Ethical Issues Related to Litigation & Mediation During the Pandemic

Disclaimer

THIS PRESENTATION WAS PUT TOGETHER BY THE MEDIATOR BASED ON THE CASES AND OTHER RAW MATERIALS PROVIDED BY THE PANELISTS IN ORDER TO HELP GIVE STRUCTURE TO THE LIVELY BACK AND FORTH DISCUSSION BETWEEN THE PANELISTS. THUS, THE MATERIAL HEREIN SHOULD NOT BE TAKEN AS LEGAL ADVISE OR THE OFFICIAL POSITION OF ANY PANELISTS. THIS IS MERELY A DISCUSSION BY HIGHLY EXPERIENCED MEMBERS OF THE PROFESSION DESIGNED TO GET PARTICIPANTS TO THINK OUTSIDE OF THE BOX ABOUT THE NEW NORMAL AND HOW THEY CAN ETHICALLY PARTICIPATE IN WORLD WHERE THE DAY TO DAY OPERATIONS OF THE LEGAL PROFESSION ARE FUNDAMENTALLY CHANGING

Today's Panel

Hon. Henry Nowak Jr.

NYS Supreme Court Justice,

8th Judical District

Judical Perspective

Elena Cacavas

Principal & Founder

Cacavas ADR

ADR Perspective

Joe Trapp

Associate

Greco Trapp, PLLC

Panel Moderator

Overview


Nowak Court Approach
Cacavas ADR Method
Moderator Questions
Open Questions

Remote Proceedings

Judiciary Law § 2-b(3)

"A COURT OF RECORD HAS THE POWER TO DEVISE AND MAKE NEW PROCESS AND FORMS OF PROCEEDINGS, NECESSARY TO CARRY INTO EFFECT THE POWERS AND JURISDICTION POSSESSED BY IT."

See ADA Advisory Memo Regarding In Person Appearances

RESTATING THAT DECISION IS MATTER OF JUDICIAL DISCRETION

MEMORANDA HELP THE BAR UNDERSTAND THE BENCH'S ETHICAL POSTURE DURING UNCERTAIN TIMES

CPLR 104

"THE CIVIL PRACTICE LAW AND RULES SHALL BE LIBERALLY CONSTRUED TO SECURE THE JUST, SPEEDY AND INEXPENSIVE DETERMINATION OF EVERY CIVIL JUDICIAL PROCEEDING"

Rules for the Bar to Remember

Pandemic or No Pandemic the New York Rules of Professional Conduct Still Stand

Competence (Rule 1.1)

- lawyers should provide competent representation, which includes determining the efficacy of appropriate technologies used in the practice of law

Due Diligence (Rule 1.3)

- lawyers should conduct appropriate due diligence and understand the risk to competence and confidentiality when using such technologies . .

Security (Rule 1.6)

- lawyers should ensure that such technologies have the appropriate and reasonable security functions and features to maintain client confidentiality

Manager Liability (Rule 5.1 & 5.3)

- lawyers who are partners, managers and supervising attorneys should make sure that subordinates (both lawyers and nonlawyers) are aware of these risks and that technologies used in the client representation comply with ethical rules

A Few Cases to Note

Bonilla v. State of NY

- The "link [to the court proceeding] was compromised every time [Mr. Bonilla's daughter] received a phone call"
- Defendant claimed to be prejudiced because technology minimized his face on screen during document sharing making the gauging of his reactions difficult. defendant's credibility was vital to case
- Court found that case must proceed virtually

People v. Cintron

- Taking of televised testimony from a child witness from a separate room permissible
- Though virtual has disadvantages, they are not prejudicial so long as they "enable the Judge, the jury and the defendant . . . to see and hear the witness and evaluate the witness's demeanor, facial expressions, voice, and mode of speaking while testimony is being given"

C.C. v. A.R.

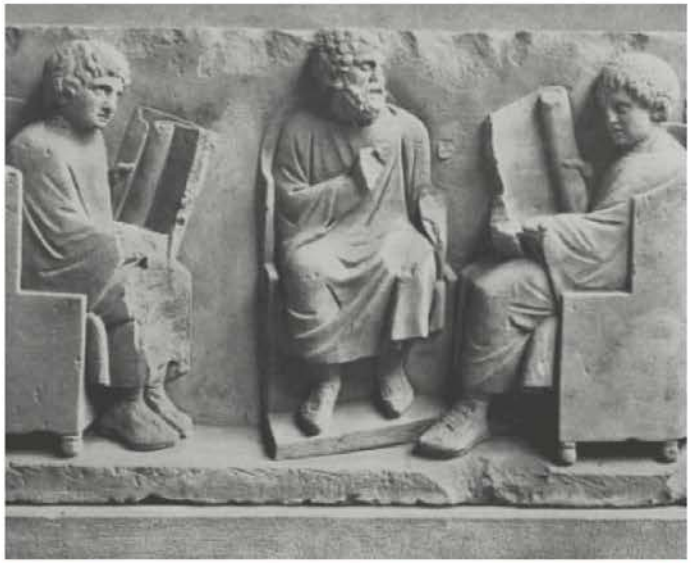
- "[T]he global pandemic is an 'exceptional circumstance' allowing this court to proceed on all aspects of this proceeding . . . by virtual means."
- The position that "this court must indefinitely postpone any continuation of the ongoing trial" is "unreasonable"

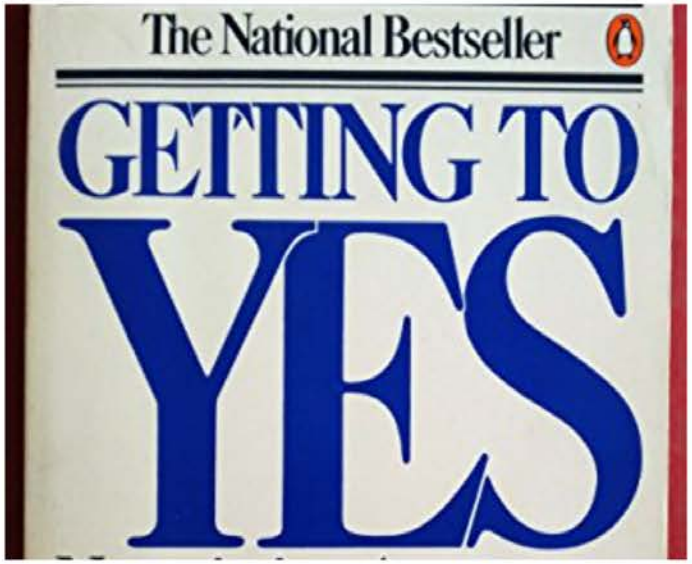
Strategies

Wide Incorporation of ADR in NYS Courts

Interim Report and Recommendations of the Statewide ADR Advisory Committee

ADR is Not New





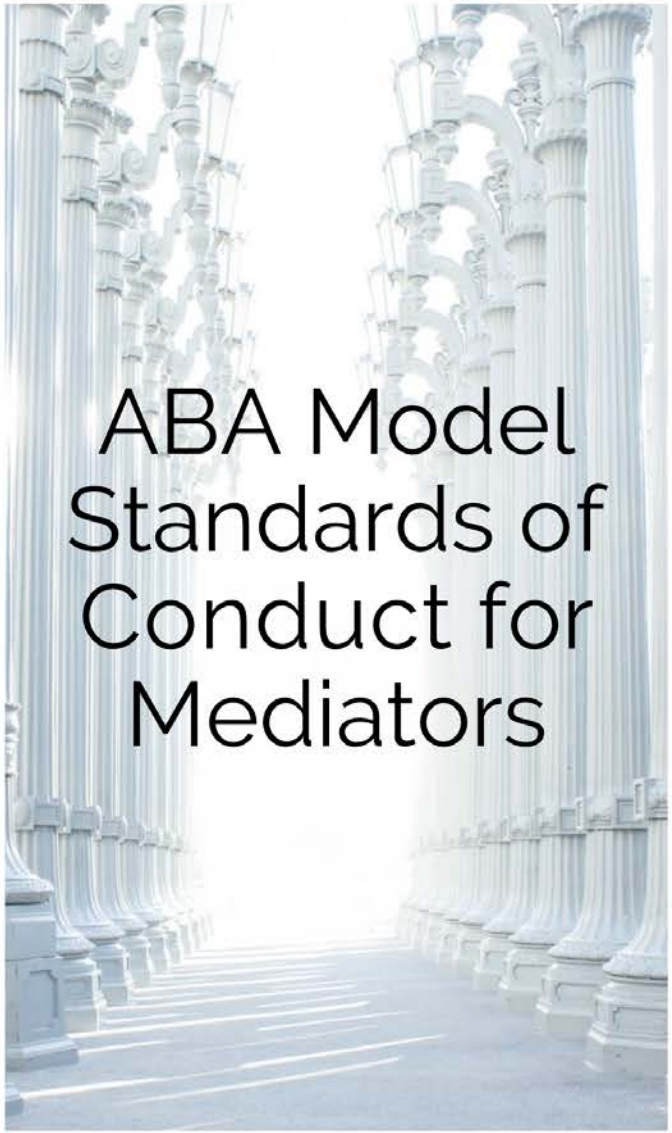
The COVID Stretch

Court shutdowns have extended an already full docket

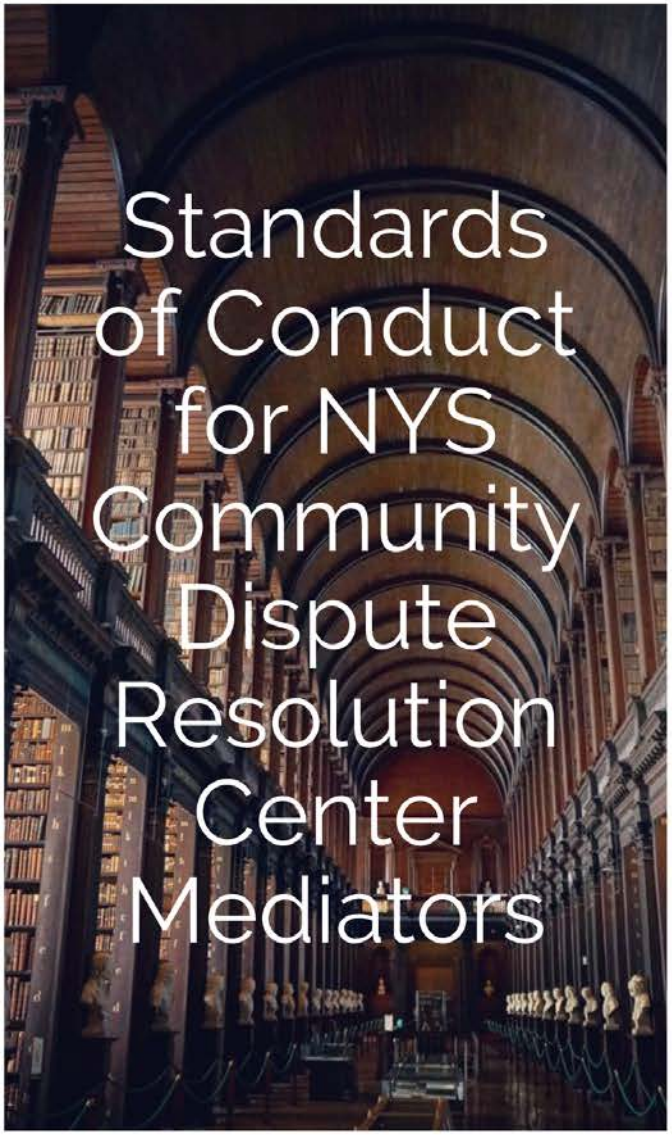
Cases on Docket

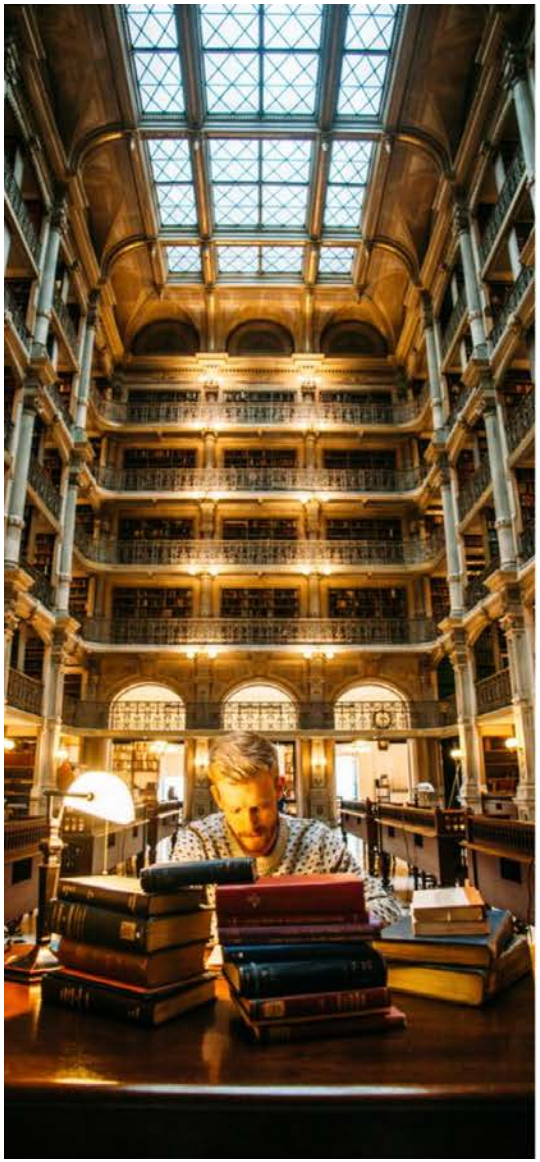
Years to Resolution

Settlement via Mediation


ABA Model
Standards of
Conduct for
Mediators


Mediator
Ethics
Advisory
Committee


Standards
of Conduct
for NYS
Community
Dispute
Resolution
Center
Mediators



Mediation Ethics: MEAC Opinons

Opinion 2015-01

- Parties requested to videotape mediation
- MEAC opined against permitting video recording

Opinion 2006-02

- Statutory rape revealed during mediation
- MEAC opined reportable under Standard V, Comment 3 regarding child abuse exception

Opinion 2008-02

- Disputed topic covered by another regulation with affirmative requirement
- MEAC opined no obligation to say something to either party

Opinion 2013-01

- Party using mediation to further discovery rather than conflict resolution
- MEAC opined that mediator *should* intervene if one side is abusing the process
- Used ABA Model Standard of Conduct for Mediators as this was a non-CDRC mediation

Opinion 2010-01

- Party discovered recording mediation
- MEAC opined that mediator must terminate mediation and advise parties as to same
- Reason for termination may be disclosed
- Mediator should report incident to CDRC staff

Arbitration

ADR's middle path between the court room and mediation

Code of Ethics for Arbitrators in Commercial Disputes

Code of Professional Responsibility for Arbitrators in Labor-Management Disputes

New York Arbitration Convention

National Arbitration Groups

- American Arbitration Association
- Conflict Prevention & Resolution
- Judicial Arbitration & Mediation Services

Topics for Moderator's Ethics Questions

Speaker Bios

Elena Cacavas, Esq.
Founder and Principal, Cacavas ADR, LLC
Retired Administrative Law Judge, New York State Public Employment Relations Board

Elena Cacavas, Esq. is the founder and principal of the firm, Cacavas ADR, LLC, specializing in arbitration, mediation, and workplace investigations of employee and officer misconduct, as well as claims of harassment and discrimination. Prior to founding her firm in 2018, she served for 25 years as an Administrative Law Judge for the New York State Public Employment Relations Board (PERB), having jurisdiction over public sector labor matters governed by the Taylor Law. During her tenure with PERB, she also served as the state delegate to the Waterfront Commission of New York Harbor. Before her appointment to PERB by the late Governor Cuomo, she was a member of the labor group of Hodgson Russ et al., specializing in a wide array of public and private sector labor and employment matters, as well as education law. Prior to her admission to the New York State Bar in 1986, she was an investigative reporter and journalist.

Ms. Cacavas is a 1985 *cum laude* graduate of the University at Buffalo School of Law, where she served as Senior Editor of the Buffalo Law Review. She received her undergraduate degree, summa cum laude and Phi Beta Kappa, from the University at Buffalo.

Ms. Cacavas now serves a broad variety of public and private sector clients on a local, state and national level. She is on numerous panels, including the AAA Labor Panel, the AAA Investigations Panel, FINRA and PERB's Mediation, Factfinding and Interest Arbitration Panels. She is a past Secretary of the Labor & Employment Section of the NYS Bar Association and currently serves on the Executive Committee of the Long Island Labor Employment Relations Association (LERA). In her 35 years of practice, Ms. Cacavas has authored numerous papers in her field, and spoken extensively on a broad range of topics relating to labor, employment and school law. She is a Contributing Editor to the treatise, Public Sector Labor and Employment Law, and a published book author. She has presided over thousands of cases and issued hundreds of decisions, including matters of first impression.

Cacavas ADR, LLC is based on Long Island, but serves clients throughout the state and nationally.

Hon. Henry J. Nowak Jr. '93
Justice, NYS Supreme Court, 8th Judicial District

Justice Nowak was elected to the New York State Supreme Court in November 2010. He initially served two years as the Expedited Matrimonial Judge, and spent the next several years handling a wide variety of civil cases. From 2016 through the end of 2019, he was assigned to the Commercial Part. Since then, he has continued to hear commercial, matrimonial and other general civil cases through the present time.

Justice Nowak also served as a Buffalo City Court Judge from 2003 through 2010. Before being elected to the bench, he worked as a trial attorney in Buffalo at Lipsitz Green Scime Cambria, LLP and Connors & Vilardo, LLP.

Justice Nowak graduated *magna cum laude* and as a University Honors Scholar from the State University of New York at Buffalo in 1990, with a degree in Biology. He continued at the University at Buffalo School of Law, where he served as the Publications Editor of the *Buffalo Law Review*, graduating in 1993. He is a regular instructor on a variety of issues at the New York State Judicial Institute and currently serves on the board of the UB Law Alumni Association.

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Secretary:	**Sara Mazgaj**	(716) 845-9477	smazgaj@nycourts.gov
Court Clerk:	**Elaine Xenos**	(716) 845-2759	exenos@nycourts.gov

MOTIONS

Motions are returnable every Thursday at either 9:30 am or 2:00 pm, with virtual appearances through Microsoft Teams. Before oral argument, counsel and self-represented litigants should (1) review the information at www.nycourts.gov/appear, and (2) make arrangements to use a computer, smartphone or other device with sufficient internet access and an adequate camera, microphone and speaker to fully participate.

` Motions brought by order to show cause shall include the following:

"Oral argument shall be held via Microsoft Teams on _____ , 2021 at _____. Please contact Court Secretary Sara Mazgaj at smazgaj@nycourts.gov or (716) 845-9477 to obtain a link to appear for oral argument. For information on joining a Microsoft Teams meeting, visit: www.nycourts.gov/appear."

At oral argument, the court will permit multiple attorneys to argue different points for each party. Such practice is encouraged when multiple attorneys researched and briefed various issues.

All oral decisions by the court are recorded. Oral argument is recorded as a matter of course only if there is an appearance by one or more self-represented litigants. In cases where all parties appear by counsel, oral argument will be recorded only upon prior stipulation by counsel that the transcript of the argument will be requested and included in any record on appeal.

MOTION PAPERS

By administrative order, hard copies of motion papers are not to be provided to the court at this time. In the event that order is lifted, parties shall provide chambers with hard copies of notices of motion, affidavits, and memoranda of law. Hard copies of e-filed exhibits shall not be submitted absent a specific request by the court. Do not send any motion papers by fax. Binding of papers is discouraged.

ADJOURNMENTS Requests for adjournments must be made at least one business day before the scheduled appearance. Motions must be adjourned to a specific date and will not be generally adjourned. All requests for adjournments must be approved by the court, and only after consent is sought from opposing counsel. Any party or attorney refusing to consent to an adjournment must demonstrate a sound basis for that refusal. Upon receiving an adjournment, the requesting party must send e-mail confirmation of the adjournment and the rescheduled date to all parties and the court.

ORDERS Proposed orders are to be provided to all attorneys and self-represented litigants at least five days before being e-filed or submitted to the court for signature. The court will entertain requests to shorten the five day requirement if circumstances warrant. Any objection to a proposed order shall be settled pursuant to Uniform Rules for the New York State Trial Courts § 202.48.

DEADLINES BEFORE TRIAL Expert disclosure shall be made thirty days before trial, absent good cause shown. One week before jury selection, marked pleadings, requests to charge, witness lists and proposed verdict sheets shall be submitted to chambers. Motions *in limine* shall be filed and served so as to be heard before commencement of jury selection.

COMMERCIAL ACTIONS

Applicability of Rules of Practice for the Commercial Division

Except as otherwise stated herein, all commercial actions are subject to the rules of practice set forth in Uniform Rules for the New York State Trial Courts § 202.70 (g), including Rule 13 (c) concerning expert disclosure.

Requests for Temporary Restraining Orders

All requests for TRO's must be made on notice to opposing counsel if known. TRO's for other Justices will be signed only with approval of that Justice or Justice's Law Clerk.

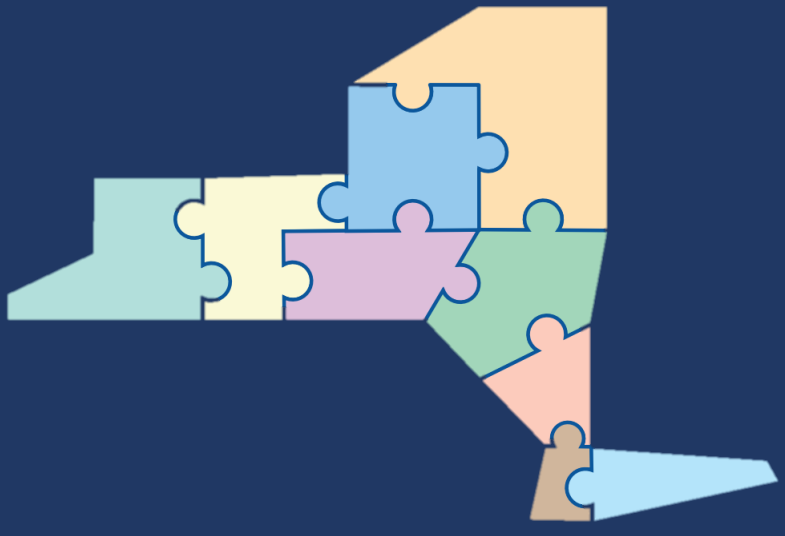
Preliminary Conferences

A preliminary conference will be scheduled upon receipt of a filed RJI and verification by the court that the case meets the jurisdictional requirements for the Commercial Division. At least one day before the conference, counsel shall provide chambers with a one paragraph summary of the case, preferably by e-mail to Sara Mazgaj at smazgaj@nycourts.gov. At the conference, counsel and self-represented litigants should be prepared to discuss appropriate deadlines and their availability for future appearances, as well as any objection to mediation or other methods of alternative dispute resolution.

ADDITIONAL RULES Please be advised that the court utilizes specific written procedures for summary jury trials and motions to withdraw as counsel. Request such procedures when appropriate.

Interim Report and Recommendations of the Statewide ADR Advisory Committee

February 2019



Chief Judge's ADR Advisory Committee's Summary Interim Recommendations

1. **Significantly expand statewide infrastructures for developing and supporting court-sponsored ADR (and particularly court-sponsored mediation)**

   a. Expand the effectiveness and reach of the statewide Office of the ADR Coordinator by directing the District Administrative Judges for each Judicial District to appoint a dedicated local ADR Coordinator, and by funding positions, if necessary, for dedicated court staff to administer local ADR programs. Authorize each District Administrative Judge to appoint additional local Coordinators as necessary in individual counties and courts.

   b. Form a Statewide Judicial Leadership Team for ADR overseen by the Chief Administrative Judge to foster coordination of efforts, exchanges of information and experiences and expansion of court-sponsored ADR programs.

   c. Ask the District Administrative Judge and the ADR Coordinator(s) for each Judicial District – in consultation with the Statewide Judicial Leadership Team and the Office of the ADR Coordinator – to develop and present a plan for implementing expanded court-sponsored mediation programs (including study of existing programs, broadening of successful ones, development of new programs and tracking of program performance) in that Judicial District.

   d. Expand staffing of the Office of the ADR Coordinator to a degree that enables it to play needed coordinating, support, training, and communication roles, recognizing that as programs expand, there will be a greater need for increased training and education about court-sponsored mediation for judges, judicial administrators, court staff, advocates, parties, mediators, and the general public.

2. **Promulgate statewide uniform court rules**

   a. Issue statewide Uniform OCA Rules that authorize, endorse and provide a framework for courts to introduce and expand court-sponsored mediation programs – particularly including mediation early in disputes accomplished through automatic presumptive referrals (subject to appropriate opt-out limitations) of identified types of disputes.

   b. Generate templates of local rules that illustrate permitted options for particular mediation programs consistent with the framework presented by

the Uniform Rules, and compile and make readily available a library of already adopted local rules, protocols, guidelines and best practices for existing programs to serve as resources for local programs implementing new programs.

3. **Increase court connections with and expand funding for Community Dispute Resolution Centers (CDRCs), as a significant component of scaling up existing court-connected programs**

   a. Make use of this already existing court-sponsored, statewide, high quality network of mediation providers and educators, which has infrastructure in place and is well situated to scale up quickly and effectively, take on increased referrals and train new mediators.

4. **Take steps to support, encourage, and educate about court-sponsored mediation**

   a. Use the ADR Advisory Committee, the Office of the ADR Coordinator, the Statewide Judicial Leadership Team and the ADR Coordinators in individual judicial districts to educate and encourage participants in the dispute resolution process in the effective use of court-sponsored mediation.

   b. Promulgate rules that require attorneys to become familiar with mediation and other processes, to discuss with clients both mediation and other potential alternatives to conventional litigation and to discuss ADR options with opposing counsel in good faith.

   c. Improve existing websites, court notices and other communications about the availability of court-sponsored mediation or other alternatives to conventional litigation.

   d. Expand trainings and communications with court personnel about administering court-sponsored mediation programs and serving as mediators.

   e. Expand trainings and communications with, and recruitment of, private mediators, to promote establishment of quality court-sponsored panels of approved mediators who will provide at least some mediation services without charge.

   f. Amend CLE rules to provide pro bono credit for periods when attorneys serve on court-approved mediator panels or provide other court-sponsored ADR services without charge.

g. Engage with and reach out to the legal community and law students concerning early mediation and other forms of ADR.

5. **Develop mechanisms for effective monitoring and evaluation of individual programs**

a. Establish mechanisms to identify and understand particular successes or shortcomings in existing programs and to identify best candidates for replication or expansion.

b. Engage the Statewide Divisions of Technology/Court Research to work with the ADR Coordinator's Office to develop data collection and analysis tools that track, by Judicial District and by individual program, referrals to mediation, opt-outs and matters actually mediated, settlements in the mediation (or sooner thereafter than if there had been no mediation), other mediation-related outcomes (such as opportunities for accelerated adjudication or other ADR processes), and litigant satisfaction with the experience.

c. Develop mechanisms for evaluating, monitoring and ensuring the quality of mediation services being performed by court personnel and members of court-approved panels.

Interim Report and Recommendations of Chief Judge's ADR Advisory Committee

February 12, 2019

I. Introduction and Summary of Interim Recommendations

A. ADR and the Chief Judge's Excellence Initiative

The ADR Advisory Committee submits this interim report to offer initial recommendations in support of expanding and facilitating New York courts' use of court-sponsored alternative methods of dispute resolution, and particularly court-sponsored presumptive mediation. The Committee believes this proposed expansion will foster faster and less expensive resolutions of disputes, offer parties valuable alternative approaches to resolving their disputes, and advance the administration of justice.

Chief Judge Janet DiFiore formed the ADR Advisory Committee in early 2018 as an important component of her Excellence Initiative, encouraging it to work with the Office of the ADR Coordinator in boldly developing alternatives to conventional litigation that will promote greater efficiency and improve the dispute resolution process. The Committee strongly supports Chief Judge DiFiore's vision. That vision implicates not only thoughtful continued experimentation but also focused efforts to move ADR programs from the experimentation phase to a scaled-up statewide implementation phase.

Court-sponsored ADR should be a significant component of the judiciary's approach to resolving disputes. The cost of litigating to a final judgment often represents such a high percentage of the amount in controversy that the parties find litigating to a final judicial decision is unaffordable. In addition, settlements reached only after parties have litigated for extended periods beg the question whether effective earlier discussions could have yielded a less expensive resolution. Alternatives to conventional litigation undeniably help parties resolve their disputes more quickly and less expensively.

New York and other courts have long administered or sponsored efforts to promote more streamlined achievement of final decisions or negotiated settlements, including: (1) a wide variety of court conferencing processes led by judges or court personnel; (2) referrals of disputes to dedicated court staff neutrals; (3) organization of "settlement days" in which courts try to resolve large numbers of disputes involving the same defendant in a focused negotiation effort; (4) mediations; (5) arbitrations; (6) neutral evaluations; (7) summary mini-trials; and (8) accelerated fast-track litigations. The ADR Advisory Committee is considering all of these ADR mechanisms. This interim report, though, focuses on recommendations regarding court-sponsored mediation – the use of a neutral facilitator to foster negotiation, usually involving the parties as well as their counsel, with a view to settling the dispute, significantly narrowing the issues to be adjudicated, or at least helping the parties to understand each other's positions and interests and to consider ways of narrowing or resolving their dispute apart from conventional litigation.

B. Court-Sponsored Mediation

New York's judicial leaders have long supported mediation as a valuable dispute resolution mechanism. Following 1981 initiatives led by Chief Judge Cooke, Community Dispute Resolution Centers throughout the state have been mediating thousands of court-referred disputes to resolution annually for almost 40 years and provide a ready and established venue and infrastructure for mediating additional disputes. A Task Force on ADR established by Chief Judge Kaye strongly endorsed increased court-sponsored mediation in 1996, which led to the formation of the Statewide

Office of the ADR Coordinator and the introduction of numerous new ADR programs. Chief Judge Lippman also broadly supported experimentation with multiple forms of court-sponsored mediation and other alternatives to conventional litigation. Notwithstanding these laudable efforts, mediation remains underutilized. Chief Judge DiFiore has expressed strong support for significant expansion of ADR to embrace a much larger percentage of cases, in particular through expansion of early and presumptive mediation models.

Experience in New York and elsewhere indicates that well-managed court-sponsored mediation programs achieve high settlement rates, and can particularly advance efficient dispute resolution when the mediation takes place very shortly after the litigation has commenced. High quality mediation can dramatically reduce the time and cost of dispute resolution to both the parties and the judicial system compared to conventional litigation. Mediation also enhances parties' sense of personal agency and self-determination in pursuing a resolution, improves parties' communications with each other and understanding of each other's positions, permits consideration of important personal dynamics apart from the dispute's legal merits, provides opportunities for understanding alternative outcomes, encourages effective approaches to litigating efficiently or achieving workable and mutually acceptable resolutions, and fosters parties' sense that they have achieved procedural justice.

Courts tend to achieve these results most broadly and effectively when they implement programs for automatic presumptive referral to mediation, preferably as early as possible in a dispute, of all or nearly all cases of particular types. Although referrals to

mediation often involve overcoming cultural and institutional resistance, the high settlement rates and participant satisfaction achieved from court referrals to early, presumptive mediation in this way suggest significant and growing public desire and appreciation for this streamlined dispute resolution.

The ADR Advisory Committee has been supporting and monitoring development of court-sponsored mediation programs in a variety of contexts, including disputes in family and matrimonial courts, surrogates courts, commercial and civil courts, and specialty courts that adjudicate matters involving essentials of life. This Interim Report presents a brief summary of Committee views and proposals developed to date, identifying some areas of near-consensus regarding court-sponsored mediation and some proposed courses of action going forward. Further recommendations will be incorporated into a final report at a later date.

These preliminary proposals advocate significantly increased use of high quality court-sponsored mediation programs in the New York State judicial system. These proposals are intended to help foster courts' development of mediation programs that give courts and parties opportunities to gain experience with this form of ADR, and that carry the potential to be scaled more broadly when they demonstrate capacity to promote substantial early settlement rates and high levels of participant satisfaction.

C. Summary of Proposals

We recommend the following steps by the Office of Court Administration and the court system generally:

1. Significantly expand statewide infrastructures for developing and supporting court-sponsored ADR, including by (a) directing District Administrative Judges in each Judicial District to designate a dedicated ADR Coordinator, or, in some districts, multiple local ADR Coordinators, to work with the Office of the Statewide ADR Coordinator (which may in certain circumstances involve establishing and funding new positions), (b) forming a Statewide Judicial Leadership Team for ADR, (c) asking the local Judicial District ADR Coordinators – in consultation with their counterparts in other Judicial Districts, the Judicial Leadership Team and the Office of the ADR Coordinator – to develop and present a plan for implementing expanded high-quality mediation programs in their Judicial Districts, and (d) increasing court connections to and financial support for CDRCs.

2. Promulgate statewide Uniform Court Rules that expressly endorse and provide a framework for courts to introduce court-sponsored mediation – particularly early in disputes, through automatic presumptive referrals of identified types of disputes that generally seem like promising candidates – and generate templates of local rules that illustrate permitted options for particular mediation programs consistent with the statewide framework.

3. Take steps to educate, support, and encourage participants in the dispute resolution process – judges, court administrators and staff, advocates, parties, and neutrals – in the constructive use of mediation, and provide for

sufficient staffing in the Office of the ADR Coordinator to facilitate significant communications and education about mediation.

4. Develop mechanisms (using the OCA's Divisions of Technology and Court Research) for effective monitoring and evaluation of individual programs, to identify and understand particular successes or shortcomings, and to identify best candidates for replication or expansion.

II. The Current State of Court-Sponsored Mediation in New York

Early court-sponsored mediation has become a routine and widely appreciated feature of judicial approaches to dispute resolution in the federal and state court systems. It is being successfully used to resolve many kinds of disputes, including high volume, low value cases; high value cases; cases in which the parties have continuing relationships; and complex cases in which the parties expect to have no future dealings. New York courts have been experimenting with court-sponsored mediation for decades, and the scope and scale of the progress has recently been expanding significantly. The rate of roll-out of new programs has increased so substantially in New York as to provide a basis for envisioning future large-scale early mediation in a significant percentage of disputes. Despite this promising expansion of programs, though, mediation continues to be underused.

Currently, most mediation referral relies on parties to mediate voluntarily or individual judges to exercise their discretion to refer parties to mediation in individual cases. By explicitly changing the default to a more automatic or presumptive form of referral to mediation, and by designating and supporting dedicated court staff to be

responsible for the development and implementation of local mediation programs in consultation with the Statewide ADR Office, courts and court administrators could refer significantly more cases to mediation, increasing efficiency and procedural justice in line with the Excellence Initiative.

New York's largest-scale mediation program by far is its statewide network of CDRCs, which are operating and conducting mediations that result in the resolution of disputes in all 62 New York counties. CDRCs handled 31,000 disputes in 2017 (about half referred to them by courts), and achieved a 74% settlement rate in an average of 25 days from first contact to case closure, using 1,100 staff and volunteer mediators, on a budget of $5.9 million from the State and an approximately equal amount from other sources (an extremely low all-in cost of about $188 in state funds per case handled, and about $286 in state funds per case serviced by an ADR process).

Another notable large-scale ADR program operates in the New York City Small Claims Court, where parties, upon attending court, are asked to choose between same-day binding arbitration before volunteer arbitrators, same-day mediation by volunteer mediators or adjudication by a judge at some future date. Parties frequently choose one of the first two options, resulting in about 12,000 arbitrations to a final decision and thousands of successful mediations out of a total of 28,000 resolutions in 2017.

Other smaller but impressive programs are in effect throughout the State. For example:

- About 1,100 disputes are arbitrated or mediated each year in the Attorney-Client Fee Dispute Resolution Program.

- In the 8th Judicial District, the Martin P. Violante ADR Program has referred a broad range of disputes to early mediation by trained court staff, while also developing a panel of court-approved volunteer mediators who are available to permit expansion of the mediation program going forward.

- Nassau County mediated over 750 commercial, civil and matrimonial disputes through in-house and volunteer private mediators in 2017.

- Appellate Division courts for three of the four Judicial Departments mediate hundreds of cases annually at the appellate level using staff mediators and volunteers.

- Administrative judges in New York City have organized collections of mass settlement days with insurance carriers, achieving high settlement rates. They also conduct extensive in-court settlement conferences and refer parties to trained, experienced, and trusted court staff neutrals, who achieve impressive success rates.

- New York City Family Court's custody and visitation mediation program increased the number of cases mediated by 25%, and has focused on early on-site referrals to mediation. In the 7th JD, a Family Court mediation initiative has also significantly reduced court appearances for parties with parenting disputes, by referring them at the earliest opportunity to free community mediation services. These mediations typically yield 92% participant satisfaction rates and 74% resolution rates. The Family Court in the 6th JD implemented this model recently with great enthusiasm and efficiency.

- The Mediation Non-Jury (Med-NJ) Program in New York Country Supreme court, which makes use of an experienced court attorney and law school externs, has been expanded to mediate both pre-note and post-note cases, ending 2018 with a 70% success rate.

Other programs are in the early but promising stages of development:

- After unimpressive results in a 2014-15 experiment with mandatory early mediation of every fifth matter, randomly selected, in the New York County Commercial Division (where the jurisdictional minimum amount in controversy is $500,000), a more recent and ongoing New York County experiment with early automatic mediation of the same types of commercial cases involving amounts in controversy below the Commercial Division's $500,000 threshold reported a 2017 settlement rate of about 60% – results that appear to justify continuing this program and

replicating it in Commercial Division courts that have significantly lower jurisdictional thresholds. This early referral to mediation model may benefit litigants and courts in other case types and for lower dollar cases types throughout the State.

- In Surrogates Court, where disputes often feature human dynamics not tied to the legal issues, a Manhattan program that offers mediation through CDRC staff and volunteers and through a bar-led group of private mediators has had success, and Westchester recently started a new early mediation program using an all-volunteer combination of experienced mediators and experienced trust and estates lawyers.

- Courts in Brooklyn and Suffolk have begun implementation of programs for early presumptive mediation of matrimonial disputes, and a pilot will begin in Rochester later this year.

The proliferation of new programs suggests a significant growth dynamic. But most of the new and even the fairly established programs remain small in relative terms. Automatic presumptive referral to mediation (with appropriate opt-out arrangements) of substantial categories of disputes, and establishment of pools of available trained court personnel or private panels of trained mediators, will ultimately be essential to achieving large-scale high-quality mediation presence in the state's judicial system.

Outside of New York, numerous states are similarly expanding their ADR programs. These expansions appear to be based on consistent experience of high settlement rates, including particularly for mediations early in disputes, that save significant party and court resources and apparently satisfy important public appetites for faster and less expensive resolutions (and for dispute resolution processes having different dynamics from conventional litigation). Some court systems require referral of all disputes of certain enumerated types to up-front mediations. Some provide for mediations by court staff, while others develop panels or rosters of approved mediators

for parties to select or courts to assign in individual cases. Some provide for the first few hours of mediation without charge, and require virtually all parties to participate in these expense-free sessions (while permitting the parties to choose whether to keep mediating and compensate the mediator once the uncharged component is finished). These other court systems provide a wide variety of options for New York courts to consider and to determine what works best in each venue.

Nearly all jurisdictions administering court-sponsored mediation programs report general enthusiasm for the benefits of mediation processes, while recognizing that mediation does not always result in rapid settlements and acknowledging the challenges of achieving sufficient scale to affect court dockets and dispute resolution processes generally (although Florida and New Jersey, and parts of Texas, appear to have achieved that degree of scale).

III. Recommendations

A. Expansion of the Statewide Infrastructure for Developing and Implementing the Roll-Out of Increased Court-Sponsored Mediation

The Office of the Statewide ADR Coordinator is extraordinarily engaged in efforts to develop, expand and improve court-sponsored mediation and other forms of ADR around New York. Many programs are in advanced stages of development or in operation. As local courts look to develop ADR programs, the statewide office needs well-informed and engaged local coordinators to help implement and optimize the quality of specific programs. Further, local courts need at least one point-person in their

courthouses charged with developing new and expanded programs and coordinating with and learning from a statewide network of ADR facilitators.

The ADR Advisory Committee recommends a significant expansion in statewide organizational infrastructure for the development of increased court-sponsored mediation. That expansion should start with the designation of a local ADR Coordinator by District Administrative Judges (DAJs) in each of the Judicial Districts. The DAJs and ADR Coordinator should be charged with inventorying and understanding ADR programs already in place, developing a plan for the roll-out and administration of new and expanded court-sponsored mediation programs within their Judicial District, working with local courts to facilitate implementation of that plan, and overseeing and participating in convenings of judges and administrators to share experiences and learn from each other's efforts. The DAJs should also be authorized and encouraged to appoint local court coordinators to oversee programs in individual counties (or smaller judicial units), and in individual courts.

To the extent ADR Coordinators are appointed for multiple courts in particular substantive disciplines – family, matrimonial, surrogates, commercial, small claims, civil or others – the Statewide Office should coordinate those specialized groups for interaction and sharing of best practices and ideas for rollouts and expansions of mediation programs in the particular contexts of their dockets, the nature of their disputes, and their individual administrative challenges.

The Chief Administrative Judge should also form a Statewide Judicial Leadership Team for ADR to provide organization in development, expansion and evaluation of

court-sponsored mediation, in coordination with the DAJs and ADR Coordinators in each Judicial District and the Statewide Office of the ADR Coordinator. A Judicial Leadership Team could be particularly effective at fostering communication, emphasizing judicial support for expansion of ADR, setting priorities, identifying programs that seem like particularly appropriate candidates for expansion or replication, considering the budgetary implications of various forms of efforts to increase the scale of court-sponsored mediation, and coordinating the roll-out of expanded mediation programs around the State. If this group is formed, it should meet periodically with the Chief Administrative Judge to discuss new programs and evaluate progress.

Staffing at the Statewide Office of the ADR Coordinator – which is already highly stretched in engagement with courts around the state that are seeking to learn about, develop or enhance mediation programs – should be expanded as needed to permit coordination and oversight of local efforts and handling of the contemplated expansion. That expansion also should be sufficient to permit an allocation of substantial resources to effective communication and education about mediation, recognizing that judges, advocates and the public generally have limited experience with mediation and will need further information and encouragement for mediation programs to flourish. In addition, resources should be allocated as needed to ensure full language access for program participants.

These recommendations are presented with recognition that they contemplate some reallocation of already tightly stretched judiciary resources toward the proposed expansion. Effective roll-out of broadly expanded mediation programs should ultimately

result in reduction of administrative burdens on courts, though, to a degree that the extra expenditures for developing these programs should ultimately pay for themselves. These resource allocations will also fulfill an important public need. Once such resources and infrastructure are in place, the Committee will work with the Statewide Office of the ADR Coordinator and the judiciary to study and coordinate an effective roll-out of new and expanded programs.

B. Statewide Uniform Court Rules and Local Templates

The ADR Advisory Committee recommends that the Office of Court Administration promulgate statewide Uniform Court Rules offering a formal endorsement of court-sponsored mediation and a framework to which individual local programs can refer. While individual districts and particular courts have adopted rules, protocols and best practices for local programs, the Committee believes that promulgation of Uniform Rules would advance important goals of confirming courts' authority to develop and operate mediation programs, and of providing a general roadmap to individual courts of how to initiate and manage court-sponsored mediation programs in their jurisdictions. New York's only current statewide rules regarding court-sponsored mediation are the provisions in Part 146 of the Rules of the Chief Administrative Judge identifying required training and experience for court-approved mediators, and Rules 3 and 10 of the Commercial Division (Section 202.70, Rules of the Commercial Division of the Supreme Court), authorizing judges to refer parties to an uncompensated mediator and requiring that counsel certify that they have discussed the availability of ADR options with their client.

The ADR Advisory Committee also believes that local courts would benefit from the availability of templates identifying options for potential approaches to court-sponsored mediations in their particular jurisdictions. These options, designed to fall within the framework of the statewide rules, would enable individual courts to experiment with different approaches to managing a court-sponsored mediation program. This identification of different options would reflect the current consensus that particularly at this developmental stage of thinking about effective mediation practices in New York, a "one size fits all" set of rules might not sufficiently permit courts to adapt and customize their programs to take account of relevant distinctive characteristics of their dockets, administrative staffs and legal communities. Existing sets of rules for programs already in place should be combined with these templates to generate a library of rules that courts can review in considering how to organize their own programs.

Promulgation of statewide rules and templates for local application of those rules would also help communicate to courts throughout the State the conviction that conventional litigation (and the use of extensive court resources to resolve litigations) should generally be viewed and treated as a backstop for circumstances where disputing parties have first exhausted efforts to resolve their disputes through negotiation or mediation. This shift in sensibilities could significantly enhance the process of resolving disputes and the administration of justice generally in New York State.

The Committee is aiming to present a set of proposed statewide Uniform Rules to the Office of Court Administration in the first quarter of 2019, following review by the Committee and by the statewide Office of the ADR Coordinator.

1. Uniform Rules

The Uniform Rules that the ADR Advisory Committee will propose for the OCA's consideration will address the following points, among others:

i. Courts are empowered to order parties to any dispute to participate in a mediation of that dispute (as distinct from case conferencing or other activities that can also sometimes lead parties to settlement). Recognizing the ultimately voluntary nature of any effort to reach a settlement, courts may permit parties to avoid or halt mediation processes under prescribed circumstances. Courts may also identify categories of disputes that will not be subject to mediation except as requested by all parties or under other special circumstances. Courts are authorized to direct parties to comply with local court rules regarding mediation, to ensure that mediation sessions are attended by the parties (or, in the case of an institutional party, someone with authority to settle for that party) as well as by their counsel, and to follow such procedures with regard to pre-mediation statements and exchanges of documents or information as the court or the local rules may direct, recognizing that such procedures may not be necessary in all programs. Those local rules may provide that failures to abide by mediation obligations (including failures to attend, to prepare or to bring

representatives with settlement authority) may be treated as a violation of a court order.

ii. While courts can direct that any individual case be referred to mediation, courts can also direct, and are encouraged to experiment with directing, that all cases of certain categories be presumptively referred automatically to mediation. The categories of cases to be uniformly referred to mediation can include all cases featuring prescribed kinds of claims, arising under prescribed laws, or involving prescribed amounts in controversy. These categories can be selected based on courts' priority preferences, empirical records indicating that particular types of disputes are especially well-suited for mediation, or intuitions or experimental desires to gain knowledge about how well mediation works in previously untested types of disputes.

iii. Similarly, while courts are empowered to direct disputes to mediation at any time, courts are particularly encouraged to refer parties to mediation as early as practicable in disputes. Although many parties and advocates have assumed that mediation is most promising when disputes have ripened through motions and discovery, experimental programs have repeatedly yielded high settlement rates for disputes submitted to mediation early, and the goal of reducing avoidable litigation costs is often best served by

early mediation. Litigations tend to take on their own momentum, leading to delays in serious engagement over settlement. Early mediation can sometimes forestall that delay at significant savings to the parties and to judicial resources.

iv. The mediators for court-sponsored mediation programs can be (1) specially trained court personnel, (2) private mediators approved by the court for membership in a panel, or (3) professional mediators who are affiliated with CDRCs or other court-approved dispute resolution organizations. In addition, parties are always free to choose private mediators not members of a court-approved panel. Courts can experiment with using mediators of any or all of these types.

a. If the mediators are court personnel, they must undergo training as mediators consistent with the requirements of Part 146, specifically communicate to the parties that they are acting as mediators, and observe the customary mediator requirements of strictly maintaining the confidentiality of all communications made during the mediation, playing no role in any decision regarding the dispute and having no communication with the judge charged with adjudicating the dispute regarding the mediation (apart from reporting whether the dispute settled

or, depending on local rules, whether any party failed to abide by the court's mediation order).

b. If courts wish to refer disputes to a mediator who is a member of a court-approved panel, the courts may establish their own rules for selection of members of the panel, provided that all approved members must satisfy the requirements of Part 146. Courts may approve rosters of mediators who are volunteers or mediators who are compensated. If the mediators are compensated, they should nevertheless agree to provide some hours of preparation and mediation without charge, and/or should agree to handle some portion of their assigned mediations without charge, as prescribed by court rule. Amendment of current CLE rules to provide for pro bono credit to attorneys who serve on court-appointed mediator panels for periods when they provide mediation services without charge would provide appropriate extra incentives and rewards for this unpaid service.

c. Courts can also refer parties to mediation through the CDRC offices in their county or through other court-approved mediation organizations, subject to court rules or to CDRC rules and practices.

v. Parties can choose to mediate their disputes with a mutually agreed-upon private mediator at any time. Courts may also see value in providing parties they refer to mediation with an opportunity to respond to the referral by agreeing to use a private mediator of their mutual choosing, or by selecting their preferred mediator from a court-approved panel.

vi. Mediations should take place under guidelines for mediator conduct akin to the Model Standards of Conduct for Mediators approved by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution, the Standards for Conduct by Mediators promulgated by the New York County Commercial Division, or the Standards of Conduct for New York State Community Dispute Resolution Center Mediators. Mediators should also be governed by ethical rules established on a statewide basis and subject to an appropriate grievance procedure for parties wishing to present complaints about instances of assertedly improper mediator conduct.

vii. Assignment of a dispute to court-sponsored mediation should result in temporary suspension of courts' Standards and Goals time count – for example, for the shorter of 60 days or the time until the mediation is suspended or completed. This should prevent the undesirable result of courts avoiding potentially constructive

mediations for the purpose of maximizing adherence to Standards and Goals timetables. Courts may also stay discovery or other litigation processes for some period to permit mediation, and may condition continuation of any such stay on receiving reports on whether the mediation appears to be making progress.

viii. Entry into mediation should not operate as a deterrent to consideration of other forms of streamlined dispute resolution, including court conferences, neutral evaluation, arbitration, requests that the court conduct a summary jury trial of discrete pivotal issues, or requests for fast-tracked litigation. These and other forms of ADR can all readily be subjects for discussion in mediation.

ix. Courts can determine by local rule, or may leave to mediators, such matters for management of mediations as the nature and scale of pre-mediation written statements, if any, to be provided to mediators in advance by the parties, and the timing deadlines for selection of mediators and commencement of mediation sessions.

x. The mediation process should be governed by principles of confidentiality, with the aim of ensuring that the mediation is kept entirely separate from the adjudicative process and that parties not suffer prejudice for engaging in candid communications during the mediation. Exceptions may apply to this principle of complete

confidentiality for the purpose of permitting disclosures mandated by law (such as allegations or evidence of child abuse as defined in the Family Court Act, § 1012(e) and (f) and Social Services Law § 412, that may be subject to mandatory disclosure under Social Services Law § 413). Exceptions may also apply for the purposes of judicial administration (such as reports about refusals to abide by courts' mediation orders, if the applicable rules call for such reports, or for the limited purpose of compiling information about how mediation processes are working for presentation to administrative personnel). Confidentiality obligations may also be governed by provisions of the enabling statute for CDRCs, Judiciary Law § 849. A statewide rule defining the confidentiality parameters for court-sponsored mediation is desirable for the purpose of guiding individual courts in adhering to the principles of confidentiality while accommodating the exceptions.

xi. Court-appointed mediators should be protected by immunity and indemnification rules for actions in their capacity as mediators to the full extent permitted by law.

xii. Mediation programs should provide for interpreters as needed to ensure that language differences do not preclude a party from participating effectively in the mediation, and should provide for satisfaction of plain language targets in all public communications.

C. Local Templates and Libraries of Existing Local Rules

Mediation programs already in place in various New York courts apply a wide range of rules, protocols and practices that are broadly consistent with the framework that the proposed Uniform Rules are intended to provide, but with significant local variations customized to reflect such factors as the preferences of the judges overseeing the programs, the availability of court personnel able and willing to act as mediators or to help administer programs, the availability of knowledgeable and experienced private mediators to join court-approved panels, local court dynamics affecting voluntarism, budgets, and connections already forged between the court and local CDRC offices.

Judges who have expressed enthusiasm about the concept of mediation programs in their courts consistently ask how to go about establishing such programs. A template of possible local rules, identifying a range of permissible variations falling within the broad scope of the proposed Uniform Court Rules, should be helpful to courts in deciding how to structure their individual programs. A readily accessible library of the rules under which current mediation programs are being operated should also provide significant assistance to courts trying to introduce their own programs. Experience with different forms of local rules may lead over time to consensus views about which approaches work best, which ones have sufficiently general application to warrant their inclusion in Uniform Rules, and which ones best promote scalability to more universally applicable mediation programs.

Beyond access to templates and libraries of local rules, courts structuring and administering new mediation programs could benefit from access to existing or potential

protocols, guidelines for program development, compilations of best practices and related support materials. These could include protocols on exchanges in advance of mediation sessions of basic documents or information independently of conventional discovery (which exist, for example, for certain kinds of disputes subject to automatic presumptive mediation in the federal court for the Southern District of New York). Some of these protocols have already been collected within the statewide Office of the ADR Coordinator. They should be made broadly available as exemplars to courts that would benefit from piggy-backing on others' organizational thinking.

D. Supporting and Expanding CDRCs

CDRCs' infrastructure – including mediation facilities, trained and certified mediators (many of whom currently are not fully utilized), and established relationships with local communities and organizations and court personnel who refer matters to them – is already in place throughout New York, with capacity in many individual offices to handle more mediations than they are currently handling.

The budget for CDRCs was cut substantially in the painful budgetary belt-tightening period associated with the financial crisis. CDRCs are likely to be central contributors to any effort to achieve substantial expansion of court-sponsored mediation and other forms of ADR in New York. Their extraordinary record of proven efficiency in achieving early settlements and reducing burdens on courts, their existing infrastructure, and their established reputation for effective and informed responsiveness to their communities present compelling reasons for increasing funding and other support for

them and treating them as an important component of efforts to foster ADR throughout New York.

CDRCs' current structure and model would not readily absorb all new court referrals to mediation. For example, several CDRC offices are directed primarily to mediations that do not contemplate a need for the mediator to be a lawyer, but some disputes may require legal resolutions or otherwise call for mediation by lawyers with the training obligations spelled out in Part 146. But CDRCs can and should play an important role in the expansion of court-sponsored mediation throughout the state (as Part 146 also contemplates) and can serve as a model for how to expand many court-sponsored mediation programs in the future.

E. Support for Education and Encouragement of Participants About Mediation

Although many courts and participants in disputes have expressed enthusiasm for expanded experimentation with mediation, many judges, advocates and parties remain generally inexperienced with alternatives to conventional litigation and wary of these unfamiliar mechanisms for dispute resolution. Other states that have developed broad programs for court-sponsored mediation have reported that experience with early mediation consistently leads to increased enthusiasm for it among participants. But until mediation has become significantly more familiar and more widely embraced, education and encouragement will likely be important components of the development and expansion of court-sponsored mediation.

1. *Attorney communications with clients and adversaries.* The OCA should promulgate rules that require attorneys to educate clients about ADR options to conventional litigation, including early mediation. These rules could be akin to Rule 10 of the Commercial Division Rules, which requires counsel to certify at the initial conference and each subsequent conference that counsel has discussed with the client whether the client may be interested in mediation. The rules could also include development of a plain language statement about ADR alternatives that counsel would be required to provide to each client in a potential or actual dispute, either in the engagement letter or in a separate communication. The rules could further require opposing counsel to discuss ADR options in good faith with each other before the first conference in any dispute. Such rules would be expected to increase the frequency of parties' and their counsels' active engagement in thinking about how to resolve their disputes more efficiently and less expensively and about whether an early negotiated resolution is potentially achievable through mediation or otherwise.

2. *Judicial communications to the parties.* Courts should improve existing communications to counsel and parties about the availability of court-sponsored mediation or other alternatives to conventional litigation. These improvements could include active management of central and local court websites to explain, in plain language, types of available ADR, the potential benefits of mediation and other forms of ADR, available

mechanisms for pursuing mediation (including free and low-cost options, and including information about language access), the credentials and hourly cost of members of panels of available private neutrals, and how the mediation or other ADR process can be expected to work. Information about mediation options should also be available in the courthouse, for both unrepresented and represented litigants – including in petition rooms, Help Centers, help lines, clerks' offices, and on posters and brochures wherever information is made available to parties.

3. *Trainings and communications with court personnel.* Court clerks and other internal personnel regularly engage in a variety of efforts to help parties settle their disputes. Those efforts prominently include case conferences encouraging identification of common ground or efforts to achieve settlements. Some courts have designated court attorneys or other personnel to focus exclusively on mediation and other efforts to achieve settlements, and other courts have expressed interest in having personnel obtain training in mediation. Particularly because mediation carries characteristics of confidentiality, neutrality, engagement of clients as well as counsel, and other points of potentially significant differentiation from other forms of settlement efforts, court personnel who act as mediators should receive training in mediation techniques that is distinct from their prior work on settlement or case conferencing, as well as training in describing the mediation process to participants so that everyone

understands how it will work. Administrators also have shown a desire for training on how to establish and administer mediation programs in their courts. These forms of training have begun to take place. Increased training in these areas will be necessary in any courts that feature mediation by court personnel as part of their court-sponsored mediation programs.

4. *Trainings and communications with private mediators.* The success of mediation programs that draw on court-approved panels of private mediators who can be chosen by the parties or appointed by the court depends substantially on the quality and engagement of the mediators. Significant training programs for mediators already exist, but an effective panel-based program will require energetic and constructive communication with local and specialty legal communities about how to obtain admission onto the panel and why becoming a panel mediator (which should carry some component of voluntarism but also should provide some measure of increased professional stature for panel members) is a good step to take. Development and nurturing of effective and well-deployed panels of court-approved mediators will also require (i) thoughtful processes for the selection of members of the panel, (ii) communications with panelists that keep them engaged and enthusiastic about participating, (iii) communications with potential users about the mediators' qualifications and billing rates, (iv) engagement of

judges in understanding that the mediators to whom they are referring their matters can be trusted to make constructive contributions to dispute resolution, (v) establishment and monitoring of court appointments of mediators to ensure effective protocols for distribution of these appointments among volunteers, (vi) attention to pursuing diversity and inclusiveness in selection of the mediator panel and assignment of mediators, and (vii) communication to the Statewide ADR Coordinator's Office about results, in ways that can be used to improve processes and evaluate what works particularly well or less well.

5. *Communication with law students and with the legal community.* Many law schools have introduced thinking about methods of dispute resolution other than conventional litigation into their curriculum. Nevertheless, most law students graduate without substantial grounding in mediation and other forms of ADR. The courts, the Office of the Statewide Coordinator and the ADR Advisory Committee should play constructive roles in supporting the expansion of legal education about different ways of resolving disputes. Similarly, many members of the legal community generally remain inexperienced in and unaware of the benefits of early mediation and other forms of ADR directed to faster and less expensive resolution of disputes. Those same groups should devote resources to speaking at public events, writing and otherwise supporting openness to new efforts in this area.

F. Support for Monitoring and Evaluation of Programs

Information about the impressive settlement rates achieved through early automatic mediation programs has tended largely to be anecdotal, although the limited instances of compiling records of outcomes have tended strongly to reinforce the anecdotal impressions.[1] At this stage of thinking about significant expansion of court-sponsored mediation programs, given the limited quantity of reliable data about outcomes and the unfamiliar and unproved character of mediation in the public consciousness, it seems essential to devote some resources to collecting and organizing data about how (and how well) court-sponsored mediation programs work.

The Committee recommends that OCA's Statewide Divisions of Technology and Court Research be asked to work with the ADR Coordinator's Office to develop data collection and analysis tools that track, by Judicial District and by individual program, referrals to mediation, opt-outs and matters actually mediated, settlements in the

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[1] *See, e.g.*, Rebecca Price, U.S. District Ct.: S.D.N.Y., Mediation Program Annual Report, January 1, 2016 – December 31, 2016 6-7, 9 (Dec. 5, 2017), http://nysd.uscourts.gov/docs/mediation/Annual_Reports/2016/Annual%20Report.2016.Final%20Draft.pdf [https://perma.cc/24KV-578U]; Alternative Dispute Resolution Plan, U.S. District Ct.: W.D.N.Y. (May 11, 2018), www.nywd.uscourts.gov/sites/nywd/files/ADR%20Committee%20--%20Amended%20ADR%20Plan%20Effective%20Date%205-11-2018%20.pdf [https://perma.cc/T5VD-YEA4]; Alternative Dispute Resolution Report, July 1, 2015-June30, 2016, U.S. District Ct.: E.D.N.Y., https://img.nyed.uscourts.gov/files/local_rules/2015-2016mediationreport.pdf [https://perma.cc/N9Q3-7M7H]; Dispute Resolution Procedures, U.S. District Ct.: E.D.N.Y., https://img.nyed.uscourts.gov/files/forms/DisputeResolutionProcedures.pdf [https://perma.cc/QJ7X-5AJW] (last visited Sept. 8, 2018); *Mandatory Mediation Program Statistics*, U.S. District Ct.: N.D.N.Y., www.nynd.uscourts.gov/mandatory-mediation-program-statistics [https://perma.cc/384C-6267] (last visited Sept. 8, 2018); *see also* Hon. Robert M. Levy, *ADR in Federal Court: The View from Brooklyn*, 26 Just. Sys. J. 343 (2005) ("[R]eporting that of cases sent to non-binding arbitration in 2004, 74% settled before arbitration hearings and almost exactly half of the remainder that were arbitrated were resolved without the need for further court proceedings."); Gilbert J. Ginsburg, *The Case for a Mediation Program in the Federal Circuit*, 50 Am. U. L. Rev. 1379, 1383 (2001) (as of 2001, the Senior Staff Counsel for the Second Circuit estimated that 45-50% of the cases referred to the Second Circuit's CAMP mediation program–the first of its kind among federal courts of appeal–settled each year).

mediation (or sooner thereafter than if there had been no mediation), other mediation-related outcomes (such as opportunities for accelerated adjudication or other ADR processes), and participants' satisfaction with the experience. The Divisions of Technology and Court Research should also be consulted about ways technology can be used to facilitate effective early referrals to mediation, about whether it is feasible and desirable to integrate mediation processes into the Uniform Case Management System and other court databases, and about website and other communications relating to court-sponsored mediation programs.

IV. Conclusion

Some court systems are plainly aiming at the goal of treating mediation as a default up-front process to be presumptively pursued at the outset of nearly all disputes (apart from ones considered poor candidates for mediation for highly specific reasons). Those courts, the parties who appear before them, and advocates who practice in them widely regard early mediation as generally constructive and frequently capable of accomplishing an earlier and less expensive resolution that satisfies a significant public appetite – one often not fully appreciated by the parties before they are directed to mediation - while freeing up resources for adjudication of disputes that parties resolve to litigate to a decision.

The current environment presents an important opportunity to focus on scaling up mediation processes to a point that establishes mediation as the first step in nearly all disputes. Such scaling up would of course likely require a substantial expansion of resources and expenditure of money. But significant expansion along the lines proposed

in these interim recommendations, which should help indicate how much and in what ways court-sponsored mediation should be expanded further, should be achievable through relatively modest additional expenditures coupled with redirection of existing priorities and energies and calls upon high quality lawyers to become members of court-approved panels (and to provide at least some of their mediation services without charge). As the value of mediation becomes more widely recognized and mediation programs demonstrate their capacity to reduce burdens on court dockets, serious consideration of significantly increased funding for broadly applied automatic presumptive mediation programs will be increasingly warranted.

The ADR Advisory Committee February 12, 2019

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New York Official Reports

69 Misc.3d 983, 133 N.Y.S.3d 200, 2020 N.Y. Slip Op. 20245

**1 C.C., Plaintiff,
v
A.R., Defendant.

Supreme Court, Kings County
REDACTED
September 30, 2020

CITE TITLE AS: C.C. v A.R.

HEADNOTE

Courts
Supreme Court
Authority to Order Virtual Proceedings in Light of COVID-19 Pandemic Where Criminal Contempt at Issue

Pursuant to Judiciary Law § 2-b (3), a court of competent jurisdiction has the authority to order a trial or hearing to proceed virtually over the objections of a party, notwithstanding allegations of criminal contempt. Accordingly, Supreme Court ordered a proceeding to hold plaintiff husband in civil and criminal contempt after having been found to have violated certain automatic orders and engaged in spoliation of evidence to proceed virtually in light of the ongoing COVID-19 pandemic, even though plaintiff faced possible imprisonment if found guilty of criminal contempt. The court does not need the consent of parties to fashion innovative procedures where necessary to effectuate the powers and jurisdiction of the court. Plaintiff had not alleged that a virtual proceeding would not satisfy the elements of testimony under oath, the opportunity for contemporaneous cross-examination, the opportunity for the judge and parties to view the witness's demeanor and preservation of a record of the witness's testimony. The global pandemic was an exceptional circumstance allowing the court to proceed on all aspects of the proceeding, including the issue of criminal contempt, by virtual means. Moreover, plaintiff created the "necessary" element by declining to participate in an in-person proceeding.

RESEARCH REFERENCES

Am Jur 2d Contempt §§ 7, 168, 171; Am Jur 2d Courts § 47.

Carmody-Wait 2d Courts and Their Jurisdiction §§ 2:301–2:303; Carmody-Wait 2d Contempt Proceedings §§ 140:4, 140:28.

McKinney's, Judiciary Law § 2-b (3).

NY Jur 2d Contempt § 84; NY Jur 2d Courts and Judges § 116.

ANNOTATION REFERENCE

See ALR Index under Contempt.

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*984 APPEARANCES OF COUNSEL

Coffinas & Lusthaus PC, Brooklyn (*Maria Coffinas* of counsel), for plaintiff.
Cassin & Cassin LLP, New York City (*Daniel Nottes* of counsel), for defendant.

OPINION OF THE COURT

Jeffrey S. Sunshine, J.

Introduction

This court determines that pursuant to Judiciary Law § 2-b (3) a court of competent jurisdiction has the authority to order a trial or hearing to proceed virtually over the objections of a party even where one of the remedies sought is criminal contempt.

This is a proceeding continuing in the midst of an ongoing pandemic emergency inter alia **2 to hold plaintiff husband in civil and criminal contempt after having been found to have engaged in spoliation of evidence and violation of automatic orders related to the installation of and attempted deletion of iPhone spyware and to consider sanctions against defendant for alleged perjury for making a false affidavit to this court regarding her knowledge about that spyware.

On September 22, 2020, plaintiff husband moved by e-filed order to show cause (mot seq No. 33) requesting the following relief:

> "1) vacating the virtual hearing scheduled for September 30th from 10:00 a.m. to 1:00 p.m. and October 1, 2020, 2:00 p.m. to 4:30 p.m. on the basis that proceeding with a virtual hearing is severely prejudicial to Plaintiff; and 2) postponing an in-person hearing until the Unified Court System determines the most effective protocols and best practices to safeguard the health and safety of litigants and attorneys for in-person matrimonial trials at the Kings County Courthouse and specifically authorizes such trials to take place; and 3) Such other and further relief as may seem just and proper."

***985** The court heard oral argument on September 25, 2020. [1]

Procedural History

This court has written numerous detailed decisions related to the spyware issue and those written decisions, including the facts and procedural history detailed therein, must be read in conjunction with this decision.

This court expended vast judicial resources related to plaintiff's actions related to his use of spyware, his invocation of his US Constitution, Fifth Amendment privilege and his subsequent spoliation of evidence. The culminating effect of plaintiff's actions resulted in the court by written decision, inter alia, striking plaintiff's pleadings as to certain equitable distribution relief not related to the children. Those written decisions must be read in conjunction with this decision as they fully outline the procedural history details of this protracted litigation.

The court notes that throughout this litigation plaintiff asserted his Fifth Amendment right in regards to all questions related to his use of spyware; however, after this court struck his pleadings in the February 5, 2018 decision (58 Misc 3d 1221[A], 2018 NY Slip Op 50182[U] [2018]) and after the court issued the financial decision after trial (65 Misc 3d 1205[A], 2019 NY Slip Op 51509[U] [Sept. 17, 2019]), plaintiff subsequently conceded in a sworn affidavit dated November 18, 2019, that he had repeatedly installed and used various spyware applications to monitor and "listen in" on the wife in support of an application to reopen discovery based upon his allegation that defendant knew about his use of spyware during the marriage and that she made a false affidavit to this court regarding that knowledge. Plaintiff now asserts that the defendant all along knew he had installed the spyware equipment and that she herself has now committed perjury.

At this time, all issues between the parties except for the cross-applications seeking awards of counsel fees, defendant's application that the court hold plaintiff in both civil and criminal contempt and the issue of whether sanctions against defendant are warranted (*see* 66 Misc 3d 1211[A], 2020 NY Slip Op 50059[U] [Jan. 14, 2020]) are resolved.

***986** The hearing on these remaining limited issues commenced before this court on March 4, ****3** 2020: defendant was represented by counsel and plaintiff was appearing pro se. During this litigation, plaintiff has been represented by two attorneys. This is the third time plaintiff has retained his current counsel to represent him in this matter.

During the evidentiary hearing on March 4, 2020, numerous exhibits of evidence were admitted into evidence. At the conclusion of the proceeding that day a dispute arose as to the admissibility of portions of a notebook that plaintiff had included in his list of proposed evidence. Pending a determination as to the admissibility of the notebook in its entirety or just the pages selected by the plaintiff the court took custody of the notebook. The matter was adjourned to March 20, 2020. On March 16, 2020, in response to the COVID-19 crisis, the Unified Court System in-person court proceedings were temporarily limited to "essential" matters. On March 19, 2020, one day before the scheduled continuation of the evidentiary hearing, plaintiff once again re-retained his current counsel for the third time in this litigation.

On June 5, 2020, this court conducted a virtual status conference in this matter. During that conference, there was a discussion related to the logistics of proceeding. Based upon that discussion, the court informed counsel that any objections to appearing virtually must be made in a timely manner so as not to further delay the conclusion of this matter. The matter was adjourned, on consent, to continue the evidentiary hearing on September 30, 2020, and October 1, 2020, either in-person or virtually depending on the protocols in place for the courts inside the City of New York.

1. Plaintiff objects to proceeding in-person or virtually.

Plaintiff's counsel criticizes the court system over the initial actions taken in March 2020 regarding the pandemic emergency which resulted in the cessation of in court operations except for essential applications and affirms that she is "willing to appear for an in-person continuation of the hearing in this case *only after I am satisfied* that the best practices are in place at the courthouse to ensure my client's and my health and safety" (emphasis added) and that "[u]ntil that time, the continued hearing in this matter should be postponed." At the same time, she also affirms that she believes this court is prohibited from virtually continuing the ongoing evidentiary hearing.

***987** 2. Evidence Objection to Virtual Appearance

Plaintiff's counsel incorrectly asserts that the Kings County courthouse is and has been "closed" due to the pandemic and that she has been, in effect, prohibited from reviewing the evidence admitted on March 4, 2020, including the "notebook," prior to her being re-retained and, as such, it would be prejudicial to plaintiff to continue the evidentiary hearing. Plaintiff's counsel argues in her affirmation in support of the order to show cause that this notebook "contains a critical page of evidence" despite her repeated representations that she has not seen this notebook. She affirms that she is "willing to review that journal in the courthouse if I am granted permission to enter the courthouse in order to do so, however *only after being assured that my health will be safeguarded*" (emphasis added). It is unclear what assurances plaintiff's ****4** counsel seeks in addition to the Unified Court System's protocols which are already in place. These are the same protocols that have been in place for months throughout the pandemic emergency as this court has been performing its duties from the courthouse.

Plaintiff's counsel contends that even if she was able to examine the notebook in advance she would "have no way of entering it in evidence during a virtual hearing," if it was accepted into evidence by the court, because the notebook itself is physically in the courthouse.

3. Criminal Contempt Objection to Virtual Appearance

Plaintiff's counsel cites dicta from a decision issued by a court of concurrent jurisdiction in support of her proposition that this court is not permitted to conduct a virtual hearing on the issue of criminal contempt inasmuch as it could result in a party being imprisoned.

Defendant wife's counsel's affirmation, dated September 23, 2020, stated that he and his client "take no position on the relief sought in Plaintiff's motion, [A.R.] is desirous of bringing this case to resolution in the safest manner possible for the benefit of everyone involved."

The Law

Safety Measures for In-Person Proceedings/Review of Evidence

The court notes that court staff, including Justices of the Supreme Court, chambers staff, part clerks, court officers, clerical staff, maintenance personnel and other employees of the court system in Kings County Supreme Court, have been working in the courthouse, observing those established protocols, ***988** for months. There have been proceedings conducted in the courthouse on a limited basis and jurors have been summoned for petit jury trials to commence in the next few weeks. While keeping foot traffic at a minimum the court has provided methods for physical access to the courthouse to the public on a case-by-case basis.

These are unprecedented times: fortunately, global pandemics have not been commonly faced in New York. All aspects of social infrastructure and daily life face the challenging task of mindfully restarting in-person operations. There are administrative orders available on the court website which provide guidance and instructions regarding court operations and safety protocols. When there is an individual who tests positive in a courthouse a public notification is made on the website. The courts are open to serve the people of New York State through a hybrid of virtual and increasingly in-person proceedings, which were regionally adapted to take into account different regions of the state. These protocols and administrative orders were disseminated and posted to the New York State Unified Court System website.

The authority and autonomy of the Unified Court System to establish and implement the appropriate measures for in-person court proceedings was recently recognized by the Southern District of New York, Federal District Court in *Bronx Defenders v Office of Ct. Admin.* (— F Supp 3d —, 2020 WL 4340967, 2020 US Dist LEXIS 134029 [SD NY, July 28, 2020, 20-CV-5420 (ALC)]). In *Bronx Defenders*, plaintiff challenged the Unified Court System determination that in-person proceedings could resume and sought an injunction from the federal court to halt in-person appearances in New York City Criminal Court. That application was denied and the case was dismissed with a finding by the Southern District of ****5** New York, Federal District Court that the federal courts

> "cannot . . . dictate if, when, and how state criminal courts reopen or schedule in-person appearances. To do so would violate fundamental principles of comity and federalism, and would result in federal supervision of state procedures and proceedings in direct contradiction of *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)" (— F Supp 3d at —, 2020 WL 4340967, *1, 2020 US Dist LEXIS 134029, *4).

***989** Similarly, it is not within the purview of a litigant or counsel to assess whether the protocols established are adequate; however, neither is plaintiff nor his counsel, under the facts and circumstances presented, required to appear in-person for the conclusion of the trial. The court notes that plaintiff has every interest in seeking to delay the resolution of this matter inasmuch as he faces possible incarceration.

This court has previously made arrangements for others to conduct in-person review of documents in the courthouse that observe social distancing and all protocol guideline procedures adopted by the Unified Court System. The court notes that it is not within the purview of this court nor of plaintiff to deem the protocols established and adopted by the Unified Court System as "sufficient" or not: nor is there a need for plaintiff to reach that determination because there is no requirement for plaintiff to appear in-person. Virtual proceedings are available precisely to fit these situations. To hold otherwise: to deem that any individual could be arbitrarily left to determine for him or herself that he or she did not believe that courthouses were safe would, in effect, grant any litigant carte blanche to postpone—indefinitely—any proceeding in which he or she did not want to appear. Certainly, such an outcome will not stand. This case need not be an exception.

Examination of Evidence

Plaintiff and plaintiff's counsel, knowing about the notebook, chose not to even request an opportunity to review, in-person, the record and evidence of this evidentiary hearing. Only, on the eve of the continued hearing, did plaintiff formally raise the issue despite this date being selected nearly three months ago. Under the existing protocols in Kings County Supreme Court, arrangements could have been made for in-person review of a case file in a proper way.

Plaintiff's counsel's contention that the notebook's location in the courthouse bars her, logistically, from offering it into evidence is unfounded. If plaintiff's counsel seeks to admit it into evidence and if the court grants that application there is no logistical impediment to the notebook being marked into evidence inasmuch as the notebook is, as plaintiff's counsel points out, already in the courtroom. This court is, and has been, working in the courthouse for many months and therefore there is no logistical impediment to this court marking said item into ***990** evidence if such a ruling is made.[2] This Part is participating in the evidence pilot program, which ****6** was announced in Chief Judge Janet DiFiore's broadcast on September 28, 2020.

Criminal contempt is not a bar to a virtual hearing.

Plaintiff's counsel cites no binding authority on this court, nor is this court aware of any, that would prohibit this court from continuing with the evidentiary hearing on the issue of criminal contempt under the facts and circumstances presented.[3]

Pursuant to Judiciary Law § 2-b (3), the court has the power "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." This authority is vested in the courts by the New York State Constitution which permits courts latitude to adopt procedures not specified in the statutes where such procedures are consistent with general practice as provided by the law (NY Const, art VI, § 30; *see also* *People v Ricardo B.*, 73 NY2d 228, 232 [1989]).

The Court of Appeals upheld this authority in *People v Wrotten* where it ruled that the Court does not need the consent of parties to fashion "innovative procedures" where "necessary" to effectuate the powers and jurisdiction of the Court (14 NY3d 33, 37 [2009]). In *People v Wrotten*, defendant was indicted with first-degree assault and two counts of robbery in the first degree: the court permitted the complaining witness to testify ***991** by live two-way video technology.[4] Similar to plaintiff in the case before this court, the defendant in *People v Wrotten* faced the possibility of imprisonment yet the Court of Appeals still found that there was no prejudice to defendant not being able to confront the complainant in-person where complainant appeared by live two-way television feed. As such, in the case at bar, plaintiff's contention that this court is *prohibited* from virtually continuing the evidentiary hearing based upon his possible ****7** imprisonment if he is found guilty of criminal contempt is unavailing.

The court further notes that, while not dispositive of this issue, the technology available at this time exceeds the technology available when *People v Wrotten* was decided in 2009. [5] , [6] In fact, even prior to the *People v Wrotten* decision, the United States Supreme Court had determined that even *one-way* live, closed-circuit television testimony could satisfy the Confrontation Clause of the Federal Constitution under certain circumstances (*Maryland v Craig*, 497 US 836, 850 [1990]) and where the essential safeguards of testimonial reliability were present, specifically, where evidence presented against a criminal defendant was subject to rigorous testing in the context of an adversary proceeding before the trier of fact (*Maryland v Craig*, 497 US at 845; *see also* *People v Wrotten*, 14 NY3d at 39).

In the case at bar, plaintiff has not alleged that a virtual proceeding as available to him before this court would not satisfy the elements of testimony under oath, the opportunity for contemporaneous cross-examination, the opportunity for the judge and parties to view the witness's demeanor as he or she testifies and preservation of a record of the witness's ***992** testimony (*see generally Maryland v Craig*, 497 US at 851; *see also* *People v Wrotten*, 14 NY3d at 39). [7]

In *People v Wrotten*, the New York Court of Appeals noted that live televised testimony is an exceptional procedure to be used "in exceptional circumstances" as "necessary" (14 NY3d at 40). This court finds that this global pandemic is an "exceptional circumstance" allowing this court to proceed on all aspects of this proceeding, including the issue of criminal contempt, by virtual means. The court also finds that plaintiff himself has created the "necessary" element, as detailed in *People v Wrotten*, by declining the opportunity to participate in an in-person proceeding.

As detailed herein-above, there is no judicial prohibition on this court continuing the ongoing evidentiary hearing on the issues presented, including criminal contempt, by virtual means.

This court is aware that this is a challenging time with uncertainty for everyone and that it may be perceived by some that a virtual proceeding is not a perfect scenario; however, there are no perfect trials whether in-person or virtually. As the Court of Appeals has noted again and again, "in this imperfect world, the right of a defendant to a fair appeal, or for that matter a fair trial, does not necessarily guarantee him a perfect trial or a perfect appeal" (*People v Rivera*, 39 NY2d 519, 523 [1976]; *see also* *People v Harris*, 57 NY2d 335 [1982]; ****8** *People v Parris*, 4 NY3d 41 [2004]).

Defendant represents that she is prepared to appear in-person or virtually on September 30, 2020, but that she desires this matter to come to a conclusion. Plaintiff asserts that he objects to any means of concluding this proceeding. As much as plaintiff resists a final determination on these issues, defendant is also entitled to a conclusion of this matter. This court will not allow plaintiff to prolong this litigation.

Under the unique facts and circumstances presented, this court will not direct this plaintiff to participate in an in-person proceeding; however, this court has found no binding authority that would prohibit this court from proceeding with the virtual proceeding.

This court will not abide plaintiff's attempt to use a global pandemic as a sword and a shield to further delay the resolution of this proceeding.

***993** To provide for an in-person review of the notebook, counsel shall contact chambers so that arrangement can be made for counsel and plaintiff, if he so desires, to enter the courthouse at a time agreed upon between 10:00 a.m. and 12:00 p.m. on Thursday October 1, 2020. A courtroom on the second floor is available so that there is no need to use an elevator. The plaintiff may bring hand sanitizer or use the newly installed dispensers that are located in the building. Counsel and her client must wear proper face masks at all times when in the courthouse and they may wear gloves when handling the notebook. If defendant wishes to examine the notebook again she may also make arrangements with chambers staff. The court is also as an accommodation willing to make copies of the notebook for both sides when appropriate.

To accommodate this review, the trial will be delayed one day: it will recommence virtually on October 1, 2020, at 2:15 p.m. by the Teams platform. This one day postponement will also provide counsel additional time to review the current pilot protocols for offering and submitting evidence and the notebook.

While breakout rooms for Teams are not yet operational, the court will accommodate reasonable requests for opportunities for counsel to speak with clients privately via telephone or for

a side bar with the court without clients present. The Teams platform allows parties and counsel to see each other and the court simultaneously.

There is no doubt that all of our lives have been impacted by the events around us; however, there are viable alternatives and that is to continue virtually—that provides additional safeguards to all involved. The defendant's right to conclude cannot be subjugated to plaintiff's unreasonable position that this court must indefinitely postpone any continuation of the ongoing trial. The court is willing to accommodate the plaintiff's counsel as to in-person proceeding in a courtroom under these circumstances but will not allow her and her client to oppose any virtual proceeding.

Footnotes

1 Defendant appeared for oral argument but plaintiff did not. Plaintiff's counsel waived plaintiff's appearance on the record and oral argument proceeded.

2 In the capacity of Statewide Coordinating Judge for Matrimonial Cases, this court is spearheading an evidence pilot project which will utilize the New York State Courts Electronic Filing e-filing system for uploading evidence separately by attorneys for identification and with court permission for in camera inspection. After hearing objections, or on consent, the court may number the documents and move them into evidence. There are drop-down menus for court exhibits and judicial notice as well as witness and evidence lists. There is also a drop-down menu for submission of evidence for in camera inspection of documents with court permission. Documents can even be introduced and shared in real time for purposes of impeachment during cross-examination. Additionally, evidence previously admitted can be uploaded into the virtual platform and shared with counsel and/or shown to parties/witnesses using screen sharing as needed during the proceeding. The court notes that had this application been made timely, the evidence could have been made available virtually to counsel and the parties months ago for virtual review. Plaintiff's failure to make this request has not prejudiced him: it threatened to prejudice the defendant and to waste judicial resources.

3 This court does not adopt the dicta proffered in *S.C. v Y.L.* (67 Misc 3d 1219[A], 2020 NY Slip Op 50590[A] [2020*S.C. v Y.L.* (67 Misc 3d 1219[A], 2020 NY Slip Op 50590[A] [2020, Cooper, J.]).

4 In *People v Wrotten*, defendant was a home health aide and complainant was an 83-year-old man who alleged that defendant hit him from behind with a hammer and demanded money. Complainant suffered five head wounds and two broken fingers. Defendant in that matter faced imprisonment.

5 As early as 1990, the Court of Appeals has upheld the use of two-way televised testimony (*see* *People v Cintron*, 75 NY2d 249 [1990]). Certainly the technology available today far exceeds that available in 1990.

6 Given that technology and its various uses have been central in this litigation, it is notable that the first generation iPhone was released in June 2007, less than two years before *People v Wrotten* was decided. Certainly with the many advances in technology in the intervening years the court is even more equipped to provide virtual proceedings today than it was in 1990 (*People v Cintron*) or 2009 (*People v Wrotten*).

7 Numerous additional federal cases are cited in *People v Wrotten* where live video testimony has been permitted under a variety of circumstances.

STATE OF NEW YORK COURT OF CLAIMS

LUIS BONILLA,

Claimant,

DECISION AND ORDER

-v-

THE STATE OF NEW YORK,

Claim No. 133141

Defendant.

BEFORE: HON. DAVID A. WEINSTEIN
Judge of the Court of Claims

APPEARANCES: For Claimant:
Irving Cohen, Attorney at Law
By: Irving Cohen, Esq.

For Defendant:
Letitia James, New York State Attorney General
By: Janet Polstein, Esq., Assistant Attorney General

In this case, claimant Luis Bonilla seeks damages for an alleged wrongful conviction under section 8-b of the Court of Claims Act. At a conference on December 14, the Court scheduled a trial on liability to be conducted virtually on May 20, 2021, subject to any potential objections which the parties might raise.

By letter dated December 21, 2020, the Assistant Attorney General representing defendant wrote the Court in opposition to the conduct of a virtual trial. The letter stated in pertinent part:

> "As ordered by the Court, Defendant proceeded with claimant's virtual deposition on December 3, 2020, which provided a window into the technical difficulties of

> proceeding virtually in this particular case. Mr. Bonilla, who testified through a Spanish interpreter, participated in the deposition from his daughter's house, and the link was compromised every time she received a phone call. Mr. Cohen [opposing counsel] and I participated remotely. As you are aware, the New York City office of the Attorney General's Office remains closed through at least February, and we are continuing to work from home. As I reiterated at the telephone conference last week, this is an unjust conviction case in which claimant's credibility is the key to the case. Defendant has obtained video surveillance footage of the crime from the District Attorney's Office. Our IT department was able to divide the original split-screen footage into separate video tapes, and I questioned Mr. Bonilla at his deposition about his activities on the tape at certain key points in time. During a virtual trial, however, when the court monitor is screen-sharing an exhibit, the video occupies the main screen, thus reducing the claimant's face to a small tile. Defendant maintains that this set-up is not ideal for assessing the claimant's credibility, or his reaction to the videotape, which I anticipate will cause him to conform his testimony at trial. For these reasons, defendant respectfully requests that the trial of this matter be stayed until Mr. Cohen and I are comfortable with the health risks associated with attending an in-person trial, and the courts in New York City are operating at normal capacity."

Claimant has not taken a position on defendant's request.

This Decision addresses defendant's objection to conducting a virtual trial on liability in this matter. There are two aspects to the analysis: (1) whether I have the authority to order a resistant party to appear for a trial to be conducted remotely; and (2) whether I should, in the exercise of discretion, exercise that authority in this case. Since I answer both questions in the affirmative, I order that the trial on liability take place virtually.

Under Judicial Law § 2-b(3), "[a] court of record has power to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." Long before anyone had heard the words "COVID-19" or "social distancing," trial courts used this authority to conduct proceedings by remote means, and appellate courts consistently upheld that authority (*see People v Cintron* (75 NY2d 249 [1990] [taking of televised testimony from a child witness from a separate room permissible]; *People v Wrotten*, 14

NY3d 33, 36 [2009] ["the court's inherent powers and Judiciary Law § 2-b vest it with the authority to fashion a procedure" whereby witnesses are permitted to testify via live, two-way television at trial]). Such procedures have routinely been applied in the Court of Claims to conduct trials on claims brought by incarcerated inmates via videoconference from correctional facilities – a practice that has been upheld as an appropriate exercise of the Courts section 2-b authority (*see Jackson v State*, 165 AD3d 1527 [3d Dept 2018]).

At least in criminal matters, the court must make an "individualized determination that denial of physical, face-to-face confrontation is necessary to further an important public policy and the reliability of the testimony is otherwise assured" (*Wrotten*, 14 NY3d at 38-39). This principle was set forth in *Wrotten* in the context of the Court's discussion of the right of a criminal defendant to confront his or her accuser under the Confrontation Clause, and thus it is not clear that it applies to civil cases (*see Wrotten*, 14 NY3d at 38 ["the exercise of this authority following a finding of necessity is permissible under the Confrontation Clauses of both the Federal and State Constitutions"]; *but see State v Robert F.*, 25 NY3d 448 [2015] [applying same test in Article 10 civil commitment context, on basis that testimony should be given remotely only in "exceptional circumstances" or upon the parties' consent, since "televised testimony is certainly not the equivalent of in-person testimony"]). I will presume for present purposes that the *Wrotten* test governs here (*see Wyona Apartments LLC v Ramirez*, 2020 NY Slip Op 20309 [Kings Cty Civ Ct Nov 22, 2020], at *3 [applying requirement of "case-specific findings" to the question of whether to hold a virtual hearing in a civil case]).

Of course, there is an exceptional circumstance in this instance: the COVID-19 pandemic (*see C.C. v A.R.*, 69 Misc 3d 983, 992 [Kings Cty Fam Ct 2020] ["the global pandemic is an

'exceptional circumstance' allowing this court to proceed on all aspects of this proceeding . . . by virtual means"]). The pandemic has presented courts with a Hobson's Choice between exposing the public and bar to a deadly and highly contagious disease through conducting in-person trials on the one hand, and greatly delaying access to the courts on the other. Virtual proceedings have presented a way out of this dilemma, allowing the legal process to move forward without endangering the health of the participants. This has been significantly true in the Court of Claims, which has successfully conducted tens of virtual trials.

Given the authority the Court to adopt remote procedures under section 2-b, and the extraordinary equities weighing in favor of the use of such procedures to address our current predicament, all courts confronted with the question during the past year have found it both permissible and advisable to compel a party to participate in virtual proceedings (*see C.C., supra* [contempt hearing]; *Wyona Apartments LLC, supra* [landlord-tenant trial]; *Ciccone v One West 64th Street, Inc.*, 2020 WL 6325719 [Sup Ct, NY Cty Sep 8, 2020] [evidentiary hearing]; *A.S. v N.S.*, 68 Misc 3d 767 [Sup Ct, NY Cty 2020] [custody trial]; *see also Rodriguez v Montefiere Medical Center*, 2020 WL 7689633 [Sup Ct, Bx Cty Dec 23, 2020] [citing numerous cases directing that depositions be conducted virtually during pandemic]; *Jones v Memorial Sloan Kettering Cancer Ctr.*, 186 AD3d 1851, 1852 n [3d Dept. 2020] ["We cannot help but take note that if the COVID-19 pandemic has proved anything, it is the usefulness (if not the preference) of conducting matters via video"]). As the Court put it in *Wynona Apartments LLC, supra*: "There can be little dispute that the state of the current COVID-19 pandemic sweeping the nation justifies conducting the instant trial by virtual means" (2020 NY Slip Op 20309, at *4).

As to the specific arguments made by defendant in this case, I find them entirely unconvincing.

First, defendant's alternative to proceeding remotely – that the parties and the Court simply wait out the pandemic, and conduct an in-person proceeding at whatever point it might be safe to do so and permitted by the administrative orders issued by the Chief Adminisrtative Judge – is no alternative at all. Given the progress of the virus in successive waves, the presence of new strains, and the uncertain course of vaccine distribution, no one can say with any assurance when in-court proceedings will again be possible (*see A.S., supra*, 68 Misc 3d at 768 ["Given the unpredictable nature of the COVID-19 pandemic it is unknown when court operations will return to normal in-person procedures"]; *C.C.*, 69 Misc 3d at 993 [position that "this court must indefinitely postpone any continuation of the ongoing trial" is "unreasonable"]). The Court cannot simply push off the trial indefinitely, on the understanding that at some unknown point in the future, the claimant will have his day in court. Such an approach would be fundamentally at odds with the principle that courts should seek to conduct the proceedings before them in an efficient and quick matter (*see* CPLR 104 ["The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding"]). And it is at odds with that old (but still quite accurate) adage that "justice delayed is justice denied."

These concerns are, if anything, particularly true in an 8-b case like this one, where the subject matter concerns an alleged crime that took place many years in the past. In this instance, the events giving rise to the alleged claim occurred on January 8, 2012, more than nine years ago (*see* Claim ¶ 11). Putting off the trial will make even harder the already difficult task of

determining precisely what occurred in the distant past, not to mention delaying further a determination of whether claimant is entitled to compensation – and providing it to him in the event he prevails.

The various potential horribles that might accompany a virtual proceedings in this case, as sketched out in defendant's letter, do not offset the costs of such delay. Defense counsel frets that the problems that manifested themselves at deposition may re-appear at trial, such as interruptions caused by incoming calls. Such issues could be avoided by preparations taken in advance of trial to ensure that claimant is provided with an appropriate device from which to access the proceedings. But if worst comes to worst and the virtual trial is disrupted, so what? Technical glitches indeed occur in video trials, but just as the parties completed their deposition, this Court has successfully carried out numerous virtual trials notwithstanding such issues – and that appears to have been the experience of the court system generally (*cf. Martinez v M Nadlan, LLC*, 69 Misc 3d 1208[a] [Civ Ct, City of NY Oct 21, 2020] [inspection of apartment conducted virtually; "video and audio quality had some connection issues but proved to be reliable for the court to make its observations"]). In essence, defendant suggests that to avoid the possible delay of minutes or even hours that can result from technical problems, the Court should impose the certainty of delaying the entire proceeding for many months. I can think of no reason why the latter alternative is preferable.

Counsel also argues that assessment of the witness's credibility will be impaired because the witness will appear small when a video exhibit is played.

While courts have recognized such disadvantages of remote testimony, it has not prevented the use of virtual proceedings as long as they "enable the Judge, the jury and the

defendant . . . to see and hear the witness and evaluate the witness's demeanor, facial expressions, voice and mode of speaking while the testimony is being given" (*see Cintron*, 75 NY2d at 260). From my own experience – and the observations of other judges in various opinions on the subject – improvements in video technology now facilitate transmission of virtual images that are clear and closeup, and allow for sufficient consideration of a witness's demeanor (*see In re RSC and ResCap Liquidating Trust Action*, 444 F Supp 3d 967, 970 [D Minn 2020] [citations and internal quotation marks omitted] [while "[c]ertain features of testimony useful to evaluating credibility and persuasiveness . . . can be lost with video technology, and the ability to observe demeanor, central to the fact-finding process, may be lessened", advances in video technology "permit[] the jury [or, in a bench trial, the Court] to see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, [and] his calmness or consideration"]). The fact that the image of a witness may be smaller while he is questioned on one exhibit in no way alters the balance of considerations outlined above.

In light of the foregoing, and provided there is no contrary directive re-opening the courthouses to in-person proceedings in advance of the trial date, the liability trial in this matter shall take place virtually, as scheduled, on May 20, 2021.

Albany, New York
January 22, 2021

DAVID A. WEINSTEIN
Judge of the Court of Claims

Documents Considered

1. Letter of Assistant Attorney General Janet Polstein to Court, dated December 21, 2020.

MEMORANDUM

August 24, 2020

To: Hon. George J. Silver
Hon. Vito C. Caruso

From: Eileen D. Millett
John J. Sullivan
Anthony R. Perri

Re: Accommodating People with Disabilities Scheduled for In-Person Court Appearances During the Pandemic

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People who have certain underlying health conditions are at greater risk of serious health consequences if they contract the COVID-19 virus.[1] As many of those underlying health conditions are disabilities under the Americans with Disabilities Act ("ADA"), such individuals may require an accommodation. With the continued expansion of in-person court operations, we anticipate a growing number of requests by court users for reasonable accommodation relating to the COVID-19 pandemic under the ADA.

1. **General Tenets:**

   - The decision to grant or deny any such accommodation is always a matter of judicial discretion.

   - Accommodation requests should be decided as far in advance of the appearance date as practicable.

   - Persons seeking an accommodation should not be required to appear inside the courthouse.

   - A decision granting or denying—in whole or in part—an accommodation request should be explained in writing or otherwise placed on the record.

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[1] The CDC is continually updating its lists of medical conditions that do or may put a person at greater risk for severe illness from Covid-19. According to the CDC, as of July 17, 2020, people of any age with the following conditions **are at increased risk** of severe illness from Covid-19: Cancer; Chronic kidney disease; COPD (chronic obstructive pulmonary disease); Immunocompromised state (weakened immune system) from solid organ transplant; Obesity (body mass index [BMI] of 30 or higher); Serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies; Sickle cell disease; Type 2 diabetes mellitus. In addition, people with the following conditions **might be at an increased risk** for severe illness from Covid-19: Asthma (moderate-to-severe); Cerebrovascular disease; Cystic fibrosis; Hypertension or high blood pressure; Immunocompromised state (weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines; Neurologic conditions, such as dementia; Liver disease; Pulmonary fibrosis; Thalassemia; Type 1 diabetes mellitus. *See* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html, updated July 17, 2020.

2. **COVID-19 Accommodations Available to a <u>Criminal Defendant</u> or <u>Defense Attorney</u>:**

   - Scheduling a remote (video or phone) appearance by both defendant and defendant's attorney; or

   - Allowing the individual in need of an accommodation to participate remotely and requiring the individual not requesting an accommodation to appear in court.

     - Under this scenario, the court must ensure that there is adequate opportunity for confidential attorney-client consultations throughout the appearance.

   - The court may excuse the individual attorney from appearing while declining to adjourn the matter where <u>only the attorney</u> (from a larger firm or an institutional defender organization) is seeking the accommodation.

     - This accommodation will necessitate a reassignment—at least temporarily—of the case by the attorney's office or organization and may require additional time when noticing counsel.

     - In some cases, it may be advisable to permit an attorney with a long-standing relationship to participate remotely in addition to the temporarily assigned attorney who is appearing in-person.

     - In others, such a longstanding relationship and/or the complexity of the appearance may caution against this accommodation and favor instead an adjournment for a remote appearance.

   - ***Note: Commencing the proceeding without an appearance by a defendant seeking an accommodation is <u>not</u> a reasonable accommodation, because it does not allow the defendant to participate in the proceeding.***

3. **Medical Documentation:**

   - The ADA permits, but does not require, the court to obtain medical documentation verifying the existence of a disability.

   - Especially under the circumstances of a public health emergency, a request may be granted on a temporary or provisional basis, subject to future medical confirmation; or on good-faith representation by counsel or party; or on whatever documentation the court finds persuasive in the interests of justice and economy.

Please distribute this memorandum as you deem appropriate. Questions about ADA accommodation issues may be addressed to John Sullivan, Statewide ADA Coordinator (jjsulliv@nycourts.gov).

US arbitral institutions and their rules

by David McLean

Produced by Latham & Watkins LLP for LexisPSL Arbitration.

When arbitrating in the United States, disputants can choose from a number of institutions. This Practice Note is intended to familiarise practitioners with the most commonly used arbitral institutions in the United States: the American Arbitration Association (AAA); the International Institution for Conflict Prevention and Resolution (CPR); and JAMS. This Practice Note outlines the key differences between the institutions in terms of panel selection, applicable rules and arbitration fees.

In this Practice Note, the following definitions will be used:

- AAA Commercial Arbitration Rules and Mediation Procedures (2013) (AAA Rules)
- CPR Rules for Non-administered Arbitration of Business Disputes (2007) (CPR Rules)
- JAMS Comprehensive Arbitration Rules & Procedures (2010) (JAMS Rules)

AAA, CDR and JAMS--profiles

AAA

AAA, the oldest provider of ADR worldwide, was formed following the enactment of the Federal Arbitration Act 1926 (FAA). AAA provides administrative services for dispute resolution throughout the United States, see Practice Note: AAA arbitration--overview, and internationally through its International Centre for Dispute Resolution (ICDR) see Practice Note: ICDR arbitration--overview.

CPR

CPR was founded in 1979 as an effort to bring together corporate counsel and their law firms to find a way to lower the cost of litigation. CPR provides both administered and non-administered arbitration services.

Unlike AAA or JAMS, CPR does not receive a portion of the fees paid to its arbitrators. CPR is funded largely through annual dues, third party grants (no government money), program fees (generally associated with annual programs) and gifts. The arbitrators also pay a nominal amount to be on the panel.

CPR does not charge a filing fee and as such it is arguably a cheaper option than using other institutions, but since the bulk of the expense in any case is the arbitrators' fees themselves, this is unlikely to be a major consideration for choosing this institution.

With a focus on expanding the use of alternative dispute resolutions, the CPR has promoted the 'CPR pledge' in which parties commit to considering ADR mechanisms before filing suit. To date, more than 4,000 operating companies and 1,500 law firms in the US have signed on to this pledge.

JAMS

Also founded in 1979, JAMS is amongst the largest private ADR providers in the world. Founded by the Hon Warren Knight, JAMS offers nearly 300 full-time neutrals to resolve disputes in most legal fields. In 2011, JAMS partnered with the ADR Centre in Italy and formed JAMS International to provide mediation and arbitration of cross-border disputes.

Other arbitral institutions

The degree of consistency which AAA, CPR and JAMS provide to parties has contributed to their international reputation. Administering thousands of cases per year, these institutions offer parties confidence that the dispute resolution process will be administered reliably. Unlike arbitration awards by the ICC, however, these three institutions do not review the final award before it is issued.

Beyond these three institutions, a number of other highly qualified institutions provide ADR services, often focusing more specifically upon a particular sector, which may provide added benefit for certain disputes, ie FINRA (the Financial Industry Regulatory Authority) offers the largest dispute resolution forum in the securities industry field, ARIAS (the AIDA Reinsurance and Insurance Arbitration Society) leads in the reinsurance field and the ICC (International Chamber of Commerce) enjoys a strong worldwide reputation, frequently administering arbitration cases in the United States, see Practice Note: ICC arbitration--overview.

Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), 149 nations have agreed to enforce international arbitration awards in their territory. While the Convention serves as the primary mechanism in which arbitration awards are enforced across borders today, New York Convention, art V, s (d) provides that recognition and enforcement may be refused if the:

> 'arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.'

An arbitral institution's prominence and international name recognition may therefore contribute to the deference afforded to it regarding the validity of its procedures, the legitimacy of the tribunal and the authority of its award.

AAA, CPR and JAMS--rules and procedures

Tribunal composition plays a key role in the arbitration process. Arbitrators' quality and expertise, as well as the selection process should factor highly in determining which institution to use. As AAA, CPR and JAMS provide the framework in which this process takes place, parties should ensure that they understand the differences between these institutions with regard to:

- tribunal selection process
- the extent to which neutral lists of potential arbitrators are available to prospective parties
- the degree to which parties may choose (and refuse) individual arbitrators, and
- the level of qualifications required

Tribunal selection and lists of arbitrators

As to the availability of a list of potential arbitrators prior to the commencement of arbitration proceedings:

- JAMS publishes its list of arbitrators on its website for all interested parties to examine
- AAA treats its list as proprietary and it is therefore not publicly available. Accordingly, prior to selecting AAA as the dispute resolution institution, the parties will have no idea of the arbitrators available to them should a dispute arise
- CPR takes a blended approach, allowing only individuals or companies who are CPR members to access the CPR list

These three institutions also differ in the manner in which the tribunal is selected once a dispute arises:

- AAA does not provide a complete list of arbitrators to the parties once a dispute arises. The parties must first inform AAA of the nature of their dispute and AAA will then provide a list of ten recommended arbitrators from which the parties may choose. Parties strike out the individuals whom they disfavour, rank the remaining names and ask AAA to select the tribunal from these individuals based upon their availability. If the AAA list proves insufficient, parties may request another list of ten arbitrators. This process can be repeated as many times as necessary until the tribunal has been constituted
- CPR and JAMS provide their complete list to the disputing parties and the parties can then choose their preferred arbitrators from these lists
- a unique feature of CPR's tribunal selection process is that of 'screened' selection. Under this optional approach, the tribunal would not know which party has selected them, enhancing their neutrality

Requirements

While all three institutions monitor the quality of their arbitrators as a source of pride, they differ in their approach to selecting the arbitrators serving on their lists.

- JAMS, founded by a judge, developed a list dominated by retired judges in the institution's early years, a preference still obvious in its current list of arbitrators
- JAMS and AAA typically require exclusivity from their arbitrators, although this limitation does not apply to serving on the CPR panel
- arbitrators for JAMS and CPR must hold a law degree, but AAA neutrals can include industry experts who are not lawyers

In addition to offering arbitrators with broad expertise, AAA, JAMS and CPR each also have arbitrators who focus on particular industries, ie financial services, construction and technology.

Moreover, all three institutions vigilantly maintain their reputations by regularly reviewing arbitrators' performance and character. Those who fail to meet the institutions' high standards are removed from the respective list.

Applicable rules

AAA, CPR, and JAMS have all established their own sets of arbitral rules. An arbitral forum with an established set of rules increases predictability and streamlines the dispute resolution process. Unlike the lists of arbitrators, these rules are readily available to be examined by interested parties.

Developed over time, each set of rules is comprehensive, addressing most of the common issues that can arise in the course of a dispute and all three institutions routinely update their rules to reflect the latest trends and developments. Hence, if a particular rule of one institution gains wide traction, it is likely the other institutions will also adopt it. This constant competition has led to the convergence of rules and a common adoption of best practices.

Note that while these institutional rules are available, all three institutions give primacy to the express will of the disputing parties. The institutional rules are thus subordinated to the language in a given agreement and may be freely adjusted to suit parties' particular needs.

Federal and state or common law

Parties should be mindful that the arbitral rules of each institution do not operate in a vacuum and may be subject to limitations based on the FAA or on applicable state or common law.

For example, CPR allows the arbitration tribunal 'to require and facilitate such discovery as it shall determine appropriate' (CPR, r 11). However, should the arbitral tribunal demand a pre-hearing third-party subpoena (ie documents or information from a third party), the third party may challenge that order in state or federal court. Section 7 of the FAA provides that:

> 'the arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case,' (Federal Arbitration Act (FAA), 9 USC § 7)

There arises, then, a question as to whether the power of the arbitral tribunal extends to pre-hearing third-party subpoenas under CPR rules. This issue has led to a split in the court circuits, with the second (*Life Receivables Trust v Syndicate 102 at Lloyd's of London* 549 F.3d 210 (2d Cir. 2008) not available in Lexis®Library) and third (*Hay Group, Inc v EBS Acquisition Corp* 360 F.3d 404 (3d Cir. 2004) not available in Lexis®Library). Circuits taking a restrictive approach, the sixth (*American Federation of Television and Radio Artists, AFL-CIO v WJBK-TV (New World Communications of Detroit, Inc)* 164 F.3d 1004 (6th Cir. 1999) not available in Lexis®Library) and eight (*Re Security Life Insurance Co of America* 228 F.3d 865 (8th Cir. 2000) not available in Lexis®Library). Circuits holding this power implicit under FAA, s 7 and the fourth (*COMSAT Corp v National Science Foundation* 190 F.3d 269 (4th Cir. 1999) not available in Lexis®Library) circuits staking out a middle ground.

Discovery

In regards to discovery:

- the AAA rules provide that there should be no discovery unless ordered by the arbitrator or based upon party agreement (AAA, r R-22)
- CPR allows the tribunal to determine the extent of discovery (CPR, r 11)
- JAMS requires the parties to co-operate in good faith in the voluntary and informal exchange of all non-privileged documents and other information and each party may presumptively take one deposition of the opposing party, unless the arbitrator determines that more is warranted (JAMS, r 17)

All three institutions also provide expedited procedures that parties can choose upon mutual agreement.

Number of arbitrators

The three institutions also differ in the number of arbitrators required to serve on the panel:

- in the absence of an express agreement between the parties, AAA uses one arbitrator, unless the AAA, in its discretion, determines that more arbitrators are necessary due to a case's size, complexity or other circumstances (AAA, r R-16).
- JAMS requires one arbitrator to conduct the arbitration unless the parties agree otherwise (JAMS, r 7)
- CPR requires three arbitrators to serve on the panel unless the parties agree otherwise (CPR, r 5)

Awards issued on default

AAA, CPR, and JAMS also differ in their approach to the absence of parties and the issuance of award on default:

- AAA does not allow an award solely based upon default and requires the present party to submit evidence supporting the award (AAA, r R-31)
- JAMS takes a similar approach to AAA, but also allows the arbitrator to arrange for a telephone hearing or to receive necessary evidence to render an award by affidavit (JAMS, r 22)
- CPR does allow the tribunal to issue an award on default, providing that the non-defaulting party produces appropriate evidence and legal arguments in support of its contentions (CPR, r 16)

Costs of arbitration

Approaches to costs vary between the three institutions.

With respect to filing fees, AAA uses a sliding scale based upon the amount in dispute, while CPR's non-administered arbitration is initiated without any filing fee.

These three providers also differ in their approach to administrative and case management fees, just as the range of arbitrator compensation varies depending on the neutrals selected. Administrative and filing fees can fluctuate widely between institutions, just as arbitrators' hourly rates can vary significantly, even within the same institution.

Choosing the right institution

Choosing an appropriate arbitral institution can serve as the first step towards successfully resolving a dispute. While many times the panellists' expertise alone could lead parties to elect one arbitral institution versus another, parties seeking to limit or expand aspects of the process (ie discovery) may focus on the institutional rules as the determining selection factor.

Parties should keep in mind that other respectable institutions could equally be the best option in certain disputes.

NEW YORK STATE UNIFIED COURT SYSTEM
DIVISION OF PROFESSIONAL AND COURT SERVICES

OFFICE OF ADR PROGRAMS

STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY DISPUTE RESOLUTION CENTER MEDIATORS

Revised 2009

STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY DISPUTE RESOLUTION CENTER MEDIATORS

INTRODUCTION

The New York State Office of Alternative Dispute Resolution Programs has developed these Standards of Conduct ("Standards") for New York State mediators in community dispute resolution centers[1] located throughout New York State. These Standards have been adapted from The Revised Model Standards of Conduct created by the American Arbitration Association, the American Bar Association (Section of Dispute Resolution) and the Association of Conflict Resolution.[2]

The Standards are intended to serve as a general framework for the practice of mediation and aim to:

1.) educate mediators regarding current standards of practice;

2.) guide mediators in their practice;

3.) promote public confidence in mediation as a dispute resolution process; and

4.) inform the mediating parties about the process.

The Standards include different levels of guidance[3]:

- Use of the term "may" is the lowest strength of guidance and indicates a practice that the mediator should consider adopting but which can be deviated from in the exercise of good professional judgment.
- Use of the term "should" indicates that the practice described in the Standard is strongly suggested and should be departed from only with very strong reason.
- Use of the term "shall" is the highest level of guidance to the mediator, indicating that the mediator must follow the practice described.

These Standards of Conduct are applicable to those practicing mediators who mediate under the auspices of a New York State Community Resolution Center Program.

The Standards are listed and followed by Comments, where appropriate. The order of the Comments is not intended to reflect any priority in their importance. The Standards are meant to be read and interpreted in their entirety.

[1]A Community Dispute Resolution Center is a community-based, private, not-for-profit program that contracts with the Chief Administrative Judge of the Unified Court System of the State of New York to provide conciliation, mediation, arbitration, or other types of dispute resolution services.

[2]Joint Committee Draft, January 1, 2004 (approved by the American Bar Association 2005).

[3]This language is adopted in large part from the *Model Standards of Practice for Family and Divorce Mediation*, developed by the Symposium on Standards of Practice (August 2000).

The Standards are to be used as a guide for ethical mediation practice. The Standards are not intended to be used as a substitute for other professional rules, applicable law, court rules, or regulations.

To the extent that a mediator cannot resolve an ethical dilemma after reading these Standards as a whole, or that the mediator finds that a certain Standard may conflict with another Standard contained therein, the mediator is encouraged to address this concern in writing to the Mediator Ethics Advisory Committee of the New York State Office of ADR Programs.[4] The Mediator Ethics Advisory Committee recognizes that a mediator may need to resolve a conflict in a shorter time period than the Committee may have to respond. In such a case, the mediator should exercise good professional judgment for guidance in reaching a resolution of the conflict.[5] Nonetheless, the mediator should consult the Mediator Ethics Advisory Committee.

The Standards are followed by "Committee Notes" that clarify, define, and expand on the statements made in the Standards and Comments, as well as a "Definitions" section and an "Appendix."

[4]The Mediator Ethics Advisory Committee ("*Committee*") serves as an ethics advisory board, to interpret and clarify the Standards as they are raised by practicing CDRCP mediators in conjunction with an ethical dilemma. The committee is appointed and serves under the rules created by the New York State Office of ADR Programs. The Committee will consider any ethical dilemma that a mediator raises in accordance with its rules, requiring that the mediator state the dilemma in writing and send the request to: The Mediator Ethics Advisory Committee, New York State Office of ADR Programs, 25 Beaver Street, Room 859-A, New York, NY, 10004, or by e-mail to: cdrcp@courts.state.ny.us.

[5]This may include looking to other applicable professional standards within the mediation field. See *Committee Notes*.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation in a manner that supports the principle of party self-determination as to both process and outcome. Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree.

COMMENTS:

1. Parties can exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in the process, and outcomes. The mediator is responsible for supporting party self-determination in each area, tempered by a mediator's duty to conduct a quality mediation process.

2. Although party self-determination is a fundamental principle of mediation practice, a mediator may need to balance party self-determination with a duty to conduct a quality mediation process. When resolving these potentially conflicting duties, a mediator should be cautious of conflict of interest issues and avoid influencing party decisions for reasons such as higher settlement rates, egos, increased fees and outside pressures from individuals or organizations.

3. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but the mediator can make the parties aware that they may consult other professionals to help them make informed choices at any point during the mediation process.[6]

4. Where a power imbalance exists between the parties such that one or both parties cannot exercise self-determination, the mediator should postpone the session, withdraw from the mediation, terminate the mediation, or consult with center staff.[7] (see *Committee Notes*)

[6]A party is unable to make a fully informed choice where, for example, the party is unable to articulate his or her concerns or lacks substantial information regarding the dispute such that the party is unable to make procedural and substantive decisions or an informed decision to agree or not to agree.

[7]Indicators of a "power imbalance" that may impede a party's ability to make a decision freely and willingly include where one party threatens, intimidates, or otherwise coerces the other party into participating in or reaching a desired result in the mediation.

STANDARD II: IMPARTIALITY

A. A mediator shall conduct a mediation in an impartial manner and shall avoid conduct that gives the appearance of partiality toward or prejudice against a party. Impartiality means freedom from favoritism or prejudice in word, action or appearance.

B. A mediator shall accept for mediation only those matters in which the mediator can remain impartial.

C. If at any time a mediator is unable to conduct the process in an impartial manner, the mediator shall withdraw.

D. In any mediation, a mediator shall neither give nor accept a gift, favor, loan or other item of value that would raise a question as to the mediator's actual or perceived impartiality.

COMMENTS:

1. A mediator should not act with partiality based on any participant's race, ethnicity, sex, religion, national origin, or sexual orientation or to any other factors that may create bias on the mediator's part.(see *Committee Notes*)

2. During the mediation, a mediator shall maintain impartiality even while raising questions regarding the reality, fairness, equity, durability and feasability of proposed options for resolution. In the event circumstances arise during a mediation that would reasonably be construed to impair or compromise a mediator's impartiality, the mediator is obligated to withdraw.[8]

3. The mediator's commitment is to remain impartial towards the parties and their choices in the process, in both joint and private sessions with the parties.[9]

[8]FLA Rule 10.330, *Committee Notes*, Florida Rules for Certified and Court Appointed Mediators (2000 Revision).

[9]A party may request, or a mediator may offer to the parties as an option, the opportunity to meet individually with the mediator. This private session is often referred to as a "separate session" or "caucus". During such separate sessions between a party and the mediator, the mediator continues to be bound by the Standard of Impartiality and the Standard of Confidentiality (Standard V.).

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid the appearance of a conflict of interest before, during and after a mediation either by disclosing the conflict or withdrawing from the process.

B. Before accepting a mediation, a mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. Thereafter, and as soon as practical, a mediator shall disclose all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's ability to fairly discharge his or her responsibilities. If a mediator learns any fact described above after accepting a mediation, she or he shall disclose it to the parties as soon as is practical. If all parties agree to retain the mediator after disclosure, the mediator may proceed or continue with the mediation. However, if a conflict of interest casts serious doubt on the integrity of the process, the mediator shall withdraw or decline to proceed regardless of the express agreement of the parties.

C. During a mediation, a mediator shall not solicit or otherwise attempt to procure any future professional services, including future mediations, beyond the sessions necessary, to obtain an outcome.

D. Subsequent to mediation, a mediator shall not establish another relationship with one of the parties in any matter that would raise questions about the integrity of the mediation process.

COMMENTS:

1. The mediator's duty to make a reasonable inquiry may be shaped by the sponsoring organization for which she or he mediates. A mediator should make an inquiry of the parties and participants prior to the time of the mediation regarding potential conflicts of interest. Given the central role that a mediator's impartiality assumes to promote the integrity and effectiveness of the mediation process, a mediator should avoid conduct that undermines the public's or party's perception of her or his impartiality. This duty to avoid conflicts of interest exists at the pre-mediation stage, during the mediation conference, and following the mediation session.

2. Disclosure of relationships or circumstances that would create the potential for a conflict of interest rests on the mediator and should be made at the earliest possible opportunity and under circumstances that will allow the parties to freely exercise their right of self-determination as to both the selection of the mediator and participation in the mediation process.

3. Development of relationships by the mediator following the mediation with persons, organizations or agencies that might create a perceived or actual conflict of interest depend upon considerations such as time elapsed following the mediation and the nature of the relationship established and services offered.

STANDARD IV: COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties and the sponsoring organization for which she or he mediates.

B. If a mediator cannot satisfy this Standard, the mediator shall immediately notify the parties and take steps reasonably appropriate under the circumstances, including declining or withdrawing from the mediation or, where appropriate, obtaining assistance from others.

C. A mediator shall not conduct any aspect of a mediation while impaired by drugs, alcohol, medication or otherwise.

COMMENTS:

1. A mediator should obtain the training, skills, experience in mediation, cultural understanding, and other qualities that are necessary for effective mediation, consistent with the sponsoring organization for which he or she mediates.

2. A mediator should inform the parties, where necessary or when asked, of information relevant to the mediator's training, education and experience.[10]

3. A mediator should attend educational programs and related activities to enhance and strengthen his or her personal knowledge of and skills in the mediation process, consistent with the sponsoring organization for which she or he mediates.

[10]Under the CDRC Program Manual and as required by Article 21-A of the New York State Judiciary Law governing all New York State community dispute resolution center programs, community mediators are required to complete a minimum of 30 hours of initial training, followed by a supervised apprenticeship at the center where they volunteer prior to becoming a community mediator for that center (CDRCP Program Manual, Ch. 7, Section I. A.(1) (revised January 1, 2007)). Additional training is required for community mediators who mediate disputes in family cases, youth cases, and civil, city, and district court cases (CDRCP Program Manual, Ch. 7, Section I. A.(5)).

STANDARD V: CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, including information obtained from the parties, non-party participants or documents shown to the mediator, with the exception of any allegation of child abuse.[11]

COMMENTS:

1. All mediations that are conducted by mediators on behalf of a New York State community resolution center are protected by a confidentiality statute, Article 21-A of the New York State Judiciary Law.[12]

2. If an allegation of child abuse is made during the mediation, the mediator is required to stop the mediation process, consult with each party individually for the purpose of obtaining as much information about the circumstances as possible, and consult with center program staff to determine whether to resume the mediation process.[13]

3. A mediator who meets with a party in private session during a mediation should not convey directly or indirectly to any other party, group or institution any information that was obtained during that private session without the consent of the disclosing party.

4. A mediator may report, pursuant to the policies of the local center, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.[14]

5. Nothing in this Standard should be construed to prohibit monitoring, research, and evaluation of mediation activities or the continuing education of mediators.

6. Nothing in this Standard should be construed to prohibit a mediator from disclosing necessary information to staff of the sponsoring organization for which she or he mediates.

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[11]All centers deem allegations or evidence of child abuse inappropriate for mediation; accordingly, this information is not deemed confidential pursuant to Formal Opinion No. 83-F17 of the New York State Attorney General (1983).

[12]This statute protects all memoranda, work product and case files from disclosure in judicial or administrative proceedings and deems confidential all communications that relate to the subject matter of the dispute resolution proceeding. Mediators at community dispute resolution center programs may request participants to sign a written consent form agreeing to mediate in order to ensure full protection under Article 21-A (1981).

[13]CDRCP Program Manual, Ch. 5, Section II. A., Guideline IV. New York State CDRCP mediators are required to be aware of these Guidelines (revised May 10, 2012).

[14]*See generally* CDRC Program Manual.

STANDARD VI: QUALITY OF THE PROCESS

A. A mediator shall conduct a quality mediation process that is consistent with these Standards of Conduct.

B. A mediator shall terminate the mediation, withdraw from service, or take other appropriate steps if she or he believes that participant conduct, including that of the mediator, jeopardizes sustaining a quality mediation process.

C. A mediator shall not exclude a party's attorney from a mediation session, including an attorney for the child.

COMMENTS:

1. A mediator should agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when she or he can satisfy the reasonable expectation of the parties concerning the timing of the process.

3. A mediator should only accept cases when he or she can satisfy the reasonable expectation of the parties concerning his or her experience and training based on the guidelines of the sponsoring organization for which the mediator mediates.

4. The mediator should respect the decision of a party who chooses not to participate in the presence of another party's attorney or another third party (see *Committee Notes*)

5. The primary purpose of a mediator is to help the parties communicate, negotiate, and/or make decisions. This role differs substantially from other professional client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators should strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice or services, or consider resolving their dispute through arbitration, neutral evaluation, or another dispute resolution process.

6. A mediator should not conduct a dispute resolution procedure other than mediation but attempt to characterize it as mediation in an effort to gain the protection of rules, statutes or other governing authorities pertaining to mediation.

7. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.

8. If a party appears to have difficulty comprehending the process, issues or settlement options, or difficulty participating in the mediation process, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination. If no such option can be reasonably provided, the mediator should take other appropriate steps, including

postponing the session, withdrawing from the mediation or terminating the mediation.

9. A mediator should postpone the session or take other appropriate steps if he or she becomes aware that a party is unable to participate due to drug or alcohol use.

10. If a mediation is being used to further illegal conduct, a mediator should take appropriate steps to insure a quality process including, if necessary, postponing the session, withdrawing from the mediation or terminating the mediation.

11. A mediator has an ongoing obligation to be sensitive to power imbalances between the parties and to ensure that the mediation process is conducted in a manner consistent with these Standards. If the mediator cannot ensure a quality process, the mediator should take appropriate steps to postpone the session, withdraw from the mediation or terminate the mediation.[15] (see *Committee Notes*)

12. A mediator is responsible for confirming with the parties that mediation is an appropriate dispute resolution process under the circumstances of each case.[16]

13. A mediator should consult with center staff if a party reveals or the mediator is otherwise made aware of a credible threat of serious and imminent physical harm to the speaker or to center staff.

[15]Such power imbalances include where a party threatens, intimidates, or otherwise coerces the other party into participating in or reaching a desired result in the mediation.

[16] FLA Rule 10.400. Mediator's Responsibility to the Mediation Process.

STANDARD VII: ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating his or her qualifications, experience, and range of available professional services.

COMMENTS:

1. Communications, including business cards, letter heads, or computer based communications, should not include any statistical settlement data or any promises as to outcome.

2. Communications may include references to a mediator's fulfilling state, national or private organization qualifications only if the entity referred to has a procedure for qualifying mediators, and the mediator has been duly granted the requisite status.[17]

3. A mediator should not solicit in a manner that could give an appearance of partiality for or against a party.

4. A mediator should not list names of clients or persons served in promotional materials and communications without their permission.

[17]The New York State Office of ADR Programs does not certify mediators. Under the CDRC Program Manual, however, mediators may obtain certification by a local center by completing an initial community training that is at least 30 hours in duration and conducted by a trainer who has been certified by the New York State Office of ADR Programs, followed by an apprenticeship at the center, a performance evaluation under the supervision of the center's Program Director, and an assessment by the Director that the mediator is prepared to mediate pursuant to the center's performance standards (Ch. 7, Section 1.A.(1)).

STANDARD VIII: RESPONSIBILITIES TO THE MEDIATION PROFESSION

A. A mediator shall act in a manner that enhances the growth and quality of the mediation profession.

COMMENTS: Any person offering mediation services under the auspices of a New York State Community Dispute Resolution Program is considered to be a member of the mediation profession. Among other activities, a mediation professional should:

1. Foster diversity in the mediation field, reaching out to individuals with differing backgrounds and perspectives.

2. Strive to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participate in research in the field when given the opportunity, including obtaining participant feedback when appropriate.

4. Participate in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assist newer mediators through training, mentoring and networking.

6. Exhibit tolerance of differing points of view within the field, seeking to learn from one another and work together to improve the profession and better serve people in conflict.

COMMITTEE NOTES

These Committee Notes contain annotations to the Introduction and "Comments" listed under each Standard. The Committee Notes include both "General Notes" and "Comment Notes." The General Notes contain introductory comments by the Committee and the Comment Notes clarify, define, and expand upon the specific Comment to which they refer. This section may be updated as necessary by the Mediator Ethics Advisory Committee ("Committee").

Introduction to Committee Notes

Where a mediator is unable to resolve an ethical dilemma after reading these Standards as a whole, or finds that a certain Standard conflicts with another Standard contained therein, the mediator is encouraged to address this concern in writing to the Committee. In the interim, a mediator may look to other applicable professional rules or standards within the mediation field. Specific reference should be made to the Community Dispute Resolution Program Manual as a general rule, but particularly in circumstances that require immediate and decisive action by a mediator. Such instances may include where a party is in danger by the other party due to domestic violence, or the particular protocol a mediator should employ if a party reveals or the mediator is otherwise made aware of an allegation of child abuse. A mediator might also look to the Model Standards of Practice for Family and Divorce Mediation, that specifically addresses ethical practice for mediators of family cases (Symposium on Standards of Practice August 2001).

STANDARD I. SELF-DETERMINATION

General Notes

Practitioners and scholars cite self-determination as the fundamental principle of mediation. Comments for Standard I, however, identify how this principle might conflict with other Standards and suggest that a mediator's duty, in limited circumstances, may override this principle.

Comment Notes

Comment 4.

The Committee recognizes that power imbalances are an inherit part of mediation between any two parties, based on many factors including informational, emotional, or verbal differences, or even due to the disparity between the numbers of parties at the table. However, since the issue of power at the mediation table concerns the fundamental principle of self-determination, the mediator should be sensitive to any significant challenge to a party's ability to freely and willingly make decisions regarding his or her own future. Such circumstances include where one party is threatening, intimidating, or otherwise manipulating the other party through either words or actions. In those cases the mediator should take immediate action to either postpone the session, withdraw from the mediation or terminate the mediation.

Comment 3.

General Notes

Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree. In order to make an informed choice, one of the mediator's roles is to

make the parties aware that they may consult other professionals at any point in the mediation process. In addition, to ensure a quality mediation process, the mediator should not mix the role of mediator with that of any other professional role. While a mediator may hold specialized knowledge, due to the mediator's profession or area of expertise, a mediator should only be acting as a mediator when mediating and not in any other professional role.

Comment Notes

The Committee recognizes that the mediator may have specialized knowledge, due to the mediator's professional role or area of expertise, as stated in Standard VI. Quality of the Process, Comment 5. Sometimes this knowledge can impact what the mediator believes to be the potential outcome of the parties' decisions (for example, the mediator is an attorney and is aware of a particular law that impacts the parties' agreement). However, even if the mediator were correct and this knowledge would impact the parties' agreement, the mediator must be careful to assist the parties in making informed choices without providing direct (professional) advice, legal, therapeutic or otherwise. Since, as Standard I. Self-Determination, Comment 3. states, the mediator's role is solely to help the parties make informed choices at any point during the mediation process, the mediator must find a balance between making the parties aware that they may consult other professionals to help them make informed choices with providing specific advice based on the mediator's specialized knowledge.

When faced with this dilemma, the mediator can assist the parties by questioning their understanding of the implications of their decisions and making them aware that they may consult with other professionals regarding any decisions they make or would like to make. The mediator should take care to question the parties in a balanced way, so that both parties are receiving the same consideration.

Committee Opinions for reference: 2008-02, 2009-01.

STANDARD II: IMPARTIALITY

Comment Notes

Comment 1.

The Committee's intention in this Comment is to reflect all possible bases of bias that may cause a mediator to act with partiality. The classes of persons listed under this Comment are provided as examples, and are not intended to serve as an exhaustive or exclusive list.

The Committee's emphasis is on the mediator's action with regard to any bias he or she may hold. A mediator who may have a particular bias towards a party for any reason must not act with partiality due to her or his views. A mediator who is unable to act in an impartial, neutral way towards all parties in the dispute must decline to mediate or withdraw from the mediation.

STANDARD V. CONFIDENTIALITY

Comment 6.

General Notes

While a mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, except any allegation of child abuse, that does not prohibit a mediator from disclosing necessary information to staff. If a mediator becomes aware of or suspects that a crime may be or may have been committed, then the mediator should consult with staff regarding next steps without delay.

Comment Notes

The Committee does not want to put the mediator in the position of making determinations as to what is legal, since it is beyond the scope of the mediator's role. When the mediator is faced with a situation where there is a concern about the legality of a certain action or a fear of something illegal taking place, the mediator should disclose this information to center staff, as indicated in Standard V. Confidentiality, Comment 6. The mediator must also consider Standard VI. Quality of the Process, Comment 10. at this time, and, if a mediation is being used to further illegal conduct, the mediator should take appropriate steps to insure a quality process, including, if necessary, postponing the session, or withdrawing from or terminating the mediation.

Committee Opinions for reference: 2006-02, 2006-03, 2008-01.

STANDARD VI: QUALITY OF THE PROCESS

Comment Notes

Comment 4.

A center must permit all parties to appear with representatives, including counsel, and to present all relevant evidence relating to the dispute, including calling and examining witnesses (22 New York Code of Rules and Regulations Part 116.3(I); see also and CDRC Program Manual, Ch. 5, Section IV. B.(3)). Parties who speak another language are afforded the assistance of a court interpreter, who must be present in the mediation (although no direct authority addresses this, this practice is recognized by centers as an "equal access to justice" issue; indirectly, this practice is covered under CDRC Program Manual Ch. 5, Section IV. B.(4), centers shall not discriminate on the basis of age, sex, religion, creed, ethnic origin, sexual orientation or disability) (emphasis added). Parties may also request the presence of other third parties, such as friends and/or family for support. Prior to the mediation, both parties should determine together if these third parties will participate in the session.

Comment 5.

General Notes

Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree. In order to make an informed choice, one of the mediator's roles is to make the parties aware that they may consult other professionals at any point in the mediation process. In addition, to ensure a quality mediation process, the mediator should not mix the role of mediator with that of any other professional role. While a

mediator may hold specialized knowledge, due to the mediator's profession or area of expertise, a mediator should only be acting as a mediator when mediating and not in any other professional role.

Comment Notes

The Committee recognizes that the mediator may have specialized knowledge, due to the mediator's professional role or area of expertise, as stated in Standard VI. Quality of the Process, Comment 5. Sometimes this knowledge can impact what the mediator believes to be the potential outcome of the parties' decisions (for example, the mediator is an attorney and is aware of a particular law that impacts the parties' agreement). However, even if the mediator were correct and this knowledge would impact the parties' agreement, the mediator must be careful to assist the parties in making informed choices without providing direct (professional) advice, legal, therapeutic or otherwise. Since, as Standard I. Self-Determination, Comment 3. states, the mediator's role is solely to help the parties make informed choices at any point during the mediation process, the mediator must find a balance between making the parties aware that they may consult other professionals to help them make informed choices with providing specific advice based on the mediator's specialized knowledge.

When faced with this dilemma, the mediator can assist the parties by questioning their understanding of the implications of their decisions and making them aware that they may consult with other professionals regarding any decisions they make or would like to make. The mediator should take care to question the parties in a balanced way, so that both parties are receiving the same consideration.

Committee Opinions for reference: 2008-02, 2009-01.

Comment 10.

General Notes

While a mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, except any allegation of child abuse, that does not prohibit a mediator from disclosing necessary information to staff. If a mediator becomes aware of or suspects that a crime may be or may have been committed, then the mediator should consult with staff regarding next steps without delay.

Comment Notes

The Committee does not want to put the mediator in the position of making determinations as to what is legal, since it is beyond the scope of the mediator's role. When the mediator is faced with a situation where there is a concern about the legality of a certain action or a fear of something illegal taking place, the mediator should disclose this information to center staff, as indicated in Standard V. Confidentiality, Comment 6. The mediator must also consider Standard VI. Quality of the Process, Comment 10. at this time, and, if a mediation is being used to further illegal conduct, the mediator should take appropriate steps to insure a quality process, including, if necessary, postponing the session, or withdrawing from or terminating the mediation.

Committee Opinions for reference: 2006-02, 2006-03, 2008-01.

Comment 11.

Comment Notes

A mediator has a duty to conduct a quality mediation process. The quality of the process, consistent with the Standards, requires the mediator to conduct a process that supports party self-determination, with impartiality, no conflicts of interest, competence, and by upholding the confidentiality of the parties (with the exception of child abuse). Specifically, this Comment refers to the Standard of Self-Determination (Standard I.). As the Committee states in Committee Notes to Standard I. Self-Determination, Comment 4., any significant challenge to a party's ability to self-determine or freely and willingly make decisions regarding his or her own future should be a concern to the mediator, such as when one party is threatening, intimidating, or otherwise manipulating the other party through either words or actions. In such circumstances, the mediator should take immediate action to either postpone the session, withdraw from the mediation or terminate the mediation.

Revision to Standard VI. Quality of the Process, C.

This new language has been added in order to ensure that a necessary party to a mediation is not excluded from the session.

While the Committee requires the mediator to not exclude the attorney for the child, the Committee also recognizes that the CDRCs play an active role in ensuring that the stakeholders in the mediation process in cases where an attorney for the child would be appointed -- generally Family Court personnel and other professionals who are integrally involved in a system based case such as a caseworker/ supervisor, in addition to the parties -- are routinely notified of scheduled mediation sessions and have an equal chance of participation

The CDRC Program Manual recognizes the importance of including all necessary parties in the mediation process (Chapter 5, Operational Policies, IV.B.1.3.) and this is reinforced through mediator's initial training as well (Chapter 7, Standards and Guidelines for Mediators and Mediation Trainers, III., 8.).

DEFINITIONS

Conflict of Interest: A person has a conflict of interest when a person is in a position that requires him or her to exercise judgment on behalf of others and also has interests or obligations that might interfere with the exercise of his or her judgment.[18]

Impartiality: Impartiality means freedom from favoritism or prejudice in word, action or appearance.

Mediation: For the purpose of these Standards, mediation is defined as a confidential, informal procedure in which a neutral third party helps disputants communicate, negotiate, and/or make decisions. With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome.

[18] www.unmc.edu/ethics/words.html.

APPENDIX

ARTICLE 21-A
COMMUNITY DISPUTE RESOLUTION
CENTERS PROGRAM

Section
849-a. Definitions.
849-b. Establishment and administration of centers.
849-c. Application procedures.
849-d. Payment procedures.
849-e. Funding.
849-f. Rules and regulations.
849-g. Reports.

S 849-a. Definitions. For the purposes of this article:
1. "Center" means a community dispute center which provides conciliation, mediation, arbitration or other forms and techniques of dispute resolution.
2. "Mediator" means an impartial person who assists in the resolution of a dispute.
3. "Grant recipient" means any nonprofit organization that administers a community dispute resolution center pursuant to this article, and is organized for the resolution of disputes or for religious, charitable or educational purposes.

S 849-b. Establishment and administration of centers.
1. There is hereby established the community dispute resolution center program, to be administered and supervised under the direction of the chief administrator of the courts, to provide funds pursuant to this article for the establishment and continuance of dispute resolution centers on the basis of need in neighborhoods.
2. Every center shall be operated by a grant recipient.
3. All centers shall be operated pursuant to contract with the chief administrator and shall comply with all provisions of this article. The chief administrator shall promulgate rules and regulations to effectuate the purposes of this article, including provisions for periodic monitoring and evaluation of the program.
4. A center shall not be eligible for funds under this article unless:
(a) it complies with the provisions of this article and the applicable rules and regulations of the chief administrator;
(b) it provides neutral mediators who have received at least twenty-five hours of training in conflict resolution techniques;
(c) it provides dispute resolution without cost to indigents and at nominal or no cost to other participants;
(d) it provides that during or at the conclusion of the dispute resolution process there shall be a written agreement or decision setting forth the settlement of the issues and future responsibilities of each party and that such agreement or decision shall be available to a court which has adjourned a pending action pursuant to section 170.55 of the criminal procedure law;
(e) it does not make monetary awards except upon consent of the parties and such awards do not exceed the monetary jurisdiction of the small claims part of the justice court, except that where an action has been adjourned in contemplation of dismissal pursuant to section 215.10 of the criminal procedure law, a monetary award not in excess of five thousand dollars may be made; and
(f) it does not accept for dispute resolution any defendant who is named in a filed felony complaint, superior court information, or indictment, charging: (i) a class A felony, or (ii) a violent felony offense as defined in section 70.02 of the penal law, or (iii) any drug offense as defined in article two hundred twenty of the penal law, or (iv) a felony upon the conviction of which defendant must be sentenced as a second felony offender, a second violent felony offender, or a persistent violent felony offender pursuant to sections 70.06, 70.04 and 70.08 of the penal law, or a

felony upon the conviction of which defendant may be sentenced as a persistent felony offender pursuant to section 70.10 of such law.

5. Parties must be provided in advance of the dispute resolution process with a written statement relating:

(a) their rights and obligations;

(b) the nature of the dispute;

(c) their right to call and examine witnesses;

(d) that a written decision with the reasons therefor will be rendered; and

(e) that the dispute resolution process will be final and binding upon the parties.

6. Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication.

S 849-c. Application procedures.

1. Funds appropriated or available for the purposes of this article may be allocated for programs proposed by eligible centers. Nothing in this article shall preclude existing resolution centers from applying for funds made available under this article provided that they are otherwise in compliance with this article.

2. Centers shall be selected by the chief administrator from applications submitted.

3. The chief administrator shall require that applications submitted for funding include, but need not be limited to the following:

(a) The cost of each of the proposed centers components including the proposed compensation of employees.

(b) A description of the proposed area of service and number of participants who may be served.

(c) A description of available dispute resolution services and facilities within the proposed geographical area.

(d) A description of the applicant`s proposed program, including support of civic groups, social services agencies and criminal justice agencies to accept and make referrals; the present availability of resources; and the applicant`s administrative capacity.

(e) Such additional information as is determined to be needed pursuant to rules of the chief administrator.

S 849-d. Payment procedures.

1. Upon the approval of the chief administrator, funds appropriated or available for the purposes of this article shall be used for the costs of operation of approved programs. The methods of payment or reimbursement for dispute resolution costs shall be specified by the chief administrator and may vary among centers. All such arrangements shall conform to the eligibility criteria of this article and the rules and regulations of the chief administrator.

2. The state share of the cost of any center approved under this section shall include a basic grant of up to twenty thousand dollars for each county served by the center and may include an additional amount not exceeding fifty per centum of the difference between the approved estimated cost of the program and the basic grant.

S 849-e. Funding.

1. The chief administrator may accept and disburse from any public or private agency or person, any money for the purposes of this article.

2. The chief administrator may also receive and disburse federal funds for purposes of this article, and perform services and acts as may be necessary for the receipt and disbursement of such federal funds.

(a) A grant recipient may accept funds from any public or private agency or person for the purposes of this article.
(b) The state comptroller, the chief administrator and their authorized representatives, shall have the power to inspect, examine and audit the fiscal affairs of the program.
(c) Centers shall, whenever reasonably possible, make use of public facilities at free or nominal cost.

S 849-f. Rules and regulations.
The chief administrator shall promulgate rules and regulations to effectuate the purposes of this article.

S 849-g. Reports.
Each resolution center funded pursuant to this article shall annually provide the chief administrator with statistical data regarding the operating budget, the number of referrals, categories or types of cases referred, number of parties serviced, number of disputes resolved, nature of resolution, amount and type of awards, rate of compliance, returnees to the resolution process, duration and estimated costs of hearings and such other information the chief administrator may require and the cost of hearings as the chief administrator requires. The chief administrator shall thereafter report annually to the governor and the and the temporary president of the senate, speaker of the assembly, and chairpersons of the judiciary and children and families committees regarding the operation and success of the centers funded pursuant to this article. The chief administrator shall include in such report all the information for each center that is required to be in the report from each center to the chief administrator.

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION
(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION
(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION
(ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005

The Model Standards of Conduct for Mediators
2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution[1]. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.[2] Both the original 1994 version and the 2005 revision have been approved by each participating organization.[3]

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

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[1] The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

[2] Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

[3] The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where

appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator

competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

Opinion #2015-01

A husband and wife contacted the center to mediate their custody and support issues that have been the subject of litigation since 2009. CDRC staff conducted a standard initial intake to determine general appropriateness for mediation. As is customary with all intimate partner cases, staff provided an additional extensive screening with each party separately, to further assess appropriateness, including the potential existence of a power and control dynamic between the parties. The case was determined to be appropriate for mediation and a certified volunteer mediator was assigned to mediate the case from the CDRC's custody and visitation roster.

Both the husband and wife are represented by attorneys; however, the parties and their attorneys agreed that the parties would attend the mediation session without their attorneys present. Prior to the initial mediation session, the husband's attorney contacted the mediator to request that the mediation be video-recorded. The attorney shared with the mediator that since he would not be present at the mediation, he wanted to have a record of it in order to best advise his client going forward. He also shared that his client, the husband, was amenable to having the session video-recorded. The mediator contacted the husband, the wife and the wife's attorney, separately, to check with them about the request, and none of them expressed an objection to video-recording the session. The mediator concluded that the husband's attorney's request stemmed from a desire to have a record of what was said in mediation for the purposes of assisting his client and not for other possible purposes. The mediator then contacted the attorney for the child, who was also unable to participate, but did not express concern about the session being video-recorded.

The mediator has brought this information to the Center Director, since she is concerned about video-recording the mediation, even with the agreement of all the necessary parties. Although the Center does not have an express policy on video-recording, the mediator and the Center are unsure how recording a session might impact confidentiality. The attorneys have not indicated that they would use the video-recording in subsequent litigation or for other purposes. However, the mediator is apprehensive about the possibility and expresses concern that the parties and their attorneys may not fully understand the possible chilling effect video-recording the mediation may have on the process. The mediator is also concerned about how video-recording the mediation could impact her ability to mediate.

Question:

> **Should the Center allow for the video-recording of the mediation as requested by the parties?**

- **Submitted by a CDRC Director**

Summary of the Opinion

The Center should not allow for the video-recording of the mediation. Although Standard I. Self-Determination extends to the parties' rights to make decisions about the process, it is the mediator's and Center's responsibility to ensure that Standard V. Confidentiality is understood

and maintained, while providing a mediation process that is consistent with Standard VI. Quality of the Process.

Authority Referenced
Standards of Conduct for NYS Community Dispute Resolution Center Mediators (rev. 2009); Standard I. Self-Determination; Standard V. Confidentiality; and Standard VI. Quality of the Process.

Opinion
The decision as to whether the Center should allow for the video-recording of the mediation would have been very clear had either party or the wife's attorney, in consultation with the wife, objected or expressed reluctance or concern about video-recording. Standard I. Self-Determination, states that: "…parties are free to make voluntary and uncoerced procedural and substantive decisions"[1] and "…can exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in the process, and outcomes."[2] Those principles, however, must be balanced against "(i)ndicators of a 'power imbalance' that may impede a party's ability to make a decision freely and willingly."[3] Had either the wife or the husband expressed reluctance or concern about the video-recording, it would not have been permitted because there would not have been the consent of both parties. Yet, after discussion with all parties and their attorneys, and after an extensive screening for power imbalances including domestic violence that is typically performed in custody and visitation mediation cases by the Center, the mediator found no indicators that there was any coerciveness present that would have influenced the parties' decisions to video-record the mediation.[4] As such, the mediator, and thereby the Center, is solely faced with the question of whether to allow the video-recording of the session for the purposes of providing a record of the session for the husband's attorney. After considering the levels of guidance and whether the Center "may", "should" or "shall" take a particular course of action, the Committee concludes that the Center should not allow the video-recording of the mediation.[5]

Standard I. Self-Determination requires that "(a) mediator shall conduct a mediation in a manner that supports the principle of party self-determination as to both process and outcome."[6] Therefore, the parties have the right to make voluntary choices about the process, including whether to video-record the mediation. However, Standard I. also states that "(t)he mediator is responsible for supporting party self-determination in each area, tempered by a mediator's duty to conduct a quality mediation process." [7] Mediators protect Standard VI., Quality of the Process,

[1] Standard I. Self-Determination, A.
[2] Id. at Comment 1.
[3] Id. at Comment 4., n 7. Comment 4. describes such power imbalances as including: "…where one party threatens, intimidates, or otherwise coerces the other party into participating in or reaching a desired result in the mediation."
[4] In addition to an initial and extensive screening in custody and visitation cases, CDRCs continually assess whether power and control dynamics are present through conversations with the parties by staff or by the mediator. Throughout the session, the mediator is also observing and noting the parties' interactions and communications, so as to ensure that the parties can freely and willingly make procedural and substantive decisions.
[5] Under the levels of guidance listed in the Introduction to the Standards, "(u)se of the term 'should' indicates that the practice described in the Standard is strongly suggested and should be departed from only with very strong reason."
[6] Standard I.A.
[7] Id. at Comment 1.

by offering a forum for resolution that is consistent with the guiding principles of mediation. Under the Standards, mediation is defined as "…a confidential, informal procedure in which a neutral third party helps disputants communicate, negotiate, and/or make decisions. With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome."[8] In order to best encourage a free and open dialogue and provide creative opportunities to assist the parties in addressing their issues, the mediator must provide a safe environment for parties to have candid conversations. Having every word potentially scrutinized after the mediation can undermine the safety and candor that mediation is intended to foster.

The Committee also looks to Standard V. Confidentiality for guidance. Standard V. states:

> "A mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, including information obtained from the parties, non-party participants or documents shown to the mediator, with the exception of any allegation of child abuse."[9]

Article 21-A of the Judiciary Law provides the statutory foundation for protecting information obtained by a mediator during a mediation, asserting that: "all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding."[10] Having a video-recording of a mediation potentially impacts the confidentiality of that session.

Because confidentiality is a fundamental principle to the process of mediation, it must be protected at all reasonable costs. Allowing information about the process to be shared with the parties' attorneys, outside of the mediation, is clearly understandable. However, while these parties and their attorneys would only allow for the video-recording to be utilized for the sole purpose of aiding in their mediation efforts, there may be unforeseen consequences in which this video-recording could be used. Unforeseen consequences could include the video being viewed by other third parties, including court personnel; or utilized for other unanticipated purposes, e.g. posting to social media and/ or an Internet website. Knowing that the substance of a mediation session could possibly be shared with third parties outside the session could further deter or discourage prospective users from engaging in the process.

In addition to the above-mentioned factors, the Committee considered whether there were other options available to the parties to capture the substance of their session. Standard VI. states that "(a) mediator shall not exclude a party's attorney from a mediation session, including an attorney for the child."[11] By participating in the session, the attorneys can exert the proper influence needed to guide and advise their clients. Having the attorneys present also increases the effectiveness of the process, since they can provide assistance contemporaneously, which reduces any misunderstandings or potential difficulties after the fact. Another option available to the parties, should their attorneys not be able to participate, is to take notes during the session. While taking notes necessarily must be balanced with participating fully, listening and

[8] See Definitions to Standards.
[9] Standard V. Confidentiality, A.
[10] Cited in part in Standard V. Confidentiality, Comment 1, n 12; provided in full in Appendix to Standards.
[11] Standard VI. Quality of the Process, C.

considering options in the moment, notes of the session can be extremely helpful for the parties when debriefing with their respective attorneys after the mediation. Further, the fundamental principles of Self-Determination and Quality of the Process always allow for the parties to request that the session be paused so a party can reach out to his/ her attorney for guidance at any time during the mediation. Finally, any agreement or decisions made by the parties can be reviewed by their attorneys before finalizing.

Opinion #2013-01

An interpersonal conflict among co-workers was referred to a non-Community Dispute Resolution Center ("CDRC") provider. The dispute involved the complainant and two respondents.

On the day of the mediation, the complainant arrived separately from the other parties and before entering the mediation room told one of the mediators (who was waiting outside of the mediation room) that he was reluctant to mediate and expressed concerns that he did not have his attorney with him and that he did not realize he should have brought his attorney. He said this notwithstanding the fact that the agreement to mediate was sent to the parties well in advance of the mediation date and is clear in stating that parties are not required to but may bring an attorney. The mediator, speaking separately with the complainant outside of the mediation room, expressed that the process was voluntary in nature so that he could stop or withdraw from the session at any time. The mediator encouraged him to contact anyone he would like before proceeding and that ultimately it was up to the complainant to decide whether he wanted to mediate. The complainant stepped away and made a phone call.

After his call, the complainant came back to the mediator who was waiting outside of the mediation room and stated that he wanted to start the mediation. The co-mediators began the mediation and all parties acknowledged having read the agreement to mediate and signed it. One of the mediators then asked which of the parties would like to begin. All of the parties hesitated, but eventually one of the respondents started to talk. The two respondents took turns speaking while the complainant listened intently and took copious notes. This went on for roughly forty-five minutes. One of the mediators glanced over at the complainant and saw that his notes were very specific and seemed to track who said what. The co-mediators checked in frequently with the complainant, but the complainant refused to speak and continued to take notes.

The co-mediators felt that they had an ethical dilemma at this point. Their concerns surrounded the complainant's lack of communication, as well as the circumstances as a whole from the beginning of the process. Particularly, they were concerned that the complainant:

1. **expressed initial reluctance to participate in the mediation without having a an attorney present;**
2. **made a phone call to someone prior to the mediation and came back with a sudden change of mind about participating;**
3. **did not speak at all during almost the first hour of the mediation and took copious notes.**

Cumulatively, the co-mediators were concerned that the complainant was possibly using the information gleaned from the session towards discovery in a later proceeding. If the mediators continued to facilitate and the respondents continued to talk, the mediators were concerned that they would be unfairly compromising the respondents. On the other hand, the co-mediators were also worried that if they caucused with the parties and tried to

explore the complainant's reluctance to speak then it might be perceived as forcing him to participate beyond his comfort level. The co-mediators pose their questions to the committee based on these concerns.

Fortunately, just seconds before the mediators were about to caucus, one of the respondents asked the complainant a question, the complainant responded and a dialogue began. Ultimately, the mediation was a success. However, had things not turned around when they did, the co-mediators discussed what they might have done next and what would be the ethical implications of various interventions. So, assuming the complainant had remained quiet and not said anything:

Questions

1. **Should the co-mediators have intervened if they reasonably believed that the complainant was using the mediation for discovery purposes or should the mediators defer to the respondents' self-determination as to whether they wish to continue talking?**
2. **If the co-mediators intervened and learned that the complainant was, in fact, using the mediation for discovery purposes, what should the co-mediators have done?**

- submitted by co-mediators of a non-CDRC mediation provider

Summary of the Opinion

Based on the facts as presented, the mediators should[1] intervene. Assuming their belief was reasonable, the co-mediators concluded that the complainant was misusing the process and that the complainant's sole objective was the unfair use of the respondents' statements in furtherance of discovery for litigation purposes. As presented in the facts, the respondents were speaking openly while the complainant silently took what appeared to be verbatim notes. The mediators believed that the complainant was not participating fairly in the process but was abusing it. Based on these facts, the co-mediators did have a duty to intervene to assure that the mediation was conducted in a manner that was consistent with the ABA Model Standards of Conduct for Mediators ("ABA Standards"); specifically ABA Standard I. Self Determination; Standard II. Impartiality; Standard V. Confidentiality; and Standard VI. Quality of the Process. The mediator also had a duty to confirm that all of the parties shared consistent expectations of confidentiality.

The manner of mediator intervention raises concerns of mediator impartiality. The manner of intervention should not give the parties the impression that the mediators favor one side over another. The purpose of the intervention should be to focus on the parties' understanding of the process and on confidentiality rather than on presumed motivations. While this opinion speaks only to the ethical dilemmas presented by these facts and does not address issues of best practices, the manner of intervention should be such that the mediators respect the parties' right of self-determination. Parties are free to participate in the process however they choose.

[1] The Committee chose to use the level of guidance "should" for this opinion for two reasons: first, the mediators stated they reasonably believed that the mediation was progressing inconsistent with the ABA Standards (utilized because the mediation was not conducted under the auspices of a CDRC, prompting a stricter level of guidance than "may"), and secondly, even if "may" were the appropriate level of guidance, the ABA Standards do not recognize "may").

Mediators, through their intervention, should not curtail that right by imposing their personal concept of appropriate participation on anyone. If mediators reasonably believe that one side is abusing the process, such that the participant's conduct jeopardizes the mediation consistent with these Standards, then the mediators should intervene and, if the participant's conduct cannot be reconciled with these Standards, then the mediator should postpone the mediation session, withdraw from the mediation or terminate the mediation.

Authority Referenced

Since the mediation was a non-CDRC mediation, the authority referenced is the ABA Model Standard of Conduct for Mediators, developed by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution ("ABA Standards"). The Standards of Conduct for New York State Community Dispute Resolution Centers contains comparable standards to those of the ABA Standards, with the exception of one less level of guidance, and the result would be the same had the mediation taken place through the CDRC.

ABA Standards: Standard I. Self Determination; Standard II. Impartiality; Standard V. Confidentiality; Standard VI. Quality of the Process

Opinion

Question 1.

Should the co-mediators have intervened if they reasonably believed that the complainant was using the mediation for discovery purposes or should the mediators defer to the respondents' self-determination as to whether they wish to continue talking?

The mediators should intervene in situations where the quality of the process is jeopardized. ABA Standard V.I requires mediators to conduct their mediations in a manner that promotes "fairness… party participation, and mutual respect…." Central to this opinion is the reliance on the facts as presented by the co-mediators. In this query, the co-mediators reasonably believed that the complainant was abusing the process by attending for the sole purpose of obtaining discovery. This is especially egregious if the respondents were unaware of this motivation and were fully trusting in the safety and confidentiality of the mediation. Pursuant to ABA Standard VI., the co-mediators should intervene to clarify the parties' understanding of the process and intentions.

The co-mediators state that they believe that the complainant intends to violate ABA Standard V. C. and D., Confidentiality. Pursuant to ABA Standard V., the co-mediators also did have a duty to clarify that the parties' expectations of confidentiality was mutual[2]. The co-mediators were concerned that the respondents might not have shared so completely and candidly had they been aware that the complainant intended to misuse the respondents' information to aid in litigation. In this case, ABA Standard V. would require the co-mediators to "promote understanding among the parties as to the extent to which the parties [would] maintain confidentiality." This would require intervention of some sort.

[2] The parties' expectation of confidentiality is based on the "Agreement to Mediate" form signed by all parties prior to the mediation, which states that the parties understand that mediation is a confidential process.

Once a determination has been made that intervention is required, the choice of how to intervene implicates ABA Standard II. Whenever mediators choose to intervene in a mediation, they should do so taking care to maintain their impartiality pursuant to ABA Standard II. Even where one party may appear to be taking advantage of another party as in the facts presented by this inquiry, mediators should not favor one party over another. The mediators also must avoid appearances of partiality. A difficulty presented by this question is determining whether or not one party is in fact abusing the process. Thus, this question also implicates ABA Standard I., the principle of self-determination. Mediators should never usurp a party's right to this fundamental freedom. A party who chooses to spend the first hour silently taking copious notes is not automatically acting inconsistently with self-determination or quality of the process. Mediators should never coerce any party into speaking, sharing information or using a particular method of taking notes. Each party is free to determine not only outcome, but also process. However, the principle of self-determination is not absolute. The process, as well as the understandings about the process, must be mutual. Therefore, in this case, checking in with the parties and clarifying matters of process and confidentiality is appropriate.

This opinion will not address best practices. It is limited to identifying the fact that there are a number of ways in which the mediators can intervene. The mediators may ask questions of the parties in joint session to check their mutual understanding of and comfort with the process and its rules. The mediators may also meet with each side individually in caucus to learn about their intentions and to clarify their satisfaction with the process. The mediators may also provide information either in joint or private session as to the availability of consultations with other professionals as appropriate.

Question 2.

If the co-mediators intervened and learned that the complainant was, in fact, using the mediation for discovery purposes, what should the co-mediators have done?

If after intervening, the co-mediators confirm that one side is in fact using the mediation for discovery purposes the co-mediators shall take appropriate action which may include termination of the mediation, withdrawal from the mediation, or postponement of the mediation session to allow both sides to consult with professionals. This opinion recognizes that these steps may impinge on the parties' rights of self-determination pursuant to ABA Standard 1. However, in this instance, considerations of confidentiality and quality of the process should trump the principle of self- determination.

Opinion 2010-01

A volunteer mediator from our center was mediating a case at Civil Court. During an individual session with one of the parties, the mediator noticed that the party had a tape recorder on her lap. When the mediator asked the party if she had been taping the mediation session all along, the party said that yes "because she wasn't a good note taker" and she didn't "want to miss anything important."

The mediator asked the party whether she was planning to share with the other party that the session had been recorded and to ask if the other party would agree to have the rest of the mediation taped. The party said she did not plan to do either, since she was recording the session for her own purposes and did not plan to use the taped session against the other party if they went before a judge.

The mediator attempted to explore with the party her underlying interests for wanting a recording of the session. However, the party did not want to discuss it beyond sharing that she just felt more comfortable having a record of the session. The mediator was unsure how to proceed.

Questions:

1. **Should the mediator continue with the mediation?**

2. **If the mediator does not continue the mediation, can the mediator disclose the reason why he is withdrawing:**
   - **A. To the other party?**
   - **B. To center staff?**

- Submitted by the director of a CDRC

Summary of the Opinion

The mediator shall not continue with the mediation. The mediator shall disclose to the parties in joint session that he is terminating the mediation.

The mediator may disclose the fact of the taping and/ or that the taping is the reason for withdrawal. After the mediation session has been ended, the mediator should disclose the taping to center staff.

Authority Referenced

Standards of Conduct for New York State Community Dispute Resolution Center Mediators, Introduction; Standard I. Self-Determination; Standard II. Impartiality, A., Comment 2 and Comment 3; Standard V. Confidentiality, A., Comment 3 and Comment 6; and Standard V1. Quality of the Process, A. and B., Comment 8. (rev. 2009).

Opinion

Question 1.) Should the mediator continue with the mediation?

The mediator shall not continue with the mediation.[1]

According to the facts, the mediator has attempted to explore the underlying interests of the party taping the session ("taping party"). In addition, the mediator has asked the taping party if she would share that she is taping the mediation with the other party. The taping party has not only declined to share the fact of the taping with the other side but has also declined to discuss her reasons for the taping any further. Because this discussion took place during a private session and since the taping party refuses to disclose it to the other party, the private taping directly conflicts with the taped party's ability to exercise self-determination by making voluntary procedural and substantive decisions from the outset. To allow the mediation to continue without revealing the private taping to the other party would also conflict directly with the quality of the process and the mediator's impartiality.

The Committee finds that the Standards impacted by this decision to terminate the mediation include Standard I. Self Determination, Standard VI. Quality of the Process, and Standard II. Impartiality.

Standard I. Self-Determination, Comment 1., states:

> Parties can exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in the process, and outcomes. The mediator is responsible for supporting party self-determination in each area, tempered by a mediator's duty to conduct a quality mediation process.

While quite unusual, tape recording of mediation can be an appropriate issue of process design for the parties to discuss at the outset of mediation. If given the opportunity to discuss the issue up front, the parties can make informed decisions related to the impact of taping. Parties can determine the acceptable uses of any tape recording given the confidential nature of mediation. They can also assess for themselves the degree to which they participate in the process including their willingness to candidly discuss sensitive concerns when the discussion is being recorded. If

[1] The Introduction to the Standards of Conduct for New York State Community Dispute Resolution Center Mediators ("CDRC Standards") states the different levels of guidance. Use of the term "may" is the lowest strength of guidance and indicates a practice that the mediator should consider adopting but which can be deviated from in the exercise of good professional judgment. Use of the term "should" indicates that the practice described in the Standard is strongly suggested and should be departed from only with very strong reason. Use of the term "shall" is the highest level of guidance to the mediator, indicating that the mediator must follow the practice described. The levels of guidance are extremely significant to understanding the Committee's analysis, because the Committee's reasoning can vary greatly whether or not a mediator "may", "should", or "shall" pursue a certain course of action. Referring to the levels of guidance when reading the Committee's Opinion is crucial to understanding the nuances revealed by the ethical dilemma and how the Committee reaches its conclusion. (Standards of Conduct for New York State Community Dispute Resolution Mediators, p. 1).

the taping party is not willing to share that taping has already occurred, then the mediator is unable to ensure that the taped party can exercise self-determination as to his participation in the process. The impact on the taped party's self-determination alone might be sufficient reason for the mediator to stop the mediation. However, the Committee's analysis includes the impact on quality of the process and impartiality.

Standard VI. Quality of the Process, A., states that " (a) mediator shall conduct a quality mediation process that is consistent with these Standards of Conduct." VI. B. further notes that a mediator "shall terminate the mediation, withdraw from service, or take other appropriate steps if she or he believes that participant conduct…jeopardizes sustaining a quality mediation process. [2]

Here, the taping party's refusal to disclose the taping to the other party conflicts with the mediator's obligation to conduct a quality mediation process. If the taped party is unaware of the taping, he would clearly have difficulty participating in the process in a manner consistent with these Standards. Again, therefore, the mediator shall terminate the mediation, withdraw from service, or take other appropriate steps, since participant conduct, including that of the mediator, would jeopardize sustaining a quality mediation process.[3]

In addition, the Committee finds further support to terminate the session or withdraw from the mediation in Comment 8. to Standard VI., where -- as in this scenario -- the party appeared to have difficulty participating in the mediation process. The Comment directs the mediator to "explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination. If no such option can be reasonably provided, the mediator should take other appropriate steps, including postponing the session, withdrawing from the mediation or terminating the mediation." Here, the mediator did attempt to explore with the taping party her underlying interests for wanting a recording of the session and the party did not want to discuss it. That provides additional justification for not continuing with the session.

The other Standard directly impacted by this scenario is Standard II. Impartiality. In addition to the above Standards that would lead the mediator to not continue with the mediation session, Standard II. would also create a reason for the session to be discontinued. The mediator could not continue with the session without informing the other party of the taping that has occurred, because to do so would be to create the appearance (and in fact the possible existence) of mediator partiality. Standard II. A. states:

> A mediator shall conduct a mediation in an impartial manner and shall avoid conduct that gives the appearance of partiality toward or prejudice against a party. Impartiality means freedom from favoritism or prejudice in word, action or appearance.

[2] Standard VI. B., Quality of the Process.
[3] The Committee does not address which of these actions to take, because the inquirer only asks whether the mediator should continue with the mediation, and because the Committee's role is not to suggest "best practices."

The taped party could very well find out about the taping at a later time and it would impact the taped party's experience of the mediation, as well as the possible outcome.

In weighing all of the above factors, the Committee concludes that the mediator shall not continue with the mediation. Taping a mediation without the other party's knowledge interferes with the other party's exercise of self-determination, the mediator's obligation to remain impartial and jeopardizes sustaining a quality mediation process. As always, if the mediator is unsure how to proceed in this instance, the mediator should stop the mediation and consult with Center staff.

Question 2.A.) If the mediator does not continue the mediation, can the mediator disclose the reason why he is withdrawing to the other party?

The Committee, after careful consideration, finds that the mediator may disclose the taping to the taped party. The Committee notes that the mediator's discretion to disclose the taping to the taped party indicates a practice that the mediator should consider adopting although it can be deviated from in the exercise of good professional judgment. [4] In reaching its conclusion, The Committee looks to Standard V. Confidentiality, Standard I. Self Determination, Standard II. Impartiality, and Standard VI. Quality of the Process.

Standard V. Confidentiality, states:

> A mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, including information obtained from the parties, non-party participants or documents shown to the mediator, with the exception of any allegation of child abuse.

The taped party would reasonably expect that communications made during the course of mediation would remain confidential. The secret tape recording of the mediation by the taping party could reasonably be seen as frustrating the taped party's expectation of mediation confidentiality.

However, the facts indicate that the mediator became aware of the tape recorder during private session and the taping party informed the mediator that she did not intend to tell the other party. Standard V. Confidentiality, Comment 3., states:

> A mediator who meets with a party in private session during a mediation should not convey directly or indirectly to any other party, group or institution any information that was obtained during that private session without the consent of the disclosing party.

The Committee therefore must attempt to balance the taping party's confidentiality with the taped party's confidentiality while at the same time examining the impact of the taping and its

[4] See explanation of levels of guidance for use of the term "may" in the Introduction to the CDRC Standards.

non-disclosure on self-determination, quality of the process, and the mediator's impartiality.

The Committee admits that on the analysis of the Standard of Confidentiality alone, the mediator might be told that he may disclose the taping to the other party. However, with the additional examination of the impact of the taping and its non-disclosure on self-determination, quality of the process, and the mediator's impartiality, the Committee solidifies the finding that the mediator may disclose the taping to the other party.

Looking to the analysis of Standard I., Comment 1., above, if the taping party is not willing to share that taping has already occurred, then the mediator is unable to ensure that both parties can exercise self-determination as to their participation in the process. The taped party cannot assess how taping could impact his participation in the process.

As stated previously in Question 1. above, the mediator shall avoid conduct that gives the appearance of partiality toward or prejudice against a party.[5] By not disclosing to the other party that the mediation had been taped, the mediator could be perceived as acting with prejudice against the taped party. Furthermore, by not disclosing the taping to the other party, the mediator would at a minimum be giving the appearance of acting with partiality towards the taping party.

Finally, Standard VI. Quality of the Process requires that the mediator "shall conduct a quality mediation process that is consistent with these Standards of Conduct."[6] By not disclosing the reason for terminating the session, withdrawing from service, or taking other appropriate steps to temper the taping party's conduct, the mediator would not be fulfilling his required duty to sustain a quality mediation process.[7] For all of the above reasons, the Committee holds that the mediator may disclose the reason for ending the session.

2.B.) If the mediator does not continue the mediation, can the mediator disclose the reason why he is withdrawing to center staff?

Standard V. Confidentiality, Comment 6., states that "(n)othing in this Standard should be construed to prohibit a mediator from disclosing necessary information to staff of the sponsoring organization for which she or he mediates."

The mediator should disclose the taping to center staff so that staff will be aware of the circumstances of why the mediator withdrew from the mediation, especially if the same parties requested or are referred to mediation by the court again.

[5] Standard II. Impartiality, A.
[6] Standard VI. A.
[7] Id. at B.

Opinion 2008-02

The Question:
A mediation session was held between an attorney and a client concerning attorney's fees. During the course of the mediation the mediator, who is also an attorney, realized that the parties' fee dispute was covered by Part 137 of The Rules of the Chief Administrator. Neither the attorney nor the client seemed to be aware of the rule or the attorney's obligation to provide the client with notice of the right to arbitrate. Does a mediator have an obligation to say something to either party regarding the rule?

- **Submitted by a CDRC mediator.**

Summary of the Opinion

The mediator has no obligation to say something to either party regarding Part 137. If, however, the mediator deems it essential to the principles of self-determination and a quality mediation process, the mediator may raise the matter in joint session with each party as part of reality testing the enforceability of the agreement and making the parties aware that they may consult outside counsel.

Authority Referenced

Standards of Conduct for NYS CDRC Mediators, Introduction; Standard I: Self-Determination, Comment 1, Comment 2, and Comment 3; Standard II: Impartiality, Comment 2 and Comment 3; Standard V1: Quality of the Process, Comment 5 and Comment 8; Part 137 of the Rules of the Chief Administrator (22 NYCRR 137); NYS CDRC Program Manual, Chapter VII. Training, Standards and Requirements for Mediators and Mediation Trainers (rev. January 1, 2007).

Opinion

Under the Standards of Conduct for New York State Community Dispute Resolution Center Mediators, the mediator does not have an obligation to advise either party regarding Part 137 of the Rules of the Chief Administrator.[1]

In this scenario, the mediator is aware of Part 137 presumably because the mediator is an attorney. The Committee notes that most community mediators would not have knowledge of Part 137. Community mediation centers provide uniform training for their mediators and do not

[1]Part 137.2 (a). states: "In the event of a fee dispute between attorney and client, whether or not the attorney already has received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration under this Part. Arbitration under this Part shall be mandatory for an attorney if requested by a client, and the arbitration award shall be final and binding unless de novo review is sought as provided in section 137.8."

expect them to have specialized legal training beyond the scope of the mandated mediation training.[2]

However, regardless of whether the mediator is an attorney or is otherwise aware of Part 137, it is not the mediator's role to notify either party of the rule. To impose such an obligation on the mediator could interfere with a party's right to self-determination, or right to make his or her choice as to the process and outcome. Such a requirement could also conflict with the mediator's obligation to refrain from acting in any other professional role but that of a mediator.

Under Standard I: Self-Determination, a mediator is required to conduct mediation in a manner that supports the principle of party self-determination as to both process and outcome. This requires that a mediator should not intervene in the decisions of parties who have both voluntarily agreed to mediate a dispute. Comment 2 of the Standard, however, states that the mediator may need to balance party self-determination with a duty to conduct a quality mediation process. In order to do so, the mediator in this case may wish to inform the parties that they may want to seek outside professional advice to help them make informed decisions. Comment 3 states further:

> "a mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but the mediator can make the parties aware that they may consult other professionals to help them make informed choices at any point during the mediation process." [3]

Standard VI: Quality of the Process elaborates on the duty of the mediator to conduct a quality mediation process. A quality mediation process is defined under Standard VI.A. as "a process that is consistent with these Standards of Conduct."

Requiring the mediator to inform the parties about Part 137 would potentially violate the mediator's obligation to not act in any other professional role but that of a mediator. Comment 5 of Standard VI states:

> "The primary purpose of a mediator is to help the parties communicate, negotiate, and/or make decisions. This role differs substantially from other professional client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators should strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate,

[2] NYS CDRC Program Manual, Chapter VII. Training, Standards and Requirements for Mediators and Mediation Trainers (rev. January 1, 2007). Attorney-client fee disputes are not classified as "special case types" for purposes of training mediators under the guidelines.

[3] A party is unable to make a fully informed choice where, for example, the party is unable to articulate his or her concerns or lacks substantial information regarding the dispute such that the party is unable to make procedural and substantive decisions, or an informed decision to agree or not to agree.

> a mediator should recommend that parties seek outside professional advice or services, or consider resolving their dispute through arbitration, neutral evaluation, or another dispute resolution process."

Therefore, the mediator may consult with the parties about seeking outside legal advice.

The Committee acknowledges that if this dispute is mediated contrary to the requirements of Part 137, the parties face a variety of possible risks.[4] Accordingly, the mediator could conclude that the parties do need more information about fee disputes to make a fully informed choice about mediating the dispute. Comment 8 states:

> "If a party appears to have difficulty comprehending the process, issues or settlement options, or difficulty participating in the mediation process, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination. If no such option can be reasonably provided, the mediator should take other appropriate steps, including postponing the session, withdrawing from the mediation or terminating the mediation."

The Committee believes that, given this situation, the mediator has the choice, if he or she determines it is appropriate, to balance the parties' right to self-determination with a quality process and inform the parties that they may want to get outside advice about any special requirements with respect to attorney-client fee disputes.

Although the inquirer's questions have been addressed, the Committee has decided to further consider how the mediator should inform the parties concerning seeking outside advice, if he or she decides to do so. The Committee considered whether it would be preferable for the mediator to raise this issue in caucus or in joint session and how the issue should be framed. Standard II: Impartiality requires that a mediation be conducted in an impartial manner. Comment 2 of the Standard says a mediator must maintain impartiality even while raising questions regarding reality, fairness, equity, durability and feasibility of proposed options for resolution. The Committee concludes that it would be consistent with the Standards for reality testing to be done in joint session with the parties. To avoid favoring one party over another, such reality testing should be done by asking questions as to whether the parties know if there are any laws or

[4] Risks could include: having the mediated agreement deemed unenforceable; impacting the client's perception of the process if not made aware of the Rule; and/or professional risks to the mediator as an attorney being aware of the Rule. The Introduction to the Standards states that the Standards are to be used as a guide for ethical mediation practice and are not intended to be used as a substitute for other professional rules, applicable law, court rules, or regulations. As such the mediator, as attorney, may also wish to consult outside professional standards before determining how to proceed if the mediator is concerned about the impact of going forward without the client seeking outside advice.

precedents that might impact the disposition of a fee dispute, without specifically referring to Part 137. [5]

[5] The Committee debated whether the mediator should specifically mention Part 137 of the Rules of the Chief Administrator or whether he should simply inform the client that she may want to seek outside legal advice. If the mediator is aware of the rule and faces the dilemma of trying to balance the parties' self-determination with the quality of the process, the Committee holds that the mediator may let the parties know about the Rule. However, such a mediator, as well as any mediator unaware of the Rule, is not obligated to let the parties know. Regardless of how the mediator proceeds, it is imperative that he draw a clear distinction between providing legal information and legal advice, by not leaving the parties with the impression that the Rule applies or interpreting the Rule on behalf of the parties' particular dispute.

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The Questions

1) **Is a mediator obligated to keep confidential or obligated to disclose a 12-year-old party's statements that the 12-year-old has engaged in sexual relations with individuals over 18 years old? If the mediator is obligated to disclose the statements, to whom must the mediator make the disclosure?**

2) **In a mediation between the 12-year-old party and that child's parent, may the mediator disclose the child's allegations that the child has had sexual relations with individuals who are over 18 years old where the child has specifically asked the mediator to refrain from doing so?**

3) **Is it appropriate for a mediator to suggest that the child discuss with her parent the child's sexual conduct after the child specifically declines to do so?**

We had a case involving a mother and her 12-year-old daughter, who came to the center to discuss issues such as the daughter's staying out late and her behavior. During caucus, the daughter discussed how she had been having sex with 18- and 19-year-old boys because she wanted them to be her friend. She stressed that she did not want this information to get back to her mom. However, in the same session, she stated that her mother already knew (about the sexual conduct). The mediator was not sure how much the mother already knew. The mediator was horrified that this young girl was sexually active and wanted to know if she should have talked the girl into discussing this with her mom.

- Submitted by a staff member of a community dispute resolution center.

Summary of the Opinion

When allegations arise concerning a child's participation in sexual conduct with an adult during caucus, the mediator should not disclose the contents of those statements to the other party without first obtaining the permission of the party who made the statement. When allegations arise concerning a child's sexual conduct with an adult, the mediator should obtain as much information as possible from the party in caucus, and then the mediator should consult with staff to determine whether the center should report those allegations to the statewide central register of child abuse and maltreatment or to a local child protective service. Staff should then move forward by considering the program's guidelines and the CDRC Program Manual.

Authority Referenced

Standards of Conduct for NYS CDRC Mediators, Standard I, Standard II(A) and (C), Standard V(A), Comments 1, 2, 3, and 6, and Standard VI (2005). Program Manual for the Community Dispute Resolution Centers Program, Chapter 5, Guidelines II, III, and IV of the Child Abuse Guidelines.

Opinion

The questions in this inquiry, although raised by a center staff member, concern the mediator's obligations when a child tells a mediator during caucus that the child has engaged in sexual conduct with individuals who are over 18 years old.

A mediator certified by a community dispute resolution center ("CDRC') is bound by the Standards of Conduct for New York State Community Dispute Resolution Center Mediators ("Official Standards") to maintain the confidentiality of all information obtained during a private session (Standard V, Comment # 3). The only exception to confidentiality under the Standards exists where there are allegations or evidence of child abuse (Standard V(A)).

Questions # 1 and #2 ask whether the mediator is obligated to keep confidential or to disclose statements made in caucus by a 12-year-old party who claims to have engaged in sexual relations with individuals over the age of 18 years old. If the mediator is obligated to disclose this information, to whom should the mediator disclose it?

Standard V, Comment # 3, states that a mediator who meets privately with a party during a mediation "should not convey directly or indirectly to any party, group or institution any information that was obtained during that private session without the consent of the disclosing party." In the absence of a contradictory comment in the Official Standards, the mediator should not disclose information gathered during caucus to another party. A review of the other comments to Standard V indicates that a mediator is not permitted to disclose the contents of any statement revealed during caucus to another party unless the mediator first obtains the permission of the party who made the statement during caucus. Accordingly, notwithstanding the nature of the parties' relationship (in this case, parent and child), the mediator should not disclose the contents of the child's statements without first obtaining the child's permission to do so.

The fact that the mediator cannot disclose the contents of the child's statements, which were made during caucus, to the child's mother does not end the inquiry. If a party has alleged conduct that might constitute "child abuse," then the mediator has an affirmative obligation to comply with Guideline IV of the Guidelines for Cases Involving Child Abuse as set forth in the Program Manual for Community Dispute Resolution Centers ("Child Abuse Guidelines"). Incidentally, these steps are also set forth in Standard V, Comment # 2 and are discussed in greater depth below.

Guideline II of the Child Abuse Guidelines defines "child abuse" in part as an act or failure to act by a parent which, as to such child, "commits, or allows to be committed, a sex offense against him or her, or allows him or her to engage in a sexual performance." (CDRC Program Manual, Ch. 5, Section II (A), Guideline II (iii)).

If the mediator believes that the child has described conduct that constitutes child abuse, then Standard V, Comment # 2 requires the mediator to stop the mediation, consult with each party individually for the purpose of obtaining as much information about the circumstances as possible, and consult with center program staff to determine whether to resume the mediation process. Accordingly, this comment expressly permits the mediator to disclose to center staff information pertaining to allegations of child abuse.

In this case, the allegation is made during caucus by the child whose safety is at issue, and the child has expressly asked the mediator not to discuss the matter with the child's mother. Although the inquirer states that the child indicated that the mother already knew about the child's sexual conduct, the mediator apparently was not sure how much the mother actually did know. In light of the fact that the allegations were made during caucus and Comment # 3 to Standard V expressly discourages a mediator from sharing information disclosed by a party during caucus with other participants, the Committee believes that the mediator in this case should use the caucus to obtain as much information from the child, adjourn the mediation pending discussion with staff, and then consult with staff to determine: (1) whether to report the allegations of child abuse to the statewide central register for child abuse or a local child protective agency as per Guideline III of the Child Abuse Guidelines (see below) - a staff responsibility; and (2) whether to resume the mediation.

Guideline III of the Child Abuse Guidelines states:

> Each community dispute resolution center (hereinafter "center") shall, during its intake process, exercise maximum care and effort to determine whether a matter for which mediation is sought involves alleged or actual child abuse. Upon any such determination, a center shall advise the parties that the matter may not be mediated. At the same time, the parties shall be informed of any resources made available by the community to victims and perpetrators of child abuse. If, based on the information learned at intake, a center reasonably believes that a child's health or physical well-being is in jeopardy, it shall also refer the matter to the statewide central register (footnote omitted) of child abuse and maltreatment or to a local child protective service."

Although Guideline III speaks of child abuse adduced during intake, the Committee believes that the same steps should be followed if evidence of child abuse is adduced during mediation. The Committee wishes to stress that mediators and center staff should not disclose allegations of child abuse to anyone other than the statewide central register or a local child protective service. If, for some reason, circumstances require immediate disclosure of this information but the center staff and mediator are unable to contact either of those entities, then it would be appropriate for the mediator and center staff to contact local police, particularly where the child's safety or well-being is in imminent danger.

Question # 3 asks whether it appropriate for a mediator to suggest that the child discuss with her parent the child's sexual conduct after the child specifically declines to do so. The Committee concludes that it would not be appropriate for a mediator to do so. Standard I of the Official Standards instructs:

> "A mediator shall conduct a mediation in a manner that supports the principle of party self-determination as to both process and outcome. Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree."

While the mediator may, for example, help a party gather more information or brainstorm options, the mediator may not suggest how the party should proceed or conduct herself. Assuming that a party is competent to make decisions as to outcome and process, those are decisions that a mediator should refrain from influencing through direct or indirect pressure.

The Committee is limited to the facts and questions posed in the inquiry and can only address in full the mediator's responsibilities. However, the Committee would like to note that staff must consider taking certain steps in such a situation. Staff should consider, among other things, the program's guidelines and the CDRC program manual for specific steps to take, but should balance these with consideration of the quality of the mediation process.