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December 30, 2016

Honorable Lawrence J. Hogan, Jr.
Governor
100 State Circle
Annapolis, MD 21401

Honorable Daniel M. Long
Chair, Justice Reinvestment Oversight Board
100 Community Place, 1st Floor
Crownsville, MD 21032

Honorable Thomas V. "Mike" Miller, Jr.
President of the Senate
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Annapolis, MD 21401

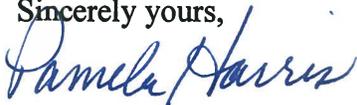
Honorable Michael E. Busch
Speaker of the House
State House, H-101
100 State Circle
Annapolis, MD 21401

Re: Report of the Criminal Mediation Best Practices Work Group
Justice Reinvestment Act, 2016 Maryland Laws Ch. 515 (S.B. 1005)

Dear Gentlemen:

Pursuant to the Justice Reinvestment Act, Section 7, please find enclosed the report of the Criminal Mediation Best Practices Work Group. This report identifies the best practices for criminal referrals to mediation, based upon research and experiences across the State.

If you have any questions, please contact Jonathan Rosenthal at (410) 260-3548, or via email at jonathan.rosenthal@mdcourts.gov.

Sincerely yours,

Pamela Harris
State Court Administrator

Enc.

Hon. Lawrence J. Hogan, Jr.
Hon. Daniel M. Long
Hon. Thomas V. "Mike" Miller, Jr.
Hon. Michael E. Busch
December 30, 2016
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cc: Honorable Mary Ellen Barbera, Chief Judge, Court of Appeals
Honorable Kathleen G. Cox, Chair, Conference of Circuit Judges
Honorable John P. Morrissey, Chief Judge, District Court
Christopher B. Shank, Chief Legislative Officer
Donald Hogan, Chief of Legislation and Justice Reinvestment, Governor's Office of
Crime Control and Prevention
Timothy Sheridan, Chair, Conference of Circuit Court Administrators
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Justice Reinvestment Act
Criminal Mediation Best Practices Work Group

December 22, 2016

Prepared by Jonathan S. Rosenthal, Esquire
Mediation and Conflict Resolution Office (MACRO)
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I. Introduction

The 2016 Maryland General Assembly requested that the Judicial Branch’s Mediation and Conflict Resolution Office (MACRO) “*study and identify best practices for criminal referrals to mediation, based on experiences across the State and research...*”¹ MACRO convened a group of stakeholders to work toward that objective. The participating stakeholders are listed in Appendix A, and include representation from the mediation community, State’s Attorneys and State’s Attorney Office staff, the Executive Branch, and Judicial Branch alternative dispute resolution (ADR) office staff, among others.

Over the course of several months and many meetings, the work group started by creating a survey to examine the existing practices of State’s Attorney Offices (SAO) that have a criminal misdemeanor mediation program. The survey also captured reasons why some State’s Attorney Offices have chosen not to have a program. The survey was sent to all 24 State’s Attorney Offices in Maryland by way of the Maryland State’s Attorneys’ Association. Ten State’s Attorney Offices responded. The survey results, discussed later, identified programs that currently exist, programs that once existed but no longer do, some programs that have changed over time, and some counties where programs have never existed.

In addition to looking at the survey results, which helped identify current practices and concerns, the research findings, the Maryland Mediation Confidentiality Act², and the Maryland Program for Mediator Excellence (MPME) Standards of Conduct for Mediators³, the work group created a list of issues that should be considered in developing criminal mediation program best practices.

On the framework of those issues, the work group developed these best practices for criminal misdemeanor mediation programs, the first of which is **to have a criminal mediation diversion program in each jurisdiction**. This document seeks to provide information, answer questions, raise a few new ones, and begin to crystallize practices and procedures that may be considered best practices for developing criminal misdemeanor programs in Maryland.

¹ Chapter 515 (Senate Bill 1005), Section 7, p. 202 of 206.

² Maryland Code, Courts and Judicial Proceedings Article, § 3-1801.

³ See Appendix E.

II. Executive Summary

The following is a **summary list of recommended Criminal Misdemeanor Mediation Program Best Practices**. The order in which they are listed is not intended to imply importance of any one over another. Rather, the order is based on the chronological order a case may follow as it moves through its life in the State's Attorneys' Office.

1. **Have a program**

Best Practice: **Have a diversion program to refer criminal misdemeanor cases to mediation.** Research findings explained later in this report make it clear that mediation may have several benefits for the participants, the State's Attorneys Offices, and the courts.

2. **Create a network**

Best Practice: **Create a network** for the State's Attorneys and other stakeholders who have misdemeanor mediation programs to meet two or three times a year, (or as needed), to talk about their respective challenges, needs, and successes in running their programs. Having such a network to share policies, procedures, forms, challenges, and other ideas will support the programs to continue developing additional best practices and to refine the existing ones.

3. **Sustainability of programs**

a. Best Practice: **Establish a funding mechanism that is reliable and consistent.**

b. Best Practice: **Document the program's processes and procedures** so they may continue if there is turnover in the State's Attorney's Office or the community mediation partner staff.

4. **Review cases for referral to mediation using established criteria**

a. Best Practice: **Case types that should be considered potentially appropriate for mediation include:** most misdemeanors; second degree assault cases excluding domestic violence; malicious destruction of property; some theft charges; harassment; telephone misuse; and trespass. All of these case types originate in the District Court. There are no mediation programs for cases originating in the Circuit Court.

b. Best Practice: **The case review should consider:**

- the nature of the alleged offense, including the severity of contact if it is a physical charge, and any injuries received;
- the defendant's Record of Arrest and Prosecution ("RAP" sheet), including the number of items on the record, and patterns of escalating charges;
- the relationship between the victim and the defendant, if any, and any history among people involved in the case (Close examination is given to domestic violence charges, which are not referred to mediation.); and
- cases involving cross charges, unless excluded by some other screening criteria, generally should be referred to mediation.

- c. Best Practice: **Cases should be reviewed to ensure, to the greatest extent feasible, that all parties can participate and speak for themselves during the mediation without fear of retaliation.** It is also a **best practice that this review continue throughout the mediation process.**

5. Domestic violence

- a. Best Practice: **Cases involving domestic violence or a protective order should not be referred to mediation.**
- b. Best Practice: **All people working in this process, including the mediators and the people conducting intake and reviewing the cases, should understand the cycle of violence and consider it in determining whether or not mediation is appropriate.**

6. Timing of the referral

Best Practice: **Referrals may be made at any time during the life of a case.** Screening should occur as early as possible (sometimes before the victim files charges), and, if a mediator is available in the court, even on the day of trial. If mediation is offered on the day of trial, participants must still be assured of having a trial on the same day if all issues are not resolved in the mediation.

7. Invitation or referral to mediation

- a. Best Practice: **The invitation to try mediation, or referral to mediation, should include:** a brief description of mediation, the role of the mediator, the voluntary nature of mediation, the principle of self-determination, and confidentiality as it applies to the case.
- b. Best Practice: **The invitation should inform and explain any requirements the State's Attorney has with regard to reviewing an agreement, in whole or in part, that participants may reach.**

8. Attorney representation

- a. Best Practice: **Cases should be eligible for, and referred to, mediation, regardless of whether participants are represented by attorneys.**
- b. Best Practice: **Attorneys need not attend the mediation,** as it is not a rights-based process.

9. The mediators

Best Practice: **Mediation programs should recruit mediators who reflect the diversity of the community they serve.** Having a roster of mediators allows for greater flexibility in matching mediators to cases/participants. Partnering with a community mediation center is one way to accomplish that objective.

10. Mediator training

- a. Best Practice: **Mediators should have a minimum of 40 hours of beginning/basic mediation training.**
- b. Best Practice: **Mediators should participate** in an organized **apprentice process.**
- c. Best Practice: **Mediators should receive feedback from other mediators on a regular basis.**
- d. Best Practice: **The mediator’s highest level of education should *not* be determinative of mediator competence** and should not be used as a threshold measure for participation in these programs.

11. Mediation framework

Best Practice: **Mediators should mediate in a framework consistent with Title 17** (Alternative Dispute Resolution) **of the Maryland Rules.** In this framework, mediators assist the participants to identify issues and options, explore their respective needs, and reach their own voluntary agreement. Mediators do this without providing recommendations for solutions and without providing legal advice. These mediations should be non-evaluative and non-directive.⁴

12. Mediator skills

- a. Best Practice: **Mediators should have the training and experience necessary to understand and mediate complex, high intensity, and high emotion conflicts.** This includes being able to identify, understand, and address a significant power imbalance, cycle of abuse, and/or participants who have fear of retaliation, among other challenges.
- b. Best Practice: **Mediators should be trained and possess the skills to terminate a mediation in a safe manner and without raising concerns** among the participants.
- c. Best Practice: **Mediators** providing services in these programs **should** be encouraged to **participate in a performance-based certification process.**⁵

13. Continuing education and skill building

Best Practice: **Mediators in these programs should be members of the *Maryland Program for Mediator Excellence* (MPME)⁶,** which is a free program designed to help mediators develop

⁴ It is important to distinguish the acceptable frameworks of mediation from other models commonly described as “evaluative” or “analytical” mediation. In such mediation models, the mediators may use evaluative techniques similar to those used in a settlement conference.

⁵ A performance-based certification process generally uses a role play and scoring mechanism to determine a mediator’s skill level. This is different than a certification process that relies solely on one’s resume or a written, non-skills based test.

⁶ The MPME web page can be found here: <http://www.mpmeonline.org/>.

professionally and continue working on their skills. Membership includes a commitment to completing eight hours of continuing education every year, plus an additional two hours of ethics education each year.

14. Intake

- a. Best Practice: **Intake should be completed by a person who has received mediation training and who understands the skills and experience of the people who will be assigned to mediate a specific case**, so assignments may be made in a thoughtful way.
- b. Best Practice: **The intake conversation should be conducted by someone other than the person assigned to mediate** that particular case.
- c. Best Practice: **All intake conversations should include the same elements for all of the invited participants** to the mediation, and should be conducted in a way that uses similar skills to those a mediator uses to help participants feel comfortable asking questions and sharing information.
- d. Best Practice: **A check list** should be used during intake to **ensure consistency** for all of the conversations.
- e. Best Practice: **The intake conversation should include an explanation of** the process; confidentiality; the role of the mediator; the role of the parties; self-determination; the voluntary nature of the process; the times and locations of the mediation session(s); any time constraint issues; and who else should participate in the mediation other than the parties in the case. **The participants should be provided an opportunity to ask any questions they may have.**
- f. Best Practice: **Accessibility issues should be considered during the intake process.**
- g. Best Practice: **Intake should include use of a tool to assess** whether participants think they can **speak without fear of retaliation during the process.**
- h. Best Practice: **The person conducting intake** should ask the participants if they can **communicate privately during the intake conversation.**

15. Confidentiality

- a. Best Practice: **An explanation of confidentiality should be given at the time of the referral (invitation) to mediation, during intake, and at the beginning of the mediation session.**

- b. Best Practice: **The explanation of confidentiality should comply with the Maryland Mediation Confidentiality Act** (see Appendix B), which will apply to these cases upon the mediator’s completion of the requirements in § 3-1802(a)(3)(i) and (ii)⁷.
- c. Best Practice: **If the States Attorney has a policy for case disposition that requires reviewing all or part of an agreement, this should be explained clearly and transparently to participants in advance of the mediation, preferably during intake**, and again at the time an agreement is reached if they want any part of their agreement to remain confidential.

16. The mediation session(s)

- a. Best Practice: **The mediation session(s) should happen at a time and location convenient and accessible to the participants.**
- b. Best Practice: **The mediation program should use post-mediation participant feedback survey forms** for each session.

17. Data collection

- a. Best Practice: **Data should be collected from each individual mediation and in aggregate by the program.**
- b. Best Practice: **Follow-up data collection should be completed three to six months** after the mediation for cases in which an agreement was reached to see if the agreement is still working and to see if there have been any additional charges filed involving the same people.

⁷ 3-1802(a) In general. – Except as provided in subsection (b) of this section, this subtitle applies to a mediation in which:
... (3) The mediator states in writing to any and all parties to the mediation and persons with whom the mediator has engaged in mediation communications that:

(i) the mediation communications will remain confidential in accordance with this subtitle; and
(ii) The mediator has read and, consistent with State law, will abide by the Maryland Standards of Conduct for Mediators during the mediation.

III. The Research

The work group was guided by two recently completed mediation research projects. The first project, concluded this year, was commissioned by the Maryland Judiciary, and it examined the impact of ADR on criminal misdemeanor cases and participants, and the effectiveness of ADR techniques on those cases and participants. The second research project concluded in 2014, and it examined the impact of reentry mediation on recidivism.

Criminal Misdemeanor Research⁸

The Judiciary commissioned research to examine the impact and effectiveness of ADR on the courts and participants in the District Court and circuit courts, and in civil, family, and criminal cases. This multi-year, multi-part research project has been hailed nationally as a breakthrough in terms of next-level empirical examination of the impact of ADR on courts and participants. The portion of the research project relevant to this report explored the impact of the cost to the court system for criminal misdemeanor cases that are referred to mediation compared to similar cases that are not referred to mediation, as well as the impact on the participants regarding how the situation has worked out for them.

The research examined two similar groups of cases; one set that was referred to mediation (the treatment group) and another set of cases that were never offered mediation (the control group). For the research, the two sets of cases were taken from Washington County (the treatment group, referred to mediation at the Washington County Community Mediation Center) and Frederick County (the control group, not referred to mediation). “Washington and Frederick counties are adjacent to one another and share many similar characteristics. The Washington County SAO uses mediation as a diversion program and the Frederick County SAO does not. This presented an opportunity to create a control group that is similar, without having to take the mediation opportunity away from those who might otherwise be offered the service.”⁹

“Generally, cases which are referred to mediation [for this research] are those in which there is an ongoing relationship between the participants which led to the alleged crime, and the SAO believes that these underlying issues could be better resolved in mediation rather than through the standard court process. In those counties where such a referral process exists, SAO staff screen cases to consider if they are appropriate for mediation, including screening out cases in which participants may not be able to speak for themselves without fear of retaliation (such as in some domestic violence situations). The SAO may refer the case to an independent community mediation center or, in two counties, in-house mediators may mediate the dispute. Generally, if participants are both satisfied with the results of the mediation, the SAO will either nolle pros the case or put the case on the inactive docket (stet)

⁸ The full report can be found here: <http://mdcourts.gov/courtoperations/pdfs/criminalcourtimpactreport.pdf>

A two-page summary can be found here:

<http://mdcourts.gov/courtoperations/pdfs/criminalcourtimpacttwopagesummary.pdf>

⁹ Impact of Mediation on Criminal Misdemeanor Cases, 2016, p. 5.

from which it will close within a year if there is no additional action. Often, the participants don't need to show up again for their court hearing if they resolve the case in mediation."¹⁰

Data were collected for both the control group and the treatment group by telephone interviews during which the researchers administered the survey questions. The first survey was conducted within two weeks of the criminal filing. The second survey was conducted between three and six months after the court case was concluded.¹¹ That three to six month time frame is considered the "short term" time frame.

A final look at the case files occurred 12 months after the court case was concluded to determine the final outcome of the case, and whether or not participants returned to court for any subsequent actions within that 12 month period. That review of court data represents the "long term" time frame.

The findings of the criminal misdemeanor research suggest that, for both short and long term analyses, mediation had a statistically significant impact on the probability that cases **would not return to court for further court or supervisory action**. Among the findings directly from the report summary:¹²

"a case that is not mediated is five times more likely to result in judicial action, five times more likely to result in jury trial prayed, and ten times more likely to result in supervised probation or jail time."

"In the analysis of case data in the **short term**, mediation had a statistically significant and negative impact on the likelihood of any judicial action, the likelihood of a jury trial prayer, or the likelihood of supervised probation or jail-time. The predicted probability of a case resulting in Judicial Action is 5.3% for a mediated cases and 29% for a non-mediated cases. The predicted probability of a case resulting in a Jury Trial Prayed is 2.4% for a mediated case and 13% for a non-mediated case. The predicted probability of a case resulting in Supervised Probation or Jail-time is .9% for a mediated case and 8.3% for a non-mediated case. The predicted probabilities are calculated after taking into consideration the many other factors that may affect these outcomes."¹³

"In the analysis of case data in the **longer term**, mediation had a statistically significant and negative impact on the likelihood of the probability of those same participants returning to criminal court with new charges in the subsequent 12 months. The predicted probability of returning to criminal court in the subsequent 12 months for cases that went to mediation is 1.7% [and] the predicted probability of returning to criminal court in the subsequent 12 months for cases that went through the regular court process was 8.2%. This means that cases that were not mediated were almost five times more likely to return to criminal court in the subsequent 12 months."¹⁴

"In the analysis of **participant data**, participating in mediation has a positive and significant impact on participants reporting several months after the intervention that the outcome is working, the

¹⁰ Impact of Mediation on Criminal Misdemeanor Cases, 2016, p. 5.

¹¹ Impact of Mediation on Criminal Misdemeanor Cases, 2016, p. 11.

¹² Impact of Mediation on Criminal Misdemeanor Cases, 2016, p. 6.

¹³ Id.

¹⁴ Id.

issues have been resolved, and they are satisfied with the process. This reinforces the findings in the case data and generally points to long term resolution.”¹⁵

“Overall, participant reports and case level analysis reinforce each other in indicating that mediation resolves issues with outcomes that work in the long term and keep cases from returning to court with subsequent criminal charges. Mediation also results in the use of fewer court and law enforcement resources in the short and long term. These results are important in terms of their implications for the judiciary as well as local law enforcement resources, in addition to their implications on the lives of the people involved in these conflicts.”¹⁶

These findings suggest that when mediation is used in criminal misdemeanor cases: fewer court and criminal justice resources are used for that case; mediated outcomes are complete in terms of addressing all underlying issues; participants are satisfied with the process; and, mediated outcomes have durability in the long term. These research findings alone make it clear that **having a diversion program for criminal misdemeanor cases should be considered a best practice.**

Reentry Mediation Research¹⁷

In addition to the criminal misdemeanor mediation research, Community Mediation Maryland (CMM) commissioned research in 2014 on Prison Re-entry mediation. “Reentry Mediation supports inmates and their families or other support people to discuss their past experiences, to build understanding, and to jointly plan for reentry into the family structure and community before the inmate is released.”¹⁸

The research considered the impact of re-entry on recidivism. Conducted by Choice Research Associates, the research “examined the impact of mediation on recidivism outcomes of arrest, conviction, incarceration, and returns to prison for violations of parole or probation. The study included 282 individuals who participated in mediation between November 2008 and March 2014.”¹⁹

“Key findings of the study comparing the Mediation Treatment Group to the CMM Control Group indicate that participation in reentry mediation has a significant impact on all recidivism outcomes measured in this project, after controlling for key factors that may otherwise explain this finding (e.g., days since release, age, number of times previously incarcerated). Specifically:

- The probability of arrest is reduced by 13% for those who mediated compared to those who did not. The number of sessions is also a significant factor – with each additional mediation session, the probability of arrest is reduced by 8%;

¹⁵ Impact of Mediation on Criminal Misdemeanor Cases, 2016, p. 7.

¹⁶ Id.

¹⁷ Community Mediation Maryland - Reentry Mediation In-Depth Recidivism Analysis, Shawn M. Flower, Ph.D., Principal Researcher Choice Research Associates, Executive Summary, November 2014.

¹⁸ Id., Executive Summary, p. i.

¹⁹ Id.

- The probability of conviction is reduced by 15%, for those who mediated compared to those who did not. Each additional mediation session, the probability of conviction is reduced by 9%;
- The probability of being sentenced to incarceration is reduced by 10%, for those who mediated compared to those who have not. Each additional mediation session, the probability of conviction is reduced by 7%;
- Among those returned to prison by DPSCS Department of Corrections (DOC), the probability of being returned for those who mediate is 12% less than those who do not mediate. The number of sessions is not a significant factor on this measure.”²⁰

A second key finding is that mediation reduces the hazard (or risk) of all outcomes reported compared to those who do not mediate. The Mediation Treatment Group survive in the community longer than the Control Group, even after controlling for relevant key factors (e.g., age, average days sentenced, number of times previously incarcerated).²¹

The principal researcher found that mediation is a short-term intervention with a long-term impact. In fact, the majority of the mediation participants had but one 2-hour session. “Given the rigor of the analytic method, the quality and quantity of the data, and the consistency of these results, it is clear that the CMM Reentry Mediation model is an effective tool for reducing the costs of involvement in the criminal justice system to the individual, their families, and the community.”²² “The impact of mediation is believed to be akin to a critical course correction to turn an individual away from a criminal trajectory through the improved relationship with family and support persons and adherence to agreements and plans negotiated during mediation. Mediation is an innovative tool that addresses a critical reentry factor and should be incorporated in a comprehensive and integrated reentry strategy.”²³

²⁰ Id., Executive Summary, p. ii.

²¹ Id., Executive Summary, p. iii.

²² Id., Executive Summary, p. i.

²³ Id., Executive Summary, p. iv.

IV. The Landscape of Criminal Misdemeanor Mediation Programs in Maryland

Currently, about half of Maryland's 24 jurisdictions have formal or informal criminal mediation programs.²⁴ Most of the State's Attorney Offices have programs that partner with local community mediation centers to provide mediation services. One program (Anne Arundel County) has in-house staff mediators to mediate these cases and a case manager to provide administrative support. And, one program (Montgomery County) utilizes both staff mediators and a partnership with the local community mediation center.

For the counties that do not have formal programs, the reasons provided in a survey included: lack of resources; feasibility concerns; and, in one instance, a cost benefit calculation comparing the salary of the person running the program to the number of cases mediated.

Of the State's Attorney Offices that have programs and responded to the survey, there are many similarities in how they operate. Most programs review cases as early as possible to determine if they are appropriate for mediation, including sometimes before charges are filed. Additionally, each State's Attorney Office that indicated they had a program included the following as considerations for referral to mediation: type of charges, relationships between the parties, and cases in which cross-charges have been filed. For both cross-charge cases and cases involving relationships, the research suggests that there is a benefit to using mediation to resolve the underlying issues. The research, as noted above, suggests those criminal misdemeanor cases that utilize mediation are more likely to be resolved without the need of further criminal justice system intervention.

The programs that exist have differing components and may have different needs. In creating this report, the working group identified not only what currently exists, but what best practices should exist. There is no single way to run a program. And while this report does identify best practices, there are various ways those best practices might be instituted. For some programs, resources might not permit adoption of all of the best practice recommendations. Simply having best practice recommendations as a guide, together with the explanations as to why something is considered a best practice, will be useful to new programs being considered and developed, and to existing programs that might seek to improve the quality and/or consistency of their program.

Sustainability

In the context of these programs, as in many others, sustainability includes support from the leader(s), institutionalizing practices and procedures, and funding. Sustainability for these programs requires commitment from the State's Attorney, an elected official.

State's Attorney Offices have varying views on the funding for such programs. In some instances, having staff screen cases and in other ways interact within the program means that the State's Attorney is internally funding the program. Other State's Attorneys use grant funding to support a partner community mediation center even though that grant funding came from sources other than the State's Attorney's Office. Other State's Attorneys, when responding to a survey, indicated there is no funding required for such

²⁴ Alternative Dispute Resolution Landscape: An Overview of ADR in the Maryland Court System, p. 10, April, 2014. Available at <http://mdcourts.gov/courtoperations/adrprojects.html>

programs, which suggests the program does not utilize funds from their own budget, and they are not aware of the costs to the partner community mediation center.

Assuming continuing support by the State's Attorney, if the program relies on a partnership with a community mediation center or other outside entity, commitment from that organization is also a necessity for success. Community mediation centers that provide mediation services for these programs require stability as well, both in terms of leadership and funding.

All of this leads to the idea that for successful and sustainable programs, funding should be stable. Funding may come from the county of the State's Attorney's Office, from grants, or from other sources. But, these programs need funding stability to be successful. In fact, two State's Attorney programs that used to have programs no longer have them due to funding issues. (Caroline and Kent counties). Sustainability also includes ensuring that the processes and procedures are documented, so they may continue if there is turnover in the State's Attorney's office personnel or in the community mediation partner staff.

Creating a network

Finally, in terms of the landscape in Maryland, it should be noted that criminal misdemeanor mediation programs will not likely be uniform, if they exist at all, because the 24 State's Attorneys are elected officials, and they will have their own priorities and their own needs in their respective jurisdictions. However, **one best practice is to create a network** for the State's Attorneys who have these programs to meet two or three times a year, (or as needed), to talk about their respective challenges, needs, and successes in terms of running the programs, and to share ideas and resources. Having such a network to share policies, procedures, forms, challenges, and other ideas will support the programs to develop additional best practices and refine the existing ones.

V. Reviewing cases for referral to mediation using established criteria

The process to determine which cases may be appropriate for mediation begins with reviewing the case file. This review may be completed by any number of employees within the State's Attorney's Office, including Assistant State's Attorneys, paralegals, case managers, victim-witness advocates, or the mediation director. Once the initial review is complete, many of those same individuals have authority to directly make the referral to mediation, or to make a recommendation to the individual who has authority to make the referral.

A best practice is that the case review process include consideration of:

1. *The type of charges filed.* The vast majority of cases referred to mediation are misdemeanors. Charges that are regularly screened as appropriate for mediation include second degree assault, malicious destruction of property, some theft charges, harassment, telephone misuse, and trespass. Under rare circumstances, a felony charge may be screened and referred to mediation. An example of the rare felony that might be screened and referred to mediation is first degree assault under limited circumstances.
2. *The nature of the alleged offense.* The screener will consider the severity of contact if it is a physical charge, in addition to any injuries received.
3. *The defendant's Record of Arrest and Prosecution ("RAP" sheet).* This will include not only the number of items on the record, but also looking for patterns of escalating charges.
4. *The relationship between the victim and the defendant,* if any, and whether there is a history between the people involved in the case. Close examination is given to domestic violence charges, which are not referred to mediation.

If there are other open charges pending against the same defendant, the screener will look to see if those charges involve the same victim, and if the charges have escalated. The decision should be on a case-by-case basis. Similarly, if the victim and the defendant have an ongoing relationship, or if cross-charges are filed, those cases will be deemed appropriate for mediation barring some other circumstance that makes the case not appropriate for the referral. Such cases, along with repeat filers, are ideal for mediation because mediation will allow for the participants to talk about the underlying causes of the conflict, which may allow for a more complete resolution of those underlying issues, whereas a decision by a judge will only focus on the immediate criminal charges.

Cases involving cross-charges are a natural fit for mediation and, unless excluded by some other screening criteria, should be referred to mediation. Cases in which cross-charges have been filed may indicate an animosity between the parties, and if such a situation can be resolved using mediation, the benefit to the parties, the courts, and the criminal justice system will be exponential. Mediation seeks not just to resolve the charges, but to get to the underlying issues that may be keeping these people in conflict with one another. The same can be said for repeat charges involving the same people, unless the record indicates escalation, which may indicate a need for court action.

While the screening of a case for appropriateness for mediation may begin with a review of the case file and the other considerations noted above, it should also be noted that the screening of the case is ongoing in terms of looking for any indication that the case is not appropriate for mediation. Intake personnel and the mediators should be trained to look for indications of domestic violence and capacity (mental health, literacy, substance abuse) issues as the screening for those issues continue throughout the process, and even during the mediation itself. Mediators should have the training necessary to identify situations in which the mediation should be terminated, and to be able to terminate the mediation safely for all and without raising any red flags.

The invitation to try mediation should be made after this initial screening is complete, and it should be by someone from the State's Attorney's Office, which may include someone from the in-house mediation program if one exists. The invitation to try mediation should be by telephone or letter. That initial contact should include a brief description of mediation that includes the following points: the role of the mediator, the voluntary nature of mediation, the principle of self-determination, and the concept of confidentiality as it applies to these programs.

A best practice is that it should also include transparent information about any requirements the State's Attorney has with regard to viewing an agreement, in whole or in part, if the participants reach one. Ideally, this information should be explained by personnel from the State's Attorney's Office or the in-house mediation staff. They will be best able to respond to questions and give a fuller explanation of the various outcome possibilities for whether the participants reach an agreement or not. A clear explanation of what may happen with the case should be provided to the participants at the outset of the invitation to try mediation.

Cases may be eligible for, and referred to, mediation, regardless of whether people are represented by counsel. Whether attorneys (or others) attend the mediation should be discussed during the intake process. Communication by an intake person should follow, and that conversation will explain the mediation process in greater detail.

While files are reviewed for appropriateness for mediation on a case-by-case basis, some case types will almost always be excluded from referrals to mediation. With very limited exceptions, felonies and cases involving domestic violence or a protective order will not be referred to mediation. By way of comparison, for civil cases involving contested custody and visitation, the Maryland Rules of Civil Procedure prohibit mediation of cases involving abuse.²⁵

Time of referral to mediation

There should be many points of entry for a case to be referred to mediation. Cases should be reviewed for appropriateness for mediation as early as possible in the life of the case, **and** at additional points during the case preparation process. Having an early review point allows for the most time possible to determine if the participants are willing, to allow for intake, and to provide as much flexibility to the participants for scheduling the mediation. Having additional review points also provides an opportunity for the State's Attorney to consider any new facts about the case as they determine appropriateness of mediation.

²⁵ Maryland Rules of Civil Procedure, 9-205 (b)(2)

Some State's Attorney Offices currently refer cases to mediation even prior to charges being filed. For example, some receive calls from victims contemplating filing charges, and they may be referred to mediation as an alternative even before charges are filed. If law enforcement files the charges, the referral may be made prior to the first court appearance.

One final consideration for a referral to mediation should take place on the day of trial, and some programs do offer mediation on the date of the first court hearing or on the day of trial. In such instances, the mediation should be given time to develop at its natural pace without rushing the conversation. This may mean that a case scheduled for a morning docket, and in which a fruitful conversation is taking place in mediation, may not return to the courtroom until the afternoon docket. Participants entering a day-of-trial mediation should do so with the assurance that their case will be heard the same day if all issues are not resolved in the mediation.

This day-of-trial criminal mediation model has worked well at the District Court level in Anne Arundel and Washington counties. The District Court has successfully incorporated day-of-trial mediation into its civil docket in many more jurisdictions over the past fifteen years. In such programs, volunteer mediators offer litigants an opportunity to resolve their disputes in mediation. If successful, their agreements are entered into the record and their cases closed, but litigants are assured of having their case heard on the same day if it is not settled during the mediation.

VI. The Mediators

Where possible, mediators should reflect the diversity of the communities they serve. This includes gender, race, ethnicity, age, and more. Mediation programs should recruit mediators who reflect that diversity. The research suggests that:

“Having at least one mediator at the table match the race of the responding participant was positively associated with participants reporting that they listened and understood each other in the ... session and jointly controlled the outcome and an increase in a sense of self-efficacy (ability to talk and make a difference) and an increase in the sense that the court cares from before to after the ADR session.”²⁶

Having a diverse roster of mediators will allow for greater flexibility in matching the referred cases and participants to its mediators. One way to achieve that is to partner with a local community mediation center, if possible. Community mediation includes diversity of its mediation roster as one of its fundamental principles.²⁷

Research suggests that having mediators who match the demographics of the participants, including race and gender, will provide benefits to the mediation outcome and the participants. The

²⁶ *What works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short and Long Term Outcomes*, P. 55, 2016

²⁷ <http://www.marylandmediation.org/about-community-mediation>

research suggests this match is even more important if the participants differ in their demographics from each other. Co-mediation makes it more likely that the demographics can be matched and makes the logistics easier for an apprentice program and regular review and feedback opportunities.

Whether using a solo or co-mediator model, the mediation program should ensure that all mediators meet the other elements noted in this document, including things like completion of an apprentice process, participation in regular feedback and review opportunities, and regular continuing education.

A balancing of the mediator skills on the one hand, and demographic match on the other hand, would be ideal, with mediator skills given primary consideration. Mediators should be selected for a mediation who match the demographics of the participants in the case when possible.

Mediators should have a minimum of 40 hours of beginning/basic mediation training, and they should participate in some form of an organized apprentice process. Mediators should receive feedback from other mediators on a regular basis, which may include being reviewed or serving in a co-mediation model in which giving and receiving feedback is a part of the mediation debrief process. Examples of successful programs that include such elements are the District Court ADR Program for civil cases and community mediation models.

Mediators should practice from either the facilitative, inclusive, or transformative mediation model.²⁸ This is parallel to what the District Court civil ADR program permits. These models support relational conversations among the participants.

The Maryland Rules²⁹ provide guidance about the way mediators should conduct themselves and about the mediation sessions. For example, the mediators should work with the parties to assist them in reaching their own voluntary agreement without providing legal advice.³⁰ Additionally, the Rules describe the role of the mediator as assisting the parties to identify issues and options, and to explore their underlying needs without inserting her/his own recommendations for resolution.³¹ Rather, the mediator utilizes her/his skills to elicit solutions from the participants.

It is important to distinguish the acceptable models of mediation from other models commonly described as "evaluative" or "analytical" mediation. In such mediation models, the mediators may use evaluative techniques not unlike in a settlement conference.³²

²⁸ Generally, in Maryland there are four mediation frameworks that utilize various techniques and strategies. The Maryland Program for Mediator Excellence has defined those frameworks here:

<http://www.courts.state.md.us/macro/pdfs/mpmemediationdefinitions.pdf>

²⁹ Maryland Rules of Civil Procedure, Title 17 Alternative Dispute Resolution

³⁰ Id., 17-102(g).

³¹ Id., 17-103.

³² Id., 17-102(l). In a settlement conference, the neutral asserts his or her experience and expertise in the case type, analyzes the merits of the sides of the dispute, and recommends possible solutions.

Mediators should be members of the ***Maryland Program for Mediator Excellence*** (MPME), which is a free program designed to assist mediators to develop professionally and continue developing their skills. This also includes a commitment to eight hours of continuing education every year, plus an additional two hours of ethics education each year.

Mediators should be encouraged to go through a performance-based certification process. In Maryland there are two programs for performance-based certification.³³ Nationally, there is at least one other.³⁴ The Association for Conflict Resolution (ACR) has created model standards for mediator certification programs, and the certification process completed by mediators should be consistent with those standards (See Appendix F).

The mediator's highest level of education is not determinative of mediator competence and should not be used as a threshold measure for a mediator to be able to participate in a program. It should be noted that for civil mediation in Maryland Courts, Title 17 of the Maryland Rules, encompassing the ADR rules for court-connected ADR, has not had a bachelor degree requirement since 2013. The Rules used to have such a requirement, but it was removed by the Court of Appeals as it recognized that the degree requirement was not determinative of high quality mediation services.

Research indicates that cases in which a mediator had greater experience in the previous 12 months are less likely to return to court for some additional enforcement action than cases in which the mediator had less experience in that same time period.³⁵ Additional research suggests that the single best measure for quality mediation is experience.³⁶ These findings suggest that a mediation roster should not be so large that the mediators are not getting sufficient experience.

Mediators for these cases should be experienced both generally, and should have mediation experience or training in complex, high intensity, and high emotion cases. Mediators should be encouraged to take additional training for cases such as these (including working through issues in addition to reaching solutions). The Standards of Conduct for Mediators state under the heading "competence" that a mediator shall have the requisite training and experience for any given case (See Appendix E).

By comparison, the District Court of Maryland ADR Peace Order program requires mediators to have a threshold amount of experience (10 cases) and to undergo training specific to the types of issues that might arise in Peace Order cases. Peace Order cases in that program often have similar relationship, intensity, and emotional issues.

³³ Community Mediation Maryland (CMM) offers a Performance-Based Evaluation of mediators in the inclusive framework. The Maryland Council for Dispute Resolution (MCDR) offers a performance-based certification program as well.

³⁴ The Institute for the Study of Conflict Transformation (ISCT) uses a "Summative Assessment Process" for mediators using the Transformative Mediation framework.

³⁵ *What works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short and Long Term Outcomes*, p. 55, 2016

³⁶ Wissler, Roselle, Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research, *Ohio State Journal on Dispute Resolution*, Vol. 17:3 2002, pp. 678-679. Specific to civil cases, not criminal misdemeanor cases.

Given all of the considerations that go into assigning mediators to cases, the mediators should be selected for each case by someone who understands mediation and who understands the skills and experience of the mediators on the roster.

VII. Intake

Intake is the process of reaching out to the people in the dispute to invite them to the mediation, explain the process, and respond to any questions they may have. The intake process should also include additional screening to determine if the case is appropriate for mediation. The screening should include a tool to assess whether all participants say they can speak for themselves without fear of retaliation. And the intake conversation should include information about the situation. The intake person should use similar skills that the mediator would use (active listening, open-ended questions, etc.), which are designed to help participants share information and ask questions.

The best practice is that intake should be completed by a person who has training as a mediator and who understands the skills and experience of the people that will be assigned to mediate a specific case, so assignments may be made in a thoughtful way. The person completing intake should be aware of case information, including the facts of the case, the history, if any, of the participants, and the demographic information of the participants, so the assignment of the mediator(s) (as described earlier) can take those facts into consideration for an appropriate match.

The intake conversation(s) should include the same elements for all of the invited participants to the mediation. A check list should be used during intake to ensure consistency, and so the mediator(s) who will ultimately be assigned to the case know what was said to the participants during intake. Doing so also ensures that each participant is given the same information. Intake should be completed by the organization providing the actual mediation service. The person conducting intake should ask if the participants can speak privately with the intake person for the call.

The intake conversation should include an explanation of the mediation process according to the check list, and should include a description of the mediation process, the neutrality of the mediator(s), the role of the mediator(s), the role of the parties, confidentiality, self-determination, the voluntary nature of the process, the fact that the mediation is free, times and locations for the mediation, time constraint issues, and the participants should be asked if they have any other questions.

Intake should also include a discussion concerning who should participate in the mediation other than the named parties to the case. In some situations, other participants may be necessary in the mediation to resolve the conflict. This should be a nuanced conversation working with the participants to determine who needs to be in the conversation while clarifying that this is not a process in which it is necessary or helpful to have 'witnesses' testifying as to what they saw. Ultimately, who participates in the mediation is left up to the participants in the case, as coordinated through the intake process.

The best practice is to consider accessibility issues at all points of the mediation process, including intake. As an example, the community mediation centers have experienced situations in which a phone call may not be the ideal way to process intake for situations in which a prospective participant only has use of a cell phone (no land line) and the minutes in that individual's monthly plan may have run out, which means any additional "talk" minutes will have a significantly higher cost. However, text messages may still be free for that plan, and face-to-face discussion may also be an option. Therefore, protocols should be in place that support confidentiality and include texting among the communication methods. Using texts increases accessibility, but paramount consideration has to be given to be sure the text messages are only going to the person involved with the case. Generally, an intake conversation is needed, and after that, texting may be used to confirm details and logistics.

The best practice is that intake should be conducted by a person who will not mediate for the case in which they conduct the intake. Participants often speak in depth during the intake about their perceptions of the conflict and what is important to them. It is important that this information is shared in a full and fresh way with the other participants in the case. If a participant has already explained all of this to the mediator during intake, they may be less likely to share fully in the mediation.

In addition, if the participants raise issues during the intake process, they may make false assumptions that the mediator(s) will raise those issues during the mediation. Rather, under the mediation principle of self-determination, mediators generally do not raise issues but help the participants in the mediation identify those issues to be discussed during the session(s).

VIII. Confidentiality

As noted previously, the explanation of confidentiality should take place during intake, and it should be provided by someone who has mediation training and fully understands the concepts of confidentiality as they relate to mediation, and of the Maryland Mediation Confidentiality Act³⁷ (see Appendix B). Confidentiality should also be fully explained at the beginning of the mediation session.

According to the specific language in the Maryland Mediation Confidentiality Act, mediators and participants may not disclose or be compelled to disclose anything discussed during intake or the mediation (mediation communications) in any judicial, administrative, or other proceeding.³⁸ However, participants may share things in other contexts unless they agree otherwise and in writing. There are some exceptions to confidentiality, including situations of abuse or credible threats of violence.

Some current programs require that if an agreement includes a restitution provision, that portion of the agreement must be shared with the State's Attorney. Such a provision may conflict with the mediators' duty to the participants and the process. Therefore, the best practice is that, per the Maryland Mediation Confidentiality Act, contents of a mediation agreement are not confidential unless participants agree otherwise. And, participants may choose to have some components of their agreement remain confidential and not other components, or they may choose to have the entire

³⁷ Courts and Judicial Proceedings Article, § 3-1801.

³⁸ *Id.* 3-1803.

agreement remain confidential. If the State's Attorney has a policy regarding case disposition that requires reviewing all or part of an agreement, this should be explained clearly and transparently to participants in advance of the mediation, **preferably during intake**, at the beginning of the mediation, and again at the time an agreement is reached if they want any part of their agreement to remain confidential. Because of the mediation principle of self-determination, the participants may make decisions about how they would like to proceed given those parameters.

IX. The Mediation Session(s)

Research suggests that participants who indicated that the location was convenient prior to the mediation starting were more likely to reach an agreement.³⁹ Holding mediations at a time and place convenient to the participants is the best practice. The mediations should take place at a location that is accessible to all of the participants in the mediation in terms of location, disability compliance, day of the week, and time of day. This may include evening or weekend hours. A benefit to partnership between the State's Attorney's Office and a community mediation center is access to multiple locations for the mediation to take place, and the ability for mediations to take place after business hours and on weekends. Taking time from work can sometimes be a challenge for mediation participants in terms of loss of income, job insecurity, daycare needs, etc. Having flexibility on those issues may assist a person in being able to participate in mediation.

X. After the Mediation

As noted earlier, the best practice is that a clear explanation of what happens with the case be provided to the participants at the outset of the invitation to try mediation. However, it is possible that this issue will surface again during the mediation process, particularly if the participants reach an agreement. If it does, the mediator should be prepared to respond and talk about how the participants can get that information.

In some locations, when discussing the potential outcome of a mediation that results in an agreement, the participants are informed that the Assistant State's Attorney (ASA) will be notified that an agreement was reached and it is up to that ASA to recommend a disposition for the case (i.e., nolle pros, stet, etc.). The ASA's recommendation will then be conveyed back to the participants. The participants may consider that information in deciding whether or not to execute that agreement. And, the mediation participants are informed that mediation is a continuing option should further disputes arise. In other locations, the ASA will recommend a nolle pros if there is an agreement in a case.

While both a nolle pros and a stet have the same effect as to stopping the time on the case, entering a nolle pros may be preferable because a stet keeps open the possibility that the case will be reopened. And as the research suggests, there is a decreasing likelihood that a case will return to court after a mediated agreement is reached.

³⁹ What Works in Child Access Mediation: Effectiveness of Various Mediation Strategies on Short and Long Term Outcomes, Executive Summary, p. viii, 2016.

Data Collection

Collecting data is an important part of evaluating and improving a program, and to help with that, it is the best practice that a program use post-mediation participant survey forms. Ideally, all programs will collect the same core data so statewide aggregated information can be collected and studied. Data points to collect should include:

- i. Number of cases referred to mediation
- ii. Number of cases referred that make it to mediation
- iii. Number of cases removed from the trial docket
- iv. Number of participants involved in the mediations
- v. Number of mediation sessions for each case
- vi. Length of time for each session
- vii. Case duration from the time of referral to the time an agreement is presented to the court
- viii. Number of cases that reached agreement in mediation
- ix. Demographic information including: age, race, ethnic group, gender, zip code, etc.
- x. Charge types referred to mediation (all charges in the case)
- xi. Referral source (defendant attorney, parent, animal control, zoning, judges and police, etc.)
- xii. Range of resolution outcome types (personal, financial – restitution, community service, counseling)

Individual programs may determine that they want to collect other qualitative information.

It is also a best practice that follow-up be completed three to six months after the mediation for cases in which an agreement was reached to see if the agreement is still working and to see if there have been any additional charges filed between the same people.

For more information contact Jonathan S. Rosenthal, Esquire, Director, Mediation and Conflict Resolution Office (MACRO), Administrative Office of the Courts, Maryland Judiciary, 410-260-3548, jonathan.rosenthal@mdcourts.gov

APPENDIX A - Work group Members

Governor's Office

Donald Hogan – Director of Legislation, Governor's Office of Crime Control and Prevention

State's Attorneys Offices

Hon. Joseph Cassilly – State's Attorney, Harford County

Brett Wilson - Assistant State's Attorney, Washington County

Paul O'Connor – Assistant State's Attorney, Baltimore City

Jocelind Julien – Mediation Director, The Mediation Center, Anne Arundel County State's Attorney's Office

Community Mediation

Lorig Charkoudian – Executive Director, Community Mediation Maryland

Sara Cuckler – Executive Director, Washington County Community Mediation Center

Patricia Ryan – Director, Carroll County Community Mediation Center

Maryland Judiciary

Lou Gieszl – Assistant Administrator for Programs, Administrative Office of the Courts, Maryland Judiciary

Maureen Denihan – Executive Director, ADR Office, District Court of Maryland

Jonathan S. Rosenthal – Director, Mediation and Conflict Resolution Office (MACRO), Administrative Office of the Courts, Maryland Judiciary

Md. COURTS AND JUDICIAL PROCEEDINGS ARTICLE

Maryland Mediation and Confidentiality Act

Code Ann. § 3-1801

§ 3-1801. Definitions

(a) In general. -- In this subtitle the following words have the meanings indicated.

(b) Mediation. -- "Mediation" means a process in which parties work with one or more impartial mediators who assist the parties in reaching a voluntary agreement for the resolution of a dispute or issues that are part of a dispute.

(c) Mediation communication. --

(1) "Mediation communication" means a communication, whether by speech, writing, or conduct, made as part of a mediation.

(2) "Mediation communication" includes a communication made for the purpose of considering, initiating, continuing, reconvening, or evaluating a mediation or a mediator.

(d) Mediator. -- "Mediator" means an individual who:

(1) Assists parties in reaching their own voluntary agreement for the resolution of a dispute; and

(2) Adheres to the Maryland Standard [sic] of Conduct for Mediators.

(e) Party. -- "Party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

HISTORY: 2012, ch. 309.

NOTES: EDITOR'S NOTE. --Section 2, ch. 309, Acts 2012, provides that the act shall take effect October 1, 2012.

§ 3-1802. Applicability

(a) In general. -- Except as provided in subsection (b) of this section, this subtitle applies to a mediation in which:

- (1) The parties are required to mediate by law;
- (2) The parties are referred to mediation by an administrative agency or arbitrator; or
- (3) The mediator states in writing to any and all parties to the mediation and persons with whom the mediator has engaged in mediation communications that:
 - (i) The mediation communications will remain confidential in accordance with this subtitle; and
 - (ii) The mediator has read and, consistent with State law, will abide by the Maryland Standards of Conduct for Mediators during the mediation.

(b) Exceptions. -- This subtitle does not apply to a mediation:

- (1) To which Title 17 of the Maryland Rules applies;
- (2) Relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;
- (3) Relating to a dispute that is pending under, or is part of the processes established by, a collective bargaining agreement unless the dispute has been filed with an administrative agency or court;
- (4) Relating to an action to enforce an agreement to arbitrate under common law, the Federal Arbitration Act, the Maryland Uniform Arbitration Act under Subtitle 2 of this title, or the Maryland International Commercial Arbitration Act under Subtitle 2B of this title;
- (5) Relating to an action to foreclose a lien against an owner-occupied residential property subject to foreclosure mediation conducted by the Office of Administrative Hearings under Maryland Rule 14-209.1;
- (6) Arising from a referral of a matter to a master, examiner, auditor, or parenting coordinator under Maryland Rules 2-541, 2-542, 2-543, or 9-205.2; or
- (7) Conducted by a judge who might make a ruling on a case based on the dispute.

(C) Agreement to exclude communications. – The parties and the mediator, by a written and signed agreement made in advance of the mediation, may agree to exclude all or part of the mediation communications from the application of this subtitle.

§ 3-1803. Duties of mediator and participants

(a) Mediator and participants requested by mediator. -- Except as provided in **§ 3-1804** of this subtitle, a mediator or any person present or otherwise participating in a mediation at the request of a mediator:

(1) Shall maintain the confidentiality of all mediation communications; and

(2) May not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.

(b) Parties or participants requested by parties. -- Except as provided in **§ 3-1804** of this subtitle:

(1) A party to a mediation and any person present or otherwise participating in the mediation at the request of a party may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding; and

(2) The parties may enter into a written agreement to maintain the confidentiality of all mediation communications and may require any person present or otherwise participating in the mediation at the request of a party to maintain the confidentiality of all mediation communications.

§ 3-1804. Requirements and exceptions

(a) Written agreement of confidentiality required. -- A document signed by the parties that records points of agreement expressed by the parties or that constitutes an agreement reached by the parties as a result of mediation is not confidential unless the parties agree otherwise in writing.

(b) Disclosures allowed. -- In addition to any other disclosure required by law, a mediator, a party, or a person who was present or who otherwise participated in a mediation at the request of the mediator or a party may disclose mediation communications:

(1) To a potential victim or to the appropriate law enforcement authority to the extent that the mediator, party, or person reasonably believes the disclosure is necessary to prevent bodily harm or death to the potential victim;

(2) To the extent necessary to assert or defend against allegations of mediator misconduct or negligence;

(3) To the extent necessary to assert or defend against allegations of professional misconduct or malpractice by a party or any person who was present or who otherwise participated in the mediation at the request of a party, except that a mediator may not be compelled to participate in a proceeding arising out of the disclosure; or

(4) To the extent necessary to assert or defend against a claim or defense that, because of fraud, duress, or misrepresentation, a contract arising out of a mediation should be rescinded or damages should be awarded.

(c) Disclosure by court order; limitations. -- A court may order mediation communications to be disclosed only to the extent that the court determines that the disclosure is necessary to prevent an injustice or harm to the public interest that is of sufficient magnitude in the particular case to outweigh the integrity of mediation proceedings.

§ 3-1805. When communications subject to discovery

Mediation communications that are confidential under this subtitle are not subject to discovery, but information that is otherwise admissible or subject to discovery does not become inadmissible or protected from disclosure solely by reason of its use in mediation.

§ 3-1806. Short title

This subtitle may be cited as the Maryland Mediation Confidentiality Act.

HISTORY: [2012, ch. 309](#).

NOTES: EDITOR'S NOTE. --See note to § 3-1801 of this article.

APPENDIX C - Two-page Summary of the Criminal Misdemeanor Research Findings

Maryland Judiciary Statewide Evaluation of Alternative Dispute Resolution Impact of Mediation on Criminal Misdemeanor Cases

This is the first study of its kind that compares mediated and non-mediated criminal misdemeanor cases with such great attention to creating a comparison group. This report explores the impacts in terms of cost to the court system for cases which are referred to mediation compared to cases which are not referred to mediation. It also explores the impact on the participants regarding how the situation has worked out for them. *This handout summarizes a multidimensional study that includes sophisticated data collection instruments and analysis tools. Information on accessing the full report can be found on the back of this flier.*

Short Term Outcomes

The study found that mediation had a statistically significant impact in reducing the likelihood of:

- judicial action
- jury trial prayer
- supervised probation or jail-time

Mediated cases were five times less likely to result in judicial action, five times less likely to result in jury trial prayed, and ten times less likely to result in supervised probation or jail-time.



Long Term Outcomes

Mediated cases were almost five times less likely to return to criminal court in the subsequent 12 months than those that were not mediated.

Mediation did not have a statistically significant impact on:

- individuals finding themselves in civil court in the subsequent 12 months



Participant Follow-Up

Participating in the mediation has a positive and significant impact on participants reporting several months after the intervention that:

- the outcome is working
- the issues have been resolved
- they are satisfied with this process

This reinforces the findings on case outcomes, and generally points to long term resolution.



Overall, participant reports and case level analysis reinforce each other and indicate that **mediation resolves issues** with outcomes that work in the long term and keep cases from returning to court with subsequent criminal charges. **Mediation results in the use of fewer court and law enforcement resources in the short and long term.**

DATA COLLECTION

The data for this study were collected from two Maryland counties: Washington and Frederick. Washington County and Frederick County are adjacent, and share similar geographic and demographic characteristics. These similarities led researchers to be confident that the two groups being compared were equivalent enough in ways other than the intervention itself. This allowed researchers to properly assess the impact of mediation. The Washington County State Attorney's Office (SAO) refers some criminal cases to mediation prior to a trial date and these cases served in the mediation (treatment) group. The Frederick County SAO does not offer mediation for criminal cases, and therefore those cases were used in the non-mediation (comparison) group.

The mediation group cases were identified from cases referred to mediation by the Washington County SAO. Researchers were then present for all mediation sessions they could attend, and cases were included in the data when mediation participants consented to inclusion in the study.

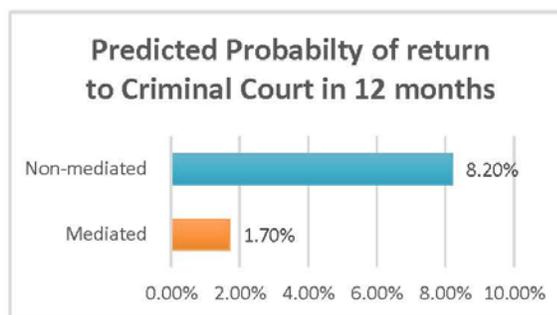
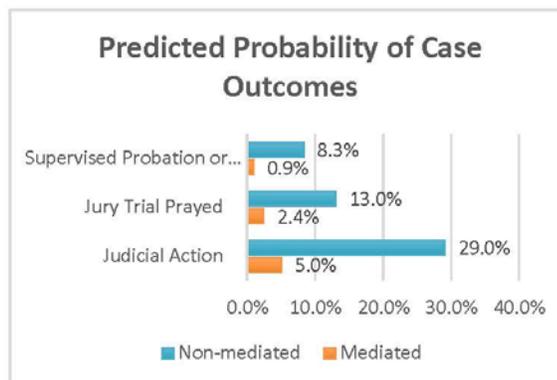
Non-mediation group cases from Frederick County were selected by researchers based on mediation referral criteria gathered from interviews with the Washington County SAO. This resulted in a group of cases that would have likely been referred to mediation had the option been available.

The Maryland Judiciary commissioned this study to be conducted by independent researchers in its ongoing effort to provide the highest quality service to Marylanders, which includes ADR.

PROCESS & ANALYSIS

The research methodology included the use of propensity score matching to consider possible selection bias and ensure cases being compared were essentially equivalent according to the variables measured. Additionally, the methodology used logistic regression analysis to isolate the effect of mediation and consider other factors that may influence the outcome.

As illustrated in the graphs below, the study found that mediated cases had far lower predicted probabilities for both continuing with court procedures or actions and returning to criminal court within a year than cases that were not mediated. These predicted probabilities were calculated after taking into consideration the many other factors that may affect these outcomes.



This research, commissioned by the **Maryland Judiciary**, is part of its Statewide Evaluation of ADR. The project was led by the Administrative Office of the Courts, and funded in part by a grant from the State Justice Institute. Salisbury University and the University of Maryland worked on the statewide study under memoranda of understanding with AOC. The research for this portion of the study was conducted by Community Mediation Maryland and the Bosserman Center for Conflict Resolution at Salisbury University. Lorig Charkoudian, PhD, served as lead researcher. Additional information about the research methods, data collection tools, and statistical analyses, and the full study can be found in the full report at: www.mdcourts.gov/publications/reports.html



APPENDIX D – Sample Forms

1. Mediation Evaluation form (CMM)
2. Intake Checklist (CMM)
3. Community Mediation Case Demographic Information (CMM)
4. Referral letter (1 – Harford County)
5. Referral letter (2 – nolle pross – Harford County)
6. Referral form (Carroll County)
7. Disposition form (Carroll County)

Mediation Evaluation Form

Please evaluate the mediation process by rating the following items in terms of whether you strongly agree, agree, neither agree nor disagree, disagree, or strongly disagree. Your answers will help us improve our services. Thank you.

	Strongly Agree	Agree	Neither Agree nor Disagree	Disagree	Strongly Disagree
1) The mediation process was adequately explained to me by the mediators and/or the program staff.					
2) As a result of the explanation of mediation, I understood the mediation process before the session began.					
3) The mediators listened to what I had to say without judging me or my ideas.					
4) I was able to express myself, my thoughts, and my concerns during the mediation process.					
5) Through this process, I think I understand the other people involved in the conflict better.					
6) Through this process, I think the other people involved in the conflict understand me better.					
7) I would bring other conflicts to mediation in the future.					
8) I would recommend mediation to others involved in conflicts.					
9) As of today, I am satisfied with the process of mediation.					
10) As of today, I am satisfied with the results of the mediation.					

Feel free to elaborate on your responses to any of the above questions.

Did you reach an agreement in the mediation? Yes No

Do you think your conflict is resolved? Yes No

Who came up with the ideas for solutions? (check all that apply)

I did the other participant did the mediators did n/a didn't get to solutions today

What did you like best about the mediation process?

What suggestions do you have to improve the mediation process and program?

For Office Use Only:

Final Session? <input type="checkbox"/> Yes <input type="checkbox"/> No

Mediation Coordination Checklist

Date opened: _____

CCCMC

Mediation Coordinator: _____

- Type of Referral: Civil Community org Outreach/publicity Government Agency State's Attorney
 Civil Personnel Non-profit Community Member Schools Criminal Court
 Police Former Client CMP Volunteer Religious Institutions

- Type of Dispute: Family Parent-teen Parenting Plan Landlord-tenant Organizational
 Neighbor Interpersonal Employment Business Roommates

Briefly describe topics involved and the duration of this dispute: _____

P1: _____ Agreed to try Mediation (Y/N)
 _____ Agreed to try Coaching (Y/N)

P3: _____ Agreed to try Mediation (Y/N)
 _____ Agreed to try Coaching (Y/N)

P2: _____ Agreed to try Mediation (Y/N)
 _____ Agreed to try Coaching (Y/N)

P4: _____ Agreed to try Mediation (Y/N)
 _____ Agreed to try Coaching (Y/N)

- P1 P2**
- Explained mediation process (briefly)
 - Explained neutrality of 2 mediators
 - Explained confidentiality (*except in cases of child abuse elder abuse, or if there is a credible threat of violence*)
 - Explained voluntary (& separate from court)
 - Asked if there are additional participants
 - Asked if there are add'l court charges (if applicable)
 - Explained that mediation is free
 - Used Screening Tool
 - Informed participant of CCCMC file number
 - Informed participant of childcare policy
 - Asked participants mode of transportation
 - Asked participant if observers are ok
 - Checked time constraints
 - Entered into database by _____
- Invitation letters sent on _____ P1 _____ P2
 Confirmation letters sent on _____
 2nd attempt letter sent on _____ P1 _____ P2
 Closure letter sent on _____
 Follow-up to referrer sent on _____

- P3 P4**
- Explained mediation process (briefly)
 - Explained neutrality of 2 mediators
 - Explained confidentiality (*except in cases of child abuse elder abuse, or if there is a credible threat of violence*)
 - Explained voluntary (& separate from court)
 - Asked if there are additional participants
 - Asked if there are add'l court charges (if applicable)
 - Explained that mediation is free
 - Used Screening Tool
 - Informed participant of CCCMC file number
 - Informed participant of childcare policy
 - Asked participants mode of transportation
 - Asked participant if observers are ok
 - Checked time constraints
 - Entered into database by _____
- Invitation letters sent on _____ P3 _____ P4
 Confirmation letters sent on _____
 2nd attempt letter sent on _____ P3 _____ P4
 Closure letter sent on _____
 Follow-up to referrer sent on _____

Reason for closure: _____
 Date closed: _____ Signature: _____
 Reopened on: _____
 2nd date closed: _____ Signature: _____

- For Parenting Plan only:**
- Described child-centered process
 - Asked participant name and age of child
 - Asked participant to bring picture
 - Asked participant to bring calendar
 - Asked participants about protective orders

Community Mediation Case Demographic Information

Please note: This information is completely anonymous and will be used for statistical purposes only. We are required to ask for the information requested below by one of our major funders, the Maryland Mediation and Conflict Resolution Office. It will be used for assessing and improving services and for supporting requests for funding. Thank you for your assistance.

1. Gender: Female Male

2. Age: 19 and under 20-29 30-39 40-49 50-59 60+

3. Race/Ethnic Group: (Check **all** that apply)

Hispanic/ Latino

American Indian/ Alaskan Native

Asian

Black/African American

Native Hawaiian/ Pacific Islander

White

4. Education (highest level achieved):

1st-8th grade High school/GED degree 2-yr college degree/Professional certificate 4-yr college degree Graduate degree

5. Household Income:

Up to \$14,999

\$15,000-\$24,999

\$25,000-\$34,999

\$35,000-\$49,999

\$50,000-\$74,999

\$75,000-\$99,999

\$100,000-\$149,999

\$150,000-\$199,999

\$200,000+

6. Active Military: Yes No

Military Veteran: Yes No

7. ZIP code: _____

Joseph I. Cassilly
District Court Division
State's Attorney
109 N. Main Street, Suite E

Bel Air, Maryland 21014
Diana A. Brooks
Diane Adkins Tobin
Deputy State's Attorneys



410-638-3231
Fax 410-638-3195

STATE'S ATTORNEY FOR HARFORD COUNTY

May 19, 2016

Complainant
Complainant Address

RE: State of Maryland v. DEFENDANT
Case No. XXXXXXXXX

Dear Mr./Mrs. Complainant:

The above captioned case has been reviewed by Emma L. Goerlich, Assistant State's Attorney with the Harford County State's Attorney's Office. Consistent with the guidelines of the Harford County Mediation Commission, Emma L. Goerlich, Assistant State's Attorney has approved this case for mediation and is referring this case to the Harford County Community Mediation Program (HCCMP) for resolution via mediation between you and the defendant.

Mediation is an alternate way to resolve the dispute in this case. While participation is voluntary, the State urges you to participate in mediation. HCCMP will notify this Office regarding your participation (or lack of participation) as well as the outcome of the mediation session. The Assistant State's Attorney will then re-assess and then determine whether to prosecute or dismiss the case.

Please contact the Harford County Community Mediation Program at 410-638-4807 within ten (10) days from the date of this letter.

If you have questions regarding the decision to refer this case to mediation please contact this Office at 410-638-3231.

Sincerely,

Emma L. Goerlich
Assistant State's Attorney

cc: File
Mediation
District Court

Joseph I. Cassilly
District Court Division
State's Attorney
109 N. Main Street, Suite E

Bel Air, Maryland 21014
Diana A. Brooks
Diane Adkins Tobin
Deputy State's Attorneys



410-638-3231
Fax 410-638-3195

STATE'S ATTORNEY FOR HARFORD COUNTY

July 6, 2016

Complainant
Complainant Address

RE: State of Maryland v. DEFENDANT
Case No. XXXXXXXXX

Dear Mr./Mrs. Complainant:

The above captioned case has been reviewed by Emma L. Goerlich, Assistant State's Attorney with the Harford County State's Attorney's Office. Consistent with the guidelines of the Harford County Mediation Commission, our office has approved this case for mediation. As such, the State's Attorney's Office will be entering a *Nolle Prosequi* (no prosecution) of all charges against DEFENDANT in the above-captioned case and will be referring this case to the Harford County Community Mediation Program (HCCMP) for resolution via mediation between you and the defendant.

Mediation is an alternate way to resolve the dispute in this case. While participation is voluntary, the State urges you to participate in mediation.

Please be advised that you will receive notice of our *Nolle Prosequi* of the above-captioned case. Your appearance in court is not required. If you have questions regarding the decision to refer this case to mediation please contact this Office at 410-638-3231.

Please contact the Harford County Community Mediation Program at 410-638-4807.

Sincerely,

Emma L. Goerlich
Assistant State's Attorney

cc: File
Mediation
District Court

Referral to Mediation

Name: *(Last)*[Click here to enter text.](#) *(First)*[Click here to enter text.](#) *(Middle)*[Click here to enter text.](#)

Home address: *(Street)*[Click here to enter text.](#)

(City)[Click here to enter text.](#) *(State)*[Click here to enter text.](#) *(Zip)*[Click here to enter text.](#)

Phone: *(Home)* [Click here to enter text.](#) *(Day Phone)*[Click here to enter text.](#) *(Cell)*[Click here to enter text.](#)

Case Number: [Click here to enter text.](#) Trial Date:[Click here to enter text.](#)

Advised of referral to Mediation: YES NO

Name: *(Last)*[Click here to enter text.](#) *(First)*[Click here to enter text.](#) *(Middle)*[Click here to enter text.](#)

Home address: *(Street)*[Click here to enter text.](#)

(City)[Click here to enter text.](#) *(State)*[Click here to enter text.](#) *(Zip)*[Click here to enter text.](#)

Phone: *(Home)* [Click here to enter text.](#) *(Day Phone)*[Click here to enter text.](#) *(Cell)*[Click here to enter text.](#)

Case Number: [Click here to enter text.](#) Trial Date:[Click here to enter text.](#)

Advised of referral to Mediation: YES NO

Name: *(Last)*[Click here to enter text.](#) *(First)*[Click here to enter text.](#) *(Middle)*[Click here to enter text.](#)

Home address: *(Street)*[Click here to enter text.](#)

(City)[Click here to enter text.](#) *(State)*[Click here to enter text.](#) *(Zip)*[Click here to enter text.](#)

Phone: *(Home)* [Click here to enter text.](#) *(Day Phone)*[Click here to enter text.](#) *(Cell)*[Click here to enter text.](#)

Case Number: [Click here to enter text.](#) Trial Date:[Click here to enter text.](#)

Advised of referral to Mediation: YES NO

BRIAN L. DELEONARDO
STATE'S ATTORNEY



KATHLEEN C. MURPHY, CHIEF DEPUTY
EDWARD J. COYNE, DEPUTY

MEDIATION DISPOSITION

RE: State vs. _____

Case # _____

Trial Date: _____

As a result of mediation session(s) / Intervention on _____

It is recommended that the above – referenced matter be:

_____ Discontinued by entering a NOLLE PROSEQUI

_____ placed on the STET DOCKET

_____ forwarded for PROSECUTION

_____ other

An agreement has been reached between the parties which provides that

The parties acknowledge they have been informed the foregoing is subject to review by the Office of the State's Attorney, and that the implications of this document have been explained and are understood. The signatures below signify the parties' consent to this recommended disposition as well as their willingness to abide by its terms. They have also been informed that failure to comply with their agreement may result in its termination, and that notice of non-compliance will be forwarded to the Office of the State's Attorney.

Party

Party

APPENDIX E - Maryland Program for Mediator Excellence (MPME) Standards of Conduct for Mediators

**Maryland Program for Mediator Excellence
The Maryland Standards of Conduct for Mediators**

Adopted in 2006 and as amended through July 2013

The Maryland Standards of Conduct for Mediators follows, with some changes, the *Standards of Conduct for Mediators* prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.

Preamble

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

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

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

Note on Construction

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

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

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

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

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

These Standards do not have the force of law until adopted by a regulatory authority.

STANDARD I. SELF-DETERMINATION

- A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.
1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.
 2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.⁴⁰
- B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

⁴⁰This section does not intend that the mediator is responsible for making an assessment of the parties' needs and recommendations regarding professional services that should be consulted. Nor does the section place an affirmative duty on the mediator to insist that parties consult other professionals.

STANDARD II. IMPARTIALITY

- A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
- B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
 - 1. A mediator should not act with partiality or prejudice based on any participant=s personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
 - 2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator=s actual or perceived impartiality.
 - 3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator=s actual or perceived impartiality.
- C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

- A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator=s impartiality.
- B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator=s actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.
- C. If a mediator learns or knows of any fact or circumstance that reasonably could be seen as creating a potential or actual conflict of interest, the mediator shall, as quickly as possible: (1) decline to accept the mediation, either with or without disclosure if the mediation has not begun; or (2) withdraw from the mediation, either with or without disclosure, if the mediation has begun, or (3) disclose the conflict to the parties and if all parties and the mediator agree, proceed with the mediation.

- D. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.
- E. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

- A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
 - 1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.
 - 2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.
 - 3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.
- B. If a mediator, during the course of a mediation determines that he or she cannot conduct the mediation competently, the mediator shall, as soon as is practicable, do one of the following: (1) discuss that determination with the parties and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance; or (2) withdraw from the mediation without disclosing the reason.
- C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

- A. A mediator and any person present or otherwise participating in the mediation at the request of the mediator shall maintain the confidentiality of all mediation communications and may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.
1. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
 2. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.
 3. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.
 4. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.
- B. In addition to any disclosures required by law⁴¹, a mediator and any person present or otherwise participating in the mediation at the request of the mediator may disclose or report mediation communications: (1) to a potential victim or to the appropriate authorities to the extent they reasonably believe necessary to help prevent serious bodily harm or death to the potential victim; (2) when relevant to the assertion of or defense against allegations of mediator misconduct or negligence; or (3) when relevant to a claim or defense that an agreement arising out of a mediation should be rescinded because of fraud, duress, or misrepresentation.

⁴¹ For the legal requirement to report suspected acts of child abuse, see Code, Family Law Article, § 5-705.

STANDARD VI. QUALITY OF THE PROCESS

- A. A mediator shall conduct a mediation in accordance with these Standards.
1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
 2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.
 3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.
 4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.
 5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator shall distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.
 6. A mediator shall not conduct a dispute resolution procedure other than mediation and label it mediation.
 7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.
 8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.
 9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps, if necessary, including postponing, withdrawing from or terminating the mediation.⁴²

⁴². Mediators should be aware that “some matters covered by these Standards may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties and the mediator have agreed, and other agreements of the parties.”

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party=s capacity to comprehend, participate and exercise self-determination.
- B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall, if necessary, take appropriate steps including postponing, withdrawing from or terminating the mediation.⁴³
- C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from, or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

- A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator=s qualifications, experience, services and fees.
 1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.
 2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.
- B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.
- C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

⁴³ . Domestic abuse or violence includes child, spousal, and elder abuse and violence. ADR professionals should be sensitive to child maltreatment issues and domestic violence abuse and violence issues, and know how to respond appropriately. *See also* the Maryland Judiciary’s Family Court ADR Program Best Practices.

STANDARD VIII. FEES AND OTHER CHARGES

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

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.
2. A mediator=s fee arrangement should be in writing unless the parties request otherwise.

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

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator=s ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

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

1. Fostering diversity within the field of mediation.
2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
5. Assisting newer mediators through training, mentoring and networking.

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

APPENDIX F

Association for Conflict Resolution Model Standards for Mediator Certification Programs

MODEL STANDARDS FOR MEDIATOR CERTIFICATION PROGRAMS

ASSOCIATION FOR CONFLICT RESOLUTION

ADOPTED ON OCTOBER 10, 2011

- **ACKNOWLEDGEMENT**

The Model Standards for Mediator Certification Programs stands on the shoulders of those who have previously designed and implemented mediator performance based assessment models. The work of these organizations has resulted in credible methods for assessing mediators' performance.

The standards result from a critical examination of contemporary mediator assessment models and, extrapolating from these models, the components integral to establishing mediator credentialing programs.

National and state professional organizations, state governmental programs, courts, and private and non-profit organizations are encouraged to follow these standards. ACR holds that the field as a whole and the public will be well served by the common adherence to this set of standards.

ACR extends its sincere gratitude, appreciation, and great respect to the organizations and individuals that have contributed their program information and recommendations.

ACR acknowledges and gives appreciation to several groups whose certification programs or standards provided important modeling for this effort. The National Institute for Dispute Resolution (NIDR) began a test design project in 1990 which focused on performance based assessment and which, in 1995, developed a publication called *Performance-Based Assessment: A Methodology for Use in Selecting, Training and Evaluating Mediators*. Examples of some of the performance based certification programs studied in the preparation of this document are: Family Mediation Canada, Institute for the Study of Conflict Transformation, International Mediation Institute, and Maryland Council for Dispute Resolution. Additionally, we acknowledge the guidance we received from the "Standards for the Accreditation of Certification Programs" of the National Commission for Certifying Agencies.

- **INTRODUCTION**

These Model Standards for Mediator Certification Programs have been written to guide entities which have or wish to institute certification programs. These entities (agencies, governmental bodies, profit or not-for-profit organizations, or other types of institutions), can look to these standards to establish and maintain a high degree of credibility. Individual programs adhering to these standards will retain autonomy in decision making over specific certification activities. These standards should be read and considered along with the Appendix which provides context, history, and a reference to distinguish between certification and other methods of credentialing.

- **SECTION I - FOUNDATIONAL REQUIREMENTS**

- **Standard 1 - Balanced Mediator Core Competencies**

Certifying programs will assess applicants for mediation certification based on their ability to:

- attend to procedural justice (the parties' sense of having been dealt with fairly);
- support self-determination, collaboration, and/or exchange among the parties;
- manage content and the issues discussed in mediation;
- appropriately deal with personal, emotional and relational issues.

Comment:

One implication of research on party satisfaction and control is that all four areas listed above are necessary spheres of competence for mediators. (Welsh 2002; Wissler 1995; Lind et al 1990) Assessments should address all of the above areas and expect competency in each appropriate to the type and setting of the mediation.

- **Standard 2 - Performance-Based Components**

Certifying programs shall include performance-based testing as a necessary component of certification. Other aspects of the certifying process could be written assessment, interview, and analysis of a case study or other methods assessing the applicant's knowledge and/or skill.

Comment:

Performance-based testing is an essential component of a meaningful mediator certification process. Performance-based testing includes observations of mediator applicants conducting actual or role played mediations.

The national discourse on mediator certification consistently points to the importance of performance-based testing. In repeated interviews and focus groups conducted by ACR and other organizations, few mediation community leaders support paper credentials, seniority, or written testing as reliable for adequately measuring mediator competency. Many, in

fact, argue forcefully that mediation requires skills that can only be demonstrated in actual practice or effective simulations. (Pou, 2002)

The 1989 study of the Society for Professionals in Dispute Resolution Commission on Qualifying Neutrals identified that that no prior academic credential, such as a bachelor degree or law degree, ensures high quality mediation skills; therefore, programs should look to performance assessment. Written tests alone may indicate who is a good test taker but not necessarily who is a good mediator. As discussed in Standard 4 below, written tests may be useful within a certification process, but are not suitable proxies for performance-based assessments.

Performance-based approaches to certification usually involve assessing mediation role play situations to judge a mediator's competence. Skilled, trained, and experienced assessors observe the mediation to identify certain mediator behaviors. Assessors use a checklist or instrument listing desired mediator behaviors, and mediators can be scored based on the frequency and appropriateness of their use of each behavior. Programs provide training and guidelines for assessors, as well as for role players, if possible.

- **Standard 3 – Performance Criteria**

To ensure high quality and meaningfulness, certification programs shall use the following criteria to examine their performance-based assessment processes:

- **(1) Consistency through Inter-Rater Reliability**

Certifying programs shall use methods which ensure Inter-Rater Reliability to minimize the element of subjectivity in the certification process.

Comment:

Different assessors should show a high level of consistency with regard to assessment scores if reviewing the same candidate, assuming that they are using measures that reflect the particular mediation model that the candidate professes to follow.

- **(2) Validity**

Programs shall ensure Validity in testing in that any assessment will measure that which it states it will measure and not something else.

Comment:

Validity is the degree to which a test is doing the job it was intended to do. Any assessment, in order to be valid, must fulfill the purpose for which it was designed and provide results in which scores or outcomes are a measurement of what the assessment program had stated that it would measure.

(3) Disclosure of Frameworks/Settings/Areas of Practice If a

certifying program is assessing mediators:

- based on a particular framework, that program shall give a clear statement of its framework and what are guidelines for that framework. The program shall provide assessors who are trained and experienced in that framework and who practice in the same setting;
- from a variety of frameworks, that program shall ensure respect for different frameworks/settings in that mediators practicing in various frameworks/settings would all receive fair treatment in the certification process. Programs shall provide assessors who are trained and experienced in the same mediation framework or approach as the candidate as well as practice in the same setting. Mediators may also be assessed using different standards or instruments depending upon their mediation framework, setting or area of practice.

Comment:

The term “Framework” refers to philosophies and methodologies that identify how the mediator carries out and identifies their practice. Such frameworks are often identified using terms such as facilitative, transformative, narrative, evaluative, inclusive, analytical or responsive.

Not only do mediators work in different contexts and settings (courts, agencies, etc.) but also in different areas of practice (community, family, workplace, etc) and adhere to different principles and methodologies. Certifying programs must be explicit about the way that these differences are considered in assessing candidates. Candidates may be asked to describe in writing the principles and practices which guide them so that they can be matched to an appropriate assessor. Programs certifying mediators who practice within different frameworks and use varying methodologies may need multiple performance assessment instruments and/or reciprocal agreements with other certifying entities.

In order to assess mediators who work in specialized settings, the program could consider reciprocal agreements with other equally qualified organizations that are capable of assessing some of those candidates. This allows the program to expand its resources to provide high quality assessment to all applicants.

• **(4) Skill Building**

Certification programs should be designed so that mediators whenever possible will benefit by participating in an interactive and developmental process, receiving guidance, comments, and suggestions from assessors whether or not candidates receive certification.

Comment:

This Skill Building component is consistent with a philosophy of continued learning.

- **(5) Feedback**

Mediation certification programs shall set up protocols to ensure that certification candidates receive helpful – written, oral and numerical feedback from their assessors. Included in this feedback should be steps to certification for candidates not granted certification. If assessors are present during a videotaped role play, the feedback session, or debrief, should also be on video for future reference. A component of training for assessors shall be instruction on giving feedback constructively and effectively.

Comment:

In general, it is good practice for assessors to review a candidate's videotaped role play with them. Those not earning certification should also be encouraged to take very specific steps to improve their skills as well as guidance on how to set personal benchmarks in order to know when a subsequent certification application would be warranted. Resources permitting, one subsequent attempt should be allowed for free or at a reduced cost.

- **(6) Due Process**

Certifying programs shall provide Due Process mechanisms for mediators who question the validity of assessor decisions. Information about how to access these Due Process mechanisms will be made available to all candidates (*See Section IV*)

- **(7) Performance Assessment Tools**

Certification programs shall ensure that the mediation (role play or actual case) used in a performance assessment adequately reflects the level of complexity needed to measure a mediator's abilities. Role plays, simulations, and case studies will be designed to match the type of cases for which the candidate is seeking certification. Role players should have training in how to carry out assessment role plays so that the candidate has the advantage of a case that is appropriately realistic.

- **Standard 4 - Written Components**

Written testing may be used to assess (1) substantive knowledge required for specified types of cases, (2) general knowledge of mediation principles and ethics, (3) the mediator's approach and philosophy, and (4) writing abilities. Writing ability shall be determined in the context of the task of the mediation process, rather than writing from another context. Mediators might also be asked to submit examples of agreements reached in mediation as relevant indicators of their writing skills.

Comment:

Documents from another context such as scholarly papers, articles, contracts, etc. are not adequate to assess how mediators might summarize the conclusion of the mediation process and/or communicate with parties.

- **Standard 5 - Mediation Experience**

Requirements for mediation experience as a prerequisite to certification shall be set in such a manner as to be achievable and should not impede efforts to enhance the diversity of the field.

Comment:

Programs will be faced with the challenge of attempting to “set the bar” high enough for credibility and quality, while recognizing the practical constraints in some instances. The requirement may vary greatly depending upon the setting and area of practice. For example, a small claims assessment may have far less demanding requirements for experience than a divorce mediation assessment. If experience is not a prerequisite to certification, the burden is on the certifying program to offer a rigorous enough assessment methodology to verify competence.

- **SECTION II - TRANSPARENCY**

- **Standard 6 – Publication of Instruments**

The certification program shall publish a description of the assessment instruments used along with any supporting information about how they were derived and how they are used.

- **Standard 7 – Publication of Assessment Areas**

The certification program shall define and publish areas of performance and tasks to be assessed as well as areas of knowledge and/or skill related to areas of performance.

- **Standard 8 – Availability of Names of Certificants**

The certification program shall maintain a list of certified individuals and verify certification upon request of any member of the public.

Comment:

There should be clear policies regarding disclosure of good standing that takes into consideration the violation of the confidentiality rights of any certificant or applicant. The program should state the policy regarding how long information is retained after a certificant is no longer duly certified.

- **Standard 9 – Practice Analysis and Assessment Instruments**

The certification program shall develop and use assessment instruments that are derived from a job/practice analysis and are consistent with generally accepted principles of the field.

- **Standard 10 – Publication of Policies and Procedures**

A certification program shall establish, publish, and periodically evaluate certification policies and procedures such as those for application for certification; confidentiality;

discipline; and policies related to diversity, nondiscrimination, disabilities, and other issues which may affect fairness to candidates or protection of consumers.

- **SECTION III - ETHICS**

- **Standard 11- Adherence to Ethical Standards**

Certifying programs will ensure that mediators seeking any type of certification commit to following the Model Standards of Conduct for Mediators, as well as any other standard relevant to the area of practice or the jurisdiction(s) in which the mediator practices. As part of the certification process, programs will have the applicant indicate to which Standards or Code of Ethics they are committed.

- **Standard 12 - Freedom from Conflicts of Interest**

Certifying programs shall scrupulously ensure that there is freedom from conflicts of interest.

Assessors must not have a financial interest in whether or not a candidate is granted certification.

A candidate shall not be assessed by a person who has been the candidate's trainer within five years.

A certifying program which also offers training shall avoid any claims or implications that completion of such training in itself is a guarantee of certification.

- **SECTION IV - DIVERSITY**

- **Standard 13 - Diversity in Policies, Leadership, and Staffing**

Certifying programs shall:

- create and maintain non-discrimination policies and practices; ensuring that the certification process has been designed so that there is not a bias based on ethnicity, race, gender, sexual orientation or other dimensions of diversity;
- employ and engage a diverse staff, leadership, and board of directors that mirror the diversity of our society; and build intercultural competency and gender equality in all activities;
- develop and publish a diversity statement.

- **Standard 14 – Diversity in Assessors**

Certifying programs shall make available assessors which reflect the diversity of our society and ensures fair assessment of underrepresented populations in the mediation field.

Comment:

The public will be served better by the inclusion of practitioners from many diverse backgrounds and ways of experiencing the world, as well as by practitioners with intercultural competency and a commitment to equality.

- **SECTION V - PROGRAM ADMINISTRATION**

- **Standard 15 - Multiple Pathways**

Certification programs shall offer multiple pathways to eligibility for certification assessment. If the certification requires professional preparation that includes particular types of training, there should be a variety of ways of receiving the training and/or the knowledge and experience represented by that training.

Comment:

Programs should, whenever possible, have some degree of flexibility built into their certification processes recognizing that there are a number of methods of professional preparation: course work, training, mentoring, etc.

- **Standard 16 - Multiple Assessment Methodologies**

Certification programs should offer more than one performance-based method of assessing candidates, including reciprocal agreements with other organizations that also meet the standards outlined in these Model Standards for Mediator Certification Programs.

Comment:

A program in order to carry out performance assessment, programs should consider a variety of methods including: assessors observing actual live or recorded mediations or live or recorded role plays.

- **Standard 17 - Degree Requirements**

Certification programs shall not consider academic degrees of any kind (Bachelors, law, etc.) as prerequisites or competency substitutions for mediator certification.

Comment:

Presently, mediators come from a wide variety of backgrounds and professions. Research (SPIDR 1989) has demonstrated that there is not a correlation between academic degrees and mediator skill. Academic training in a post-graduate degree program of any sort may be considered as a complement to, rather than a substitute for mediation experience.

The new surge of undergraduate and post-graduate conflict resolution degree programs indicates that, in all probability, an increasingly larger percentage of our field will include academically trained practitioners, some of whom have selected the dispute resolution field as their original profession or career. Over time, mediation roster programs and certifiers

may want to examine the connection between formal academic training and mediation skills.

- **Standard 18 - Diversity of Practice**

Certifying programs should acknowledge the diversity of mediation practices and stay current as new styles and frameworks of mediation practice emerge.

- **Standard 19 - Grand parenting**

Programs shall not certify mediators based on experience or any criteria other than those promulgated by the certification program. Performance assessment and testing will be an expectation for all mediators seeking certification.

Comment:

There may be a need for flexibility with regard to documentation, especially from well-established and highly experienced mediators. For example, mediators who have been practicing for many years might not be able to produce copies of their original training certificates but could attest to the training they received at various points in their careers.

- **Standard 20 - Resources**

A certifying program shall have adequate financial and human resources to conduct reliable certification and recertification activities as well as maintain accurate record keeping.

- **Standard 21 - Cost**

Any costs of certification shall fairly reflect the resources required to administer the certification system.

Comment:

Certification programs should bear in mind their responsibility to the development of the field in general as well as to ensuring high quality services to parties. Because any fee has the potential to freeze out skilled mediators and reduce diversity in the field, fee waivers, scholarships, reduced rates for volunteer mediators, and other creative ways to promote quality and diversity should be provided.

Programs must consider the legal implications, costs and benefits of their work, as well as their potential effects on practitioners who are attempting to earn a living as mediators. Programs may need to strike a balance among competing values with regard to diversity, cost, flexibility, and program capacity. Program managers need to determine what is reasonable for their venue and mediator population.

- **SECTION VI - DUE PROCESS / MAINTAINING CERTIFICATION**
- **Standard 22 - Due Process**

Certification programs shall have:

- established appeal processes for candidates who are denied certification and for those whose certification is revoked;
- clearly defined processes for handling complaints made against mediators.

Comment:

The appeals processes should provide the mediator an opportunity to question or challenge procedural inconsistencies, assessment results, and substantive aspects of the certification process. The appeals system may have several different levels that could be classified as either informal or formal, with the hope that most could be addressed at the informal level.

Formal and informal processes may be established with the hope of resolving most complaints informally.

Standard 23 - Renewal of Certification

Certifying programs will:

- renew certification on a regular basis, with an expectation that mediators complete a specified number of hours of relevant and verifiable continuing education during each period;
- present a clear statement of requirements, expectations, and process.

Comment:

It should be up to the certified mediator to develop and follow his/her own continuing education plan and develop specialty and subspecialty practices. Mediators should, however, be encouraged to identify the substantive knowledge needed for their area of practice and stay current with respect to developments in the field. Mediators should also be expected to seek out opportunities to work on ethics, diversity and cultural competence as each relates to mediation.

Standard 24 - Revoking Certification

Certifying programs shall:

- have a clear process for temporarily or permanently revoking certification if a mediator is found to be in violation of ethical standards or determined to have been engaged in mediator misconduct;

- have, and clearly articulate, a range of possible remedies in circumstances when there have been confirmed violations so that revoking certification is not the only option. Responding to complaints and alleged violations of standards should be an interactive and growth-oriented process for both the program and the mediator.

Comment:

While revocation of certification may be necessary, it should be designed as a restorative step rather than a punitive one. Any mediator who has acted in such a way as to have certification revoked should be offered, wherever possible, a pathway to improvement and correction. Any certifying program should be seen as a guide to practitioners and a partner in bringing quality to the field.

- **References follow the Appendix**

APPENDIX
MODEL STANDARDS FOR
MEDIATION CERTIFICATION PROGRAMS
ASSOCIATION FOR CONFLICT RESOLUTION

(ADOPTED ON OCTOBER 10, 2011)

- **INTRODUCTION, BACKGROUND, DEFINITIONS AND CONTEXT**

- **1.0 Introduction**

These Model Standards for Mediation Certification Programs were developed and approved by the Association for Conflict Resolution (ACR) on October 10, 2011. The Standards are the result of widespread collaboration and consensus building among ACR members and other stakeholders in the mediation community. These standards are intended to set goals to which new and existing mediator quality assurance programs should aspire.

These Standards build on the historic work on mediator certification conducted by ACR and its predecessor organizations. Products of this work include but are not limited to the 1989 report of Society for Professionals in Dispute Resolution (SPIDR) Commission on Qualifying Neutrals, *Qualifying Neutrals: The Basic Principles, Report of the SPIDR Commission on Qualifications* (April, 1989), the National Institute for Dispute Resolution's (NIDR) Performance-Based Assessment: A Methodology for Use in Selecting, Training and Evaluating Mediators, Test Design Project (NIDR, 1995), and the *ACR Mediator Certification Task Force Report and Recommendations to the ACR Board of Directors*, March 31, 2004. The 2004 Task Force recommended creating a national mediator certification program, but subsequent feasibility studies indicated that creating best practices for certification programs might be a more logical first step.

ACR encourages entities that certify mediators to adopt, as some have, a nurturing and skill-building approach to certification, reflecting a sense of responsibility to the field, as well as respect for practitioners at all levels.

- **1.1 Rationale**

ACR recognizes the potential benefits of mediator certification, as observed at state, regional and local levels. While many agencies establish standards for mediators, there is no uniform standard for the certification programs themselves. Without some degree of standardization, it is difficult for professionals to choose among various programs that offer certification and almost impossible for members of the public to evaluate the competence of mediators based upon the certification that mediators advertise. ACR reached out to established certifying entities and reviewed the extensive literature in the creation of these model standards for certification programs.

- **1.2 Background**

ACR, along with the American Bar Association and the American Arbitration

Association, has already adopted Model Standards of Conduct for Mediators, which serve as fundamental ethical guidelines for mediators. ACR has also developed Ethical Standards for ACR Neutrals and Recommended Standards for School-Based Peer Mediation Programs.

These standards have been developed to help national organizations, state programs, and non-profit agencies achieve excellence in credentialing mediators. Not all programs or agencies will wish to certify mediators and may choose to use a less rigorous method of credentialing. The standards, nevertheless, can serve as a unifying guide to enhance the credibility of the field.

These Standards are to be read and construed in their entirety. No significance should be attached to the sequence in which the Standards appear.

- **1.3 Mediation Defined**

For purposes of these Standards, mediation is defined as a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute. Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired. (Model Standards of Conduct for Mediators)

Terms:

- The use of the terms “shall and will” in these Standards indicates that in order to comply with the Standard, the certifying program must follow the practice described.
- The terms “will” and “must” indicate the same level of expectation of adherence to the Standard as does “shall.”
- The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for compelling reasons requiring careful use of judgment and discretion.

- **1.4 Overview of Credentialing**

“Credentialing” is an umbrella term that encompasses quality assurance practices such as licensure, certification qualification, accreditation, rostering, and registration. Numerous authorities have discussed the benefits, challenges, and trade-offs inherent in each of these credentialing approaches as applied to mediation (See, e.g., ABA Task Force 18-21; Pou, Assuring Excellence 329-33; Herrman 32-37; Milne, Parameters 49). Each of these credentialing approaches requires that a candidate demonstrate, to some level of qualification, successful completion of one or more of the three Es:

- education (e.g., an educational or training program),
- experience (e.g., clinical internship or supervised practicum), and
- examination (e.g., written exam or performance assessment).

Each of these credentialing approaches provides some degree of assurance that individuals holding themselves out as qualified to provide a professional service, they have the knowledge and skill to competently provide that service competently (ABA Task Force 18).

- **1.5 Movement of Mediator Credentialing toward “Certification”**

Mediator credentialing systems abound in the United States. The result is a vast patchwork of credentialing programs that vary considerably in their standards of qualification and are often localized to the point that they may be isolated from one another even within the same state. (ABA Task Force 18-31; Pou, *Assuring Excellence* 312-23).

Roster Programs. Roster programs are by far the most prevalent form of credentialing for mediators. They are common in court-administered mediation programs and state or national professional associations of mediators (Della Noce, *Communicating Quality Assurance* 770-73; ABA Task Force 21-26). A roster exists when an organization establishes qualification standards (usually education/training and experience) and requires applicants to show evidence of meeting the qualifications before being listed on the roster (Della Noce 770-73; Herrman 35). As evidence of competence, mediator rosters most often rely on paper credentials, such as training certificates and academic degrees, and on documented hours of mediation experience and sometimes hours of supervised practice (Id.). Roster programs rarely have a process for independent third-party verification and authentication of the credentials, relying in good faith on the individual who purports to meet the defined standards (see Della Noce). The strength of roster programs rest in its lower cost and ease of administration, while the often minimal training and experience requirements are seen as a weakness (Herrman 35; Pou, *Assuring Excellence* 305). The criteria used for court-administered rosters most often require little more than some training (typically forty hours), some experience, and/or supervised practice (three to ten cases), and “modest continuing education” (Pou, *Assuring Excellence* 332).

Certification. Various state and national groups have launched initiatives for certification of mediators. The Institute for Credentialing Excellence (ICE), a national body that develops standards for professional certification programs, defines “certification” as a voluntary process by which individuals are evaluated against predetermined standards for knowledge, skills, or competencies believed essential for competent practice in the field (Features of Quality Certification Programs 2-3; NCCA Standards 21). In many established professions, certification is national in scope and confers upon the individual the legally protected right to use the term “certified” (or equivalent initials) as a credential. Because the field of mediation is in an early stage of development, it is difficult to predict how certification may evolve and the level of competency it may seek to assure within its various subfields or the field as a whole.

ACR believes that well-designed programs promise to elevate the level of quality assurance and accountability in mediation as well as increase practitioner self-awareness and advance professional development. This requires moving beyond review of paper credentials to include performance-based assessment. Rather than only verifying whether candidates have specified hours of experience and training, performance assessment focuses on how candidates *apply* their knowledge and what they can *do*. It more accurately reflects an individual’s capacity for competent performance. The work on performance assessment in recent years has produced more precise knowledge of mediation practice, making it possible to design performance-based testing that is valid for the intended purpose and produces reliable and fair results. These model standards outline criteria to assist in developing performance-based assessment as a component of certification.

1.6 Distinguishing Certification and Certificate Programs.

“Certificate” programs need to be clearly distinguished from professional certification programs. A certificate program differs from professional certification in important ways, the most important being that it is centered on learning events and coursework completion. A certificate program is a training program on a topic for which participants receive a certificate after attendance and/or completion of the coursework (Features of Quality Certification Programs 5-7: 2005 NOCA Guide 5).

Certification is more comprehensive and necessarily includes an assessment of an individual’s knowledge, skills, and abilities based on a body of knowledge pertaining to a profession or occupation. For example, people often receive certificates for completing their beginning mediation training. Some certificate programs require the individual to pass an assessment, but the assessment is designed to evaluate accomplishment of intended learning outcomes rather than competencies required for professional practice. Moreover, certification is valid for a specific time period and involves recertification at the expiration of the stated period, whereas certificates are generally issued for life.

- **1.7 Distinguishing Certification and Licensure**

Licensure refers to the process by which a license to practice in the profession is granted by a government board, or by an independent professional organization authorized by government. The Institute for Credentialing Excellence defines licensure as “the mandatory process by which a governmental agency grants time-limited permission to an individual to engage in a given occupation after verifying that he/she has met predetermined and standardized criteria” (2005 NOCA Guide 5). Licensure offers title protection for those who meet the criteria, and persons without a license are prohibited from practicing. Although licensure is a mandatory form of credentialing, it may not necessarily hold practitioners to a higher standard of practice than certification or other forms of credentialing. No state currently licenses mediation professionals.

- **1.8 Challenges Associated with Developing Mediator Certification Programs**

The issue of certification has been a topic of particular interest and concern for mediators across the country. The extensive diversity of opinion on mediator licensing and certification reflects the national dialogue on this topic. Strong divisions exist among practitioners and experts as to how to define, measure, and promote quality mediation practice. These differences have generated debates that have raised a variety of policy, practical, legal, and logistical concerns, such as how best to assess whether practitioners have the skills that can be crucial for a quality process, how to assure diversity, and how to minimize bureaucracy.

These issues arise in part because mediators are asked to play complicated, diverse roles that may vary from program to program or even from case to case.

Some people believe that the field is still evolving and should not be regulated at all. Many knowledgeable people favor market-based philosophies or suggest that insufficient knowledge exists to measure or predict quality performance. Others believe that research is beginning to show the attributes that are important for effective performance in various settings and how those aptitudes are best acquired. (Pou, 2002)

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APPENDIX G

Justice Reinvestment Oversight Board

State Government Article

9-3202.

There is a justice reinvestment oversight board in the governor's office of crime control and prevention.

9- 3203.

- (A) the Board consists of the following members:
- (1) one member of the Senate of Maryland, appointed by the President of the Senate;
 - (2) one member of the House of Delegates, appointed by the Speaker of the House;
 - (3) the Executive Director, or the Executive Director's designee;
 - (4) the Secretary of Public Safety and Correctional Services, or the Secretary's designee;
 - (5) the Chair of the Maryland Parole Commission, or the Chair's designee;
 - (6) the Secretary of State Police, or the Secretary's designee;
 - (7) the Attorney General, or the Attorney General's
 - (8) the Public Defender, or the Public Defender's designee;
 - (9) the Secretary of Budget and Management, or the Secretary's designee;
 - (10) the Secretary of Health and Mental Hygiene, or the Secretary's designee;
 - (11) the Chair of the Local Government Justice Reinvestment Commission, or the Chair's designee;
 - (12) two members appointed by the Chief Judge of the Court of Appeals;
 - (13) the Secretary of Labor, Licensing, and Regulation, or the Secretary's designee;
 - (14) one member appointed by the Maryland Chiefs and Sheriffs association;
 - (15) the president of the Maryland State's Attorneys' association or the president's designee;
 - (16) two members of the Maryland Correctional Administrators Association, appointed by the President Of The Maryland Correctional Administrators

Association, including one representative from a large correctional facility and one representative from a small correctional facility;

- (17) the President of the Maryland Association of Counties or the President's designee; and
- (18) the following individuals, appointed by the Governor:
 - (i) one member representing victims of crime;
 - (ii) one member representing law enforcement;
 - (iii) two local health officers; and
 - (iv) one member with direct experience teaching inmates in academic programs intended to achieve the goal of a high school diploma or general educational development certification.
- (B) to the extent practicable, in making appointments under this section, the Governor shall ensure geographic diversity among the membership of the board.
- (C)
 - (1) the term of an appointed member of the Board is 4 years.
 - (2) the terms of the appointed members of the Board are staggered as required by the terms provided for members of the board on October 1, 2016.
 - (3) at the end of a term, an appointed member:
 - (i) is eligible for reappointment; and
 - (ii) continues to serve until a successor is appointed and qualifies.
 - (4) a member who is appointed or reappointed after a term has begun serves only for the remainder of the term and until a successor is appointed and qualifies.
 - (5) the members of the Board appointed from the Senate of Maryland, the House of Delegates, and the Chief Judge of the Court Of Appeals, shall serve in an advisory capacity only.

9– 3204.

- (A) the Governor shall appoint the Chair of the Board.
- (B) with the approval of the Board, the Chair may appoint a Vice Chair who shall have the duties assigned by the Chair.