

## A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation

*Suzanne J. Schmitz\**

### I. INTRODUCTION

A major change in Illinois civil procedure has emerged during the past decade with little fanfare or debate. Almost one-half of the circuits in Illinois have adopted or are in the process of adopting court-ordered mediation programs<sup>1</sup> for major civil matters. These programs enable the court, in any civil action, to order parties and counsel to take part in mediation, regardless of whether the parties consent.<sup>2</sup>

Judges and attorneys need to understand the effect of the rules governing the mediation program. In general, the rules being adopted in Illinois do reflect good practice, but some clarifications would improve the program. However, education of the bench and bar is the most important tactic for ensuring effective programs. No special rule is needed to facilitate that education; it should be offered and promoted by the Illinois courts. Additionally, the circuits should adopt the Illinois

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\* Suzanne J. Schmitz is an Associate Clinical Professor of Law at Southern Illinois University School of Law. She thanks Susan Yates and Jennifer Shack of the Center for Analysis of Alternate Dispute Resolution Systems for their assistance; Associate Professor of Law Jill Adams, attorney-mediator Don Hammer, and mediator Richard Green for their comments; and James Webb, J.D. expected 2006, for his research and editorial assistance.

1. The term "court-ordered" is used rather than mandatory mediation for two reasons. First, there is no automatic referral of cases to mediation as there is in mandatory arbitration where cases fitting the jurisdictional requirements are automatically sent to arbitration. *See* Mandatory Arbitration System, 735 ILL. COMP. STAT. 5/2-1001A (1993). Rather, this program requires the court to make referrals on a case-by-case basis. Second, the use of the term mandatory mediation suggests to some that settlement is, in fact, mandatory. Under the mediation program discussed in this article, attending mediation is ordered, but reaching agreement is voluntary. *See infra* Part III (discussing the parties' ability to dispense with the mediation).

2. ILL. COOK COUNTY CIR. CT. pt. 20 (2004); ILL. 1ST CIR. CT. COURT-ORDERED MEDIATION R.; Court-Annexed Mediation, Admin. Order No. 99-4 (Ill. Cir. Ct., 6th Cir., Dec. 1, 1999); ILL. 12TH CIR. CT. R. 21.00 (2004); ILL. 14TH CIR. CT. pt. 26; ILL. 16TH CIR. CT. art. 12 (2004); ILL. 17TH CIR. CT. R. 2.08 (2003); ILL. 18TH CIR. CT. art. 14 (2004); ILL. 19TH CIR. CT. R. 20 (2004). Some circuits permit the chief judge to excuse certain categories of cases from court-ordered mediation. *See, e.g.*, ILL. 11TH CIR. CT. R. 111(1)(B); ILL. 16TH CIR. CT. R. 12.01(b); ILL. 17TH CIR. CT. R. 2.08(I)(B) (2003); ILL. 19TH CIR. CT. R. 20.01(b) (2004) (permitting the chief judge to create exceptions from court-ordered mediation); Court-Annexed Mediation for Civil Cases, Admin. Order No. 04-39 (Ill. Cir. Ct., 20th Cir., Oct. 26, 2004).

Uniform Mediation Act (“IUMA”)<sup>3</sup> as their rule on confidentiality, as well as rules or protocols concerning mediator ethics, de-certification, and training.

A recent national survey<sup>4</sup> measures those practices and procedures that appear to work in the field of mediation. Further, the evaluation of the then-pilot court-sponsored mediation program in the Seventeenth Circuit of Illinois offers useful guidance.<sup>5</sup> Additionally, “best practice” guides developed by scholars, court officials, mediation practitioners, and litigators assist courts that sponsor mediation programs, aiding in the interpretation and assessment of the circuit rules.<sup>6</sup> Notably, research about court-ordered mediation programs is in its infancy.<sup>7</sup> As experts complete more studies, courts, counsel, and mediators should revisit these rules in light of further findings.

This Article begins with a discussion of court-ordered mediation generally<sup>8</sup> and the assignment of cases to mediation.<sup>9</sup> Within the context of the circuit rules, this Article next examines the mediation

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3. See Illinois Uniform Mediation Act, 710 ILL. COMP. STAT. 35/1-99 (2002) (establishing a privilege for mediation communications and requiring mediators to disclose conflicts of interest to those participating in mediation); see also Jennifer E. Shack & Danielle Loevy, *Summary of Court-Annexed ADR in Illinois* (summarizing the effect of the IUMA), at [http://www.caads.org/studies/adr\\_summary.htm](http://www.caads.org/studies/adr_summary.htm) (last modified Sept. 16, 2004).

4. See Bobbi McAdoo et al., *Institutionalization: What do empirical studies tell us about court mediation?*, 9 DISP. RESOL. MAG., Winter 2003, at 8 (summarizing much of the empirical research available about mediation in major civil cases); see also Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002) (reviewing three studies of mediation in nine Ohio courts); Shack & Loevy, *supra* note 3 (surveying all of the various types of alternative dispute resolution in Illinois). Because this article focuses on mediation of major civil litigation, parts of studies concerning small claims and family mediation are not included.

5. JAMES J. ALFINI ET AL., N. ILL. UNIV. COLL. OF LAW, MAJOR CIVIL CASE MEDIATION PILOT PROGRAM: 17TH JUDICIAL CIRCUIT OF ILLINOIS (1994).

6. CTR. FOR DISPUTE SETTLEMENT & THE INST. OF JUDICIAL ADMIN., NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1992) [hereinafter NATIONAL STANDARDS]; ROBERT J. NIEMIC ET AL., FED. JUDICIAL CTR., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR (2002), available at <http://purl.access.gpo.gov/1ps15445> (last visited Apr. 1, 2005); Susan M. Yates, *Creating a Successful Major Civil Case Mediation Program*, at <http://www.Caads.org/studies/success.htm> (last modified Sept. 2003).

7. See Wissler, *supra* note 4, at 690–702 (considering mediation participants’ assessments and noting the need for future research regarding the relationships among case type, dispute and party characteristics, attorney fee arrangements, and mediation agreements, as well as the impact of mediation beyond the mediation session).

8. See *infra* Part II (introducing the mediation process and the circuit programs for court-ordered mediation).

9. See *infra* Part III (exploring issues surrounding the referral to mediation, including which cases to refer, how much discovery should occur prior to commencement of the mediation, and ruling on dispositive and interim motions).

process,<sup>10</sup> the role of counsel and participants,<sup>11</sup> and the need for confidentiality.<sup>12</sup> The Article then addresses the appointment of mediators<sup>13</sup> and mediator ethics.<sup>14</sup> Finally, it argues for education of all parties to maximize the value of the Illinois court-ordered mediation programs.<sup>15</sup>

## II. WHY PERMIT COURTS TO ORDER MEDIATION?

The Supreme Court of Illinois granted the circuit courts the authority to adopt rules for court-ordered mediation via Supreme Court of Illinois Rule 99.<sup>16</sup> Rule 99 permits Illinois courts to adopt mediation programs, subject to Supreme Court of Illinois approval of the circuit rules governing these programs.<sup>17</sup> To date, eight of the twenty circuits and Cook County have adopted such rules,<sup>18</sup> and two more circuits have enacted essentially the same rules by administrative order.<sup>19</sup> After adopting the rules, the circuit courts have the authority to order mediation in any civil case, with certain exceptions provided in the rules.<sup>20</sup> Nothing requires that all civil cases be mediated; however, the rules permit the court to order mediation in any case, regardless of the parties' consent.

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10. See *infra* Part IV (outlining the mediation process, beginning with the referral order and culminating with the settlement agreement).

11. See *infra* Part V (identifying the roles and obligations of the various parties in the mediation process).

12. See *infra* Part VI (emphasizing the critical role of confidentiality and how best to maintain it).

13. See *infra* Part VII (discussing mediator appointments, qualifications, training, and judicial oversight).

14. See *infra* Part VIII (surveying some ethical considerations in mediation and advocating the adoption of ethical guidelines).

15. See *infra* Part IX (contending that court-ordered mediation programs are maximized only through education of the bench and bar).

16. ILL. SUP. CT. R. 99 (2001).

17. *Id.*

18. COOK COUNTY CIR. CT. R. 20.02 (2004); ILL. 1ST CIR. CT. R. (B)(1) (2004); ILL. 11TH CIR. CT. R. 111(1)(A) (2004); ILL. 12TH CIR. CT. R. 21.01(A) (2004); ILL. 14TH CIR. CT. R. 26(2)(A) (2004); ILL. 16TH CIR. CT. R. 12.01(A) (2004); ILL. 17TH CIR. CT. R. 2.08(1)(A) (2003); ILL. 18TH CIR. CT. R. 14.02(e) (2004); ILL. 19TH CIR. CT. R. 20.01(a) (2004).

19. Court-Annexed Mediation, Circuit Administrative Order 99-4 (Ill. Cir. Ct., 6th Cir., Nov. 12, 1999); Court-Annexed Mediation for Civil Cases, Admin. Order No. 04-39 (Ill. Cir. Ct., 20th Cir., Oct. 26, 2004).

20. Several circuits permit the Chief Judge of the Circuit to issue administrative orders specifying matters not to be referred to mediation. See, e.g., Court-Annexed Mediation, Circuit Administrative Order 99-4 (I)(B) (Ill. Cir. Ct., 6th Cir., Nov. 12, 1999); 11TH CIR. CT. R. 111(I)(B); 12TH CIR. CT. R. 21.01(B); 14TH CIR. CT. R. 26(2)(B); 16TH CIR. CT. R. 12.01 (B); 17TH CIR. CT. R. 2.08, I B; and 19TH CIR. CT. R. 20.02(B). I am not aware of any such orders that have been issued.

These rules and the considerations surrounding them are important even for circuit courts that have not adopted a court-ordered mediation program. All circuits have the authority under Supreme Court of Illinois Rule 218(a)(7) to ask parties and counsel to consider the advisability of Alternate Dispute Resolution (“ADR”).<sup>21</sup> Thus, understanding court-ordered mediation programs will guide all circuits in determining whether and when to recommend cases for mediation.

### *What is Mediation?*

Before delving into an analysis of the court-ordered mediation rules, an introduction to mediation may be helpful. Mediation, as defined by one of the Illinois circuits, refers to a:

[C]onfidential process by which a neutral mediator, selected by the parties or appointed by the court, assists the litigants in reaching a mutually acceptable agreement. The role of the mediator is to assist in identifying the issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise, and finding points of agreement as well as legitimate points of disagreement.<sup>22</sup>

Although mediation styles and practices vary, a typical mediation begins with pre-mediation inquiries, scheduling, and education of the parties and counsel.<sup>23</sup> The mediator then introduces the parties to the process in a joint session of all attendees.<sup>24</sup> In a joint or private session, depending on the mediator’s practice, the mediator listens to the parties and counsel, and inquires into the issues of the case as well as the parties’ interests.<sup>25</sup> The mediator then, jointly or in private sessions, invites the parties and counsel to generate ideas for resolution, helps them assess the options, and finally, assists in closing the mediation, having reached agreement or impasse.<sup>26</sup> Mediators do not decide the issues in dispute, give legal advice, or substitute as independent legal counsel for the parties. Mediations are confidential under the circuit rules and the Illinois Mediation Act,<sup>27</sup> and thus are not transcribed or recorded, and witnesses rarely attend.

A typical mediation of an uncomplicated dispute would involve the

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21. ILL. SUP. CT. R. 218(a)(7) (2002).

22. ILL. 11TH CIR. CT. R. 111.

23. KIMBERLY K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 24 (1994).

24. *Id.*

25. *Id.* at 25.

26. *Id.*

27. *See* Illinois Uniform Mediation Act, 710 ILL. COMP. STAT. 35/4 (2002) (setting forth regulations for privilege, admissibility, and discovery of mediation communication); *infra* Part VI (discussing the necessity of confidentiality in the mediation process and noting that although most circuits have confidentiality guidelines, the IUMA is much more comprehensive).

mediator, the parties, and their attorneys. For those cases in which an insurance company will pay the settlement, a representative of the insurance company usually must attend.<sup>28</sup> In the Seventeenth Circuit pilot program, most mediations concluded in just one session, with the times ranging from fifty minutes to over four hours.<sup>29</sup> More complex matters may require several days or multiple sessions separated by additional preparation.

### *Court-Ordered Mediation*

Some critics suggest that courts should never order mediation because it should be a voluntary, consensual process.<sup>30</sup> Further, some judges fear that ordering mediation will either burden the party's right to a jury trial, or add costs and create delays in the wake of a possibly unsuccessful mediation.<sup>31</sup> However, the experience of mediation programs as well as the available empirical research suggests that court-ordered programs are effective.<sup>32</sup> When the courts do require mediation, courts must clearly explain to the parties that although attendance is required, settlement is not.<sup>33</sup> Further, the research suggests that "mandatory referral does not appear to adversely affect either litigant's perceptions of procedural justice or, according to most studies, settlement rates."<sup>34</sup>

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28. ILL. SUP. CT. R. 99(2)(ix)(2002). *See, e.g.*, ILL. 17TH CIR. CT. R. 2.08(III)(E)(3) (2003); ILL. 11TH CIR. CT. R. 111(3)(N) (2004); ILL. 16TH CIR. CT. R. 12.03(P) (2004) (detailing the rules regarding confidentiality as required by Supreme Court of Illinois Rule 99).

29. *See* ALFINI ET AL., *supra* note 5 (discussing the overall range in the durations of mediation sessions). In the Ohio studies, mediations typically ranged from one-half hour to three hours. *See* Wissler, *supra* note 4, at 651 (surveying the lengths of single initial mediation sessions).

30. *See* NIEMIC ET AL., *supra* note 6, at 51 (suggesting that critics of court-ordered mediation believe a judge should do no more than make parties aware of ADR options).

31. *Id.* Because the parties must pay the fees of the mediator, some courts believe that they may be imposing costs on the right to a jury trial. Such costs are not imposed for settlement conferences that are also court-ordered. Additional arguments against mandatory referrals include fear that mandatory referral risks forcing cases into a process that for one reason or another may be inappropriate. *Id.* Further, if the program is not of high quality, the referral to mediation may add to parties' anger, frustration, or hostility toward the judicial system. *Id.*

32. Effectiveness can be measured in any number of ways: whether mediation results in settlements, whether it saves time and costs, or whether it provides parties with a sense of justice. As noted above, the fact that mediation is court ordered does not hinder effectiveness. Being court ordered does not affect either settlement rates or the parties' sense of justice. McAdoo et al., *supra* note 4, at 8.

33. NATIONAL STANDARDS, *supra* note 6, at §§ 5.1, 11.2. Extreme care must be taken to ensure that parties who choose not to settle are not penalized in any way. *Id.* at § 11.5.

34. McAdoo et al., *supra* note 4, at 8. Rather, court-ordered mediation programs expose lawyers and their clients to mediation, and often result in increased voluntary use of mediation. *Id.* Procedural justice refers to the fairness of the procedures or processes that are used to arrive at outcomes. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got*

The rules identify only one purpose for court-ordered mediation; namely, to “provid[e] citizens . . . with an expeditious and expense-saving alternative to traditional litigation.”<sup>35</sup> However, parties choose mediation for reasons other than saving time and money, and these reasons warrant consideration by the court. Parties often seek resolutions that courts simply cannot provide, such as apologies<sup>36</sup> or assurance that the incident that led to the suit will not happen to someone else.<sup>37</sup> In other cases, the parties to the lawsuit need to preserve a degree of cooperation with each other in some way after completion of the lawsuit.<sup>38</sup> Further, mediation referrals also permit parties, rather than counsel, to participate and have a voice in the outcome of the case as well as a sense of control.<sup>39</sup>

Of the several processes for resolving disputes short of adjudication,<sup>40</sup>

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*to Do With It?*, 79 WASH. U.L.Q. 787, 817 (2001).

35. ILL. COOK COUNTY CIR. CT. R. 20.01 (2004); ILL. 11TH CIR. CT. R. 111 (2004); ILL. 17TH CIR. CT. R. 2.08 (2003). The goals of the Seventeenth Circuit’s pilot programs were as follows: reduction of time to disposition of cases in mediation and of those not in mediation; reduction of costs to the court and to parties and attorneys; reduction in time and effort of litigants and lawyers; enhanced satisfaction of litigants and lawyers with the mediation process and the overall quality of justice. See ALFINI ET AL., *supra* note 5, at 4 (setting forth the goals of pilot mediation programs); see also ILL. COOK COUNTY CIR. CT. R. 20.01; ILL. 17TH CIR. CT. R. 2.08 (proffering very similar goals).

36. In the Ohio studies, sixteen percent of the personal injury cases and sixty-four percent of the contract cases contained a non-monetary provision, typically an apology, promise to repair, or return of property. See Wissler, *supra* note 4, at 666–67 (outlining the relative incidence of non-monetary settlement provisions in various cases, attributing the low percentage of non-monetary settlement provisions in mediation program cases to the high percentage of personal injury cases mediated). See also NIEMIC ET AL., *supra* note 6, at 21–23 (explaining that the solutions parties are looking for vary based on the nature of the claim as well as the parties themselves); KOVACH, *supra* note 23, at 125–26, 135–36 (detailing the process of assessing possible alternative solutions).

37. See Wissler, *supra* note 4, at 667 (discussing the most common possible non-monetary settlement provisions).

38. See NIEMIC ET AL., *supra* note 6, at 21–23 (noting that the relationship between parties can influence the mediation process); KOVACH, *supra* note 23, at 75–76 (observing that the nature of mediation permits parties, who often have a deeper knowledge of the issue, to take a more active approach while their attorneys often play a more passive role than in the courtroom).

39. ALFINI ET AL., *supra* note 5, at ii. “Parties seem to be merely satisfied with having an informal, non-binding forum in which to express their side of the case.” *Id.* at 34. See Nancy Welsh, *Disputants’ Decision Control in Court-Connection Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 187, 191–92 (2002); KOVACH, *supra* note 23, at 75–76 (recognizing the importance of party participation).

When a court orders parties to mediation, the court should be concerned that the parties see the process as fair. Most research indicates that parties want participation and control in any dispute resolution process and find it in mediation. Robert A. Baruch Bush, “*What do We Need a Mediator For?*”: *Mediation’s “Value-Added” for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 18–19 (1996). See Wissler, *supra* note 4, at 661 (reviewing participants’ assessments of the mediation process and the mediation outcome).

40. Under Supreme Court of Illinois Rule 218, the courts have the authority to inquire as to

mediation represents the least risky and least costly method of dispute resolution. Because mediation is non-binding, a party dissatisfied with the options available for resolution may reject all options and may stop the mediation process. Although the parties incur some costs in terms of preparation time and the mediator's fees, preparation for binding forms of dispute resolution would cost more.<sup>41</sup>

### III. WHICH CASES TO REFER TO MEDIATION AND WHEN

Once the adoption of a program vests a court with the authority to order mediation, the court retains discretion over which cases to refer. Judges, on a case-by-case basis, must examine the particular case before them to determine whether to refer the matter to mediation, and if so, when to make the referral.

#### *Assignment of Cases*

The rules permit the court to order any civil matter to mediation unless the court, by administrative order or other ruling, provides otherwise.<sup>42</sup> Thus, judges have broad latitude in referring cases to mediation. The mediation literature suggests that there is no empirical support for categorizing the "best" type of cases to mediate.<sup>43</sup> Surprisingly, the level of acrimony between litigants does not argue against the likelihood of settlement through mediation.<sup>44</sup> Indeed, there is no typical case "for which mediation has detrimental effects."<sup>45</sup>

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the advisability of any form of ADR. In addition to arbitration and mediation, courts sometimes order early evaluation and summary jury trials. See KOVACH, *supra* note 23, at 7–18 (discussing the more common varieties of ADR devices used in the United States); NIEMIC ET AL., *supra* note 6, at 12–16 (outlining the use of ADR in the federal court system).

41. A few definitions may be helpful. "Binding" refers to the result of the process. Court decisions, administrative adjudications, and arbitration awards are binding in that the decision-maker has the authority to impose a decision on the parties who must comply with the decision. Mediation and several other processes are non-binding because the parties retain control over the outcome and are not subject to a decision by someone with authority to bind them. While "mandatory" refers to court rules, orders, or statutes that require parties to attend mediation, "voluntary" refers to the agreement of the parties to resolve the conflict through mediation.

42. Many of the circuits with mediation rules also have mandatory arbitration programs. The mandatory arbitration programs have jurisdictional limits on the types of cases sent to arbitration. While circuits vary, the statutory limit refers to cases seeking money damages of \$50,000 or less. 735 ILL. COMP. STAT. 5/2-1001A (2002). The rules governing the court-ordered mediation program often provide for referral of cases not already diverted to the mandatory arbitration. See, e.g., ILL. 11TH CIR. CT. R. 2.07(a) (setting forth the cases subject to mandatory arbitration).

43. McAdoo et al., *supra* note 4, at 9. The Seventeenth Circuit's evaluation suggested that personal injury cases were excellent candidates for mediation, but a Florida study indicated that contract cases are extremely amenable to mediation. ALFINI ET AL., *supra* note 5, at ii, 33, 36.

44. McAdoo et al., *supra* note 4, at 9.

45. *Id.*

This Illinois rule permitting courts to order mediation in *any* civil case is sound. Some cases, such as those involving a *pro se* party, a governmental body, or a class action, may need extra care to mediate.<sup>46</sup> However, courts should not automatically exclude categories of cases from mediation.<sup>47</sup> Because judges are the “gatekeepers”<sup>48</sup> to the court-ordered mediation process, and because they possess a great deal of responsibility in making referrals, they must exercise great discretion in doing so. Further, courts should ensure that their mediation rosters include mediators who possess familiarity with a wide range of cases.<sup>49</sup>

The rules also permit parties to move the court to dispense with mediation for any of several reasons: (1) the parties previously mediated the matter under court order; (2) the issue presents a question of law only; (3) the order violates an administrative order of the court; (4) the parties state that mediation will not facilitate a reasonable possibility of settlement; or (5) other good cause shown.<sup>50</sup>

In analyzing the dispensation rule, it is critical to recall its purpose. Cases will be sent to mediation on a case-by-case basis via order from the court. If the parties agree with the court order, there will be no need for seeking dispensation; however, if one or more of the parties disagree with the court’s order, this rule permits the party to move for dispensation from the court.<sup>51</sup>

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46. Unfortunately, mediation is not a cure-all for cases involving a *pro se* party. The mediator should not give legal advice and is not a substitute for the party receiving independent legal advice. Mediators should receive training in mediating cases where one or more of the parties is *pro se*.

47. See KOVACH, *supra* note 23, at 40–44 (explaining the multitude of factors for consideration when assessing the appropriateness of mediation in a given case); NIEMIC ET AL., *supra* note 6, at 20 (noting that the most common approach is case-by-case referrals).

48. See Yates, *supra* note 6 (observing that the role of judges as gatekeepers requires them to determine which cases are appropriate for mediation and to oversee the program as a whole).

49. Although the literature indicates that subject matter expertise is not a determining factor in reaching agreements, parties and counsel may want a mediator to be somewhat familiar with the area of law at issue. Thus, some mediators should be familiar with products liability cases, some with malpractice, some with commercial litigation, some with proprietary issues, etc. ALFINI ET AL., *supra* note 5, at 36.

50. Court-Annexed Mediation, Circuit Administrative Order 99-4 (III)(c) (Ill. Cir. Ct., 6th Cir., Nov. 12, 1999); ILL. 11TH CIR. CT. R. 111(2)(C) (2004); ILL. 12TH CIR. CT. R. 21.02(D) (2004); ILL. 14TH CIR. CT. R. 26(3)(C) (2004); ILL. 16TH CIR. CT. R. 12.02(C) (2004); ILL. 17TH CIR. CT. R. 2.08(II)(C) (2003); ILL. 19TH CIR. CT. R. 20.02(C) (2004); Court-Annexed Mediation for Civil Cases, Admin. Order No. 04-39 (III)(c)(1) (Ill. Cir. Ct., 20th Cir., Oct. 26, 2004). The First Circuit has no such rule.

51. Court-Annexed Mediation, Circuit Administrative Order 99-4 (III)(C) (Ill. Cir. Ct., 6th Cir., Nov. 12, 1999); ILL. 11TH CIR. CT. R. 111(2)(C); ILL. 12TH CIR. CT. R. 21.02(D); ILL. 14TH CIR. CT. R. 26(3)(C); ILL. 16TH CIR. CT. R. 12.02(C); ILL. 17TH CIR. CT. R. 2.08(II)(C); ILL. 19TH CIR. CT. R. 20.02(C); Court-Annexed Mediation for Civil Cases, Admin. Order No. 04-39 (III)(c)(1) (Ill. Cir. Ct., 20th Cir., Oct. 26, 2004). The First Circuit has no such rule.

The rules concerning dispensation are flawed and are probably unnecessary. First, the reasons listed in the rules as causes for dispensation from mediation have no basis in the research. Empirical studies show that there is no type of case categorically unsuitable for mediation.<sup>52</sup> Thus, any rule carving out categories of cases unsuited for mediation will be overinclusive.<sup>53</sup> Further, the very creation of a list of reasons for dispensation may invite parties to file motions seeking dispensation. Thus, this rule seems ill advised.

Nevertheless, mediation is not always appropriate. It may not be suitable “when there is a need for public sanctioning of conduct; when repetitive violations of statutes or regulations need to be dealt with collectively and uniformly, and when a party . . . [is] not able to negotiate effectively . . . [even] with assistance of counsel.”<sup>54</sup> Indeed, there may be other individual circumstances that argue for dispensation. Thus, courts do need the ability to excuse the parties from mediation under such occasional circumstances.

Even if the rule for dispensation is retained, however, the fourth ground, that “there is no reasonable basis for settlement,”<sup>55</sup> should be struck. This ground invites potentially premature or unfounded motions. Many cases have been resolved through mediation despite a firm insistence by the parties or their counsel prior to the mediation that only a trial could resolve the matter.<sup>56</sup> Thus, counsel’s argument that there is no reasonable basis for settlement may be premature or uninformed.

A court that orders mediation certainly has the authority to reconsider the order when informed of a circumstance arguing against mediation;

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52. See Wissler, *supra* note 4, at 696 (indicating that most studies found no difference in settlement rates between broad case categories); NIEMIC ET AL., *supra* note 6, at 20–23 (discussing how party and case characteristics influence the appropriateness of a case for mediation, and determining that no characteristic absolutely indicates that ADR should or should not be used); see also KOVACH, *supra* note 23, at 40–43 (detailing a list of case attributes in which research suggests that mediation is inappropriate, but noting that none of the research has evidenced the validity of these factors).

53. For example, some matters involving only legal issues may have been brought to clarify the law or create precedent, and therefore need adjudication. Other matters involving only questions of law, however, may have been brought as the only means of resolution apparent to the parties; these matters may involve underlying issues that could be resolved through mediation.

54. NATIONAL STANDARDS, *supra* note 6, at § 4.2 (listing as examples cases involving intentional dumping of toxic waste and recurring consumer fraud).

55. ILL. 12TH CIR. CT. R. 21.02(D) (2004).

56. See NIEMIC ET AL., *supra* note 6, at 50 (explaining that most professional mediators have encountered parties who insisted that they were unwilling to compromise at the outset, but still reached a settlement agreement). In the Seventeenth Circuit’s pilot program, over one-third of the attorneys in cases that mediated doubted the likelihood of settlement prior to the mediation, yet the matter ultimately settled during the mediation process. ALFINI ET AL., *supra* note 5, at ii.

thus rendering the rule on dispensation unnecessary.<sup>57</sup> Alternatively, the circuits should adopt the Cook County Rule that allows the court to exercise its discretion to “set aside or modify the order of referral upon good cause.”<sup>58</sup>

In addition to determining which cases to send to mediation, the court must also determine the proper time at which to implement mediation. Referrals to mediation should occur “at the earliest possible time that the parties are able to make an informed choice about their participation in mediation.”<sup>59</sup> In fact, early referrals to mediation yield more cases that settle, fewer motions that require decision, shorter case disposition time for those cases that do not settle,<sup>60</sup> and less costly discovery for those that do settle.<sup>61</sup> Early referrals may “catch the parties at a point where they are not firmly entrenched in their positions . . . and thus can be more flexible.”<sup>62</sup> Further, mediation should commence “at some reasonable point before discovery is completed, but only after dispositive or other critical motions have been decided.”<sup>63</sup>

### *Discovery*

[W]henver possible the parties are encouraged to limit discovery to the development of the information necessary to facilitate a meaningful mediation conference. Upon entry of an Order of Referral to court-ordered mediation, discovery is deferred. The duty to supplement existing discovery continues throughout the mediation process. In the event the case is not resolved during the mediation process, upon transfer back to the trial judge, discovery may recommence.<sup>64</sup>

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57. The court can rely on its inherent authority to excuse those cases that need excusing.

58. ILL. COOK COUNTY CIR. CT. R. 20.02(b) (2004). Occasionally, cases will arise in which a party's resistance to mediation is so great as to render mediation in those circumstances futile, and even harmful. NATIONAL STANDARDS, *supra* note 6, at § 5.2 cmt. If the court sends a case to mediation that should not be there, the court must respect the decision of the mediator to refer the case back to the trial docket. *Id.*

59. *Id.* at § 4.4.

60. See McAdoo et al., *supra* note 4, at 8–9 (discussing the benefits of early referral to mediation); see also ALFINI ET AL., *supra* note 5, at 33 (finding that recently filed cases are the most likely to settle).

61. NIEMIC ET AL., *supra* note 6, at 15.

62. *Id.* But see McAdoo et al., *supra* note 4, at 8–9 (suggesting that “[l]ocal litigation customs and case management practices affect lawyers' comfort with the early use of mediation, and the chance of settlement is reduced somewhat if lawyers lack critical information about their cases”).

63. McAdoo et al., *supra* note 4, at 8–9.

64. ILL. 18TH CIR. CT. R. 14.04(b) (2004). For further illustrations of rules allowing for discovery to continue during mediation, see ILL. COOK COUNTY CIR. CT. R. 20.06 (2004); ILL. 1ST CIR. CT. COURT-ORDERED MEDIATION R. B(8) (2004); Court-Annexed Mediation, Circuit Administrative Order 99-4 (IV)(M) (Ill. Cir. Ct., 6th Cir., Nov. 12, 1999); ILL. 11TH CIR. CT. R.

The Illinois circuit court rules address the impact of mediation on discovery. The rules encourage parties to defer further discovery and provide assurance that, should the case return to the trial docket, the parties may commence further discovery. Presumably, the drafters intended to encourage parties to conduct only that pre-mediation discovery necessary to make the mediation meaningful, and to impose a continuing duty to supplement discovery. Assuming that such a policy is the intent of the rule, the rule(s) should be more clearly drafted.

The rules raise the question of what discovery is necessary to meaningful mediation.<sup>65</sup> In the Ohio studies for example, one-fourth of the non-settling cases did not settle during mediation because of missing information or incomplete discovery.<sup>66</sup> A commonly accepted rule of thumb suggests that the parties should conduct enough discovery during mediation so that both sides can properly evaluate the case.<sup>67</sup> Counsel familiar with the case and the mediation process can assist the court in determining the best time for referral to mediation.<sup>68</sup>

Despite appropriate timing for the referral, the parties may realize the need for additional discovery after the mediation has commenced.<sup>69</sup> Competent and experienced mediators can help the parties develop a plan for expeditiously completing the needed discovery without court intervention.<sup>70</sup> However, should the parties disagree on the requisite discovery, the court should entertain the possibility of hearing a motion, even on short notice, to compel additional limited discovery.<sup>71</sup>

Despite the suggestion that most discovery should be deferred until after mediation, many circuits permit or require discovery to continue throughout the mediation process.<sup>72</sup> There are strong arguments for and

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111(3)(M) (2004); ILL. 12TH CIR. CT. R. 21.03(M) (2004); ILL. 14TH CIR. CT. R. 26(4)(L) (2004); ILL. 16TH CIR. CT. R. 12.03(O) (2004); ILL. 17TH CIR. CT. R. 2.08(III)(M) (2003); ILL. 19TH CIR. CT. R. 20.03(I) (2004).

65. See generally NIEMIC ET AL., *supra* note 6, at 17–18 (evaluating the potential value of conducting discovery during mediation, including prompting parties to assess the soundness of their positions, determining a fair settlement value, and allowing parties to resume litigation without delay if mediation fails).

66. See Wissler, *supra* note 4, at 666 (discussing the reasons for non-settlement cited most frequently by mediators).

67. ALFINI ET AL., *supra* note 5, at 19. In most cases, discovery of experts and some other witnesses is probably unnecessary prior to mediation.

68. NATIONAL STANDARDS, *supra* note 6, at § 4.5.

69. NIEMIC ET AL., *supra* note 6, at 117.

70. *Id.*

71. The mediation can be suspended until the motion is resolved and the discovery, if any, is completed.

72. Presumably, the discovery referred to in such rules is the typical pre-trial discovery, not discovery needed for mediation. See ILL. 18TH CIR. CT. R. 14.04(a)–(b) (encouraging parties to

against continuing discovery through the mediation period. The continuation of such discovery ensures that the case moves toward trial without undue delay. Continuing discovery also permits the parties to timely file motions such as summary judgment motions that may depend on discovery. On the other hand, continuing discovery distracts the parties from mediation, especially if the discovery is contested.<sup>73</sup> Further, permitting discovery to continue defeats one of the aims of mediation—avoiding costly discovery.<sup>74</sup> The better approach defers all discovery except that needed to evaluate the case and to rely on the deadlines for completing mediation as a safeguard against undue delay.

Regardless of which decision the court makes, the decision of whether to continue discovery must be clear. Without such clarity, some parties may wrongly assume that the discovery deadline is suspended and may find themselves in non-compliance with court docket management or pre-trial orders.<sup>75</sup>

#### *Other Timing Issues*

None of the circuit court rules have provisions for deciding dispositive motions prior to referring a case to mediation. While such a rule may not be needed, most of the research suggests that the court should make such rulings prior to mediation.<sup>76</sup>

Most of the circuit rules permit parties to seek interim relief at any time.<sup>77</sup> Interim relief refers to motions directed to the court for relief

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limit discovery, if possible, to that needed for effective mediation, and not stating that discovery shall proceed as in all other actions); *see* NIEMIC ET AL., *supra* note 6, at 17–18 (discussing arguments favoring and disfavoring such an approach).

73. *See* NIEMIC ET AL., *supra* note 6, at 16 (setting forth reasons for placing discovery and pretrial periods on hold until ADR has completed).

74. *See* ALFINI, ET AL., *supra* note 5, at 4 (establishing the goals of the Seventeenth Circuit's pilot mediation program, including avoidance of costs).

75. Supreme Court of Illinois Rule 218(a)(5)(iii) requires that the limitations on discovery, including deadlines for completion, be set at the initial case management conference. ILL. SUP. CT. R. 218 (a)(5)(iii). In this regard, the Cook County Referral Order provides a good example of making the choice clear on a case-by-case basis. ILL. COOK COUNTY CIR. CT. COURT-ANNEXED MEDIATION REFERRAL ORDER FORM 2.

76. NIEMIC ET AL., *supra* note 6, at 18–19 (discussing the possible approaches a court may follow when faced with a dispositive motion, weighing the benefits of referring the case to mediation and continuing deliberation on the motion against referring the case to mediation and staying deliberation on the motion until completion of mediation). *See also* Wissler, *supra* note 4, at 677–78 (noting that status of discovery did not affect the likelihood of settlement, but that pending dispositive motions made parties less likely to settle).

77. *See, e.g.*, Court-Annexed Mediation, Circuit Administrative Order 99-4 (IV)(D) (Ill. Cir. Ct., 6th Cir., Nov. 12, 1999) (“A party may apply to the court for interim or emergency relief at any time. Mediation shall continue while such a motion is pending absent a contrary order of the court or a decision of the mediator to adjourn pending disposition of the motion.”); *see also* ILL.

such as preliminary injunctions and protective orders. Just as dispositive motions are best addressed prior to mediation, it is likely that motions seeking emergency or other interim relief are best addressed prior to the commencement of mediation. However, one can imagine situations in which the need for interim relief arises during mediation. In some instances, the parties, with the help of the mediator, may be able to resolve the related issue, but in other cases, parties may need a court ruling.<sup>78</sup> Because of the range of possible emergencies, this rule prudently permits the court to address such an emergency when it occurs.

Most of the circuit court rules provide deadlines for completing mediation, generally seven to eight weeks after the first mediation conference, and for reporting to the court the results of the mediation.<sup>79</sup> Nevertheless, some cases will not settle in mediation. Rather than allowing such cases to drag on in unsuccessful mediation attempts, the court should move these cases toward later settlement or trial.<sup>80</sup>

#### IV. WHAT OCCURS DURING THE MEDIATION?

The mediation commences upon a referral order from the judge. The mediator will control the mediation process according to his or her mediation style. Finally, the successful mediation culminates in an agreement between the parties.

##### *Referral Orders*

A referral order is an order signed by a judge, assigning a particular matter to mediation and addressing other issues. Several circuits have model referral orders.<sup>81</sup> The primary value of such orders is the court's ability to modify the rules to fit the specific needs of the case or to

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11TH CIR. CT. R. 111(3)(D) (2004); ILL. 12TH CIR. CT. R. 21.03(D) (2004); ILL. 14TH CIR. CT. R. 26(4)(D) (2004); ILL. 16TH CIR. CT. R. 12.03(D) (2004); ILL. 17TH CIR. CT. R. 2.08 (III)(D) (2003); ILL. 19TH CIR. CT. R. 20.03(d) (2004) (allowing parties to seek interim or emergency relief at any time).

78. See NIEMIC ET AL., *supra* note 6, at 18 (addressing the concern of many parties that ADR will only have potential if they know how a court will rule on a certain issue, and suggesting that the court can alleviate such concerns by ruling on those particular issues and leave the remaining issues to be determined through ADR).

79. See, e.g., ILL. COOK COUNTY CIR. CT. R. 20.03(c) (2004) (requiring that the first mediation session be held within eight weeks of the referral order and that mediation be completed within seven weeks of the first mediation session unless extended by order of the court or stipulation of the parties).

80. See ALFINI ET AL., *supra* note 5, at 20 (suggesting that most cases that do not settle in mediation will settle prior to trial simply because ninety percent of filed cases never reach trial).

81. ILL. COOK COUNTY CIR. CT. COURT-ANNEXED MEDIATION REFERRAL ORDER FORM 2.

address issues not in the rules. Courts should avoid the tendency to believe that the rules cover every aspect of the program, requiring no further orders. Rather, for mediation to succeed, the court must engage mediators, parties, and counsel in designing a mediation process specific to the needs of the particular case, or authorize the mediator to do so.

### *The Process*

The mediator shall at all times be in control of the mediation and the procedures to be followed in the mediation.<sup>82</sup>

The rules authorize the mediator to control the mediation process, but assure attorneys that they may communicate privately with their clients during the mediation.<sup>83</sup> The mediator may adjourn and reconvene the mediation sessions as needed.<sup>84</sup> The mediator is also authorized to terminate the mediation because an impasse has been reached or because one party is unable or unwilling to participate meaningfully in the mediation.<sup>85</sup> The rules wisely allow the mediator great latitude concerning the mediation session itself,<sup>86</sup> permitting the mediator to adapt it to the needs of the case and the parties.

In practice, mediators take numerous approaches to mediating. Some use only joint sessions, in which the parties discuss ideas together, while others use primarily private sessions, or caucuses, meeting with the plaintiff and defendant separately.<sup>87</sup> Many mediators use both approaches. Some employ a facilitative style, which emphasizes helping the parties communicate; and others prefer an evaluative style in which mediators offer their views on the merits or value of the case.<sup>88</sup>

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82. ILL. 16TH CIR. CT. R. 12.03(H) (2004).

83. ILL. COOK COUNTY CIR. CT. R. 20.04(c) (2004); Court-Annexed Mediation, Circuit Administrative Order 99-4 (IV)(D) (Ill. Cir. Ct., 6th Cir., Nov. 12, 1999); ILL. 11TH CIR. CT. R. 111(3)(G) (2004); ILL. 12TH CIR. CT. R. 21.03(H) (2004); ILL. 14TH CIR. CT. R. 26(4)(G) (2004); ILL. 16TH CIR. CT. R. 12.03(G) (2004); ILL. 17TH CIR. CT. R. 2.08(III)(G) (2003); ILL. 19TH CIR. CT. R. 20.03(g) (2004).

84. ILL. COOK COUNTY CIR. CT. R. 20.04(d); Court-Annexed Mediation, Circuit Administrative Order 99-4 (IV)(D) (Ill. Cir. Ct., 6th Cir., Nov. 12, 1999); ILL. 11TH CIR. CT. R. 111(3)(F); ILL. 12TH CIR. CT. R. 21.03(F); ILL. 14TH CIR. CT. R. 26(4)(F); ILL. 16TH CIR. CT. R. 12.03(F); ILL. 17TH CIR. CT. R. 2.08(III)(F); ILL. 19TH CIR. CT. R. 20.03(f).

85. ILL. 1ST CIR. CT. COURT-ORDERED MEDIATION R. (B)(9); ILL. 14TH CIR. CT. R. 26(11); ILL. 16TH CIR. CT. R. 12.03(G); ILL. 18TH CIR. CT. R. 14.10(a); ILL. 19TH CIR. CT. R. 20.03(i).

86. ILL. 16TH CIR. CT. R. 12.03(I) ("The mediator may meet and consult privately with either party and his/her representative during the mediation session.").

87. See KOVACH, *supra* note 23, at 127 (describing how a private caucus can be helpful in allowing parties to speak with the sort of candor that they would not in the presence of their party-opponent).

88. Some scholars question whether evaluative mediation is ever appropriate. Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997).

Some evidence suggests that mediators begin with a facilitative approach, utilizing more evaluative methods as the mediation progresses and the gap between the parties narrows.<sup>89</sup>

Empirical research indicates that mediators should use a variety of mediation styles.<sup>90</sup> When mediators use a facilitative style that encourages parties and counsel to participate, the parties perceive the mediation process as fair.<sup>91</sup> Where mediators shun evaluations and remain silent about their views of the case, fewer cases settle.<sup>92</sup> Given the variety of both mediators and the needs of the parties, the circuit rules correctly provide maximum flexibility to permit the parties and the mediator to choose the appropriate mediation style.<sup>93</sup>

Critically, the rules should preclude the mediator from pressuring the parties to settle. Many of the rules acknowledge that any agreement reached must result from the parties' assent and not the mediator's decision. Where the court compels the parties to mediate, as under these rules, the mediator must not exert undue pressure.<sup>94</sup> The pressure to settle not only defeats the goal of mediation, to reach a mutually acceptable agreement,<sup>95</sup> but it may lead to broken settlements, thus

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For more on the facilitative-evaluative distinction, see Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) (providing a clear distinction of the differences between facilitative and evaluative mediation strategies).

89. Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Style in the Course of a Case*, 2000 J. DISP. RESOL. 41 (2000).

90. See McAdoo et al., *supra* note 4, at 9 (asserting that an evaluative style promotes settlement and a facilitative style heightens a litigant's perception that mediation provides justice).

91. See *id.* at 10 (examining factors leading to case settlement and also factors leading to party perceptions of fairness, which is especially important when the court orders the parties to use mediation).

92. See *id.* (noting that parties prefer mediators who help to evaluate the case, but do not push a particular settlement); see also ALFINI ET AL., *supra* note 5, at 29–32, 34 (assessing perceptions of the quality of mediation conferences and recommending that the mediator encourage settlement, play an active role as agent of reality, and promote communications between the parties).

93. The Cook County mediator application form allows the mediator to describe his or her style, thereby assisting the parties in selecting a mediator. See ILL. COOK COUNTY CIR. CT. MEDIATOR APPLICATION & SELF-CERTIFICATION OF QUALIFICATIONS FORM 1 (requiring the potential mediator to provide basic data listing of experience and qualifications, information on mediation style, and an affirmation to uphold the Circuit Court of Cook County Rules for Court-Annexed major civil case mediation). The form is available to the public. See also *infra* Part VII (stressing the preference for mediators selected by the parties).

94. See NATIONAL STANDARDS, *supra* note 6, at § 8.1(f) (advocating creation of ethical standards for mediators that promote honesty, integrity, and impartiality in mediation).

95. See ILL. 11TH CIR. CT. R. 111 (stating that the goal of mediation is to reach a mutually acceptable agreement but refraining from pressuring parties into settlement if one cannot be reached).

defeating any cost- or time-saving benefits.

Further, courts themselves must avoid creating undue pressure on the parties to settle. The educational materials produced regarding the mediation program should stress that reaching an agreement is in the hands of the parties, not the mediator. Courts must be careful not to suggest or advertise settlement rates, lest they create unrealistic expectations of settlement and subtle pressure to settle. Finally, the post-mediation practices of the court should not punish those who did not settle in mediation.<sup>96</sup>

### *Agreements Reached in Mediation*

Once the parties come to an agreement through the mediation process, the court must be empowered to enforce the agreement. Mediation may lead to no agreement, partial agreement, or total agreement. Where the parties reach agreement, most circuits impose sanctions on parties who fail to perform under the agreement.<sup>97</sup> This rule seems grounded in the notion that an agreement reached in mediation should be treated as a contract.<sup>98</sup> Generally, Illinois circuits have avoided the practice of at least one state of imposing additional requirements before permitting the enforcement of the mediation agreement.<sup>99</sup>

The practice of mediators drafting settlement agreements raises several potential problems. First, there is the potential for an unauthorized practice of law issue if the mediator is not an attorney.<sup>100</sup>

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96. NATIONAL STANDARDS, *supra* note 6, at § 11.5.

97. ILL. 18TH CIR. R. 14.10(g) ("In the event of any breach or failure to perform under the 'agreement,' the court upon motion may impose sanctions, including but not limited to costs, attorneys fees or entry of judgment on the agreement."). For further examples of rules authorizing the court to, upon motion, impose sanctions, including costs, attorney fees or other appropriate remedies for breach of a mediation or agreement, see ILL. COOK COUNTY CIR. CT. R. 20.05(e); ILL. 1ST CIR. CT. COURT-ORDERED MEDIATION R. (B)(10); Court-Annexed Mediation, Circuit Administrative Order 99-4 (IV)(L) (Ill. Cir. Ct., 6th Cir., Nov. 12, 1999); ILL. 11TH CIR. CT. R. 111(3)(L); ILL. 12TH CIR. CT. R. 21.03(L); ILL. 14TH CIR. CT. R. 26(4)(K); ILL. 16TH CIR. CT. R. 12.03(N); ILL. 17TH CIR. CT. R. 2.08(III)(L); ILL. 19TH CIR. CT. R. 20.03(k).

98. *See, e.g.*, ILL. COOK COUNTY CIR. CT. R. 20.05(b) (providing that if an agreement is reached in mediation, it is to be reduced to writing and signed by the parties and counsel at the conclusion of the mediation process). Further, the purpose of the rule is to have the agreement memorialized before there is a dispute as to the terms as well as to prevent the parties from rescinding their agreement. The rule is silent, however, on who is to draft the agreement.

99. Not all jurisdictions recognize this hazard. *See* Minnesota Civil Mediation Act, MINN. STAT. ANN. § 572.31 et. seq. (West 2000) (requiring the agreement to be in writing and contain cautionary language as to conditions of enforceability).

100. While the author believes that a non-lawyer mediator can often appropriately draft the terms of the agreement like minutes of a meeting, some states have challenged mediators in this regard. *See* ABA Section of Dispute Resolution, *Resolution on Mediation and the Unauthorized*

If the mediator is an attorney, the attorney-mediator may not represent conflicting parties by drafting an agreement for adverse parties.<sup>101</sup>

Second, the mediator may be called to testify in a later proceeding to verify that the parties reached an agreement, or to help interpret its terms. If faced with a dispute over the agreement, a court may be tempted to call the only disinterested witness, the mediator. In general, mediators strongly believe that they should not be called to testify in such disputes. The mediator community believes that testifying may compromise their impartiality, or the perception thereof.<sup>102</sup> Further, mediators fear that future parties may resist fully disclosing their interests and concerns in mediation, fearful that the mediator may testify against them at a later date.<sup>103</sup>

The better practice is for parties' counsel, during the mediation, to draft a memorandum of the agreement, capturing the key points of agreement. If a dispute as to wording arises, the mediator can mediate the dispute, but may not draft the language. The mediator should not sign the memorandum. Later, the parties' counsel can complete any additional documentation as needed.

While counsel should prepare the agreement, the mediator should prepare the report made pursuant to the IUMA, conveying to the court that the mediation took place, whether a settlement resulted, and attendance.<sup>104</sup> The IUMA prohibits mediators from making any other report, assessment, evaluation, recommendation, finding, or taking any similar action.<sup>105</sup> Although not completely consistent with the IUMA, the mediator should report any statistical data needed by the court, such

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*Practice of Law*, Feb. 2, 2002, available at <http://www.abanet.org/dispute/resolution2002.pdf> [hereinafter "ABA Disp. Resol."].

101. See MODEL RULES OF PROF'L CONDUCT R. 2.4 (2002) (explaining that a lawyer-mediator must clearly explain that he does not represent both parties). While the author does not believe that drafting an agreement under these circumstances violates the Model Rules, some may make that accusation. See ABA Disp. Resol., *supra* note 100, at c.1 (citing NEW JERSEY SUP. CT. ADVISORY COMMITTEE ON PROFESSIONAL ETHICS, Opinion No. 676 (1994), which held that when a lawyer serves as a third-party neutral, he is practicing law and subject to the rules of conduct).

102. See UNIF. MEDIATION ACT prefatory n. 1, 7A pt. II U.L.A. 96-97 (West, Supp. 2004) (explaining the need to protect mediation statements in order to promote candor among participants and public confidence in the mediation process). See generally *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (holding that in deciding whether to compel a mediator to testify, the court should consider if such testimony would undermine the value of mediation).

103. UNIF. MEDIATION ACT at prefatory n. 1, 7A pt. II U.L.A. 96-97.

104. 710 ILL. COMP. STAT. 35/7(b) (West, Supp. 2004).

105. 710 ILL. COMP. STAT. 35/7(a).

as the duration of the mediation.<sup>106</sup> Circuit rules that involve the mediator in reporting more than that described here should be voided.<sup>107</sup> All rules should clearly state that counsel or the parties must draft the agreement and that the mediator neither drafts nor signs the agreement.<sup>108</sup>

## V. ROLES OF THE PARTIES AND COUNSEL DURING MEDIATION

The rules ascribe three obligations to mediation participants: pre-mediation submission, attendance, and good faith participation.

### *Pre-Mediation Submission*

At least ten (10) days before the session, each side shall present to the mediator a brief, written summary of the case containing a list of issues as to each party . . . the facts of the occurrence, opinions on liability, all damage and injury information, and any offers or demands regarding settlement. Names of all participants and their relationship to the parties in the mediation shall be disclosed to the mediator in the summary prior to the session.<sup>109</sup>

The more that lawyers prepare their clients for mediation, the greater the likelihood of settlement.<sup>110</sup> The pre-mediation submission adds value to the mediation process because it requires counsel and the parties to expend at least some effort preparing the case in advance of mediation.<sup>111</sup>

In some cases, mediators may not want a submission, and in other cases, may prefer a pre-mediation submission that includes items not listed in the rule, such as the most recent pleadings, documents at issue in the case, or background information concerning technical issues.<sup>112</sup>

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106. See COOK COUNTY MEDIATOR REPORT, FORM 6 (reporting statistics such as case type, how a mediator was selected, whether or not a settlement was reached, the duration of the mediation, and the number of participants, both counsel, parties and non-parties, to the Supreme Court).

107. See, e.g., ILL. 11TH CIR. CT. R. 111(3)(K) (2004). For further information on how a mediator is involved in reporting on which cases remain after a partial settlement is reached, see ILL. 1ST CIR. CT. COURT-ORDERED MEDIATION R. (B)(9)(e) (2004); ILL. 14TH CIR. CT. R. 26(9)(a) (2004); ILL. 18TH CIR. CT. R. 14.10(e) (2004). This ancillary reporting task is better left to counsel.

108. Where the parties are pro se, drafting the agreement may present challenges to the mediator. This is another reason why the mediator training must address issues involving pro se parties. See *supra* note 46 (discussing the unique concerns of mediation with pro se parties).

109. ILL. COOK COUNTY CIR. CT. R. 20.03(c) (2004).

110. McAdoo et al., *supra* note 4, at 10; Wissler, *supra* note 4, at 676.

111. KOVACH, *supra* note 23, at 75 (noting that by requiring each party's representative to prepare a written statement, the case will at least have been reviewed prior to mediation).

112. See NIEMIC ET AL., *supra* note 6, at 107 n.267 (listing items sometimes included in pre-

Therefore, the rules should be re-drafted to permit the mediator to determine whether to require a pre-mediation submission, and if so, its contents. Alternatively, the rule should permit the court in the referral order to adjust the requirement of the pre-trial submission.<sup>113</sup>

### *Attendance*

[U]nless stipulated by the parties, or by order of the court, a party is deemed to appear at a mediation conference if the following persons are physically present: . . . [t]he party or its representative having full authority to settle without further consultation; and . . . [t]he party's counsel of record, if any; and . . . [a] representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to negotiate and recommend settlements to the limits or the policy of the most recent demand, whichever is lower without further consultation.<sup>114</sup>

Mediation has little chance of success without the attendance of those individuals necessary to reach a resolution. The attendance rules prevent the frustration that may occur when the necessary parties do not attend by defining party attendance and the level of authority that those attending must have.

Parties must attend a mediation session in person or through their counsel.<sup>115</sup> Some circuits require that the plaintiff, but not the defendant, appear in person.<sup>116</sup> Those who attend a mediation must have the full authority to settle without further consultation,<sup>117</sup> and those who

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mediation submissions). Mediators use the pre-mediation submission to learn the basic facts and issues, become familiar with special terminology, and to identify the parties needed for resolution. KOVACH, *supra* note 23, at 74.

113. By requiring that the parties, in their pre-mediation submission, provide names of those participating in mediation, the circuit rules may cause some confusion. The rule, as presently written, could be interpreted to convey to counsel the authority to determine who attends the mediation session, when in actuality, the rule defines the attendance requirement. Counsel, in the submission, simply provides the name of the party representative who shall fulfill the attendance requirement. Determination of who attends mediation should remain in the hands of the mediator, not counsel or the parties. Moreover, the rule should be clarified to prevent misinterpretation.

114. ILL. 11TH CIR. CT. R. 111(3)(E) (2004).

115. ILL. COOK COUNTY CIR. CT. R. 20.04(a) (2004); ILL. 1ST CIR. CT. COURT-ORDERED MEDIATION R. (B)(5)(a) (2004); Court-Annexed Mediation, Circuit Administrative Order 99-4 (IV)(E) (Ill. Cir. Ct., 6th Cir., Nov. 12, 1999); ILL. 11TH CIR. CT. R. 111(3)(E) (2004); ILL. 12TH CIR. CT. R. 21.03(B) (2004); ILL. 14TH CIR. CT. R. 26(4)(E) (2004); ILL. 16TH CIR. CT. R. 12.03(E) (2004); ILL. 17TH CIR. CT. R. 2.08(III)(E) (2003); ILL. 18TH CIR. CT. R. 14.08(a) (2004); ILL. 19TH CIR. CT. R. 20.03(e) (2004).

116. ILL. 18TH CIR. CT. R. 14.08(a). Additionally, where a party is insured, a representative of the insurance carrier must also attend. *See, e.g.*, ILL. 1ST CIR. CT. COURT-ORDERED MEDIATION R. (B)(5)(a)(iii).

117. ILL. COOK COUNTY CIR. CT. R. 20.04(a); ILL. 1ST CIR. CT. COURT-ORDERED

fail to appear are subject to sanctions from the court.<sup>118</sup>

Additionally, a non-monetary settlement becomes impossible without the attendance of those with authority to make such non-monetary offers.<sup>119</sup> Most circuit rules permit the court to compel the attendance of all persons necessary for resolution.<sup>120</sup> Thus, a court may inquire as to the type of relief sought to determine whether additional parties need to appear at the mediation.

These rules, as well as the IUMA, ensure the right of counsel to attend the mediation.<sup>121</sup> Although some mediators dispute the value of attorneys attending mediation, the current consensus, particularly in civil cases, supports the notion that attorneys play an integral role in the process.<sup>122</sup> Especially where courts mandate mediation, the presence of attorneys can help reassure their clients that while attendance is mandatory, resolution is not.

The IUMA provides that an attorney or “other individual,” may accompany a party and may participate in the mediation.<sup>123</sup> The drafters of the IUMA were concerned that a less powerful party may choose to

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MEDIATION R. (B)(5)(a); Court-Annexed Mediation, Circuit Administrative Order 99-4(IV)(E) (Ill. Cir. Ct., 6th Cir., Nov. 12, 1999); ILL. 11TH CIR. CT. R. 111(3)(E); ILL. 12TH CIR. CT. R. 21.03(E); ILL. 14TH CIR. CT. R. 26(4)(E); ILL. 16TH CIR. CT. R. 12.03(E); ILL. 17TH CIR. CT. R. 2.08(III)(E); ILL. 18TH CIR. CT. R. 14.08(a); ILL. 19TH CIR. CT. R. 20.03(e); ILL. 20TH CIR. CT. R. IV(F). Similarly, the insurance representative must have full authority to negotiate and recommend settlements to the limits of the policy or the most recent demand, whichever is lower, without further consultation. ILL. 18TH CIR. CT. R. 14.08(a)(iii).

118. See ILL. 18TH CIR. CT. R. 14.08(b) (including as sanctions the award of mediation costs and reasonable attorneys’ fees as well as other costs). Some circuits require that all persons necessary to facilitate settlement must appear, providing for sanctions against those who fail to appear. ILL. 11TH CIR. CT. R. 111(3)(E).

119. Non-monetary offers include an apology, a letter of recommendation, or an agreement to repair. Wissler, *supra* note 4, at 666. See *supra* Part II (positing that a major advantage of mediation is the possibility of non-monetary settlements).

120. See, e.g., ILL. 18TH CIR. CT. R. 14.08(a) (requiring the attendance of all persons necessary to facilitate settlement).

121. ILL. 11TH CIR. CT. R. 111(3)(e). See also 710 ILL. COMP. STAT. 35/10 (West Supp. 2004) (providing the right for an attorney to attend mediation); NATIONAL STANDARDS, *supra* note 6, at § 10.2 (arguing that parties, after consulting with their attorneys, should have the right to decide if attorneys will be present).

122. Some mediators feared that lawyers attending mediation would “spoil” the mediation process by not permitting their clients to speak. Indeed, some courts have rules prohibiting attorneys from attending mediations, especially family mediations. However, even in family cases, that fear has subsided as attorneys have learned the value of client participation. See Craig McEwen & Nancy Rogers, *Bring the Lawyers Into Divorce Mediation*, DISP. RESOL. MAG., 1994, 8–10; see also UNIF. MEDIATION ACT § 10 cmt. 7A pt. II U.L.A. 30 (West Supp. 2004) (explaining that due to the capacity of attorneys to help level power imbalances and the absence of other procedures to do the same in the mediation process, the drafters elected to let parties and not mediators decide whether or not to bring counsel).

123. 710 ILL. COMP. STAT. 35/10 (West Supp. 2004).

bring someone for assistance.<sup>124</sup> While the court rules not only permit, but also require the attendance of counsel, the rules are silent about other individuals chosen by the party. Regardless, courts and mediators need to comply with the IUMA by welcoming those accompanying parties to mediation.

The circuit rule governing attendance requires physical presence at the mediation rather than appearance by telephone; however, there are instances where some parties will need to appear by phone.<sup>125</sup> As videoconferencing becomes more accessible, some parties may appear in that fashion; however, as yet, the rule does not offer such an alternative. The rule should be amended to permit mediators to use their discretion to permit videoconferencing or telephonic appearances in those circumstances where the mediators determine that such arrangements will permit a mediation that would not otherwise be possible and will not unduly hinder the mediation process.

Some circuits recognize that public entities, even when party to a lawsuit, are required by law to deliberate and act in ways that offer challenges to the mediation process.<sup>126</sup> Typically, public entities must act in open meetings, with a quorum, and in accordance with certain procedures; on the other hand, mediation prizes confidentiality. To balance these countervailing interests, a public entity may appear at mediation through a representative. The representative has full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body. However, the final decision must rest with the public body, acting publicly and in accord with governing law.

Other situations concerning attendance and participation may require attention from the court. For example, an insurance adjustor, government official, or other party may be greatly inconvenienced by

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124. UNIF. MEDIATION ACT § 10 cmt. 7A pt. II U.L.A. 30. The Uniform Mediation Act drafters were concerned about the imbalance of power that could result from a *pro se* party on one side, facing a party with a lawyer on the other side. The drafters wanted to ensure that the unrepresented party could bring someone, who is not an attorney, to support him or her.

125. Most mediators can relate stories where a key player appeared by telephone and was an inadequate substitute for a physical appearance in the mediation room. However, in person, the participants can better “take the temperature” of the other participants and better appreciate the dynamics of the process. Nevertheless, there are times when only a telephone appearance may be possible. See Suzanne J. Schmitz, *Telephone Mediation: Tips for Doing them Well*, DISP. RESOL. MAG., Summer 2003, at 32 (discussing tips for how to participate in a telephone mediation).

126. ILL. 12TH CIR. CT. R. 21.03(E) (2004); ILL. 17TH CIR. CT. R. 2.08(III)(E) (2003). However, this is not the rule across all the circuits. See, e.g., ILL. 18TH CIR. CT. R. 14.08 (2004); ILL. 19TH CIR. CT. R. 20.03(e) (2004).

the need to personally appear.<sup>127</sup> A court may wish to excuse a defendant in an automobile accident, where the insurance company will attend.<sup>128</sup> Alternatively, the court may excuse the defendant, but require someone to appear for her.<sup>129</sup> The court must address these issues through referral orders or the rules must authorize the mediator to address attendance issues in a pre-mediation letter to the parties.

While these rules detail the authority that a party must have, they do not specify which counsel must attend. To encourage successful mediation, the rules should provide that counsel who attends should either be lead counsel, or at least be familiar with the case.<sup>130</sup>

These circuit rules provide the courts with sufficient authority to deal with various special circumstances, assuming the court's willingness to

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127. Generally, telephone participation is an inadequate substitute for in-person participation. Yet, in some situations, the mediation will not be held if the party is required to attend in person. See Schmitz, *supra* note 125, at 32 (discussing tips for handling the telephone mediation process); NIEMIC ET AL., *supra* note 6, at 58–61 (discussing creative ideas for handling cases involving government bodies and larger entities such as obtaining assurances from an attorney that a representative with full settlement authority will be present by phone).

128. See NATIONAL STANDARDS, *supra* note 6, at § 5.1 (advocating mandatory attendance only where it is likely to serve interests of the parties, the justice system, and the public).

129. Some of the model referral orders adopted by these circuits encourage the parties to secure the attendance of lien holders and others whose authority may be needed before the agreement can be reached. ILL. 19TH CIR. CT. ORDER OF REFERRAL TO COURT-ANNEXED MEDIATION para. 1(a). See ILL. COOK COUNTY CIR. CT. COURT-ANNEXED MEDIATION REFERRAL ORDER FORM 2; ILL. 6TH CIR. CT. ORDER OF REFERRAL TO COURT-ANNEXED MEDIATION; ILL. 14TH CIR. CT. ORDER OF REFERRAL; ILL. 17TH CIR. CT. ORDER OF REFERRAL TO COURT-ANNEXED MEDIATION (stating that lien holders or others needed for a full and complete settlement shall attend the mediation sessions).

One can imagine other situations that call for creativity on the part of the court and the mediator to decide on the best parties to attend the mediation. For example, in a sexual harassment case, the plaintiff might be "re-victimized" by facing the alleged harasser while in another similar case, the victim may want to confront the harasser. Courts should inquire of counsel concerning special circumstances affecting attendance. Alternatives to face-to-face confrontation include the use of caucus, telephone mediations, or the appearance of a representative of the entity associated with the alleged harasser.

130. See ILL 19TH CIR. CT. ORDER OF REFERRAL TO COURT-ANNEXED MEDIATION para. 1(a) (providing that counsel who attends has such knowledge); see also ILL. COOK COUNTY CIR. CT. COURT-ANNEXED MEDIATION REFERRAL ORDER FORM 2; ILL. 6TH CIR. CT. ORDER OF REFERRAL TO COURT-ANNEXED MEDIATION; ILL 14TH CIR. CT. ORDER OF REFERRAL; ILL. 17TH CIR. CT. ORDER OF REFERRAL TO COURT-ANNEXED MEDIATION (regulating counsel who will try the case). Courts are all too familiar with the situation where the attorney attending the settlement or pre-trial conference is someone unfamiliar with the case.

The court should also permit counsel to bring another attorney who may be more suited to the negotiation process than trial counsel. One of the most frequent errors noticed by one mediator is trial counsel who cannot adapt to the mediation setting. The author suggests that attorneys more familiar with transactional law would be better suited. See Tom Arnold, *Twenty Common Errors in Mediation Advocacy*, 13 ALTERNATIVES TO THE HIGH COST OF LITIG. 69, 69 (1995) (noting that courts should be more flexible to permit teams of trial counsel familiar with the case and other counsel more familiar with the process).

tailor the referral order to the needs of the case. Because the mediator may have more information than the court about whose attendance is needed and in what manner, the rules should also be clarified to give the mediator the authority to control attendance.

### *Good Faith Effort*

Parties and their representatives are required to mediate in good faith but are not compelled to reach an agreement.<sup>131</sup>

Empirical research suggests that settlement is more likely and the parties' sense of fairness is greater when the lawyers behave more cooperatively during mediation.<sup>132</sup> An order referring a case to mediation is flaunted if a party meets the appearance requirement but does not act in good faith. Such problems in the mandatory arbitration programs led the courts to require good faith as well as attendance.<sup>133</sup>

However, a good faith requirement can invite ancillary litigation. First, the term, "good faith" is vague and subject to variant interpretations,<sup>134</sup> thus inviting litigation. Second, some parties will claim bad faith by the opposing party in order to avoid the mediation requirement, delay the litigation, increase opponents' costs, or gain some other advantage. Finally, should the court ask the mediator to determine whether a party acted in good faith or to testify as to what happened in mediation, such an inquiry may undermine the impartiality of the mediator and the entire mediation process.<sup>135</sup>

Judges faced with the issue of good faith participation should follow the wise example of the United States District Court for the Eastern District of Missouri. That court required certain parties to attend the

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131. ILL. COOK COUNTY CIR. CT. R. 20.01 (2004). For further rules providing that while parties are required to mediate in good faith, they are not required to reach an agreement, see ILL. 1ST CIR. CT. COURT-ORDERED MEDIATION R.; ILL. 11TH CIR. CT. R. 111 (2004); ILL. 14TH CIR. CT. R. 26(1) (2004); ILL. 17TH CIR. CT. R. 2.08 (2003); ILL. 18TH CIR. CT. R. 14.01 (2004); ILL. 19TH CIR. CT. R. 20.00 (2004); Court-Annexed Mediation Circuit Court Admin. Order 99-4(I) (Ill. Cir. Ct., 6th Cir., Nov. 12, 1999).

132. McAdoo et al., *supra* note 4, at 9. At first glance, this rule serves that purpose. See NIEMIC ET AL., *supra* note 6, at 63–64 (arguing that many scholars believe that mediation will be futile without good faith participation and suggesting the needs for an ethical rule concerning attorney good faith participation); KOVACH, *supra* note 23, at 123 (reasoning that this rule allows courts to be able to enforce orders).

133. See ILL. SUP. CT. R. 91 (2001) (requiring that all parties to an arbitration participate in good faith and in a meaningful manner and if parties are found unanimously by the panel of arbitrators to have failed to do so may be subject to sanctions).

134. NIEMIC ET AL., *supra* note 6, at 64 (noting that the good faith standard with respect to participation in mediation is vague and subject to differing opinions).

135. See *id.* at 97–98 (citing BANKR. C.D. CAL. OFFICIAL FORM 708) (noting that other than the signed agreement, nothing from the mediation will be disclosed or admissible and the mediator will not be called upon to testify in any proceeding).

mediation and make pre-mediation submissions, but the defendant failed to comply with both requirements.<sup>136</sup> Understanding the subjective nature of negotiations, the court focused only on objective behavior that violated clearly defined requirements of the court order.<sup>137</sup>

To discourage such ancillary litigation, the court should send several clear messages through educational programs and conferences with counsel. Additionally, the court should prevent bad faith issues by ensuring that the bench and bar are adequately educated about the purpose of court-ordered mediation programs, as well as informed of the expectations of counsel and parties.<sup>138</sup> Finally, the court should not be surprised if some parties act in bad faith during mediation, for those same parties likely act in bad faith in other aspects of the legal proceedings.<sup>139</sup> Courts have authority under the Supreme Court of Illinois rules to deal with parties acting in bad faith.<sup>140</sup>

#### VI. HOW TO ENSURE CONFIDENTIALITY IN THE MEDIATION PROCESS

All oral or written communications in a mediation conference, other than the executed settlement agreement, shall be exempt from discovery and shall be confidential and inadmissible as evidence in the underlying cause of action unless all parties agree otherwise . . . [T]he mediator may not disclose any information obtained during the mediation process.<sup>141</sup>

Confidentiality is necessary to identify the parties' real interests, uncover potential options for resolution, protect mediator impartiality, protect proprietary information, and encourage parties to use mediation. Although the circuit rules vary slightly, each of the circuits provides for confidentiality, but because not one of the Illinois circuits offer as much confidentiality as does the recently enacted IUMA, the circuits should amend their rules to adopt the IUMA.<sup>142</sup>

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136. *Nick v. Morgan's Food, Inc.*, 99 F. Supp. 2d 1056 (E.D. Mo. 2000). The defendant arguably engaged in bad faith during the mediation negotiations when it failed to make any counteroffer to two offers made by the plaintiff. *Id.* at 1058.

137. *Id.* at 1063–64 (sanctioning the defendant, but only with regard to the attendance and pre-submission requirements, not as to strategy).

138. *See infra* Part IX (advocating education of the legal profession as to court-ordered mediation).

139. Courts should not be overly concerned with bad faith. An Ohio study reported that unreasonable attorneys were impediments to settlement in only seven percent of the cases. *Wissler, supra* note 4, at 666. Unreasonable parties were impediments in twenty-one percent. *Id.*

140. ILL. SUP. CT. R. 218, 219 (2001).

141. ILL. 11TH CIR. R. 111(3)(N) (2004). Similar rules exist in every circuit. *See, e.g.*, ILL. COOK COUNTY CIR. CT. R. 20.07(a) (2004) (deeming all communication within mediation to be confidential and privileged within the meaning of the Uniform Mediation Act).

142. 710 ILL. COMP. STAT. 35 (West. Supp. 2004). Many of the circuit rules were enacted

The IUMA applies to court-ordered mediation and creates an evidentiary privilege for the mediator, the mediating parties, and for any non-party participants, all of whom may refuse to disclose and prevent any other person from disclosing a mediation communication.<sup>143</sup> The IUMA privilege applies in any proceeding, defined as: “(A) a judicial, administrative, arbitral or other adjudicative process, including related pre-hearing or post-hearing motions, conferences and discovery; or (B) a legislative hearing or similar process.”<sup>144</sup> In contrast, most circuits protect mediation communications only from discovery and admission at trial of the underlying lawsuit.<sup>145</sup>

Further, in contrast to the privilege created by the Act, which covers statements “made during mediation” or “made for the purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator[,]”<sup>146</sup> most circuit rules refer only to communications “in mediation conference.”<sup>147</sup> Thus, the IUMA offers a broader mediation privilege than do the circuits.

Additionally, most mediators believe that if they are called to testify by any party, the other parties will question the mediator’s impartiality, even after the mediation has concluded.<sup>148</sup> Such doubts will cause the public to lose faith in the mediation process. However, a court may be faced with the need for such testimony, because other public policies may prevail over the protection of the mediation process. Accordingly, the IUMA recognizes certain waivers, preclusions, and exceptions to the mediation privilege.<sup>149</sup> When a crime has been committed, and the

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prior to the adoption of the IUMA in 2003. Prior to that time, circuit rules were the only means of ensuring confidentiality. Since passage of the IUMA, most circuits have not revisited their rules.

143. 710 ILL. COMP. STAT. 35/3-4.

144. 710 ILL. COMP. STAT. 35/2(7).

145. *See, e.g.*, ILL. 11TH CIR. CT. R. 111(3)(N) (prohibiting the admission of all oral or written communications in a mediation conference in the underlying cause of action unless all parties agree). *See also* ILL. COOK COUNTY CIR. CT. R. 20.07 (protecting the communications from admission in any proceeding); ILL. 18TH CIR. CT. R. 20.07 (prohibiting disclosure in any action or before any administrative body or agency or to any public officers).

146. 710 ILL. COMP. STAT 35/2(2).

147. *See, e.g.*, ILL. 11TH CIR. CT. R. 111(3)(N) (referring to communications, either written or oral, in mediation conferences). *See also* ILL. COOK COUNTY CIR. CT. R. 20.07 (referring to communications with the mediator at any time).

148. UNIF. MEDIATION ACT prefatory n.1, 7A pt. II U.L.A. 96–97 (West. Supp. 2004).

149. 710 ILL. COMP. STAT. 35/5-6. Exceptions include threats to inflict bodily harm or to commit a crime, evidence of child abuse, or evidence offered to prove or disprove a claim of mediator malpractice. 710 ILL. COMP. STAT. 35/6(a)(3)–(5), (a)(7) (West Supp. 2004). *See* ILL. COOK COUNTY CIR. CT. R. 20.07 (creating exceptions to the confidentiality rule for circumstances involving professional misconduct, defense of malpractice lawsuit, or threat of prospective crimes or serious imminent harm).

mediation communications are sought to be produced, the court must conduct an *in camera* hearing.<sup>150</sup> The party who moves for the admission of mediation communications must show that the evidence is not otherwise available and that the need for that evidence substantially outweighs the interest in protecting mediation confidentiality.<sup>151</sup> The court, *in camera*, can determine whether the mediator is competent to testify and has relevant evidence not otherwise available.<sup>152</sup>

Adoption of the IUMA would avoid potential conflicts between court rules and the Act, and will lead to uniformity between circuits regarding confidentiality in the mediation process. Uniform laws regarding confidentiality encourage predictability as well as simplicity. Illinois has paved the way in adopting the Uniform Mediation Act, and should ensure that the same uniformity extends across the circuits.

Communications between the court and the mediator pose a threat not only to mediation confidentiality, but also to public confidence in mediation.<sup>153</sup> Several circuits have addressed that issue by providing that the mediator should report to the court any lack of agreement “without comment or recommendation.”<sup>154</sup> Although some circuits mandate that the mediator, rather than counsel, shall report on full or partial agreements, others require that the parties do so.<sup>155</sup> Once again, a few circuits are in conflict with the IUMA’s prohibition of any report beyond reporting on whether the mediation occurred or was terminated, whether an agreement was reached, and who attended.<sup>156</sup> However, because the reports are served on all parties, such forms should mitigate concerns that the mediator might have communicated anything else to

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The drafters of the IUMA studied the experience of other states and carefully crafted exceptions to the mediation privilege. Courts and legislatures have created exceptions to the mediation confidentiality rules where there were allegations of child abuse, criminal offenses, etc. UNIF. MEDIATION ACT, § 8 cmt. 7A.

150. 710 ILL. COMP. STAT. 35/6(b).

151. *Id.*

152. *Cf.* Rinaker v. Superior Court, 74 Cal. Rptr. 2d 464, 472 (Cal. Ct. App. 1998) (interpreting a California statute that predates, but is similar to this portion of the IUMA.)

153. See NATIONAL STANDARDS, *supra* note 7, at § 12.1–12.2 (1992) (listing the types of information that need to be communicated between the mediator and the court during and after mediation).

154. ILL. 11TH CIR. CT. R. 111(3)(J) (2004).

155. Compare ILL. 19TH CIR. CT. R. 20.03(j) (2004) (stating that the mediator shall file with the court), with ILL. 17TH CIR. CT. R. 2.08(III)(K) (2004) (stating that counsel, or if no counsel the parties, shall be responsible for notifying the court).

156. 710 ILL. COMP. STAT. 35/7(a)–(b) (West Supp. 2004). See *supra* notes 104–07 and accompanying text (discussing the mediator’s role in reporting to the court). Mediators may also disclose anything that constitutes an exception to the privilege under the Act. 710 ILL. COMP. STAT. 35/6(d).

the court.<sup>157</sup>

Finally, casual conversations between the court and the mediator can defeat even the best efforts to protect the mediator's impartiality. For example, the court may seek the mediator's advice as to further proceedings, especially when a case does not settle. The court or mediator may want to discuss who was at fault or who prevented the settlement. Such conversations may destroy the confidence of the parties and counsel in the mediation process.<sup>158</sup>

Related to the issue of confidentiality is that of reporting to the Supreme Court. The Supreme Court of Illinois requires that the circuits have a mechanism for reporting to the court on the program.<sup>159</sup> All circuits have some rule requiring the court to collect statistical information concerning referrals and settlement rates. The courts should seek additional information to evaluate the efficiency of their mandatory mediation programs.<sup>160</sup> The information to be gathered depends on the goals of the program.<sup>161</sup>

Additionally, courts should attempt to determine if the litigants and their counsel are satisfied with the program and perceive it as just.<sup>162</sup> Fortunately, several counties provide mediators, attorneys, and parties with excellent evaluation forms.<sup>163</sup> Software is also available to track data received from these evaluations and to compare data among the

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157. The Nineteenth Circuit utilizes forms so as to keep the mediator's report to a minimum. ILL. 19TH CIR. CT. R. 20.03(n) (describing which forms are to be used in conjunction with Court-Annexed mediation). *But see* ILL. 11TH CIR. CT. R. Appen. F-G (inviting the mediator to give a reason for the suspension of mediation or for the lack of agreement). The author discourages use of such forms, as they may violate the IUMA. 710 ILL. COMP. STAT. 35/7(a) (West Supp. 2004).

158. *See* NATIONAL STANDARDS, *supra* note 7, at § 9.1-9.4 (discussing the court's policies relating to confidentiality); *see also* UNIF. MEDIATION ACT § 7 cmt. (amended 2003), 7A pt. II U.L.A. 123 (West. Supp. 2004) (commenting on disclosure by a mediator to an authority that may make a ruling on the dispute being mediated).

159. ILL. SUP. CT. R. 99(b)(2)(x).

160. *See* NATIONAL STANDARDS, *supra* note 7, at § 2.4 (advocating a reporting requirement for information related to the court's objectives in creating the program and the court's responsibility for ensuring the quality of services provided).

161. *Id.* The court, in conjunction with the local bar, must determine the goals of the circuit mediation program. Then it must design a means of evaluating whether those goals are met. For example, if cost-savings is a major goal, the court may survey attorneys and parties about cost, whereas if speedier case disposition is a goal, courts will want to track disposition time of cases referred to mediation against those not referred.

162. *See, e.g.,* ALFINI ET AL., *supra* note 5, at 36 (assessing the success of a mediation program by whether the parties and the lawyers are satisfied with the process).

163. *See* Mediation Evaluation Form for Attorneys, *Mediation Evaluation Form for Parties and Mediation Evaluation Form for Mediators*, at <http://www.mediatenow.org/forms/1stCirAttyEvalForm.pdf> (listing those forms utilized by the First Circuit). Note that similar forms are also used in Cook County. ILL. COOK COUNTY. CIR. R. 20.11.

circuits.<sup>164</sup>

#### VII. APPOINTMENT OF MEDIATORS AND RESPONSIBILITIES ASSIGNED BY THE COURT

[T]he parties may agree upon . . . a certified mediator [or] a mediator who does not meet the certification requirement . . . but who in the opinion of the parties . . . is otherwise qualified by training or experience to mediate all or some of the issues in the particular case.<sup>165</sup>

Because of the variety of roles that the mediator must play, as well as the conflicting interests, the court should appoint as mediator only those who will competently fulfill their duties. A majority of the circuits agree that the parties have the authority to select the mediator, either from a court-approved roster or any mediator qualified in the matter through training, experience, or otherwise. Only where the parties cannot agree on a mediator, does the court appoint one.<sup>166</sup> The rules vary as to how a court should choose the mediator, with some circuits requiring the court to choose a certified mediator.<sup>167</sup>

#### *The Parties' Choice of a Mediator*

A court should maximize the parties' choice of mediator, intervening only when necessary or when a significant inequality in knowledge or experience in selecting a mediator exists between the parties.<sup>168</sup> Where the parties choose the mediator, there is greater satisfaction with the

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164. Interview with Jennifer Shack, CAADRS (Dec. 21, 2004).

165. ILL. 14TH CIR. CT. R. 26(4)(1)(a), (b) (2004); ILL. 16TH CIR. CT. R. 12.03(A)(1)(a)–(b) (2004). See ILL. 11TH CIR. CT. R. 111(4)(A) (2004) (“For certification, a mediator . . . must: [c]omplete a mediation training program approved by the Chief Judge . . . and [b]e a member in good standing of the Illinois Bar with at least seven years of practice or be a retired judge; and [b]e of good moral character.”). For analogous rules describing the requirements for certification as a mediator, compare ILL. COOK COUNTY. R. 20.08(a) (2004); ILL. 1ST CIR. CT. ORDERED MEDIATION OP; Court-Annexed Mediation, Circuit Administrative Order 99-4 (V)(A) (Ill. Cir. Ct., 6th Cir., Nov. 12, 1999); ILL. 11TH CIR. CT. R. 111(3)(A) (2004); ILL. 16TH CIR. CT. R. 12.04(A) (2004); ILL. 19TH CIR. CT. R. 20.04(a) (2004). The 12th Circuit requires that the mediator selected by the parties be on the court-approved list. ILL. 12TH CIR. CT. R. 21.03(A)(1) (2004).

166. See, e.g., ILL. 16TH CIR. CT. R. 12.03(A)(2) (2004) (stating that if the parties cannot agree upon a mediator within fourteen days, the plaintiff's attorney shall notify the court within seven days, and the court will appoint a certified mediator).

167. See *id.* (noting that a procedure such as a rotation would be proper). For example, the First Circuit provides that each party submit a list of three approved mediators and the court chooses from that list. ILL. 1ST CIR. CT. ORDERED MEDIATION R. (B)(2).

168. See NATIONAL STANDARDS, *supra* note 7, at § 7.1 (noting that the court should emphasize the parties' choice for mediator, unless there are reasons why party choice may not be appropriate).

mediation process as well as a more cooperative attitude toward the process.<sup>169</sup> Party choice also guards against real or perceived judicial favoritism, and places some responsibility for ensuring quality in the hands of the parties and their counsel.<sup>170</sup>

Further, the rules should continue to offer the parties the opportunity to select a mediator not on the court-approved list. Certain complicated cases may call for a non-lawyer mediator.<sup>171</sup> For example, a construction dispute might be best mediated by an engineer or construction manager, and a business dispute by a financial expert, assuming they have been trained as mediators.<sup>172</sup>

### *Qualifications of a Mediator*

A chosen mediator must be amply qualified to properly serve the mediation process. Before exploring the issue of qualifications, several clarifications concerning the qualifications of a mediator are needed. First, no circuit employs full-time mediators in civil cases; rather, each uses mediators in private practice. Second, Illinois has no statewide licensing program,<sup>173</sup> certification program,<sup>174</sup> or specific provisions relating to mediator qualification, nor does the IUMA create any mediator qualifications. Those circuits with mediation programs establish the qualification standards of the mediators who seek court appointment. Thus, the terms used in the circuit rules referring to “court-approved,” “court-certified,” or “certified” mediators probably refer to mediators who meet the qualifications of the respective circuits and have received placement on the “approved list.”<sup>175</sup>

The qualifications for inclusion on the court-approved list are fairly consistent across the circuits. Mediators must either be experienced

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169. *Id.* at § 7.1 cmt.

170. *Id.*

171. See NIEMIC ET AL., *supra* note 6, at 74 (observing that a non-lawyer may be helpful in cases where legal issues are not at the core of the dispute).

172. One can also imagine a case where an environmental matter might be mediated by a team of a lawyer and a bioengineer, or the breakup of a business by a family business lawyer and a social worker or financial planner, depending on the issues that block resolution. More complex cases will often use a team of mediators. Most of the cases addressed in this paper will use only one, but the point should be emphasized that a lawyer paired with a non-lawyer is often of value.

173. Licensing refers to the process whereby a person who meets the minimal standards is entitled to engage in the designated profession. SOC’Y OF PROF’LS IN DISPUTE RESOLUTION ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE; REPORT NO. 2 OF THE SPIDR COMM’N ON QUALIFICATIONS 6 (1995) [hereinafter SPIDR REPORT].

174. Certification generally refers to a confirmation that a person has completed training in accordance with standards established by the trainer. *Id.*

175. For simplicity, the author will refer to the court-approved list to mean those mediators who meet the mediator qualifications of the circuit court as provided by its rules.

lawyers in good standing or retired judges, must complete a mediation-training program,<sup>176</sup> and must be of good moral character. Some circuits also require the mediator to observe one to two mediations prior to becoming an active mediator.<sup>177</sup> Some circuits provide that training must last thirty to forty hours. None of the circuits, however, specify the content of the training, though several require court approval of the training program.<sup>178</sup>

### *The Court's Interest in the Chosen Mediator*

The courts have a continuing responsibility to ensure the quality of the mediators to whom they refer cases.<sup>179</sup> Because court-appointed mediators receive judicial immunity in Illinois, the court's responsibility to ensure quality is particularly acute.<sup>180</sup> Immunizing the mediator from suit for their conduct argues for special care in the selection of the mediator to serve the court.<sup>181</sup>

Ensuring the quality of the mediation process by assessing the qualifications of the mediator has been the subject of much debate within the profession. Some argue for no qualifications, letting the market decide issues of quality.<sup>182</sup> Others stress the importance of academic qualifications, such as a law degree,<sup>183</sup> pen and paper tests measuring basic knowledge about mediation, performance-based standards testing mediation skills, legal or life experience requirements, apprenticeships, peer review, and continuing education.

Most of the Illinois circuits use minimal training and some

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176. See ILL. 1ST CIR. CT. COURT-ORDERED MEDIATION R. C(1)(a) (2004) (permitting retired judges to qualify as a mediator without any training). Seven to ten years of experience as a lawyer suffices for qualification purposes. *Id.* at (C)(1)(b).

177. ILL. COOK COUNTY CIR. CT. R. 20.08(a)(1)(e) (2004).

178. See, e.g., ILL. COOK COUNTY CIR. CT. R. 20.08(a)(1)(d) ("The applicant shall certify to having successfully completed mediation training in a program consisting of forty hours of training approved by the presiding judge of the Law Division of Cook County.").

179. NATIONAL STANDARDS, *supra* note 6, at § 6.1.

180. For rules providing for mediator indemnification, see ILL. 1ST CIR. CT. COURT-ORDERED MEDIATION R. (B)(II) (2004); ILL. 12TH CIR. R. 21.04(D) (2004); ILL. 14TH CIR. R. 26(8) (2004); ILL. 18TH CIR. R. 14.13 (2004).

181. For examples on mediator indemnification, see ILL. 1ST CIR. CT. COURT-ORDERED MEDIATION R. (B)(11); ILL. 12TH CIR. CT. R. 21.04(D).

182. SPIDR REPORT, *supra* note 173, at 3.

183. See ABA Section of Dispute Resolution, *Resolution on Mediation and the Unauthorized Practice of Law* (Feb. 2, 2002) (explaining that all individuals whether they are lawyers, should be able to serve as mediators). *But see* NATIONAL STANDARDS, *supra* note 6, at § 6.1 cmt. (noting that "[n]o degree ensures competent performance," and while in some cases legal or other knowledge related to the subject may be appropriate, "parties should be free in most circumstances to select a mediator of their choice").

professional experience to qualify mediators.<sup>184</sup> Yet, these qualifications do not address the skills needed to become a mediator, except by requiring some sort of training program, and trusting that the program will teach those skills<sup>185</sup> key to mediation qualification.<sup>186</sup> While skills may be gained through training, experience, or both,<sup>187</sup> attendance at a training program reassures the court and the parties that the mediator at least has been exposed to mediation skills, even though it is no guarantee of the degree of skill.

Another means of qualifying mediators is to require that a new mediator observe a more experienced mediator before becoming court-approved.<sup>188</sup> Courts should require that the training received by the mediators on the court-approved list include role-playing with feedback on their performance.<sup>189</sup> None of the rules address the evaluation of mediators.<sup>190</sup>

### *Mediation Training Programs*

Despite the vagueness of the rules regarding the training of mediators, circuits initiating mediation programs have worked with the Center for Analysis of Alternative Dispute Resolution Systems (“CAADRS”)<sup>191</sup> and others to offer training programs that include role playing as well as other opportunities for mediators to gain the requisite skills. Skilled and experienced trainers who also mediate civil cases

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184. *Cf.* FLA. R. FOR CERTIFIED & COURT APPOINTED MEDIATORS R. 10.100 (2000) (using the same combination of minimal training and some professional experience).

185. *See* NATIONAL STANDARDS, *supra* note 6, at § 6.1 cmt. (enumerating some of the skills required of a mediator: the ability to listen, to analyze problems, deal with complex factual materials, understand power imbalances, be sensitive to strongly felt values, understand the negotiation process, earn trust, convert parties’ positions into interests, help create options, help parties identify principles that guide their decision-making, help parties assess settlement options, help parties make informed choices, and help the parties assess the feasibility of the proposals).

186. *Id.* at § 6.1; NIEMIC ET AL., *supra* note 6, at 73.

187. NATIONAL STANDARDS, *supra* note 6, at § 6.1 (“Skills can be acquired through training and/or experience.”); NIEMIC ET AL., *supra* note 6, at 72–73 (“Although it is widely believed that ADR neutrals should receive substantial training, many ADR skills, such as generating creative solutions and improving communication between parties, are best acquired by experience or are natural to some individuals.”).

188. For examples of rules implementing a requirement of new mediators to observe one or more mediations, see ILL. COOK COUNTY CIR. CT. R. 20.08(a)(1)(e) (2004); ILL. 17TH CIR. R. 2.08(IV)(A)(2) (2004).

189. NATIONAL STANDARDS, *supra* note 6, at § 6.2 (“Courts need not certify training programs but should ensure that the training received by the mediators to whom they refer cases includes role-playing with feedback.”).

190. The evaluation of mediators is a subject beyond the scope of this Article.

191. *See* CAADRS, *CAADRS Mediation Training* (discussing the training program as well as evaluations under CAADRS), at <http://www.caadrs.org/about/medtrain.htm#Summaries> (last modified Aug. 24, 2004).

conduct these training programs.

Most training programs in Illinois have been limited to between sixteen and twenty hours. Experience, rather than length of the training, is generally the key to obtaining settlements through mediation.<sup>192</sup> Nevertheless, many scholars argue for longer training.<sup>193</sup> Additionally, the rules offer little guidance as to future training or to determine the eligibility of mediators trained by programs other than those offered through the courts.<sup>194</sup> Because all circuits should require that mediators receive some minimal training, the circuits should further clarify what constitutes such training.

Although lawyers often prefer mediators with expertise in the field of dispute resolution, neither the years in the practice of law nor the mediator's knowledge of the field has an appreciable impact on the rate of settlement or on the litigants' sense of procedural justice.<sup>195</sup> The one feature empirically linked to settlement is mediation experience. The more the mediator has mediated, the more likely the case will settle.<sup>196</sup> Thus, the court-appointed list should remain small enough such that those on the list may receive as many referrals as possible, thus building experience. Yet, the list needs to be large enough to serve the needs of the circuit and to provide the parties with some meaningful choice.

#### *Court Regulation of Mediators' Fees*

In addition to regulating training programs, the courts may also regulate the mediator's fees. Several circuits specify the hourly fee due to a mediator if the parties cannot reach agreement on the issue.<sup>197</sup> The rules should additionally require disclosure of fees and resolution of the fee arrangement prior to the start of the mediation. Another issue not addressed by the rules is that of contingency fees. Use of contingency fees in the mediation context gives the mediator an improper interest in

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192. See Wissler, *supra* note 4, at 678–79 (discussing that settlement was more likely if the mediator had previous experience).

193. See KOVACH, *supra* note 23, at 436 (arguing that extensive mediator experience is needed); FLA. ST. MEDIATORS R. 10.100(c) (2002) (requiring forty hours of training plus two observations for their major civil case mediators).

194. Nevertheless, some circuits have developed some means of approving training programs. ILL. COOK COUNTY CIR. CT. R. 20.08(a)(1) (2004); ILL. 11TH CIR. CT. R. 111(4)(A)(1) (2004); ILL. 12TH CIR. CT. R. 21.04(A)(1) (2004); ILL. 16TH CIR. CT. R. 12.04(A)(1) (2004).

195. NIEMIC ET AL., *supra* note 6, at 73 (noting that settlement may be the goal of the ADR process, but making it a criteria for selecting neutrals invites them to pressure parties to settle); McAdoo et al., *supra* note 4, at 9 (stating that matching mediators to cases based on subject matter expertise makes lawyers more comfortable with the process).

196. McAdoo et al., *supra* note 4, at 9.

197. See ILL. 12TH CIR. CT. R. 21.03(B); ILL. 16TH CIR. CT. R. 12.03(B); ILL. 17TH CIR. CT. R. 2.08(III)(B); ILL. 20TH CIR. CT. R. IV(C).

the outcome of the mediation.<sup>198</sup> The rules or ethical norms adopted by the circuit should prohibit such conduct.

When addressing fees, courts must also ensure that indigent parties may receive mediation in the same fashion as those who are capable of paying. Most circuits provide that parties who cannot afford a mediator can participate in mediation through some sort of pro bono process.<sup>199</sup> Some circuits require the mediator to accept one or more pro bono cases as a requirement of appointment to the court-approved roster.<sup>200</sup> Others appoint pro bono mediators as needed.<sup>201</sup> Courts that order the parties to mediate have an obligation to ensure that the mediation is accessible to all parties, including those without the ability to pay for private mediation.<sup>202</sup>

### VIII. ETHICS AND MEDIATION

All of the current discussion must be considered within the context of high quality mediation practice. Defining quality mediation practice is complicated by the fact that unlike the legal and judicial professions, the mediation profession has no single model code of conduct or practice. Nevertheless, the rules contemplate the adoption of standards of practice for mediators. Several circuits provide that the Chief Judge may promulgate standards of mediation practice with which mediators must comply.<sup>203</sup> To date, none of the circuits have published any such standards. Further, most circuits provide for disqualification<sup>204</sup> and decertification<sup>205</sup> of mediators without defining the standards by which mediators are regulated. Additionally, mediators face many questions for which the circuits offer no guidance.<sup>206</sup> The courts should adopt a

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198. NATIONAL STANDARDS, *supra* note 6, at § 8.1(d). The Joint Standards of Conduct for Mediators forbids contingency fees in all cases mediated. *Id.* These standards are voluntary, however. Because there are no standards that bind all court-appointed mediators, the circuit rules must address the issue of contingency fees. *Id.*

199. ILL. 18TH CIR. CT. R. 14.17(c); ILL. 19TH CIR. CT. R. 20.03(b)(4).

200. ILL. COOK COUNTY CIR. CT. R. 20.08(d); ILL. 12TH CIR. CT. R. 21.03(B); ILL. 16TH CIR. CT. R. 12.03(B); ILL. 18TH CIR. CT. R. 14.14(a)(5); ILL. 19TH CIR. CT. R. 20.03(b)(1).

201. ILL. 1ST CIR. CT. COURT-ORDERED MEDIATION R. (C)(4)(c); ILL. 14TH CIR. CT. R. 26(4)(B)(3); ILL. 18TH CIR. CT. R. 14.17(c).

202. NATIONAL STANDARDS, *supra* note 6, at §§ 1.1, 13.1 (stating that mediation services should be available like any other services of the court, regardless of a party's ability to pay).

203. ILL. 12TH CIR. CT. R. 21.04(B) (2004); ILL. 16TH CIR. CT. R. 12.04(B) (2004); ILL. 17TH CIR. CT. R. 2.08(IV)(B) (2003).

204. ILL. 11TH CIR. CT. R. 111(3)(C) (2004).

205. ILL. 11TH CIR. CT. R. 111 (4)(C); ILL. 20TH CIR. R. V(b), (c). *See supra* notes 165, 174 and accompanying text (describing certification).

206. Mediators face such issues as impartiality, conflicts of interest, and the context of their role and relationship with the court. Lawyer mediators also face issues regarding conflicts of

code of ethics that addresses issues that mediators commonly face.<sup>207</sup>

The IUMA addresses conflicts of interests, and requires a mediator to inquire into facts that could affect impartiality.<sup>208</sup> These facts include financial or personal interests in the outcome, or past or present relationships with the parties.<sup>209</sup> The mediator must disclose any relevant facts either before accepting the mediation, or as soon as practical after learning of a potential conflict.<sup>210</sup>

However, the IUMA does not address all of the ethical issues that can occur and the court should adopt standards in those areas. The Standards of Conduct for Mediators have been adopted by several national ADR organizations, including the ABA Section on Dispute Resolution, and can offer guidance to circuits to develop rules of ethics.<sup>211</sup> The standards offer guidance to mediators on the issues listed above; however, they are not designed as the basis for disciplining mediators.<sup>212</sup> While courts should not expect a rash of disciplinary matters, the expectation of quality mediator practice leads to a more credible mediation program. De-certifying the occasional inept or unethical mediator improves the quality of the practice as a whole. Illinois courts should implement some standard of practice “to instill public confidence in the mediation process.”<sup>213</sup>

Similarly, many circuits provide for disqualification but offer no explanation as to what constitutes good cause for disqualification.<sup>214</sup> Certainly, a mediator should be disqualified for a conflict of interest that would create the appearance of bias for or against a party.<sup>215</sup> Without

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interest and office practice such as advertising their dual role.

207. See NIEMIC ET AL., *supra* note 6, at 123 (noting that a code of ethics should address impartiality, conflicts of interest, mediator advertising, fee disclosure, confidentiality, and the role of mediators in settlement).

208. 710 ILL. COMP. STAT. 35/9(a)(1) (West Supp. 2004).

209. *Id.*

210. 710 ILL. COMP. STAT. 35/9(a)(2), (b).

211. AMERICAN ARBITRATION ASS'N, ABA SECTION OF DISPUTE RESOLUTION & SOC'Y OF PROF'LS IN DISPUTE RESOLUTION, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994), available at [http://www.adr.org/index2.1.jsp?JSPssid=15727&JSsrc=upload\LIVESITE\Rules\\_Procedures\ADR\\_Guides\..\Resources\Roster\Mediators\standard.html](http://www.adr.org/index2.1.jsp?JSPssid=15727&JSsrc=upload\LIVESITE\Rules_Procedures\ADR_Guides\..\Resources\Roster\Mediators\standard.html) (last visited Apr. 1, 2005).

212. The ethical rules for court-appointed mediators adopted by the Florida courts are designed as the basis for disciplining mediators. Further, Florida has had the lengthiest experience of any state in certifying and de-certifying mediators. FLA. ST. MEDIATOR R. 10.200-10.690 PT. II (2000). Therefore, Florida has considerable experience drafting and enforcing ethical standards for mediators and would be a good source of guidance to the Illinois courts.

213. FLA. ST. MEDIATOR R. 10.200 (2000).

214. ILL. 17TH CIR. CT. R. 2.08(III)(C) (2003).

215. NIEMIC ET AL., *supra* note 6, at 80–82 (discussing the disqualification of a mediator due to a conflict of interest).

some additional guidance as to what constitutes good cause, this rule invites parties to abuse the mediator selection system. Courts should rely on the IUMA when interpreting the disqualification rules and should enforce the IUMA's conflict of interest provision.

Some circuits provide for regular review of the mediators on the court-approved list, while others provide for mediator removal from the list for violations of the court rules, court orders, or standards to be promulgated.<sup>216</sup> De-certification procedures instill confidence in the court's approved list of mediators, but are fair only if clearly defined standards of conduct exist.<sup>217</sup>

#### IX. EDUCATION OF THE LEGAL COMMUNITY

Standards for the conduct of mediators may aid in enhancing the credibility of the program, but will only realize limited success without educating the judicial and legal communities about the mediation process as a whole. Good faith participation in mediation becomes more likely only when lawyers receive education about mediation and understand the expectations for lawyers in the mediation process. Similarly, courts will properly exercise their gate-keeping and supervisory roles only if judges understand and are knowledgeable about mediation. Local legal culture and leadership from the bar also affect the success of mediation programs.<sup>218</sup> Courts that strive for a successful mediation program must lead in partnering with the bar to sponsor programs for the bench and bar about mediation.<sup>219</sup> The current absence of education programs in the circuit rules is neither a barrier nor a guarantee of education. The Supreme Court of Illinois as well as the circuits must take the lead in such education.

At a minimum, educational programs for judges and counsel must explain the mediation process and how it differs from adjudication, discuss the availability of the program, emphasize the confidentiality of the program, and review procedures as to how it shall operate.<sup>220</sup> Additionally, the various participants need continuing education aimed at the various applicable roles in the process.<sup>221</sup> Lawyers should

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216. ILL. 11TH CIR. CT. R. 111(4)(C).

217. Also lacking are procedures for receiving and investigating complaints and due process procedures for mediators accused of unethical conduct. However, this task is beyond the scope of this Article.

218. Interview with Susan Yates, Center for Analysis Dispute Resolution Systems (Sept. 29, 2004).

219. McAdoo et al., *supra* note 4, at 8.

220. NATIONAL STANDARDS, *supra* note 6, at § 3.1.

221. *See id* at § 6.4 (noting that mediators must understand what the court expects of them,

understand how their role in mediation differs from their traditional role in adjudication, the advantages and disadvantages of active participation by the parties and counsel in mediation, their role in advising their clients and otherwise preparing the case for mediation, the importance of a negotiation strategy, and the skills needed in mediation, such as making an opening statement in mediation.<sup>222</sup> Judges and other court personnel must understand the benefits and limits of mediation. The legal academy and mediation scholars must assist the bench and bar in designing model curricula to meet these needs.

#### X. CONCLUSION

The circuits should be congratulated for the work done thus far in instituting court-ordered mediation programs. For the most part, the rules reflect the findings of the empirical research and the recommendations of “best practices” studies. There are, however, a number of issues that the circuits should address as soon as possible. First, the circuits should adopt the IUMA as it pertains to confidentiality, and the circuits should clarify the procedures for reporting to the court. Second, the circuits should develop criteria for the required training programs for mediators. Third, the circuits should develop standards of conduct for mediators. Fourth, the circuits should clarify the rules to address the criticisms discussed in this article, such as mediator control over attendance and pre-mediation submission. Fifth, the circuits need to expand the evaluation of data collected, regularly review the data, and re-examine the rules in light of newly collected data or newly conducted research.

Ultimately, the leaders of the bench and the bar should join together to sponsor educational programs. Only when judges, court personnel, mediators, and lawyers understand the purpose of the program and the intricacies of its operation, can the court expect success. Further, lawyers who were not trained while in law school in the skills of being an advocate or representative in mediation will benefit from gaining practical skills through such educational programs.

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including timeliness).

222. *Id.* at §§ 10.1, 10.3; *see also* Wissler, *supra* note 4, at 698 (suggesting that attorneys’ lack of familiarity with mediation or their lack of skill in handling their clients’ unrealistic expectations may affect the quality of the mediation).

Many jurisdictions have prepared booklets for parties and counsel about mediation, its advantages and disadvantages, and the need for preparation for mediation. The courts with required mediation programs in Illinois should publish such guides. These guides are readily available from federal courts and can be easily adjusted to fit the local requirements. One value of the guides is that the court can educate the clients, during the time that counsel may be learning about mediation.