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How Can Courts–Practically for Free–Help Parties Prepare for Mediation Sessions?

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I. INTRODUCTION

Consider two hypothetical scenarios of mediations of a personal injury lawsuit. In one scenario, Kenji, the plaintiff, arrived at the mediation session feeling anxious because his attorney hadn't told him much about the process and he didn't know what to expect. He didn't understand the factual and legal issues, how the mediation would unfold, or how he might participate in the process. He felt demoralized because he didn't know enough to feel confident and assertive about making decisions in his case. In the mediation session, he spent a lot of time alternately hearing the mediator explain why he couldn't get as much money as he expected and waiting for the mediator to come back after "caucusing" with the other side. Kenji felt increasingly frustrated because the mediator – and sometimes his own attorney – repeatedly encouraged him to reduce his demands. He grudgingly went along with most of their suggestions, but he became so angry that he almost decided not to settle. He eventually accepted the defendant's last offer because it was late in the day. His attorney and the mediator emphasized that he could avoid the stress of continued litigation by settling right then. When he got home, he had buyer's remorse, feeling that he got less money than he deserved. He was furious at everyone including the defense counsel, the mediator, and especially his attorney because he felt blindsided in the process.

In a second scenario, at the outset of the case, the plaintiff, Ava, discussed mediation and other dispute resolution processes with her attorney. They decided to suggest mediation to the defendant, who agreed. Before the mediation session, both attorneys discussed the process between themselves and with the mediator. They exchanged documents and planned how the mediation session would proceed.

Ava's attorney told her how the process would work and explained what to expect. They reviewed the evidence, legal issues, her tangible and intangible interests in the case, the defendant's arguments, potential court outcomes after deducting legal expenses, and possible mediation strategies. All the preparation empowered her to participate as knowledgeably and effectively as possible.[1] When the parties and attorneys arrived at the mediation session, they were ready to mediate seriously and efficiently. All this enabled Ava to feel fairly confident and assertive. She participated actively in the mediation session, including a joint session, caucuses with the mediator, and discussions with her attorney while the mediator caucused with the defendant. The parties reached an agreement, and her attorney told her that this was one of the best mediations he had ever experienced. The process was exhausting, but Ava felt that she had some control over the decisions. Although she wouldn't get as much money as she hoped, she thought that the agreement was about as good as she could realistically expect. She and everyone else in the mediation felt good about the mediation – and relieved that the case was over. She was ready to let it go and move on with her life.

Of course, these two hypothetical cases do not represent the dynamics in all cases. But they are consistent with mediation theory, practice, and empirical research.

Roselle Wissler and Art Hinshaw's important study, *What Happens Before the First Mediation Session? An Empirical Study of Pre-Session Communications*,[2] summarizes key goals of preparation before mediation sessions:

> The most common goals for pre-session communications are for: (1) the mediator to develop a basic understanding of the dispute; (2) the mediation participants to gain an understanding of the mediator's approach and the mediation process; (3) the mediator and the mediation participants to discuss how to structure the mediation process for the particular dispute; and (4) the mediator and the mediation participants to begin to build rapport and trust. Accomplishing these goals would enable the mediator and the mediation participants to plan how they can most productively approach the first mediation session and would also help reduce the parties' stress before and during the mediation.[3]

The American Bar Association ("ABA") Section of Dispute Resolution's Task Force on Improving Mediation Quality, which relied on data from focus groups and a survey, recommended careful preparation before mediation sessions. I summarized the Task Force's findings as follows:

> The vast majority of the survey respondents said that preparation by the mediator and mediation participants is very important. Indeed, it helps

1. *See* John Lande, *Party Self-Empowerment from Preparation for Mediation Sessions*, INDISPUTABLY BLOG (June 26, 2023), http://indisputably.org/2023/06/party-self-empowerment-from-preparation-for-mediation-sessions/ (suggesting that preparation before mediation sessions can help parties empower themselves).

2. Roselle Wissler & Art Hinshaw, *What Happens Before the First Mediation Session? An Empirical Study of Pre-Session Communications*, 23 CARDOZO J. CONFLICT RESOL. 143 (2022) [hereinafter *Wissler-Hinshaw Study*].

3. *Id.* at 145 (footnotes omitted).

> to consider that "mediation" really begins during the preparation phase – not when everyone convenes at a mediation session. . . .
>
> Most of the respondents said that attorneys should send a mediation memo to mediators and that it is essential for mediators to read everything they receive (which may include additional documents such as pleadings, legal memos, or expert reports). They also generally said that mediators and attorneys should talk before the mediation session to discuss procedural and substantive issues, including the "real issues" and potential stumbling blocks. . . .
>
> These discussions can prompt the attorneys to prepare themselves and their clients, which can make a big difference in the success of mediation. The parties should have an appropriate understanding of the process, the issues, and their real interests. They should expect to hear things that they will disagree with, and they will probably be asked challenging questions. Parties should be open to reconsidering their positions based on the discussions in mediation.[4]

Empirical research indicates that careful preparation before mediation sessions can produce significant benefits. In a study by Roselle Wissler, she found:

> The *amount* of preparation parties received from their lawyers was uniformly and favorably related to parties' and lawyers' assessments of mediation in the present study of general civil mediation . . . . Parties who had more preparation for mediation, compared to parties with less preparation, thought that the mediation process was more fair; that they had more chance to tell their views and more input into the outcome; and that the mediator was more impartial, understood their views better, and treated them with more respect. Notably, parties who had more preparation felt less pressured to settle than did parties who had less preparation. In addition, parties who received more preparation for mediation were more likely to settle and were more likely to think the settlement was fair.
>
> . . .
>
> Lawyers who engaged in more client preparation for mediation also had consistently more favorable assessments of mediation than lawyers who did less client preparation in the present general civil mediation study . . . . For instance, lawyers who did more client preparation thought that mediation was more fair, allowed more party involvement in resolving the case, and was more helpful in defining the issues and evaluating both their client's and the other side's case.[5]

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4. John Lande, *Doing the Best Mediation You Can*, 14 DISP. RESOL. MAG. 43 (2008).

5. Roselle Wissler, *Representation in Mediation: What We Know From Empirical Research*, 37 FORDHAM URB. L. J. 419, 432–34 (2010) (emphasis in original, footnotes omitted).

Unfortunately, many parties do not know that they could take advantage of mediation or other dispute resolution processes. A study by Donna Shestowsky found that more than two-thirds of parties across three courts did not know that they were eligible for the courts' mediation and arbitration programs.[6] Parties represented by attorneys were not significantly more likely to identify their court's programs than self-represented litigants.[7] Thus we cannot assume that attorneys will necessarily educate their clients and properly prepare them to participate in mediation.

In another study, Donna Shestowsky highlighted the importance of attorneys educating clients about their dispute resolution options.

> Our findings suggest the value of educating litigants about legal procedures, helping them develop realistic expectations for what each procedure can entail for their situation, and helping them make informed decisions about whether to attend their procedures.
>
> The findings also highlight the role that lawyer involvement and efficient case disposition play in terms promoting satisfaction and perceived fairness from the litigant viewpoint.
>
> . . .
>
> Courts can institute rules that require attorneys to discuss all legal procedures that are available to their clients. Ideally, such rules would encourage lawyers to start these discussions early in the litigation process and revisit them at various points as the case develops.[8]

Mediators should help parties prepare for mediation if feasible and permitted under applicable rules. Unfortunately, many parties are not well prepared before their mediation sessions. In a survey of mediators in eight states, the Wissler-Hinshaw study found that, "Overall, 66% of the mediators in civil cases and 39% in family cases held pre-session discussions about non-administrative matters with the parties and/or their attorneys in their most recent case."[9] In 11% of civil cases and 31% of family cases, mediators had no feasible opportunity to hold pre-session discussions or were prohibited from doing so.[10] This suggests that mediators in about 23% of civil cases and 30% of family cases could have conducted such activities but did not do so. Wissler and Hinshaw concluded:

> The findings show that, before the first mediation session, a sizeable number of mediators do not have communications with the mediation participants or do not have case documents, and many disputants themselves do

6. Donna Shestowsky, *When Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L. REV. 189, 211–13 (2017).

7. *Id.* at 222.

8. Donna Shestowsky, *Why Client Expectations of Legal Procedures Must Be Managed to Achieve Settlement Satisfaction*, 40 ALTS. TO HIGH COST OF LITIG. 105, 116 (July/Aug., 2022).

9. *Wissler-Hinshaw Study*, *supra* note 2, at 153.

10. *Id.* at 154.

> not participate in pre-session discussions. Accordingly, mediators often do not begin the first formal mediation session informed about the disputants or the dispute, and disputants do not necessarily enter the first session with an understanding of the mediation process. This is contrary to conventional mediation thinking and advice that stresses the importance of preparing for mediation. In addition, the lack of pre-session information negatively impacts the ability of mediators and mediation participants to customize the mediation process to the needs of the individual case, which is considered to be one of mediation's advantages.[11]

A survey of mediators conducted by Timothy Hedeen and his colleagues is consistent with the Wissler-Hinshaw study, finding that about half or less than half of parties were considered to be prepared for mediation.[12] About 80% of parties in civil cases were represented by attorneys but mediators perceived that only about 55% of these parties were prepared.[13]

To be as well prepared as possible, parties need to understand their cases and the potential mediation procedures and to make some decisions well before mediation sessions begin.[14] Whenever appropriate and feasible, parties should participate in decision-making about choice of dispute resolution process,[15] get advice from lawyers and/or others,[16] obtain and exchange relevant information with their counterparts and the mediators,[17] learn about applicable law if relevant, learn how the mediation process would work in their case, identify and prioritize their goals in mediation, anticipate their counterparts' perspective, consider the likely outcomes if the parties do not reach agreement, and plan possible mediation strategies.[18]

A threshold decision for parties is what dispute resolution process to use. Although many parties find mediation to be most appropriate, they may prefer other processes such as short judicial settlement conferences that do not involve as much time and expense.[19] Thus parties should understand the range of dispute resolution processes they might use, whether they might be ordered to mediate,[20] and whether they might opt out of mediation.[21]

Before beginning a mediation session, parties should know if there are rules such as "good faith" requirements that could profoundly affect the mediation process. Courts with such requirements can override normal confidentiality protections to determine if parties don't make offers that the courts deem reasonable, i.e., in good faith.[22]

Courts have strong interests in promoting preparation for court-connected mediation. In general, if everyone is well prepared before a mediation session, the

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11. *Id.* at 184–85 (footnotes omitted).
12. Timothy Hedeen et al., *Setting the Table for Mediation Success: Supporting Disputants to Arrive Prepared*, 2021 J. DISP. RESOL. 65, 72–73.
13. *Id.* at 75–76.
14. *See infra* Parts III.C.1, 3.D.2.
15. *See infra* Parts III.C.2, 3.D.3.
16. *See infra* Parts III.C.7, 3.D.3, 3.D.4.
17. *See infra* Parts III.C.5, 3.C.6.
18. *See* text accompanying *supra* notes 3–4.
19. *See infra* Parts III.C.2, 3.D.3.
20. *See infra* Parts III.C.3, 3.D.8.
21. *See infra* Parts III.C.4, 3.D.8.
22. *See infra* Parts III.C.8, 3.D.6.

process is likely to achieve the goals of the participants as well as the court's. This obviously benefits parties and reduces the time that courts spend managing litigation and trying cases.[23]

Courts can undertake initiatives to help parties, attorneys, and mediators prepare for mediation sessions. Such initiatives can have a major impact on the quality of the process and the outcomes.[24] Court assistance in preparation is especially appropriate when courts order parties to mediate without their consent.[25]

In some cases, mediators may not know the identity of the parties until right before the mediation session begins. In such cases, courts can help parties prepare by providing written materials and/or videos well before the mediation session with information provided by mail, email, and/or websites.[26] Courts can promote or operate programs for pro bono attorneys to represent otherwise self-represented parties in mediation in appropriate cases.[27]

Courts can promote preparation for mediation sessions without incurring additional costs – essentially for free. This would involve reviewing and revising court rules, policies, and publications, which are activities that courts routinely do in any case. So, although these efforts would require some time by judges and other court personnel, courts should not need to hire additional staff or incur substantial out-of-pocket expenses. If experts develop guidelines and generic materials to help parties prepare, courts can use or adapt them with relatively little effort.[28] Courts also can encourage or require mediators and attorneys to undertake careful preparation, which should be a routine practice whenever possible and appropriate.[29]

Courts should not assume that parties and attorneys will follow court rules about preparation without court intervention. Roselle Wissler and Bob Dauber's study, *Leading Horses to Water: The Impact of an ADR "Confer and Report" Rule*, found that there was no increase to early ADR discussions or settlements resulting from a rule requiring lawyers to confer with their counterparts about ADR early in litigation and report the results to the court.[30] Wissler and Dauber cited research indicating that active involvement of judges or lawyers acting as neutrals would be more effective in promoting early resolution than simply adopting rules.[31] This suggests that courts can increase preparation by monitoring compliance and insisting that parties, attorneys, and mediators comply with the rules. If courts routinely do so in pretrial conferences, these activities should become part of the practice culture that practitioners are likely to internalize in their routines.

To assess federal district courts' efforts to promote such preparation, this article analyzes information relevant to preparation for mediation sessions on the websites of all 94 federal district courts.

Part II of this article provides general background information about court-connected mediation. It begins by noting that parties are – or should be – critically

23. *See* text accompanying *supra* note 5.

24. *See generally infra* Part III.D (describing policies of some courts to improve mediation processes and outcomes).

25. *See infra* Parts III.C.3, III.D.7.

26. *See infra* Part III.C.1.

27. *See* text accompanying *infra* notes 93–94.

28. *See infra* Part III.D.8.

29. *See infra* Part III.D.4.

30. Roselle Wissler and Bob Dauber, *Leading Horses to Water: The Impact of an ADR "Confer and Report" Rule*, 26 JUST. SYS. J. 253, 260–64 (2005).

31. *Id.* at 266–70.

important decision-makers in their cases. This Part shows that courts are complex dispute systems subject to the principles of dispute system design. It presents provisions of the National Standards for Court-Connected Mediation Programs relevant to preparation for mediation sessions. It describes three paths that courts can take regarding mediation, which I call the "voluntary," "liti-mediation," and "middle" paths.

Part III analyzes mediation in federal district courts, beginning with a history of courts' involvement in alternative dispute resolution. It then summarizes the courts' website information relating to preparation for mediation sessions, which usually is located in the courts' local rules. This Part provides citations to the local rules and policies of specific district courts. It highlights praiseworthy provisions and materials that other courts may want to use or adapt. The final section in this Part offers recommendations for courts, including using mediation process labels, similar to nutrition labels on grocery products.

Part IV discusses the implications of this study for real practice systems theory. This theory uses a dispute system design framework to analyze practitioners' thoughts and actions before, during, and after professional interventions like mediation. Practitioners' individual practice systems may be nested within organizational systems like court-connected mediation.

Part V is the conclusion. Although this article focuses on court-connected mediation, particularly in federal district courts, the same general principles can be applied in other mediations, including those sponsored by other courts and organizations. The district courts use detailed pretrial procedures and parties often are represented by attorneys. In contexts with different procedures, mediation system designers should plan to help parties be as ready as possible to mediate seriously when they begin mediation sessions. The plans for each court or mediation program should be tailored to the particular types of cases, parties, and other circumstances involved.

The Appendix includes a table identifying provisions in each district court's rules related to preparation for mediation sessions. It also collects selected materials that parties, attorneys, mediators, and program administrators can use to make mediations as effective as possible. Courts may include links on their websites to some of these materials.

II. COURT-CONNECTED MEDIATION GENERALLY

This Part presents a general overview of how mediation fits into courts' activities. Part II.A demonstrates that parties are – or should be – central decision-makers in litigation and mediation. Part II.B shows that mediation and other "alternative" dispute resolution processes now are regular parts of courts' complex dispute systems. Part II.C cites detailed provisions in National Standards for Court-Connected Mediation Programs prescribing preparation practices for mediation sessions. Part II.D describes and contrasts three philosophies about court-connected mediation.

A. The Central Role of Parties in Litigation and Mediation

In a common image of the legal system, judges sit atop the decision-making hierarchy. That image is somewhat misleading because litigants are actually critical

decision-makers, and judges can make decisions only when parties give them that authority. Most disputes are resolved without litigation because the parties decide not to invoke courts' authority.[32] Even after a party files suit, in most cases, the parties can effectively oust the courts' jurisdiction and reassert their authority over their disputes by settling lawsuits.

Similarly, there is a misleading notion that lawyers have decision-making authority over their clients. Under Rule 1.2(a) of the ABA Model Rules of Professional Conduct, "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . A lawyer shall abide by a client's decision whether to settle a matter."[33] Rule 1.4(b) states, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[34]

Parties are clearly the decision-makers in mediation. Standard I.A of the Model Standards of Conduct for Mediators states:

> A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.[35]

Although some judges, lawyers, and mediators do not respect parties' decision-making authority, those actions are deviations from professional norms.

Some courts explicitly recognize parties' predominant decision-making authority in mediation. For example, the U.S. District Court for the Western District of Tennessee's ADR Plan states, "The central tenet of mediation is that the parties find their own solutions, with the assistance of the Mediator."[36] The U.S. District Court for the District of Idaho states the same fundamental principle:

> The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options and finding points of agreement. *Whether a settlement results from a mediation and the nature and extent of the settlement are within the sole control of the parties*.[37]

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32. *See* Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 544–45 (1980) (exemplifying a classic study, finding that overall, people filed lawsuits in only eleven percent of disputes, though the rate varied by type of case).

33. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 1983).

34. *Id.* r. 1.4(b).

35. AM. ARB. ASS'N, AM. BAR ASS'N, & ASSN' FOR CONFLICT RESOL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS Std. 1.A (2005).

36. W.D. Tenn. ADR Plan § 5.1.

37. D. Idaho Civ. R. 16.4(b)(3)(A) (emphasis added).

B. Courts as Dispute Systems

There is a common misconception that the main business of "trial courts" is to conduct trials. Of course, trial courts always have conducted trials. According to legal historian Lawrence Friedman, however, trial-level courts always have processed settlements and plea bargains much more often than they tried lawsuits.[38]

For an article about federal "trial" courts, I interviewed federal court clerks, who are the chief administrative officers of the courts.[39] One clerk observed, "Trials are not our main business,"[40] reflecting the fact that courts do many other important tasks in the administration of justice. That article noted that courts "must do many things in addition to conducting trials, including assisting litigants, providing overall case management, managing case documents, conducting pretrial hearings, deciding contested motions, arranging for special services such as translation, administering jury pools, supervising public defender and probation systems, operating ADR programs, publicizing court decisions, and promulgating rules, policies, and procedures."[41] Judges also conduct settlement conferences to terminate suits without trial.

C. Standards for Court-Connected Mediation

The Center for Dispute Settlement and Institute for Judicial Administration developed National Standards for Court-Connected Mediation Programs.[42] The sixteen standards reflect the systemic nature of court-connected mediation including provisions relevant to preparation for mediation sessions. The drafters recognize that courts may not be able to adhere to all the standards and that courts should follow them as much as appropriate given their "local needs and circumstances."[43] This Part presents selected standards relevant to preparation.

Standard 2.0 addresses courts' responsibility for mediation.[44] Standard 2.1.a states, "The court is fully responsible for mediators it employs and programs it operates."[45] Standard 2.1.b states, "The court has the same responsibility for monitoring the quality of mediators and/or mediation programs outside the court to which it refers cases as it has for its own programs."[46] Standard 2.3.a(2) states, "When a court makes a mandatory referral of parties to mediation, whether inside or outside the court, it should be responsible for providing the mediator or mediation program sufficient information to permit the mediator to deal with the case effectively."[47]

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38. *See* Lawrence M. Friedman, *The Day before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 689–97 (2004).

39. *See* John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213.

40. *Id.* at 222.

41. *Id.* at 219–20 (footnotes omitted).

42. CTR. FOR DISP. SETTLEMENT & INST. JUD. ADMIN., NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (n.d.).

43. *Id.* at ii.

44. *Id.* at Standard 2.0.

45. *Id.* at Standard 2.1.a.

46. *Id.* at Standard 2.1.b.

47. *Id.* at Standard 2.3.a(2).

Standard 3.0 addresses courts' responsibility to provide information for judges, court personnel, and users.[48] Standard 3.1 states, "Courts, in collaboration with bar and professional organizations, are responsible for providing information to the public, the bar, judges, and court personnel regarding the mediation process; the availability of programs; the differences between mediation, adjudication and other dispute resolution processes; the possibility of savings in cost and time; and the consequences of participation."[49] Standard 3.2.a states:

> Courts should provide the following information to judges, court personnel and the bar:
>
> (1) the goals and limitations of the jurisdiction's program(s)
> (2) the basis for selecting cases
> (3) the way in which the program operates
> (4) the information to be provided to attorneys and litigants in individual cases
> (5) the way in which the legal and mediation processes interact
> (6) the enforcement of agreements
> (7) applicable laws and rules concerning mediation.[50]

Standard 3.2.b states:

> Courts should provide the following information to users (parties and attorneys) in addition to the information in (a):
>
> General information:
>
> (1) issues appropriate for mediation
> (2) the possible mediators and how they will be selected
> (3) party choice, if any, of mediators
> (4) any fees
> (5) program operation, including location, times of operation, intake procedures, contact person
> (6) the availability of special services for non-English speakers, and persons who have communication, mobility, or other disabilities
> (7) the possibility of savings or additional expenditures of money or time
>
> Information on process:
>
> (1) the purpose of mediation
> (2) confidentiality of process and records

48. CENTER FOR DISPUTE SETTLEMENT & INSTITUTE OF JUDICIAL ADMINISTRATION, *supra* note 42, at Standard 3.0.

49. *Id.* at Standard 3.1.

50. *Id.* at Standard 3.2.a(1)–(7).

(3) role of the parties and/or attorneys in mediation
(4) role of the mediator, including lack of authority to impose a solution
(5) voluntary acceptance of any resolution or agreement
(6) the advantages and disadvantages of participating in determining solutions
(7) enforcement of agreements
(8) availability of formal adjudication if a formal resolution or agreement is not achieved and implemented
(9) the way in which the legal and mediation processes interact, including permissible communications between mediators and the court
(10) the advantages and disadvantages of a lack of formal record.[51]

Standard 5.1 states:

> Mandatory attendance at an initial mediation session may be appropriate, but only when a mandate is more likely to serve the interest of parties (including those not represented by counsel), the justice system and the public than would voluntary attendance. Courts should impose mandatory attendance only when:
>
> a. the cost of mediation is publicly funded, consistent with Standard 13.0 on Funding:
>
> b. there is no inappropriate pressure to settle, in the form of reports to the trier of fact or disincentives to trial; and
>
> c. mediators or mediation programs of high quality (i) are easily accessible; (ii) permit party participation; (iii) permit attorney participation when the parties wish it; and (iv) provide clear and complete information about the precise process and procedures that are being required.[52]

The commentary to Standard 5.1 states, "In using the term 'mandatory attendance[,]' the intention of the Standards is to clarify that by referring parties to mediation on a mandatory basis a court should require only that they attend an initial mediation session, discuss the case, and be educated about the process in order to make an informed choice about their continued participation."[53]

Standard 11.0 deals with inappropriate pressure on parties to settle their cases.[54] Standard 11.1 states, "Courts should institute appropriate provisions to permit parties to opt out of mediation."[55] Standard 11.2 states, "Courts should provide parties

51. *Id.* at Standard 3.2.b.
52. *Id.* at Standard 5.1.
53. *Id.* at Standard 5.1 comment.
54. CENTER FOR DISPUTE SETTLEMENT & INSTITUTE OF JUDICIAL ADMINISTRATION, *supra* note 42, at Standard 11.0.
55. *Id.* at Standard 11.1.

who are required to participate in mediation with full and accurate information about the process to which they are being referred, including the fact that they are not required to make offers and concessions or to settle."[56] Standard 11.2 also addresses "good faith" requirements, as described below.[57]

Standard 16.0 describes courts' obligations to regularly monitor and evaluate their ADR programs and base decisions on the courts' programs based on the collected data, as described below.[58]

D. Three Paths for Court-Connected Mediation

Many modern court systems now routinely offer mediation and sometimes require parties to mediate without their consent. Mediation is, by definition, a voluntary process in which parties are free to decide *not* to reach agreement and, instead, use other procedures such as trial. The fact that parties do not have to reach agreement in mediation is part of the rationale for court-connected mediation – parties need only attend but not necessarily agree.

There has been a long-standing controversy about the appropriateness of courts ordering parties to mediate without their consent. I described two differing theoretical perspectives in *Charting a Middle Course for Court-Connected Mediation*.[59] I called them the "liti-mediation" and "voluntary" perspectives, which I described as follows:

> From a "liti-mediation" perspective, courts regulate mediation as a normal part of the litigation process. Court-connected mediation – especially *court-ordered* mediation – helps relieve some courts' caseload burdens by referring part of their dockets to mediation. It is grounded in a concern that without a court order, parties and attorneys would not mediate some cases that are appropriate for mediation. In that situation, some parties lose valuable opportunities to mediate, and parties and courts spend their limited resources on cases that would appropriately be resolved in mediation. Courts want to ensure that parties and attorneys comply with their orders and cooperate with the courts' case management systems. From this perspective, courts must regulate mediation and rigorously enforce rules to ensure the integrity of mediation.
>
> The other perspective focuses on the voluntary nature of mediation and emphasizes the distinction from the litigation process. Parties have a constitutional right to trial but no constitutional right to mediation. Courts have the authority to order parties to mediate, but courts are not obligated to order mediation and parties have no right to compel courts to do so. Litigation is designed to produce binding adjudications of facts and law.

56. *Id.* at Standard 11.2.
57. *See* text accompanying *infra* note 134.
58. *See* text accompanying *infra* notes 138–40.
59. *See* John Lande, *Charting a Middle Course for Court-Connected Mediation*, 2022 J. DISP. RESOL. 63.

> Mediation is designed to help parties to communicate, negotiate, and settle cases, and any settlement must be a voluntary decision of the parties.[60]

From the voluntary perspective, a liti-mediation approach puts too much pressure on parties and risks undermining the integrity of mediation. In a pure version of the voluntary perspective, courts may promote mediation but do not order parties to mediate without their consent. "Another version of this voluntary process perspective accepts the legitimacy (or at least the reality) of court-ordered mediation but places a premium on protecting parties' rights to make their own decisions free from inappropriate pressure."[61]

I distinguished the two theoretical perspectives regarding various issues including requirement to attend mediation, whether parties can readily opt out of a mediation requirement, how long they are required to participate in mediation, whether they have a right to leave mediation without the mediator's permission, courts' willingness to respect mediation confidentiality, whether parties are required to participate in "good faith," whether parties have a duty to negotiate, and how the courts define the settlement authority needed for mediation.[62]

I advocated a middle course in designing and operating court-connected mediation. It starts from the voluntary perspective but also accommodates important interests reflected in a liti-mediation perspective. I argued that a middle course would be in courts' enlightened self-interest.

My recommended approach is intended to make mediation attractive so that parties would willingly choose to use it. Even when courts order parties to mediate, courts can operate programs that make parties want to take advantage of it. The more that parties and attorneys believe that mediation satisfies their interests, the more that they will use it without compulsion and the less that courts are likely to need to adjudicate disputes about mandated mediation.[63]

III. MEDIATION IN FEDERAL DISTRICT COURTS

This Part analyzes policies of federal district courts to illustrate how some courts routinely promote preparation for mediation sessions by mediators, attorneys, and parties. Part III.A describes how district courts have been required to develop local rules implementing ADR programs for their individual courts. Part III.B provides an overview of the information that district courts provide about preparation on their websites and in their local rules. Part III.C analyzes specific procedures in the rules relevant to preparation, and Part III.D recommends that courts adopt or adapt certain exemplary court rules.

A. Brief History and Overview of Mediation in Federal District Courts

The federal courts have promoted mediation for more than a quarter century. The Civil Justice Reform Act of 1990 ("CJRA") mandated local rulemaking by all

60. *Id.* at 67 (emphasis in original).
61. *Id.* at 68.
62. *Id.* at 68–69.
63. *Id.* at 69–70.

federal district courts.[64] It required each court to develop a "civil justice expense and delay reduction plan . . . to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."[65] It required each court to consider authorizing judges to refer appropriate cases to ADR processes, specifically including mediation, among other measures to reduce litigation delay and cost.[66]

The CJRA essentially required each district court to conduct a dispute system design process.[67] Each court was required to create a representative advisory group to develop local court management practices, including ADR policies.[68] Under the CJRA, the advisory groups were required to prepare reports including: (1) an assessment of the courts' dockets, (2) the basis for their recommendations, and (3) recommended measures, rules, and programs.[69]

In my study of court clerks, some clerks described the significant impact of the CJRA process.

> One clerk said that in his court, the advisory group was surprisingly aggressive and assertive in its recommendations to the court for reducing delay. "I know this Congressional directive was merely winked at in many jurisdictions, producing very little of substance and almost no changes. Ours was a watershed experience. This court has been substantially reformed as a result of the work of the CJRA advisory group, and the follow up by the judges and staff that implemented the group's recommendations."[70]

Another clerk said:

> I've worked in 3 different districts since the inception of CJRA and my observations are that it has made judges more conscious of and accountable for their civil caseload and particularly the age of motions. Like many things for all of us, once something's brought to our attention, we deal with it. Even remembering the work that went into setting the whole system up and the work it takes each time reports are due, my opinion is that it's been time and effort well spent and I don't know that it would've happened any other way.[71]

In 1993, Rule 16 of the Federal Rules of Civil Procedure, which authorizes courts to conduct pretrial conferences, was amended to authorize courts to take actions regarding "settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule."[72]

64. Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–482 (1990).
65. *Id.* § 471.
66. *Id.* § 473.
67. *See* John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 109–12 (2002).
68. 28 U.S.C. § 478(a).
69. *Id.* § 472(b)(1)–(3).
70. Lande, *supra* note 39, at 245.
71. *Id.*
72. FED. R. CIV. P. 16(c)(2)(I).

The Alternative Dispute Resolution Act of 1998[73] requires each federal district court to adopt local rules implementing its own ADR program. It states, "Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration."[74]

The provisions cited above are very general and do not include detailed prescriptions for how district courts should handle their cases. These decisions generally are embodied in local rules of court. So, each court has great discretion in how it offers and manages ADR processes. Indeed, different judges within the same district court may have very different procedural preferences about the use of mediation, among many other pretrial matters. For example, the District of South Carolina's website includes different policies of various judges on its court.[75]

B. Federal District Court Websites and Local Rules

This Part describes features of federal district court websites relevant to preparation for mediation sessions. This focuses on these websites for several reasons. As just noted, there is a long history of court-connected mediation in the federal courts, and they are legally required to sponsor ADR programs. There are federal courts in all the states and the District of Columbia as well as U.S. territories. The Wissler-Hinshaw study found that mediators in civil cases referred by federal courts were more likely to have some information about the case, including mediation memos, pleadings, and motions, than civil cases referred by state courts.[76] So it seemed likely that the federal courts generally might provide more and better materials to promote preparation than state courts. As a practical matter, there is a convenient website with links to all the federal district court websites.[77]

This article does not analyze websites of federal specialty courts (such as bankruptcy courts), federal appeals courts, state courts, or other entities sponsoring mediation programs. Further research would be useful to analyze how these entities do or do not help parties prepare for mediation sessions.

Appendix 1 identifies some provisions relevant to preparation for mediation sessions on the federal district courts' websites. Although some court websites provide material that is useful in preparation for mediation sessions, most of the courts' websites do not provide helpful information about this.

It is hard to find information about mediation on most of the courts' websites. Only ten court websites have a link on the homepage to a webpage about ADR. An additional thirty-two websites have a webpage devoted to ADR that can be accessed from a wide variety of tabs. Most of these webpages are accessed from tabs labeled as information for attorneys. Other webpages with information about the local ADR programs are in tabs linking to pages about "programs and services," "case management," "court information," "general information," information for self-represented parties, and information for the public.

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73. Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–58.

74. *Id.* § 652(a).

75. *District Judges*, U.S. DIST. CT. D.S.C., https://www.scd.uscourts.gov/Judges/distjudge.asp. (last visited Apr. 14, 2024).

76. *Wissler & Hinshaw Study*, *supra* note 2, at 159.

77. *Court Website Links*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links (last visited May 14, 2024).

The material on the ADR webpages varies greatly. Some webpages are quite short. The webpages of some courts merely refer to the applicable local rule or provide a list of mediators and applications to be included in the courts' roster of mediators. The District of South Dakota's rule is especially brief, merely stating, "Parties are encouraged to use alternative dispute resolution procedures to try to settle their cases without a trial. Magistrate judges are available as mediators to facilitate alternative dispute resolution procedures."[78] Other websites are quite extensive, such as the U.S. District Court for the Central District of California's website (which has a forty-six-page general order about ADR)[79] and the Western Division of the U.S. District Court for the Northern District of Illinois's website (which includes an ADR Handbook).[80] Only twenty websites include material with clearly-understandable language.

In fifty-three of the websites, there was no information about mediation except provisions in the local rules or other formal documents such as general orders, plans, or special local rules for ADR.[81] Many of the documents with the rules are quite long – often well over 100 pages – and are full of legal jargon.

The provisions dealing with mediation and ADR can be hard to find and interpret, even for an emeritus law professor. For example, some rules state that courts may "refer" cases to mediation, which presumably is an order not a suggestion, though that is not always clear. While some rules clearly distinguish judicial settlement conferences from mediation by private mediators, other rules refer to private mediation as "mediated settlement conference[s]"[82] and some rules refer to "mediation" as a process conducted by sitting judges.[83]

Merely reading the rules may be of little or no help to parties – especially self-represented litigants ("SRL"). Almost all courts' websites – eighty-two out of ninety-four courts – have webpages specifically for SRLs, but only twenty-two SRL webpages have any information referring to ADR or mediation. Many of those webpages merely mention or define these terms without providing any information about how or why SRLs might take advantage of these processes.

Very few websites use terminology from mediation theory. One exception is the U.S. District Court for the District of Kansas, though most dispute resolution experts would define the terms differently than its rule. That court's Rule 16.3(b)(1) states, "A mediator may employ traditional facilitative strategies (aimed at solutions to problems underlying the litigation), evaluative strategies (designed to present the strengths and weaknesses of the case, or its relative value), or a combination of both approaches."[84] Some rules authorize mediators to use "evaluative" techniques without using that term. For example, under a rule in the U.S. District Court for the Western District of Missouri, a mediator may give:

78. D.S.D. Civ. R. 53.1.

79. *Alternative Dispute Resolution (ADR) in the Central District: An Overview*, U.S. D. C.D. CAL., https://www.cacd.uscourts.gov/attorneys/adr (last visited May 14, 2024).

80. *Mediation Program for the Western Division*, U.S. D. N.D. ILL. https://www.ilnd.uscourts.gov/Pages.aspx?AhQrDes4bAdRS1GzTDqjm3pU+aw2eOb7 (last visited Apr. 14, 2024).

81. For simplicity, this article refers to all such documents as "rules."

82. *See, e.g.*, W.D.N.C. Loc. Civ. R. 16.2(A).

83. *See, e.g.*, E.D. Wash. R. 16(a)(5)(C).

84. D. Kan. R. 16(b)(1).

a) an estimate, where feasible, of the likelihood of liability and the dollar range of damages;
b) an opinion of the verdict or judgment if he or she were the trier of fact;
c) an assessment of key evidentiary and tactical issues; and
d) a nonbinding, reasoned evaluation of the case on its merits, including addressing the strengths and weaknesses of the case.[85]

Virtually all the information about mediation in the courts' websites is in the form of text describing the process. One exception is the U.S. District Court for the Western District of Michigan's video describing the prisoner early mediation program.[86]

C. Provisions in Local Rules Relevant to Preparation

Courts' rules governing mediation address a wide variety of issues. This Part focuses on existing rules in some courts that are designed to help parties and attorneys prepare for mediation sessions.

Several rules require that parties be given information about ADR, as described in Part III.C.1. Some also require attorneys to consult with their clients about the use of ADR. Many more rules require attorneys to consult with their counterparts about this, as described in Part III.C.2.

Part III.C.3 discusses whether parties might be required to mediate without their consent. Part III.C.4 describes rules for parties seeking to opt out of mediation. It is important for parties to know in advance whether they might be ordered to mediate and whether they might try to use another process such as a settlement conference.

Part III.C.5 presents provisions regarding parties' and attorneys' consultation with mediators before mediation sessions. Part III.C.6 describes provisions about mediation memos to be provided before mediation sessions.

Part III.C.7 analyzes some courts' requirements that parties mediate in "good faith." Parties should know in advance whether they are at risk of a court considering their participation to be in bad faith (e.g., if the court deems their positions to be unreasonable) and whether a good faith requirement would override normal confidentiality protections.

1. Providing Information to Parties

Four courts require that parties be given information about ADR either by the courts directly or by the parties' attorneys. Two courts assume the responsibility of informing parties about ADR. In the U.S. District Court for the District of Rhode Island, "Prior to the Rule 16(b) Conference, the Court will include with the Notice

85. W.D. Mo. Gen. Ord. § III.A (effective Aug. 8, 2023).
86. U.S. D. Mich., *Prisoner Early Mediation Program*, YOUTUBE (Sept. 11, 2018) https://www.youtube.com/watch?v=sqvpkAPe6jk.

and Order mailed to the parties, a brief summary of essential ADR information."[87] In the U.S. District Court for the Southern District of Georgia,

> [U]pon the filing of the complaint the Clerk shall furnish plaintiff's counsel with sufficient copies of the Notice of ADR and Case Management Procedures, also referred to as a Litigant's Bill of Rights, for distribution to all parties to the litigation. The purpose of this Notice is to apprise counsel and parties of alternative dispute resolution opportunities, the availability of the use of a Magistrate Judge, the period of time expected for completion of discovery, and to alert the parties that they may be required to appear at a pretrial conference.[88]

Two courts require attorneys to inform their clients about ADR. In the U.S. District Court for the Central District of California, in cases assigned to judges participating in the Court-Directed ADR Program, "Counsel are required to furnish and discuss with their clients the 'Notice to Parties: Court Policy on Settlement and Use of Alternative Dispute Resolution' . . . and the ADR options available to them before the [pretrial] conference."[89] In the Western Division of the U.S. District Court for the Northern District of Illinois,

> [P]arties, through their attorneys, must e-file with the court a certification indicating:
>
> (a) each has read the Local Rules and pamphlet governing the court's mediation program;
> (b) the attorneys have discussed with their respective clients the available dispute resolution options provided by the court and private entities;
> (c) an estimate of the fees and costs that would be associated with litigation of the matter, through trial, has been given to the client; and
> (d) [w]hen applicable, the mediator has been selected by the parties and the date of mediation or the other method of ADR selected is identified.[90]

Some courts do not require that parties be given materials about mediation or ADR but have developed clear documents to help parties understand it. Appendix 4 includes links to court websites with helpful materials for parties.

Many websites include a webpage with information specifically for self-represented litigants (SRL). Unfortunately, many of these pages are identified as being for "pro se" litigants, which many SRLs would not recognize as applying to them. The webpages focus almost exclusively on litigation procedures. Some of these webpages include handbooks for SRLs that refer to mediation or ADR, though most of these references are brief and buried in a lot of unrelated text. A few courts

87. D.R.I. Alternative Dispute Resolution Plan § II.
88. S.D. Ga. Civ. R. 16.7.1.
89. C.D. Cal. Gen. Ord. 11-10 § 5.1.
90. N.D. Ill. W. Div. Alt. Disp. Resol. R. 3-2.

provide helpful information about ADR for SRLs. For example, the U.S. District Court for the Western District of Tennessee's guide for SRLs includes a detailed section explaining ADR.[91] The U.S. District Court for the Eastern District of Wisconsin has a webpage devoted to mediation in its section for SRLs.[92]

Some courts provide information for SRLs about getting pro bono attorneys but generally do not refer to representing clients in mediation and other ADR processes. The U.S. District Court for the Southern District of Illinois is an exception, where the presiding judge may recruit "special mediation counsel" to represent SRLs in mediation.[93] These counsel help clients prepare for mediation, attend mediation, and assist in any follow-up activities such as processing a settlement agreement.[94]

2. Consulting with Clients and/or Counterpart Attorneys About Choice of Dispute Resolution Process

Although the ABA Model Rules of Professional Conduct do not require that attorneys consult with their clients about dispute resolution process options, this obligation is implicit – and especially important – in cases where clients might be ordered to mediate. Rule 1.4(a) states, "A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished."[95] Comment 5 states:

> The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. . .. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others.[96]

Aside from any obligation under ethical rules, many attorneys routinely discuss dispute resolution options with clients because mediation often is a regular part of the litigation process. Of course, some attorneys do not do so.

Thirty-eight courts require parties to consider using ADR. For example, in the U.S. District Court for the District of Alaska, "At an early stage in every case, the parties must actively consider mediation or a settlement conference to facilitate less costly resolution of the litigation."[97]

Some courts have rules requiring attorneys to consult with their clients and/or counterpart attorneys about the choice of dispute resolution process rather than the conduct of mediation. In nineteen courts, parties – or, practically, their attorneys – are required to consult with each other about the use of ADR. For example, in the

91. *Pro Se Litigants*, W.D. TENN., https://www.tnwd.uscourts.gov/pro-se-litigants (last visited Apr. 15, 2024).

92. *Mediation*, E.D. WIS. https://www.wied.uscourts.gov/mediation-representing-yourself (last visited Apr. 15, 2024).

93. S.D. Ill. Admin. Ord. 301 §§ 2.1.A.3, 3.1.D, 3.9.B.4.

94. *See id.* §§ 5–6.

95. MODEL RULES OF PRO. CONDUCT r 1.4(a) (AM. BAR ASS'N 1983).

96. *Id.* at comment 5.

97. D. Alaska Civ. R. 16.2(b)(1).

U.S. District Court for the District of Oregon, "Not later than 120 days from the initiation of a lawsuit, counsel for all parties (after conferring with their clients) must confer with all other attorneys of record and all unrepresented parties, to discuss whether the case would benefit from any private or court-sponsored ADR option."[98]

Only seven courts have rules requiring attorneys to *consult with their clients* about ADR. Some courts require attorneys to discuss ADR with both their clients and counterpart attorneys. For example:

- In the U.S. District Court for the Southern District of Texas, "Before the initial conference in a case and within 60 days after the deadline for close of discovery in a case, counsel are required to discuss with their clients and with opposing counsel the appropriateness of ADR in the case."[99]

- In the U.S. District Court for the District of Maine, "[C]ounsel shall consult with each other and their clients concerning all available ADR processes and shall consider all ADR options."[100]

- In the U.S. District Court for the District of South Carolina, "[C]ounsel for each party shall file and serve a statement certifying that counsel has (1) provided the party with any materials relating to ADR that were required to be provided by the . . . scheduling order, (2) discussed the availability of ADR mechanisms with the party, and (3) discussed the advisability and timing of ADR with opposing counsel."[101]

Some courts require attorneys to try to reach agreement about the use of ADR. In the U.S. District Court for the Northern District of California:

> In cases assigned to the ADR Multi-Option Program, as soon as feasible..., counsel must meet and confer to discuss the available ADR processes, to identify the process each believes will be most helpful to the parties' settlement efforts, to specify any formal or informal exchange of information needed before an ADR session, and to attempt to agree on an ADR process, and a deadline for the ADR session.[102]

In addition, both attorneys and clients must certify in writing that they have:

> (1) Read the handbook entitled "Alternative Dispute Resolution Procedures Handbook" on the Court's ADR website (found at cand.uscourts.gov/adr);

98. D. Or. R. 16-4(c).
99. S.D. Tex. R. 16.4.B.
100. D. Me. R. 83.11(b)(1).
101. D.S.C. Civ. R. 16.03.
102. N.D. Cal. ADR R. 3-5(a).

> (2) Discussed with each other the available dispute resolution options provided by the Court and private entities; and
>
> (3) Considered whether their case might benefit from any of the available dispute resolution options.[103]

Attorneys must file a report about their discussions and preferences for using ADR.

> Counsel must include in their joint case management statement a report on the status of ADR, specifying which ADR process option they have selected and a proposed deadline by which the parties will conduct the ADR session or, if they do not agree, setting forth which option and timing each party prefers.[104]

3. Requiring Parties to Mediate

The court websites generally fit into one of the three theoretical perspectives concerning court-connected mediation described above.[105] The local rules in twenty-six courts reflect a somewhat "voluntary" perspective as their rules do not permit courts to order parties to participate in mediation without the parties' consent. Many of these rules authorize courts to order mediation *with* the parties' consent. Some parties and attorneys may appreciate such orders because they provide judicial structure, supervision, and enforcement if needed. These courts may require parties to participate in judicial settlement conferences without their consent, but parties may prefer them because they do not pay fees to the judges and the settlement conferences may be shorter than mediations.

In eleven courts, parties are automatically or presumptively ordered to mediate, reflecting a "liti-mediation" perspective.[106] In sixty courts, the local rules give judges the discretion to order mediation on a case-by-case basis. This may reflect a middle course between voluntary and automatically mandatory mediation.

These are rough characterizations considering that the actual attitudes as the approaches of the courts presumably vary within each of these three groups. Moreover, individual judges have great discretion in managing their cases, so particular judges within each court undoubtedly have different preferences and policies about mediation.

The rules generally do not specify how long parties must remain in mediation or when they are permitted to leave. The U.S. District Court for the Southern District of Illinois is an exception as its mandatory mediation is limited to two hours, though "the parties are encouraged to spend additional time unless the mediator agrees that additional time would not be productive."[107] The U.S. District Court for the Western District of Michigan's description of its "Voluntary Facilitative Mediation Program" states that "The parties are free to continue with the process as long

103. *Id.* at R. 3-5(b)).
104. *Id.* at R. 3-5(d)(1).
105. *See* text accompanying *supra* notes 59–63.
106. *See* text accompanying *supra* note 60.
107. Mandatory Mediation Program, Admin. Ord. 301 §§ 3.9.A.1, 3.9.B.2 (S.D. Ill. Oct. 8, 2021).

as they feel it is productive."[108] By contrast, the rule in the U.S. District Court for the Northern District of Indiana apparently requires parties to participate in two mediation sessions before they may terminate mediation.[109]

4. Opting Out of Mediation

Courts differ in their policies enforcing mediation mandates. Few courts reflect the "voluntary" mediation perspective[110] by giving parties unilateral discretion to opt out of mediation. The U.S. District Court for the District of Utah is unusual in giving parties power to opt out without the court's permission. Its ADR Plan states, "[A]ny party to a civil action which has been referred to the ADR Program may opt out of participation in the program."[111]

Courts reflecting a "middle course"[112] make it easy to opt out of mediation. For example, the U.S. District Court for the District of South Carolina requires parties to show "good cause" to opt out but provides that "relief shall be freely given" from any mediation requirement. [113] The Western Division of the U.S. District Court for Northern District of Illinois considers the parties' perspectives about whether mediation would be productive:

> The court, in considering whether a case is appropriate for referral to mediation, will consider the likelihood that mediation will be beneficial, the burden imposed on the parties by mediation, the additional costs to the parties, and the recommendations of the parties. If the judge at the case management conference determines that mediation is not likely to deliver benefits to the parties sufficient to justify the resources consumed by its use, the judge will exempt the case from participating in any ADR process.[114]

In eight districts, courts use a strict "liti-mediation" approach[115] making it hard or impossible for parties to avoid mediation mandates. Local rules display this approach in provisions setting strict standards for opting out. For example, the U.S. District Court for the Southern District of Illinois has the following provision:

> Motions to opt out shall be granted only for "good cause" shown. Inconvenience, travel costs, attorney fees, or other costs shall not constitute "good cause." Each judge may identify criteria that he or she finds to establish good cause in a particular case. A party seeking relief from the Mandatory Mediation Program must set forth specific and articulable reasons why mandatory mediation has no reasonable chance of being

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108. *Voluntary Facilitative Mediation Program Description § VI.F,* W.D. MICH., https://www.miwd.uscourts.gov/sites/miwd/files/vfm_program_desc.pdf (last visited May 14, 2024).
109. N.D. Ind. R. 16-6(c); Ind. R. ADR 2.7(D)(2).
110. *See* text accompanying *supra* note 60.
111. *ADR Plan*, D. UTAH (Aug. 12, 2023), https://www.utd.uscourts.gov/adr-plan [https://web.archive.org/web/20230812215344/https://www.utd.uscourts.gov/adr-plan#aOptingOut].
112. *See* text accompanying *supra* note 63.
113. D.S.C. Civ. R. 16.05.
114. N.D. Ill. W. Div. ADR R. 2-3(a).
115. *See* text accompanying *supra* note 60.

> productive and identify when the case may be in a better posture to explore settlement.[116]

It is practically impossible to demonstrate that mediation has *no* reasonable chance of being productive. Presumably this language is intended to discourage parties from investing the time and money to even try to get excused from a mediation order.

5. Consulting with Mediators before Mediation Sessions

Sixteen courts suggest or require parties or attorneys to consult with mediators before a mediation session. In the U.S. District Court for the Northern District of California:

> The mediator must schedule a brief joint phone conference before the Mediation session with counsel who will attend the Mediation session to discuss matters such as the scheduling of the Mediation, the procedures to be followed, compensation of the neutral, the nature of the case, the content of the written Mediation statements, and which client representatives will attend. The mediator may schedule additional pre-session calls either jointly or separately as appropriate.[117]

The U.S. District Court for the Central District of California has a detailed provision about consultations before mediation sessions:

> Within thirty (30) days of the Notice of Assignment of Mediator, the panel member must communicate with counsel to schedule the mediation session. The communication may take the form of a brief joint telephone conference with counsel, as described below, or in writing, at the mediator's discretion. A joint telephone conference with counsel would likely include a discussion of the following matters:
>
> (a) fixing a mutually convenient date, time and place for the mediation;
> (b) the procedures to be followed during the mediation;
> (c) who shall attend the session on behalf of each party;
> (d) what material or exhibits shall be provided to the mediator prior to the mediation or brought by the parties to the mediation;
> (e) any issues or matters that the mediator would like the parties to address in their written mediation statements;
> (f) page limitations for mediation statements;

116. S.D. Ill. Admin. Ord. 301 § 2.2.B.
117. N.D. Cal. ADR R. 6-6.

> (g) whether the parties are likely to want to continue beyond the three pro bono hours offered by the panel member and, if so, the terms and rates of the panel member . . .;
> (h) and any other matters that might enhance the quality of the mediation.[118]

Rules generally require that only attorneys consult with mediators before mediation sessions, but some also authorize mediators to require parties to participate in these conversations. For example, in the U.S. District Court for the District of Oregon, "The mediator may schedule a preliminary conference before the mediation and may also require the parties to participate in the preliminary conference along with their attorneys."[119]

6. Providing Mediation Memos

Thirty-nine courts have rules referring to memos for parties to provide before mediation sessions, sometimes at the discretion of the mediators. Many of these rules are brief, while some provide more detail. The U.S. District Court for the Southern District of New York specifies the content of mediation statements in detail:

> a. Unless otherwise directed by the mediator, at least seven (7) days before the first scheduled mediation session, each party shall deliver either to the mediator alone, or between the parties if the parties so consent, a brief mediation statement not exceeding ten double-spaced pages including:
> i. the party's contentions as to both liability and damages;
> ii. an assessment of strengths and weaknesses of each party's claims and/or defenses;
> iii. the status of any settlement negotiations, including prior demands and offers;
> iv. barriers to settlement, if any;
> v. the parties' reasonable settlement range, including any non-monetary proposals for settlement of the action;
> vi. any other facts or circumstances that may be material to the mediation or settlement possibilities; and

118. *Alternative Dispute Resolution (ADR) Program*, Gen. Order 11-10 § 8.1 (C.D. Cal. Aug. 15, 2011).
119. D. Or. R. 16-4(f)(4).

vii. next steps in the litigation if settlement is not reached.[120]

7. Preparing Parties to Mediate

I found only one court website encouraging attorneys to prepare their clients to participate in mediation, perhaps because courts assume that attorneys routinely do so. The U.S. District Court for the Middle District of Alabama's mediation page includes the following language: "To minimize any effects surprising evidence may have on the parties' willingness to compromise, attorneys representing mediating parties should begin preparing their clients by fully informing them of the strengths and weaknesses of their case. Once the parties understand the risks they face, prior to mediation, they should determine the specific compromises they are willing to make and be prepared to inform the mediator when asked."[121]

Not surprisingly for a court policy, this focuses solely on expectations about the possible court outcomes but not on clients' intangible interests,[122] which attorneys should help their clients consider. Even so, this is a better policy than the policies of courts that do not encourage or require attorneys to prepare their clients for mediation.

8. Participating in "Good Faith"

Local rules in twenty-seven courts require parties to participate in mediation in "good faith," and the rules implicitly or explicitly authorize courts to impose sanctions on parties deemed not to be mediating in good faith. As described below, this is a significant risk and so it is important for parties understand the risks before their mediation sessions.

The term "good faith" is vague and susceptible to many different interpretations. Most of the rules do not define the term, implying that, like obscenity, you know good (and bad) faith when you see it. One court opinion illustrated a "you-know-it-when-you-see-it" ("YKIWYSI") definition of good faith:

> "Good faith" is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of a design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone.[123]

Some federal court rules do define good faith in dispute resolution processes. For example, the U.S. District Court for the Northern District of Oklahoma provides

120. *Mediation Program Proc.* § 9, S.D.N.Y. (May 15, 2022), https://www.nysd.uscourts.gov/sites/default/files/pdf/Mediation/Mediation%20Rules%20and%20Procedures/Mediation%20Program%20Procedures%202022_0.pdf.

121. *Mediation in the Middle District*, M.D. ALA., https://www.almd.uscourts.gov/about/mediation-middle-district.

122. *See* MICHAELA KEET, HEATHER HEAVIN & JOHN LANDE, LITIGATION INTEREST AND RISK ASSESSMENT: HELP YOUR CLIENTS MAKE GOOD LITIGATION DECISIONS 29–64 (2020).

123. Doyle v. Gordon, 158 N.Y.S.2d 248, 259–60 (Sup. Ct. 1954).

the following definition of good faith in its rules governing settlement conferences. "The parties and counsel shall participate in the conference in good faith. This means that based on discussion at the conference, the parties will reconsider their negotiating positions, objectively evaluating the strengths and weaknesses of their case or defense, the anticipated cost of the litigation and the uncertainty of a particular result."[124] The U.S. District Court for the Western District of Pennsylvania provides a very detailed description of good faith in mediation:

> It is the expectation of the court that all parties ordered to mediation shall attend with full and complete settlement authority and shall participate in good faith. "Good faith" shall refer to the duty of the parties to meet and negotiate with a willingness to reach agreement, full or partial, on matters in dispute. If parties and/or party representatives with full settlement authority participate, consider and respond to the proposals made by each other, and respect each other's role by not acting in a manner which is arbitrary, capricious or intended to undermine the mediation process, the parties are deemed to be acting in good faith.[125]

The YKIWYSI conception of good faith is similar to these two provisions except that the YKIWYSI conception also includes taking "reasonable" positions and making some concessions. Conversely, bad faith is considered to be unwillingness to make concessions.

In *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*,[126] I analyzed court decisions interpreting good faith requirements. In the final decisions in those cases, the courts found bad faith only when parties failed to attend the mediation or provide required pre-mediation memos as well as some cases where organizational parties did not provide representatives with sufficient settlement authority.[127]

However, in numerous cases, parties relied on YKIWYSI conceptions in claiming bad faith. These claims included that a party made insufficient or insincere efforts to resolve the matter, had not made any offer or any suitable offer, had not participated substantively, had not provided requested documents, had made inconsistent legal arguments, or had unilaterally withdrawn from mediation.[128] Various statutes and rules requiring good faith participation authorize sanctions including fees and costs related to the mediation, contempt, referral to judicial arbitration, preclusion of a court hearing, and even dispositive actions such as dismissal.[129]

A major problem with definitions like those in the Oklahoma and Pennsylvania rules[130] is that, when courts adjudicate claims of bad faith, they must conduct intrusive inquiries into the communication processes in mediation that violate the confidentiality of the process. For example, under the Pennsylvania provision, the court would need to determine if parties actually negotiated with a willingness to reach

124. N.D. Okla. Civ. R. 16-2(a).
125. *ADR Policies and Procedures* § 2.8, W. D. PA. (Jan. 2, 2019), https://www.pawd.uscourts.gov/sites/pawd/files/ADR_Policies_and_Procedures_21.pdf.
126. Lande, *supra* note 67.
127. *Id.* at 84.
128. *Id.* at 84–85.
129. *Id.* at 81.
130. *See* text accompanying *supra* notes 124–25.

agreement, considered proposals made by the other side, acted in an arbitrary or capricious manner, or intended to undermine the mediation process. To make these factual findings, courts would need testimony by parties, attorneys, mediators, and perhaps other participants that delve deeply into mediation by receiving testimony about who said what and in response to what other statements.

Most of the local rules governing mediation include provisions protecting the confidentiality of mediation communications. These provisions generally do not include exceptions for allegations of bad faith, but some rules do so. Moreover, such rules require mediators' statements about who allegedly mediated in bad faith. For example, In the U.S. District Court for the Northern District of West Virginia, mediators are "required to advise the Court . . . if either party disrupts the mediation process, fails to appear or fails to mediate in good faith."[131] In the U.S. District Court for the District of Puerto Rico, mediators "shall not be called by any party as a witness in any court proceeding related to the subject matter of the mediation unless related to . . . the good faith requirement . . .."[132]

Requiring mediators to report their perceptions about who participated in bad faith undermines basic principles of mediation. To enable parties to talk candidly, the process is supposed to be confidential, insulated from litigation. A good faith requirement can make parties uncertain whether the other side or the mediator will report them to the court. Parties often engage in hard bargaining, which their opponents can claim to be bad faith – and some courts would agree with them.

A good faith requirement also undermines the perception of mediators' impartiality, as parties may understandably worry that mediators might report them to the court if the parties do not accept the mediators' suggestions. Indeed, rejection of such suggestions could bias mediators.

Good faith requirements are the logical results of courts requiring parties to mediate and making it hard or impossible to opt out. Without these liti-mediation policies,[133] parties could simply decline to attend mediation or leave if they believe that the other side would not mediate sincerely.

Mediation experts recommend against courts using "good faith" requirements. The commentary to Standard 11.2 of the National Standards for Court-Connected Mediation Programs states:

> In some jurisdictions, mandated referrals explicitly provide or are interpreted to provide that parties must participate in the process "in good faith." . . . Although there is no doubt that successful mediation involves good faith, requirements to participate in good faith are vague, counterproductive, and cannot be enforced without the mediator's testimony. They may also pressure parties to make offers of settlement that might not be made in the absence of such provisions.[134]

The ABA Section of Dispute Resolution adopted a Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs which is consistent with Standard 11.2. The American Bar

131. N.D. W. Va. Civ. R. 16.06(e).
132. D.P.R. Civ. R. 83J(g).
133. *See* text accompanying *supra* note 60.
134. CENTER FOR DISPUTE SETTLEMENT & INSTITUTE OF JUDICIAL ADMINISTRATION, *supra* note 42, at Standard 11.2.

Association resolution states, "Sanctions should be imposed only for violations of rules specifying objectively determinable conduct."[135]

D. Recommendations for Federal District Court Websites and Local Rules

Each court and mediation program differs because of variations in the population of cases and stakeholders and the local practice culture. Accordingly, each court should tailor its mediation program and the information it provides about it. This Part recommends that courts should use dispute system design processes to develop and periodically update their policies. A critical element of courts' system design is the information that they provide to their stakeholders. Of course, no policy or procedure will – or should – guarantee that all parties will settle their cases in mediation. But following these recommendations generally should enhance the quality of mediation processes and outcomes.

1. Courts Should Use Dispute System Design Processes to Periodically Evaluate and Update Their ADR Rules

Since the enactment of the 1998 ADR Act, federal district courts have been required to develop local rules authorizing use of ADR processes in all civil actions. Each district court is required to implement its own ADR program to "encourage and promote the use of alternative dispute resolution in its district."[136] Each district court is required to "designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's alternative dispute resolution program."[137]

The National Standards for Court-Connected Mediation Programs call for courts to regularly monitor and evaluate their ADR programs and use data to base decisions on the courts' mediation programs. These standards reflect the theory and practice of dispute system design. Standard 16.1 states, "Courts should ensure that the mediation programs to which they refer cases are monitored adequately on an ongoing basis, and evaluated on a periodic basis and that sufficient resources are earmarked for these purposes."[138] Standard 16.2 states, "Programs should be required to collect sufficient, accurate information to permit adequate monitoring on an ongoing basis and evaluation on a periodic basis."[139] Standard 16.3 states, "Courts should ensure that program evaluation is widely distributed and linked to decision-making about the program's policies and procedures."[140]

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135. *Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs*, AM. BAR ASS'N SEC. DISP. RESOL. 2 (Aug. 7, 2004), http://indisputably.classcaster.net/files/2023/03/ABA-SDR-policy-of-good-faith-in-court-mandated-mediation.pdf.

136. 28 U.S.C. § 651(b).

137. *Id.* § 651(d).

138. CENTER FOR DISPUTE SETTLEMENT & INSTITUTE OF JUDICIAL ADMINISTRATION, *supra* note 42, at Standard 16.1.

139. *Id.* at Standard 16.2.

140. *Id.* at Standard 16.3.

2. Courts Should Provide Clear, Easily-Accessible Information About Mediation

An important element of mediation programs is the information provided to judges, court personnel, and users.[141] Because parties should be the key decision-makers in court-connected mediation,[142] it is in courts' enlightened self-interest to provide parties with clear, easily-accessible information to help them be as ready as possible right from the start of a mediation session. From the "voluntary" perspective of court-connected mediation,[143] parties need to be prepared to mediate so that they can make well-informed decisions in mediation. From the liti-mediation perspective,[144] parties are more likely to mediate productively and settle if they are well prepared.

Considering the mandate of the 1998 ADR Act to operate ADR programs,[145] it would be appropriate for every district court to have a webpage describing its ADR program. Indeed, each court should include a link to an ADR webpage from the court's homepage. This is especially appropriate in courts that may order parties to mediate without their consent. Ideally, courts would require court clerks and/or parties' attorneys to provide information to the parties describing their courts' ADR programs. Some courts now do this[146] and practically every court could do so.

Courts might develop clear materials for parties to learn about their ADR programs. People are familiar with standardized nutrition labels that highlight important information, as illustrated in Figure 1. The revised label in Figure 1 illustrates the value of highlighting especially important facts to help people make decisions more easily.

141. *See* text accompanying *supra* notes 48–51.
142. *See supra* Part II.A.
143. *See* text accompanying *supra* note 60.
144. *See id*.
145. *See* text accompanying *supra* note 73.
146. *See* text accompanying *supra* notes 87–88.

Figure 1: U.S. Food and Drug Administration Nutrition Facts Label

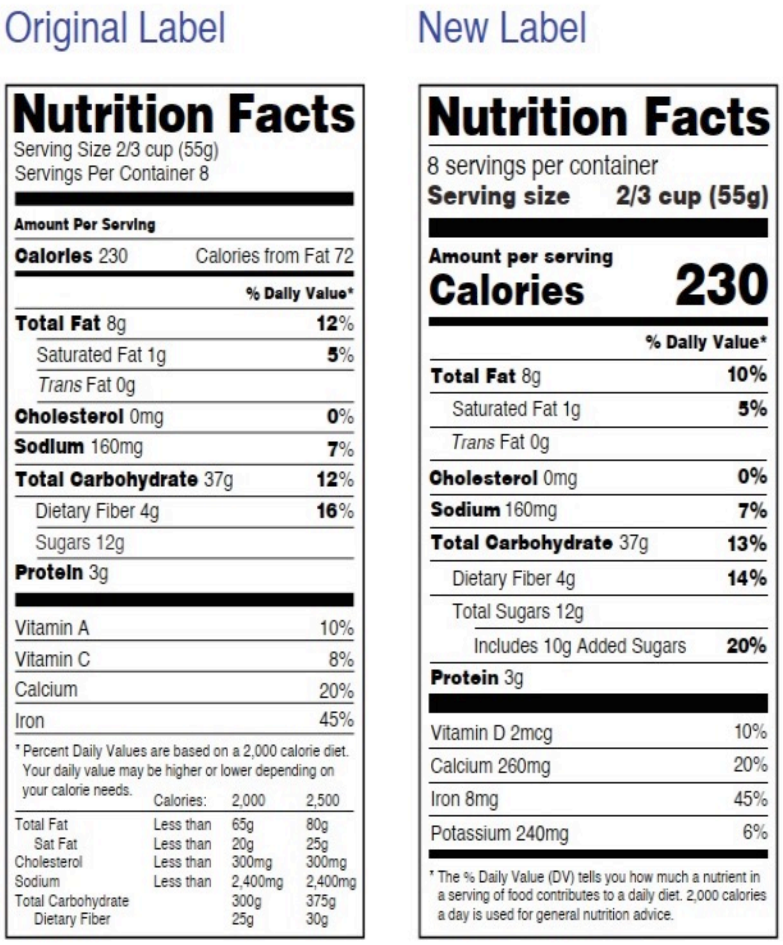

Figure 2 uses a similar generic format to provide important information for parties about courts' mediation programs. Each court should tailor the document to fit its mediation program, which might involve different categories of information than shown in Figure 2. The document should provide information for parties to understand key elements of the mediation program and include references with more detail. It should be understandable to parties with varying levels of literacy. In addition to developing such textual materials, courts can provide videos on their websites to help parties who are not highly literate. Courts should get feedback from a variety of litigants about their materials to make sure that people understand them accurately.

Figure 2: Generic Template of Information About a Court's Mediation Program

Court's ADR Program	This would describe the court's general philosophy of mediation and why parties might benefit from it.
Description of Mediation Process	This would provide an overview of the mediation process.
Selection of Cases for Mediation	This would indicate if specified categories of cases are automatically ordered to mediation, presumptively ordered to mediation, ordered to mediation in the court's discretion, or ordered to mediation only with the parties' consent. It might identify categories of cases included or excluded.
Timing of Mediation	This would specify when mediation would be scheduled, or when it must begin and/or be completed
Attendance and Participation of Parties	If parties are required to attend mediation, this would explain the requirement and any procedures for requesting to be excused from mediation.
Confidentiality	This would describe the confidentiality of the process, including significant exceptions to confidentiality.
Preparing for Mediation	This would describe any memos that must be submitted and/or conversations before the first mediation session. It also should include information to help parties and attorneys prepare for mediation.
Violation of Rules	This would describe rules about participation in mediation, such as good faith requirements and possible sanctions.
Mediation Fees	This would describe the fees that parties would be required to pay, if any, and how they would be divided between the parties.
For More Information	This section would include a link to applicable local rules and materials prepared for parties, attorneys, and mediators.

Figures 3 through 5 summarize key provisions of the mediation programs in the U.S. District Courts for the District of Utah,[147] Northern District of California,[148] and Northern District of New York.[149] These programs illustrate what I called "voluntary," "middle course," and "liti-mediation" perspectives, respectively.[150] In the Utah program, parties are free to opt out of mediation. In the California program, the court consults with parties about which dispute resolution option to use. One option is a settlement conference with a magistrate judge. In the New York program,

147. D. Utah R. 16-2.; *ADR Plan*, D. UTAH, https://www.utd.uscourts.gov/adr-plan (last visited May 14, 2024) [https://web.archive.org/web/20230629105612/https://www.utd.uscourts.gov/adr-plan].

148. *ADR Local Rules*, N.D. CAL., https://www.cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/adr-local-rules/#ADR-MOP (May 1, 2018); *ADR Procedures Handbook*, N.D. CAL. (May 2018), https://www.cand.uscourts.gov/wp-content/uploads/court-programs/adr/ADR-Handbook_May-1-2018.pdf; *ADR in the Northern District*, N.D. CAL., https://www.cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/ (June 30, 2021).

149. *General Order #47: Mandatory Mediation Program*, N.D.N.Y. (Dec. 1, 2023), https://www.nynd.uscourts.gov/sites/nynd/files/general-orders/GO47.pdf; *ADR Program*, N.D.N.Y., https://www.nynd.uscourts.gov/adr-program (last visited May 14, 2024).

150. *See* text accompanying *supra* notes 59, 63.

cases generally are referred automatically into the mandatory mediation program. To avoid having a case being ordered to mediation, a party must show why mediation has "no reasonable chance of being productive."

The language in these figures is adapted from the rules currently governing these mediation programs. The language was selected and edited to provide users with the most important information as clearly and concisely as possible. It uses common terms instead of legal terminology that parties may not readily understand. For example, it uses "attorney" instead of "counsel." Instead of simply referring to a "motion," it uses "formal request '(motion)'." These documents would include cites and links to the governing documents so that readers can easily get more information. They also would include links to guides developed by the ABA Section on Dispute Resolution to help parties prepare for mediation.[151]

These information sheets use a convenient format for conveying important information, though some courts may use other formats such as handbooks or FAQs ("frequently asked questions"). Courts serving substantial populations that do not speak English can produce materials translated into other languages.

151. AM. BAR ASS'N SEC. OF DISP. RESOL., PREPARING FOR MEDIATION (2012), http://indisputably.classcaster.net/files/2022/11/ABA-Mediation-Guide-general.pdf [hereinafter "PREPARING FOR MEDIATION"]; AM. BAR ASS'N SEC. OF DISP. RESOL., PREPARING FOR FAMILY MEDIATION (2012), http://indisputably.classcaster.net/files/2022/11/ABA-Mediation-Guide-family.pdf [hereinafter "PREPARING FOR FAMILY MEDIATION"]; AM. BAR ASS'N SEC. OF DISP. RESOL., PREPARING FOR COMPLEX CIVIL MEDIATION (2012), indisputably.classcaster.net/files/2022/11/ABA-Mediation-Guide-complex-civil.pdf [hereinafter "PREPARING FOR COMPLEX CIVIL MEDIATION"].

Figure 3: Possible Summary of the District of Utah's Mediation Program

Court's ADR Program	The court's alternative dispute resolution (ADR) program includes mediation, arbitration, and judicial settlement conferences.
Description of Mediation Process	The mediator is a neutral third party who helps parties negotiate an agreement that is acceptable to both parties. The mediator sets an agenda and manages the mediation process. The mediator helps the parties state their interests, improve communication, and generate options to resolve the dispute. The parties sometimes meet together and sometimes only with the mediator. The mediator does not impose any agreement on the parties. ADR Plan § 6(d).
Selection of Cases for Mediation	The court may refer cases to mediation after a formal request ("motion") by a party or the court's independent decision. Rule 16-2(e). Parties may decide not to mediate. Parties who do not want to mediate must formally inform the court within 20 days after the order to mediate. If at least one plaintiff and one defendant want to mediate, they may mediate. ADR Plan § 1(a).
Timing of Mediation	Mediators schedule mediation within twenty days after they are selected. Mediators discuss scheduling with the parties or their attorneys. ADR Plan § 6(b).
Attendance and Participation of Parties	All parties and their attorneys must be prepared to discuss all relevant issues. ADR Plan § 1(d). Parties and their attorneys must attend mediation in person unless the mediator agrees that there is a good reason that they cannot attend. ADR Plan § 6(j).
Confidentiality	Mediation is designed to encourage informal and confidential discussions. ADR Plan § 3(a). Communications in mediation generally are confidential, with limited exceptions. ADR Plan § 6(i).
Preparing for Mediation	Attorneys should discuss the court's ADR program with their clients. Rule 16-2(d). The court clerk may provide an orientation about ADR if requested. ADR Plan § 1(e). Unless the parties otherwise agree, at least ten days before the mediation, each party must provide the mediator a memo describing the party's position on the issues in the mediation. The mediator may decide that the memos should be exchanged between the parties. ADR Plan § 6(c). The American Bar Association Section of Dispute Resolution developed this guide for preparing for mediation. Another guide is for complex civil cases.
Violation of Rules	The court may impose penalties ("sanctions") on parties who do not attend mediation. ADR Plan § 6(f).
Mediation Fees	Parties will pay mediators at an hourly rate set by the court. This might include time preparing for mediation sessions. Fees are divided equally between the parties unless they agree otherwise or the court decides otherwise. ADR Plan § 2(h).
For More Information	See Local Civil Rule of Practice 16-2 and the Court's ADR Plan.

Figure 4. Possible Summary of the Northern District of California's Mediation Program

Court's ADR Program	Most civil cases are automatically assigned to the alternative dispute resolution (ADR) Multi-Option Program under ADR Local Rules. Before the initial case management conference, parties and attorneys must discuss possible ADR processes including early neutral evaluation, mediation, settlement conference with a magistrate judge, and private ADR. Rule 3.
Description of Mediation Process	Mediation is a flexible, non-binding, confidential process in which a neutral person (the mediator) helps in settlement negotiations. The mediator works to improve communication, helps parties state their interests and understand the other parties' interests, discusses the legal issues, identifies areas of agreement, and helps generate possible agreements. The mediator generally does not give an overall evaluation of the case. Rule 6-1.
Selection of Cases for Mediation	Generally, mediation must be held within 90 days after the case is ordered to mediation. Rule 6-4(c).
Timing of Mediation	Judges may order mediation based on an agreement of the parties, a party's formal request ("motion"), or the judge's independent decision. Rule 6-2.
Attendance and Participation of Parties	If a case is ordered to mediation, all parties and their attorneys must attend in person unless excused. Rule 6-10(a).
Confidentiality	In general, written and oral communications made in connection with the mediation are confidential. There are some exceptions to confidentiality. Rule 6-12.
Preparing for Mediation	Before the mediation session the mediator must have a joint phone call with the attorneys to plan the details of the mediation. Rule 6-6. Each party must submit a written mediation statement directly to the mediator and other parties. Rule 6-7. The mediator may ask parties to send the mediator an additional confidential written statement or to have confidential conversations with the attorneys. Rule 6-9. The American Bar Association Section of Dispute Resolution developed this guide for preparing for mediation. Another guide is for complex civil cases.
Violation of Rules	The ADR Director will try to resolve complaints informally. If someone makes a formal complaint and the Court finds bad faith, it may order the offender to pay the other parties' fees. Rule 2-4.
Mediation Fees	Mediators volunteer up to two hours for preparation and the first four hours in a mediation session. After that, the mediator may (1) continue to volunteer or (2) ask the parties if they want to end the mediation or pay the mediator. The mediation will continue only if all parties and the mediator agree. If all parties agree to continue, the mediator may charge whatever all parties agree to pay. Rule 6-3(c). Generally, mediation fees are divided equally between the parties, but they may agree to other arrangements. Rule 6-3(d).
For More Information	See the Court's ADR webpage, which includes its ADR Procedures Handbook and ADR Local Rules.

Figure 5. Possible Summary of the Northern District of New York's Mediation Program

Court's ADR Program	The Court's Mandatory Mediation Program is designed to provide quicker, less expensive, and satisfying procedure than continuing in litigation. The Program is governed by General Order 47.
Description of Mediation Process	The Program provides a flexible, non-binding, confidential process to help parties in settlement discussions. The mediator helps parties find their own solutions based on their needs and interests. The mediator has no authority to impose a decision. § 3.1. The mediation process is described in more detail in § 3.7.

Selection of Cases for Mediation	Most civil cases are referred automatically into the Mandatory Mediation Program. The Court will permit parties to opt out of mediation only for "good cause." Inconvenience, travel costs, or attorney fees are not considered good cause. Parties who do not want to mediate must state reasons why mediation has no reasonable chance of being productive. §§ 2.1, 2.2.B.
Timing of Mediation	Cases are mediated as early as possible in a case. § 3.1.A. Generally, mediation is scheduled within 12 weeks after the Local Rule 16.1 conference. § 3.10.A. Mediation must be at least two hours. §§ 3.7.A, 3.10.A. Mediation does not affect the schedule of pretrial activities or trial. § 3.1.B.
Attendance and Participation of Parties	All parties and their attorneys must attend mediation session(s). Anyone required to attend mediation may request to be excused for good cause. Not being in the location where the mediation will be conducted is not considered good cause. § 3.6.A, E.
Confidentiality	Mediation generally is confidential and private. No participant may communicate confidential information from mediation without the consent of the person providing the information. § 3.8.A. Exceptions to confidentiality are listed in § 3.8.A.4.
Preparing for Mediation	Each party must submit a written "Mediation Memorandum" to the mediator at least seven days before the mediation session. § 3.4.A. The contents of the memorandum are listed in § 3.4.C. After receiving the memos, the mediator may request additional information. The mediator also may discuss the case confidentially with attorneys, parties, and/or representatives. § 3.5. The American Bar Association Section of Dispute Resolution developed this guide for preparing for mediation. Another guide is for complex civil cases.
Violation of Rules	If a party fails to attend mediation, pay for mediation services, substantially comply with the mediation Referral Order, or otherwise participate in good faith, the Court may impose sanctions, which may include paying other parties' fees. §§ 2.3, 3.6.G.

Mediation Fees	Mediators receive $150/hour for the first two hours of the first mediation session (and possibly for up to two hours in cases requiring substantial preparation). After the first two hours of a mediation session, mediators may receive no more than $325/hour. If parties cancel mediation less than 48 hours before a mediation session, they each will be responsible for one hour of mediation time. § 4.4.A. Mediator fees normally are divided equally between the parties. § 4.4.C.
For More Information	See the Court's ADR webpage and General Order 47.

3. Courts Should Require Attorneys to Consult with Their Clients and Counterparts About Use of ADR at the Earliest Appropriate Time

Courts should require attorneys to consult with their clients as well as their counterpart attorneys about choosing a dispute resolution process, similar to U.S. District Court for the Southern District of Texas Rule 16.4.B(1).[152] This rule requires that attorneys consult clients about this before the initial conference in a case.[153] It is important that these conversations occur early in their cases because it maximizes parties' opportunities to make decisions before they invest a lot of time and money in the case and adversarial dynamics may have escalated.[154]

Courts also should require attorneys or parties to try to reach agreement about the use of ADR with a rule like U.S. District Court for the Northern District of California ADR Rule 3-5.[155] This rule requires that, in their joint case management statement to the court, attorneys must state what ADR process option they have agreed to use and, if they do not agree, identify the process that each believes will be most helpful to the parties' settlement efforts.[156] It also requires attorneys to file a certification that they and their clients have read the court's ADR handbook, discussed ADR options with each other, and considered ADR options.[157]

It should be an obvious choice for courts to adopt rules like these. As a matter of professional ethics and good practice, attorneys should routinely consult their clients and counterparts early in their cases about the possible use of ADR. Undoubtedly, some attorneys do so, but empirical research shows that a substantial proportion do not.[158] Provisions like Rule 3-5 force attorneys to have these conversations and create opportunities for courts to monitor them and intervene as appropriate.

152. *See* text accompanying *supra* note 99.
153. *Id.*
154. John Lande, *Survey of Early Dispute Resolution Movements and Possible Next Steps* 2-3 (University of Missouri School of Law Legal Studies Research Paper No. 2021-06, April 22, 2021), available at SSRN: https://ssrn.com/abstract=3832282.
155. *See* text accompanying *supra* notes 102–04.
156. N.D. Cal. ADR R. 3-5.
157. *Id.*
158. *See* text accompanying *supra* notes 6–7, 13.

4. Courts Should Require or Encourage Attorneys and Parties to Prepare Effectively Before Mediation Sessions

Courts should require attorneys to prepare their clients for mediation sessions. The U.S. District Court for the Middle District of Alabama explains the benefits of doing so.[159] That court's language focuses solely on expectations about the possible court outcome and compromises. Court rules also should require attorneys to discuss their clients' interests and goals.[160]

Courts normally should require parties or attorneys to consult with mediators before a mediation session. U.S. District Court for the Northern District of California ADR Rule 6-6 provides a good model, requiring mediators to schedule phone conversations and specifying topics to be discussed.[161] Courts often require preparatory conversations only between attorneys and mediators, but they might follow the example of U.S. District Court for the District of Oregon Rule 16-4(f)(4) which authorizes mediators to require the parties to participate in the preliminary conversations along with their attorneys.[162]

Courts should establish a presumption that attorneys or parties provide written memos to mediators unless it would be unnecessary, inappropriate, or too expensive under the circumstances. Ideally, attorneys and mediators should communicate about key issues in the dispute, first in conversations and then by providing needed objective information in memos.[163]

5. Courts Should Help Self-Represented Litigants Manage the Mediation Process

Courts should help SRLs get the benefits of mediation. Courts can develop clear, concise, and easily-accessible materials designed for these parties. These materials should be linked on courts' homepages and/or webpages for SRLs. In pretrial conferences, judges should confirm that SRLs are aware of these materials and discuss whether mediation or other dispute resolution processes would be most appropriate in their cases.

Courts, possibly in collaboration with state or local bar associations, should encourage attorneys to provide pro bono representation to SRLs in mediation. Courts should consider organizing programs similar to that in the Southern District of Illinois where pro bono attorneys represent SRLs in mediation, limited to helping them prepare for and participate in mediation and assisting with any follow-up activities related to the mediation.[164]

159. *See* text accompanying *supra* note 121.
160. *Id.*
161. *See* text accompanying *supra* note 117.
162. *See* text accompanying *supra* note 119.
163. *See* KEET ET AL., *supra* note 122, at Appendix H.
164. *See* text accompanying *supra* notes 93–94.

6. Courts Should Use Policies to Promote Serious Participation in Mediation Other Than "Good Faith" Requirements

Courts should consider adopting good faith requirements only as a last resort if they encounter significant problems that are not managed well through other policies such as those recommended above.

It is understandable that some courts would establish good faith requirements, especially if they require parties to mediate and make it hard to opt out. If courts order parties to mediate, the courts may feel obligated to ensure that parties take the process seriously. Courts are familiar with the concept of "good faith" in other contexts and may assume that it can easily be applied in liti-mediation as well.[165]

However, requirements that parties mediate in "good faith" are very problematic for numerous reasons. There is no clear definition of good faith in mediation, it is a loophole in confidentiality protections, and it can be used offensively by bad actors accusing others of acting in bad faith. Some courts have interpreted good faith requirements by applying their own standards of the adequacy of parties' negotiation tactics and positions.[166]

If courts use the definition of good faith in the U.S. District Court for the Western District of Pennsylvania Policies and Procedures § 2.8, the courts would need to conduct intrusive inquiries to determine if parties actually negotiated with a willingness to reach agreement, considered proposals made by the other side, acted in an arbitrary or capricious manner, or intended to undermine the mediation process.[167] Obviously, this would violate the confidentiality of the process by getting testimony of parties, attorneys, and mediators about who said what and in response to what other statements.

If parties do not want to mediate, they are not likely to mediate constructively and may be motivated to use strategies that some would consider as bad faith. If courts provide other options, such as judicial settlement conferences, parties may be more constructive. If parties do not want to settle after a reasonable period of time, courts should respect the parties' decisions and let them proceed with litigation. They may settle later in the process and, if not, they are entitled to go to trial.

7. Courts Should Avoid or Limit Compulsion to Mediate

A "liti-mediation" approach creates significant risks of undermining the fundamental principle of parties' voluntary decision-making in mediation.[168] This is particularly problematic when courts order parties to mediate without their consent, make it hard to opt out, require them to stay in mediation until the mediator declares an impasse, and threaten sanctions if they are not deemed to be mediating in good faith.

Ordering parties to mediate without their consent creates two significant problems. First, it increases the amount of time and money that parties must spend on litigation. Litigation generally requires substantial expense and time commitments, and courts should avoid increasing the tangible and intangible costs unless the

165. *See* text accompanying *supra* notes 126–29.
166. *See* text accompanying *supra* note 128–32.
167. *See* text accompanying *supra* note 125.
168. *See* text accompanying *supra* note 59–60.

benefits are likely to outweigh the costs. Second, increasing these costs effectively disadvantages parties that cannot bear these costs as much as their opponents.

Courts should avoid or reduce these problems by offering judicial settlement conferences or mediation without cost. Normally, parties do not pay for settlement conferences, which typically are shorter than mediations. Courts can offer settlement conferences by magistrate or other judges. Courts that employ staff mediators can provide mediation without charge.

Another option is to require private mediators on their mediation panels to provide a limited period of mediation without charge, similar to U.S. District Court for the Northern District of California ADR Rule 6-3(c).[169] That rule requires mediators to volunteer up to the first four hours in a mediation.[170] After that, the mediator may continue to volunteer, the parties may agree to pay the mediator, or the parties may end the mediation.[171] The Southern District of Illinois Administrative Order 301 §§ 3.9.A.1, 3.9.B.2 limits parties' obligation to mediate to two hours, though parties are encouraged to continue in mediation if it seems likely to be productive.[172] Members of the court's mediation panel have an obligation to provide some pro bono mediation services under § 4.2.A.[173]

When courts require parties to pay for mediation, courts should adopt a rule like the Western Division of the U.S. District Court for Northern District of Illinois Rule 2-3(a), which directs judges to exempt parties from participating in mediation if "mediation is not likely to deliver benefits to the parties sufficient to justify the resources consumed by its use."[174]

Courts that promote effective preparation for mediation sessions are likely to find that parties are more willing to participate in mediation constructively, thus reducing problems related to compulsion to mediate.

8. ADR Experts Should Develop Best Practice Guidelines for Preparation for Mediation Sessions

ADR experts should develop best practice guidelines to help courts promote preparation for mediation sessions in their cases. Such guidelines could help courts develop or refine their efforts to help parties prepare for mediation sessions. The guidelines should be flexible, recognizing each court's need to tailor implementation to its particular circumstances. In addition to guidelines identifying general principles, courts and other organizations might develop specialized guidelines for particular types of cases, jurisdictions, and organizational settings.

This article demonstrates that federal courts vary widely in their rules, policies, and practices about preparing parties and attorneys to mediate effectively. Some courts have developed impressive materials and procedures to promote effective mediation processes while others provide very little assistance. Best practice guidelines could help all courts, especially those with poorly developed mediation programs.

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169. N.D. Cal. ADR R. 6-3(c).
170. *Id.*
171. *Id.*
172. *See* text accompanying *supra* note 107.
173. S.D. Ill. Admin. Order 301 § 4.2.A.
174. N.D. Ill. W. Div. ADR R. 2-3(a); *see also* text accompanying *supra* note 114.

The process of developing or updating guidelines should include representatives of key stakeholder groups and use dispute system design procedures.[175] The guidelines might include a standard information template, such as in Figure 2,[176] to help parties understand and prepare for mediation. Each court would tailor the structure and content of its information sheets to reflect the elements of its program.

The Alliance of Mediators for Universal Disclosure has developed an analogous set of disclosure guidelines for individual mediators:

> Mediators around the world are committing to using the 6 elements of UDPM (Universal Disclosure Protocol for Mediation) at the start of their mediations. UDPM is a framework developed by international mediation professionals from around the globe to promote best practices in mediation.
>
> By explaining Conflict of Interest, Confidentiality, General Process, Role of Mediator/Parties, Technology, and Impact of Venue, mediators can help reduce potential confusion or conflict over the mediation process. This approach also supports self-determination, acknowledging cultural influences, promoting transparency, and respecting the flexibility of the mediation process.[177]

Guidelines for court-connected mediation programs might include a recommendation that individual mediators provide disclosures about their procedures including some or all of the elements of the UDPM.

IV. IMPLICATIONS FOR REAL PRACTICE SYSTEMS THEORY

Building on real practice systems theory,[178] this article illustrates how courts are dispute systems.[179] The judicial system in the U.S. is highly decentralized with a federal judicial system and separate judicial systems for states and territories. The highest policy-making bodies in the federal system – Congress and the Judicial Conference of the United States – have adopted very general policies and delegated most of the decision-making to the courts in each district. Court personnel, including judges, routinely engage in dispute system design, though they do not generally call it that or identify as "dispute system designers."[180]

The district court websites reveal the systemic nature of the courts, demonstrating how they do so much more than just trying cases. Indeed, trying cases is only a relatively small part of what they do. Much more of their workload entails providing information and services to various stakeholders, managing pretrial litigation, and promoting settlement.[181]

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175. *See generally* Lande, *supra* note 67.
176. *See supra* Figure 2.
177. *Universal Disclosure Protocol for Mediation*, ALL. OF MEDIATORS FOR UNIVERSAL DISCLOSURE, https://universaldisclosureprotocolmediation.com/ (last visited May 14, 2024).
178. John Lande, *Real Mediation Systems to Help Parties and Mediators Achieve Their Goals*, 24 CARDOZO J. CONFLICT RESOL. 347, 364–87 (2023).
179. *See supra* text accompanying notes 39–41.
180. John Lande, *Think DSD, Not ADR*, 16 N.Y. DISP. RESOL. LAW. 14, 15–16 (2023).
181. *See* text accompanying *supra* notes 39–41.

Court-connected mediation and other dispute resolution programs clearly fit into courts' case management functions. Spurred by statutes in 1990 and 1998,[182] each federal district court has developed its own dispute resolution program and has had great discretion how to do so. The programs vary widely. Some courts have developed complex programs that are intricately incorporated into the courts' overall dispute resolution systems. Other courts' programs seem like afterthoughts that play only a small role in those courts' operations. Most courts are somewhere in between.

Courts have limited power to dictate the specific mediation procedures in their cases because there are too many variables to impose very specific and strict prescriptions. Local rules and policies establish general frameworks that leave a lot of room for negotiation between judges, attorneys, and parties about how the process would unfold in each case.

Practitioners' individual practice systems[183] are nested within the courts' mediation systems. Practitioners' systems involve procedures before, during, and after mediation sessions, including routine procedures and strategies for dealing with challenging situations.[184] Mediators' and attorneys' procedures to prepare for mediation sessions are important parts of their systems.[185] Presumably the courts' rules influence their behavior in court-connected mediations and perhaps mediations in other contexts as well.

This article demonstrates the value of using court rules and other materials as qualitative and quantitative data in dispute system design analyses. Of course, these materials are imperfect representations of actual practice, which sometimes deviates from prescribed actions. But the materials manifest the histories, values, goals, ideas, and general practices of stakeholders in particular practice communities. They reflect categories of cases, parties, and behavior patterns that lead courts to design routine procedures and strategies for dealing with recurring challenges. In other words, they represent the courts' dispute systems.

The federal courts provide a convenient source of data because of the limited number of courts in a somewhat standardized system. For example, researchers could mine the federal district court rules for issues other than preparation for mediation sessions. They might also seek insights from analyzing bankruptcy court and federal appellate court rules or those from every level of state court systems.

V. CONCLUSION

Good preparation before mediation sessions generally should satisfy the interests of all stakeholders in court-connected mediation. Most importantly, preparation is key to empowering parties to advocate for themselves in making procedural and substantive decisions in mediation. When attorneys carefully prepare their clients for mediation sessions, they can collaborate more effectively. It is particularly helpful when parties and their attorneys consult early in a case about what process to use and agree with their counterparts about this. After preparing for a mediation session, everyone can get right down to business and efficiently figure out the best

182. *See* text accompanying *supra* notes 64–71, 73.
183. Lande, *supra* note 178, at 364–87.
184. *Id.*
185. *Id.*

way to satisfy the parties' tangible and intangible interests. This should maximize the number of cases like Ava's, described at the outset of this article, and minimize the number of experiences like Kenji's. Of course, some parties do not reach agreement in mediation. Being well prepared should help such parties realize more quickly that they do not want to settle – at least not at that time.

Some courts have implemented excellent rules to promote careful preparation. Some rules and websites provide clear, easily-accessible information about mediation for parties, require attorneys to consult with their clients and counterparts about what dispute resolution process to use, provide convenient alternatives such as judicial settlement conferences, require attorneys and parties to prepare effectively before mediation sessions, and help self-represented litigants manage the mediation process. Unfortunately, many courts' systems do not include these elements.

Courts regularly develop and revise rules, so updating rules related to preparation should not require substantial out-of-pocket expenses or even a great deal of additional time. Attorneys and mediators periodically refine their procedures, which should include careful preparation for mediation sessions whenever appropriate. After courts and practitioners incorporate good preparation practices into their regular routines, it should require little or no additional time.

There is practically no downside to promoting good preparation. Perhaps the greatest risk would be investing more time and resources than is warranted by the parties' interests in the cases. The amount of preparation generally should be proportionate to the parties' interests. Preparation also may lead parties and lawyers to entrench their positions in mediation rather than being open to considering other perspectives. These risks are inherent in preparation. Courts may reduce these risks with helpful guidance about how parties can gain the benefits of mediation.

Although this article specifically focuses on mediation in U.S. federal district courts, the general principles should be applicable in most other settings. This would include other federal, state, and local courts operating dispute resolution programs in the U.S. as well as courts in other countries. In addition, mediation and similar processes (such as ombuds) are honeycombed throughout society in many public and private entities.[186] In all these settings, arranging for parties to prepare effectively before mediation sessions generally should improve the process and results.

In practically every setting, mediation programs and practitioners should take all reasonable steps to help parties be as prepared as possible at the outset of a mediation session. In any setting, the system for preparation before mediation sessions should be tailored to the parties and context of the disputes. For example, the preparation process necessarily should vary based on many factors such as the amount of time before a mediation session, whether parties are representing themselves or have retained attorneys to do so, and the stakes involved.

Courts have a special obligation – and opportunity – to enhance the process when parties represent themselves and/or have little time to prepare before mediation sessions. In such cases, courts should take the initiative to provide helpful materials to parties in time for them to consider their situation and be ready at the outset of a mediation session. When parties have retained attorneys, courts should adopt

186. *See generally* Marc Galanter & John Lande, *Private Courts and Public Authority*, 12 STUD. IN L., POL. & SOC'Y 393 (1992) (cataloging a wide range of dispute resolution mechanisms throughout society).

rules and provide resources to help attorneys prepare their clients and collaborate with their counterparts and mediators to plan the best possible mediation process in each case. Courts can help self-represented litigants by providing clear, easily-accessible materials and offering pro bono representation in appropriate cases.

ADR experts could promote widespread use of good preparation systems by developing best practice guidelines for preparation and generic materials that courts can easily use or adapt.

Appendixes

Appendix 1 identifies federal district court rules and other materials about issues relevant to preparation for mediation sessions. The other appendixes collect resources in various contexts including but not limited to federal district courts. These appendixes include publications, videos, websites, and other resources and for parties and practitioners. Some of the documents are lists of frequently asked questions (FAQs).

Appendix 1. Federal District Court Rules Relevant to Preparation for Mediation

This appendix summarizes information provided in the websites of federal district courts about their mediation programs.[187] In various courts, these provisions are included in local rules, orders, and other documents.

The second column indicates the location in the websites with information about the mediation programs.

The third column indicates whether courts are authorized to order parties to mediate without the parties' consent. Provisions authorizing courts to order mediation only with parties' consent are not included in this column.

The fourth column indicates whether attorneys are required to consult with their clients or counterpart attorneys before mediation sessions.

The fifth column indicates whether parties (or their attorneys) are required to provide memos to mediators before mediation sessions. Some of these provisions require these memos only if the individual mediators require them.

The sixth column indicates provisions about parties (or their attorneys) consulting with mediators before mediation sessions. Any provision referring to such consultations is included in this column regardless of whether the consultations are required or not.

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[187] *Court Website Links*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links (last visited May 15, 2024) [https://perma.cc/PR5R-UNZE].

Court	Mediation / ADR Program Description	Authority to Order Mediation	Consult with Client and/or Counterpart	Pre-Session Memo	Consult with Mediator
M.D. Ala.	For Attorneys *and* Represent-ing Yourself > Mediation in the Middle District.	No. Rule 16.1.	Mediation page.		
N.D. Ala.	Local Rules > 16.1(b).	Yes. Rule 16.1(b).			
S.D. Ala.	Local Rules and Standing Orders > Standing Order 23.	Yes. Order 23 ¶ IV.A.		Order 23 ¶ IV.A.7.a.	Order 23 ¶ IV.A.7.c.
D. Alaska	Programs and Resources > ADR.	Yes. Rule 16.2(c).			
D. Ariz.	Local Rules > Rule 83.10.	Yes. Rule 83.10(a).			
E.D. Ark.	General Orders > Order 50 provides for judicial settlement conferences.				

Court	Mediation / ADR Program Description	Authority to Order Mediation	Consult with Client and/or Counterpart	Pre-Session Memo	Consult with Mediator
W.D. Ark.	General Orders > Order 32 provides for judicial settlement conferences.				
C.D. Cal.	Information for Attorneys > ADR.	Yes. Rules 16-15.1, 16-15.3. General Order 11-10 ¶ 5.1.	General Order 11-10 ¶¶ 5.2, 6.2.	General Order 11-10 ¶ 8.4.	General Order 11-10 ¶ 8.1.
E.D. Cal.	Local Rules > Rule 271.	No. Rule 271(c)(2).	Rule 271(d), (e)(2), (l)(2)(A).	Rule 271(j), (k).	Rule 271(j).
N.D. Cal.	Home > ADR Program & Rules.	Yes. Rule 6-2.	Rule 3-5(a).	Rules 6-7, 6-9.	Rules 6-4(b), 6-6.
S.D. Cal.	Local Rules > Rules 16.1 & 16.3 provide for early neutral evaluation and mandatory settlement conferences.				
D. Colo.	Local Rules > Rule 16.6.	Yes. Rule 16.6(a).			
D. Conn.	Local Rules > Rule 16(h).	No. Rule 16(h)(1).			

Court	Mediation / ADR Program Description	Authority to Order Mediation	Consult with Client and/or Counterpart	Pre-Session Memo	Consult with Mediator
D. Del.	Local Rules > Rule 72.1(a)(1).	No. Rule 72.1(a)(1) provides for ADR by magistrate judge.			
D.D.C.	Attorney Information > Court Mediation Program.	Yes. Rule 84.4(a)(2).		Rule 84.6.	
M.D. Fla.	For Lawyers > Mediation and Settlement.	Yes. Rule 4.03.			
N.D. Fla.	Local Rules > Rule 16.3.	Yes. Rule 16.3.			
S.D. Fla.	Attorney Resources > Mediation.	Yes. Rule 16.2(d).		Rule 16.2(d)(1)(C).	
M.D. Ga.	Programs and Services > ADR.	No. Rule 16.2.			
N.D. Ga.	Local Rules > Rule 16.7.	No. Rule 16.7(D)(1).		Rule 16.7(H).	
S.D. Ga.	Local Rules > Rule 16.7.	No. Rule 16.7.5(b).		Rule 16.7.6(b).	
D. Guam	Local Rules > Civil Rule 16-2.	Yes. Rules 16-2(b)(2)(B), 16-2(c)(2).			
D. Haw.	Local Rules > Rule 88.1.	Yes. Rule 88.1(e)(2).			

Court	Mediation / ADR Program Description	Authority to Order Mediation	Consult with Client and/or Counterpart	Pre-Session Memo	Consult with Mediator
D. Idaho	For Attorneys > ADR.	Yes. Rules 16.4(b)(1), 16.4(b)(3)(C), 16.4(c).	Rule 16.4(c)(1)(A).		
C.D. Ill.	Local Rules > Rule 16.4.	No. Rule 16.4(E)(2).		Rule 16.4(E)(5).	
N.D Ill. gen.	Local Rules > Rule 16.3 (voluntary mediation for trademark cases).	No. Rule 16.3(a).			
N.D Ill. W. Div.	Home > Alternative Dispute Resolution (Western Division).	Yes. Rules 2-3(a), 4-2.	Rule 3-1.	Rule 4-7.	Rule 4-6.
S.D. Ill.	Administra-tive Orders > Order 301 Mandatory Mediation Plan.	Yes. Admin. Order 301 ¶ 2.1.A.1.	Admin. Order 301 ¶ 3.1.C.1.	Admin. Or-der 301 ¶ 3.4.	Admin. Order 301 ¶ 3.5.
N.D. Ind.	Attorneys > Mediation / ADR.	Yes. Rule 16-6(b).		Indiana Rule for ADR 2.7.C.	
S.D. Ind.	Local Rules > Local Rules of ADR.	No. Rule 2.2.		Rule 2.6(c).	
N.D. Iowa	Programs and Services > ADR.	No. Rule 72B.a.			

Court	Mediation / ADR Program Description	Authority to Order Mediation	Consult with Client and/or Counterpart	Pre-Session Memo	Consult with Mediator
S.D. Iowa	Local Rules > Rule 72B (jointly with N. Iowa).	No. Rule 72B.a.			
D. Kan.	For Attor-neys > ADR.	Yes. Rule 16.3(c).			
E.D. Ky.	Local Rules > Rule 16.2.	Yes. Rule 16.2.			
W.D. Ky.	Local Rules > Rule 16.2.	Yes. Rule 16.2.			
E.D. La.	Local Rules > Rule 16.3.1.	No. Rule 16.3.1.			
M.D. La.	Local Rules > Rule 16.3(b).	No. Rule 16.3(b)(1).			
W.D. La.	Local Rules > Rule 16.3.1.	No. Rule 16.3.1.			
D. Me.	Local Rules > Rule 83.11.	No. Rule 83.11(c).	Rule 83.11(b).		
D. Md.	Local Rules > Rule 607.	No. Rule 607.			
D. Mass.	Local Rules > Rule 16.4.	No. Rule 16.4(c)(2)(A).			
E.D. Mich.	Local Rules > Rule 16.3, 16.4.	No. Rule 16.3.		Rule 16.4(e)(3).	

Court	Mediation / ADR Program Description	Authority to Order Mediation	Consult with Client and/or Counterpart	Pre-Session Memo	Consult with Mediator
W.D. Mich.	Home > ADR. The court offers Voluntary Facilitative Mediation (VFM) and Prisoner Early Mediation (PEM).	No in VFM. Program Description ¶ V.B. Unclear in PEM.		Yes in VFM. Program Description ¶ VI.E. Yes in PEM. Admin. Order 18-RL-091 ¶¶ VI, VII.	
D. Minn.	Local Rules > Rule 16.5.	Yes. Rule 16.5(c)(1).			
N.D. Miss.	Local Rules > Rule 83.7.	Yes. Rule 83.7(e)(1).	Rule 83.7(f)(1).	Rule 83.7(f)(4).	
S.D. Miss.	Local Rules > Rule 83.7.	Yes. Rule 83.7(e)(1).	Rule 83.7(f)(1).	Rule 83.7(f)(4).	
E.D. Mo.	Home > ADR.	Yes. Rule 6.01.	Rule 6.02(A)(1).	Rule 6.02(C)(3).	Rule 6.04(B).
W.D. Mo.	District Court Local Rules > Mediation and Assessment Program.	Yes. General Order ¶ IV.A.		General Order ¶ V.G.	General Order ¶ V.H.
D. Mont.	Attorneys > ADR.	Yes. Rule 16.5(c)(1).			
D. Neb.	Public *and* Attorneys > Mediation.	Yes. Plan ¶ I.B.			
D. Nev.	Local Rules > Rule 16-5.	Yes. Rule 16-5.			

Court	Mediation / ADR Program Description	Authority to Order Mediation	Consult with Client and/or Counterpart	Pre-Session Memo	Consult with Mediator
D.N.H.	Case Manage-ment > ADR.	Yes. Rule 53.1(c)(3).	Rule 53.1(c)(1).	Mediation Guidelines ¶ (3)(b).	
D.N.J.	Programs and Services > Mediation.	Yes. Rule 301.1(d).		Rule 301.1(e)(2).	App. Q ¶ II.A.
D.N.M.	Information > Local Rules and Orders.	Apparently, No. Rule 16.2 provides for mandatory settlement conferences.			
E.D.N.Y.	Programs and Services > ADR.	Yes. Rule 83.8(b)(1).		Rule 83.8(b)(5).	
N.D.N.Y.	Programs and Services > ADR.	Yes. General Order 47 ¶ 2.1.A.		General Or-der 47 ¶ 3.4.	General Order 47 ¶ 3.5.
S.D.N.Y.	Programs > Mediation / ADR > Rule 83.9 *and* Mediation Program Procedures.	Yes. Rule 83.9(e)(3), 83.10(8).		Mediation Program Procedure ¶ 9.	Media-tion Pro-gram Proce-dure ¶ 7.b.
W.D.N.Y.	Attorney Information > ADR.	Yes. ADR Plan ¶ 2.1.	ADR Plan ¶ 4.2.	ADR Plan ¶ 5.7.	ADR Plan ¶ 5.8.

Court	Mediation / ADR Program Description	Authority to Order Mediation	Consult with Client and/or Counterpart	Pre-Session Memo	Consult with Mediator
E.D.N.C.	Attorneys > Mediators.	Yes. Local ADR Rule 101.1a – referring to mediation as "mediated settlement conferences."		Local ADR Rule 101.1d(c).	
M.D.N.C.	Local Rules > Rules 16.4, 83.9a-g.	Yes. Rules 16.4, 83.9b - referring to mediation as "mediated settlement conferences."		Rule 83.9e(c).	Rule 83.9e(e).
W.D.N.C.	Programs and Services > ADR and State Mediation Rules.	Yes. Rule 16.2(a) – referring to mediation as "mediated settlement conferences." State Mediation Rule 1(c)(1).	State Mediation Rule 1(b).		State Mediation Rule 6(a)(2).
D.N.D.	Local Rules > Rule 16.2.	No. Rule 16.2(B).	Rule 16.2(B).		
D.N. Mar. I.	Local Rules > Rule 16.4.	No. Rule 16.4.a.	Rule 16.4.	Rule 16.4.b.3.C.	
N.D. Ohio	Home > ADR.	Yes. Rule 16.6(a).		Rule 16.6(e).	
S.D. Ohio	Attorneys > ADR (Mediation).	Yes. Rule 16.3(a)(1). Supplemental Procedure ¶ 2.3.		Supplemental Procedure ¶ 5.5.	

Court	Mediation / ADR Program Description	Authority to Order Mediation	Consult with Client and/or Counterpart	Pre-Session Memo	Consult with Mediator
E.D. Okla.	Programs and Services > ADR (under construc-tion).	Yes. Rule 16.2(k).			
N.D. Okla.	Home > ADR.	Yes. Rule 16-2(k).			
W.D. Okla.	Local Rules > Rules 16.1, 16.3.	Yes. Rule 16.3(a).	Rule 16.1(a)(1).	Rule 16.3(d).	
D. Or.	Attorneys > ADR.	Yes. Rule 16-4(e)(3).	Rule 16-4(c).	Rule 16-4(f)(4).	Rule 16-4(f)(4).
E.D. Pa.	Programs and Services > Mediation.	Yes. Rule 53.3.4.	Rule 53.3.1.		
M.D. Pa.	Home > ADR.	Yes. Rules 16.7, 16.8.1.			
W.D. Pa.	For Attorneys > ADR > ADR Program Information.	Yes. Policies & Procedure ¶ 3.2.			Policies & Proce-dure ¶ 3.6.
D.P.R.	Local Rules > Rule 83J.	Yes. Rule 83J(b)(1).		Rule 83J(e)(2).	
D.R.I.	For Attorneys > ADR > ADR Plan.	No. ADR Plan ¶ III, X.		ADR Plan ¶ X.1(B).	
D.S.C.	Home > Mediation / ADR Guidelines.	Yes. Rule 16.01(B)(3).		Rule 16.08(B).	

Court	Mediation / ADR Program Description	Authority to Order Mediation	Consult with Client and/or Counterpart	Pre-Session Memo	Consult with Mediator
D.S.D.	Local Rules > Rule 53.1.	No. Rule 53.1.			
E.D. Tenn.	Court Information > Mediation/ Arbitration.	Yes. Rules 16.3(a), 16.4(a).			
M.D. Tenn.	Local Rules > Rules 16.02–16.05.	Yes. Rule 16.02(b)(1).			
W.D. Tenn.	Local Rules > ADR Plan.	Yes. ADR Plan ¶ 2.1.	ADR Plan ¶ 4.2(a).	ADR Plan ¶ 5.6.	ADR Plan ¶ 5.7.
E.D. Tex.	Attorneys > Court-Annexed Mediation Plan.	Yes. Mediation Plan ¶ VI.			
N.D. Tex.	Attorneys > ADR.	Yes. ADR Use by the Court.			
S.D. Tex.	General Information > ADR.	Yes. Rule 16.4.C.	Rule 16.4.B(1).		
W.D. Tex.	Local Rules > Rule CV-88.	Yes. Rule CV-88(a) - for some form of ADR.			
D. Utah	Court Information > ADR Program.	Yes. Rule 16-2(e). ADR Plan ¶ 6(j).	Rule 16-2(d).	ADR Plan ¶ 6(c).	

Court	Mediation / ADR Program Description	Authority to Order Mediation	Consult with Client and/or Counterpart	Pre-Session Memo	Consult with Mediator
D. Vt.	Local Rules > Rule 16.1 (authorizes early neutral evaluation).	No provision for mediation.			
D.V.I.	Programs and Services > ADR.	Yes. Rule 3.2(b).			
E.D. Va.	Local Rules > 83.6.	Unclear. Rule 83.6(A).			
W.D. Va.	Programs and Services > ADR.	Yes. Rule 83(b).			
E.D. Wash.	Local Rules > Rule 16(a)(5).	No. Rule 16(a)(5)(C), but court may "refer" case to "mediation" by a judge.			
W.D. Wash.	Attorneys > ADR.	Yes. Rule 39.1(c)(1).		Rule 39.1(c)(5)(C).	
N.D. W. Va.	Attorney Info > Local Rules > Rule 16.06.	Yes. Rule 16.06(a).		Rule 16.06(d).	
S.D. W. Va.	Local Rules > Rule 16.6-16.6.8.	Yes. Rule 16.6(a).		Rule 16.6.5.	
E.D. Wis.	For Attorneys > Mediation.	No. Rule 16(d)(1).			

Court	Mediation / ADR Program Description	Authority to Order Mediation	Consult with Client and/or Counterpart	Pre-Session Memo	Consult with Mediator
W.D. Wis.	For Attorneys > Mediation.	No. Rule 16.6.A.			
D. Wyo.	Programs and Services > ADR.	No. Rule 16.3(b) authorizes settlement conferences.			

Appendix 2. Publications for Parties

American Bar Association Section of Dispute Resolution, mediation guides including a general guide[188] as well as guides for family cases[189] and complex civil cases.[190]

Association of Family and Conciliation Courts, Family Resources.[191]

Aurit Center, The Ultimate Guide to Divorce Mediation.[192]

Center for Appropriate Dispute Resolution in Special Education, Special Education Mediation Parent Guide.[193]

Center for Conflict Resolution, About the Mediation Process.[194]

DivorceNet, Divorce Mediation Checklist: How to Prepare for Your First Session.[195]

[188] PREPARING FOR MEDIATION, *supra* note 151.
[189] PREPARING FOR FAMILY MEDIATION, *supra* note 151.
[190] PREPARING FOR COMPLEX CIVIL MEDIATION, *supra* note 151.
[191] *Family Resources*, ASS'N OF FAM. & CONCILIATION CTS., https://www.afccnet.org/Resource-Center/Family-Resources (last visited May 2, 2024).
[192] *Divorce Mediation – Step by Step Guide*, AURIT CTR., https://auritmediation.com/divorce-mediation-guide/ (last visited Apr. 10, 2024).
[193] *IDEA Special Education Mediation Parent Guide*, CTR. FOR APPROPRIATE DISP. RESOL. IN SPECIAL EDUC., https://www.cadreworks.org/resources/cadre-materials/idea-dispute-resolution-parent-guides/mediation (including materials in multiple languages) (last visited May 2, 2024).
[194] *About the Mediation Process*, CTR. FOR CONFLICT RESOL., https://www.ccrchicago.org/about-the-mediation-process (last visited May 2, 2024).
[195] *Divorce Mediation Checklist: How to Prepare for Your First Session*, DIVORCENET, https://www.divorcenet.com/resources/divorce-mediation-checklist.html (last visited May 2, 2024).

Greg Enos, How To Prepare For Your First Divorce Mediation Session.[196]

Family Mediators Association (Scotland), Mediation Information and Assessment Meetings.[197]

International Institute for Conflict Prevention and Resolution, Early Case Assessment Guidelines.[198]

International Mediation Institute, Mediation Frequently Asked Questions.[199]

JAMS Mediation Services, A Guide to the Mediation Process.[200]

Ron Kelly, 20 Questions Before You Meet.[201]

Nina Khouri, Mediation Plan Worksheet.[202]

MWI, Mediation Preparation.[203]

New Hampshire Judicial Branch, Mediation Preparation Sheet.[204]

Polk County (Iowa) Bar Association, Preparing Yourself for Mediation.[205]

C. Eileen Pruett, A Brief Guide to Family Mediation for Parents Who Are Self-Represented.[206]

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[196] Greg Enos, *How to Prepare for Your First Divorce Mediation Session,* MEDIATE.COM (Dec. 17, 2021), https://mediate.com/how-to-prepare-for-your-first-divorce-mediation-session/.

[197] *Mediation Information and Assessment Meeting,* FAM. MEDIATORS ASS'N, https://thefma.co.uk/miams/ (last visited May 2, 2024).

[198] *Early Case Assessment Guidelines,* INT'L INST. FOR CONFLICT PREVENTION & RESOL., https://www.cpradr.org/early-case-assessment (last visited May 2, 2024).

[199] *Mediation FAQs,* INT'L MEDIATION INST., https://imimediation.org/resources/mediation-faqs/ (last visited May 2, 2024).

[200] *A Guide to the Mediation Process,* JAMS MEDIATION SERVS., https://www.jamsadr.com/mediation-guide/ (last visited May 2, 2024).

[201] Ron Kelly, *20 Questions Before You Meet*, https://www.ronkelly.com/pg5.cfm (last visited May 2, 2024).

[202] Nina Khouri, *Mediation Plan Worksheet*, NINA KHOURI MEDIATION, https://ninakhouri.co.nz/?smd_process_download=1&download_id=1057 (last visited May 2, 2024).

[203] *Mediation Preparation*, MWI, https://www.mwi.org/mediation-preparation-page/ (last visited May 2, 2024).

[204] *Mediation Preparation Sheet,* N.H. JUD. BRANCH, https://www.courts.nh.gov/sites/g/files/ehbemt471/files/inline-documents/sonh/District%20Division%20Mediation%20Prep%20Sheet.docx (last visited May 2, 2024).

[205] *Preparing Yourself for Mediation,* POLK CNTY. BAR ASS'N, https://www.iowacourts.gov/static/media/cms/Preparing_Yourself_for_Mediation_7653BF6EED20D.pdf. (last visited May 2, 2024).

[206] C. Eileen Pruett*, A Brief Guide to Family Mediation for Parents Who are Self-Represented*, AFCC (July 2017), https://www.afccnet.org/Portals/0/PDF/Representing%20Yourself%20Mediation.pdf?ver=H_EHSdrl8yMC2zse9QziKA%3d%3d.

U.S. District Court for the Northern District of California, Mediation[207] and Alternative Dispute Resolution Procedures Handbook.[208]

U.S. District Court for the District of Columbia, Mediation Brochure.[209]

U.S. District Court for the Eastern District of Missouri, Introduction and Frequently Asked Questions for Mediation.[210]

U.S. District Court for the Western District of Missouri, Mediation and Assessment Program (MAP) Frequently Asked Questions[211] and Guidelines for Participants.[212]

U.S. District Court for the District of New Hampshire, Mediation FAQs.[213]

U.S. District Court for the Eastern District of New York, FAQs: ADR Mediation[214] and FAQs for Self-Represented Parties.[215]

U.S. District Court for the Eastern District of Tennessee, Mediation Handbook.[216]

U.S. District Court for the Western District of Tennessee, Introduction and Overview:
ADR Plan and Mediation Program.[217]

U.S. District Court for the Eastern District of Texas, Alternative Dispute Resolution.[218]

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[207] *Mediation,* U.S. DIST. CT. N.D. CAL., https://www.cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/mediation/ (last visited May 2, 2024).
[208] *Alternative Dispute Resolution Procedures Handbook,* U.S. DIST. CT. N.D. CAL. (May 2018), https://www.cand.uscourts.gov/wp-content/uploads/court-programs/adr/ADR Handbook_May-1-2018.pdf.
[209] *Mediation Brochure,* U.S. DIST. CT. D.C., https://www.dcd.uscourts.gov/sites/dcd/files/District%20Court%20Mediation%20Program%20Brochure%20%26%20FAQs_01.30.23.pdf (last visited May 2, 2024).
[210] *Introduction and Frequently Asked Questions for Mediation,* U.S. DIST. CT. E.D. MO., https://www.moed.uscourts.gov/sites/moed/files/ADR-Introduction-for-mediation.pdf. (last visited May 2, 2024).
[211] *Mediation and Assessment Program (MAP) Frequently Asked Questions*, U.S. DIST. CT. W.D. MO., https://www.mow.uscourts.gov/sites/mow/files/MAP_FAQs.pdf (last visited May 2, 2024).
[212] *Mediation and Assessment Program (MAP) Guidelines for Participants*, U.S. DIST. CT. W.D. MO., https://www.mow.uscourts.gov/sites/mow/files/MAP-Participant-Guidelines.pdf (last visited May 2, 2024).
[213] *Mediation FAQs,* US DIST. CT. N.H., https://www.nhd.uscourts.gov/mediation-info/faq (last visited May 2, 2024).
[214] *FAQs: ADR Mediation*, U.S. DIST. CT. E.D.N.Y., https://www.nyed.uscourts.gov/court-info/faq/ADRMediation (last visited Apr. 1, 2024).
[215] *FAQs: ADRPROSE*, U.S. DIST. CT. E.D.N.Y., https://www.nyed.uscourts.gov/court-info/faq/ADR-Mediation (last visited Apr. 1, 2024).
[216] *Mediation Handbook*, U.S. DIST. CT. E.D. TENN. (Jan. 1, 2000), https://www.tned.uscourts.gov/sites/tned/files/mediation_handbook.pdf.
[217] *Introduction and Overview: ADR Plan and Mediation Program*, U.S. DIST. CT. E.D. TENN., https://www.tnwd.uscourts.gov/alternative-dispute-resolution (last visited Apr. 1, 2024).
[218] *Alternative Dispute Resolution*, U.S. DIST. CT. E.D. TEX., https://www.txed.uscourts.gov/?q=faq/alternative-dispute-resolution (last visited Apr. 1, 2024).

U.S. District Court for the Northern District of Texas, Alternative Dispute Resolution.[219]

U.S. District Court for the District of Utah, Primer for Parties and Attorneys Participating in the District of Utah's Mediation Program [220] and ADR FAQs.[221]

Appendix 3. Videos for Parties

Some parties learn more about mediation by watching videos than by reading written materials, especially rules written in legal language. This part lists videos produced to help parties understand mediation.

Arkansas Access & Visitation Mediation Program, Helping Parents Design and Plan for Access, Visitation & Custody of Their Children.[222]

Center for Appropriate Dispute Resolution in Special Education, IDEA Special Education Mediation[223] and Preparing for Mediation[224] as well as IDEA Early Intervention Mediation[225] and Preparing for IDEA Early Intervention Mediation.[226]

District of Columbia Courts, Understanding Family Mediation[227] (in Spanish)[228] and Understanding Community Mediation[229] (in Spanish).[230]

California Courts, Types and Benefits of ADR.[231]

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[219] *Alternative Dispute Resolution*, U.S. DIST. CT. N.D. TEX., https://www.txnd.uscourts.gov/faq/alternative-dispute-resolution (last visited Apr. 1, 2024).
[220] *Primer for Parties and Attorneys Participating in the District of Utah's Mediation Program*, U.S. DIST. CT. N.D. UTAH., https://www.utd.uscourts.gov/sites/utd/files/med_primer_0.pdf (last visited Apr. 1, 2024).
[221] *ADR FAQs*, U.S. DIST. CT. N.D. UTAH., https://www.utd.uscourts.gov/court-info/faq_adr (last visited Apr. 1, 2024).
[222] *Helping Parents Design and Plan for Access, Visitation & Custody of Their Children*, ARK. ACCESS & VISITATION PROGRAM, http://www.araccess.org/ (last visited Apr. 1, 2024).
[223] CADREworks, *IDEA Special Education Mediation*, YOUTUBE (Jan. 21, 2020), https://www.youtube.com/watch?v=2hnDf6ozDvk.
[224] CADREworks, *Preparing for Mediation,* YOUTUBE (Jan. 21, 2020), https://www.youtube.com/watch?v=2Dy4doLGDrk.
[225] CADREworks, *IDEA Early Intervention Mediation*, YOUTUBE (Dec. 16, 2020), https://www.youtube.com/watch?v=kKMBan5_ndw.
[226] CADREworks, *Preparing for IDEA Early Intervention Mediation*, YOUTUBE (Dec. 29, 2020), https://www.youtube.com/watch?v=ALh4DK1zRNs.
[227] DC Courts Channel, *Understanding Family Mediation*, YOUTUBE (Dec. 15, 2015), https://www.youtube.com/watch?v=eIvf3ZInhOQ.
[228] DC Courts Channel, *Comprendiendo Mediacion Familiar/Understanding Family Mediation*, YOUTUBE (Dec. 15, 2015), https://www.youtube.com/watch?v=I0dDnpaSROs.
[229] DC Courts Channel, *Understanding Community Mediation*, YOUTUBE (Dec. 15, 2015), https://www.youtube.com/watch?v=YaYxAyV6HZA.
[230] DC Courts Channel, *Comprendiendo Mediacion Comunitaria / Understanding Community Mediation, En espanol*, YOUTUBE (Dec. 15, 2015), https://www.youtube.com/watch?v=J1JrNvruXkg.
[231] *Types of ADR and Benefits*, CAL. CTS., https://www.courts.ca.gov/3074.htm (last visited Apr. 1, 2024) (listing videos describing mediation, arbitration, neutral evaluation, and settlement conferences).

High Conflict Institute, Pre-Mediation Coaching - Out with the Old and In with the New (Ways)![232]

Maine Judicial Branch, Mediation & Alternative Dispute Resolution (ADR).[233]

Maryland Courts, Mediation: A Four-Part Series.[234]

Michigan Courts, ODR Video Resources.[235]

Stacy Roberts, 5 Tips to Prepare for Mediation.[236]

Appendix 4. Court Websites

The following federal district court websites provide helpful information about mediation:

Northern District of California[237]

District of the District of Columbia[238]

Western District of Missouri[239]

District of New Hampshire[240]

Eastern District of New York[241]

The following state court systems provide helpful information about mediation:

[232] High Conflict Institute, *Pre-Mediation Coaching - Out with the Old and In with the New (Ways)!*, YOUTUBE (Mar. 20, 2015), https://www.youtube.com/watch?v=er5OeJ9IJRI (simulating conversation with party).
[233] *Mediation and Alternative Dispute Resolution (ADR)*, ST. OF ME. JUD. BRANCH, https://www.courts.maine.gov/programs/adr/index.html (last visited Apr. 1, 2024).
[234] *Mediation: A Four-Part Series*, MD. CT., https://www.mdcourts.gov/reference/mediationvideolibrary (last visited Apr. 1, 2024). This website includes videos explaining what mediation is, how to find a mediator, how to participate in mediation, and common questions after mediation. The video on participating in mediation describes how to prepare for mediation.
[235] *ODR Video Resources*, MICH. CTS., https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/ODR_videos/ (last visited Apr. 1, 2024) (listing five videos explaining online text mediation for family and other cases, what is mediation, preparing for mediation, and who is the mediator).
[236] Stacy Roberts, *5 Tips to Prepare for Mediation*, MEDIATE.COM (Mar. 2, 2015), https://mediate.com/5-tips-to-prepare-for-mediation/.
[237] *Court Programs*, U.S. DIST. CT. N.D. CAL., https://www.cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/ (last visited Apr. 1, 2024).
[238] *Court Mediation Program*, U.S. DIST. CT. D.C., https://www.dcd.uscourts.gov/court-mediation-program (last visited Apr. 1, 2024).
[239] *Mediation and Assessment Program (MAP)*, U.S. DIST. CT. W.D. MO., https://www.mow.uscourts.gov/mediation-and-assessment-program-map (last visited Apr. 1, 2024).
[240] *Alternative Dispute Resolution*, U.S. DIST. CT. N.H., https://www.nhd.uscourts.gov/mediation-0 (last visited Apr. 1, 2024).
[241] *Alternative Dispute Resolution*, U.S. DIST. CT. E.D. N.Y., https://www.nyed.uscourts.gov/alternative-dispute-resolution (last visited Apr. 1, 2024).

Alaska[242]

Connecticut[243]

Florida[244]

Maine[245]

Maryland[246]

Michigan[247]

Nebraska[248]

New Hampshire[249]

New Mexico[250]

New York[251]

Ohio[252]

Tennessee[253]

Utah[254]

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[242] *Mediation***,** ALASKA CT. SYS., https://courts.alaska.gov/mediation/index.htm (last visited May 2, 2024).
[243] *Alternative Dispute Resolution (ADR),* JUD. BRANCH, ST. OF CONN., https://jud.ct.gov/external/super/altdisp.htm (last visited May 2, 2024).
[244] *Alternative Dispute Resolution (ADR*), FLA. CTS., https://www.flcourts.gov/Resources-Services/Alternative-Dispute-Resolution (last visited May 2, 2024).
[245] *Mediation & Alternative Dispute Resolution*, JUD. BRANCH, ST. OF ME., https://www.courts.maine.gov/programs/adr/index.html (last visited May 2, 2024).
[246] *Mediation and ADR*, MD. CTS., https://www.mdcourts.gov/legalhelp/mediationadr (last visited May 2, 2024).
[247] *Office of Dispute Resolution*, MICH. CTS. https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/ (last visited May 2, 2024).
[248] *Mediation & Restorative Justice*, ST. OF NEB. JUD. BRANCH, https://supremecourt.nebraska.gov/programs-services/mediation-restorative-justice (last visited May 2, 2024).
[249] *Judicial Branch, Mediation*, N.H., https://www.courts.nh.gov/resources/mediation (last visited May 2, 2024).
[250] *ADR: Paths to Settlement*, N.M. CTS., https://adr.nmcourts.gov/ (last visited May 2, 2024).
[251] *What is ADR?,* N.Y. ST. UNIFIED CT. SYS., https://ww2.nycourts.gov/ip/adr/What_Is_ADR.shtml (last visited May 2, 2024).
[252] *Dispute Resolution Section*, SUP. CT. OF OHIO & OHIO JUD. BRANCH, https://www.supremecourt.ohio.gov/courts/services-to-courts/dispute-resolution/ (last visited May 2, 2024).
[253] *Mediation Resources for the Public*, TENN. CTS., https://tncourts.gov/programs/mediation/resources-public (last visited May 2, 2024).
[254] *Mediation / Arbitration*, UTAH ST. CTS., https://www.utcourts.gov/en/about/miscellaneous/mediation.html (last visited May 2, 2024).

Virginia[255]

Federal appellate courts are authorized to "direct" attorneys and parties to participate in mediation under the Federal Rules of Appellate Procedure.[256] The following websites provide useful information about mediation in their courts.

Second Circuit[257]

Third Circuit[258]

Fourth Circuit[259]

Sixth Circuit[260]

Ninth Circuit[261]

Eleventh Circuit[262]

Some of these courts' websites include a direct link from their homepages to webpages about mediation, including the Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. The Fourth and Ninth Circuits' websites provide guidance about preparing for mediation.[263]

Appendix 5. Publications for Practitioners

There are many articles written for professionals about how to prepare effectively for mediation. A search of the Westlaw Law Reviews and Journals database yielded almost 2800 results. Of course, many of the articles mentioned preparation only in passing, but it still reflects a significant focus on this important topic. Many of the articles provide generic advice and some deal with specific types of cases such as divorce, employment, or construction. Many books about mediation

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[255] *Mediation,* VA. JUD. SYS., https://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/home.html (last visited May 2, 2024).
[256] Rule 33 states, "The court may direct the attorneys – and, when appropriate, the parties – to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. . .. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case." FED. R. APP. P. 33.
[257] *Mediation (CAMP),* U.S. CT. APP. SECOND CIR., https://www.ca2.uscourts.gov/staff_attorneys/mediation.html (last visited May 2, 2024).
[258] *Mediation*, U.S. CT. APP. THIRD CIR., https://www.ca3.uscourts.gov/mediation (last visited May 2, 2024).
[259] *Mediation*, U.S. CT. APP. FOURTH CIR., https://www.ca4.uscourts.gov/mediation (last visited May 2, 2024).
[260] *Mediation*, U.S. CT. APP. SIXTH CIR., https://www.ca6.uscourts.gov/mediation (last visited May 2, 2024).
[261] *Mediation in the Ninth Circuit*, U.S. CT. APP. NINTH CIR., https://www.ca9.uscourts.gov/mediation/ (last visited May 2, 2024).
[262] *Kinnard Mediation Center*, U.S. CT. APP. ELEVENTH CIR., https://www.ca11.uscourts.gov/kinnard-mediation-center (last visited May 2, 2024).
[263] *Preparing for a Mediation*, U.S. CT. APP. FOURTH CIR., https://www.ca4.uscourts.gov/mediation/preparing-for-a-mediation (last visited May 2, 2024); *Preparing for a Mediation*, U.S. CT. APP. NINTH CIR., https://www.ca9.uscourts.gov/mediation/preparing-for-mediation/ (last visited May 2, 2024).

and advocacy in mediation discuss this subject, often in detail. The following list consists almost entirely of articles and blog posts, which may be more accessible than books.

Alliance of Mediators for Universal Disclosure, Universal Disclosure Protocol for Mediation.[264]

Lisa Blomgren Amsler, Janet K. Martinez, and Stephanie E. Smith, Dispute System Design: Preventing, Managing, and Resolving Conflict.[265]

Daniel Ben-Zvi, Nine Ways for Counsel to Prepare for Mediation.[266]

David I. Bristow & Zimba Moore, Preparing for Mediation in a Multiparty Construction Dispute.[267]

Judy Cohen, How Preliminary Conferences Lay the Groundwork for a Productive Process.[268]

Chuck Doran, Preparing Mediation Statements.[269]

Brian Farkas & Donna Erez-Navot, First Impressions: Drafting Effective Mediation Statements.[270]

Paul R. Fisher, Preparation Emphasizes What Clients Don't Want to Hear.[271]

Steven M. Gold, Pre-Session Calls: A Crucial Step in the Mediation Process.[272]

Bonnie Blume Goldsamt, How to Get the Most for Your Clients When Their Case Is Referred to Mediation.[273]

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[264] *Universal Disclosure Protocol for Mediation (UDPM)*, ALL. OF MEDIATORS FOR UNIVERSAL DISCLOSURE, https://universaldisclosureprotocolmediation.com/ (last visited May 2, 2024).
[265] LISA BLOMGREN AMSLER, JANET K. MARTINEZ, AND STEPHANIE E. SMITH, DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT (Stan. Univ. Press, 2020).
[266] Daniel Ben-Zvi, *Nine Ways for Counsel to Prepare for Mediation*, MEDIATE.COM (June 19, 2011), https://mediate.com/nine-ways-for-counsel-to-prepare-for-mediation/.
[267] David I. Bristow & Zimba Moore, *Preparing for Mediation in a Multiparty Construction Dispute*, 19 ALTS. TO HIGH COST OF LITIG. 135 (2001).
[268] Judy Cohen*, How Preliminary Conferences Lay the Groundwork for a Productive Process*, 30 ALTS. TO HIGH COST OF LITIG. 169 (2012).
[269] Chuck Doran, *Preparing Mediation Statements*, MWI, https://www.mwi.org/preparing-mediation-statements/ (last visited May 2, 2024).
[270] Brian Farkas & Donna Erez-Navot, *First Impressions: Drafting Effective Mediation Statements*, 22 LEWIS & CLARK L. REV. 157 (2018).
[271] Paul R. Fisher, *Preparation Emphasizes What Clients Don't Want to Hear*, 20 ALTS. TO HIGH COST OF LITIG. 63 (2002).
[272] Steven M. Gold*, Pre-Session Calls: A Crucial Step in the Mediation Process*, 267 N.Y. L.J. 1 (Jan. 14, 2022).
[273] Bonnie Blume Goldsamt, *How to Get the Most for Your Clients When Their Case Is Referred to Mediation*, BONNIE THE MEDIATOR (May 27, 2011), https://bonniethemediator.wordpress.com/2011/05/27/how-to-get-the-most-for-your-clients-when-their-case-is-referred-to-mediation-managing-the-mediated-case-from-the-attorney%E2%80%99s-perspective/.

Frederick B. Goldsmith, Mediation Preparation, Part One: The Plaintiff's Perspective.[274]

Frederick B. Goldsmith, Mediation Preparation, Part Two: The Defense Perspective.[275]

Elayne E. Greenberg, Starting Here, Starting Now: Using the Lawyer as Impasse Breaker During the Pre-Mediation Phase.[276]

Timothy Hedeen, Remodeling the Multi-Door Courthouse To "Fit the Forum to the Folks": How Screening and Preparation Will Enhance ADR.[277]

Timothy Hedeen et al., Setting the Table for Mediation Success: Supporting Disputants to Arrive Prepared.[278]

Amber Hill, In Defense of Mediation Preparation.[279]

Michaela Keet, Heather Heavin & John Lande, Litigation Interest and Risk Assessment: Helping Your Clients Make Good Litigation Decisions.[280]

Katherine M. Kitzmann, Gilbert R. Parra & Lisa Jobe-Shields, A Review of Programs Designed to Prepare Parents for Custody and Visitation Mediation.[281]

Karen K. Klein, Representing Clients in Mediation: A Twenty-Question Preparation Guide for Lawyers.[282]

Jason J. Knutson, Preparing a Personal Injury Plaintiff for Mediation.[283]

Jeffrey Krivis, 10 Steps in Preparing For a Mediation.[284]

John Lande, Charting a Middle Course for Court-Connected Mediation.[285]

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[274] Frederick B. Goldsmith, *Mediation Preparation, Part One: The Plaintiff's Perspective*, 25 LAWS. J. 5 (Apr. 7, 2023).
[275] Frederick B. Goldsmith, *Mediation Preparation, Part Two: The Defense Perspective*, 25 LAWS. J. 9 (Apr. 21, 2023).
[276] Elayne E. Greenberg, *Starting Here, Starting Now: Using the Lawyer as Impasse Breaker During the Pre-Mediation Phase*, *in* DEFINITIVE IMPASSE-BREAKING TECHNIQUES IN MEDIATION 15 (Molly Klapper ed., 2011).
[277] Timothy Hedeen, *Remodeling the Multi-Door Courthouse To "Fit the Forum to the Folks": How Screening and Preparation Will Enhance ADR*, 95 MARQ. L. REV. 941 (2012).
[278] Hedeen et al., *supra* note 12 (including a detailed literature review).
[279] Amber Hill, *In Defense of Mediation Preparation*, 48 COLO. LAW. 20 (June 2019).
[280] KEET ET AL., *supra* note 122.
[281] Katherine M. Kitzmann, Gilbert R. Parra, & Lisa Jobe-Shields, *A Review of Programs Designed to Prepare Parents for Custody and Visitation Mediation*, 50 FAM. CT. REV. 128 (2012).
[282] Karen K. Klein, *Representing Clients in Mediation: A Twenty-Question Preparation Guide for Lawyers*, 84 N.D. L. REV. 877 (2008).
[283] Jason J. Knutson, *Preparing a Personal Injury Plaintiff for Mediation*, WISC. LAW. 13 (Aug. 2007).
[284] Jeffrey Krivis, *10 Steps in Preparing For a Mediation*, FIRST MEDIATION CORP., https://jeffreykrivis.com/10-steps-in-preparing-for-a-mediation/ (last visited May 14, 2024).
[285] Lande, *supra* note 59.

John Lande, Courts Should Make Mediations Good Samaritans Not Frankensteins.[286]

John Lande, The Critical Importance of Pre-Session Preparation in Mediation.[287]

John Lande, Doing the Best Mediation You Can.[288]

John Lande, How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice.[289]

John Lande, How Will Lawyering and Mediation Practices Transform Each Other?[290]

John Lande, How You Can Solve Tough Problems in Mediation.[291]

John Lande, Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money.[292]

John Lande, Party Self-Empowerment from Preparation for Mediation Sessions.[293]

John Lande, Real Mediation Systems to Help Parties and Mediators Achieve Their Goals.[294]

John Lande, Survey of Early Dispute Resolution Movements and Possible Next Steps.[295]

John Lande, Think DSD, Not ADR.[296]

John Lande, Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs.[297]

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[286] John Lande, *Courts Should Make Mediations Good Samaritans Not Frankensteins*, (University of Missouri School of Law Legal Studies Research Paper No. 2021-09, May 3, 2021), available at SSRN: https://ssrn.com/abstract=3843331.
[287] John Lande, *The Critical Importance of Pre-Session Preparation in Mediation*, (University of Missouri School of Law Legal Studies Research Paper No. 2022-15, Dec. 19, 2022), available at SSRN: https://ssrn.com/abstract=4306617.
[288] Lande, *supra* note 4.
[289] Lande, *supra* note 39.
[290] John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839 (1997).
[291] John Lande, *How You Can Solve Tough Problems in Mediation*, 29 MICH. DISP. RESOL. J. 2 (2021).
[292] JOHN LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY (2d ed. 2015).
[293] Lande, *supra* note 1.
[294] Lande, *supra* note 178.
[295] John Lande, *Survey of Early Dispute Resolution Movements and Possible Next Steps*, (University of Missouri School of Law Legal Studies Research Paper No. 2021-06, April 22, 2021), available at SSRN: https://ssrn.com/abstract=3832282.
[296] Lande, *supra* note 180.
[297] Lande, *supra* note 67.

Michael Koss & Jann Johnson, How to Prepare Your Client for Mediation: Recommendations from ADR Systems' Neutrals.[298]

Jason Long, 10 Ways to Prepare Your Client for Mediation.[299]

Jonathan Marks, Mediating Complex Business Disputes: How Pre-Mediation Interactions Affect In-Session Negotiation Success.[300]

MH Mediate, Pre-Session Preparation to Prevent Inadvertent Misconduct.[301]

Randall Nichols, 4 Tips to Prepare for a Successful Family Law Mediation.[302]

Cinnie Noble, Preparing Parties to Participate in Mediation – The Evolution of a Coaching Model.[303]

Hon. Stuart A. Nudelman (Ret.) & Jann Johnson, Premediation Preparation: A Key Component to Successful Dispute Resolution.[304]

Bennett G. Picker, Preparation: The Key to Mediation Success.[305]

Leonard L. Riskin & Nancy A. Welsh, Is That All There Is?: "The Problem" in Court-Oriented Mediation.[306]
Myer J. Sankary & Marco Imperiale, Mediation Before the Mediation; The Important Role of a Pre-Mediation Session.[307]

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[298] Michael Koss & Jann Johnson, *How to Prepare Your Client for Mediation: Recommendations from ADR Systems' Neutrals*, ADR SYS. (Dec. 20, 2022), https://www.adrsystems.com/news/how-to-prepare-your-client-for-mediation-recommendations-from-adr-systems-neutrals/.
[299] Jason Long, *10 Ways to Prepare Your Client for Mediation*, AGILE L., https://www.agilelaw.com/blog/10-ways-to-prepare-your-client-for-mediation/ (last visited May 2, 2024).
[300] Jonathan Marks, *Mediating Complex Business Disputes: How Pre-Mediation Interactions Affect In-Session Negotiation Success*, 31 ALTS. TO HIGH COST OF LITIG. 83 (2013).
[301] *Pre-Session Preparation to Prevent Inadvertent Misconduct*, MH MEDIATE, https://drive.google.com/file/d/1aJOatsp_TUmur5I82jcFnevT8qZA_K-F/view (last visited May 14, 2024).
[302] Randall Nichols, *4 Tips to Prepare for a Successful Family Law Mediation*, FAM. LAW. MAG. (Feb. 1, 2019), https://familylawyermagazine.com/articles/4-tips-to-prepare-for-a-successful-family-law-mediation/.
[303] Cinnie Noble, *Preparing Parties to Participate in Mediation – The Evolution of a Coaching Model*, 31 CAN. ARB. & MEDIATION J. 10 (2022).
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[305] Bennett G. Picker, *Preparation: The Key to Mediation Success*, 28 ALTS. TO HIGH COST OF LITIG. 25 (2010).
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Appendix 6. Technological Resources

Case management software can help mediators gather and organize party information, communicate standard information about the process, track "to-do" lists and party "homework" assignments, and help remind mediators about topics to consider, such as asking about domestic violence in divorce cases. Some software tools provide automated intake and case preparation systems. Case management software built for mediators, like ADR Notable,[320] allows mediators to create standard preparation checklists for different case types. NextLevel Mediation[321] uses online questionnaires and priority and risk analysis to help parties understand their own interests. The company dtour.life[322] organizes financial information in preparation for divorce. There are many software programs that produce decision trees, which can help anticipate possible outcomes if parties do not reach agreement in mediation.

As technology develops, especially artificial intelligence applications, there are likely to be new and improved technological tools that can help parties, attorneys, and mediators prepare for mediation sessions.

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