary of the Supreme Court of Virginia appoints the panel members to two-year staggered terms. The Director of DRS and one other member make a quorum of its members for any authorized actions.

Within 30 days of receipt by the DRS of the complaint, the MCP meets in person or by conference call to determine whether, if the facts alleged are taken as true, they indicate that the mediator has failed to comply with the SOEs. The Director of the DRS calls this step in the process the determination of “facial sufficiency.” If the MCP concludes that the alleged facts could not be considered a violation of the SOEs, it dismisses the complaint. The Director of DRS conveys this decision in writing to both the complaining party and the mediator. However, the MCP can also conclude that the mediator, while not in violation of the SOEs, should still obtain additional training or mentorship. Thus, the early warning system set up in Virginia allows the regulators to intervene early to prevent future harm to mediation parties even when the mediator has not crossed any ethical boundaries. The mediator may simply need coaching on skills, mediation theory, or ethical considerations.

If the MCP concludes that the mediator has possibly violated the SOEs, it sends a letter to the mediator with a copy of the complaint. The complaining person also gets a copy of this letter. The mediator may respond to the MCP’s letter.
within 20 days. The complaining person receives a copy of this response. After reviewing the response of the mediator, the MCP may dismiss the complaint. The Director of DRS sends a copy of the dismissal to the mediator and the complaining party. Accordingly, throughout this process, the complaining party knows how the MCP is handling his or her complaint.

The MCP will begin an investigation of the complaint in two circumstances. First, it will investigate the complaint if the mediator fails to respond to the MCP's letter. Second, the MCP will investigate the complaint if the mediator's response to the letter does not adequately address the concerns of the panel. The process typically moves forward in two ways. As the first step in either process, the Director of DRS, as the “investigative arm of the panel,” will interview the complainant, the mediator, and any other parties with information about the complaint. She will also review any pertinent documents.

*826 iv. MCP and Review Committee Functions: Complaint Resolution Alternatives

Next, the Director of DRS will report her investigative findings to the other members of the MCP. The MCP may then decide, as the first process alternative, to facilitate a meeting between the complainant and the mediator. This meeting may lead to a settlement of the complaint to the satisfaction of the complainant, the mediator, and the MCP. If the meeting does not result in a settlement, however, or if the MCP determines a meeting is not appropriate, the MCP applies the second process alternative and refers the matter to the Mediator Review Committee (Review Committee).

The Complaint Procedures define the Review Committee as composed of “three members of the Dispute Resolution Services Advisory Council (who are not members of the [MCP]) and two certified providers of mediation services.” The Executive Secretary appoints the members of this committee to two-year staggered terms. A judge, three attorney-mediators, and one non-attorney mediator comprise the current Review Committee. Four of its members make a quorum. They may act based on a simple majority vote.

The Review Committee studies the complaint, the mediator's response, the MCP's concerns, and the results of the investigation. Within 60 days from the time the MCP has referred the matter to the Review Committee, it sets an informal hearing. At that time, the parties may present witness testimony, documents, or other information in support of or in opposition to the complaint. Legal counsel may appear for any participating person. But, as the Complaint Procedures emphasize: “[T]he focus of the proceeding will *827 be on dialogue with the parties themselves.” The Complaint Procedures do not establish the burden of proof required to prove a violation of a SOE.

v. Review Committee Function: Imposition of Sanctions

Within 15 days of the close of the informal hearing, the Review Committee shall issue a written decision. If the Review Committee finds the mediator has breached the SOE or has otherwise engaged in poor practice, it may impose a range of sanctions. The sanctions include:

1. sending a formal letter identifying the corrective action necessary;
2. notifying the dispute resolution center, court service unit, or other entity with whom the mediator is affiliated of the complaint and its results;
3. requiring one or more consultations or co-mediations with a “mentor” selected from the list maintained
by the Review Committee; [4] requiring some form of group or individual training; or [5] decertifying the mediator. 470

Unlike the Florida disciplinary system, the Virginia Review Committee has no authority to order the mediator to pay the cost of the mediation, any other damages the complaining person may have suffered, the cost of the complaint process, or the cost of any subsequent mediation. In that sense, its “restorative” powers are limited. The Review Committee advises the mediator of its decision to impose corrective action or sanctions by letter. 471

If the Review Committee decertifies a mediator, the mediator may apply for recertification after two years from the date of the Review Committee's decision. 472 If the Director of DRS denies the application for recertification, the mediator may reapply every six months. 473 The Complaint Procedures do not indicate what additional information the Director of DRS may consider in her decision to recertify the mediator. 474

vi. Executive Secretary Function: Requests for Review or Reconsideration

If, at any step in this process, the Director of DRS, the MCP, or the Review Committee dismisses the complaint, the complaining person may request a review by the Executive Secretary of the material gathered in the investigation. 475 The Executive Secretary may uphold the dismissal or reopen the complaint and send it to the next step in the process. The Executive Secretary may also request the Review Committee to reconsider any decision it has made. 476 The Complaint Procedures provide that the Review Committee's decision on reconsideration is final. 477

If the Review Committee imposes corrective action or a sanction, the mediator may also request the Executive Secretary to permit reconsideration of the decision and an opportunity to be heard. 478 The mediator must submit his or her request in writing within 30 days of any notification from the Review Committee of its decision. 479 The Executive Secretary must respond to the mediator's request within 15 days of his reconsideration of the matter, or in the event the mediator exercises his or her right to be heard at a hearing, within 15 days after the close of the hearing. 480 The Executive Secretary's decision on any request for reconsideration is final. 481 Unlike Florida, no right to appeal beyond the Review Committee exists in Virginia. 482

vii. Confidentiality in the Complaint Process

The Virginia grievance process moves forward under statutes and SOEs governing confidentiality. As noted above, Section 801-576.10(vi) creates an exception to the evidentiary privilege that attaches to mediation communications under Section 801-576.10 for communications necessary to prove or defend a claim of mediator misconduct. 483 Section I of the SOE contains similar language and imposes a duty on the mediator to describe the scope of confidentiality and the exceptions to it. 484 A footnote to the Complaint Procedures states: “At the start of each mediation, the mediator should ensure that the parties and the mediator sign a waiver of confidentiality with respect to any investigation arising out of a complaint against the mediator.” 485 This footnote suggests that, in addition to the mandatory disclosures required under SOE section D, the mediator must also specifically create this waiver. 486
The public has access to any formal complaint filed with DRS and information about its disposition. The Director of DRS maintains these records indefinitely. Any other information disclosed during the investigation by any person remains confidential under Sections 8.01-596.9 through 8.01-596.10 of the Code of Virginia. The records assembled in connection with complaints that do not result in a formal action by the Review Committee remain confidential. However, the Director of DRS retains the information “until the next opportunity for the mediator to be considered for recertification.”

viii. Immunity for Persons Handling Complaints

Virginia has no statute or rule that provides immunity for persons handling disciplinary matters.

D. Georgia’s System of Regulation

1. History of Programs and the Regulatory System

Georgia has also created a well-planned and coordinated system of mediator regulation. Georgia, through rules of the Georgia Supreme Court, regulates the training, registration, re-registration, ethical standards, and grievance process for mediators who serve in court-connected cases. It also approves court-connected ADR programs in more than 90 counties in the state that serve an estimated population of eight million people. It provides the designers and administrators of these programs advice and guidance. The Georgia Office of Dispute Resolution (GODR) also plays a significant role in the regulation of mediators. [It] serves as a resource for ADR education and research; provides technical assistance to new and existing court-connected ADR programs; provides training to neutrals in court ADR programs; implements the Commission's policies regarding qualification of neutrals and quality of programs; registers neutrals who serve court programs; and collects statistics from court-connected programs in order to monitor their effectiveness.

The GODR Director serves at the pleasure of the Commission on Dispute Resolution. GODR's activities are funded as a line item in the judicial branch budget.

2. Barriers of Entry to the Field

The Commission on Dispute Resolution views the neutral registration project as essential to ensuring quality mediation and other ADR processes used in Georgia courts. The GODR registers neutrals for potential service in court-connected programs in five designations: General Mediation, Domestic Relations Mediation, Specialized Domestic Violence Mediation,
Arbitration, and Early Neutral Evaluation. Thus, unlike Virginia, Georgia recognizes only three designations of mediators. Only registered neutrals may serve in court-connected mediation programs. By rule, persons seeking registry must take a training course approved by the GODR.

*833 The GODR clearly states that neutral registration is not the same as certifying neutrals or licensing them. The office simply maintains a registry of neutrals who have met specified training requirements and passed a moral character screening. The registration does not apply to neutrals taking only private referrals. Once registered, the neutral contacts the court in which he or she plans to work. That court may impose additional training requirements under its local rules. Like Virginia, the mediator's registration remains current for two years.

The ADR Rules provide that documents considered in the registration or renewal of registration process cannot be subpoenaed, apparently for use in any subsequent judicial or administrative proceeding. However, applicants for registration agree to allow the GODR to review the surrounding circumstances when a professional organization has disciplined an applicant, including private reprimands. Additionally, the GODR conducts criminal background checks on initial applications and renewals of registration.

All applicants for the registry must show good moral character. An applicant must disclose if he or she has (1) been convicted of, pleaded guilty or nolo contendere to a violation of law, including DUI offenses; (2) been disciplined by any professional organization; (3) has had his or her professional privileges curtailed; or (4) relinquished a professional privilege or license while under investigation.

Like Florida, Virginia and Maine, trainees must satisfy an observation requirement. Unlike these states, General Mediation applicants are encouraged, but not required, to co-mediate with experienced mediators during the early stages of their careers. But the GODR does not require co-mediation as a prerequisite to registration. However, applicants seeking the Domestic Relations Mediator category must co-mediate at least two divorce or custody cases.

In addition, the Commission on Dispute Resolution sets standards for continuing mediation education that appear in Appendix B to the ADR Rules. They require six hours of additional CME during every two-year registration renewal cycle. The rule does not require, however, additional ethics training. The GODR can remove a neutral from the registry if he or she fails to meet the requirement.

The rules governing ADR programs encourage administrators of the programs to collect evaluations from parties and attorneys of mediators and the process. Like Virginia and Maine, these evaluations can lead to scrutiny of a mediator's ethical conduct in a grievance proceeding.

3. Ethics Code and Advisory Opinions

The state also has a well-formed set of Ethical Standards for Neutrals “serving court programs in Georgia.” The Georgia Ethical Standards include commentary from the drafters, as well as examples of the ethical dilemmas a mediator may face in the context of each rule. The Georgia Ethical Standards make a distinction between conduct which is “settled” and does not lend itself to the exercise of discretion on the part of the mediator and conduct that does require discretion.
rules governing “settled” conduct appear at Part V and include rules on referrals, fees, competence, advertising, and diligence. Parts I to III govern the core values of party self-determination, confidentiality, and impartiality of the mediator. Part IV deals with issues of fairness of the process and the settlement. Applicants for registration must certify on the application form that they have read the Georgia Ethical Standards, understand them, and agree to conduct mediations consistent with them.

The Georgia Supreme Court expressly permits the Commission on Dispute Resolution to issue ethics advisory opinions. The Commission on Dispute Resolution may also publish the decisions or rulings it or the Committee on Ethics makes in response to complaints against mediators.

*836 4. Guidelines for Interacting with the Legal World

i. Confidentiality in Mediation

Georgia does not have a statute governing confidentiality in mediation. Instead, a Supreme Court rule creates a broad “umbrella” of confidentiality, as well as an evidentiary privilege. It deems any statement made during the case intake process or in the mediation “confidential, not subject to disclosure. . . . [It] may not be disclosed by the neutral or program staff, and may not be used as evidence in any subsequent administrative or judicial proceeding.” It exempts only a limited number of communications from the protection of the rule, including “communications relevant to legal claims or disciplinary complaints brought against a neutral or an ADR program, but only to the extent necessary to protect the neutral or ADR program.” A separate rule governs communications between the mediator, program administrators, and the courts. In addition, parties may supplement this grant of confidentiality through contract provisions appearing in the agreement to mediate.

*837 In addition, two of the advisory ethics opinions issued by the Committee on Ethics analyze confidentiality in mediation.

ii. Unauthorized Practice of Law Guidelines and Mediator Immunity

The GODR is currently working on a set of guidelines about the unauthorized practice of law. Like Virginia and Minnesota, Georgia provides qualified immunity to mediators working in court-annexed or court-referred programs. A person cannot hold a mediator liable for any “statement, action, omission or decision made in the course of any ADR process unless that statement, action, omission, or decision is 1) grossly negligent and made with malice or 2) is in willful disregard of the safety or property of any party to the ADR process.”

iii. ADR Education of Bar

The Georgia Supreme Court has also taken an unusual step by requiring each member of the State Bar of Georgia to complete a one-time mandatory three-hour CLE program on dispute resolution and ADR processes. Lawyers who have studied the subject in law school are exempt from the requirement. Trained neutrals are also exempt. The court recommends that legal ethics programs include subjects on ethics in the ADR context. In addition, the court also amended the ethical considerations for lawyers imposing a duty to inform clients about “various forms of dispute resolution,” including reasonable alternatives to litigation.
5. Public Oversight of Georgia Mediators Through a Complaint System

i. Introduction

The Georgia Supreme Court ADR Rules require courts to establish procedures to monitor the performance of mediators and procedures to remove “incompetent, ineffective, or unethical neutrals from the roster of registered neutrals.” In 1999, Georgia developed a complaint process it calls the “Ethics Procedures.” The procedures deal with questions about a mediator’s ethical conduct or moral character. The GODR refers complaints dealing with other issues to the Committee on Training and Credentials of the Commission on Dispute Resolution. That committee handles complaints arising from persons to whom the court has denied registration because of inadequate training or other qualification issues other than moral character issues.

ii. Staff Function: Complaint Intake Process

Complaints may arise in a number of ways. Like Virginia, persons can easily find ethics information on the GODR’s website. But he or she will have difficulty finding the Ethics Procedures and a complaint form on the website. Anyone with knowledge of the subject matter of a complaint may file one with the GODR. Persons may file complaints against the court-connected mediation programs; persons conducting, administering or promoting training programs; and mediators.

The Ethics Procedures also require the GODR Director to conduct, on his or her own initiative, an investigation when GODR learns that a mediator has engaged in conduct that reflects on his or her moral character or fitness. Those events include situations when:

1. A court has convicted a mediator or the mediator has pled guilty or nolo contendere to a violation of law;
2. A professional organization has disciplined the mediator;
3. A professional organization has curtailed the mediator’s professional privileges;
4. The mediator has relinquished any professional privilege or license while under investigation; or
5. The mediator does not meet competency standards.

The complaint can take any form, but the person filing it must file a signed and written complaint. A GODR staff member acknowledges the complaint and keeps the complainant informed of its progress throughout the complaint process. GODR only forwards formal complaints to the neutral. A mediator or other respondent has 20 days to respond to the complaint.

iii. Staff Functions: Facial Sufficiency Analysis and Investigation of the Complaint
Like Virginia, the GODR Director makes a preliminary review of the formal complaint to determine if it is facially sufficient in stating a claim under the applicable rules governing ethics, training, or moral character. The Ethics Procedures, however, require the GODR Director to report all formal complaints to the Chair of the Committee on Ethics, who may determine independently that the GODR Director should refer a complaint to the Committee on Ethics. This additional step ensures that the Chair keeps abreast of all incoming complaints and that the GODR Director does not exercise his or her discretion in an inappropriate way. To date, the GODR Director has not found any complaint facially insufficient.

Like Virginia, the GODR Director next conducts an investigation of the complaint. The GODR Director typically has phone conversations with the complainant, the mediator, and any other knowledgeable persons to elicit relevant information.

iv. Staff and Committee on Ethics Functions: Complaint Resolution Alternatives

The Ethics Procedures also expressly grant the GODR Director the discretion to conduct a facilitated meeting between the parties as an attempt to resolve the matter early when the complaint “has arisen primarily from a misunderstanding” or when the GODR Director concludes that “the complaint does not rise to that level of seriousness required for Committee Ethics review . . . .” As in Florida and Virginia, this process allows the complaining party an opportunity to exchange information with the mediator and be heard. In the past five years, the GODR Director has not used the process, but instead has put all complaints into the formal complaint process.

v. Committee on Ethics Function: Formal Hearing

A mediator against whom a party has filed a complaint may request a hearing before the Committee on Ethics. If the mediator does not request a hearing, the Committee on Ethics may convene a hearing in its discretion. The respondent to the complaint gets notice of the hearing by letter, along with information that may assist him or her in preparing for the hearing, including a copy of the complaint and a copy of the procedural rules. The respondent may review at GODR's offices any “relevant written material submitted to the Committee by any person.” The responding mediator may not see any work product of the GODR Director, his or her staff, or the Committee, or notes of the witness interviews. The Committee on Ethics will also send copies of relevant documents to the respondent upon request. The respondent has the right to submit additional written material or witness testimony at the hearing.

The Committee on Ethics holds private, informal hearings in which the rules of civil procedure or evidence do not apply. The hearings are recorded and the respondent may request a copy of the tape. The Ethics Procedures take care to delineate the standard of proof, the right to counsel, the permissible forms of testimony, and the right to subpoena and sequester witnesses. It also permits the Committee to pay the fees and mileage of witnesses. It allows the Committee to seek contempt of court against witnesses who fail to appear. The Committee may, however, decide the matter based on the evidence before it even when a witness fails to appear. Like Florida, it may dismiss the complaint if the complainant fails to appear.

vi. Committee on Ethics Function: Imposition of Sanctions
The Committee on Ethics may impose a sanction if it finds that the mediator has violated the Georgia Ethical Standards or violated the good moral character requirement. It may also sanction a mediator who previously has suffered court or professional sanctions for acts or violations that would constitute a violation of the ethical standards or the moral character requirement.

Unlike the other states analyzed, the Ethics Procedures in Georgia contemplate two levels of sanctions. The first set of sanctions applies to situations in which the conduct of the mediator involves no moral turpitude, no potentially injurious risk to the public, no gross incompetence, or no repeated complaints. In those circumstances, the Committee on Ethics may require additional training, continuing education, and mentoring by an experienced mediator/mentor. Otherwise, the Committee may remove the mediator from the GODR’s registry and thereby prevent him or her from conducting any additional court-connected mediations. The Ethics Procedures identify two additional sanctions: restriction of the types of cases to be mediated in the future and suspension for a specified term. If the respondent does not comply with the sanctions, the Committee on Ethics may remove him or her from the registry, without an additional adjudicatory hearing.

The Commission on Dispute Resolution also may impose remedial sanctions earlier in the process. If the investigation reveals that a mediator may pose a threat of harm to mediation parties or to the public, the GODR may ask the Commission on Dispute Resolution to suspend the mediator until the parties complete the disciplinary proceedings.

A unique feature of the grievance process allows the Georgia Committee on Ethics to resolve the complaint in two ways. First, it may issue a written decision. Second, it may issue an advisory ethics opinion. As of September 2005, the Committee had issued six advisory opinions and two ethics opinion. The advisory opinions may arise when a complaint does not result in a sanction, but raises issues the Committee wants to discuss publicly. Ethics opinions relate to conduct giving rise to a specific complaint and can function as a sanction because the committee may, by rule, reveal the name of the mediator in the opinion.

The opinions serve an educational and cautionary role.

Georgia has a more formal appeal process than provided in Virginia's grievance system. If the Committee on Ethics issues a decision adverse to the respondent-mediator, the respondent may appeal the decision to the Commission on Dispute Resolution within 30 days of the date of the decision. A decision of the Commission on Dispute Resolution is final. It deliberates outside the presence of the Committee on Ethics and the parties on appeal.

The Commission on Dispute Resolution may resolve the appeal by setting the matter for another private hearing. However, the Commission on Dispute Resolution typically looks only at the official record, which includes correspondence between the parties and GODR, any evidence considered by the Committee on Ethics, and the recording of the hearing. It will accept briefs and hear oral arguments if the respondent requests those options. If it holds a hearing or oral argument, the Ethics Procedures provide that the respondent-mediator will provide an opening statement and argument, either pro se or through his or her counsel. Next, the Commission on Dispute Resolution may hear a statement from the complainant and any additional evidence if he or she shows good cause for expanding the record. The Commission on Dispute Resolution may also question the members of the Committee on Ethics about the basis for its decision. The Commission on Dispute Resolution has the same power as the Committee on Ethics to compel the testimony of witnesses, sequester them, pay their fees and expenses, and seek an order of contempt if they fail to appear. However, the hearing rules do not indicate that the Commission
on Dispute Resolution will take that testimony during the review process, unless it constitutes additional evidence, which the complainant may show good cause to offer. 591

Of the grievance systems analyzed in this article, the Georgia system is the only one that specifically sets forth the standard of review on appeal:
The Commission will not substitute its judgment for that of the Committee in regard to the weight of the evidence or facts, but may reverse or modify the original decision upon a finding that substantial rights of the appellant have been prejudiced because the Committee's findings, inferences, conclusions or decision are:
(a) In violation of constitutional or statutory provisions;
(b) Beyond the authority of the Committee in either substance or procedure;
(c) Clearly erroneous;
(d) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted discretion. 592
These confusing standards of review fail to indicate when they support great deference to the decisions of the Committee on Ethics and when they circumscribe that committee's power. 593 The clearly erroneous standard typically applies to findings of fact and so apparently contradicts the instruction that the Commission on Dispute Resolution “will not substitute its judgment for that of the Committee in regard to the weight of the evidence or facts.” 594 The standards of review also seem to open every case to appeal 846 when the Committee on Ethics issues a sanction that affects the mediator's ability to earn a living by conducting court-referred mediations. 595 That sanction necessarily prejudices the “substantial rights of the appellant.” 596 Thus, the language of the Georgia Ethics Procedures does not clarify when the Commission on Dispute Resolution is likely to reverse or modify the decision of the Committee on Ethics. The language also reserves to the Commission on Dispute Resolution, in the form of ill-defined standards of review, great discretion.

viii. Confidentiality in the Complaint Process

The Ethics Procedures also govern the confidentiality that attaches to the complaint process, the identities of the parties, and the documents created in the process. 597 Part III provides that GDR keeps “mere grievances” confidential. 598 If the GODR Director, during her Part II(E) review, finds that the complaint does not rise to a level of seriousness under the Georgia Ethical Standards or the moral character requirements, those complaints remain confidential from public disclosure. 599

However, complaints forwarded to the Committee on Ethics are treated differently. They lose some of the confidentiality surrounding them. 600 The GODR may reveal publicly the complaint's existence, but cannot disclose the complaint itself or any response to it until after the Committee on Ethics makes its decision. 601 After that decision, GODR treats the complaint, response, and opinion as a matter of public record. 602 It may publish a synopsis of the case in the office's Symposium newsletter. 603 If the Committee of Ethics suspends a mediator from the court's registry, either before or after a final decision by the Committee on Ethics, or removes the mediator from the registry after a final decision, GODR disseminates this information to program directors throughout the state. 604 This action ensures that the de-listed mediator does not get any court-referred mediations inconsistent with the sanction. 605
Other exceptions to confidentiality exist. The Ethics Procedures waive the parties' right to confidentiality of mediation communications “to the extent necessary to allow the complainant to fully present his [or] her case and to allow the neutral to fully respond to the complaint.” 606 The Ethics Procedures intend the waiver to be narrow and to relate “only to information necessary to deal with the complaint.” 607 The procedures also instruct the Commission on Dispute Resolution, the Committee on Ethics, and the GODR to protect the privacy of all parties “to the fullest extent possible commensurate with fairness to the neutral and protection of the public.” 608

In a confusing paragraph, the Ethics Procedures seem to create an evidentiary privilege precluding the disclosure of statements made in the course of the GODR's investigation, or of statements made before the Committee on Ethics or Commission on Dispute Resolution during any private hearing held by these entities. 609 The procedures also protect from discovery notes and records pertaining to the investigation or hearing of the complaint of the members of the Committee on Ethics, the Commission on Dispute Resolution, or the GODR staff, including any tape recording of the proceeding. 610 The mediator or other respondent may have access to the tape recording in certain circumstances. 611

ix. Immunity for Persons Handling Complaints

Like Minnesota, the Georgia Supreme Court has provided qualified immunity for members of the Committee on Ethics, the Commission on Dispute Resolution, and the GODR staff against civil damages for any “statement, action, omission or decision” made by them during the investigation or hearing of an “ethics matter.” 612 Unlike any other state analyzed, the immunity extends also to individuals reporting to or testifying before the Committee, Commission on Dispute Resolution, or the GODR. 613 However, the immunity does not protect statements, actions, omissions, or decisions that are grossly negligent and made with malice. 614

E. Minnesota's System of Regulation

1. History of Programs and the Regulatory System

Minnesota, like Florida, is a recognized leader in the development and institutionalization of court-connected ADR programs. 615 The Minnesota legislature authorized in 1984 the first mandatory, court-connected ADR programs. 616 Two metropolitan areas first experimented with ADR. Hennepin County District Court in Minneapolis started with a non-binding arbitration program for civil claims of low value. In 1987, responding to enabling legislation, the court referred cases valued in excess of $50,000 to mandatory ADR. Ramsey County courts in St. Paul first experimented with family law mediation in 1986 in custody and visitation cases. The program expanded in the same year when the legislature provided clear guidance on when courts could refer cases to ADR. 617

After engaging in a two year process, an ADR Task Force recommended in 1989 statewide legislation to authorize use of ADR in civil cases. The Task Force responded to a request by the Minnesota Supreme Court and the Minnesota State Bar to “explore alternative methods by which the burden of the caseload upon the courts might be eased and the resolution of the legal problems for citizens facilitated.” 618 The legislature adopted statutes implementing a statewide program and required the Minnesota Supreme Court to adopt rules governing the programs. In turn, the court established the ADR Implementation Committee, which submitted its recommendations to the court in 1993. Out of that process, the Minnesota Supreme Court promulgated Practice Rule 114. 619
2. Barriers of Entry to the Field

Minnesota’s Supreme Court has created higher barriers to entry than aspiring mediators face in at least 35 other states. 620 It recognizes two types of “facilitative/hybrid neutrals” - civil and family - who are qualified to conduct mediations, mini-trials, med-arb, and other facilitative processes. It also recognizes two types of “adjudicative” neutrals and one type of “evaluative neutral,” which are not discussed in this article in detail. 621

The Minnesota Supreme Court allows on its roster of qualified neutrals only those persons who complete the training requirements set out by the Minnesota Supreme Court through courses approved by the Education & Organization Development Division of the State Court Administrator’s Office. 622 Trained mediators may easily find the applications for placement on the roster on the court’s website. 623 The state, unlike the four other states analyzed in this article, does not require applicants to observe experienced mediators. Unlike Florida, Virginia, and Maine, it does not require co-mediation experience. Neutrals who satisfy the requirements are then listed by areas of experience on the Minnesota Supreme Court’s website roster. Unlike Florida and Virginia, the court does not “certify” mediators or require recertification or requalification after their original placement on the court’s roster. Mediators, however, may allow their roster registration to lapse if they fail to pay an annual fee or fail to satisfy continuing education requirements. 624

Minnesota requires facilitative/hybrid neutrals to attend 18 hours of ADR-related continuing education every three-year period. All other neutrals must attend nine hours of ADR-related continuing education training in a three-year period. 625 Despite these relatively rigorous requirements for entry to the field and maintenance of roster status, Charles Pou, Jr. would still call this system a low hurdle/low maintenance program. 626

The Minnesota Supreme Court does not do a background check or moral character review of applicants. However, the application for placement on the roster requires applicants to disclose if they are licensed professionals. If so, they must disclose if the applicant’s license is suspended or has ever been revoked. The applicant must also disclose if a profession has refused him or her membership or practice rights and whether a profession has ever banned, dropped, or expelled the applicant. 627 If a profession has revoked an applicant’s license, the Minnesota Supreme Court will not allow him or her to join the neutral roster. If a profession has suspended an applicant's license, the neutral cannot conduct ADR processes during the time of the suspension. 628

3. Ethics Code and Advisory Opinions

The Minnesota Supreme Court approved a Code of Ethics for neutrals in 1997. 629 In 2000, it began enforcing the Minnesota Code of Ethics. 630 The code appears at the Appendix to Rule 114 of the Minnesota General Rules of Practice, which a person can easily access at the court’s webpage. The introduction to the Minnesota Code of Ethics explains: “In order for ADR to be effective, there must be broad public confidence in the integrity and fairness of the process.” 631 The introduction reminds neutrals of their duties to the parties, to the courts, and to the improvement of ADR processes. It instructs mediators to “observe high standards of ethical conduct” and instructs those persons applying the code to construe it to “advance those objectives.” 632
The Minnesota Supreme Court intends the code to guide neutrals, to inform and protect the consumers of ADR services, and to ensure the integrity of the ADR processes. The short code sections are accompanied by longer comments by the Advisory Task Force explaining and illustrating the meaning and purpose of the rule. The Introduction to the Code of Ethics expressly states that the “[c]omments are intended as guides to interpretation but the text of each rule is authoritative.”

The Minnesota Code of Ethics applies to individuals and organizations approved by the ADR Review Board as qualified under Rule 114 to act as neutrals in court-referred cases. It also applies to non-rostered neutrals whom the court appoints to handle ADR processes other than mediation or med-arb in court-connected cases. Thus, the Code would not apply to non-rostered mediators who mediate cases referred privately rather than through the courts. The introduction to the Code advises approved neutrals that they consent to the jurisdiction of the ADR Review Board and agree to comply with the Minnesota Code of Ethics. Failure to comply with the Code gives the Minnesota Supreme Court authority to remove the neutral from the roster of neutrals or take other authorized action.

With an apparent eye to possible malpractice claims and the standards of negligence that might support them, the introduction to the Code states: “Violation of a provision of this Code shall not create a cause of action nor shall it create any presumption that a legal duty has been breached. Nothing in this Code should be deemed to establish or augment any substantive legal duty on the part of neutrals.” Minnesota is unique in providing this language, which the state hopes will protect mediators from lawsuits based on the Minnesota Code of Ethics.

Minnesota does not offer neutrals ethics advisory opinions. Members of the ADR Review Board discussed this service recently, but decided that the Board, a volunteer group, does not have the resources to provide the service.

4. Guidelines for Interacting with the Legal World

i. Confidentiality in Mediation

The Minnesota Supreme Court has created two rules governing confidentiality in mediation. One creates an evidentiary privilege against the disclosure of statements and documents produced in mediation. It also protects the notes, records, and recollections of mediators under any circumstances, unless (1) the mediator and the parties waive confidentiality of the materials or (2) the disclosure is required by law or other professional codes. The second rule governs the parties' communications with the mediator and the mediator's communications to the court during and after the mediation.

The legislature has protected mediation communications and documents from disclosure in court if the parties execute an agreement to mediate. It has also made a mediator incompetent to testify in subsequent proceedings, except in three circumstances, including administrative hearings involving professional misconduct. Although the language is less clear than in the other states analyzed, it indicates that a neutral could defend against a complaint, but it says nothing about when the complaining party may breach confidentiality to support a complaint against a mediator.

ii. Unauthorized Practice of Law Guidelines and Mediator Immunity
The ADR Review Board has not developed any guidelines for the unauthorized practice of law in the context of mediation. Only the Lawyers Professional Responsibility Board has issued advisory opinions on the unauthorized practice of law and they do not relate to mediation.

Like Virginia and Georgia, Minnesota has created a qualified immunity for mediators.

5. Public Oversight of Minnesota Mediators Through a Complaint System

i. Introduction

The complaint process in Minnesota reflects the depth of knowledge found in its mediation community and the state bar. It also reflects the leadership of the Chief Justice of the Minnesota Supreme Court and the dedication of many hours of volunteer time by the system's designers. For instance, a well respected ADR scholar-James Coben, Associate Professor and Director of the Dispute Resolution Institute at the Hamline University School of Law-currently sits on the ADR Review Board and played an active role in the design of the complaint handling procedures. His colleague, Professor Bobbie McAdoo, also served on the ADR Review Board and joined him in the early design process. Professor Nancy Welsh served on the Minnesota ADR Implementation Committee and also served on the ADR Review Board.

ii. Staff and ADR Review Board Functions: Complaint Intake Process

Persons who are unhappy after participating in mediation may easily find a complaint form at a dedicated webpage tab called “Filing Complaints.” The webpage explaining the process instructs unhappy parties to mail the signed complaint in writing to an address appearing on the webpage. The webpage also makes the Minnesota Code of Ethics easily accessible and also provides the membership of the ADR Review Board. In addition, the webpage makes available the Minnesota Code of Ethics Enforcement Procedure (Enforcement Procedure). In other words, an unhappy party can easily find all the documents relevant to his or her complaint at one easily accessed web page under a tab identified as: “For Court Users-Alternative Dispute Resolution.”

The complaint form requires the name and contact information for the complainant and the neutral. It asks for the names of parties involved and the date of the “incident.” It only requires a general description of the facts that form the basis for the complaint. Finally, the complaint form requires the complainant to certify that “everything contained in the complaint is correct to the best of my knowledge and belief.”

The authors of the Enforcement Procedure have provided a succinct and clearly written set of procedures that cover qualified neutrals on the Minnesota Supreme Court's roster or neutrals serving as court appointed mediators. In addition, the Enforcement Procedure applies to complaints under the Minnesota Code of Ethics, but the ADR Review Board may also consider “the full context of the alleged misconduct, including whether the neutral was subject to other applicable codes of ethics . . . .” Thus, in Minnesota, as in Virginia, a mediator may be subject to concurrent, but perhaps inconsistent, rules of professional conduct.
iii. ADR Review Board Function: Sufficiency Analysis of Complaint

The procedure requires the ADR Review Board to determine whether the allegations, if true, state a violation of the Minnesota Code of Ethics. If the complaint is insufficient to state a claim, the ADR Review Board must dismiss it and notify in writing both the complainant and the neutral of its ruling. 665

iv. ADR Review Board Function: Investigation of the Complaint

If the complaint survives this analysis, the ADR Review Board may make a review, begin an investigation, or request additional information needed to make a decision about the appropriate process. The mediator will receive, by certified mail, a copy of the complaint, a list identifying possible violations of the Minnesota Code of Ethics, and a request for a written response. Like Florida, but unlike Virginia, when the mediator fails to respond to the complaint, the ADR Review Board deems the allegations admitted by the mediator. 666

v. ADR Review Board Function: Complaint Resolution Alternatives

At this stage of the procedure, the ADR Review Board may recommend that the parties attempt to resolve in mediation the issues raised in the complaint. Both parties, however, must consent to the process. The ADR Review Board offered this option once, but the neutral declined to use the process. 667 If the parties reach an agreement, the ADR Review Board will dismiss the complaint, but may impose any sanction to which the parties agree. If the mediation does not result in an agreement, the ADR Review Board “shall determine whether to proceed further.” 668

The next step in the process appears to be a “review and investigation” that leads to an “action” by a panel of the ADR Review Board. 669 Both the complainant and the mediator receive, by certified mail, notice of the ADR Review Board’s action. Only the mediator may request a hearing before a three-member panel of the ADR Review Board to contest proposed findings or sanctions. 670 The Enforcement Procedures quickly recite the mediator’s due process rights afforded him or her at the hearing. They state: “The neutral shall have the right to defend against all charges, to be represented by an attorney, and to examine and cross-examine witnesses.” 671 The ADR Review Board may accept any evidence it deems necessary and construes the relevancy of the evidence liberally in favor of admission to the electronic recording of the proceedings. However, the ADR Review Board may only consider previous or concurrent ethical complaints to the extent that they show a pattern of related conduct, “the cumulative effect of which constitutes an ethical violation.” 672 The ADR Review Board may issue subpoenas for the attendance of witnesses, the production of documents, and other evidentiary materials. If the mediator does not request a hearing, the ADR Review Board’s decision becomes final. 673

vi. ADR Review Board Function: Imposition of Sanctions

The ADR Review Board may impose sanctions, but as in Florida, only on clear and convincing evidence of an ethical violation. The ADR Review Board may impose five stated sanctions, but the rule seems to permit other sanctions as well. 574 The ADR Review Board may:

1. Issue a private reprimand;
2. Designate the corrective action necessary for the neutral to remain on the roster;
*860* (3) Notify the appointing court and any professional licensing authority with which the neutral is affiliated of the complaint and its disposition;

(4) Publish the neutral's name, a summary of the violation, and any sanctions imposed; 675

(5) Remove the neutral from the roster of qualified neutrals, and set conditions for reinstatement. 676

This portion of the Enforcement Procedure has no advisory comments indicating what factors the ADR Review Board may consider in imposing each sanction. The procedures do not contemplate economic sanctions.

vii. Full ADR Review Board Function: Appeals

Within 14 days after receipt of the panel's decision, the mediator or the complainant may appeal the decision to the full ADR Review Board. The full ADR Review Board conducts a de novo review of the record and the appealing party must pay to transcribe that record. 677 The decision of the full ADR Review Board is final. 678

viii. Confidentiality in the Complaint Process

As noted above, the state's confidentiality statute makes a neutral incompetent to testify about mediation communications or conduct. 679 It makes the mediator competent to testify about any statement or conduct that could “constitute professional misconduct.” 680 Accordingly, the accused mediator may offer evidence to defend a grievance, but it is not clear from *861 the statutory language that the complainant or any other participant in the mediation is also competent to provide evidence about misconduct.

The Enforcement Procedure contains two provisions governing confidentiality in the complaint process. The first provision waives any confidentiality that attaches under Rule 114.08(e) to the mediator's notes, records, or recollections. 681 The second rule keeps confidential all files, records, and proceedings of the ADR Review Board. In addition, the rule permits disclosure of these materials at any time in the process between ADR Review Board members. It allows the mediator to review any file maintained by the ADR Review Board, excluding its work product. 682 The complainant, however, does not have access to these materials. The rule also permits disclosures of the ADR Review Board's files when otherwise required or permitted by rule or statute. 683 The mediator may also waive the confidentiality of the materials assembled for the proceeding. 684 In addition, the Enforcement Procedure creates an absolute evidentiary privilege for communications made in the enforcement process. 685 The procedures, unlike those in any other state analyzed, provide that no statement made in the disciplinary proceedings can serve as a basis for a civil lawsuit brought against the person making the statement.

If the ADR Review Board imposes a sanction it becomes public, but its files and records otherwise remain confidential. 686 Unlike Virginia and Georgia, the language of the rule suggests that no one can disclose information about the allegations in the complaint or the mediator's response. Unlike Florida, but like the other states, the procedures seem to preclude any public statements about complaints that do not result in a sanction. However, the ADR Review Board has interpreted the Ethics Enforcement Procedure broadly to allow public disclosure of the sanction imposed on a mediator and the provisions of the
ix. Immunity for Persons Handling Complaints

Finally, like Georgia, the Enforcement Procedure provides a qualified immunity to ADR Review Board members and staff for their official conduct.

F. Maine’s Regulatory System

1. History of Programs and the Regulatory System

In 2005, the Honorable Howard H. Dana, Jr., serving as the Maine Supreme Judicial Court’s liaison to its ADR Planning and Implementation Committee and Chair of the Court’s Advisory Committee to the Court ADR Service (CADRES), published a history of the use of ADR in Maine. Maine experimented as early as 1977 with a court-connected mediation pilot project in several district courts handling small claims. The legislature funded the program in 1979 and authorized it in 1980. Today, every district court with a small claims docket refers cases to mediation.

Also in 1977, Maine experimented with a court sponsored voluntary mediation service for domestic relations cases. On March 17, 1983, the Chief Justice of the Supreme Court, reflecting the positive conclusions of a report he had received a year earlier, ordered attorneys to discuss ADR options with their domestic relations clients. He also encouraged judges to assess settlement efforts and to recommend mediation when appropriate. In addition, he instructed courts to give scheduling priorities to cases in which parties had attempted to mediate. A legislative commission reported in 1984 the need for greater use of ADR in domestic relations cases, but stopped short of recommending a mandatory program. Nonetheless, the legislature mandated mediation in contested cases involving children. A 1995 study generally viewed the program effective. In a later study, the authors concluded that it produced settlements in less than half the time it took to litigate resolutions, with the parties more often agreeing to joint legal custody in mediation.

The next pilot project took place in the superior courts of two counties from 1988 to 1990. Parties in non-domestic civil cases could opt to use an ADR process not typically offered in a pilot program. Dana describes it as early neutral evaluation with lawyers who had received only three hours of training. In 1995, the Maine Supreme Court designed another pilot project in four counties in which parties worked with a neutral attorney who explored settlement possibilities with the parties and reported to the court the types of ADR processes that the parties might use successfully to resolve the dispute. Eventually, the court would issue a case management order outlining the ADR processes that the parties would pursue.

Finally, a divided Supreme Judicial Court adopted Rule 16B of the Maine Rules of Civil Procedure, effective January 1, 2002. This rule requires all parties who have filed or removed civil actions to a Superior Court to engage in a suitable ADR process. The rule exempts nine types of actions from the requirement, including personal injury cases where the damages are estimated to be less than $30,000, cases involving mortgage foreclosures or other secured transactions, prisoner actions, cases in which parties have already attempted a settlement through an ADR process, and cases in which a court concludes-based on “good cause shown”-that they should be exempted from the requirement. The program is funded by a dedicated fund.
2. Barriers of Entry to the Field

Maine has imposed relatively high barriers to entry on persons seeking to join one of the five rosters of approved mediators. For instance, listing on the Small Claims Roster requires the lowest level of training, but the requirements exceed those of most states.706

Applicants can download the roster application form from the court's website.707 The form asks for the applicant's educational background, employment experience, formal dispute resolution training, other rosters on which the applicant has served, experience as a neutral and the nature of that experience, the district and superior courts in which the applicant is willing to work, whether the neutral will offer pro bono services in two cases per year, the types of cases the mediator seeks as referrals, the names and contact information of two references, a list of the professional organizations to which the applicant belongs, and professional licensing information. All applicants must agree to be available for at least four mediations per year as provided in the ADR Provider Agreement each successful applicant must sign.708

The ADR Director screens the applications at least twice a year.709 She may recommend to the Court Alternative Dispute Resolution Service Committee (CADRES Committee) a waiver of any requirement for any particular applicant.710 The ADR Director accepts or rejects applicants based on the criteria set out in the appendices to the Maine Operational Rules.711 The applicant's acceptance on any roster is conditional on the outcome of a criminal background investigation conducted by the Administrative Office of the Courts. 712 The applicant starts this process by completing a separate form entitled “Background Investigation Information.” The form indicates that the review will include inquiry into any criminal or motor vehicle arrest records, conviction records, or other regulatory agency records.713 Unlike the other states analyzed, this abbreviated moral character review does not consider disciplinary or other actions taken by regulators of the applicant's profession of origin.

Maine has no formal certification process, but instead maintains a roster of mediators who have satisfied the specified training requirements imposed by the Maine Supreme Judicial Court.714 It does not require periodic re-registration on the roster, but it does impose substantial continuing education requirements on all rostered mediators.715 Small Claims mediators must complete eight hours of continuing education every year.716 Superior Court, General Civil Litigation, Domestic Relations, and Land Use mediators must accrue 15 hours of continuing education training every year.717 The training should include mediation process training, substantive law or court procedure in the area of practice, and standards of ethical conduct. Like Florida and Virginia, and unlike Georgia, the rules impose minimum hours of ethics training each year.

3. Ethics Code and Advisory Opinions

“[Judicially-rostered ADR [n]eutrals” must comply with the CADRES Code of Conduct,718 the Maine Operational Rules, and all other rules, policies, and procedures of the courts, including protocols for domestic abuse screening and for creating safe environments for mediation parties.719 The rules also require rostered mediators to comply with “any other professional code that governs the activities of the neutral.”720 As noted above, the rules do not require specific training in ethics for inclusion on the roster, but the two training programs available in Maine dedicate some time to the topic.721

Maine does not issue ethics advisory opinions directed to mediators.
4. Guidelines for Interacting with the Legal World

i. Confidentiality in Mediation

Rule 16B of the Maine Rules of Civil Procedure, governing ADR in Superior Courts, sets out the scope of confidentiality in mediation in those courts. It instructs mediators doing court-connected mediations not to disclose any “conduct, statements, or other information acquired at or in connection with the ADR conference, without the ‘informed written consent’ of the parties.” The court also outlines the following exceptions to confidentiality. The mediator may disclose (1) information that is necessary as part of conducting the ADR process or reporting its result to the court; (2) information concerning the abuse or neglect of any protected person; (3) information concerning the intention of one of the parties to commit a crime, or the information necessary to prevent the crime, or to avoid subjecting others to the risk of imminent physical harm; or (4) as required by statute or court order. The Code of Conduct covers the scope of confidentiality in two brief paragraphs that lack specificity about the nature of any exemptions from confidentiality. Taken together, the rules govern disclosures by the mediator, but not by other participants in the mediation.

Also, Rule 408 of the Maine Rules of Evidence gives a limited evidentiary privilege to “conduct or statements made in compromise negotiations or in mediation.” A party could not introduce these communications into evidence to support or refute any substantive issue in dispute, but they could still introduce them if the communications relate to non-substantive issues. Maine does not have a separate statute governing confidentiality in mediation. In 2003, Maine considered adopting the Uniform Mediation Act, but did not do so.

Under Rule 16B and Part II of the Maine Operational Rules, mediators must submit on a form provided a written report to the CADRES office or to the court. Rule 16B requires the mediator to report, in the event parties fail to reach settlement, “any agreements of the parties on matters such as stipulations, identification and limitation of issues to be tried, discovery matters and further alternative dispute resolution efforts.” The report also must indicate whether the parties failed to reach agreement. If the neutral fails to file the report within the required ten-day period, the rule instructs the parties to make the report. The reporting requirements of the Maine Operational Rules are vague and inconsistent with the requirements of Rule 16B. They require a report at the “conclusion of each ADR session” whether it ends in a settlement or not. The report states the outcome of the mediation session “and such other information requested.”

ii. Unauthorized Practice of Law Guidelines and Mediator Immunity

Like Georgia and Minnesota, Maine does not offer mediators guidelines on the unauthorized practice of law. The Maine Professional Ethics Commission of the Board of Overseers of the Bar has issued at least two opinions on unauthorized practice of law in the context of mediation: one relating to business structures and the other to conflicts of interest.

A statute grants absolute immunity from civil liability to ADR providers under contract with the Judicial Department of Maine to the same extent provided to governmental employees under the Maine Tort Claims Act, so long as the provider acts within the scope of the provider's or the director's duties. The Maine Operational Rules give immunity to “ADR providers under contract with the Judicial Branch” from liability for actions taken in connection with the Maine Operational Rules.

5. Public Oversight of Maine Mediators Through a Complaint System
i. Introduction

The ADR Director acknowledges that Maine has a much more informal system of regulating the quality of services provided by mediators in court-connected programs. She believes the informality reflects the state's lower population, its culture, and its legal culture. She notes that the informality may express itself most notably in the grievance context in the amount of discretion the ADR Director has in identifying violations of the Code of Conduct, investigating the claims, and imposing sanctions on the mediator.

ii. Staff Function: Complaint Intake Process

While the website of the Maine Supreme Judicial Court offers consumers of ADR services helpful information about ADR processes, it still does not make easily available information about filing a complaint against a mediator. The court recently created active links to the Code of Conduct, the court's ADR rules, and the ADR referral rules. But the website does not have a dedicated tab for complaints against mediators as does Virginia, Georgia, and Minnesota. It does not post on the website copies of a complaint form or advise to whom a person should make a complaint and how.

Like Virginia, the ADR Director may initiate a review of a mediator based upon feedback she receives on evaluation forms mediators distribute to mediation participants. The Exit Questionnaire assures parties that CADRES wants to know if the mediation was helpful and if each party was treated "fairly and professionally." It asks eight questions designed to elicit information about the mediator's conduct and effectiveness. It encourages parties to "comment further on your mediation session or the mediator" by contacting the ADR Director at an indicated phone number or e-mail address.

The Maine Operational Rules also authorize the ADR Director to initiate review of a mediator based on “the ADR provider's reports, complaints submitted in accordance with the [Maine] Operational Rules, an observation, or any combination of these sources.” The ADR Director may get complaints through the court clerk who has received a complaint about a mediator from the parties participating in a court-ordered mediation in that court. The ADR Director also has received complaints from other sources. In addition, the ADR Director will accept complaints by e-mail, unlike other state programs. Moreover, the complaint does not need to be in writing, signed, or certified by the complainant as in Florida, Virginia, Georgia, and Minnesota. Thus, in some ways, a party may have an easier time in lodging a complaint in Maine, as long as he or she can obtain contact information for the ADR Director.

The ADR Director keeps a log of complaints. She promptly acknowledges each complaint by a letter and expresses regret that the party is unhappy about his or her mediation experience.

iii. Staff Functions: Facial Sufficiency Analysis and Investigation of Complaints

The Maine Operational Rules allow the ADR Director to “screen the complaint and . . . discuss the complaint with the ADR provider or other participants in confidence.” She also determines whether the complaint is frivolous or fails to state a claim under the Code of Conduct. If she finds the complaint frivolous, she will contact the complaining party by phone to explain the basis for her determination.
The ADR Director's investigation of claims alleging a violation of the Code of Conduct may include observing the mediator in a mediation session. This observation gives her information about the mediator's style, philosophy, and technique. It also offers her the opportunity to discuss the observed session and the complaint received. She may then coach the mediator in more skillful approaches in mediation. She always contacts the mediator in writing and in person about a complaint. Maine, therefore, gives more discretion to the program director to identify possible ethics violations and to investigate those claims than any state analyzed, except Virginia.

iv. Staff Functions: Complaint Resolution Alternatives and Imposition of Sanctions

Maine uniquely gives its program director the discretion to take actions, make interventions, or impose sanctions without first holding any type of formal evidentiary hearing. Like Virginia, the ADR Director may impose a remedial action-like training or supervised mediation experience-even when she does not find a technical violation of an ethics rule. Under the rule, the ADR Director may impose a sanction-called an action-if she finds merit to the complaint. She suggests the needed action in a letter to the mediator.

As noted above, sanctions tend to require the accused mediator to observe or work under the supervision of an experienced mediator or to get additional training. The ADR Director has great discretion in imposing sanctions. Her purpose in imposing most sanctions is educative or “restorative.” In one situation, however, the ADR Director removed a mediator from the roster, and in four other situations apparently encouraged their voluntary resignation from the roster. Under Maine's more flexible process, the ADR Director expects the outcome to “fit the particular case . . .”

v. CADRES Committee Function: Appeals

If the mediator is not happy with the imposed sanction, the mediator may appeal the ADR Director's action to the CADRES Committee within 14 days from the date of the action letter. So far, no mediator has filed an appeal.

An unusual feature of the appeal process allows the complaining party and the responding mediator to mediate the dispute. If the parties do not choose to mediate the complaint or the mediation does not result in an agreement, the CADRES Committee conducts a review of the ADR Director's proposed action. The rule does not indicate the evidence the CADRES Committee may consider or its standard of review. It also does not outline the rights of the mediator in presenting evidence on appeal. The CADRES Committee may affirm, reject, or modify the ADR Director's proposed action or sanction.

vi. Confidentiality in the Complaint Process

Unlike the four other states analyzed, Maine has no rule or statute exempting mediation communications from confidentiality when they may relate to a claim of professional misconduct. Therefore, a complainant or mediator has no clear authority to breach confidentiality to support or defend against a claim.

In addition, no rule or statute specifically governs confidentiality in the complaint process. One rule, however, permits the ADR Director to discuss the complaint with the mediator and other mediation participants. The mediator may review the complaint and other information "developed by the Director." The rule does not make clear whether the mediator has access to the ADR Director's notes, interview summaries, and other work product. The CADRES Committee must notify the mediator.
and the ADR Director of any decision it makes on appeal. Accordingly, the rules governing the complaint process make it unclear what types of information he or she may access to better understand the complaint. In addition, the information available to the complaining party seems quite limited under these rules. One rule allows the ADR Director to inform the complainant about the resolution of the complaint.

Moreover, the rules do not clearly indicate what information the program director can disclose to the public. The state's Sunshine Act would support the disclosure of the allegations in the complaints against mediators and the resolution of each complaint while keeping the identity of the mediator confidential. The state could resolve this uncertainty through more carefully written statutes and rules as a way to enhance the educational function of the complaint process.

*876 vii. Immunity for Persons Handling Complaints

The Maine Operational Rules give immunity to “ADR providers under contract with the Judicial Branch” from liability for actions taken in connection with the Maine Operational Rules. The ADR Director has the same grant of immunity. Thus, the rules protect the ADR Director when she handles ethics-related complaints involving rostered mediators. The rule does not specify whether the grant of immunity from liability is absolute or qualified. However, the CADRES Committee is granted absolute immunity for actions taken as “persons acting on behalf of a governmental entity in any official capacity, whether temporarily or permanently . . . .”

G. Summary and Analysis of Mediator Complaint Systems

Virginia, Georgia, and Minnesota make access to complaint forms, ethical rules, and complaint procedures easily available to the public on court-sponsored websites. Florida and Maine also have websites that can provide links to information about the complaint process, but they do not provide complaint forms or easily identified access to the complaint procedures. Virginia, Georgia, and Maine use written post-mediation evaluation forms to help the directors in those states monitor mediator quality. These forms trigger a follow-up process in each state that may cause an unhappy party to file a formal complaint against a mediator. All of the states analyzed, except Maine, require written, signed complaints certifying the accuracy of the allegations made in the complaint.

The rules of the complaint procedure in Virginia, Georgia, and Maine delegate responsibility and discretion to the program directors to determine whether a complaint meets formal filing requirements and whether it states a claim under the ethics rules. These directors also serve as the investigators of the claims and are charged with evaluating, at least as the first step in the review process, whether the mediator has likely violated an ethics rule based on the available facts. In contrast, Florida and Minnesota require members of appointed review bodies to conduct the facial sufficiency analysis. These review bodies also investigate the claim, or in the case of Florida, they may hire an independent investigator.

Mediators defending claims in Florida, Virginia, and Georgia have 20 days to respond to the complaint and a specific list of possible rule violations. In Minnesota, a mediator may respond in 30 days, while the rules in Maine do not set a response deadline. If the mediator fails to respond to the complaint, the reviewing bodies in Florida and Minnesota may assume that the mediator admits the facts in the complaint. In Virginia, the mediator's failure to respond triggers a further investigation of the facts.

Accused mediators have varying levels of access to the investigative materials assembled by the directors or the review bodies. Generally, states provide limited access to the work product of the directors or review bodies. Florida provides the broadest
disclosures to the mediator, including witness statements. Maine also provides broad disclosures by giving the mediator access to the complaint and the information developed by the ADR Director during her investigation. Virginia's rules do not sufficiently address the permitted disclosures. Florida, Georgia, and Minnesota give at least one of the bodies regulating mediators the power to subpoena witness testimony and documentary evidence.

None of the grievance programs specifically address accommodations for persons with disabilities or for persons who may not speak English fluently. 770

All the states allow the person or entity first considering the matter to hold a meeting with the parties to attempt an early and more informal resolution of the grievance. In Florida, the parties must attend any scheduled meeting. In Minnesota, the parties must consent to the meeting. Maine holds this informal meeting at the CADRES Committee appeal level.

Only Georgia includes lay people on the adjudicatory hearing panel. Four of five states provide for an adjudicatory hearing with some right of reconsideration, review, or appeal. Maine does not provide this step in the process. The adjudicatory hearing typically follows a decision that the mediator has likely violated a rule. In Florida, Virginia, and Minnesota, the *878 first level review body makes the decision to forward complaints with merit to a hearing panel. In Georgia, either the mediator may request a hearing or the Committee on Ethics may set the complaint for hearing on its own motion.

In Florida, the regulators may not impose a sanction without holding an adjudicatory hearing. In contrast, the Maine ADR Director may impose sanctions without holding a formal hearing. All the states analyzed allow the regulators to de-roster a mediator. However, only Georgia specifies when that sanction is appropriate and no state, except Maine, will de-roster a mediator without a formal hearing. In fact, in Florida, this action may require a second hearing proving that the mediator failed to comply with the less onerous sanctions first imposed.

Only Florida permits the regulators to hire an independent prosecutor. Florida and Minnesota require proof of an ethical violation with clear and convincing evidence. Georgia requires only a preponderance of the evidence to prove an ethical violation. Virginia and Maine do not specify the burden of proof imposed on the regulating body.

Florida, Virginia, Georgia, and Maine only allow the mediator to request review of any adverse decision of the hearing panels. Minnesota allows either the mediator or the complainant to appeal any adverse decision to the full membership of the ADR Review Board. Only Virginia allows the complainant to seek review of any decision dismissing the complaint.

Only Florida permits an appeal to a court of law or to the chief justice of the supreme court. Virginia only permits reconsideration of the sanction decision by the same body that initially made the decision. Minnesota allows an appeal to the full membership of its ADR Review Board. Georgia and Maine allow an appeal to an oversight commission or committee. Florida, Georgia, and Minnesota specify the standard of review on appeal, review, or reconsideration, but each state has chosen a different standard. Virginia and Maine do not specify the standard of review.

The rules of confidentiality that affect the proof, defense, investigation, and publication of grievance-related information vary greatly among the analyzed states. In all states but Maine, the mediation confidentiality statute exempts certain mediation communications needed to prove or defend a claim. Florida makes available to the public more grievance-related information than any other analyzed state, even publishing information about the complaint and its resolution when its regulators dismiss a claim against a mediator. Virginia makes available only information about formal complaints and their resolution. Similarly, Georgia publishes only the complaint, the response, and the final decision for complaints leading to a sanction. If the complaint does not lead to a sanction, Georgia publicly acknowledges only *879 the filing of the complaint. Minnesota publishes only the sanction decision. After the ADR Review Board issues a sanction, Minnesota will publish information about the sanction.
Maine has no specific rule on what part of the grievance process the director may publish. As a result of the limited disclosures allowed by state statute or rule, the grievance data published in Virginia, Georgia, Minnesota, and Maine does not serve the educational function it could if the rules or statutes provided greater public access to the information about all filed grievances, as they do in Florida. The limited disclosures may also undermine public confidence in the mediator disciplinary systems, and as discussed above, the courts referring cases to mediators.

In addition, the type of immunity conferred on persons handling grievances varies from absolute in Florida and Maine (for some participants) to none in Virginia. Georgia and Minnesota provide a qualified immunity for persons handling complaints.

Florida, Virginia, Georgia, and Minnesota tie the complaint analysis and the disciplinary process back to specific provisions of the applicable code of ethics. Florida and Virginia provide the most detailed codes, but Georgia and Minnesota have provided interpretive comments to the provisions of their codes. Maine’s code appears modeled on a judicial code of ethics and fails to reflect more recent thinking about mediator ethics. Thus, the ADR Director has not always tied the allegations arising in disciplinary process back to specific provisions of the code.

More generally, Florida provides mediators the most due process protections in the grievance process by providing four levels of review, with each level of review having a clearly defined function. It also has in place several steps in the process designed to weed out frivolous complaints. The clearly delineated burden of proof and standards of review on appeal provide additional due process protections for mediators. Florida mediators also have greater access to information relating to the complaint, including witness statements.

Maine offers mediators the least due process protections, consolidating in the ADR Director responsibilities that include starting the grievance process against mediators, determining whether a complaint states a claim under the ethics rules, investigating the claim, determining whether the mediator has likely violated an ethics rule, meeting with the mediator to discuss the matter, and imposing-without conducting a formal hearing—a number of sanctions, including de-rostering. An appeal to the CADRES Committee after the ADR Director imposes a sanction is the only check on the decisions made in the process. Moreover, a Maine mediator would have more difficulty determining which behaviors the ADR Director may deem inappropriate under the applicable standards.

The rules governing mediators in Maine grant great discretion and responsibility to the ADR Director to ensure the quality of the mediation services provided to courts and litigating parties. However, the tools given to the ADR Director to perform those tasks are the least developed of any state examined in this article. Overall, the Code of Conduct and the Maine Operational Rules do not reflect increasingly well-accepted standards of mediator ethics, confidentiality, or party self-determination. The rules governing complaints against mediators often use ambiguous language that does not tie sanctions to specific violations of the Code of Conduct, do not state decisionmaking standards either at the level of the ADR Director or at the level of appeal before the CADRES Committee, and outline a very informal process that may undermine due process protections the field may agree should exist when a mediator faces a significant loss of income or damage to his or her professional reputation. The ADR Director has indicated that she is engaged in a “complete overhaul” of the policy and procedure manual, which presumably covers many of the rules and procedures discussed in this article.

The systems of Virginia, Georgia, and Minnesota fall somewhere between the systems of Florida and Maine in providing specific ethical guidance to mediators, following more fully developed rules governing the grievance process, and offering mediators procedural fairness and due process protections.
*881 Taken together, the processes and sanctions developed in each state analyzed still make the complaining party a spectator or witness to the grievance process rather than an active participant. The remedies protect the mediators, the mediation process, court programs, and the field without necessarily providing a meaningful remedy to the complaining party. 774

H. Grievance Systems on the Drawing Board

1. Initiatives in North Carolina to Revise its Formal Complaint System

i. Introduction

North Carolina experimented with court-connected mediation as early as 1989 in the family court context. 775 In the following year, bar leaders drafted legislation to establish a “Mediated Settlement Conference” pilot program based on the experiences of Florida. 776 In 1991, the General Assembly approved the legislation with the support of the state bar, the chief justice of the supreme court, and other ADR supporters on the bench and in the bar. In 1995, the legislature authorized implementation of the program in superior courts throughout North Carolina. 777 In the 2003/2004 fiscal year, the courts ordered 11,138 civil cases and 1,388 “family financial settlement” cases 778 into mediation. 779 During the 2003/2004 fiscal year, North Carolina *882 certified 1,063 civil mediators and 215 family financial settlement mediators. 780

ii. New Legislation Governing Complaints Against Mediators

On July 7, 2005, Governor Mike Easley signed updated legislation that had earlier authorized the North Carolina Supreme Court to adopt standards of conduct for mediators working in court-connected programs. 781 The earlier legislation authorized the Dispute Resolution Commission (DR Commission) to impose certification and annual recertification requirements for mediators and to charge fees for the certification process. 782 In addition, it authorized the court to develop standards for mediation training programs and procedures for enforcing the standards for certification and conduct, including decertification of mediators. 783 The revised statute restates many of the provisions found in the earlier version of the statute, but adds eight new provisions dealing primarily with disciplinary actions against mediators. 784 The new sections arose from an initiative taken by the DR Commission “to address an increasing number of disciplinary issues.” 785 The 2003/2004 fiscal report of the Executive Secretary to the Commission explains:

This [initiative] is due in part to new requirements for the reporting of disciplinary matters adopted by the Commission three years ago. Under the new reporting requirements, applicants for certification and certification renewal must disclose on their applications any of the following: *883 convictions, pending grievances filed against them with professional licensing/certification bodies, sanctions imposed on them by professional licensing certification bodies, and judicial sanctions. Also, this year the Commission saw an increase in the number of formal complaints filed against mediators by third parties . . . .[The Commission has] begun . . . to re-draft the Commission's rules to both strengthen and clarify its investigative and hearing procedures and to insure due process rights of applicants and mediators. 786

The DR Commission administers the standards, as a division of the Judicial Department, and is under the supervision of the Director of the Administrative Office of the Courts. 787 The DR Commission consists of five judges; a superior court clerk;
four certified mediators; two practicing attorneys who are not mediators, including one family law specialist; and three citizens “knowledgeable about mediation.”

The DR Commission has had in place an informal disciplinary process. It describes the applicable procedures in three short paragraphs appearing on the courts’ website. An unhappy participant in the mediation may download a complaint at this site. The investigatory process begins when the Executive Secretary receives a sworn, written complaint by which the complainant agrees to the process set out in the complaint. Through September 2005, the DR Commission had conducted two formal hearings. The DR Commission has also imposed sanctions on mediators without holding a formal hearing. The Executive Secretary only recently created a log of these actions. However, she reports that the complaints leading to the formal hearings involved attorneys who mediated disputes between separating couples and then represented one of the parties in later litigation.

The revised statute creates a highly-developed enforcement structure allowing the chair of the DR Commission to hire an executive secretary and other staff and to hire special counsel to assist the DR Commission in conducting hearings related to certification, revocation of certification, or complaints against mediators or training programs. The DR Commission may also hire counsel to handle appeals of the DR Commission’s decisions on these matters. In connection with these activities, the statute authorizes the DR Commission to administer oaths to witnesses, subpoena evidence, and apply to the superior court for orders needed to perform its enforcement function. It also provides for appeals of the DR Commission’s decisions to the General Court of Justice, Wake County Superior Court Division. It thus establishes only the second program allowing an appeal of a certification, renewal, decertification, or disciplinary decision to a court of law.

The statute provides confidentiality for all information the DR Commission collects during the certification, renewal of certification, decertification, or complaint processes, with certain exceptions. Complaint information remains confidential until the DR Commission determines that a mediator or trainer has violated standards of conduct, violated other professional standards of conduct, acted inconsistently with good moral character, or acted in a way that reflects a lack of fitness to serve as a mediator.

North Carolina had already established rules governing confidentiality in mediation. The rules create an evidentiary privilege for mediation statements and conduct and prevent their admission in “any proceeding . . . on the same claim.” The new legislation creates additional rules governing confidentiality in “mediated settlement conference[s] or other settlement proceeding[s] conducted under this section.” It creates an evidentiary privilege for statements and conduct made during the mediation session by all participants in the process, including neutral observers.

The legislation provides for four exceptions to confidentiality:

1. [i]n proceedings for sanctions under this section;
2. [i]n proceedings to enforce or rescind a settlement of the action;
3. [i]n disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals;
4. [i]n proceedings to enforce laws concerning juvenile or elder abuse.

Thus, one of the exceptions permits disclosures required for the mediator disciplinary process. Also, a person may admit to evidence otherwise discoverable. Mediators cannot be compelled to testify or produce evidence concerning mediation.
statements or conduct, except to authenticate signatures to settlement agreements and to respond to proceedings to impose sanctions or otherwise discipline the mediator. 802

The new legislation also contemplates ethical advisory opinions by granting confidentiality to the identity of persons seeking informal guidance from the Executive Secretary or written opinions from the DR Commission's Advisory Opinions Committee. 803 The DR Committee has issued eight advisory opinions since 1999. 804 An existing statute gives some guidance on the unauthorized practice of law. It explains that the “practice of law” does not include “the writing of memorandum of understanding or other mediation summaries by mediators at community mediation centers authorized by G.S. 7A-38.5.” 805 In addition, the North Carolina Bar Association Dispute Resolution Section's Task Force on Mediation and the Practice of Law issued “Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law” in 1999. The courts' website makes the document available to the public. 806

Existing statutes establish immunity for neutrals who handle court-connected cases. 807 The new legislation, however, does not provide immunity for members of the Commission and its staff for actions that they take in the certification, renewal, decertification, or disciplinary process.

During the fall of 2005, the DR Commission drafted the proposed rules to implement the legislation. 808 The North Carolina Supreme Court will issue the final rules. 809

2. Maryland Program for Mediator Excellence

i. Introduction

Maryland's judicial, mediation, and legal communities have designed-through a highly collaborative process-a program that encourages high quality mediation services without imposing strict credentialing requirements. The program is based on a “guildhall” model that encourages regular exposure of mediators to each other and to other styles of mediation. 811 It also encourages ongoing education and skill development. The Maryland Program for Mediator Excellence (MPME) purportedly “shuns regulatory systems and exclusionary practices,” but persons joining the program must (1) complete a basic mediation training course; (2) sign a commitment to seek self-improvement as a mediator by, among other things, taking five to ten hours each year of continuing education; (3) follow the Maryland Mediator Ethics Standards; (4) provide evaluation forms to their clients at the close of each mediation session; (5) provide some compilation of the evaluations to the MPME oversight committee to assist in further development of the field; and (6) participate in the MPME's grievance process for resolving client complaints. 813

ii. Proposed Maryland Mediator Grievance Ombudsman Process

Maryland's proposed Mediator Grievance Ombudsman Process (MGOP) shows a synthesis of the programs existing in five states, as well as some new thinking about handling mediator complaints. The proposal expressly states the values it seeks to reinforce. The task force designers envision the MGOP as a restorative program offering a framework for building competency among mediators who are the subject of legitimate complaints, a system of accountability within the mediation field, a system of responsiveness to concerns and complaints about the mediation experience, an opportunity to help people making complaints regain an understanding of mediation, its benefits and purpose, and a tangible service to help build public trust and confidence in the mediation field.
The design task force understands that consumers and mediators must perceive the program as offering a procedurally fair process. It also hopes *889 mediators will perceive it as a resource for them to improve their skills. 815 It reflects a “general consensus” expressed during the discussions held throughout the state about the MPME that mediators participating in the program should adhere to standards of practice and submit to a grievance process. 816

The system design contemplates three participating entities: the ombuds, the MGOP Council, and the Mediator Excellence Council (MEC). The designers have instructed the ombuds to resolve complaints “at the earliest stages-or lowest possible level-of the process.” 817 The grievance process applies, by agreement, to mediators who join the MPME. However, if the ombuds receives a complaint about a mediator who does not participate in the MPME, the ombuds may still attempt a facilitated dialogue leading to a conciliated resolution of the dispute “as a public service and to increase consumer confidence in mediation, even though the mediator is not required to cooperate.” 818

a. Ombuds Functions: Intake, Investigation, Conciliatory Resolution, Referral of Complaint to MGOP Council, and Statistical Reports

An ombuds-a part-time independent contractor to start-will further develop the complaint form and interview questions drafted by the Grievance Process Committee. The ombuds will use these materials to gather information about the complaint. The designers also expect consumers to file complaints by way of a toll free number, a web link, a fax number, or a postal address. 819 The proposal also seems to contemplate that the ombuds will help design the website for the program and participate in public awareness programs. 820 The ombuds is charged with explaining the process to complainants and providing information about mediation that may help complaining parties better understand the merits of their complaint. The ombuds will explain the confidentiality rights of the complainant and his or her right to withdraw the complaint at any time. 821

*890 In addition, the ombuds will contact the mediator, but only with the complainant’s consent. At this stage in the process, the ombuds will gather information about the complaint and begin to “take a conciliatory approach, working [as a conciliator, mediator, or facilitator] with both the complainant and the mediator to facilitate a dialogue that allows them to choose an appropriate outcome or resolution.” 822 The ombuds may also encourage the parties to participate in mediation or another dispute resolution process independently of the ombuds. 823

If these processes do not resolve the complaint, the ombuds will conduct a further investigation of the allegations. The ombuds may contact third parties for additional information, but only with the consent of the complainant. 824

The proposal also envisions that the ombuds will “follow-up with complainants and mediators to see what actions have been taken and assess their effectiveness as resolutions.” 825 In addition, the ombuds will keep records of advisory opinions and any decisions made by the MGOP Council. He or she will compile annually, or as requested, data on the “number and nature of complaints received and resolved, without revealing information about individual complaints.” 826 A later provision of the proposal instructs the ombuds to prepare a “comprehensive written summary of each infraction and how the MGOP dealt with it.” 827

*891 b. MGOP Council Functions: Consideration of Complaint; Possible Evidentiary Hearing
Based on the investigation, the ombuds may decide to refer the complaint to the MGOP Council, along with his or her recommendations, but only with permission of the complainant. The MGOP Council will consist of five to seven “highly experienced mediators” chosen by MACRO with input from the Mediator Excellence Council (MEC). It will also include “one consumer at-large member.” Its members will serve “rotating tenures” for three and five-year terms. Council members are expected to be “on call” to respond within 48 hours “of being called for guidance on a particular complaint.” The proposal expects that the MGOP Council will hear complaints “about (a) violations of standards of practice or ethics . . . (b) disrespectful behavior, and (c) sexual or other harassment.” If adopted, this program will have a broader jurisdictional scope than any other program analyzed in this article, except perhaps that of Maine. It seems to require a complainant to bring a complaint within one year of the mediation session and so would be the only state to impose a statute of limitations. The designers of the grievance program also hope to prevent malpractice claims by recommending that the legislature pass a statute making the grievance process a step the complainant must complete before he or she can file a civil action against a mediator.

When the ombuds refers a complaint to the MGOP Council, it will consider the allegations in the complaint, the results of the investigation, and the ombuds' recommendation. The proposal contemplates a multi-step process even at this stage of the complaint handling process. The MGOP Council may consult with the Advisory Committee, apparently about appropriate responses to the complaint. It may recommend an appropriate “restorative action” that the mediator may apparently accept. If the mediator does not accept the recommendation or adhere to it, the MGOP Council may then hold a hearing. The hearing will comply with the Maryland Court's Rules for Arbitrators and, because the MGOP Council will conduct it under the authority of the judiciary, it will be a non-binding arbitration proceeding. The proposal does not explain the next step in the process if either party refuses to be bound by the decision.

The proposal also permits the complainant and the mediator to bring a representative or support person into the process at any time, but it does not otherwise specify the due process rights of the mediator. The MGOP Council will make a sanctions decision within ten days following the hearing, apparently after concluding that a preponderance of the evidence supports it.

c. MGOP Function: Available Decision Options

As noted above, the proposal indicates that the MGOP Council may recommend to the parties that a mediator comply with a certain remedy. The MGOP Council can also impose a specified remedy. Those remedies are:

- Closing the complaint, with an explanation to the mediator and/or the complainant;
- Contacting a mediation program or roster manager or mediator certification group with concerns about the mediator and recommendations about how to address those concerns; and/or
- Training for the mediator at the mediator's cost;
- Mediation observation at the mediator's cost;
- Mentoring for the mediator at the mediator's cost;
- Public service to benefit the complainant or the mediation community;
· A written apology;
· Giving the consumer back what was paid to the mediator;
· Paying restitution to compensate the complainant for damages;
· Paying for the cost of investigation;
· Sending a warning letter or written reprimand;
· Paying for the cost of hearing;
· Paying for the cost of appeal;
· Removing any MPME certification that may exist;
· Suspending a mediator from the MPME program;
· Removing a mediator from the MPME program.\textsuperscript{841}

Thus, like Florida, the MGOP Council would have broad authority to impose economic or monetary sanctions, as well as non-monetary sanctions.

d. Possible Appeal

The designers anticipate the ombuds and the MGOP Council will develop an appeal process that will involve an appeal to the MEC. It would apply only to “mediators objecting to [MGOP] Council decisions.”\textsuperscript{842} Thus, like Florida, Virginia, Georgia, and Maine, complainants unhappy with MGOP Council decisions would have no appellate recourse.

e. Confidentiality in the Grievance Process

As a policy statement, the designers plan to maintain confidentiality to the greatest extent possible.\textsuperscript{843} They do not explain the reasoning behind this statement or the choices made to implement the policy. The designers appear especially protective of the complainant's identity, unlike any other program analyzed in this article. All information about the complaint, the complainant, and the mediator will remain confidential if the parties resolve the dispute without a hearing before the MGOP Council. If the MGOP Council intends to conduct a hearing, the ombuds will reveal the names of the complainant and mediator to the council.\textsuperscript{844} The proposal allows the mediator to reveal confidential mediation communications to the extent necessary to respond to the complaint.\textsuperscript{845}

If the MGOP Council removes a mediator from the roster, that decision will not be posted on the MACRO website. Instead, MACRO will no longer list the mediator on its rosters, including the one that appears on the website.\textsuperscript{846} The confidentiality provisions of the proposal do not yet sufficiently coordinate with any rules or statutes governing confidentiality in mediation,
state's Sunshine Law, or even with the goal of preserving confidentiality in the process, while providing educational information about how the ombuds or MGOP Council resolve each complaint.  

VII. Designing Mediator Grievance Systems

Nearly two decades ago, Ury, Brett, and Goldberg came to the central Appalachian coal fields to design a dispute resolution system for high-strike *895 mines. 848 They outlined a three-step process: (1) diagnosing the disputes in the existing dispute resolution system; (2) designing an effective dispute resolution system using six basic principles; and (3) making the system work by involving the disputing parties in its implementation. 849

A. Diagnosing the Disciplinary Disputes

The diagnosis step requires finding answers to at least the following questions: (1) What types of disputes arise? Who are the disputants? How frequently do they occur? What is causing the disputes?; (2) How are the disputes being handled? Do disputants lack available procedures for filing complaints? What do people do if they have a complaint? With whom, if anyone, do they bring it up? How frequently do disputants “lump it”? Are disputants “lumping it” because no established procedures exist to deal with complaints? What obstacles hinder the use of dispute resolution procedures? Do the procedures have to be actively administered by a person or institution? Is the lack of people, information, or institutions due to insufficient funding?; (3) Why do disputants use some procedures and not others? How is the surrounding culture affecting the procedures used? Do they know the procedures are available? Do they know how to use the procedures? If they use the procedures, do they use them effectively? Are they presenting evidence effectively? Do they make appropriate arguments?; and (4) Can new procedures meet the needs of disputants at lower costs? 850

Most administrators of court-connected mediation programs would likely find it difficult to answer these questions as they relate to mediator misconduct, poor skill development, clumsy skill use, or unethical behavior. Most of these programs have no effective methods of obtaining participant feedback. Even among the five states analyzed in this article, only two rely on participant exit surveys to monitor mediator quality. As noted, most *896 unhappy participants seem to be “lumping it” with all the risks to the legitimacy of the courts, the field, and the process that go along with that form of conflict resolution. Professor Lisa Bingham recently called on courts to collect more data about their ADR programs. 851 As part of that data collection process, courts could begin soliciting from mediation parties regular post-mediation feedback and evaluations.

In addition, if the designer is trying to discern “what is causing the disputes” in the professional disciplinary context, he or she needs to know the professional standards that define the duties mediators owe parties. Most states have not provided even this essential element of the disciplinary system.

B. Designing the Disciplinary System

Ury, Brett, and Goldberg acknowledge the difficulty of designing a dispute resolution system. They suggest that parties do not move from the status quo until the “pain” of it gets too great. 852 Insiders often spearhead the change. 853 In the context of mediator grievance systems, courts may not move to create the systems until they perceive that their own credibility and legitimacy are at stake. I can only hope that, as in the states analyzed, “insiders” including well-respected judges, lawyers, mediators, academics, and consumers of ADR services take the lead. Ury and his colleagues suggest the formation of a design committee, 854 which all of the states analyzed in this paper have used to design and implement their disciplinary systems.
As the Maryland MACRO process shows, the design process can be arduous, time consuming, expensive, and frustrating. Designers must plan for these challenges.

The design step relies on six basic principles: (1) focus on interests; (2) design procedures that encourage disputants to return to negotiation through “loop back” procedures; (3) provide low cost rights procedures that, if all else fails, will bring about a final resolution of the dispute; (4) prevent disputes whenever possible by building in a procedure for constructive feedback after a dispute; (5) arrange the different procedures in a sequence from least to most costly; and (6) provide motivation, skills, and resources necessary to make all the procedures work.

For the most part, the state systems analyzed in this article adhere to these six basic principles. The systems are designed to elicit the underlying interests of the parties through informal consultations with the complainant and through factual investigations that involve the mediator and other parties with knowledge of the dispute. Many complainants seem satisfied with the types of remedial sanctions accepted by mediators or imposed by the regulatory body that encourage the mediator to improve his or her skills. A follow-up survey would confirm this hypothesis. Recall Clare's goal: “Maybe a complaint won't help me. But it might help someone else.”

All five state systems analyzed in this article provide for an informal meeting between the complainant and the mediator which attempts to resolve the dispute through a low cost negotiation process. All five states provide a low cost formal hearing procedure that, with or without another layer of review, can resolve the dispute with finality. At least in several of the states analyzed, the program administrators have used the grievance process to design better training programs for new and experienced mediators. In that way, the systems themselves help prevent future disputes.

The steps in the process are arranged to ensure that mediators need not respond at more formal levels to complaints that do not state a claim or do not survive a “probable cause” review. The steps in the process also attempt informal resolutions before the complainant must assume a more difficult burden of proof in the formal hearing process. And by statute or court rule, the courts have financial resources—often through a dedicated fund or fee—to hire skilled staff to manage the grievance system, maintain the information about complaints and procedures (especially the court websites), and conduct the early steps in the grievance process.

These states have also successfully managed the political tasks required to create these grievance systems. They have garnered support for the grievance systems and more importantly, the ethics codes that provide the normative values enforced by the systems. They have dealt with resistance to the grievance system, and more importantly, to the effort to mandate standards of ethical conduct. They have motivated people to accept a more regulated environment. They have adapted the grievance system to the particular program's needs. And they have involved a variety of stakeholders to participate in the design and implementation process. Some states, like Virginia, may have used a more “top-down” approach in designing the ethics code than Minnesota, but the process leading up to that point reflected an effort to obtain feedback about appropriate standards. In fact, Virginia's Standards of Ethics draw criticism today because they reflect a political process involving stakeholders who wanted more liberal rules about providing legal advice and case evaluations.

In most states, the courts relied on a design committee composed of highly respected members of the academic, legal, and mediation communities. In all states, the regulatory systems received high-level support from chief justices of the state supreme courts who showed great commitment to the use of ADR in the judicial branch. Most of these states started the ethics rules and grievance system design process in the early 1990s, relatively early in the life of the court-connected mediation programs. They dealt with opposition to the grievance system by making changes experimentally and by staying open to the need for additional changes in the process or in the ethics codes. Most of these states implemented the programs by providing additional
incentives to learn more about the ethics codes and by making grievance decisions available to the public on court websites or through training programs. They provided coaching to help complaining parties get through the system successfully by acknowledging complaints, providing information required to file a complaint, by providing complaining parties a copy of the applicable ethics code and disciplinary procedures, and by keeping the complainant informed about the status of his or her complaint.

*899 1. Meeting the Procedural Justice Expectations of Mediation Parties

While these systems generally meet the design criteria of Getting Disputes Resolved, they often fall short of delivering the procedural justice complainants are likely to expect. Overall, the grievance systems analyzed still make the complaining party more of a bystander to the process rather than a direct participant. Typically, the complaining party has reduced access to information assembled in the investigation process. The grievance systems do not designate the complaining party as a party to the proceeding, but instead make him or her a witness—often deemed dispensable—in a proceeding that is based on a prosecutorial model rather than a civil suit model. The complaining party may therefore feel he or she has little “voice” in the process.

The complaining party may have little input into the sanction imposed and cannot hope, under the authorized sanctions in four states, to be made whole financially through economic sanctions. In four of the states analyzed in this article, the complaining party may not seek review or appeal of an adverse decision made by the program staff, the investigatory body, or the hearing panel. These limitations may affect complaining parties' perceptions of procedural justice as it relates to meaningful consideration by the third party and of the respect and dignity they receive in the process. Moreover, only one state allows laypersons to serve in the third-party role. Thus, a process lacking in procedural justice may feel even more biased if the complaining party perceives that the regulators are simply protecting “their own.” Recall Clare's concern: “How do I distinguish myself seriously to the parties that handle such things? If other attorneys are reviewing and investigating, why would that be fair?” 861

Welsh's research underscores why system designers should keep in mind the pool from which they draw mediators, or in the case of grievance systems, the backgrounds of the members serving on the investigatory bodies or hearing panels. In her research involving special education mediations, she found that parents of children with disabilities made up a small percentage of the mediator pool. Instead, experience in education largely affected who administrators accepted into the pool of mediators.

*900 It is revealing that experience as an educator was considered helpful while experience as a parent was not. These selection criteria may need to change in order to enhance mediation's capacity to send a stronger signal, particularly to parents, that mediation is meant to facilitate reciprocal voice, reciprocal consideration, and joint problem solving. 862

Similarly, bodies regulating mediators may need to show greater diversity by including lay people and other consumers of mediation services.

2. Meeting the Due Process Expectations of Mediators

At the same time, mediators pulled into the grievance process by a complaining party may have very different perceptions of procedural justice, especially if the mediators are also lawyers. They may be looking for more formal and more familiar touchstones of neutrality, even-handedness, and respect. They may have greater expectations about traditional due process protections.
Welsh's research indicates that parties' perceptions of procedural justice may be colored by the role they play in the dispute. Thus, in special education mediations, parents sought a process that gave them opportunities to thoroughly explain their child's needs to school officials. “The parents [did] not view mediation as a means to change the power relationship with the school officials. Rather, they view[ed] mediation as a means to achieve the respect and attention that they deserve[d] from public officials, if only temporarily.” Parents also did not readily perceive themselves as part of a problem-solving team, because the school officials had control over the knowledge and resources needed to develop and implement an educational program for the disabled child.

School officials had slightly different needs. They wanted parents to understand the norms the school officials could legally apply. But more importantly, school officials seemed to view mediation primarily as an opportunity, in a calm setting, for “one-way voice.” During the mediation school officials could hear and better understand the parents' perspective.

In the context of mediator disciplinary proceedings, a disparity in expectations about procedural justice may give rise to an expectation by the accused mediator of greater due process protections, especially if the mediators are also trained as lawyers. Hensler suggests that “[a]ccording ‘due process’ to individuals is equivalent to recognizing their status as members in good standing of their social group, which has a value to people that is independent of any effect process might have on outcome.” Thus, due process may take on more salience for mediators, who as a group are far more conscious of the importance of process as an independent value. Due process may also have higher salience for lawyer-mediators who may wish to guard their status as lawyers in a profession typically accorded high status.

The due process clause of the Fourteenth Amendment to the United States Constitution provides: “No state . . . [shall deprive] any person of life, liberty, or property, without due process of law[.]” Courts have interpreted the procedural due process doctrine arising under this constitutional amendment as limited to protecting individuals from an arbitrary and binding deprivation of rights by government entities. In a criminal context, due process requires: (1) the prosecution to provide the defendant formal notice of the charges; (2) the prosecution to show in a probable cause hearing before a neutral magistrate that he or she believes the defendant has committed a crime; (3) the court to appoint a lawyer for an indigent defendant; (4) the court to allow a defendant to call witnesses on his or her behalf and to cross-examine adverse witnesses; (5) an impartial jury to try the case; and (6) a lawyer to represent the defendant at trial if the defendant wishes. Due process also protects a defendant from self-incrimination.

Due process protections also apply in disciplinary proceedings because every professional has a protected interest in pursuing his chosen profession free from unreasonable government interference. A license to practice one's profession is a property right deserving constitutional protection. However, as the Supreme Court noted in Morrissey v. Brewer, “[d]ue process is a flexible concept and the form of procedural protection varies according to the particular situation.” Some controversy exists as to what due process principles should apply to disciplinary proceedings. Some persons argue that the proceedings are more criminal in nature and that criminal due process protections should apply. Others persons argue that the proceedings are civil in nature and rules of civil procedure should apply. Still others believe that disciplinary proceedings are neither criminal nor civil, but rather have a nature all of their own because a professional can be disciplined for violations which are not criminal in nature or that do not involve fault.

In In re Ruffalo, the Court characterized disciplinary proceedings as “adversary proceedings of a quasi-criminal nature.” The Court reasoned that the boards should be required to inform a respondent of the charges against him before the disciplinary
proceedings commence. Later cases at the state and federal levels have interpreted Ruffalo as not requiring “the full panoply of rights afforded to an accused in a criminal case.” As one legal ethics scholar explains:

878 [T]he notice requirements in disciplinary cases may not be as stringent as those in criminal cases; there is no right to appointment of counsel; there is no right to a jury trial; the concept of double jeopardy does not apply; and the Fifth Amendment right against self-incrimination may be limited in disciplinary proceedings. Even though in some discipline systems the investigatory and adjudicatory functions of the state disciplinary agency are combined in a single body, this has been held not to violate due process requirements.

879 Moreover, states do not agree on the discovery rights of accused professionals in disciplinary proceedings. While the professional generally has the right to present evidence, the right to discovery, as defined in the criminal process, does not exist. In some states, like South Carolina, a party must show good cause to obtain discovery. These rules may limit the ability of the professional to prepare a defense.

880 In addition, most professional disciplinary organizations impose confidentiality on some aspect of their proceedings or files. Disciplinary boards issue many reprimands or sanctions privately with no publication to the public. These limitations put the accused professional at a disadvantage because they make it difficult, if not impossible, to research previous grievance dispositions.

881 Even if courts have allowed significant deviation from traditional due process protections in the disciplinary context, designers of a grievance system for mediators must still consider the due process elements required by law. Courts provide some guidance. First, the mediator should have proper notice of the charges made against him or her. Thus, the allegations in the formal complaint and the applicable standards of professional conduct cannot be overly vague. For instance, in Minnesota due process requires that “the charges of professional misconduct, though informal, should be sufficiently clear and definite, in the light of the circumstances of each case, to afford the respondent an opportunity to prepare and present his defense.”

883 Second, a professional has a right to an impartial adjudicatory panel, but as the discussion of the systems in five states indicates, some disciplinary rules do not have mechanisms for reconstituting the members of the decisionmaking body if the parties discover conflicts of interest or other potential biases.

884 Again, the process protections that may feel “fair” to an accused lawyer-mediator in a disciplinary proceeding may exceed the constitutional requirements of due process required by courts. Of the five states analyzed in this article, Florida has provided the most due process protections for mediators. It provides clear ethics standards and disciplinary rules. Florida makes ethics opinions and the disciplinary dispositions public. It has several steps in the process designed to weed out frivolous complaints. And it has learned over time to separate clearly the functions and bodies handling each step of the process. Maine, on the other hand, provides the least due process protections for mediators. It has a poorly conceived set of ethics standards and frequently ambiguous disciplinary rules. The Maine Supreme Court has also concentrated in the ADR Director great responsibility and discretion; and with that responsibility no demarcation between her roles as investigator, prosecutor, fact-finder, or sanction decision-maker.

905 C. Implementing the Disciplinary System

Ury, Brett, and Goldberg also acknowledge the difficulty of implementing a dispute resolution system. To put the changes in place, they recommend: (1) motivating parties to use the new procedures; (2) demonstrating the procedures; (3) using peers of
the community as proponents for the change; (4) setting specific goals about how grievances will be handled, i.e., all grievances will be settled within 30 days; (5) designing incentives to use the system; (6) publicizing early successes; (7) allowing designers to remain for a time as symbols of success and as watchdogs over the process; (8) training and coaching disputants in the process; (9) then evaluating whether the new system is working; and (10) diffusing the program to broader contexts, if appropriate. 886

The grievance systems analyzed in this article have reached successful implementation based on most of these measures. Those states with continuing mediator education requirements often use programs approved for training to teach mediators about the grievance processes and the underlying ethical values they enforce. The court-connected mediation grievance systems would probably benefit, however, from better monitoring to see if they are working as intended or working as effectively as intended. Ury and his colleagues suggest that designers should also ask whether the newly designed system has negative or unintended consequences.

These grievance systems—limited to either court-connected programs or to certified, registered, or rostered mediators—have had little diffusion to other state mediation programs, to other states, and to a broader class of mediators. Perhaps the discussion in this article will encourage their broader diffusion.

VIII. Conclusion

While the mediation field may not be “all grow’d up yet,” even in its adolescent stage it requires structure, behavioral guidelines, and discipline. I have not found one scholar or commentator in the field who opposes the concept of complaint systems for court-connected mediation programs. In fact, scholars report “widespread” support for these systems. And even those persons most vocal about the need to avoid too much regulation of the field, recognize the need for enforceable behavioral rules for mediators—at least in court-connected mediation programs—to protect parties, referring courts, and the process. They also support mediator complaint processes. Yet, only a handful of states have implemented complaint systems and have dedicated the resources needed to manage and operate them. The current research does not identify why so many states or their supreme courts have failed to implement programs. I suspect strained court budgets play some role, but the inability to agree on a set of professional standards, the existence of mediator immunity, and a belief that parties do not complain about mediator performance may also play a role.

While formal complaints against mediators, either in the form of malpractice suits or grievance complaints filed with regulators of the profession, remain quite low, the research shows that many parties leave mediation unhappy about the mediator, the process, or the result. Those parties, possibly denied procedural justice in the mediation process, may need procedural justice in a complaint system to regain their faith in the judicial system and the process of mediation. I expect the field will continue to ignore the problem until mediators become more frequent targets of lawsuits and complaints to professional regulatory bodies. The field will respond because the complaint systems appear to protect mediators from the expense and bother of responding to frivolous claims of misconduct. As a field, are we mature enough to face our separate responsibilities to the third parties that use our services? Even rebellious adolescents know that sometimes you do things just because they are the right thing to do.

*907 Appendix A

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*909 Appendix B

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Appendix C: Summary of Florida DRC Formal Complaints

Appendix D: Virginia DRS Log of Formal Complaints

Appendix E: GO DR Complaint Summary

Appendix F: Minnesota ADR Review Board Complaint Log Through June 11, 2005

Appendix G: Maine CADRES Complaint Log

Appendix H: North Carolina DR Commission Complaint Log

Appendix I: Arkansas ADR Commission Complaint Log

Footnotes

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2 Posting of Clare Smith to FindLaw for Legal Professionals, General Discussion, http://boards.lp.findlaw.com/cgi-bin/WebX.fcgi?14@206.LLVGbGvR5V% 5E0@.ef0688b/1571 (Feb. 15, 2004, 17:49 EST). The posting in its entirety, with its spelling, grammar, and punctuation errors, appears in Appendix A. In the excerpt above, I have corrected some of those errors, for easier reading, without notation.

3 Confidentiality is the third core value of mediation typically identified. See, e.g., Carol L. Izumi & Homer C. La Rue, Prohibiting “Good Faith” Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent, 2003 J. Disp. Resol. 67, 86. The authors argue that: the three core values of self-determination, mediator neutrality, and confidentiality are
interdependent qualities that define mediation as it was originally envisioned and gave rise to the promise of mediation as a distinct alternative to adjudication. The values are integral to the legitimacy of mediation as a consensual, flexible, creative, party-driven process to resolve disputes.

4 Mr. Cassman does not have a listing in the Martindale-Hubbell lawyer directory. See Lawyer Locator Basic Search, http://www.martindale.com/xp/Martindale/home.xml (last visited Mar. 2, 2006). A Google search using his name as the search term does not show him associated with any law firm. He does not maintain a return e-mail address or website reference on Findlaw. Posting of Martin Cassman to FindLaw, General Discussion, http://boards.lp.findlaw.com/cgi-bin/WebX.fcg?14@206.LLVGbGGvRSV%5E0%0D_e0f068b/1571 (Feb. 16, 2004, 13:28 EST). Thus, Clare's posting raises the prospect of a party who has no process available to file a complaint against the mediator, no lawyer interested in pursuing a malpractice claim on her behalf against her former lawyer or the mediator, and a non-lawyer giving her advice about both options. Even if Mr. Cassman is a lawyer, it does not appear he is licensed to practice law in Kentucky. See Welcome to the Kentucky Bar Association, Lawyer Locator, http://www.kybar.org/Default.aspx?tabid=26 (last visited Mar. 2, 2006). Mr. Cassman's full response to Clare's posting appears in Appendix B.

5 See generally Vanessa Mitchell, Note, Mediation in Kentucky: Where Do We Go From Here?, 87 Ky. L.J. 463 (1998-99) (arguing that Kentucky needs a statewide rule for mediation, giving a history of efforts to adopt a mediation rule in the state, suggesting possible approaches to a rule, and surveying the mediation court referral rules in North Carolina, Delaware, and Tennessee).


8 In re: Amendment to the Rules of Administrative Procedure AP Part XII. Mediation Guidelines for Court of Justice Mediators, Order 2005-02 (Ky. Apr. 15, 2005), available at http://www.kycourts.net/AOC/MAFCS/AOC_MAFCS.shtm; see Ctr. for Dispute Settlement, The Inst. of Judicial Admin., National Standards for Court-Connected Mediation Programs iv (1998) [hereinafter National Standards], available at http://www.caadrs.org/studies/Nationstd.htm (defining court-connected mediation programs as “any program or service, including a service provided by an individual, to which a court refers cases on a voluntary or mandatory basis, including any program or service operated by the court”); see also Policy Consensus Initiative, Directory of DR Programs, http://www.policyconsensus.org/directory/alldirectory.php (providing an online list and description of the dispute resolution programs established by state courts and agencies) (last visited Mar. 2, 2006). See generally Wayne D. Brazil, Court ADR 25 Years After Found: Have We Found a Better Way?, 18 Ohio St. J. on Disp. Resol. 93 (2002) (describing the public's enhanced confidence in the quality and integrity of the justice system and encouraging the development of more quality court-connected mediation programs); Dorothy J. Della Noce et al., Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection, 3 Pepp. Disp. Resol. L.J. 11 (2002) (reviewing studies of court-connected mediation programs, discussing the tensions between the interests of the courts and mediator values, and identifying system design issues); Deborah R. Hensler, Suppose It's Not True: Challenging Mediation Ideology, 2002 J. Disp. Resol. 81 (suggesting that no evidence exists that the public prefers mediation to litigation and suggesting reforms in court-connected ADR programs); Nancy A. Welsh, The Place of Court-Connected Mediation in a Democratic Justice System, 5 Cardozo J. Conflict Resol. 117 (2004) [hereinafter Welsh, Court-Connected Mediation] (urging greater use of mediation in U.S. judicial system); Roselle L. Wissler, Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research, 17 Ohio St. J. on Disp. Resol. 641 (2002) (hereinafter Wissler, What We Know) (discussing the effectiveness of court-connected mediation in Ohio courts and recommending continued research).

9 The “Application to be Placed on the Mediator Roster” requires the following certification in the signature block: “I further certify that I have read and understand the Mediation Guidelines for the Court of Justice Mediators [and] agree to adhere to the ethical guidelines as stated in Section 3 . . . .” Kentucky Court of Justice, Division of Mediation Services, http://www.kycourts.net/AOC/
MAFCS/MAFCS_MSForms.shtm (last visited Mar. 2, 2006). Thus, the Kentucky Administrative Office of the Courts, Mediation and Family Court Services can only require, by agreement, that mediators seeking to be placed on the court’s roster of neutrals adhere to the guidelines.

The use of the term “grieving party” describes someone who files a formal or informal complaint against a mediator, but the term also connotes the great sense of loss many unhappy parties may feel after a mediation they feel the mediator conducted unfairly or improperly. They may lose important substantive rights. They may lose the ability to determine aspects of their future lives that will help them financially, emotionally, and psychologically. They may lose faith in a judicial system they thought was designed to protect them. They certainly lose faith in the process of mediation.

See discussion infra note 48 and accompanying text.


This article discusses North Carolina’s recently revised grievance system in Section VI.H.1. Its grievance data appears in Appendix H.

The author received late in the publication process for this article, complaint data from North Carolina and Arkansas. The additional data appears in the appendices, but is not discussed in the text of this article. See also Arkansas Judiciary, Alternative Dispute Resolution Commission, http://courts.state.ar.us/courts/adr.html (last visited Mar. 2, 2006). E-mail from Jennifer Taylor, Coordinator, Arkansas Alternative Dispute Resolution Commission, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Feb. 6, 2006, 13:55 EST) (transmitting the Arkansas ADR Commission Summary of Disciplinary Matters Prior to Implementation of Certification) (on file with the author). In keeping with the focus of this article, the summary appearing in Appendix I does not include a complaint about a mediator who failed to make a disclosure on his certification application or a complaint involving the alleged embezzlement of a non-profit organization’s funds by a certified mediator while she was not engaged in a mediation.

South Carolina has had rules for some time that allowed the creation of a disciplinary process, “but only recently started to implement them with any rigor—probably because until 2002, [South Carolina] had no administrator per se.” E-mail from Andrew Walsh, Administrator, South Carolina’s ADR Commission and Board of Arbitrator & Mediator Certification, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Oct. 7, 2005, 16:31 EST) (on file with the author).

Sarah Rudolph Cole, Nancy H. Rogers & Craig A. McEwen, Mediation: Law Policy & Practice 11-12 (2d ed. 2005). I have resolved this debate for myself, at least in the context of court-connected mediation, in favor of more comprehensive regulation. My current opinion has been influenced by no small way by my move four years ago from a state with little regulatory infrastructure-Missouri-to a state with a highly developed, and some would say rigid, regulatory infrastructure-Virginia. As discussed infra in Section VLC, adhering to the requirements of the Virginia regulatory system has made me a more knowledgeable and skillful mediator without incrementally increasing the expense of my practice or the public’s access to my services.


Id. at 5-6.


Cole, supra note 20, at 7-8.

Id. at 9.


Id.

Id.

Id.

Id. at 14-16.


Id.

Id. at 11.


Pou, Assuring Excellence, supra note 32, at 335, 351-53.

Id. at 343-44.

No empirical research supports this conclusion.

Charles Pou, Jr. has created a “Mediator Quality Assurance Grid” which helps conceptualize the “prototypical” approaches to mediator training and other barriers to entering and staying in the field. The five approaches are: (1) No hurdle/No maintenance; (2) High hurdle/Low maintenance; (3) High hurdle/High Maintenance; (4) Low hurdle/Low maintenance; and (5) Low hurdle/High maintenance. Pou, Assuring Excellence, supra note 32, at 325. He explains that a “high hurdle” or an initial barrier of entry to the field could include many hours of training, experience, or observation requirements. Id. It could also include minimum degree credentials, performance based reviews or tests, moral character reviews, and high application fees. Id. Low hurdles are designed to allow people with little training and experience to enter the field. Id. at 325-26. Maintenance requirements include continuing education, a minimum number of mediations completed since the initial entry into the field, periodic renewal of the mediator's certification, registration or roster status, and renewal fees. Of the state regulatory systems analyzed below, Florida, Virginia, Georgia, and Maine have high initial entry barriers and high maintenance requirements in comparison with most other states. See discussion infra Section VI.

In the specific context of mediator training, scholars have focused little on identifying good training components and techniques. Moreover, they have not often empirically proved the relationship between training and mediator competency. Cole, supra note 20, at 11 n.5-6. See Jessica Pearson & Nancy Thoennes, Divorce Mediation Research Results, in Divorce Mediation: Theory and Practice 429, 436 (Jay Folberg & Ann Milne eds., 1988) (empirical evidence showing that lawyer and social worker mediators have higher settlement rates if the mediators have previously mediated greater than five cases); Wissler, What We Know, supra note 8, at 678-79 (finding training had no impact on settlement rates in mediation, but finding that experience did affect settlement rates); Nichol M. Schoenfield, Notes & Comments, Turf Battles and Professional Biases: An Analysis of Mediator Qualifications in Child Custody Disputes, 11 Ohio St. J. on Disp. Resol. 469, 487 (1996) (studies reveal little variation in the success rates of attorney-mediators and mental health professional-mediators when compared to the success rates of volunteer lay people-mediators, citing Pearson &
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Thoennes study); see also James R. Antes & Judith A. Saul, What Works in Transformative Mediator Coaching: Field Test Findings, 3 Pepp. Disp. Resol. L.J. 97 passim (2002) (describing techniques for the effective training of transformative mediators); Grace E. D’Alo, Accountability in Special Education Mediation: Many a Slip ’Twill twixt Vision and Practice?, 8 Harv. Negot. L. Rev. 201, 224-28 (2003) (recommending, based on survey data, use of more relevant tools to evaluate mediators and imposition of stricter training standards); Lela P. Love, Twenty-Five Years Later with Promises To Keep: Legal Education in Dispute Resolution and Training of Mediators, 17 Ohio St. J. on Disp. Resol. 597, 601-02, 605 (2002) (noting that over the last 25 years, the mediation community has focused more attention on minimum training requirements, effective training curriculum, certifying trainers or training programs, the use of observations and co-mediation experiences as part of the training requirements, and continuing mediation education; also recommending that we “create more useable, tested, accessible, appealing, and downloadable training material”); Forrest S. Mosten, Mediation 2000: Training Mediators for the 21st Century, 38 Fam. & Conciliation Cts. Rev. 17 passim (2000) (outlining training policy issues, components of an effective training program, and qualities of effective trainers). See generally Disp. Resol. Mag., Fall 2005, at 5, 5-23 (discussing the views of 13 academics, lawyers, and mediators about mediator training).

See, e.g., Mary Thompson, Teaching Ethical Competence, Disp. Resol. Mag., Winter 2004, at 23, 23 (describing several types of interactive training exercises designed to teach mediation ethics).

See generally Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 555-584 (1985) (criticizing moral character evaluations of applicants to the legal bar as inaccurate, ineffective, unfairly applied, and overly burdensome, resulting in a misdirection of resources).

See Association for Conflict Resolution, ACR Mediator Certification Task Force, Report and Recommendation to the ACR Board of Directors (March 31, 2004), http://www.acrnet.org/about/taskforces/certification.htm [hereinafter ACR Certification Task Force] (proposing test of 11 areas of knowledge, including communication, conflict theory, content management and resources, cultural diversity, ethics, history of mediation, models, strategies and styles, negotiation, process structure, role of third party, and systems and group dynamics).


Several commentators categorize common credentialing options into six categories: statements of standards, registers, rosters, accreditation, certification, and licensure. Margaret S. Herrman et al., Supporting Accountability in the Field of Mediation, 18 Negot. J. 29, 33 (2002). A decade ago, Sharon Press, Director of the Florida Dispute Resolution Center (DRC), identified the debate over mediator qualifications and credentialing as “lively.” Sharon Press, Building and Maintaining a Statewide Mediation Program: A View from the Field, 81 Ky. L.J. 1029, 1036 (1992-93). That debate is ongoing and perhaps even livelier. Forrest S. Mosten, Institutionalization of Mediation, 42 Fam. Ct. Rev. 292, 294-96 (2004) (discussing regulation of mediators, certification, and voluntary ethics standards); Stephanie A. Henning, Note, A Framework for Developing Mediator Certification Programs, 4 Harv. Negot. L. Rev. 189, 189 (1999) (“Mediator certification has long been a contentious issue in the mediation community, invoking concerns about the growth and diversity of the field, mediation's obligations to participants, and most of all, the direction in which the field is evolving.”); Ellen A. Waldman, The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity, 30 U.S.F. L. Rev. 723, 724 (1996) (“[I]dentification of the criteria by which qualified mediators may be distinguished from charlatans has proven elusive.”); Donald T. Weckstein, Mediator Certification: Why and How, 30 U.S.F. L. Rev. 757, 761 (1996) (arguing that certification can protect consumers, but it can also be anti-competitive and elitist); see Cole, supra note 20, at 7 (“To assess whether this movement toward certification is cause for commendation or for concern, we must first consider the stated goals of certification . . . .”); see also ABA Section of Dispute Resolution, Task Force on Credentialing, Report on Mediator Credentialing and Quality Assurance § 1(C), (Discussion Draft Oct. 2002), available at http://www.abanet.org/dispute/taksforce_report_2003.pdf [hereinafter ABA Credentialing Task Force Report] (recommending that the task force develop “model standards for mediator preparation programs [and] [o]utline one or more model systems of mediator credentialing . . . .focusing initially on the accreditation of mediator preparation programs”); ACR Certification Task Force, supra note 41, passim (includes selected bibliography); Pou,


See citations supra note 43.


Several national organizations have developed rules of ethics that are aspirational or apply to mediators who are members of the organization. For example, the American Arbitration Association (AAA), ABA, and the Society of Professionals in Dispute Resolution (SPIDR) developed the Model Standards of Conduct for Mediators (1994). See also Model Standards of Practice for Family and Divorce Mediation (2000), http://www.nafcm.org/pg9.cfm (last visited Mar. 2, 2006); Victim-Offender Mediation Ass'n, Recommended Ethical Guidelines, http://www.voma.org/docs/ethics.doc (last visited Mar. 2, 2006). For articles about the 1994 Joint Standards, see John D. Feerick, Toward Uniform Standards of Conduct for Mediators, 38 S. Tex. L. Rev. 455, 456-76 (1997) (describing drafting history of Joint Standards developed by the ABA, AAA and SPIDR); Jamie Henikoff & Michael Moffitt, Remodeling the Model Standards of Conduct for Mediators, 2 Harv. Negot. L. Rev. 87 (1997) [hereinafter Moffitt, Remodeling] (arguing that the Model Standards failed to achieve the drafters' goals of serving as a guide for the conduct of mediators, informing the mediating parties, and promoting confidence in mediation as a process of dispute resolution).

State courts have also adopted aspirational guidelines. See, e.g., Hawaii Sup. Ct., Guidelines for Hawaii Mediators (Haw. 2002), available at http://www.courts.state.hi.us/attachment/3D52C4AB783B29B7EC64289CC8/guidelines.pdf (“The Guidelines are not promulgated as binding rules, and they are not intended to regulate the work of mediators.”).

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See Bruce A. Blitman, Mediator Ethics: Florida's Ethics Advisory Committee Breaks New Ground, Disp. Resol. Mag., Spring 2001, at 10 passim (describing origin of committee, its approach to decision-making and some of the opinions it has issued); Arthur Garwin, Double Identity: Ethics Issues Do Not Disappear for Lawyers who Serve as Mediators, A.B.A. J., June 1998, at 88, 88 (1998) (examining state bar ethics opinions affecting lawyer-mediators). Few state courts or professional organizations issue ethics advisory opinions involving mediators. They are difficult to find on the internet and no other resource creates easy access to them. Moreover, bar panels typically issue the opinions relating to the unauthorized practice of law. Often, the membership of these panels does not include lawyer-mediators, so the opinions often fail to reflect a thoughtful resolution of the tensions between the values and concerns of the two professions. As discussed infra notes 302-05, 413-14, 524-25, and 803-04 and accompanying text, Florida, Virginia, Georgia and North Carolina make ethics advisory opinions available on their ADR-related court websites.

Uncertainty and controversy exist in mediation practice when expectations, values, competing interests, and public policy clash at the intersection of the mediation world with the legal world. For instance, confidentiality in mediation pits two competing public policies against each other. The first policy seeks to preserve confidentiality in the mediation process to encourage candor in the exchange of information that will, in turn, lead to the early and cost-effective resolution of disputes. The second policy emphasizes the justice system's need to consider in judicial and administrative proceedings all of the available evidence. See generally Eric D. Green, A Heretical View of the Mediation Privilege, 2 Ohio St. J. on Disp. Resol. 1, 22-25, 31-36 (1986) (concluding that a blanket privilege protecting the confidentiality of mediation communications “is a bad idea”). See also Peter Robinson, Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened, 2003 J. Disp. Resol. 135 passim (discussing tension between strict mediation confidentiality rules and contract law governing enforcement of contracts).

Ellen E. Deason, The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?, 85 Marq. L. Rev. 79 passim (2001) (urging the adoption of the Uniform Mediation Act (UMA) to create more predictability in determining the scope of confidentiality in mediation and identifying the risks of the current state-by-state rules and statutes); Richard C. Reuben, The Sound of Dust Settling: A Response to Criticisms of the UMA, 2003 J. Disp. Resol. 99 passim (providing previously unpublished history of the UMA drafting process and responding to criticisms of the model law); Joseph B. Stulberg, The UMA: Some Roads Not Taken, 2003 J. Disp. Resol. 221 passim (examining the drafting process of the UMA and urging states to consider more substantial protections than provided in the model law); see generally Uniform Mediation Act Symposium: Uniform Mediation Act, 2003 J. Disp. Resol. 1 passim (discussing goals of the UMA and the problems it creates, may solve, and ignores).

See ABA Section of Disp. Resol., Resolution on Mediation and the Unauthorized Practice of Law (adopted Feb. 2, 2002), available at http://www.abanet.org/dispute/resolution2002.pdf (identifying growing consensus that mediation is not the practice of law); ACR Bd. of Dir., The Authorized Practice of Mediation: Proposed Policy Statement of the Association for Conflict Resolution (Sept. 28, 2004), http://www.acrnnet.org/about/initiatives/publicpolicy/upl.htm (identifying mediation as a practice distinct from law; listing those mediation activities a mediator should be able to conduct without engaging in UPL so long as they are conducted consistently with mediation's core values; identifying activities improper for a mediator); see also Phyllis E. Bernard, Dispute Resolution and the Unauthorized Practice of Law, in Dispute Resolution Ethics: A Comprehensive Guide 89 (Phyllis Bernard & Bryant Garth eds., ABA 2002); James M. McCauley, Professional Responsibility, 39 U. Rich. L. Rev. 315 passim (2004) (reviewing unauthorized practice of law rulings in Virginia); Carrie Menkel-Meadow, Is Mediation the Practice of Law?, 14 Alt. to High Cost Litig. 57 passim (1996) (arguing that mediation is the practice of law, especially when mediators predict court outcomes or evaluate the merits of the parties’ legal positions); Bruce Myerson, Lawyers Who Mediate are Not Practicing Law, 14 Alt. to High Cost Litig. 74, 74-75 (1996) (arguing that mediators do not practice law and they should not give legal advice); Jacqueline M. Nolan-Haley, Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective, 7 Harv. Negot. L. Rev. 235 passim (2002) (arguing that UPL guidelines leave non-lawyer mediators unsure of permitted practices, asserting that the consumer protection rationale of UPL regulation is a “myth,” demonstrating how non-lawyer mediators regularly engage in the practice of law, and calling for greater honesty in the way we protect mediation parties); Geetha Ravindra, When Mediation Becomes the Unauthorized Practice
of Law, 15 Alt. to High Cost Litig. 94 passim (1997) (analyzing case law and ethics opinions on UPL in Virginia); Matt Wise, Separation Between the Cross-Practice of Law and Mediation: Emergence of Proposed Model Rule 2.4, 22 Hamline J. Pub. L. & Poly 383, 398-99 (2001) (suggesting ABA must decide when lawyer-mediators may be practicing law before codifying model rule that applies to lawyers serving as neutrals); Andrew S. Morrison, Comment, Is Divorce Mediation the Practice of Law? A Matter of Perspective, 75 Calif. L. Rev. 1093, 1095, 1096-1107, 1155 (1987) (examining the five tests courts use to determine if someone is engaged in UPL, finding that the tests yield a line of decisions consistent only in their inconsistency, and concluding that non-lawyer-divorce mediators are not engaged in the practice of law, but that lawyer-divorce mediators are); Joshua R. Schwartz, Note, Laymen Cannot Lawyer, But Is Mediation the Practice of Law?, 20 Cardozo L. Rev. 1715, 1746 (1999) (concluding that facilitative mediators engage in the practice of law when they make editorial suggestions to the memorialized agreement rather than serving merely as a scrivener; further concluding that evaluative mediators who give legal opinions and predictions regarding disputed facts engage in the practice of law); John W. Cooley, Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR, Disp. Resol. J., Aug.-Oct.2000, at 72 passim (arguing that Virginia's guidelines on UPL frame the wrong question and provide little help to mediators about lawful behavior); Furlan et al., supra note 44, at 276-78; Mark Hansen, At the Crossroads: States Focus on UPL Enforcement and Regulation of Nonlawyer Practitioners, A.B.A. J., May 2005, at 62; David A Hoffman & Natasha A. Affolder, Mediation and UPL: Do Mediators Have a Well-Founded Fear of Prosecution?, 6 Disr. Resol. Mag., Winter 2000, at 20, 22-23 (calling for a new approach to analyzing UPL in the mediation context and suggesting that greater regulation of mediators may discourage regulation by those outside the field); Bridget Hoy, Watch What You Say: Avoiding the Accidental Attorney-Client Relationships, Ill. B.J., Jan. 2005, at 22 passim (discussing the inadvertent creation of an attorney-client relationship); Roger C. Wolf, The Grey Zone: Mediation and the Unauthorized Practice of Law, Md. B.J., July/Aug. 2003, at 40, 41-42 (2003) (describing five approaches to determining whether a mediator is engaged in UPL).

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of Mediation, Session 4.05; Sharon Press et al., Joint Committee on Model Standards of Conduct for Mediators, Session 6.08; John Lande et al., Delivering Quality Mediation: What's Ethics Got to Do With It?, Session 7.03; Margaret S. Powers, The Over Eager Mediator: I Aim to Please, Session 7.07; Margaret S. Powers et al., ACR Town Meeting on Ethical Practice, Session 8.01; and Suzanne McCorkle & Melanie Reese, Mediator Ethics: Does it Make a Difference What or Where You Practice?, Session 8.09); see also Clarence Cramer et al., Ethical Dilemmas for Family and Divorce Mediators: An Update and Panel Perspective, Session 4.21 at the ACR 2004 Annual Conference, Valuing Peace in the 21st Century: Expanding the Art and Practice of Conflict Resolution (Sacramento, Cal. Sept. 29-Oct. 2, 2004), available at https://www nrstaping.com/acr/acro2004.htm.

I also attended the following ethics related conference programs: Jack Hanna, Carrie Menkel-Meadow, Eric Tuchman, John J. Welsh & Terrence T. Wheeler, A National ADR Ethics Board-Is it Time?, Session C9; and Josh Stulberg, Wayne Thorp & Susan Yates, The New Model Standards of Conduct for Mediations, Session E9 at the ABA Section of Dispute Resolution, The Golden State of ADR, Seventh Annual Conference (Los Angeles, Cal. Apr. 14-16, 2005). The ABA did not record these sessions. Conference papers for the sessions are available on a CD-ROM from the ABA Section of Dispute Resolution, 740 15th Street, N.W., Washington, D.C. 20005.

I also acknowledge the role a new ethics book played in my thinking on the subject. See generally Dispute Resolution Ethics, supra note 52.

55 See comments supra notes 13-15 and accompanying text.


57 Kelly, supra note 56, at 17.

58 Roselle L. Wissler, The Effectiveness of Court-Connected Dispute Resolution in Civil Cases, 22 Conflict Resol. Q. 55, 58 (2004). The author of the article did not report the data in specific percentages.

59 E. Franklin Dukes, What We Know About Environmental Conflict Resolution: An Analysis Based on Research, 22 Conflict Resol. Q. 191, 199 (2004).

60 D’Alo, supra note 38, at 221-22; see also Cynthia F. Cohen & Murray E. Cohen, Relative Satisfaction with ADR: Some Empirical Evidence, Disp. Resol. J., Nov. 2002-Jan. 2003, at 37, 38-40 (suggesting that studies of student satisfaction with six types of ADR processes may also reflect the preference of actual users of ADR for processes giving them control of the process and the outcome).

61 See generally Robert W. Rack, Jr., Thoughts of a Circuit Court Mediator on Federal Court-Annexed Mediation, 17 Ohio St. J. on Disp. Resol. 609, 625 (2002) (“Historically, complaints to [the U.S. Court of Appeals for the Sixth Circuit] of which I am aware have been rare, maybe a half dozen in 20 years.”); Wissler, What We Know, supra note 8, at 645 n.11, 661, 663 (based on questionnaires completed by mediators, parties, and attorneys in 1,730 cases referred to mediation between 1992 and 2000, “[a] majority of the litigants not only felt the mediation process was fair (72%), but that they had a sufficient chance to tell their views of the dispute (84%) and also had considerable input in determining the outcome (63%).” Eighty-nine percent of attorneys thought the mediation process was very fair.); Jennifer Shack, Mediation in Courts can Bring Gains, but Under What Circumstances, Disp. Resol. Mag., Winter 2003, at 11 passim (summarizing research showing that 70% of parties are satisfied with the mediation process).

62 “‘Lumping it’ means that an individual knows they [sic] have a problem but for strategic reasons chooses not to bring it up to another party. This can be a form of submission, or it can be a part of a larger interaction in which the possible gain is not worth the possible loss.” Jessie Dye, Mediation: Win-Win Alternatives for Conflict Resolution, 4 In Context 29 (1997), available at http://www.context.org/ICLIB/IC04/Dye.htm. See generally William L.F. Felstiner, Richard L. Abel & Austin Sarat, The Emergence and Transformation of Disputes: Naming, Blaming, Claiming - . . ., 15 Law & Soc’y Rev. 631, 632-33 (1980-81) (“[T]oo few wrongs are perceived, pursued, and remedied . . . . [T]he capacity of people to tolerate substantial distress and injustice . . . may represent a failure to perceive that one has been injured; such failure may be self-induced or externally manipulated.”); Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 14 (1983) (“Even where injuries are perceived, a common response is resignation, that is, ’lumping it.’”); Martha Minnow, Speaking of Silence, 43 U. Miami L. Rev. 493, 493 (1988) (book review) (“There are real costs to complaining.
There may also be a kind of survival strategy in swallowing injury, or ‘lumping it.’ To respond to hurt with silence, however, leaves the source of hurt unchallenged. This is the insight behind the satirist’s invocation: ‘Will all those who feel powerless to influence events please signify by maintaining their usual silence.’


Suing Mediators, supra note 66, at 151.

Id. at 185 n.130, 186 n.132.

For a discussion of “claiming” behavior, see Felstiner, supra note 62, at 635-36 (“The third transformation occurs when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy. We call this communication claiming.”) (emphasis in original).

In states requiring ethics training, the training often occurs as a one or two hour addition to the already crowded basic mediator training curriculum. The trainers often teach the subject hurriedly, by a lecture method, to students who have no context for the discussion because they have not yet conducted a real mediation. In addition, in states that do not have an ethics code, trainers must decide which aspirational ethics code they should offer to students. See, e.g., Mediation Training, Missouri University Office of Continuing Legal Education & The Center for the Study of Dispute Resolution (June 5-7, 2005) (providing 20.4 hours of Missouri MCLE, including 1 hour of ethics training).

When I mentioned this factor at two recent ethics training sessions, therapists in the room started to nod their heads in agreement.


Rubin & McGirney, supra note 54.

Sharon Press, Director of the Florida Dispute Resolution Center (DRC), believes that perhaps 50% of domestic cases involve pro se parties in Florida, not 50% of all civil cases. Telephone Interview with Sharon Press, Director of Florida’s DRC, in Tallahassee, Fla. (Nov. 25, 2005).

Id. Rubin has served as a member of the Supreme Court of Florida’s ADR Policy Committee, teaches as an adjunct professor at the University of Miami Law School, and is a certified mediator in Florida. He is not a member of the Florida bar. See Mediation Services Inc, About Mel Rubin, http://www.mediate.com/melrubin/pg1.cfm. Rubin has not supported this statement with empirical research and he has not responded to my efforts to discuss the support for this statement. Sharon Press, Director of the Florida DRC, believes most parties ordered to court-connected mediation sessions are represented by counsel. Telephone Interview with Sharon Press, Director of the Florida DRC, in Tallahassee, Fla. (Mar. 28, 2005). See Connie J. A. Beck & Bruce D. Sales, A Critical Reappraisal of Divorce Mediation Research and Policy, 6 Psych. Pub. Pol’y & L. 989, 993-94 (2000) (citing two studies in Maricopa County, Arizona, two studies of California courts, and a study of 16 courts nationwide indicating that in divorce and child custody mediations held since 1992, 72% to 90% of the mediations involved one pro se party; and 35% to 56% of the mediations involved two pro se parties); Deborah R. Hensler, supra note 8, at 133 (citing research showing that lawyers generally participate in mediations with their clients); Craig A. McEwen et al., Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation, 79 Minn. L. Rev. 1317, 1362 n.261 (1995) (analyzing data assembled by the National Center for State Courts
and finding that lawyers played no role in mediation in 43 percent of the 205 court-related divorce mediation programs studied); see also Katherine R. Kruse, Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Client Representation, 8 Clinical L. Rev. 405, 414 n.19 (2002) (citing two sources reporting that up to 88% of family law cases, not necessarily in mediation, involve one pro se party; also reporting that 69% to 72% of Wisconsin cases filed in an urban area court involved at least one pro se party). Thus, Rubin and Firestone seem to assume that parties who participate in a suit pro se do not retain attorneys when a court orders them to attempt a mediated settlement of the dispute.

76 Firestone, supra note 54.

77 Wissler, What We Know, supra note 8, at 696-701. For a review of research on the effects of process features on parties' perceptions of procedural justice, see Nancy A. Welsh, Making Deals in Court-Connected Mediation: What's Justice Got To Do With It? 79 Wash. U. L.Q. 787, 789 (2001) [hereinafter Welsh, Making Deals] (demonstrating that mediation's adoption of attorney dominance of the process, evaluative interventions, marginalization or abandonment of joint sessions, and a focus on monetary settlements represents a successful adaptation of the process to the needs of “litigotiation,” but arguing that mediation should offer disputants an experience of procedural justice that is generally inconsistent with these types of interventions).

78 Rubin & McGirney, supra note 54.

79 Id.

80 I use the term “profession of origin” to describe any other professional competencies a mediator may have that would subject him or her to a different set of ethical standards, including the professions of lawyers, therapists, psychologists, social workers, accountants, or physicians. One issue that falls beyond the scope of this article is whether other ethics codes may apply when a mediator is a member of one or more professions. Martin's response to Clare's Findlaw posting, supra notes 2, 4, raises this issue. Even in a state like Kentucky that has no mediator ethics rules, the lawyer-mediator may still be governed by the ethics code governing lawyers. A therapist-mediator may end up defending a grievance filed under ethical rules applying to therapists. In Virginia, for instance, the Standards of Ethics expressly state:

These Standards are not intended to be exclusive and do not in any way limit the responsibilities the mediator may have under codes of ethics or professional responsibility promulgated by any other profession to which the mediator belongs or to any other code of ethics or professional responsibility to which the mediator subscribes, such as those promulgated by the Society of Professionals in Dispute Resolution or the Academy of Family Mediators.

Virginia SOEs, supra note 48, § P.

81 Telephone Interview with Sharon Press, supra note 74.

82 After the publication deadline for this article, the author discovered that Arkansas and South Carolina also had complaint systems. See discussion supra notes 13-15 and accompanying text. The complaint data for North Carolina and Arkansas appears in Appendices H and I, respectively, and are not discussed in the text of this article.

83 Michigan and New Hampshire have established procedures to process complaints against family law mediators. See Mich. Comp. Laws Ann. § 552.526 (West 2005); N.H. Rev. Stat. Ann. § 328-C:7 (2004); see also Kimberlee K. Kovach, Enforcement of Ethics in Mediation, in Dispute Resolution Ethics: A Comprehensive Guide 111 (Phyllis Bernard & Bryant Garth eds., 2002). See generally National Standards, supra note 8, § 2.6 (recommending that “[p]arties 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.”). The Director of the Florida Court Management and Dispute Resolution Center, Michael Bridenback, who brought his experience in drafting the Florida ethics standards, and the Executive Secretary of the Virginia Supreme Court, Robert N. Baldwin, served on the Advisory Board at the time the board developed the National Standards. Id. at iii. It should come as no surprise that Florida and Virginia are among the five states that have ethics codes that reflect the values found in the National Standards, including the complaint mechanism recommended in section 2.6.

84 In most of the states analyzed in this article, the complaint procedures require a signed, written complaint. Some procedures require the complaining party to certify that the facts stated in the complaint are believed to be true. Informal complaints fail to meet these standards.
In November 2004, the Florida Supreme Court advised the Florida legislature that the court system, based on accepted objective formulas, needed 67 new circuit court judges, 41 new county court judges, and 2 additional appellate court judges. In re: Certification of Need for Additional Judges, 889 So. 2d 734, 740-41 (Fla. 2004). Since 2000, the legislature had authorized less than 20% of the trial judges requested by the court. It has authorized no new trial judges in the past two years, and no new county court judges in the past three years. Id. at 737, 738. The court noted, however, that 50% of its civil docket involved the needs of children and families, including juvenile and dependency cases. Id. at 736. Of the ten most populous states, Florida ranked second in the case filings per judge, with general district court judges handling 46.5% more filings than the average judge nationally. Id. at 737. Court dockets swell during the winter months when the state's population also swells. The courts spend increasing time and resources accommodating the language needs of the large Latino-American population in the state. And the state's aging population puts unique demands on the court system. Id. at 737-38. In a three-year period, 1999-2003, labor intensive non-capital murder cases increased 31%. Id. at 738. In the past decade, cases involving domestic violence increased 100%. Id. In the same three-year period, county court filings, exclusive of traffic infractions, increased 11%. Id. The court believes it can protect the rights of due process and equal protection and provide access to the courts for parties when the ratio of appellate judges to circuit judges remains at or below a one to nine ratio. Id. at 742. In one appellate circuit, the ratio stood at 1 to 11 in 2004 and cases per appeals judge approximated 441 cases per year. In the 2003-2004 fiscal year, persons filed 24,157 cases in the district courts, an 11% increase over the 1999-2000 fiscal year filings. Id. These statistics suggest why Florida courts increasingly rely on mediation to handle court dockets.

A summary of the complaints filed against Florida mediators and their resolution appears in Appendix C to this article [hereinafter Summary of Florida DRC Formal Complaints]. Sharon Press, the Director of Florida's DRC, provided the summaries of the grievances and their resolutions. See E-mail from Sharon Press, Director of Florida's DRC, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Oct. 3, 2005, 10:50 EST) (on file with the author). The Director of Florida's DRC summarized the complaint handling process in Sharon Press, Standards . . . Results: Florida Provides Forum for Grievances Against Mediators, Disp. Resol. Mag., Spring 2001, at 8 passim (analyzing 49 complaints that had been filed since 1992). The original data, compiled by the Florida DRC, consists of the following: “Mediator Qualifications Board Grievances Filed Pre-October 1995 Summary,” “Mediator Qualifications Board Grievances Filed October 5, 1995-March 31, 2000 Summary,” and “Mediator Qualifications Board Grievances Filed April 1, 2000-Present Summary” (on file with author). Florida's DRC received the first grievance against a mediator in July 1993. Telephone Interview with Sharon Press, Director of Florida's DRC, in Tallahassee, Fla. (Aug. 12, 2005). The complaints summarized in Appendix C may refer to earlier versions of the current Standards of Conduct, discussed infra notes 296-301. They may also reflect a different numbering system for the Standards of Conduct. The footnotes to this article refer to the current versions of the Florida Standards of Conduct. Summary of Florida DRC Formal Complaints, supra. Florida's DRC staff also processes complaints involving the moral character of applicants and persons seeking recertification. This article does not discuss these complaints, with the exception of three. In one situation, the regulators took the mediator off the court's roster of approved mediators. See discussion infra note 111 and accompanying text. In the remaining two complaints, the mediator made misstatements on his application for certification or in his continuing education reporting form that possibly reflected on the mediator's integrity under Rule 10.620 of the Florida Standards of Conduct. See discussion infra note 102.

The complaint committees, assembled by the DRC from members of the Mediator Qualifications Board, are described infra note 273 and accompanying text.

The Director of Florida's DRC explains that this finding typically comes after the complaint committee or an independent investigator discovers that the facts are inconsistent with the facts stated in the complaint. The investigated facts indicate that the mediator has not violated an ethics rule. The Director of Florida's DRC gives the following example. A complaint came in to Florida's DRC alleging the following:

This was horrible. I was in this mediation for ten hours. The mediator would not let us break. I wasn't allowed to eat. I was hypoglycemic. . . . I would [have] sign[ed] anything . . . just get me out of that room. We did a whole investigation into it and it turns out that the person said, “Well, you know, actually we really did get to eat, but it just wasn't a very good meal.”

Conference Transcript, supra note 88, at 15.

The hearing panels are described infra notes 274-76 and accompanying text.

Each complainant may have alleged a violation of several standards of conduct. In addition, Florida's DRC staff may also refer to the complaint committee a violation of a standard that the staff member sees as “embedded” in the facts of the alleged in the complaint. Telephone Interview with Sharon Press, supra note 89.

See generally Fla. Standards of Conduct, supra note 48. The rules took effect in May 1992. Telephone Interview with Sharon Press, supra note 89. Several provisions of the Standards of Conduct govern party self-determination. “The ultimate decision-making authority . . . rests solely with the parties.” Fla. Standards of Conduct, supra note 48, R. 10.220. “The purpose of mediation is to provide a forum for consensual dispute resolution by the parties. It is not an adjudicatory process. Accordingly, a mediator's responsibility to the parties includes honoring their right of self-determination; acting with impartiality; and avoiding coercion, improper influence, and conflicts of interest.” Id. R. 10.300.

(a) Decision-making. Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination. (b) Coercion Prohibited. A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation. (c) Misrepresentation Prohibited. A mediator shall not intentionally or knowingly misrepresent any material fact or circumstance in the course of conducting a mediation. (d) Postponement or Cancellation. If, for any reason, a party is unable to freely exercise self-determination, a mediator shall cancel or postpone a mediation.


The Standards of Conduct provide:

(a) Providing Information: Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide. (b) Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal advice. (c) Personal or Professional Opinion. A mediator shall not offer a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination[,] however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

Fla. Standards of Conduct, supra note 48, R. 10.370(a)-(c).

The Standards of Conduct provide:

(a) Generally. A mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual. (b) Withdrawal for Partiality. A mediator shall withdraw from mediation if the mediator is no longer impartial. (c) Gifts and Solicitation. A mediator
shall neither give nor accept a gift, favor, loan, or other item of value in any mediation process. During the mediation process, a mediator shall not solicit or otherwise attempt to procure future professional services. Id. R. 10.330(a)-(c). The Director of Florida's DRC reported:

They're not impartial . . . . [I]t . . . shows [up as an allegation] in almost every single complaint that we get. Even if there are other complaints . . . it seems to be the thing that drives someone to say, “You know what, I'm really angry about what happened in the process.” They'll forgive lots of stuff, but that's the one that really sticks with them . . . .

Conference Transcript, supra note 88, at 11-12.

Summary of Florida DRC Formal Complaints, supra note 89.

The Standards of Conduct provide:

Adjournment or Termination. A mediator shall: (1) adjourn the mediation upon agreement of the parties; (2) adjourn or terminate any mediation which, if continued, would result in unreasonable emotional or monetary costs to the parties; (3) adjourn or terminate the mediation if the mediator believes the case is unsuitable for mediation or any party is unable or unwilling to participate meaningfully in the process; (4) terminate a mediation entailing fraud, duress, the absence of bargaining ability, or unconscionability; and (5) terminate any mediation if the physical safety of any person is endangered by the continuation of mediation.

Fla. Rules for Mediators, supra note 48, R. 10.420(b).

“A mediator shall not accept any engagement, provide any service, or perform any act that would compromise the mediator's integrity or impartiality.” Id. R. 10.620. “A mediator's business practices should reflect fairness, integrity and impartiality.” Id. R. 10.300.

The Standards of Conduct provide:

Orientation Session. Upon commencement of the mediation session, a mediator shall describe the mediation process and the role of the mediator, and shall inform the mediation participants that: (1) mediation is a consensual process; (2) the mediator is an impartial facilitator without authority to impose a resolution or adjudicate any aspect of the dispute; and (3) communications made during the process are confidential, except where disclosure is required by law.

Id. R. 10.420(a).

The Standards of Conduct provide:

(a) Generally. A mediator shall not mediate a matter that presents a clear or undisclosed conflict of interest. A conflict of interest arises when any relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator's impartiality . . . . (d) Conflict During Mediation. A mediator shall not create a conflict of interest during the mediation. During a mediation, a mediator shall not provide any services that are not directly related to the mediation process.

Id. R. 10.340(a), (d).

The Standards of Conduct provide:

(a) Generally. A mediator holds a position of trust. Fees charged for mediation services shall be reasonable and consistent with the nature of the case . . . . (c) Written Explanation of Fees. A mediator shall give the parties or their counsel a written explanation of any fees and costs prior to mediation . . . . (e) Remuneration for Referrals. No commissions, rebates, or similar remuneration shall be given or received by a mediator for a mediation referral. (f) Contingency Fees Prohibited. A mediator shall not charge a contingent fee or base a fee on the outcome of the process.

Id. R. 10.380(a), (c), (e), (f).

The Standards of Conduct provide:

(a) Scope. A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required by law. (b) Caucus. Information obtained during caucus may not be revealed by the mediator to any other mediation participant without the consent of the disclosing party. (c) Record Keeping. A mediator shall maintain confidentiality in the storage and disposal of records and shall not disclose any identifying information when materials are used for research, training, or statistical compilations.

Id. R. 10.360(a)-(c).

“A mediator shall be patient, dignified, and courteous during the mediation process.” Id. R. 10.350.
“A mediator shall not engage in marketing practices which contain false or misleading information. A mediator shall ensure that any advertisements of the mediator's qualifications, services to be rendered, or the mediation process are accurate and honest. A mediator shall not make claims of achieving specific outcomes or promises implying favoritism for the purpose of obtaining business.” Id. R. 10.610.

“A mediator shall acquire and maintain professional competence in mediation. A mediator shall regularly participate in educational activities promoting professional growth.” Id. R. 10.630.

“The benefits of the process are best achieved if the mediation is conducted in a . . . timely fashion.” Id. R. 10.400. “A mediator shall schedule a mediation in a manner that provides adequate time for the parties to fully exercise their right of self-determination. A mediator shall perform mediation services in a timely fashion, avoiding delays whenever possible.” Id. R. 10.430.

This complaint related to the good moral character of a lawyer-mediator who had an alcohol abuse problem and a history of criminal convictions for assault. After the first hearing, the hearing panel required the mediator to comply with the Florida Lawyer Assistance Contract and to do additional training and mentorship. Florida’s DRC staff learned the mediator had not completed all of the sanctions. The hearing panel held a second hearing confirming the mediator's failure to comply with all of the sanctions and then decided to de-certify the mediator. Telephone Interview with Sharon Press, supra note 89. This grievance, and the resulting sanction, does not appear in Appendix C to this article because it did not involve a violation of the Florida Standards of Conduct. Id. I include it in the discussion to show how infrequently Florida takes a mediator off the roster of court-approved mediators. It also illustrates the procedural safeguards Florida uses before imposing this sanction. In contrast, in Maine, the investigation of four complaints resulted in the voluntary resignation of four mediators, apparently without a hearing or other due process protections. In another situation, the ADR Director of the Maine program removed a mediator from the court’s roster when she observed a violation of the state's ethics standards. Apparently, she imposed the sanction without conducting a hearing or providing other procedural safeguards. However, the mediator did not appeal the sanction. See discussion infra notes 178, 758 and accompanying text.

Summary of Florida DRC Formal Complaints, supra note 89.


See discussion infra note 399.

The Virginia Supreme Court supervises this department and Ms. Ravindra reports to the Executive Secretary of the Virginia Supreme Court (Executive Secretary). Telephone Interview with Geetha Ravindra, Director of the Virginia Department of Dispute Resolution Services (DRS) in Richmond, Va. (July 22, 2005). The Executive Secretary's responsibilities are described infra note 401.

Geetha Ravindra, Director of the DRS in Richmond, Va., Complaint Procedures for Mediators Overview at the Virginia Mediation Network Spring Conference (April 2005) at slide 15 (on file with author) [hereinafter DRS Director's Presentation]. Telephone Interview with Geetha Ravindra, supra note 115.

DRS Director's Presentation, supra note 116, at slide 15. A summary of the complaints against Virginia certified mediators appears as Appendix D to this article [hereinafter Virginia DRS Log of Formal Complaints]. See E-mail from Geetha Ravindra, DRS Director, Virginia Supreme Court, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (July 22, 2005, 15:27 EST) (transmitting Virginia DRS Log of Formal Complaints) (on file with author); see also E-mail from Geetha Ravindra, DRS Director, Virginia Supreme Court, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Apr. 14, 2005, 12:47 EST) (categorizing complaints by nature of complaint) (on file with author).

DRS Director's Presentation, supra note 116, at slide 15. Telephone Interview with Geetha Ravindra, supra note 115.

This panel is described infra notes 438-42 and accompanying text.

121 DRS Director's Presentation, supra note 116, at slide 15. Telephone Interview with Geetha Ravindra, supra note 115.

122 This committee is described infra notes 460-64 and accompanying text.

123 Virginia DRS Log of Formal Complaints, supra note 113. The typical sanction requires continuing education or mentorship. DRS Director's Presentation, supra note 116, at slide 17; Virginia DRS Log of Formal Complaints, supra note 113; see also discussion infra note 470 and accompanying text.

124 DRS Director's Presentation, supra note 116, at slide 17.

125 Id. at slide 16; see also E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), supra note 117. The Virginia SOEs provide:
   1. A mediator shall be impartial and advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality. Impartiality means freedom from favoritism or bias in word, action, and appearance. Impartiality implies a commitment to aid all parties in moving toward an agreement. 2. A mediator shall avoid conduct which gives the appearance of partiality towards one of the parties. A mediator should guard against partiality or prejudice based on the parties [sic] personal characteristics, background, or performance in the mediation. 3. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

   Va. SOEs, supra note 48, § G. One complaint also raised an issue about conflict of interest under section H of Virginia's SOEs, which provides:
   1. The mediator has a duty to remain free from conflict of interest that could in any way affect the ability of the mediator to conduct a neutral and balanced process. 2. A mediator must disclose any current, past, or possible future representation or relationship with any party or attorney involved in the mediation. Disclosure must also be made of any relevant financial interest. All disclosures shall be made as soon as possible after the mediator becomes aware of the interest or relationship. 3. After appropriate disclosure, the mediator may serve if the parties so desire.

   Va. SOEs, supra note 48, § H; see also Va. Rules of Prof'l. Conduct R. 2.10(d)-(f) (2004) (similar language); E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), supra note 117.

126 DRS Director's Presentation, supra note 116, at slide 16.

127 E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), supra note 117. Virginia's SOEs provide:
   1. Mediation is based on the principle of self-determination by the parties. Self-determination requires that the mediator rely on the parties to reach a voluntary agreement. 2. The mediator may provide information about the process, raise issues, and help explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. 3. The mediator may not coerce a party into an agreement, and shall not make decisions for any party to the mediation process. 4. The mediator shall promote a balanced process and shall encourage the parties to conduct the mediation in a collaborative, non-adversarial manner. 5. Where appropriate, the mediator shall promote consideration of the interests of persons affected by actual or potential agreements who are not present or represented at the mediation.

   Va. SOEs, supra note 48, § E. In addition, Virginia Rules of Professional Conduct, Rule 2.10(b)(4) further provides that a mediator “may not compel or coerce the parties to make an agreement.” This allegation may fall to second place in Virginia, unlike Florida, because the Virginia SOEs expressly permit a mediator to provide legal information and evaluations, at least in three circumstances. See Va.'s SOEs, supra note 48, § F; Va. Rules of Prof'l. Conduct, infra note 128, R. 2.11 (c), (d) (2004); see also Carl T. Hahn, Using Evaluative Techniques: The Virginia Approach, 16 Alt. to High Cost Litig. 149, 149 (1998) (describing debate involved in drafting Virginia's SOEs and explaining the informed consent approach adopted that also provides express rules governing evaluative techniques); Laflin, supra note 46, at 518 (“The drafters of the Virginia rules thoroughly debated the issue of evaluation, striving to resolve it through what they termed a ‘delicate compromise.’”).

128 DRS Director's Presentation, supra note 116, at slide 16. Telephone Interview with Geetha Ravindra, supra note 115. Virginia's SOEs provide:
   1. The mediator shall encourage the participants to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a participant. 2. A mediator shall give information only in those areas where qualified by training or experience. 3. When providing information, the mediator shall do so in a manner that will neither affect the parties' perception of the mediator's impartiality, nor the parties' self-determination.
TAKE IT OR LEAVE IT. LUMP IT OR GRIEVE IT:..., 21 Ohio St. J. on...

Va. SOEs, supra note 48, § F; see also Va. Rules of Prof'l. Conduct R. 2.10(b)(2) & cmt. [3] (2004) (similar language). A Virginia Supreme Court rule, however, confuses the role of the mediator by providing:

(c) A lawyer-mediator may offer legal information if all parties are present or separately to the parties if they consent . . . . (d) A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties.

Id. R. 2.11(c), (d) (2004).

Taken together, the Virginia Rules of Professional Conduct for Lawyers and the Virginia SOEs prevent a mediator from offering legal advice, but allow a mediator to provide legal information in specific contexts, and authorize at least three types of case evaluation. Although the issue of the unauthorized practice of law (UPL) is beyond the scope of this article, under the DRS's careful interpretation of Virginia law, UPL occurs when a mediator applies the law to specific facts. See Virginia's Judicial System, Guidelines on Mediation & the Unauthorized Practice of Law, http://www.courts.state.va.us/drs/upl/preface.html (last visited Mar. 2, 2006). I have concluded that it is nearly impossible to draw a meaningful line between legal advice, legal information, and case evaluation under the interpretation compelled by current Virginia law. Thus, UPL remains a trap for unwary Virginia mediators who believe they have explicit Supreme Court authorization to engage in activities that the Virginia Bar may consider UPL. For other evaluations of the UPL issue, including the latest analysis of the Authorized Practice of Mediation by the ACR Board of Directors, see citations supra note 52. Ms. Ravindra served on the ACR Task Force that reported its finding to the board of directors. Telephone Interview with Geetha Ravindra, supra note 115.

The compliant procedures provide: “If the complaint involves a procedure which is a combination of mediation with another dispute resolution process, the scope of review under these procedures is limited to the mediation portion of the proceeding.” Office of the Exec. Sec. of the Sup. Ct. of Va., Complaint Procedures for Mediators Certified to Receive Court-Referred Cases, § 1(c) (Mar. 1997) [hereinafter Complaint Procedures], available at http://www.courts.state.va.us/drs/forms/complaintprocedures2002.pdf. Thus, a dissatisfied participant could file separate claims under other complaint systems against a mediator engaged in med-arb or case evaluation for any ethical violations committed while conducting ADR processes other than mediation. A mediator, therefore, may defend a complaint before the DRS, as well as, for instance, in the Virginia Bar's Fee Dispute Resolution Program. See Virginia State Bar, Resolution of Fee Disputes, http://www.vsb.org/feedisputes.html (last visited Mar. 2, 2006). Virginia does not have an arbitrator complaint process. Telephone Interview with Geetha Ravindra, supra note 115.

129 DRS Director's Presentation, supra note 116, at slide 16. Section L of Virginia's SOEs provides:

1. A mediator shall conduct the mediation diligently and shall not prolong the mediation for purposes of charging a higher fee. 2. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from nondisclosure or fraud by a participant, the mediator shall inform the parties. The mediator shall discontinue the mediation in such circumstances, but shall not violate the obligation of confidentiality.

Va. SOEs, supra note 48, § L.

130 E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), supra note 117. Virginia's SOEs provide:

Prior to agreeing to mediate, and throughout the process, the mediator should determine that: 1. Mediation is an appropriate process for the parties; 2. each party is able to participate effectively within the context of the mediation process; and 3. each party is willing to enter and participate in the process in good faith. If in the judgment of the mediator the conditions specified in (1) through (3) are not met, the mediator shall not agree to mediate or, if the concerns arise after the process has begun, shall consider suspending or terminating the process.

Va. SOEs, supra note 48, § C. This section of the Virginia SOEs tracks the requirements of Virginia Rules of Professional Conduct, Rule 2.11(b).

131 E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), supra note 117. Virginia is unique in explicitly requiring a specific set of disclosures by the mediator in the opening statement and/or the agreement to mediate. A portion of these disclosures is now known in Virginia as the “four legals.” Failure to make these disclosures serves as grounds for voiding the settlement agreement reached in mediation. See discussion of Va. Code Ann. § 8.01-576.12 (West Supp. 2005) infra note 412 and accompanying text. The Virginia Rules of Professional Conduct, Rule 2.11(e), and section D of Virginia's SOEs require the disclosures. Virginia's SOEs provide:
1. Description of Mediation Process. The mediator shall define mediation and describe the mediation process to the parties and their attorneys, if present.

a) Mediation is a process in which a neutral facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute.

b) The description of the process shall include an explanation of the role of the mediator.

c) The mediator shall also describe his style and approach to mediation. The parties must be given an opportunity to express their expectations regarding the conduct of the mediation process. The parties and mediator must include in the agreement mediator must to mediate a general statement regarding the mediator's style and approach to mediation to which the parties have agreed.

d) The stages of the mediation process shall be described by the mediator.

2. Procedures.

a) Prior to commencement of the court-referred mediation, the mediator shall inform the parties in writing of the following:

1. The mediator does not provide legal advice.

2. Any mediated agreement may affect the legal rights of the parties.

3. Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so.

4. Each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.

b) In all other cases, the mediator shall inform the parties orally or in writing, of the substance of the disclosures required in 2(a) above.

c) The mediator shall reach an understanding with the participants regarding the procedures which may be used in mediation. This includes, but is not limited to, the practice of separate meetings (caucus) between the mediator and participants, the involvement of additional interested persons, the procedural effect on any pending court case of participating in the mediation process, and conditions under which mediation may be terminated by the mediator.

d) If the mediation is conducted in conjunction with another dispute resolution process, such as arbitration, and the same neutral conducts both processes, the mediator must describe to the parties the mediator must procedures to be followed in both processes clearly, prior to entering into the agreement to mediate.

Va. SOEs, supra note 48, § D (emphasis added).

E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), supra note 117. Section I of Virginia's SOEs tracks the statutes governing confidentiality in mediation. See Va. Code Ann. § 8.01-576.10, -581.22 (West Supp. 2005). Section 8.01-576.22 provides:

All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation which relates to the controversy, including screening, intake and scheduling a mediation, whether made to the mediator or mediation program staff or to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing. Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the mediation agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the mediator or mediation program and a party to the mediation for damages arising out of the mediation, (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation, (iv) where a threat to inflict bodily injury is made, (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime, (vi) where an ethics complaint is made against the mediator by a party to the mediation to the extent necessary for the complainant to prove misconduct and the neutral to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or (ix) as provided by law or rule. The use of attorney work product in a dispute resolution proceeding shall not result in a waiver of the attorney work product privilege.

Notwithstanding the provisions of this section, in any case where the dispute involves support of the minor children of the parties, financial information, including information contained in the child support guidelines worksheet, and written reasons for any deviation from the guidelines shall be disclosed to each party and the court for the purpose of computing a basic child support amount pursuant to § 20-108.2.
The language of Section 8.01-576.10 is nearly identical, but the statute applies to neutrals and “dispute resolution programs” as defined in section 8.01-576.4. See also discussion infra notes 415-17 and accompanying text.

E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), supra note 117. Virginia's SOEs provide:
The mediator has no vested interest in the outcome of the mediation; therefore, the mediator must encourage the parties to develop their own solution to the conflict. The mediator may suggest options for the parties to consider, only if the suggestions do not affect the parties' self determination or the mediator's impartiality. The mediator may not recommend particular solutions to any of the issues in dispute between the parties nor coerce the parties to reach an agreement on any or all the issues being mediated. Prior to the parties entering into a mediated agreement, the mediator has the obligation to determine that:
1) the parties have considered all that the agreement involves and the possible ramifications of the agreement;
2) the parties have also considered the interests of other persons who are not parties to the mediation but are affected by the agreement; and
3) the parties have entered into the agreement voluntarily.
The mediator shall encourage review of any agreement by independent counsel for each of the parties prior to the mediated agreement being signed by the parties.
If the mediator has concerns about the possible consequences of a proposed agreement or that any party does not fully understand the terms of the agreement or its ramifications, the mediator has the obligation to raise these concerns with the parties. Under circumstances in which the mediator believes that manifest injustice would result if the agreement was signed as drafted, the mediator shall withdraw from the mediation prior to the agreement being signed.
Va. SOEs, supra note 48, § J.

E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), supra note 117. Virginia's SOEs provide: “A mediator shall be truthful in advertising and solicitation for mediation.” Va. SOEs, supra note 48, § N.


E-mail from Christina Petrig, Program Coordinator, Georgia Office of Dispute Resolution, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Oct. 3, 2005, 9:51 EST) (on file with author).


See Georgia Office of Dispute Resolution Complaint Summary in Appendix E; see also Ga. Ethical Standards, supra note 48. The Georgia Supreme Court adopted the Georgia Ethical Standards on Sept. 28, 1995. E-mail from Christina Petrig, Program Coordinator, Georgia Office of Dispute Resolution, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Aug. 10, 2005, 11:17 EST) (on file with author). Ms. Petrig supplied data on post-2002 complaints because the Georgia Office of Dispute Resolution has not kept data on prior complaints in the format requested by the author. In one complaint not appearing in Appendix E, the Committee found mediator misconduct, but issued an advisory opinion rather than sanction the mediator. See Ga. Comm'n on Disp. Resol., Advisory Opinions, available at http://www.godr.org/ethics_info.html. The Committee believed it did not have jurisdiction to sanction the mediator because the conduct leading to the complaint occurred before the Georgia Supreme Court had adopted the Georgia Ethical Standards. See E-mails from Christina Petrig, Program Coordinator, Georgia Office of Dispute Resolution, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Aug. 10, 2005, 10:25 EST & August 10, 2005, 11:17 EST) (on file with author).

Conference Transcript, supra note 88, at 58 (Taaffe commented: “[W]e get people calling in about, ‘Well, I want to file a complaint. What do I do?’ . . . I bend over backwards to make that information available . . . . Most of those people don't follow up . . . .”).

Taaffe reported: “I will read the complaint enormously broadly because I don't want to be charged with protecting the mediators to the detriment of the public, and we'll send the complaint . . . to the mediator and ask for a written response.” Conference Transcript, supra note 88, at 28.

The Georgia Ethical Standards provide:
A. In order for parties to exercise self-determination they must understand the mediation process and be willing to participate in the process. A principle duty of the mediator is to fully explain the process. This explanation should include: (1) An explanation of the role of the mediator as a neutral person who will facilitate the discussion between the parties but who will not coerce or control the outcome . . . . D. The mediator must guard against any coercion of parties in obtaining a settlement.
Id. R. I(A), I(D).

The Georgia Ethical Standards provide:
A. [The mediator shall provide] . . . (4) An explanation of the fact that the mediator will not give legal or financial advice and that if expert advice is needed, parties will be expected to refer to outside experts . . . (8) An explanation that the parties are free to consult legal counsel at any time and are encouraged to have any agreement reviewed by independent counsel prior to signing . . . . E. It is improper for lawyer/mediator . . . to offer professional advice to a party. If the mediator feels that a party is acting without sufficient information, the mediator should raise the possibility of the party's consulting an expert to supply that information.
Id. R I(A), I(E).

Confidentiality is the attribute of the mediation process which promotes candor and full disclosure . . . . Statements made during the conference and documents and other material, including a mediator's notes, generated in connection with the conference are not subject to disclosure or discovery and may not be used in a subsequent administrative or judicial proceeding . . . . Information given to a mediator in confidence by one party must never be revealed to another party absent permission of the first party.
Id. R. II. These provisions do not exempt from confidentiality communications needed to prove or defend against a claim of mediator misconduct.

The mediator is the guardian of the fairness of the process. In that context, the mediator must assure that the conference is characterized by overall fairness and must protect the integrity of the process . . . . A mediator may refuse to draft or sign an agreement which seems fundamentally unfair to one party.
Id. R. IV, IV(A). “Mediators are obligated not to undertake cases for which their training or expertise is inadequate.” Id. R. V.

Telephone Interview with Christina Petrig, Program Coordinator, GODR, in Atlanta, Ga. (July 28, 2005).


E-mail from Bridget Gernander, Staff Attorney, Minnesota A.D.R. Review Board, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Aug. 9, 2005, 9:30 EST) (on file with author); E-mail from Bridget Gernander, Staff Attorney, Minnesota A.D.R. Review Board, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (July 22, 2005, 11:55 EST) (on file with author).

Minn. Gen. R. Prac. 114 (amended 2005). The rule exempts family law matters involving domestic abuse, contempt actions, or in certain support actions when a public agency is a party to the proceeding. It also exempts guardianship, conservatorship, or civil commitment matters from ADR as well as proceedings in juvenile court. Minn. Code of Ethics, supra note 48.

The ADR Review Board is described infra notes 652, 657 and accompanying text.

Minnesota ADR Review Board Complaint Log, Updated: June 11, 2005, a copy of which appears in Appendix F [hereinafter Minnesota ADR Review Board Complaint Log] (received as an attachment to E-mail from Bridget Gernander (Aug. 9, 2005, 9:30 EST), supra note 149.) “Facilitative” neutrals conduct mediations. “Hybrid” neutrals conduct mediation, med-arb, and mini-trial
processes and include parenting time expeditors. “Adjudicative/Evaluative” neutrals conduct arbitration, summary jury trials, early neutral evaluation, neutral fact finding, moderated settlement conferences, and consensual Special Magistrate processes. Minn. Gen. R. Prac. 114.02 (amended 2005). On request of either party or on its own motion, a court may appoint a “parenting time expediter” to resolve parenting time disputes. Minn. Stat. § 518.1751 (West 1990); see also discussion infra note 622. Parenting time expeditors are typically engaged in a med-arb process. Telephone Interview with Bridget Gernander, Staff Attorney, Minnesota A.D.R. Review Board, in St. Paul, Minn. (July 27, 2005). A “parenting consultant” is an individual appointed by stipulation of the parties or order of the court to assist the parties with communication and cooperation regarding parenting issues, meeting the children's needs, and addressing the best interests of the children. This individual may consult with other professionals working with the parents and children. Parents will mutually agree upon the selection of the consultant and will sign an independent contract with the consultant that outlines the duties and authority of the consultant.

See Glossary, Alternative Dispute Resolution, http://www.proparentingservices.com/glossary.php (last visited Mar. 2, 2006). Courts created this hybrid facilitator in Minnesota. The lack of clarity over their responsibilities to the courts and to parties, especially regarding confidentiality of the process, has led to a number of complaints filed against them. Telephone Interview with Bridget Gernander, supra note 152.

The Minnesota Code of Ethics provides:
A neutral shall work to ensure a quality process. A quality process requires a commitment by the neutral to diligence and procedural fairness. A neutral shall not knowingly make false statements of fact or law. The neutral shall exert every reasonable effort to expedite the process including prompt issuance of written reports, awards, or agreements.
Minn. Code of Ethics, supra note 48, R. V.

“The neutral shall maintain confidentiality to the extent provided by Rule 114.08 and 114.10 and any additional agreements made with or between the parties.” Id. R. IV. Rule 114.08 on confidentiality provides:
(a) Evidence. Without the consent of all parties and an order of the court, or except as provided in Rule 114.09(e)(4), no evidence that there has been an ADR proceeding or any fact concerning the proceeding may be admitted in a trial de novo or in any subsequent proceeding involving any of the issues or parties to the proceeding.
(b) Inadmissibility. Statements made and documents produced in non-binding ADR processes which are not otherwise discoverable are not subject to discovery or other disclosure and are not admissible into evidence for any purpose at the trial, including impeachment (except as provided in paragraph (d)).
(c) [applying to special master and arbitration processes]
(d) [applying to summary jury trial]
(e) Records of Neutral. Notes, records, and recollections of the neutral are confidential, which means that they shall not be disclosed to the parties, the public, or anyone other than the neutral, unless (1) all parties and the neutral agree to such disclosure or (2) required by law or other applicable professional codes. No record shall be made without the agreement of both parties, except for a memorandum of issues that are resolved.
Minn. Gen. R. Prac. 114.08 (amended 2005). Rule 114.10 governing “Communication with Neutral” provides in pertinent part:
(b) Non-adjudicative Processes. Parties and their counsel may communicate ex parte with the neutral in non-adjudicative ADR processes with the consent of the neutral, so long as the communication encourages or facilitates settlement.
(c) Communication to Court During ADR Process. During an ADR process the court may be informed only of the following:
(1) The failure of a party or an attorney to comply with the order to attend the process;
(2) Any request by the parties for additional time to complete the ADR process;
(3) With the written consent of the parties, any procedural action by the court that would facilitate the ADR process; and
(4) The neutral's assessment that the case is inappropriate for that ADR process.
(d) Communication to Court During ADR Process. During an ADR process the court may be informed only of the following:
(1) If the parties do not reach an agreement on any matter, the neutral should report the lack of an agreement to the court without comment or recommendations;
(2) 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; and
(3) With the written consent of the parties, the neutral's 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. Minn. Gen. R. Prac. 114.10 (amended 2005).

Rule I of the Minnesota Code of Ethics governing “impartiality” provides: “A neutral shall conduct the dispute resolution process in an impartial manner and shall serve only in those matters in which she or he can remain impartial and evenhanded. If at any time the neutral is unable to conduct the process in an impartial manner, the neutral shall withdraw.” Minn. Code of Ethics, supra note 48, R. I.

Rule II of the Minnesota Code of Ethics governing “Conflicts of Interest” provides: A neutral shall disclose all actual or potential conflicts of interest reasonably known to the neutral. After disclosure, the neutral shall decline to participate unless all parties choose to retain the neutral. The need to protect against conflicts of interest shall govern conduct that occurs during and after the dispute resolution process. Without the consent of all parties, and for a reasonable time under the particular circumstances, a neutral who also practices in another profession shall not establish a professional relationship in that other profession with one of the parties, or any person or entity in a substantially factually related matter. Id. R. II.

Mediation Rule I of the Minnesota Code of Ethics governing party “Self-Determination” provides: A mediator shall recognize that mediation is based on the principle of self-determination by the parties. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. The primary responsibility for the resolution of a dispute and the shaping of a settlement agreement rests with the parties. A mediator shall not require a party to stay in the mediation against the party's will. Id. Mediation R. I. For a discussion of this rule, see Welsh, Thinning Vision, supra note 97, at 52-59.

Rule III of the Minnesota Code of Ethics governing “competence” provides: “A neutral shall serve as a neutral only when she/he has the necessary qualifications to satisfy the reasonable expectations of the parties.” Id. R. III.

Rule VII of the Minnesota Code of Ethics governing “Fees” provides: A neutral shall fully disclose and explain the basis of compensation, fees and charges to the parties. The parties shall be provided sufficient information about fees at the outset to determine if they wish to retain the services of a neutral. A neutral shall not enter into a fee agreement which is contingent upon the outcome of the alternative dispute resolution process. A neutral shall not give or receive any commission, rebate, or similar remuneration for referring a person for alternative dispute resolution services. Id. R. VII.

Rule VI of the Minnesota Code of Ethics governing “Advertising and Solicitation” provides: A neutral shall be truthful in advertising and solicitation for alternative dispute resolution. A neutral shall make only accurate and truthful statements about any alternative dispute resolution process, its costs and benefits, the neutral’s role and her or his skills or qualifications. A neutral shall refrain from promising specific results. Id. R. VI

No specific rule of the Minnesota Code of Ethics applies to the mediator's authority. However, the ADR Review Board sanctioned the mediator in both complaint actions when the complaining party combined this allegation with allegations about the neutral's ability to maintain the quality of the process. The Advisory Task Force Comments discuss the interventions a mediator has authority to make in the 1997 comments to Rule 1 of the mediation rules. Minn. Code of Ethics, supra note 48, Mediation R. I, Advisory Task Committee.

Id.


Minnesota ADR Review Board Complaint Log, supra note 152.

Id.

Id.; see discussion supra note 152.
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E-mail from Diane Kenty, ADR Director, Maine Jud. Branch, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (July 27, 2005, 8:53 EST) (on file with author); see also Maine.gov, Directory of ADR Neutrals on Superior Court Rosters, http://www.courts.state.me.us/courtservices/adr/directory.html (as of Aug. 29, 2005 the court's website lists only 89 rostered mediators); Conference Transcript, supra note 88, at 38, 47 (indicating Maine had about 90 rostered mediators). The ADR Director explains that the website list does not include domestic relations or other types of mediators. E-mail from Diane Kenty, ADR Director, Maine Jud. Branch, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Sept. 1, 2005, 14:24 EST) (on file with author). However, the website search format suggests that this list is inclusive of all rostered mediators.


The ADR Director recounted a situation in which she saw a mediator violate the ethics code by discussing a recently completed mediation with the court clerk. See Conference Transcript, supra note 88, at 44.

Maine CADRES Complaint Log attached as Appendix G, provided by the ADR Director. See Letter from Diane Kenty, ADR Director, Maine Jud. Branch to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (July 11, 2005) (on file with author).

Me. Code of Conduct, supra note 48. At the time the author conducted the research for this article, the Maine Supreme Court did not make the Maine Code of Conduct available to the public on its website. See Maine.gov, ADR Rules, http://www.courts.state.me.us/courtservices/adr/adr_rules/html (last visited Mar. 2, 2006); see also E-mail from jbwebmaster, one, Maine government, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (July 18, 2005, 9:48 EST). The ADR Director provides a copy of the Maine Code of Conduct upon request. See Me. Code of Conduct, supra note 48, Canon 1 A-E. In a more recent e-mail, the ADR Director advised that the website will soon have active links to the Maine Code of Conduct and other ADR related rules. See E-mail from Diane Kenty, Director of the Office of Court ADR for Maine, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Aug. 1, 2005, 10:22 a.m. EST) (on file with author). In September 2005, the webmaster activated the links.

Canon 1 admonishes the neutral to maintain high standards of conduct through competence, compliance with court rules, fidelity and diligence to the mediation process, and by not suggesting that the neutral is in a “special position to influence any judicial official or decision outside [the mediation context].” Me. Code of Conduct, supra note 48, Canon 1A-E.

Canon 2 instructs the neutral to promote public confidence in the integrity and impartiality of ADR. It instructs the neutral to act impartially and without bias or prejudice. The neutral may also take cases only when the neutral “has or obtains sufficient training, skill, and any substantive knowledge relevant to the dispute.” Id. Canon 2A(4). The neutral must withdraw if he or she finds the case goes beyond his or her competence. Id. The same canon also instructs the neutral to require order and decorum, be patient, dignified and courteous, and again to act without bias or prejudice. Id. Canon 2B(1)-(3). It also instructs the neutral to give participants a right to be heard. Id. Canon 2B(5). In a two-sentence paragraph, it deals with confidentiality in mediation by providing: “A Neutral shall preserve the confidentiality of conduct and communications of the participants except if disclosure is required by rule or law. Confidentiality may be waived by the consent of all participants.” Id. Canon 2B(6). The next subsection also prohibits a neutral from disclosing “non-public information” acquired in mediation for any purpose unrelated to his or her ADR duties. A neutral also cannot publicly comment about the ADR process except where the parties waive confidentiality. Id. Canon 2B(7). The last subsection of Canon 2B requires the neutral to promptly dispose of the matter and to perform his or her ADR responsibilities properly. Id. These confidentiality provisions do not exempt communications needed to make or defend a claim of mediator misconduct.

Canon 2C deals with disclosure of conflicts of interests, impartiality, and withdrawal as the neutral. Id. Canon 2C(1)-(3). Canon 2D discusses fees. It also instructs the neutral that he or she shall not “unnecessarily or inappropriately commence or prolong an ADR process . . . .” Id. Canon 2D.

Canon 3 again deals with impartiality. It also instructs the neutral to conduct his or her ADR or other professional activities in a way that does not demean the neutral or interfere with his or her proper performance. Id. Canon 3.

Canon 4 imposes on rostered neutrals the requirement to comply with the Maine Code of Conduct, the rules governing ADR, and any other professional code that governs the activities of the neutral. Id. Canon 4.

The Maine Code of Conduct gives the overall impression that it is modeled on judicial rules of conduct rather than on a well-vetted set of rules governing mediators. Of necessity, the Director often considers the aspirational guidelines of mediator conduct promulgated by the Maine Association of Dispute Resolution Professionals in handling complaints against mediators. Telephone Interview with

Maine CADRES Complaint Log, supra note 171.

In Florida, staff would refer to the Complaint Committee even a complaint, like this, that appears facially insufficient. See Conference Transcript, supra note 88, at 23 (Sharon Press: “If a complaint comes in and it says that, ‘I didn't like my mediator because the mediator wore . . . an ugly outfit.’ That complaint goes to a complaint committee”).

Conference Transcript, supra note 88, at 45.

Maine CADRES Complaint Log, supra note 171.

The allegations leading to the four voluntary resignations from the roster were: “lacked focus in mediation / offered solutions”; “rude to litigant”; “insensitive to DV issues / offered own opinion / recommended settlement”; and “failure to appear / competence to mediate.” The allegations leading to the voluntary inactive status of one mediator were: “asked degrading questions, pressed for agreement / poor appearance.” Maine CADRES Complaint Log, supra note 171.

See discussion supra note 111 and accompanying text.

The ADR Director does not consider these actions “sanctions.” Accordingly, I have called them interventions. Attachment to e-mail from Diane Kenty, ADR Director, CADRES, to Professor Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Aug. 26, 2005, 16:02 EST) (on file with author).

Maine CADRES Complaint Log, supra note 171.

E-mail from Bridget Gernander, Staff Attorney, Minnesota A.D.R. Review Board, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Nov. 4, 2005, 11:48 EST) (on file with author).

Conference Transcript, supra note 88, at 10, 42, 58.

Clough & Foss, supra note 66, at 1-5 (providing description of the lawsuits without sufficient detail to make definitive statements about the states in which they were filed or whether they were filed before the states analyzed in this article had created their complaint processes); see also Rubin & McGirney, supra note 54 (stating that as of 2002, Complete Equity Markets, Inc. reported 21 ADR neutral malpractice cases: California had six; Florida had four (including two grievance proceedings); New York and Texas had three each. Five other states had one case each: New Jersey, Pennsylvania, Colorado, Wisconsin, and Ohio. Of the reported cases, 14 involved mediators and 7 involved arbitrators. Ten of the 21 cases involved employment law; 6 involved family law; 2 involved insurance coverage; the other cases involved contract, civil rights, and other matters.).

Nancy A. Welsh, Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value, 19 Ohio St. J. on Disp. Resol. 574, 575 (2004) [hereinafter Welsh, Looking Glass] (examining the importance of procedural justice in the context of special education mediation and using 70 interviews of participants in 12 mediations to conclude that parents value the mediations as being more procedurally just than the unsupervised meetings with school officials).

Id.

Wayne D. Brazil, supra note 8, at 120.

Id.

Id. at 122-23.

Id. at 123.

Welsh, Looking Glass, supra note 185, at 606 n.137.
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192 Id. at 577 n. 21, quoting Wayne D. Brazil, Continuing the Conversation About the Current Status of the Future of ADR: A View from the Courts, 2000 J. Disp. Resol. 11, 24.


194 Welsh, Hollow Promise, supra note 193, at 605-06.


196 See National Standards, supra note 8, at i.

197 Id. at ii.

198 Id. at i.

199 See discussion infra notes 856-60 and accompanying text. Diane Kenty, the Director of the Maine Court-Connected Mediation Program remarked: “One thing I've learned from administering [the grievance system] . . . is how much time these things do take.” Conference Transcript, supra note 88, at 51-52.


201 Id. at 1003 (recommended that ADR provider organizations offer processes for receiving complaints against neutrals).

202 Id. at 989, 990, 1003.

203 Id. at 997.

204 Id. at 1004.

205 National Standards, supra note 8, at 2-6.

206 CPR-Georgetown, supra note 200, at 997; see also Moffitt, Remodeling, supra note 47, at 98 (“Crucial to the functioning of codified restrictions [of professional conduct] is the existence of enforcement mechanisms . . . Mediators . . . face no consistent or predictable threat of enforcement.”).

207 CPR-Georgetown, supra note 200, at 965; National Standards, supra note 8, at i-ii.

208 CPR-Georgetown, supra note 200, at 986 (ADR providers should meet the parties’ expectations for “fair, impartial, and quality dispute resolution services and processes”); National Standards, supra note 8, at Commentary to § 11.1 (“Fairness of the mediation process requires both courts and mediators to protect the parties’ ability to make free and informed choices about whether or not to settle.”).

209 National Standards, supra note 8, at ii; see also CPR-Georgetown, supra note 200, at 983 nn.2, 4.

210 Conference Transcript, supra note 88, at 7-8.

211 Welsh, Thinning Vision, supra note 97, at 33 n.138 (citing SPIDR Commission on Qualifications, Qualifying Neutrals: The Basic Principles, SPIDR Commission on Qualifications Report 14 §§ 2-1, 6-1, 6-3, 6-5, 6-6 (1989)).
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212
McAdoo & Welsh, Look Before You Leap, supra note 195, at 427.

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Welsh, Making Deals, supra note 77, at 817-30; Welsh, Thinning Vision, supra note 97, at 7-8 n.24; Welsh, Hollow Promise, supra note 193, at 184-87; Welsh, Looking Glass, supra note 185, at 575-82; see also Lisa B. Bingham, Why Suppose? Let's Find out: A Public Policy Research Program on Dispute Resolution, 2002 J. Disp. Resol. 81, 85-95 (suggesting that courts should pay more attention to ADR design issues rather than, as they have, experiment blindly; asserting that research shows parties prefer mediation when it satisfies procedural justice concerns; and suggesting that the lower use of ADR on a voluntary basis may indicate a failure in the full implementation of the system design in courts; urging courts to collect data that would help the field better understand court-connected ADR processes and outcomes); Hensler, supra note 8, passim (arguing that litigants like trials, that courts making referrals to ADR may undermine their own legitimacy, and cautioning the field to develop ADR processes that are fair from a procedural justice perspective); E. Patrick McDermott & Danny Ervin, The Influence of Procedural and Distributive Variables on Settlement Rates in Employment Discrimination Mediation, 2005 J. Disp. Resol. 45, 48-50 (“[P]arties to a dispute must first be given a fair chance to voice their concerns. Second, parties must have control over the outcome of mediation since mediation is about self-determination. Third, the mediator must be perceived as (and be) fair and neutral.”).

215
Welsh, Hollow Promise, supra note 193, at 185; Welsh & McAdoo, Look Before You Leap, supra note 195, at 405.

216
Welsh, Making Deals, supra note 77, at 824, quoting Tom R. Tyler & Robert Folger, Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters, 1 Basic & Applied Soc. Psychol. 281, 292 (1980); Hensler, supra note 8, at 93 (“According 'due process' to individuals is equivalent to recognizing their status as members in good standing in their social group . . . .”).

217
Hensler, supra note 8, at 93.

218
Welsh, Making Deals, supra note 77, at 792 (“Ultimately, insuring that mediation comes within a procedural justice paradigm serves some of the courts' most important goals-delivering justice, delivering resolution, and fostering respect for the important public institution of the judiciary.”)

219
Welsh, Hollow Promise, supra note 193, at 181-82.

220
Welsh, Making Deals, supra note 77, at 830.

221
Welsh, Looking Glass, supra note 185, at 663 (“Quantitative studies have begun to detect the effects of procedural justice and resolution. The interviews analyzed here affirm that procedural justice and resolution represent the dual cornerstones of mediation's value to disputants-and thus should become the cornerstones for mediator selection, training, and evaluation.”); Welsh, Making Deals, supra note 77, at 791 (“[P]articularly within the context of the courts, mediation should be expected to deliver to disputants an experience of justice, more commonly referred to as procedural justice.”) (emphasis added).

222
Welsh, Looking Glass, supra note 185, at 629-51.

223
My concern parallels the concern of A. Leon Higgenbotham expressed at the Pound Conference about court connected ADR programs. He said:
I hope the fruits of [the conference's] success will flow not just to judges, not just to lawyers, not just to court personnel, but also to those who, in the nature of things, will seldom be attending a conference like this—the weak, the poor, the powerless-those who, whether they like it or not, are inevitably involved in the process and the system that we are privileged to preside over. By all means let us reform that our process, let us make it more swift, more efficient, and less expensive, but above all let us make it more just . . . . Let us not, in our zeal to reform our process, make the powerless into victims who can secure relief neither in courts nor anywhere else.
Welsh & McAdoo, Look Before You Leap, supra note 195, at 403.
Welsh agrees. Welsh & McAdoo, Look Before You Leap, supra note 195, at 426-27 (“Courts should establish monitoring and evaluation mechanisms to ensure the quality of mediator performance, with emphasis upon procedural justice factors. Courts should establish ethical requirements for mediators, as well as easily-accessible grievance procedures.”).

Pou, Assuring Excellence, supra note 32, at 346.

Conference Transcript, supra note 88, at 54.

Pou, Assuring Excellence, supra note 32, at 346.

Conference Transcript, supra note 88, at 21-22.

See Appendix A, supra note 2.

Welsh notes that practices like reducing the role of parties in mediation, showing a preference for evaluative interventions, and the abandonment or marginalization of joint sessions affect party self-determination and perceptions of procedural justice in potentially meaningful ways that might be expressed as complaints against mediators. Welsh, Making Deals, supra note 77, at 838-55; see also Welsh & McAdoo, Look Before You Leap, supra note 195, at 414.

Mediation is a largely informal and confidential process. . . . [M]ediator interventions often include evaluative techniques such as assessing the strengths and weaknesses of parties' cases, predicting court outcomes, and proposing possible settlement options. The mediators, however, are largely unregulated, and few courts operate rigorous monitoring systems, or any systems at all. The potential for coercion is very real . . . .

Id.

See discussion supra notes 191-95 and accompanying text.

Conference Transcript, supra note 88, at 10.

See discussion supra note 184 and accompanying text.

For biographical information about Mel Rubin, see discussion supra note 75.

Rubin & McGirney, supra note 54.

See Appendix A, supra note 2.

Hensler notes that clients disliked judicial settlement conferences because they were excluded from them and distrusted their attorney's descriptions of the discussions that occurred in them. Hensler, supra note 8, at 90-91.

National Standards, supra note 8, § 2.1 (court must monitor quality of mediators and mediation programs); § 2.6 (parties should have access to complaint mechanism); § 5.3 (court should conduct periodic evaluation of mediation programs); § 6.0 (courts must ensure quality of mediators' skills); § 6.5 (courts should monitor performance of mediators); § 6.6 (courts should remove from their rosters poorly performing mediators); § 8.1 (courts should adopt codes of ethics for mediators); § 14.0 (courts should not develop rules that protect mediators from liability); § 16.1 (courts should monitor mediation programs and provide sufficient resources for that task); CPR-Georgetown Commission, supra note 200, at 989 (“With the growth of voluntary and mandatory ADR use . . . the Drafting Committee believes it is essential to hold the ADR Provider Organizations . . . to the highest standards of quality and competence.”). ADR Provider Organizations should require neutrals to adhere to an ethics code. Id. at 997; see also Margaret S. Herrman et al., supra note 43, passim (identifying several ways courts can assure mediator quality and analyzing the strengths and weaknesses of each choice); Posting of Ingo Keilitz, Show Me the Data: Ten Good Reasons Why You Should Measure Court Performance to Performance Standards, Measurements, and Management Room, National Center for State Courts, http://www.ncsconline.org/d_icm/readingrm/ icmerroom_keilitz2.htm (Aug. 2001) (among other benefits, monitoring mediation programs suggests better practices); Welsh & McAdoo, Look Before You Leap, supra note 195, at 414, 426-27 (noting that mediators are largely unregulated and only a few courts operate any systems to monitor mediator or court-connected mediation programs; recommending that courts establish monitoring
and evaluation mechanisms to ensure high-quality mediator performance; suggesting courts adopt ethical requirements for mediators and create an easily-accessible grievance process); Donna Stienstra, Monitoring and Evaluating a Court ADR Program, prepared for the Mini-Conference on Court ADR, ABA Section of Dispute Resolution Conference (Mar. 20, 2003) (on file with author) (identifying a four-step process for monitoring and evaluating court-connected mediation programs); Wissler & Rack, Participant Questionnaires, supra note 42, at 229-30 (empirical research examining attorneys’ assessment of mediator performance in one court-connected program); Nancy Welsh, Thinning Vision, supra note 97, at 34-59, Appendix (analyzing ethics codes adopted by Florida and Minnesota).

239 I am grateful to each program director for their assistance in helping me understand the history and structure of the current court-connected mediation programs in the states analyzed. I apologize in advance for any errors I have made in conveying their comments on these subjects.


241 Id.


244 Id.

245 E-mail from Sharon Press, supra note 89.

246 Id. Stakeholders generally supported the disciplinary rules because they wanted to show mediation consumers that a remedy exists if they have a bad experience in mediation. Telephone Interview with Sharon Press, supra note 89.


248 Telephone Interview with Sharon Press, supra note 74.

249 E-mail from Sharon Press, supra note 89.


252 Id. R. 10.730(a); see also Robert B. Moberly, Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment, 21 Fla. St. U. L. Rev. 701, 719-23 (1994) (describing Florida's enforcement standards of professional conduct and the mediator complaint process).
Fla. Discipline Rules, supra note 251, R. 10.730(b). The three attorneys must have substantial trial practice. They cannot be certified as mediators or judicial officers during their terms on the board. At least one of the attorneys must have substantial experience in the dissolution of marriages. Id. R. 10.730(b)(6). It has become increasingly difficult to find experienced trial or family law attorneys to serve on the MQB who are not also certified mediators. Telephone Interview with Sharon Press, supra note 89.

Fla. Discipline Rules, supra note 251, R. 10.730(c).

Id. R. 10.800(a)(1)-(2).

Id. R. 10.800(a)(3).

Id.

Telephone Interview with Sharon Press, supra note 89.


The Florida Dispute Resolution Center, supra note 243.

Id.

Id.

Fla. Discipline Rules, supra note 251, R. 10.730(e).

Id. R. 10.800(a)(1).

Id. R. 10.800(a)(1)-(2).

Id. R. 10.800(b).

Fla. Rules for Mediators, supra note 247, R. 10.900. Georgia and North Carolina also provide ethics opinions, but a separate committee does not issue them. Instead, the program directors provide the guidance. See discussion infra notes 302-05, 312, 315 and accompanying text.


Fla. Rules for Mediators, supra note 247, R. 10.900(b). Telephone Interview with Sharon Press, supra note 89.


Fla. Rules for Mediators, supra note 247, R. 10.900(b).

Id. R. 10.900(c).

Fla. Discipline Rules, supra note 251, R. 10.730(d).

Id. R. 10.730(f).

Id.

Id. R. 10.740(c).

The Florida Dispute Resolution Center, supra note 243.

Telephone Interview with Sharon Press, supra note 89.
Telephone Interview with Sharon Press, supra note 74.

The author uses the term “lay” in this context as not including members of the court administrative system, judges, lawyers, or mediators.

Id. The Director of Florida's DRC explains that a lay person would likely have difficulty analyzing the Florida Standards of Conduct, supra note 48, as they apply to allegations of mediator misconduct without experience in the mediation process as a lawyer, judge, or mediator. Telephone Interview with Sharon Press, supra note 74.

Fla. Rules for Certified and Ct. Appointed Mediators, R. 10.100-10.110 (West 2005) [hereinafter Fla. Mediator Qualifications Rules]. County mediator applicants must complete at least 20 hours of training in a program certified by the Florida Supreme Court. Id. R. 10.100(a)(1). They must also observe four county court mediations conducted by a certified mediator and conduct four mediations under the supervision of a certified mediator. Id. R. 10.100(a)(2). They must also show good moral character. Id. R. 10.100(a)(3). The Supreme Court of Florida will likely soon adopt proposed changes to the Mediator Qualifications Rules. See discussion infra note 288 and accompanying text.

Those seeking certification to mediate family matters and dissolution of marriages must complete a minimum of 40 hours in a certified family mediation training program. Fla. Mediator Qualifications Rules, supra note 282, R. 10.100(b)(1). They must also hold a master's degree or doctorate in social work, mental health, or behavioral sciences, or be a physician certified to practice psychiatry, an attorney, or a licensed certified public accountant. Id. R. 10.100(b)(2). Alternatively, they may be an attorney or a certified public accountant licensed to practice in any jurisdiction in the United States. Id. All applicants must also have a minimum of four years practical experience in one of those fields or have eight years of family mediation experience (with a minimum of ten mediations per year). Id. Additionally, they must observe two family mediations conducted by a certified family mediator and conduct two family mediations under supervision and observation of a certified family mediator. Finally, they must be of good moral character. Id. R. 10.100(b)(3).

Circuit court mediation applicants must complete a minimum of 40 hours in a certified circuit court mediation training program. Fla. Mediator Qualifications Rules, supra note 282, R. 10.100(c)(1). They must also be members in good standing of the Florida Bar with at least five years of Florida practice and be an active member of the Florida Bar within one year of application for certification. Id. R. 10.100(c)(2). Alternatively, they may be trial judges from any U.S. jurisdiction who were members of the bar in which the judges presided for at least five years immediately preceding the year that certification is sought. Id. They must observe two circuit court mediations conducted by certified circuit mediators and conduct two circuit mediations under the supervision and observation of certified circuit court mediators. Finally, they must be of good moral character. Id. R. 10.100(c)(4).

Dependency mediators handle matters involving abused and neglected children. Fla. Mediator Qualifications Rules, supra note 282, R. 10.100(d). Persons seeking this certification must complete a supreme court certified dependency mediation training program. Id. R. 10.100(d)(1). They must have a master's degree or doctorate in social work, mental health, behavioral sciences, or be a physician licensed to practice adult or child psychiatry or pediatrics. Id. R. 10.100(d)(2). The current rules also permit certification of an attorney with four years experience in family and/or dependency issues, a licensed mental health professional with at least four years practical experience, or certified family or circuit mediators with a minimum of 20 mediations. Id. Additionally, the rules require applicants to observe four dependency mediations conducted by certified dependency mediators and to conduct two dependency mediations under the supervision and observation of certified dependency mediators. Lastly, they must be of good moral character. Id. R. 10.100(d)(4).


See Digest of State-wide Requirements for Court Mediators, supra note 286, passim.
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289 Fla. Mediator Qualification Rules, supra note 269, R. 10.110(b).

290 Id. R. 10.110(c)(2).

291 Id. R. 10.110(c)(4).


293 Proposed Sup. Ct. Adm. Order, supra note 288, at 9-12. The order explains the types of trainings and formats that will satisfy its requirements. The mediator must attend live trainings for at least half the required hours, but some video-taped or internet trainings may satisfy the requirements under certain circumstances. Mediators may also earn a maximum of four hours of CME credit through mentored activities. Id. at 10. The order does not allow mediators to carry forward extra CME hours into the next re-certification cycle. The DRC may report any misrepresentations on the CME Reporting Form to the MQB. Id. at 16. The CME Reporting Form is available at the website of the Florida Academy of Professional Mediators, Inc., http://www.tfapm.org/education_form.shtml. The Florida State Courts' website provides a link to it at http://www.flcourt.org/gen_public/adr/cmeindex.shtml.

294 Id. at 10-12.

295 Id. at 10.


298 Id.

299 Id. R. 10.200.

300 The distinction between the two classes of mediators appears to contemplate mediators who are not certified, but may perform mediations in court-connected programs at the request of the parties and by appointment of the courts.

301 See Florida Proposed Rules, supra note 292, at 9-11.


303 Mediator Ethics Advisory Committee Opinions, supra note 270. The website lists the opinions with a reference number and a short summary. A member of the public or a mediator may read the full opinions by clicking on the links. The full text includes the question presented, a summary of the opinion, the authority referenced, and the opinion. As of January 2006, the MEAC has issued nearly 100 advisory opinions.

304 See discussion infra notes 312, 315 and accompanying text.

305 Telephone Interview with Sharon Press, supra note 89.

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307 Id. § 44.403(1). It broadly defines the beginning and end of mediation to which the protection applies. A court-ordered mediation starts when the court issues the order to enter mediation and ends when the parties sign a full or partial settlement agreement; the mediator declares an impasse and reports to the court that the parties could not reach agreement; a court order, court rule, or other law terminates the mediation; or the mediation terminates by agreement of one or both parties. Id. § 44.404(1).

308 Id. § 44.405.

309 Id. § 44.405(2). It defines a “subsequent proceeding” as “an adjudicative process that follows a mediation, including related discovery.” Id. § 44.403(5).

310 Id. § 44.405(4)(a)(4), (6).

311 Id. § 44.406(1).


313 Telephone Interview with Sharon Press, supra note 89.

314 The DRC Director suggests that we should instead think of this issue as the “authorized practice of mediation” rather than the “unauthorized practice of law.” Telephone Interview with Sharon Press, supra note 74.


316 Fla. Standards of Conduct, supra note 48, R. 10.650 (“Other ethical standards to which a mediator may be professionally bound are not abrogated by these rules. In the course of performing mediation services, however, these rules prevail over any conflicting ethical standards to which a mediator may otherwise be bound.”)


318 Conference Transcript, supra note 88, at 33.


320 Telephone Interview with Sharon Press, supra note 89.
Parties may not file complaints anonymously. Conference Transcript, supra note 88, at 35. As of October 2003, mediation parties filed 47 of the complaints and attorneys filed eight of the complaints. Id. at 36. Florida does not impose a statute of limitations by which parties must file complaints. However, most parties file a complaint within a couple of months of the completed mediation. Id. at 16-17. However, unlike the Virginia rules, the Florida Disciplinary Rules do not prevent a party from filing a complaint before the mediation session has ended. Id. at 34; see also discussion infra note 428 and accompanying text.

Unlike Maine, Florida's DRC staff members do not have the time or resources to observe the over 5,000 certified mediators in the state. Accordingly, observation would not lead to a disciplinary proceeding. More importantly, Florida's DRC staff does not want that responsibility. The Director of Florida's DRC has noted: "I can't imagine in Florida me . . . walking up to a mediator and saying . . . . 'Okay. I'm sorry . . . . I've written you up on a couple of these [Standards of Conduct] that I don't think that you did, so I'm . . . pulling your ticket.' So, it's really a stark . . . stark difference [from Maine's approach]." Conference Transcript, supra note 88, at 48-49. If the Director of Florida's DRC had de-rostered mediators in Florida at the rate Maine has de-rostered mediators (6 of approximately 140 mediators), over 200 of Florida's 5300 mediators would no longer be certified. See discussion supra notes 87, 160, 178-79 and accompanying text.

As of October 2003, Florida had also processed 40 complaints relating to a mediator's good moral character. Conference Transcript, supra note 88, at 10. This article does not discuss either type of complaint, but focuses instead on complaints relating to the Florida Standards of Conduct.

The DRC Director recently advised the author that the DRC had added a complaint form to its website. Telephone Interview with Sharon Press, supra note 74. However, a search of the website does not show its posting and even if it is posted, mediation parties would have a difficult time finding it. See Fla. St. Cts., Court Programs and Initiatives, Alt. Disp. Resol., http://www.flcourts.org/gen_public/adr/index.shtml (last visited Mar. 2, 2006). Sharon Press, the Director of Florida's DRC, acknowledges that regulators could require mediators to advise parties about the availability of the complaint process. Conference Transcript, supra note 88, at 18. Virginia comes closest to imposing this requirement in a footnote to the Complaint Procedures that requires as follows: "At the start of each mediation, the mediator should ensure that the parties and the mediator sign a waiver of confidentiality with respect to any investigation arising out of a complaint against the mediator." Complaint Procedures, supra note 128, at 4 n.1. See discussion infra notes 483-86 and accompanying text. One could anticipate that a discussion of this waiver would lead to a broader discussion about the complaint process.

E-mail from Sharon Press, supra note 89. Thus, these important learning tools may not get the public exposure they deserve.
Id. In Florida, unlike the other states analyzed in this article, Florida’s DRC staff makes no determinations about the facial sufficiency of the complaint.

Id. This contact will be one in a series of contacts with the complaining party. As the Director of Florida’s DRC has noted: “In Florida, we also always notify the complainant, and . . . it’s very interesting because our complainants . . . want to know [what is going on] . . . and I find it . . . useful to . . . keep them in the loop . . . . They want to make sure that [the complaint has] not just been . . . dropped somewhere along the line.” Conference Transcript, supra note 88, at 50.

Id.

Id.; Fla. Discipline Rules, supra note 251, R. 10.810(f).

Conference Transcript, supra note 88, at 29-30.

Fla. Discipline Rules, supra note 251, R. 10.810(g).

Id. R. 10.810(h).

Id. R. 10.810(i).

Id. R. 10.720(g).

Telephone Interview with Sharon Press, supra note 74; see also Fla. Discipline Rules, supra note 251, R. 10.810(i).

See Summary of Florida DRC Formal Complaints, supra note 89, at Appendix C to this article. Complaint committee members are more likely to hire an investigator if they anticipate the need to interview witnesses. Telephone Interview with Sharon Press, supra note 74.

Fla. Discipline Rules, supra note 251, R. 10.810(k). The Supreme Court revised the rules to add the probable cause step after the Florida DRC’s experience with the fourth complaint filed against a mediator. Shortly into the disciplinary process against a well-known mediator, the Florida DRC realized that no credible evidence existed to support the allegations of the complaint. Even so, under the then-existing rules, the complaining party could more easily get a hearing, and the confidentiality provisions did not sufficiently protect the name of the mediator if the process did not result in a sanction. This case raised concerns about the due process rights of accused mediators that informed the views and recommendations of the Standing Committee on ADR Rules. Telephone Interview with Sharon Press, supra note 74.

Fla. Discipline Rules, supra note 251, R. 10.810(l).

Unlike the other states analyzed in this article, the complaint committee can require the parties to attend the meeting.

Fla. Discipline Rules, supra note 251, R. 10.810(h) & (j).

Telephone Interview with Sharon Press, supra note 89.

Fla. Discipline Rules, supra note 251, R. 10.810(o). The hearing panel may also dismiss a complaint on the motion of the complainant or mediator. Id. R. 10.820(c).

Id. R. 10.810(m), 10.820(a).

Id. R. 10.810(h), (l); see also Telephone Interview with Sharon Press, supra note 89.

Fla. Discipline Rules, supra note 251, R. 10.810(n).

Id. The DRC Director believes that a mediation party who is not a lawyer would have a difficult time adequately presenting a case against a mediator. An appointed prosecutor ensures that the complaining party has adequate voice in the formal hearing process. Telephone Interview with Sharon Press, supra note 74.
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Id. R. 10.820(a). A party may move to remove a hearing panel member if that member, or that member's relative, is a party to the pending case or has an interest in the case's outcome. A party can also move to remove a panel member if he or she is related to an attorney or counselor of record in the case or is a material witness to the case. The chair of the committee or panel determines the legal sufficiency of the motion to disqualify. A panel member may also recuse him or herself. The DRC will then assign a MQB member to take the place of the disqualified or recused member. Id. R. 10.870(a)-(f). Only Florida and Virginia plan for potential conflicts of interest arising with members of the entities regulating mediators. See discussion infra note 442 and accompanying text.

Fla. Discipline Rules, supra note 251, R. 10.820(b).

Id. R. 10.820(d)-(i).

Id. R. 10.820(f).

Id. R. 10.820(g).

Id. R. 10.840(a). Georgia and Minnesota also give the entities regulating mediators the power to subpoena witness testimony and documents. See discussion infra notes 566, 590, 673 and accompanying text.

Fla. Discipline Rules, supra note 251, R. 10.820(h)-(i).

Id. R. 10.820(m). Florida is one of three states analyzed in this article to establish the standard of proof required to find a violation of the ethical guidelines. It is one of two states to require clear and convincing evidence of the violation. See discussion infra notes 564, 673-74, 840 and accompanying text.

Fla. Discipline Rules, supra note 251, R. 10.820(m).

Id. R. 10.820(j).

Id. R. 10.820(l).

Id. R. 10.830(a)


See discussion supra notes 111-12 and accompanying text.

Fla. Discipline Rules, supra note 251, R. 10.830(d).

Id. R. 10.830(e).

Id. R. 10.830(b); see also discussion supra note 111 and accompanying text.

Fla. Discipline Rules, supra note 251, R. 10.830(g).

Id. R. 10.880(a).

Id. R. 10.880(b). This rule change reflects the Florida Supreme Court's concern that it has no original jurisdiction in these types of appeals by statute or by the constitution.


Fla. Discipline Rules, supra note 251, R. 10.850(a).

Id.

Id. R. 10.830(f).
The Director of Florida's DRC notes: "[F]or educational purposes, [we] do publish every complaint that is filed officially with the grievance board . . . ." Conference Transcript, supra note 88, at 12. “I've learned a lot based on the grievances that have come in, and it's helped inform the training that we do.” Id. at 21. As noted above, the grievance information does not appear on the Florida State Courts' website, but the DRC makes the information available upon request. See discussion supra note 89.

Id.; see also discussion infra note 859 and accompanying text.


See discussion infra note 492 and accompanying text.

See discussion infra notes 766-68 and accompanying text.

Laflin, supra note 46, at 516.

Telephone Interview with Geetha Ravindra, supra note 115. Ms. Ravindra noted that the inclusive design process created “transparency and buy-in” by judges, lawyers, and mediators. Id. Many of the applicable rules also seem to draw on the CPR-Georgetown Commission principles. See Laflin, supra note 46, at 512-16; CPR-Georgetown Commission, supra note 200.

See Lawrence H. Hoover, Virginia ADR Joint Committee has a Rich History (Part I), Virginia ADR (Summer 2002), available at http:// www.mccammongroup.com/articles/index.asp; Hahn, supra note 127, at 149 (providing the drafting history of Virginia's SOEs).

The Complaint Procedures state: “These rules apply to all proceedings involving complaints against certified mediators.” Complaint Procedures, supra note 128, at 1. The Virginia SOEs state: “The Standards of Ethics and Professional Responsibility apply to all certified mediators.” Virginia SOEs, supra note 48, § B. Thus, the Virginia regulatory system confers both benefits and burdens on mediators that relate to their status as certified mediators rather than solely as a function of the context in which they mediate-court-referred mediations versus private referrals.

DRS is described and defined supra note 115 and accompanying text.


The DRS Director may deny certification or recertification if an applicant has been convicted of a felony or a misdemeanor involving moral turpitude or has had a professional license revoked. Id. §§ B(5), (H).

Mediators seeking the General District Court certification must complete 20 hours of approved training. Mediators seeking the Juvenile and Domestic Relations District Court certification must complete 40 hours of training, including 20 hours of basic mediation training and 20 hours of family mediation training. Mediators seeking the Circuit Court-Civil certification must complete 40 hours of training, including 20 hours of basic mediation training and another 20 hours of advanced training in skills required to handle procedurally complex cases. Mediators seeking the Circuit Court-Family Mediation certification must take 52 hours of approved mediation training, including 20 hours of basic mediation training, 20 hours of family mediation training, and 12 hours of advanced mediation training in family finance and economic issues, including equitable distribution and spousal support. Both domestic certifications require eight hours of additional training in domestic abuse issues. All of the certifications require a four-hour course in Virginia's judicial system. Training Guidelines, supra note 387, § C. The applicant must complete Form ADR-1000A, http:// www.courts.state.va.us/drs/forms/home.html.

The Office of the Executive Secretary of the Virginia Supreme Court also prescribes the curriculum of approved training courses for each mediator designation. The Training Guidelines are intended to “ensure that court-referred mediators also meet a high standard of competence and ethical responsibility.” Training Guidelines, supra note 387, at Statement of Intent. Certified trainers must provide the training under pre-approved curricula. See Guidelines for the Certification of Mediation Training Programs (effective Jan. 1, 2000), http://www.courts.state.va.us/drs/forms/guidelines_training_ program.html. Trainers seeking approval of training programs must submit the Application for Mediation Course Certification, Form ADR-2000, http:// www.courts.state.va.us/drs/forms/home.html.
All of the certification designations require the applicant to observe two mediations conducted by certified mentors in cases similar to the ones the mediator expects to handle. Training Guidelines, supra note 387, § (D)(1). If a mediator cannot meet the observation requirement, the Training Guidelines substitute an additional eight-hour training requirement in which the applicant observes two mediations, at least one of which is a live demonstration conducted by a certified mentor. Id. at 3-6; see also Verification of Observation Form, Form ADR-1007, http://www.courts.state.va.us/drs/forms/home.html.

Applicants must complete at least five hours of mediation in a minimum of three completed cases for the General District Court certification, at least ten hours of family mediation in a minimum of five completed family cases for the Juvenile and Domestic Relations certification, at least ten hours of mediation in a minimum of five completed Circuit Court non-family cases, and at least ten hours of family mediation in a minimum of five completed Circuit Court Family cases. Training Guidelines, supra note 387, at 3-7; see also Mentee Evaluation Form, Form ADR-1001, http://www.courts.state.va.us/drs/forms/home.html.

See Application for Mentor Status, Form ADR-4000, http://www.courts.state.va.us/drs/forms/home.html. Florida and Maine require observations or supervised mediation experience, but not with certified mentors. See discussion supra note 287 and accompanying text and infra note 706 and accompanying text.

Training Guidelines, supra note 387, at 3-7; see also Kathey Foskett & John Settle, Mentoring Workshop: Mentor Responsibilities, Virginia Mediation Network Spring Conference (April 3, 2005) (on file with author).

Training Guidelines, supra note 387, § G; see also Application for Mediator Recertification, Form ADR-1003, http://www.courts.state.va.us/drs/forms/home.html.

Training Guidelines, supra note 387, § G; see also Application for Mediator Recertification, supra note 395.

Training Guidelines, supra note 387, § G(9).

Telephone Interview with Geetha Ravindra, supra note 115. The number of mediators on the court roster nonetheless remains stable at about 1,000 mediators because about 200 people join it every year. Id.

At a recent training conference held in Virginia by the Virginia Mediation Network, a mediator sitting in the author's work group complained about the recertification requirements. She claimed that even as a practicing attorney with court contacts, she found it difficult to conduct the additional mediations required to recertify.

The Executive Secretary maintains the Virginia Supreme Court's information system about the 319 courts in the state. It accumulates financial and case information. And it provides administrative services, including payment and payroll processing for the courts, magistrates, the Judicial Inquiry, the Review Commission, and the Virginia Criminal Sentencing Commission. Telephone Interview with Geetha Ravindra, supra note 115.

Training Guidelines, supra note 387, § H. This section of the guidelines does not specifically reference Virginia's SOEs, supra note 48.

Training Guidelines, supra note 387, § H(2).

Id. § B(6).

See Virginia SOEs, supra note 48. Nancy Welsh has described these ethical provisions as “particularly thoughtful.” See Welsh, Thinning Vision, supra note 97, at 33 n.139.

The Judicial Council of Virginia is the policy making body of the court. The Chief Justice of the Virginia Supreme Court chairs it. It includes other judges, lawyers, and state politicians. Telephone Interview with Geetha Ravindra, supra note 115; see also Hahn,
note 127, at 149 (providing some drafting history and explaining the resolution of the debate about the use of evaluative techniques in mediation).


Id. § 8.01-576.8 (West Supp. 2005).

Id. §§ 8.01-576.9, 8.01-581.24 (West Supp. 2005).

Id. §§ 8.01-576.11, 8.01-581.25 (West Supp. 2005).

Id. §§ 8.01-576.12, 8.01-581.26 (West Supp. 2005). The court may vacate an agreement and any related court order when:

1. The agreement was procured by fraud or duress, or is unconscionable; 2. If property or financial matters in domestic relations cases involving divorce, property, support or the welfare of a child are in dispute, the parties failed to provide substantial full disclosure of all relevant property and financial information; or 3. There was evident partiality or misconduct by the neutral, prejudicing the rights of any party.

Id. Mediator misconduct includes failure of the neutral to inform the parties in writing at the commencement of the mediation process that: (i) the neutral does not provide legal advice; (ii) any mediated agreement may affect legal rights of the parties; (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.”

Id. In Virginia, these required disclosures are known as the “four legals.” See discussion supra note 131 and accompanying text. The risk that a party can undo an agreement because of this particular type of so-called mediator misconduct serves as an additional incentive for Virginia certified mediators to know and adhere to Virginia’s SOEs.

Telephone Interview with Geetha Ravindra, supra note 115.


Id.

Id. § 8.01-576.10(vi).

North Carolina has also provided mediators guidance on the unauthorized practice of law. See http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/UnauthorizedPracticeofLaw.pdf; see also discussion of Florida’s ethics advisory opinions supra notes 312, 315.

See http://www.courts.state.va.us/drs/upl/preface.html; see also Cooley, supra note 52, at 73-75; Ravindra, supra note 52, at 106-07; McCauley, supra note 52, passim.

See Va. Code Ann. § 8.01-581.23 (West Supp. 2005) (“When a mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia, or who is trained and serves as a mediator through the statewide mediation program . . . then that mediator . . . shall be immune from civil liability for, or resulting from any act or omission done or made while engaged in mediation, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.”). See generally discussion of mediator immunity supra note 53. Four of the states analyzed confer immunity by statute. One state confers it by court rule. See discussion supra notes 317-18 and accompanying text and infra notes 533, 650, 733-34 and accompanying text.
Thus, like Florida, the grievance system is designed to enforce the Training Guidelines, as well as Virginia's SOEs. See Scope and Purpose of the Complaint Procedures, http://www.courts.state.va.us/drs/grievance_process.html. This article, however, will not discuss complaints relating to the Training Guidelines.

See discussion infra note 470 and accompanying text.


Client Evaluation of Mediation and Mediators, supra note 423. The skills and attributes that the client may rank include whether [t]he mediator: 1. explained the process and procedures; 2. provided useful information; 3. was a good listener; 4. allowed me to talk about issues that were important to me; 5. was respectful; 6. helped clarify issues; 7. encouraged us to come up with our own solutions; 8. informed me that I could consult an attorney; 9. was neutral; [and] 10. wrote our agreement clearly and accurately. Id. The evaluation form then seeks general comments about the process and the mediator. Many of the identified skills and attributes tie to requirements under Virginia's SOEs. See discussion supra notes 125-34 and accompanying text.

DRS Director's Presentation, supra note 116, at slide 6.

Id.

Id.

Id. at slide 2; see also Training Guidelines, supra note 373, at 1. Florida and Maine have not received complaints mid-mediation, but the state's complaint procedures would not preclude them. Conference Transcript, supra note 88, at 34. Georgia's GODR, in contrast, has received complaints filed after the mediation session ended, but before the court approved the mediated settlement agreement. It has also handled e-mail complaints lodged before all mediation sessions ended. Id. (Taaffe noted: “They're hot about something that happened in . . . the pre-mediation, or during the mediation process, but they have not followed up with formal written complaints.”)

Telephone Interview with Geetha Ravindra, supra note 115.

Complaint Procedures, supra note 128, § 5b.

DRS Director's Presentation, supra note 116, at slide 3; Telephone Interview with Geetha Ravindra, supra note 115.

DRS Director's Presentation, supra note 116, at slide 4.

Complaint Procedures, supra note 128, § 5a.

DRS Director's Presentation, supra note 116, at slide 3. The complaining party uses OE Form ADR 1004. Persons can download the complaint form at http://www.courts.state.va.us/drs/forms/complaintformadr-1004.pdf.


See discussion supra note 427. A web search using Google quickly found this website, thus making the grievance process information readily available to the public. The main webpage for the DRS also has a specific tab with a link to the “Grievance Process.” See Virginia's Judicial System, Complaint Process, http://www.courts.state.va.us/drs/main.htm (last visited Mar. 2, 2006).

DRS Director's Presentation, supra note 116, at slide 5.

Id. at slide 7; Complaint Procedures, supra note 128, § 5(a).

Complaint Procedures, supra note 128, § 2(a). The Dispute Resolution Services Advisory Council includes judges, court clerks, and mediators. Telephone Interview with Geetha Ravindra, supra note 115.
The membership of the MCP is not posted on the court's ADR website, but the DRS Director makes it available upon request. Telephone Interview with Geetha Ravindra, supra note 115.

Complaint Procedures, supra note 128, § 3(b).

Id. § 3(d). The Complaint Procedures provide the make-up of the panel when a member or the Director has a conflict of interest. Id. § 3(e).

DRS Director's Presentation, supra note 116, at slide 7.

Id.

Id. at slide 8; Complaint Procedures, supra note 128, § 6(b).

Complaint Procedures, supra note 128, § 6(b).

DRS Director's Presentation, supra note 116, at slide 8. “If a complaint . . . indicates that there is a need for intervention or training, the letter notifying the mediator of the decision not to take formal action on the complaint may also suggest appropriate training and mentorship. An individual consultation with a mentor mediator selected from a list maintained by the Review Committee may be offered as a means of assisting the mediator in improving performance.” Complaint Procedures, supra note 128, § 6(b).

Complaint Procedures, supra note 128, §§ 5(c), 6(c).

Id. § 6(c).

Id.

Id.

Id.; DRS Director's Presentation, supra note 116, at slide 9.

Complaint Procedures, supra note 128, § 7(a).

Id.

Id. The MCP considers the results of the Director's investigation in making its decision to refer the matter to the Review Committee. It may also conduct an additional investigation. The Director takes the lead investigatory role because she has the staff and time to do it. The other members of the MPC are employed full-time at ADR provider organizations and work as unpaid volunteers on the MCP. Telephone Interview with Geetha Ravindra, supra note 115.

The Director has authority to interview the co-mediator, another party to the original mediation, and other persons when appropriate, but she cannot compel their participation in the investigation. Complaint Procedures, supra note 128, § 7(b). As noted in the discussion supra note 358 and infra notes 566, 590, 673, other states have given the regulatory bodies subpoena powers.

Complaint Procedures, supra note 128, § 7(c).

Id.

DRS Director's Presentation, supra note 116, at slide 10.

Complaint Procedures, supra note 128, § 2(b).

Id. § 4(b). The Executive Secretary recently appointed the author to the Review Committee.

Telephone Interview with Geetha Ravindra, supra note 115.
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463 Complaint Procedures, supra note 128, § 4d.

464 Id. The Complaint Procedures allow for alternative appointments when a member has a conflict of interest. The Complaint Procedures do not define a conflict of interest in this context. Id. § 4(e).

465 Id. § 7(e); DRS Director's Presentation, supra note 116, at slide 11.

466 Complaint Procedures, supra note 128, § 7(e).

467 Id.

468 Id. § 8(a).

469 Id. § 8(b). The Review Committee exercises great discretion in determining when to impose sanctions. Telephone Interview with Geetha Ravindra, supra note 115.

470 Complaint Procedures, supra note 128, § 8(a). The Training Guidelines also provide that the Virginia Supreme Court may remove a mediator from the list of certified mediators if the mediator engages in conduct that “reflects adversely on his impartiality or on the performance of his duties as a mediator, or is found to have persistently failed to carry out the duties of a mediator, or is found to have engaged in conduct prejudicial to the proper administration of justice . . . .” Training Guidelines, supra note 387, § H(1).

471 Complaint Procedures, supra note 128, § 9(c).

472 Id. § 11(a).

473 Id. § 11(b).

474 The Director has not had to face this decision so far. However, she would consider what the mediator has done since de-certification to enhance his or her training, skills, or ethical awareness. Telephone Interview with Geetha Ravindra, supra note 115.

475 Complaint Procedures, supra note 128, § 9(a).

476 Id. § 9(a)-(b).

477 Id. § 9(b).

478 Id. § 9(c).

479 Id.

480 Id.

481 Id. § 9(d).

482 Telephone Interview with Geetha Ravindra, supra note 115.

483 Va. Code Ann. §§ 8.01-576.1 to -581.22 (West Supp. 2005). Other exceptions relating to alleged misconduct in the mediation permit disclosure of mediation communications:

(ii) in a subsequent action between the neutral or dispute resolution program and a party to the dispute resolution proceeding for damages arising out of the dispute resolution proceeding . . . .

(vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation.

(viii) where communications are sought or offered to prove or disprove any of the grounds listed in [§§] 8.01-576.12 in a proceeding to vacate a mediated agreement.

Id.

484 Virginia's SOE, supra note 48, § 1.
Complaint Procedures, supra note 128, § 7(a), n.1.

See Virginia's SOE, supra note 48, § D(2).

Complaint Procedures, supra note 128, § 10(a). Despite the specific exemption that applies to information about the complaint and its disposition, the Virginia Supreme Court would not release the information to the author. It would authorize only the release of the summary information appearing in Appendix D to this article. E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), supra note 117; see also E-mail from Geetha Ravindra, DRS Dir., Va. Sup. Ct., to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (May 26, 2005, 13:20 EST) (on file with author) (stating that the acting Executive Secretary would not give the author access to mediator complaint files to conduct research and agreeing instead to provide a summary of the files).

Complaint Procedures, supra note 128, § 10(b).

Id. § 10(a).

Id. § 10(b). Florida, in contrast, makes available information about all formal complaints it receives, even if the Complaint Committee or the Hearing Panel does not find an ethics violation. See Appendix C to this article and discussion supra note 89. This information serves an educational function simply by showing the types of behaviors and situations that make parties suspicious of the mediator or the process.

Complaint Procedures, supra note 128, § 10(b). The Complaint Procedures do not indicate how the records may influence the recertification decision and who may consider them in that decision. The Director has explained that they may serve as a benchmark to determine what additional efforts the mediator has taken to improve his or her training, skills, or ethical awareness. Telephone Interview with Geetha Ravindra, supra note 115.

E-mail from Geetha Ravindra, DRS Dir., Va. Sup. Ct., to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Sept. 29, 2005, 15:01 EST) (on file with author) (confirming author's research).

The Virginia system served as a model for the Georgia system's designers. Telephone Interview with Christina Petrig, supra note 146.


Georgia ADR Rules, supra note 494, at II(A)(1). The Commission consists of the current Chief Justice of the Georgia Supreme Court or the Chief Justice's designee, a judge of the Georgia Court of Appeals, a designee of the President of the State Bar of Georgia, three superior court judges, and two judges to be drawn from the other four classes of trial courts in Georgia. The remaining members of the Commission will be one member from the Georgia General Assembly, four members of the State Bar of Georgia, and three non-lawyer public members. Id.; see also GODR Summary, supra note 494, at 1. Thus, Georgia is the only state analyzed that includes lay persons as part of its public oversight of mediators. The lay persons currently serving on the Commission are a retired court administrator, a retired Veteran's Administration administrator, and a psychiatrist. See Facsimile Transmission from Christina Petrig, Program Dir., GODR, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (July 28, 2005) (on file with author).

Georgia ADR Rules, supra note 494, at II(A)(3).}

GODR Summary, supra note 494, at 1.

Georgia ADR Rules, supra note 494, at II(A)(4); Telephone Interview with Christina Petrig, supra note 146. The GODR uses mediator registration fees authorized by Georgia ADR Rule II(B)(3) for other program activities. Those fees do not provide the primary source of operating funds for GODR. E-mail from Christina Petrig, Program Coordinator, GODR, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Aug. 16, 2005, 17:14 EST) (on file with author).
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500  GODR Summary, supra note 494, at 8.
502  Georgia ADR Rules, supra note 494, at 4.
503  Id. at IV; see also Training Approval Guidelines, supra note 487, § II. The Georgia ADR Rules permit a previously trained mediator the opportunity to prove his or her training meets the requirements under the new rule. It also permits reciprocal recognition of training taken by persons out of state. Ga. Sup. Ct., Requirements for Qualification and Training of Neutrals, App. B to the Georgia ADR Rules II (1993), http://www.godr.org/adrrules.html [hereinafter Georgia ADR Rules Appendix B]. The General Mediation designation requires 28 hours of training in an approved course. Georgia ADR Rules Appendix B, id. at 1(A). The course must cover ethics and professionalism. Id. at 1(A). Domestic Relations Mediators must show they hold a bachelor's degree from an accredited college or university. Id. They must also complete 40 hours of domestic relations training that “substantially meets the standards of the Family Section of the Association for Conflict Resolution.” Id. This training must include a segment on domestic violence. Id. Mediators who intend to handle cases involving allegations of domestic violence must have additional training. They must first be registered as Domestic Relations Mediators. They must then take an additional 14 hours of approved specialized domestic violence training. Id. Registrants for the category of specialized domestic violence mediator must also provide a letter of recommendation from a director of a court-connected ADR program who is familiar with the mediator’s work as a domestic relations mediator. Id. The rules once required all mediators to submit letters of recommendation. The GODR dropped the requirement when it found the letters posed a serious barrier to entry for non-lawyers who did not have previously existing professional relationships with judges, court personnel, or lawyers who could write the letters of recommendation. Telephone Interview with Christina Petrig, supra note 146.
504  GODR Summary, supra note 494, at 8.
505  Id. at 9.
508  Id.; see also Neutral Registration Application, supra note 501, at 5, 8; Reinstatement Application, supra note 506, at 8. The application forms require the applicant to permit the GODR to do a criminal background check.
509  Neutral Registration Application, supra note 501, at 8.
510  Georgia ADR Rules Appendix B, supra note 503, at IV(A).
511  Id. at 1(A). Unlike Virginia, Georgia does not have a formal mentor system. General Mediation applicants must observe or co-mediate five general civil mediations with a registered mediator. Applicants may substitute an approved general mediation practicum. Id. Domestic relations mediators must observe one mediation of a divorce or custody case. Applicants may substitute an approved domestic relations mediation practicum. Id. Approved courses and practicums appear at http://www.godr.org/neutral_training.html (last visited Mar. 2, 2006).
512  Georgia ADR Rules Appendix B, supra note 503, at 1(A).

Georgia ADR Rules Appendix B, supra note 503, at 16.

See Georgia ADR Rules Appendix B, supra note 503, at 16-17 (requirements do not mention an ethics CME requirement).

Georgia ADR Rules Appendix B, supra note 503, at II.

Georgia ADR Rules Appendix A, supra note 513, § 10.

See discussion supra notes 423-26 and accompanying text and infra notes 741-42 and accompanying text.

See Georgia Ethical Standards, supra note 48. Leila Taaffe, the GODR Director, recently reinforced the role of ethical guidelines in the disciplinary process. She said: “[Y]our standards are a guidepost for the mediators, and they are also a frame of reference for the consumer. The consumer knows what to expect from the individual [mediator] and from the mediation.” See Conference Transcript, supra note 88, at 6.

Georgia Ethical Standards, supra note 48. Ansley Barton, the former GODR Director, and the then-Chief Justice of the Georgia Supreme Court, drafted the original ethics standards and commentary. The examples found in the standards reflected ethical dilemmas identified by practicing mediators. Telephone Interview with Christina Petrig, supra note 146.

The author has not seen another mandatory or aspirational set of ethics guidelines organized around this conceptual approach.

Georgia Ethical Standards, supra note 48, at IV.

2005 Registration Application, supra note 501, at 8. The signature block of the application states: “I further certify that I understand the ethical standards and agree to conduct myself in accordance with these standards.” Id.

Georgia ADR Rules, supra note 494, at V. See discussion infra notes 577-80 and accompanying text. For instance, Advisory Opinion 5 discusses confidentiality in the context of juvenile court-connected mediations. An inquiry from the program staff prompted the opinion. See Committee on Ethics, GODR, Advisory Op. 5 (Aug. 2004), http://www.godr.org/pdfs/Advisory%20Opinion%205.pdf. In contrast, the Committee on Ethics issued Ethics Opinion 2002-1 in response to a complaint lodged against a mediator. See Committee on Ethics, GODR, Advisory Op. 6 (June 14, 2005), http://www.godr.org/ethics_info.html. E-mail from Christina Petrig, Program Coordinator, GODR, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Aug. 10, 2005, 10:25 EST) (on file with author). Telephone Interview with Christina Petrig, supra note 146; see also GODR Complaint Summary at Appendix E to this article. The advisory and ethics opinions appear at http://www.godr.org/ethics_info.html.

Georgia ADR Rules, supra note 494, at V.

Georgia ADR Rules, supra note 494, at VII.

The exemptions are:

(1) the mediated settlement agreement; (2) threats of imminent violence to self or to other persons; (3) communications supporting the mediator’s suspicion of child abuse or danger to the safety of any person; (4) communications relevant to legal claims or disciplinary proceedings brought against a mediator or an ADR program, but only to the extent necessary to protect the neutral or ADR program; (5) communications the mediator must report under any other mandatory reporting obligations; and (6) information necessary to monitor the quality ADR program.”

Id. Arguably, the language of exception (6) opens all the communications to scrutiny if a party makes a complaint against a mediator based on the quality of the process.

Id. This language suggests that the person making the complaint may not reveal confidential communications. Instead, only the neutral or program administrator can do so in his, her, or its defense. The GODR Program Coordinator, Christina Petrig, agrees that...
the language of the rule is confusing. She explains that parties are bound by contractually agreed confidentiality provisions, not by the rule. The rule instead binds mediators, program staff, and courts. Telephone Interview with Christina Petrig, supra note 146.

529 Georgia ADR Rules Appendix A, supra note 513, § 7. It requires all communications to be in writing, with copies to the parties, and strictly limits the types of communications the neutral can make.

530 Telephone Interview with Christina Petrig, supra note 146.


532 Telephone Interview with Leila Taaffe, Dir., GODR (July 1, 2005).

533 Georgia ADR Rules, supra note 494, at VII(C).

534 Id. at VIII.

535 This exemption suggests that the Georgia Supreme Court felt the need to teach “old dogs” new tricks. I often tell my ADR survey class students that they have more training in negotiation and mediation than most practicing attorneys, as evidenced by the empirical research in Bobbi McAdoo & Art Hinshaw, The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri, 67 Mo. L. Rev. 473, 486 (T. 4 (2002) (reporting that 96% of surveyed Missouri lawyers had no more than 20 hours of ADR training prior to 1997).

536 Georgia ADR Rules, supra note 494, at VIII.

537 Id., amending Ethical Consideration 7-5. The Georgia Supreme Court inadvertently removed this provision from the current draft of the Rules and Regulations of the State Bar of Georgia when the court eliminated Ethical Considerations from the format of the rules. Telephone Interview with Christina Petrig, supra note 146. GODR hopes to have the requirement included in the next version of those rules. Id.

538 Georgia ADR Rules Appendix A, supra note 513, § 10.

539 Georgia Ethics Procedures, supra note 507, at 32 n.56.

540 Id. at Introduction.

541 This article does not discuss complaints relating to a mediator's qualifications.


543 When a person clicks on the tab dedicated to ethics, a paragraph headed “Ethics Information” indicates that: “This section contains the ethical standards for mediators serving court programs in Georgia. It also contains the procedures adopted for handling questions regarding a neutral's fitness as well as advisory opinions and ethics opinion [sic] issued by the Georgia Commission on Dispute Resolution's Committee on Ethics.” See Georgia Commission on Dispute Resolution: Ethics Information, http://www.godr.org/ethics_info.html (last visited Mar. 2, 2006) (emphasis added). An unhappy mediation party may not understand that his or her complaint relates to a “neutral's fitness” and he or she may not know that the complaint procedures are identified as the Ethics Procedures on the next webpage. I did not find a complaint form on an otherwise well-designed website.

544 Georgia Ethics Procedures, supra note 507, § II(B).

545 See id.

546 Id. § II(A).
Id. § II(C). Until the person files a formal complaint, the GODR considers the matter a “grievance.” Id. § II(B). GODR does not give notice to the mediator of an unhappy party’s concerns until the party files a formal complaint. Id. § II(B)-(C). GODR does not investigate grievances and does not refer them to the Committee on Ethics. Id. § II(B). Thus, unlike Virginia, these informal complaints do not enter the process even if the Director feels they have merit. The GODR Director, Taaffe, explained: “I document that . . . [the] person called on such and such a day and this information was sent to them [sic]. Most of those people don’t follow up, but I want to be able to establish that we responded to that call in an appropriate period of time.” Conference Transcript, supra note 88, at 58. Taaffe further explained: “[W]e need something signed . . . . [P]eople in the heat of the moment will put anything into an e-mail . . . . And also, we want people to take ownership for the complaint because it’s . . . a serious matter.” Id. at 27.

As the GODR Director explained:
I take the position that in order for the complainant to feel that the process is completed or to know that[,] we as an institution[,] have followed through on the articulated grievance process . . . they have to be notified that the complaint was resolved one way or the other . . . . I think it’s very important when the complaint is received to acknowledge that formally with a letter and thank the individual for bringing it to the attention of the office, because it’s the only way the profession will grow. The complainant needs to feel validated. Conference Transcript, supra note 88, at 49.

Georgia Ethics Procedures, supra note 507, §§ II(C), II(D).

Id. at II (E).

Id.

Telephone Interview with Christina Petrig, supra note 146.

Georgia Ethics Procedures, supra note 507, § II(F).

Id. § II(G).

Telephone Interview with Christina Petrig, supra note 146.

Georgia Ethics Procedures, supra note 507, § II(I). The complaining party may not request a hearing. Conference Transcript, supra note 88, at 1.

Telephone Interview with Leila Taaffe, supra note 532.

Telephone Interview with Christina Petrig, supra note 146; see also Conference Transcript, supra note 88, at 31. The Georgia Ethics Procedures do not indicate how soon the Committee on Ethics must set a matter for hearing. See Georgia Ethics Procedures, supra note 507.

Georgia Ethics Procedures, supra note 507, § II(I). The GODR has its offices in Atlanta, Georgia. See http://www.godr.org/odr.html.

Telephone Interview with Christina Petrig, supra note 146.

Georgia Ethics Procedures, supra note 507, § II(I).

Id. §§ II(J), III(I). The Committee holds hearings in Atlanta or at other locations convenient to the parties. Telephone Interview with Christina Petrig, supra note 146.

Georgia Ethics Procedures, supra note 507, § II(J). Georgia is the only state analyzed in this article that tape records the proceedings, although Minnesota keeps a record in “electronic” format. Minn. Code of Ethics, supra note 48, § II(f). According to this section of the procedures, the tape is not considered part of the record. Only the complaint, the response, and all correspondence make up the record under the Georgia Ethics Procedures. Georgia Ethics Procedures, supra note 507, § II(J). However, later sections of the procedures suggest the tape is a part of the record. Id. § II(N)(2).

Id. § II(J) (preponderance of the evidence).
Id. The Committee will allow telephonic evidence upon good cause shown. Id.

Georgia Ethics Procedures, supra note 507, § II(J).

Georgia Ethics Procedures, supra note 507, § II(H).


Telephone Interview with Christina Petrig, supra note 146.

See Georgia Ethics Procedures, supra note 507, § II(M).

Id. § II(N)(1). Thus, a complainant who gets an adverse decision may not appeal. The Georgia Ethics Procedures define “respondent” as “[a] neutral, program director or training program director against whom a complaint is lodged . . . .” Id. § II(I); see also Georgia ADR Rules Appendix B, supra note 503, at V(D) regarding the appeal after the Committee on Ethics removes a neutral from the registry.

Id. § II(N)(4)(a).

Id. § II(N)(4)(b).
Id. § II(N)(4)(c).

Id. § II(N)(2). The Georgia Supreme Court amended the rule to add the subpoena power in May 1999. Id. § II(N)(2), n.71.

Id. § II(N)(4).

Id. § II(N)(3) (emphasis added). These standards do not indicate when they will apply. One scholar analyzes the standards of review in civil cases in these categories: (1) jury verdicts reviewed for sufficiency of evidence; (2) trial court's findings of fact reviewed for clear error; (3) conclusions of law reviewed de novo; (4) discretionary determinations regarding the conduct of the case reviewed for abuse; and (5) errors of law reviewed for harmless error. See generally 19 James Wm. Moore et al., Moore's Federal Practice ¶¶ 206.02-08 (3d ed. 2005). The standards of review recognize the allocation of power between and the expertise of the trial and appellate court. I recommend that the Georgia Ethics Procedures make the application of these standards to fact, law, and discretionary decisions more clear.

See discussion supra notes 554-72 and accompanying text.

Georgia Ethics Procedures, supra note 507, § II(N)(3).

See Conference Transcript, supra note 88, at 32 (Taffe remarked: “[W]e . . . deregister[, which has a tremendous economic impact on people, and that's why we're so careful about due process concerns.”).

Georgia Ethics Procedures, supra note 507, § II(N)(3).

Id. § II(A)-(I).

Id. § III(A). The Georgia Ethics Procedures do not explain the reasons for this limitation and it seems to undercut an interest in educating mediators about the types of complaints parties lodge.

Id. § III(B). Again, the Georgia Ethics Procedures do not explain the reasons for this limitation. Again, it limits the amount of information available to mediators who are concerned about best practices.

Id. § III(C).

Id.; see also id. § III(F).

Id. § III(F). The Georgia Ethics Procedures do not indicate what level of confidentiality attaches to these documents during the time in which the respondent has an opportunity to request an appeal or in the event a respondent requests an appeal. Ms. Petrig advises that if the Committee on Ethics issues a private reprimand or letter advising the mediator of better or best practices, the complainant does not get a copy of the reprimand or letter. He or she only gets a notice of the action taken. Telephone Interview with Christina Petrig, supra note 146.

Georgia Ethics Procedures, supra note 507, § III(F); see also Conference Transcript, supra note 88, at 21 (Taffe noted: “[I]f there's action taken, other than the dismissal of the complaint, that information is published and it's circulated to neutrals as well as to [local court] program directors. So that everyone's educated from this particular event.”).

Georgia Ethics Procedures, supra note 507, § III(D).

Telephone Interview with Christina Petrig, supra note 146.

Georgia Ethics Procedures, supra note 507, § III(G).

Id.

Id.
Id. § III(I). The confusing portion of the procedures provides that these statements will not be “subject to disclosure.” The following clause in this provision suggests that they will be protected only from disclosure or use as evidence in any subsequent administrative or judicial proceeding. Id. However, earlier provisions of the rules suggest that these statements have absolute confidentiality because only the complaint, response, and opinion are part of the public record. Id. § III(F).

Telephone Interview with Christina Petrig, supra note 146.

Georgia Ethics Procedures, supra note 507, § IV. It is not clear if the use of the words “ethics matter” intends to extend this immunity beyond the investigation and handling of complaints.

Id. This language does not indicate whether it extends to the complainant and the respondent, who have likely testified before these entities.

Welsh, Thinning Vision, supra note 97, at 33.


Id. at 409 (quoting Minn. Sup. Ct., Minn. State Bar Ass'n Task Force on Alt. Disp. Resol, Final Report (1990)).

See Digest of State-wide Requirements for Court Mediators, supra note 286.


Id. at 114.2, 114.13(a). Thus, like Florida, Virginia, and Georgia—and unlike Maine—Minnesota approves training programs. Applications for approval of training courses, previously approved courses, and continuing education courses are available at Minnesota Judicial Branch, Information for ADR Neutrals, http://www.courts.state.mn.us/page/?pageID=165&subSite=adr (last visited Mar. 2, 2006). Persons seeking to join the list of civil facilitative/hybrid neutrals must take 30 hours of training, with 15 hours of that in role-play situations. The training must include ethics and standards of practice pursuant to the Civil Mediation Act, Minn. Stat. Ann. §§ 572.31-.40 (West 2000). See Minn. Gen. R. Prac. 114.13(a) (amended 2005). Persons wanting to join the roster of family law facilitative/hybrid mediators start by getting 40 hours of training. They must also get six hours of certified domestic abuse issues training and two hours of ethics training. See id. at 114.13(c) (amended 2005); see also Minn. Stat. Ann. § 518.619(4) (West Supp. 2005) (child custody mediation qualifications). Persons may also qualify as “parenting time expeditors” if they satisfy continuing education requirements. Id. § 518.1751(2c). A parenting time expediter helps divorcing parties resolve parenting time disputes that arise under a parenting time court order. Parenting time expeditors are allowed to enforce, interpret, clarify, and address circumstances not specifically addressed in the court order. They may also determine whether a party has violated an existing parenting order. The statute characterizes the parenting time expediter as a “neutral” authorized to use a med-arb process. They are instructed to first attempt resolutions by facilitating negotiations between the parties. If the negotiations fail, the parenting time expediter “shall” make a decision resolving the dispute. Id. §§ 518.1751(1), (1b). Twelve of the 33 complaints listed on the Minnesota ADR Review Board Complaint Log involved parenting time expeditors. See Minnesota ADR Review Board Complaint Log, supra note 152.

Telephone Interview with Bridget Gernander, supra note 152.

Minn. Gen. R. Prac. 114.13(g) (amended 2005); see also Sup. Ct. Minn, Order Promulgating Transitional ADR Continuing Education Reporting Requirements and Amendments to General Rules of Practice, Order No. CX-89-18632 (Dec. 19, 2000); MN Judicial Branch, Information for ADR Neutrals, Individual Application Form, § 3, http://www.courts.state.mn.us/documents/adr/individual_application.doc (last visited Mar. 2, 2005). In the past year, about 130 neutrals lost their roster status, while approximately 150 neutrals applied to join the roster. Telephone Interview with Bridget Gernander, supra note 152.


Telephone Interview with Bridget Gernander, supra note 152.

See McAdoo, A Report, supra note 617, at 409-10; McAdoo, The Minnesota ADR Experience, supra note 617, at 72-87; see also Duane W. Krohnke, Minnesota Takes up ADR Ethics Challenge, 14 Alt. to High Cost of Litig. 121, 122 (Nov. 1996).

Telephone Interview with Bridget Gernander, supra note 152.

Minn. Code of Ethics, supra note 48, at Introduction.

Minn. Code of Ethics, supra note 48, at Introduction.

Id.

Id. The Minnesota Supreme Court Committee, which promulgates and revises the General Rules of Practice for the District Courts, formed the Advisory Task Force. Telephone Interview with Bridget Gernander, supra note 152.

Minn. Code of Ethics, supra note 48, at Introduction.

Id.

Minn. Gen. R. Prac. 114.05(b) (amended 2005) (“Except when mediation or med-arb is chosen as a dispute resolution process, the court, in its discretion, or upon recommendation of the parties, may appoint a neutral who does not qualify under Rule 114.12 of these Rules, if the appointment is based on legal or other professional training or experience. A neutral so selected shall be deemed to consent to the jurisdiction of the ADR Review Board and compliance with the Code of Ethics set forth in the Appendix to Rule 114.”). The Ethics Enforcement Procedure applies to “complaints against any individual or organization placed on the roster of qualified neutrals pursuant to R. 114.12 or serving as a court appointed neutral pursuant to R. 114.05(b).” MN Judicial Branch, Filing Complaints, Code of Ethics Enforcement Procedure, http://www.courts.state.mn.us/page/?pageID=164&subSite=adr (last visited Mar. 2, 2006) [hereinafter Ethics Enforcement Procedure]; see also id. at Advisory Comments to Rule I (stating that the procedure applies “whether the services are court ordered or not, and whether the services are or are not pursuant to Minnesota General Rules of Practice.”).

E-mail from Bridget Gernander, supra note 180.

Minnesota Code of Ethics, supra note 48, at Introduction.

Id. The introduction to the Ethics Enforcement Procedure emphasizes that inclusion on the court's roster is a “conditional privilege, revocable for cause.” Ethics Enforcement Procedure, supra note 637, at Introduction.

Minn. Code of Ethics, supra note 48, at Introduction.
Alabama and Arkansas include similar provisions in their mandatory ethics codes for mediators. See Ala. Code of Ethics for Mediators, supra note 48. Mel Rubin believes tort lawyers will bypass this limitation by proving negligence through expert testimony that refers to generally agreed standards of conduct. See also Rubin & McGirney, supra note 54 (describing his role as an expert in a mediator malpractice case).

643 Telephone Interview with Bridget Gernander, supra note 152.

644 See Minn. Gen. R. Prac. 114.08(a)-(b) (amended 2005); see supra note 155 and accompanying text.

645 Minn. Gen. R. Prac. 114.08(e).

646 Id. R. 114.10; see also supra note 155 and accompanying text.

647 The applicable statute provides:
A person cannot be examined as to any communication or document, including work notes, made or used in the course of or because of mediation pursuant to an agreement to mediate. This does not apply to the parties in the dispute in an application to a court by a party to have a mediated settlement agreement set aside or reformed. A communication or document otherwise not privileged does not become privileged because of this paragraph. This paragraph is not intended to limit the privilege accorded to communications during mediation by the common law.

Minn. Stat. Ann. § 595.02(1)(i) (West 2000). Another section provides:
No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could: (1) constitute a crime; (2) give rise to disqualification proceedings under the rules of professional conduct for attorneys; or (3) constitute professional misconduct.

Minn. Stat. Ann. § 595.02(1a)(1)-(3) (West 2000). This language suggests the mediator could breach confidentiality to the extent needed to defend a grievance complaint filed against him or her.

648 Telephone Interview with Bridget Gernander, supra note 152. Minn. Stat. Ann. § 481.02(1) prohibits anyone but licensed attorneys to “maintain, conduct, or defend [any action in court], except personally as a party thereto in other than a representative capacity, or by word, sign, letter, or advertisement, to hold out as competent or qualified to give legal advice or counsel, or to prepare legal documents . . . .” Minn. Stat. Ann. § 481.02(1) (West 2002). The only explicit exemption from the limitation permits agents for condominiums, cooperatives, or townhouses to appear for the corporate entity or association in conciliation court. Id. § 481.02(3)(16).


650 The statute provides: “A person presiding at an alternative dispute resolution proceeding is not subject to civil liability for the person's conduct in presiding over the proceeding, except for injury caused by malice, bad faith, or reckless conduct. This section does not restrict or affect immunity from liability that may be available under other law.” Minn. Stat. Ann. § 604A.32 (West Supp. 2005).

651 E-mail from Bobbi McAdoo, Professor and Senior Fellow, Dispute Resolution Institute, Hamline University School of Law, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Sept. 16, 2005, 15:41 EST) (on file with author).


653 E-mail from Bobbi McAdoo, supra note 651.


656 Id.; see also Ethics Enforcement Procedure, supra note 637, R. II(A) (requiring a written and signed complaint). The Ethics Enforcement Procedure also advises that a person may get a complaint form by calling a telephone number or by contacting the ADR Review Board at a designated e-mail address. Id. at Advisory Comment to Rule II.

657 See Minn. Code of Ethics, supra note 48; see also A.D.R. Review Board 2005, supra note 652. The currently posted list of members, however, shows persons with expired terms. The Minnesota Supreme Court appoints the ADR Review Board members from the following categories: five district court judges, two individuals with experience in family law, a court ADR program director, an ADR practitioner from greater Minnesota, an ADR practitioner from the Twin Cities, an attorney, a representative of a nonprofit ADR organization, and a representative of a for-profit ADR organization. It has no lay person members. Telephone Interview with Bridget Gernander, supra note 152.

658 Ethics Enforcement Procedure, supra note 637.


661 Ethics Enforcement Procedure, supra note 637, R. II(A) (requiring the complaint to “identify the neutral and make a short and plain statement of the conduct forming the basis of the complaint”).

662 Complaint Form, supra note 655.

663 Ethics Enforcement Procedure, supra note 637, at Advisory Comment to Rule I (stating that the procedure applies “whether the services are court ordered or not, and whether the services are or are not pursuant to Minnesota General Rules of Practice.”); see also discussion supra note 620 and accompanying text. Rule 114.02(b) of Minnesota General Rules of Practice defines a “neutral” as “an individual or organization who provides an ADR process.” The rule defines a “qualified neutral” as “an individual or organization included on the State Court Administrator's roster as provided in R. 114.12.” Id. Attorneys who practice collaborative law are subject to the Minnesota Rules on Lawyers Professional Responsibility. The Lawyers Professional Responsibility Board hears complaints filed against them. Minn. Stat. Ann. § 114.02(b).

664 Ethics Enforcement Procedure, supra note 637, at Advisory Comment to Rule I.

665 Id. R. II(C).

666 Id. R. II(D) (giving mediator 30 days to respond).

667 Telephone Interview with Bridget Gernander, supra note 152. A panel of neutrals has offered to conduct these mediations for a flat fee paid by the ADR Review Board from roster registration fees. Id.

668 Ethics Enforcement Procedure, supra note 637, R. II(E). The rule does not indicate what factors the ADR Review Board may consider in making this “going forward” decision.

669 Id. R. II(F). The ADR Review Board may appoint a complaint review panel comprising members of the ADR Review Board. The ADR Review Board's staff may also conduct investigations. Id. at Advisory Comment to Rule II. This comment does not indicate if the panel that conducts the review and investigation is the same three-member panel that conducts the hearing.

670 Id. R. II(F). The mediator must request a hearing within 14 days of his or her receipt of the notice. Id.

671 Id.

672 Id. R. III(B).

673 Id. R. II(F).
Id. R. III(A) (the sanctions include, but are not limited to, the five enumerated sanctions).

The ADR Review Board has not yet used this sanction. Telephone Interview with Bridget Gernander, supra note 152.

Ethics Enforcement Procedure, supra note 637, R. III(A)(5).

Id. R. II(G).

Id. R. II(G).

Minn. Stat. Ann. § 595.02 (subd.1a)(1)-(3) (West 2000). The statute provides:

No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could: (1) constitute a crime; (2) give rise to disqualification proceedings under the rules of professional conduct for attorneys; or (3) constitute professional misconduct.

Id.

Id.


Id. R. IV(A). Work product is apparently defined as the “mental processes or communications of the Board or staff.” Id. The rule does not define what communications of the Board or staff are protected from disclosure, but it would seem to protect all communications including those with witnesses during the investigation. It raises questions about how useful the right to inspect the ADR Review Board’s file may be to the accused mediator.

See discussion supra notes 155, 644-46 and accompanying text.

Ethics Enforcement Procedure, supra note 637, R. IV(A)(4).

Id. R. V(A).

Id. R. IV(B).


Id. R. V(B).

Howard H. Dana, Jr., Court-Connected Alternative Dispute Resolution in Maine, 57 Me. L. Rev. 349 (2005).

Id. at 362; see also McEwen, supra note 75, at 1357-75 (describing divorce mediation in Maine and the high participation in the process by lawyers); Craig McEwen & Richard J. Maiman, Small Claims Mediation in Maine: An Empirical Assessment, 33 Me. L. Rev. 237, 243-45, 249-64 (1981) (describing and assessing empirically the small claims pilot program). For a summary of the study's findings see Dana, supra note 689, at 362.

Dana, supra note 689, at 363-64.
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692 Id. at 364.
693 Id.
694 Id.
695 Id.
696 Id. at 365.
697 Id. at 365-67.
698 Id. at 368.
699 Id.
700 Id. at 370-71.
701 Id.
702 Id. at 375.

Is this a “mandatory” ADR program? In most types of civil, commercial cases, the parties are required to try some form of ADR. Because Rule 16B exempts many types of cases from that requirement . . . [t]his is more accurately characterized as a “presumptive” ADR program, because there is a presumption that the parties will engage in ADR unless their case is exempt or they are granted a waiver.

697 Id.
706 Digest of State-wide Requirements for Court Mediators, supra note 286, passim; see State of Maine Jud. Branch, Court Alternative Dispute Resolution Service Operational Rules (Nov. 26, 1996), available at http://www.courts.state.me.us/courtservices/adr/adr_rules.html [hereinafter Maine Operational Rules]. Applicants must complete 20 hours of mediation process training, with the person completing 8 of those hours within two years of applying for the roster. Id. at App. B. Applicants must also complete 15 hours of experience as a mediator or co-mediator, although the state does not impose a requirement, like Virginia, of observation and co-mediation experience with qualified mentors. Id. In addition, the applicant must complete at least three hours of training or experience in consumer or debtor/creditor law. Id. Applicants seeking to join the General Civil Litigation Roster must have at least 40 hours of training, with at least 15 of those hours within two years of the date of the application. Id. at App. D. He or she must also accrue 20 hours of experience as a mediator or co-mediator and 10 hours of training or experience in general civil law and court procedure. Id. Applicants seeking inclusion on the Superior Court Mediation Roster must meet the most rigorous requirements imposed by Maine. The applicant must first be a member of the General Civil Litigation Roster. Id. at App. E. In addition, he or she must have at least 100 hours of training or experience consisting of at least 40 hours of mediation training, 20 hours of experience as a mediator or co-mediator, 10 hours of training or experience in general civil law and court procedure, and a half-day orientation and training program offered by the Court Alternative Dispute Resolution Service (CADRES) on mediation and the Superior Court’s ADR program. Id. Listing on the Domestic Relations Roster requires a person to complete 40 hours of training, with the person completing at least 15 hours of the training within two years of his or her application for inclusion on the roster. Id. at App. A. The applicant also needs 20 hours of experience as a mediator or co-mediator. Id. Finally, the applicant must complete ten hours of training or experience in domestic relations law and eight hours of training that relates to domestic abuse issues. Id. Maine also recognizes a category
of mediators not recognized in most other states—the Environmental, Land Use, and Natural Gas Pipeline mediator. See Me. Rev. Stat. Ann. tit. 5, § 3341 (2002) (establishes the land use mediation program); Me. Rev. Stat. Ann. tit. 5, § 3345 (2002) (establishes the natural gas pipeline mediation program); Me. Rev. Stat. Ann. tit. 38, § 347-A(4)(E) (2001) (establishes the environmental law violation mediation program). To join the roster for the environmental mediation program, applicants must have 40 hours of mediation training and 20 hours of experience as a mediator, facilitator of multi-party contested issues, or a co-mediator. Maine Operational Rules, supra, at App. C. The applicant must also have 20 hours of work experience or training in land use or environmental law. Id. The Director of the Office of Court ADR (ADR Director) makes the final determination about the adequacy of the experience or training on the topics. Id. If the mediator plans to handle complex multi-party disputes, he or she must have additional training or experience in handling those types of disputes. Id. The CADRES orientation and training course are required for all rosters, even though Appendix E only seems to require it for superior court mediators. E-mail from Diane Kenty, supra note 172.


Id.

Maine Operational Rules, supra note 706, at II(1)(A).

Id. at II(1)(B). The CADRES Committee consists of the Chief Justice of the Supreme Judicial Court or a designee, the Chief Justice of the Superior Court or a designee, the Chief Judge of the District Court or a designee, and the state court administrator or a designee. Me. Rev. Stat. Ann. tit. 4, § 18-B(6) (Supp. 2005). The ADR Director did not return the author's request for additional information about the role of the CADRES Committee, its membership, and its lay members.

Maine Operational Rules, supra note 706, at Apps. (A-G); see also Me. Rev. Stat. Ann. tit 4, § 18-B(6) (discussing who is on the CADRES Committee). If the ADR Director rejects an application to join a roster, the applicant may appeal the decision to the CADRES Committee. Maine Operational Rules, supra note 706, at II(3)(C).

Maine Operational Rules, supra note 706, at (II)(1)(B) and App. B.

See discussion supra note 707 about the availability of the roster application form.

The Judicial Branch does not approve training programs. See E-mail from Diane Kenty, supra note 172.

Maine Operational Rules, supra note 706, at II(2)(D).

Id. at App. B(B).

Id. at Apps. C(C), (D)(B), E(II).

Me. Code of Conduct, supra note 48. The ADR Director has applied the Standards of Professional Conduct developed by the Maine Association of Dispute Resolution Professionals (MADR). See discussion supra notes 172-76 and accompanying text. However, these rules only apply to MADRP members by agreement. See Maine Assn. of Disp. Resol. Professionals, MADRP Info, http://www.madrp.org/Ethics.html (last visited Mar. 2, 2006).

Maine Operational Rules, supra note 706, at II(2)(A). This language suggests, but does not say, that the Maine Code of Conduct applies to rostered neutrals even when they are conducting privately referred mediations.


Telephone Interview with Diane Kenty, supra note 173.

Me. R. Civ. P. 16B(k).

Id.
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725 Me. R. Civ. P. 16B(k); see also Advisory Committee's Notes, id. at 91 (“It is anticipated [that] a disclosure pursuant to court order will be utilized only after the court finds that the need for disclosure substantially outweighs the importance of the state's policy favoring the protection of confidentiality of settlement discussions.”).

726 Me. Code of Conduct, supra note 48, at Canon 2(B)(6) (“A Neutral shall preserve the confidentiality of conduct and communications of the participants except if disclosure is required by rule or law. Confidentiality may be waived by the consent of all participants.”); Id. at Canon 2(B)(7) (“A Neutral shall not disclose or use, for any purpose unrelated to ADR duties, nonpublic information acquired in the capacity as an [sic] Neutral. A Neutral shall abstain from public comment on an ADR process except where confidentiality is waived by the consent of all participants.”).

727 Me. R. Evid. 408; see also Michael T. Bigos, Maine Considers the Uniform Mediation Act, 18 Me. Bus. J. 222, 224 (2003).


729 Me. R. Civ. P. 16B(h)(2).

730 Id.

731 Maine Operational Rules, supra note 706, at II(2)(B).


734 Maine Operational Rules, supra note 706, at IV.

735 Conference Transcript, supra note 88, at 38.

736 “We have only 1.2 million people in the whole state . . . so things tend to operate with fewer formalities in some circumstances.” Id.

737 Id. The ADR Director operates pursuant to Me. S. Ct. R. 16B, which, based on information available to the author, was drafted before the current ADR Director assumed her position. Conference transcript, supra note 88, at 37-38.

738 The ADR Director promises to make the information more accessible at the site. E-mail from Diane Kenty, supra note 172.

739 Maine.gov, Court Rules, http://www.courts.state.me.us/courtservices/adr/adr_rules.html (last visited Mar. 2, 2006). At the time the author first contacted the ADR Director in July 2005 these links did not exist.

740 Nonetheless, the ADR Director believes an effective complaint procedure is “accessible and easy to use.” Conference Transcript, supra note 88, at 44.

741 See Maine Operational Rules, supra note 706, at II(2)(C).

742 Attachment to E-mail from Bethany M. Gagnon, Adm. Secretary for the CADRES Program, Maine Jud. Branch, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (July 27, 2005, 09:27 EST) (on file with author).

743 Id. In one situation, she sanctioned a mediator for breach of confidentiality that she observed directly. See discussion supra notes 111, 178 and accompanying text. The ADR Director explained: “I have added a personal observation of a mediator following a complaint, because that's the best way for me to judge what is happening there.” Conference Transcript, supra note 88, at 40.
Conference Transcript, supra note 88, at 39 (Kenty stated, “I would accept an e-mail.”).

Id. at 39, 44. The Maine Operational Rules provide: “[T]he Director shall respond to the complainant and may inform the complainant about the outcome of the complaint.” Maine Operational Rules, supra note 706, at II(3)(A); see also E-mail from Diane Kenty, supra note 172.

Maine Operational Rules, supra note 706, at II(3)(A).

Conference Transcript, supra note 88, at 39. The Maine Operational Rules provide, without stating a standard for dismissal, the following: “The Director shall then consider all information available and may dismiss the complaint without further action or review the complaint further.” Maine Operational Rules, supra note 706, at II(3)(A).

Conference Transcript, supra note 88, at 38-39. Kenty stated:
I act as the human filter . . . . I respond immediately by writing a letter . . . or I would write a responsive e-mail to acknowledge that I've received the complaint, and I also express that someone has been dissatisfied with their mediation. So I am the determination of whether a complaint is frivolous or whether it has substance. [Discusses the complaint in which a party expected the mediator to represent him/her in court.] And of course, that's not what a mediator would do . . . . So that for me is an example of the kind of complaint in which I would take no further action, except to talk to the party and help them [sic] understand more about mediation. Id.

In her other roles as the ADR Director she regularly observes mediators as part of the quality assurance system of the court. Accordingly, she may sit in on the mediation without first explaining that a person has filed a complaint against the mediator. Conference Transcript, supra note 88, at 40-42. She tries to observe every rostered mediator every two years. Id. at 42.

See Conference Transcript, supra note 88, at 40. The Maine Operational Rules allow the ADR Director to consider “all pertinent information, including interviews with or written statements from the ADR provider, disputants' counsel, and court personnel, [as well as] the complaint and other information developed by the ADR Director.” Maine Operational Rules, supra note 706, at II(3)(B).

Conference Transcript, supra note 88, at 40. The Operational Rules require the ADR Director to “notify the ADR provider of the pending review in writing.” Maine Operational Rules, supra note 706, at II(3)(B).

Conference Transcript, supra note 88, at 40-41. The Maine Operational Rules provide: “[T]he Director may terminate the review without action or may notify the ADR provider in writing of any proposed action and the method by which an ADR provider may appeal the decision . . . .” Maine Operational Rules, supra note 706, at II(3)(B). The rules, however, do not delineate-unlike the other states analyzed-the sanctions, interventions, or actions the ADR Director may impose.

The ADR Director has explained that the situation in which she removed a mediator from the roster does not appear on the Maine CADRES Complaint Log, supra note 171, because the ethics complaint did not originate from a party complaint. Instead, she directly observed the behavior. Conference Transcript, supra note 88, at 44; E-mail from Diane Kenty, supra note 172; see also discussion supra notes 111, 178 and accompanying text.

Conference Transcript, supra note 88, at 43-44. The Maine Operational Rules also give the ADR Director discretion to remove someone from the roster prior to completion of the investigation of a complaint when “it is in the best interest of CADRES to do so.” Maine Operational Rules, supra note 706, at II(4). The Maine CADRES Complaint Log indicates that mediators who have withdrawn from the roster have done so voluntarily. See Maine CADRES Complaint Log, supra note 171.

Conference Transcript, supra note 88, at 46.

Maine Operational Rules, supra note 706, at II(3)(C).

Telephone Interview with Diane Kenty, supra note 173.
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759 Maine Operational Rules, supra note 706, at II(3)(C).
760 Id.
761 Id. at II(3)(A).
762 Id. at II(3)(B).
763 Id. at II(3)(C).
764 Id. at II(3)(A).
766 Maine Operational Rules, supra note 706, at IV.
767 Id. Because the Maine Operational Rules govern the complaint procedures, the ADR Director appears to have immunity against liability for actions taken in handling complaints against mediators. Id.
769 As noted above, Sharon Press recognizes that regulators could require mediators to advise parties about the availability of a grievances process at the beginning or end of the mediation. Conference Transcript, supra note 88, at 18.
770 See National Standards, supra note 8, § 1.1 (all persons should have equal access to the court-connected service); § 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.”).
771 By comparison, the lawyer disciplinary systems in 36 states open the proceedings to the public with the filing of formal charges against the lawyer. Arizona, Florida, and West Virginia make all records accessible to the public after a finding of probable cause or dismissal for lack of probable cause and Oregon is entirely open from the filing of the complaint. Among 11 jurisdictions which are not considered ‘open,’ Alabama, Delaware, Kentucky, and South Dakota make the matter public after the Board recommends public discipline. Geoff Yuda, Disciplining Pennsylvania Lawyers: How Public Should it Be?: Lawyers and the Public Register Their Views About Proposals for a More Open Review Process, 27 Penn. Law. 40, 41 (Jan.-Feb. 2005). Thus, the mediator disciplinary systems in four of the five states analyzed in this article make less information available to the public than most states make public in connection with lawyer disciplinary proceedings.
772 Id. at 40-48 (describing Pennsylvania's effort to make all attorney disciplinary information available to the public to increase public confidence in the disciplinary system, and by association, the judicial system).
773 E-mail from Diane Kenty, supra note 172.
774 Telephone Interview with Christina Petrig, supra note 146.
775 Alternative Dispute Resolution in North Carolina: A New Civil Procedure 37 (Jacquelene R. Clare et al. eds., 2003) (describing history of ADR in the state and serving as a guide to practitioners).
776 Id. at 42-43.
777 Id. at 44-45.


N.C. S. Bill 806, 2005 N.C. Sess. Laws 167, § 7A-38.2(a), as amended, available at Westlaw 2005 NC S.B. 806 (NS) [hereinafter S. Bill 806]. Sections 1 and 3 of the S. Bill 806 became law effective October 1, 2005. Sections 2 and 4 become effective “when it becomes law.” Id. § 5. The legislature authorized the court-connected mediation programs in 1995 legislation codified at N.C. Gen. Stat. Ann. § 7A-38.1 (West 2005) (superior court cases); § 7A-38.3 (farm nuisance cases); § 7A-38.4A (district court cases); § 7A-494, § 7A-495, § 50-13.1 (child custody and visitation cases); and § 50-21 (divorce mediation). The revised mediation statute applies to mediators handling superior court, farm nuisance, and district court cases. See also § 7A-38.2(a) (authorizing the N.C. Supreme Court to adopt standards for the certification and conduct of mediators; allowing the court to adopt procedures to enforce the standards).

N.C. Gen. Stat. Ann. § 7A-38.2(d) (West 2005); Telephone Interview with Leslie Ratliff, supra note 779. Mediators who are not certified by the DR Commission may take cases so long as the litigating parties nominate them as the neutral. Id.


S. Bill 806, supra note 781, § 7A-38.2(c)-(j) (creating new sections of statute).


Id. at 4-5.

S. Bill 806, supra note 781, § 7A-38.2; see also Ratliff Report, supra note 779, at 2. The Commission has four committees: Executive Committee, Program Oversight Committee, Mediator Certification and Training Committee, and the Standards and Discipline Committee. The last named committee “reviews disciplinary matters self-reported by mediators or applicants for mediator certification and investigates and reviews complaints filed by litigants, attorneys, and others regarding mediator conduct.” Id. at 4.

S. Bill 806, supra note 781, § 7A-38.2(c). A list of its members for the 2003/2004 year appears in the Ratliff Report, supra note 779, at 2. At this time, the DR Commission does not include any members who could be called laypersons. Telephone Interview with Leslie Ratliff, supra note 779.

The North Carolina Court System, Complaint Process, http://www.nccourts.org/Courts/CRS/Councils/DRC/Standards/Complaint.asp (last visited Mar. 2, 2006). The North Carolina Supreme Court has substantially revised the DR Commission’s rules, including those rules governing mediator misconduct. E-mail from Leslie Ratliff, Executive Secretary, DR Commission, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Feb. 9, 2006, 10:18 EST) (transmitting Rules of the North Carolina Supreme Court for the Dispute Resolution Commission) (on file with author).

Dispute Resolution Commission Complaint, Form AOC-DRC-05, available at http://www.nccourts.org/Forms/Documents/624.pdf. Unlike any other state analyzed in this article, the complaint form requires the complaining party to agree that if the [DR] Commission finds that the mediator . . . is not guilty of the misconduct alleged in this Complaint and then further finds that this Complaint was made with the intent to harass or vex its subject, that [the complainant] may be liable for the costs associated with the hearing[.]

Id.

See North Carolina DR Commission Complaint Log, a copy of which appears in Appendix H to this article. See E-mail from Leslie Ratliff, supra note 789 (transmitting North Carolina DR Commission Regulatory Activity 1995 to present). Appendix H does not
include a complaint about a mediation trainer and a complaint concerning disclosures an applicant failed to make on his certification application.

E-mail from Leslie Ratliff, Executive Secretary, N.C. DR Commission, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Sept. 30, 2005, 13:41 EST) (on file with author).

Fees collected from mediators and from training programs for certifications and renewals have provided the budget for the DR Commission. In the 2003/2004 fiscal year, the DR Commission collected $160,315 in fees. Ratliff Report, supra note 779, at 3; Telephone Interview with Leslie Ratliff, supra note 779.

S. Bill 806, supra note 781, § 7A-38.2(e).

Id. § 7A-38.2(k). For the Florida appeal rights, see the discussion at supra notes 371-72 and accompanying text.

S. Bill 806, supra note 781, at § 7A-38.2(h) (DR Commission may publish the names, contact information, and biographical information for certified neutrals).

Id. § 7A-38.2(f)-(h).

N.C. Gen. Stat. Ann. § 7A-38.1(l) (West 2005) (applying in Superior Court-ordered mediations); id. § 7A-38.4(A)(j) (West 2005) (applying in District Court-ordered mediations). North Carolina is among the few states analyzed in this article that protects from disclosure conduct, as well as statements.

Id. § 7A-38.4A(j) (West 2005), as rewritten.

Id.

Id.

Id.

Id. § 7A-38.2(h) (West 2005). In the past, the Executive Secretary of the DR Commission operated a “hotline” which allowed mediators to call for ethical guidance, even during a mediation session. The Executive Secretary logged receipt of the request for advice and a synopsis of the advice she gave. In that way, a mediator later accused of misconduct could show that he or she attempted to get advice at the time the ethical dilemma arose. When the mediator did not face time pressures, he or she could request a written ethics opinion from the committee. Telephone Interview with Leslie Ratliff, supra note 779; see also The North Carolina Court System, Advisory Opinion Policy, http://www.nccourts.org/Courts/CRS/Councils/DRC/Standards/Policy.asp (last visited Mar. 2, 2006).


See discussion supra note 789.

Chief Judge Robert M. Bell created the Maryland ADR Commission (Maryland Commission) in 1998. In 2002, the Maryland Mediation and Conflict Resolution Office (MACRO) succeeded the Maryland Commission as the design entity. Its office is part of the judicial branch of the state. Later, MACRO created the Maryland Quality Assurance Committee and sponsored more than 12 sessions, in two rounds of feedback, that allowed mediator groups, the ADR section of the state bar, judges, mediation program directors, and consumers of mediation services to provide information about the types of systems that would work to enhance and maintain mediation services in the state. Charles Pou, Jr. served as the consultant and over two and a half years assembled data on existing quality assurance systems used by other states and mediation organizations. A new 15 member Mediator Excellence Council will implement the Maryland Program for Mediator Excellence through task groups focused on specific issues. This article focuses on the work-product of the Grievance Process Committee. The Mediator Excellence Council plans to implement the Maryland Program for Mediator Excellence in Fall 2005. Charles Pou, Jr., Scissors Cut Paper: An Innovative “Guildhall” Helps Maryland’s Mediators Sharpen Their Skills 15, 18, 19, 21-22, 23 (June 28, 2005) (hereinafter Pou, Guildhall) (unpublished manuscript, on file with author); Roger Wolf & Toby Treem, Growing Maryland’s Mediators: The Maryland Program for Mediator Excellence, Just. Sys. J., 2-3 (forthcoming 2006) (also describing the design history and elements of the program) (on file with author).

Pou, Guildhall, supra note 810, at 15.

Id. at 17.

Id.

MGOP Proposal, supra note 227, at 2. A 12 member committee made the proposal. Its members include mediators, lawyers, judges, and a social worker. The cover sheet to the proposal indicates that the design committee intended to add a consumer representative. Id. at 1. A group formed from the persons nominated by mediation service providers, mediation roster managers, consumers, community members, and private practitioners would be responsible for helping to make the public and the mediation community aware of the grievance ombuds program. This Advisory Committee would meet once a year. It would develop policy along with the MGOP Council. Id. at 4. See discussion infra notes 828-40 and accompanying text about the MGOP Council.

MGOP Proposal, supra note 227, at 3.

Id. at 2.

Id. at 6.

Id. at 10.

Id. at 3-4, 6-9.

11.

Id. at 6.

Id. at 7.

Id.

Id. The designers' efforts to give control to the complainant over the investigation and progress of the complaint may run counter to the accused mediator's expectations about procedural justice. See discussion infra notes 863-85 and accompanying text.

MGOP Proposal, supra note 227, at 8.

Id. at 5. I recommend that the language in the final proposal be more specific about the information the ombuds can disclose to the public. It would seem impossible to describe the “nature of complaints” without revealing information about “individual complaints.” Id. at 5. The design task force contemplates that the ombuds will not reveal the names or other identifying information of any complainant or accused mediator if the process does not result in a hearing or sanction. Id. at 7, 10-11. But the design task force still intends to give the ombuds the ability to summarize and publish the allegations of complaints and their disposition in the same
way that Florida, Virginia, and Georgia do. Telephone Interview with Louise Phipps Senft, Chair, Maryland Grievance Process Committee, in Baltimore, Md. (Oct. 5, 2005). Without further clarification, however, the current guidelines on disclosures most resemble Minnesota's very restrictive confidentiality requirement.

827 MGOP Proposal, supra note 227, at 11. The summary should “assure consistency of outcomes, provide a teaching tool for the profession, establish precedent, and ensure the integrity of the MGOP.” Id. These disclosure goals enhance mediator competence, encourage ethical behavior, and provide procedural justice that enhances the reputation of the grievance process, mediation programs, and referring courts. But the imprecise language currently used in the proposal about confidentiality may undermine these goals.

828 Id. at 7. Thus, again, the designers give control over the process to the complainant. This approach, therefore, seems to assume that the process is intended to resolve disputes rather than to discipline mediators or to provide broader education to the mediation community. If the designers made the latter goals paramount, the MGOP Council could process complaints they believed had merit, even if the complainant was ready to “lump it.” At the same time, in Florida and Georgia the hearing panel will dismiss a complaint if the complainant does not pursue it at this same step in the process. Fla. Discipline Rules, supra note 251, R. 10.810(h); Georgia Ethics Procedures, supra note 507, § II(J). In addition, by giving greater control over the process to the complainant, it may also enhance the complainant's perception of procedural justice. See discussion supra notes 861-62 and accompanying text.

829 MGOP Proposal, supra note 227, at 3.

830 Id. Accordingly, the designers plan to include consumers on this hearing panel, but they do not define “consumer.” They may define it as court personnel or attorneys, depending on how they envision the consumers of mediation services.

831 Id.

832 Id. at 4.

833 Id. at 10.

834 See discussion supra notes 172-76 and accompanying text.

835 MGOP Proposal, supra note 227, at 10; see also Conference Transcript, supra note 88, at 16. During the conference presentation, Sharon Press noted:

[U]nder the Florida system there is no statute of limitation by which one can file a complaint. So . . . someone could have mediated in 1988 and show up at our door today, and there is nothing to say that we would dismiss that complaint. The good news is, that . . . nobody does that. The longest it's taken somebody [to file a complaint] is a couple of months, and then it was for really special circumstances.

836 MGOP Proposal, supra note 227, at 11. The Grievance Process Committee recommends that it get an advisory opinion from the Attorney General's Office on whether the proposal, or presumably the new ethics standards, could give rise to a new cause of action. Id. The proposal says nothing about mediator immunity or about immunity for persons handling complaints against mediators.

837 Id. at 7; see also Telephone Interview with Louise Phipps Senft, supra note 826. The proposal, however, says that the decision would be binding. MGOP Proposal, supra note 227, at 8. If the MGOP Council does not consider the matter or does not hold a hearing, the complainant may pursue the complaint in court. Id.

838 MGOP Proposal, supra note 227, at 7, 10.

839 The proposal never uses the term “sanctions.” Instead, the proposal talks about “decisions.” Id. at 8.

840 Id. at 10. Thus, Maryland plans to adopt the burden of proof used in Georgia. See discussion supra note 564.

841 MGOP Proposal, supra note 227, at 8 (emphasis in original).

842 Id. at 11; see also Telephone Interview with Louise Phipps Senft, supra note 826.
843 MGOP Proposal, supra note 227, at 5.

844 Id. at 7.

845 Id. at 6.

846 Id. at 10. In other words, the designers have not decided to use public disclosure of the sanction as a warning to other mediators.

847 See discussion supra notes 812-15 and accompanying text.

848 See generally William L. Ury, Jeannie M. Brett, & Stephen B. Goldberg, Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict (1993). Based on the information disclosed in the book, the International Harvester mine that served as the focus for the research was located at Benham, Kentucky, less than two and a half hours from the campus of the Appalachian School of Law. See Kentucky Coal Mining Museum, http://www.kingdomcome.org/pdf/MUSEUM.PDF.


850 Ury, Brett & Goldberg, supra note 848, at 20-40.

851 Bingham, supra note 214, at 122-25.

852 Ury, Brett & Goldberg, supra note 848, at 65-66.

853 Id. at 66.

854 Id. at 69.

855 See discussion supra note 810; see also Telephone Interview with Louise Phipps Senft, supra note 826.

856 Ury, Brett & Goldberg, supra note 848, at 41-64.

857 See Appendix A, supra note 2. Diane Kenty, the Maine ADR Director makes the same comment: “[V]ery frequently [complainants] say, ‘You know, I’m not so concerned about this for my own case, and specifically do not want to talk to the mediator about this, but I wanted you to know for further reference that this happened to me.’” Conference Transcript, supra note 88, at 41.

858 See Kovach, supra note 83, at 115-16.

859 Conference Transcript, supra note 88, at 21 (Sharon Press reporting that Florida uses the information available through the grievance process to design training programs for mediators).

860 See discussion supra notes 240-47, 384, 619, 690-702 and accompanying text. Welsh & McAdoo note: “[P]utting together monitoring and evaluation mechanisms early is much easier than developing such mechanisms after a new program has developed its own vested constituencies.” Welsh & McAdoo, Look Before You Leap, supra note 195, at 430.

861 See Appendix A, supra note 2; see also Conference Transcript, supra note 88, at 8-9 (Leila Taaffe noted: “[O]ne of the complaints often . . . leveled against the bar or medical professional is that they aren't hard enough on their own . . . . [A]nd that's why many [malpractice] cases go to court.”).

862 Welsh, Looking Glass, supra note 185, at 660; see also Yuda, supra note 771, at 40 (acknowledging the public’s perception that lawyers are “protecting their own” in disciplinary proceedings and reporting lawyer opposition to a proposal seeking to include lay people on lawyer disciplinary bodies).

863 Welsh, Looking Glass, supra note 185, at 654-55.
864 Id. at 655.
865 Id. at 581.
866 Id. at 656. Bingham reports that supervisors participating in the U.S. Postal Service's REDRESS program expressed greater satisfaction with the mediation process than did employees, suggesting some difference in the parties' expectations about procedural justice. Bingham, supra note 214, at 113.
867 Welsh suggests that the U.S. Supreme Court's due process jurisprudence focuses on ensuring the “accuracy” of the decisionmaking. In that way, it is outcome, rather than process, oriented. Welsh, Hollow Promise, supra note 193, at 187-90; Welsh, Looking Glass, supra note 185, at 664.
868 Hensler, supra note 8, at 93.
869 U.S. Const. amend. XIV.
870 Welsh, Hollow Promise, supra note 193, at 188.
873 Id.; see also Beauchamp v. De Abadia, 779 F.2d 773, 775 (1st Cir. 1985) (finding physician had a protected interest in his license to practice medicine); Keney v. Derbyshire, 718 F.2d 352, 354 (10th Cir. 1983) (finding that a license to practice medicine is a property right deserving constitutional protection, including due process); Padilla v. Minn. State Bd. of Med. Exam'rs, 382 N.W.2d 876, 882 (Minn. Ct. App. 1986) (finding doctor's due process rights were not violated when board applied evidentiary rules used in contested cases). No court has yet resolved whether a mediator, who is not typically licensed by a state, would have the same due process protections as state licensed professionals.
875 See In re Echeles, 430 F.2d 347 (7th Cir. 1970) (attorney disbarment); Burns v. Clayton, 117 S.E.2d 300 (S.C. 1960) (attorney disbarment and public reprimand).
876 Examples include mental infirmity or other disabilities.
877 In re Ruffalo, 390 U.S 544, 551(1968).
879 Timothy P. Chinaris, Even Judges Don't Know Everything: A Call for a Presumption of Admissibility for Expert Witness Testimony in Lawyer Disciplinary Proceedings, 36 St. Mary's L.J. 825, 870-71, nn.262-67 (2005); see also Andrea G. Nadel, Extent and Determination of Attorney's Right or Privilege Against Self-Incrimination in Disbarment or Other Disciplinary Proceedings-Post-Spevack Cases, 30 A.L.R.R.4th 243 (1984). Minnesota, for instance, has a multi-tiered lawyer disciplinary system. A complaint starts out with the Director of the Office of Lawyers Professional Responsibility. He may dismiss the complaint without investigation or refer the matter to the District Ethics Committee for investigation. After the committee reports its findings to the Director, he may dismiss the complaint, negotiate a probationary agreement with the lawyer, or issue an admonition “if the Director concludes that a lawyer's conduct was unprofessional but of an isolated and non-serious nature.” Minn. Rules on Law. Prof. Resp., 52 Minn. Stat. R. 8(d)(2) (1999). The Director may also refer the matter to a Board Panel for a hearing. If the Board Panel finds that probable cause exists that the lawyer engaged in unprofessional conduct and believes the lawyer warrants public discipline, the Board Panel will instruct the Director to file a petition for disciplinary action in the Minnesota Supreme Court. The supreme court may then use a
referee or its own personnel to hear evidence on the allegations in the complaint. The supreme court will then issue a disciplinary sanction. Throughout the process, one group of fact-finders makes recommendations to a decisionmaker, who has not heard the prior proceedings and testimony. Id. R. 6-14.

880 See Netterville v. Mississippi State Bar, 397 So. 2d 878 (Miss. 1981) (attorney private reprimand).

881 In re Application for Disciplinary Action Against Peterson, 446 N.W.2d 254, 256 (N.D. 1989) (attorney suspension and public reprimand).


883 In re Peterson, 110 N.W.2d 9, 13 (Minn. 1961) (attorney disbarment).

884 In re Heirich, 140 N.E.2d 825 (Ill. 1956) (attorney disbarment).

885 Kovach, supra note 83, at 115 (“[I]t is important that both the mediator and the consumer understand what kind of hearing may take place. Rules [about] the presentation of evidence should be specified.”).

886 Ury, Brett & Goldberg, supra note 848, at 75-83.