Ensuring the Right to Be Heard – Court Access and Judicial Conciliations

ACBA Bench Bar Conference,

June 12, 2025

Continuing Judicial Education-[Judges only]

Distinguished Panel Members & Moderator

- Panel
  - The Honorable William Scott Hardy
  - The Honorable Judge Mary McGinley
  - The Honorable Judge Terrence R. Nealon
- Moderator
  - The Honorable Judge Andrew F. Szefi (retired)

Code of Conduct for United States Judges (Federal Court)

- Canon 3(A) **Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently**

- **A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law.**

Code of Jud. Conduct, Rule 2.6, 42 Pa. C.S.A. (State Court)

- Rule 2.6. Ensuring the Right to be Heard
- A judge shall accord to every person or entity who has a legal interest in a proceeding, or that person or entity's lawyer, the right to be heard according to law.

What can Judges do to improve access to Justice for Pro Se Litigants?

- Tone at the top – Staff recognizes that the Court serves the public
- Easy to follow Standard Operating Procedures for Judges and all Court departments
- Staff available daily during working hours
- Published chambers telephone number and/or at least one staff email address available

What can Courts do to improve access to Justice for Pro Se Litigants?

- Self help centers – kiosks if possible – partnership with Law Library
- Frequently asked question pages on web sites and available in ‘hard copy form’
- Forms that can be completed on-line
- Telephone numbers that work – when someone calls can they reach a person?

Canon 3(A) – Ex Parte Discussions and Conciliation (Federal Court)

- A judge may initiate, permit, or consider ex parte communications as authorized by law.
  - Commentary:
    - A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.

Rule 2.6, 42 Pa. C.S.A. (State Court)

- A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

Rule 2.6, Comment includes 6 factors that a judge should consider when deciding upon an appropriate settlement procedure

- (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions,
- (2) whether the parties and their counsel are relatively sophisticated in legal matters,
- (3) whether the case will be tried by the judge or a jury,
- (4) whether the parties participate with their counsel in settlement discussions,
- (5) whether any parties are unrepresented by council, and
- 6) whether the matter is civil or criminal.

Judicial Conciliations – tips – best practice – things to avoid

- Turning to our panel –
- What tips or tactics are most beneficial to you in conciliating cases?
- What do you caution counsel or the parties to avoid while conciliating?

OK or NOT OK?

“Nice motion in limine you have there. Be a shame if something happened to it.”

OK or NOT OK?

“Trial will not go well for your client. But I can’t make you settle.”

OK or NOT OK?

“The offer is more than reasonable. Your client should take it.”

OK or NOT OK?

- With eyebrows raised “So your adjuster is prepared for a 7-figure verdict?”

Ensuring the Right to be heard – Access to Justice and Judicial Conciliations

- Questions and Answers

- Thank you!

Access to Justice Resources

- Please see articles provided when signing up for this CJE, and also
- National Center for State Courts website:
  - https://www.ncsc.org/

- National Center for Access to Justice
  - What is Access to Justice? | NCAJ
  - Justice Index | NCAJ

Code of Jud. Conduct, Rule 2.6, 42 Pa.C.S.A.

Rule 2.6. Ensuring the Right to Be Heard

Currentness

(A) A judge shall accord to every person or entity who has a legal interest in a proceeding, or that person or entity's lawyer, the right to be heard according to law.

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

Comment:

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[2] The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement procedure for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

[3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether recusal may be appropriate. See Rule 2.11(A)(1).

Credits
Adopted Jan. 8, 2014, effective July 1, 2014.

Code of Jud. Conduct, Rule 2.6, 42 Pa.C.S.A., PA ST CJC Rule 2.6
Current with amendments received through September 15, 2024. Some rules may be more current; see credits for details.

Selected Portions:

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased. The judge should adhere to the following standards:

(A) *Adjudicative Responsibilities*.

(1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) **A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law.** Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) **with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.**

(5) A judge should dispose promptly of the business of the court.

(6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding;

(e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the

proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

(D) *Remittal of Disqualification*. Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

COMMENTARY

Canon 3A(3). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

Canon 3A(4). The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision.

A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts. (Emphasis added.)

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Article
John Lande [a1]

HOW CAN COURTS--PRACTICALLY FOR FREE--HELP PARTIES PREPARE FOR MEDIATION SESSIONS?

TABLE OF CONTENTS

I. Introduction 83
II. Court-Connected Mediation Generally 89
A. The Central Role of Parties in Litigation and Mediation 89
B. Courts as Dispute Systems 91
C. Standards for Court-Connected Mediation 91
D. Three Paths for Court-Connected Mediation 94
III. Mediation in Federal District Courts 95
A. Brief History and Overview of Mediation in Federal District Courts 95
B. Federal District Court Websites and Local Rules 97
C. Provisions in Local Rules Relevant to Preparation 99
1. Providing Information to Parties 99
2. Consulting with Clients and/or Counterpart Attorneys About Choice of Dispute Resolution Process 101
3. Requiring Parties to Mediate 103
4. Opting Out of Mediation 104
5. Consulting with Mediators before Mediation Sessions 105
6. Providing Mediation Memos 106
7. Preparing Parties to Mediate 107
8. Participating in "Good Faith" 107
D. Recommendations for Federal District Court Websites and Local Rules 110
1. Courts Should Use Dispute System Design Processes to Periodically Evaluate and Update Their ADR Rules 110
2. Courts Should Provide Clear, Easily-Accessible Information About Mediation 111
3. Courts Should Require Attorneys to Consult with Their Clients and Counterparts About Use of ADR at the Earliest Appropriate Time 119
4. Courts Should Require or Encourage Attorneys and Parties to Prepare Effectively Before Mediation Sessions 120
5. Courts Should Help Self-Represented Litigants Manage the Mediation Process 120
6. Courts Should Use Policies to Promote Serious Participation in Mediation Other Than "Good Faith" Requirements 121
7. Courts Should Avoid or Limit Compulsion to Mediate 121
8. ADR Experts Should Develop Best Practice Guidelines for Preparation for Mediation Sessions 122
IV. Implications for Real Practice Systems Theory 123
V. Conclusion 124

*83 I. INTRODUCTION

Consider two hypothetical scenarios of mediations of a personal injury lawsuit. In one scenario, Kenji, the plaintiff, arrived at the mediation session feeling anxious because his attorney hadn't told him much about the process and he didn't know what to expect. He didn't understand the factual and legal issues, how the mediation would unfold, or how he might participate in the

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

In a second scenario, at the outset of the case, the plaintiff, Ava, discussed mediation and other dispute resolution processes with her attorney. They decided to suggest mediation to the defendant, who agreed. Before the mediation session, both attorneys discussed the process between themselves and with the mediator. They exchanged documents and planned how the mediation session would proceed. ***84** Ava's attorney told her how the process would work and explained what to expect. They reviewed the evidence, legal issues, her tangible and intangible interests in the case, the defendant's arguments, potential court outcomes after deducting legal expenses, and possible mediation strategies. All the preparation empowered her to participate as knowledgeably and effectively as possible. [1] When the parties and attorneys arrived at the mediation session, they were ready to mediate seriously and efficiently. All this enabled Ava to feel fairly confident and assertive. She participated actively in the mediation session, including a joint session, caucuses with the mediator, and discussions with her attorney while the mediator caucused with the defendant. The parties reached an agreement, and her attorney told her that this was one of the best mediations he had ever experienced. The process was exhausting, but Ava felt that she had some control over the decisions. Although she wouldn't get as much money as she hoped, she thought that the agreement was about as good as she could realistically expect. She and everyone else in the mediation felt good about the mediation-- and relieved that the case was over. She was ready to let it go and move on with her life.

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

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

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

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

> The vast majority of the survey respondents said that preparation by the mediator and mediation participants is very important. Indeed, it helps ***85** to consider that "mediation" really begins during the preparation phase--not when everyone convenes at a mediation session ....
>
> Most of the respondents said that attorneys should send a mediation memo to mediators and that it is essential for mediators to read everything they receive (which may include additional documents such as pleadings, legal memos, or expert reports). They also generally said that mediators and attorneys should talk before the mediation session to discuss procedural and substantive issues, including the "real issues" and potential stumbling blocks ....

> These discussions can prompt the attorneys to prepare themselves and their clients, which can make a big difference in the success of mediation. The parties should have an appropriate understanding of the process, the issues, and their real interests. They should expect to hear things that they will disagree with, and they will probably be asked challenging questions. Parties should be open to reconsidering their positions based on the discussions in mediation. [4]

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

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

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

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

> Our findings suggest the value of educating litigants about legal procedures, helping them develop realistic expectations for what each procedure can entail for their situation, and helping them make informed decisions about whether to attend their procedures.
>
> The findings also highlight the role that lawyer involvement and efficient case disposition play in terms promoting satisfaction and perceived fairness from the litigant viewpoint.

...

> Courts can institute rules that require attorneys to discuss all legal procedures that are available to their clients. Ideally, such rules would encourage lawyers to start these discussions early in the litigation process and revisit them at various points as the case develops. [8]

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

> The findings show that, before the first mediation session, a sizeable number of mediators do not have communications with the mediation participants or do not have case documents, and many disputants themselves do ***87** not participate in pre-session discussions. Accordingly, mediators often do not begin the first formal mediation session informed about the disputants or the dispute, and disputants do not necessarily enter the first session with an understanding of the mediation process. This is contrary to conventional mediation thinking and advice that stresses the importance of preparing for mediation. In addition, the lack of pre-session information negatively impacts the ability of mediators and mediation participants to customize the mediation process to the needs of the individual case, which is considered to be one of mediation's advantages. [11]

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

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

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

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

Courts have strong interests in promoting preparation for court-connected mediation. In general, if everyone is well prepared before a mediation session, the ***88** process is likely to achieve the goals of the participants as well as the court's. This obviously benefits parties and reduces the time that courts spend managing litigation and trying cases. [23]

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

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

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

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

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

Part II of this article provides general background information about court-connected mediation. It begins by noting that parties are--or should be-- critically ***89** important decision-makers in their cases. This Part shows that courts are complex dispute systems subject to the principles of dispute system design. It presents provisions of the National Standards for Court-Connected Mediation Programs relevant to preparation for mediation sessions. It describes three paths that courts can take regarding mediation, which I call the "voluntary," "liti-mediation," and "middle" paths.

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

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

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

mediation sessions. The plans for each court or mediation program should be tailored to the particular types of cases, parties, and other circumstances involved.

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

II. COURT-CONNECTED MEDIATION GENERALLY

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

A. The Central Role of Parties in Litigation and Mediation

In a common image of the legal system, judges sit atop the decision-making hierarchy. That image is somewhat misleading because litigants are actually critical ***90** decision-makers, and judges can make decisions only when parties give them that authority. Most disputes are resolved without litigation because the parties decide not to invoke courts' authority.[32] Even after a party files suit, in most cases, the parties can effectively oust the courts' jurisdiction and reassert their authority over their disputes by settling lawsuits.

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

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

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

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

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

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

91** ***B. Courts as Dispute Systems

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

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

C. Standards for Court-Connected Mediation

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

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

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

> Courts should provide the following information to judges, court personnel and the bar:
>
> (1) the goals and limitations of the jurisdiction's program(s)
>
> (2) the basis for selecting cases
>
> (3) the way in which the program operates
>
> (4) the information to be provided to attorneys and litigants in individual cases

(5) the way in which the legal and mediation processes interact

(6) the enforcement of agreements

(7) applicable laws and rules concerning mediation. [50]

Standard 3.2.b states:

Courts should provide the following information to users (parties and attorneys) in addition to the information in (a):

General information:

(1) issues appropriate for mediation

(2) the possible mediators and how they will be selected

(3) party choice, if any, of mediators

(4) any fees

(5) program operation, including location, times of operation, intake procedures, contact person

(6) the availability of special services for non-English speakers, and persons who have communication, mobility, or other disabilities

(7) the possibility of savings or additional expenditures of money or time

Information on process:

(1) the purpose of mediation

(2) confidentiality of process and records

***93** (3) role of the parties and/or attorneys in mediation

(4) role of the mediator, including lack of authority to impose a solution

(5) voluntary acceptance of any resolution or agreement

(6) the advantages and disadvantages of participating in determining solutions

(7) enforcement of agreements

(8) availability of formal adjudication if a formal resolution or agreement is not achieved and implemented

(9) the way in which the legal and mediation processes interact, including permissible communications between mediators and the court

(10) the advantages and disadvantages of a lack of formal record. [51]

Standard 5.1 states:

> Mandatory attendance at an initial mediation session may be appropriate, but only when a mandate is more likely to serve the interest of parties (including those not represented by counsel), the justice system and the public than would voluntary attendance. Courts should impose mandatory attendance only when:
>
> a. the cost of mediation is publicly funded, consistent with Standard 13.0 on Funding:
>
> b. there is no inappropriate pressure to settle, in the form of reports to the trier of fact or disincentives to trial; and

> c. mediators or mediation programs of high quality (i) are easily accessible; (ii) permit party participation; (iii) permit attorney participation when the parties wish it; and (iv) provide clear and complete information about the precise process and procedures that are being required. [52]

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

Standard 11.0 deals with inappropriate pressure on parties to settle their cases. [54] Standard 11.1 states, "Courts should institute appropriate provisions to permit parties to opt out of mediation." [55] Standard 11.2 states, "Courts should provide parties ***94** who are required to participate in mediation with full and accurate information about the process to which they are being referred, including the fact that they are not required to make offers and concessions or to settle." [56] Standard 11.2 also addresses "good faith" requirements, as described below. [57]

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

D. Three Paths for Court-Connected Mediation

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

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

> From a "liti-mediation" perspective, courts regulate mediation as a normal part of the litigation process. Court-connected mediation--especially *court-ordered* mediation--helps relieve some courts' caseload burdens by referring part of their dockets to mediation. It is grounded in a concern that without a court order, parties and attorneys would not mediate some cases that are appropriate for mediation. In that situation, some parties lose valuable opportunities to mediate, and parties and courts spend their limited resources on cases that would appropriately be resolved in mediation. Courts want to ensure that parties and attorneys comply with their orders and cooperate with the courts' case management systems. From this perspective, courts must regulate mediation and rigorously enforce rules to ensure the integrity of mediation.

> The other perspective focuses on the voluntary nature of mediation and emphasizes the distinction from the litigation process. Parties have a constitutional right to trial but no constitutional right to mediation. Courts have the authority to order parties to mediate, but courts are not obligated to order mediation and parties have no right to compel courts to do so. Litigation is designed to produce binding adjudications of facts and law. ***95** Mediation is designed to help parties to communicate, negotiate, and settle cases, and any settlement must be a voluntary decision of the parties. [60]

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

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

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

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

III. MEDIATION IN FEDERAL DISTRICT COURTS

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

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

The federal courts have promoted mediation for more than a quarter century. The Civil Justice Reform Act of 1990 ("CJRA") mandated local rulemaking by all ***96** federal district courts. [64] It required each court to develop a "civil justice expense and delay reduction plan ... to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." [65] It required each court to consider authorizing judges to refer appropriate cases to ADR processes, specifically including mediation, among other measures to reduce litigation delay and cost. [66]

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

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

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

Another clerk said:

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

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

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

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

B. Federal District Court Websites and Local Rules

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

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

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

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

***98** The material on the ADR webpages varies greatly. Some webpages are quite short. The webpages of some courts merely refer to the applicable local rule or provide a list of mediators and applications to be included in the courts' roster of mediators. The District of South Dakota's rule is especially brief, merely stating, "Parties are encouraged to use alternative dispute resolution procedures to try to settle their cases without a trial. Magistrate judges are available as mediators to facilitate alternative

dispute resolution procedures." [78] Other websites are quite extensive, such as the U.S. District Court for the Central District of California's website (which has a forty-six-page general order about ADR) [79] and the Western Division of the U.S. District Court for the Northern District of Illinois's website (which includes an ADR Handbook). [80] Only twenty websites include material with clearly-understandable language.

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

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

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

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

> ***99** a) an estimate, where feasible, of the likelihood of liability and the dollar range of damages;
>
> b) an opinion of the verdict or judgment if he or she were the trier of fact;
>
> c) an assessment of key evidentiary and tactical issues; and
>
> d) a nonbinding, reasoned evaluation of the case on its merits, including addressing the strengths and weaknesses of the case. [85]

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

C. Provisions in Local Rules Relevant to Preparation

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

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

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

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

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

1. Providing Information to Parties

Four courts require that parties be given information about ADR either by the courts directly or by the parties' attorneys. Two courts assume the responsibility of informing parties about ADR. In the U.S. District Court for the District of Rhode Island, "Prior to the Rule 16(b) Conference, the Court will include with the Notice ***100** and Order mailed to the parties, a brief summary of essential ADR information." [87] In the U.S. District Court for the Southern District of Georgia,

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

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

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

> (d) [w]hen applicable, the mediator has been selected by the parties and the date of mediation or the other method of ADR selected is identified. [90]

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

Many websites include a webpage with information specifically for self-represented litigants (SRL). Unfortunately, many of these pages are identified as being for "pro se" litigants, which many SRLs would not recognize as applying to them. The webpages focus almost exclusively on litigation procedures. Some of these webpages include handbooks for SRLs that refer to mediation or ADR, though most of these references are brief and buried in a lot of unrelated text. A few courts ***101** provide helpful information about ADR for SRLs. For example, the U.S. District Court for the Western District of Tennessee's guide for SRLs includes a detailed section explaining ADR. [91] The U.S. District Court for the Eastern District of Wisconsin has a webpage devoted to mediation in its section for SRLs. [92]

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

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

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

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

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

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

Some courts have rules requiring attorneys to consult with their clients and/or counterpart attorneys about the choice of dispute resolution process rather than the conduct of mediation. In nineteen courts, parties--or, practically, their attorneys--are required to consult with each other about the use of ADR. For example, in the ***102** U.S. District Court for the District of Oregon, "Not later than 120 days from the initiation of a lawsuit, counsel for all parties (after conferring with their clients) must confer with all other attorneys of record and all unrepresented parties, to discuss whether the case would benefit from any private or court-sponsored ADR option." [98]

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

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

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

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

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

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

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

> (1) Read the handbook entitled "Alternative Dispute Resolution Procedures Handbook" on the Court's ADR website (found at cand.uscourts.gov/adr);
>
> ***103** (2) Discussed with each other the available dispute resolution options provided by the Court and private entities; and
>
> (3) Considered whether their case might benefit from any of the available dispute resolution options. [103]

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

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

3. Requiring Parties to Mediate

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

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

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

The rules generally do not specify how long parties must remain in mediation or when they are permitted to leave. The U.S. District Court for the Southern District of Illinois is an exception as its mandatory mediation is limited to two hours, though "the parties are encouraged to spend additional time unless the mediator agrees that additional time would not be productive." [107] The U.S. District Court for the Western District of Michigan's description of its "Voluntary Facilitative Mediation Program" states that "The parties are free to continue with the process as long ***104** as they feel it is productive." [108] By contrast, the rule in the U.S. District Court for the Northern District of Indiana apparently requires parties to participate in two mediation sessions before they may terminate mediation. [109]

4. Opting Out of Mediation

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

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

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

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

> Motions to opt out shall be granted only for "good cause" shown. Inconvenience, travel costs, attorney fees, or other costs shall not constitute "good cause." Each judge may identify criteria that he or she finds to establish good cause in a particular case. A party seeking relief from the Mandatory Mediation Program must set forth specific and articulable reasons why mandatory mediation has no reasonable chance of being ***105** productive and identify when the case may be in a better posture to explore settlement. [116]

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

5. Consulting with Mediators before Mediation Sessions

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

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

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

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

> ***106** (g) whether the parties are likely to want to continue beyond the three pro bono hours offered by the panel member and, if so, the terms and rates of the panel member ...;
>
> (h) and any other matters that might enhance the quality of the mediation. [118]

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

6. Providing Mediation Memos

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

> a. Unless otherwise directed by the mediator, at least seven (7) days before the first scheduled mediation session, each party shall deliver either to the mediator alone, or between the parties if the parties so consent, a brief mediation statement not exceeding ten double-spaced pages including:

i. the party's contentions as to both liability and damages;

ii. an assessment of strengths and weaknesses of each party's claims and/or defenses;

iii. the status of any settlement negotiations, including prior demands and offers;

iv. barriers to settlement, if any;

v. the parties' reasonable settlement range, including any non-monetary proposals for settlement of the action;

vi. any other facts or circumstances that may be material to the mediation or settlement possibilities; and

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

7. Preparing Parties to Mediate

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

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

8. Participating in "Good Faith"

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

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

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

Some federal court rules do define good faith in dispute resolution processes. For example, the U.S. District Court for the Northern District of Oklahoma provides ***108** the following definition of good faith in its rules governing settlement conferences. "The parties and counsel shall participate in the conference in good faith. This means that based on discussion at the conference, the parties will reconsider their negotiating positions, objectively evaluating the strengths and weaknesses of their case or defense, the anticipated cost of the litigation and the uncertainty of a particular result." [124] The U.S. District Court for the Western District of Pennsylvania provides a very detailed description of good faith in mediation:

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

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

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

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

A major problem with definitions like those in the Oklahoma and Pennsylvania rules [130] is that, when courts adjudicate claims of bad faith, they must conduct intrusive inquiries into the communication processes in mediation that violate the confidentiality of the process. For example, under the Pennsylvania provision, the court would need to determine if parties actually negotiated with a willingness to reach ***109** agreement, considered proposals made by the other side, acted in an arbitrary or capricious manner, or intended to undermine the mediation process. To make these factual findings, courts would need testimony by parties, attorneys, mediators, and perhaps other participants that delve deeply into mediation by receiving testimony about who said what and in response to what other statements.

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

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

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

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

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

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

The ABA Section of Dispute Resolution adopted a Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs which is consistent with Standard 11.2. The American Bar ***110** Association resolution states, "Sanctions should be imposed only for violations of rules specifying objectively determinable conduct." [135]

D. Recommendations for Federal District Court Websites and Local Rules

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

will--or should-- guarantee that all parties will settle their cases in mediation. But following these recommendations generally should enhance the quality of mediation processes and outcomes.

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

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

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

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

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

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

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

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

Original Label

NUTRITION FACTS
Serving Size 2/3 cup (55g)

Servings Per Container 8	
Amount Per Serving	
Calories 230	Calories from Fat 72
	% Daily Value [a1]
Total Fat 8g	**12**%
Saturated Fat 1g	**5**%
Trans Fat 0g	
Cholesterol 0mg	**0**%
Sodium 160mg	**7**%
Total Carbohydrate 37g	**12**%
Dietary Fiber 4g	**16**%
Sugars 12g	
Protein 3g	
Vitamin A	10%
Vitamin C	8%
Calcium	20%
Iron	45%

Footnotes

a1 Percent Daily Values are based on a 2,000 calorie diet. Your daily value may be higher or lower depending on your calorie needs.

	CALORIES:	**2,000**	**2,500**
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

New Label

NUTRITION FACTS	
8 servings per container	
Serving size	**2/3 cup (55g)**
Amount per serving	
Calories	**230**
	% Dally Value [a1]
Total Fat 8g	**10%**
Saturated Fat 1g	**5%**
Trans Fat 0g	
Cholesterol 0mg	**0%**
Sodium 160mg	**7%**
Total Carbohydrate 37g	**13%**
Dietary Fiber 4g	**14%**
Total Sugars 12g	
Includes 10g Added Sugars	**20%**
Protein 3g	
Vitamin D 2mcg	10%
Calcium 260mg	20%
lron 8mg	45%
Potassium 240mg	6%

Footnotes

a1 The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2000 calories a day is used for general nutrition advice.

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

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

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

Figures 3 through 5 summarize key provisions of the mediation programs in the U.S. District Courts for the District of Utah, [147] Northern District of California, [148] and Northern District of New York. [149] These programs illustrate what I called "voluntary," "middle course," and "liti-mediation" perspectives, respectively. [150] In the Utah program, parties are free to opt out of mediation. In the California program, the court consults with parties about which dispute resolution option to use. One option is a settlement conference with a magistrate judge. In the New York program, ***114** cases generally are referred automatically into the mandatory mediation program. To avoid having a case being ordered to mediation, a party must show why mediation has "no reasonable chance of being productive."

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

Court's ADR Program	The court's alternative dispute resolution (ADR) program includes mediation, arbitration, and judicial settlement conferences.
Description of Mediation Process	The mediator is a neutral third party who helps parties negotiate an agreement that is acceptable to both parties. The mediator sets an agenda and manages the mediation process.

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

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

Court's ADR Program	Most civil cases are automatically assigned to the alternative dispute resolution (ADR) Multi-Option Program under ADR Local Rules. Before the initial case management conference, parties and attorneys must discuss possible ADR processes

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

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

Court's ADR Program	The Court's Mandatory Mediation Program is designed to provide quicker, less expensive, and satisfying procedure than continuing in litigation. The Program is governed by General Order 47.
Description of Mediation Process	The Program provides a flexible, non-binding, confidential process to help parties in settlement discussions. The mediator helps parties find their own solutions based on their needs and interests. The mediator has no authority to impose a decision. § 3.1. The mediation process is described in more detail in § 3.7.
Selection of Cases for Mediation	Most civil cases are referred automatically into the Mandatory Mediation Program. The Court will permit parties to opt out of mediation only for "good cause." Inconvenience, travel costs, or attorney fees are not considered good cause. Parties who do not want to mediate must state reasons why mediation has no reasonable chance of being productive. §§ 2.1, 2.2.B.
Timing of Mediation	Cases are mediated as early as possible in a case. § 3.1.A. Generally, mediation is scheduled within 12 weeks after the Local Rule 16.1 conference. § 3.10.A. Mediation must be at least two hours. §§ 3.7.A, 3.10.A. Mediation does not affect the schedule of pretrial activities or trial. § 3.1.B.
Attendance and Participation of Parties	All parties and their attorneys must attend mediation session(s). Anyone required to attend mediation may request to be excused for good cause. Not being in the location where the mediation will be conducted is not considered good cause. § 3.6.A, E.
Confidentiality	Mediation generally is confidential and private. No participant may communicate confidential information from mediation without the consent of the person providing the information. § 3.8.A. Exceptions to confidentiality are listed in § 3.8.A.4.
Preparing for Mediation	Each party must submit a written "Mediation Memorandum" to the mediator at least seven days before the mediation session. § 3.4.A. The contents of the memorandum are listed in § 3.4.C. After receiving the memos, the mediator may request additional information. The mediator also may discuss the case confidentially with attorneys, parties, and/or representatives. § 3.5.
	The American Bar Association Section of Dispute Resolution developed this guide for preparing for mediation. Another guide is for complex civil cases.
Violation of Rules	If a party fails to attend mediation, pay for mediation services, substantially comply with the mediation Referral Order, or otherwise participate in good faith, the Court may impose sanctions, which may include paying other parties' fees. §§ 2.3, 3.6.G.
Mediation Fees	Mediators receive $150/hour for the first two hours of the first mediation session (and possibly for up to two hours in cases requiring substantial preparation). After the first two hours of a mediation session, mediators may receive no more than $325/hour. If parties cancel mediation less than 48 hours before a mediation session, they each will be responsible for one hour of mediation time. § 4.4.A. Mediator fees normally are divided equally between the parties. § 4.4.C.

For More Information	See the Court's ADR webpage and General Order 47.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. Courts Should Avoid or Limit Compulsion to Mediate

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

Ordering parties to mediate without their consent creates two significant problems. First, it increases the amount of time and money that parties must spend on litigation. Litigation generally requires substantial expense and time commitments, and courts should avoid increasing the tangible and intangible costs unless the ***122** benefits are likely to outweigh the costs. Second, increasing these costs effectively disadvantages parties that cannot bear these costs as much as their opponents.

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

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

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

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

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

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

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

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

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

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

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

IV. IMPLICATIONS FOR REAL PRACTICE SYSTEMS THEORY

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

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

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

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

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

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

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

V. CONCLUSION

Good preparation before mediation sessions generally should satisfy the interests of all stakeholders in court-connected mediation. Most importantly, preparation is key to empowering parties to advocate for themselves in making procedural and substantive decisions in mediation. When attorneys carefully prepare their clients for mediation sessions, they can collaborate more effectively. It is particularly helpful when parties and their attorneys consult early in a case about what process to use and agree with their counterparts about this. After preparing for a mediation session, everyone can get right down to business and efficiently figure out the best ***125** way to satisfy the parties' tangible and intangible interests. This should maximize the number of cases like Ava's, described at the outset of this article, and minimize the number of experiences like Kenji's. Of

course, some parties do not reach agreement in mediation. Being well prepared should help such parties realize more quickly that they do not want to settle--at least not at that time.

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

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

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

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

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

Courts have a special obligation--and opportunity--to enhance the process when parties represent themselves and/or have little time to prepare before mediation sessions. In such cases, courts should take the initiative to provide helpful materials to parties in time for them to consider their situation and be ready at the outset of a mediation session. When parties have retained attorneys, courts should adopt ***126** rules and provide resources to help attorneys prepare their clients and collaborate with their counterparts and mediators to plan the best possible mediation process in each case. Courts can help self-represented litigants by providing clear, easily-accessible materials and offering pro bono representation in appropriate cases.

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

Appendixes

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

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

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

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

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

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

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

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

COURT	MEDIATION / ADR PROGRAM DESCRIPTION	AUTHORITY TO ORDER MEDIATION	CONSULT WITH CLIENT AND/OR COUNTERPART	PRE-SESSION MEMO	CONSULT WITH MEDIATOR
M.D. Ala.	For Attorneys *and* Representing Yourself > Mediation in the Middle District.	No. Rule 16.1.	Mediation page.		
N.D. Ala.	Local Rules > 16.1(b).	Yes. Rule 16.1(b).			
S.D. Ala.	Local Rules and Standing Orders > Standing Order 23.	Yes. Order 23 ¶ IV.A.		Order 23 ¶ IV.A.7.a.	Order 23 ¶ IV.A.7.c.
D. Alaska	Programs and Resources > ADR.	Yes. Rule 16.2(c).			
D. Ariz.	Local Rules > Rule 83.10.	Yes. Rule 83.10(a).			
E.D. Ark.	General Orders > Order 50 provides for judicial settlement conferences.				
W.D. Ark.	General Orders > Order 32 provides for judicial settlement conferences.				
C.D. Cal.	Information for Attorneys > ADR.	Yes. Rules 16-15.1, 16-15.3. General Order 11-10 ¶ 5.1.	General Order 11-10 ¶¶ 5.2, 6.2.	General Order 11-10 ¶ 8.4.	General Order 11-10 ¶ 8.1.

E.D. Cal.	Local Rules > Rule 271.	No. Rule 271(c)(2).	Rule 271(d), (e)(2), (l)(2)(A).	Rule 271(j), (k).	Rule 271(j).
N.D. Cal.	Home > ADR Program & Rules.	Yes. Rule 6-2.	Rule 3-5(a).	Rules 6-7, 6-9.	Rules 6-4(b), 6-6.
S.D. Cal.	Local Rules > Rules 16.1 & 16.3 provide for early neutral evaluation and mandatory settlement conferences.				
D. Colo.	Local Rules > Rule 16.6.	Yes. Rule 16.6(a).			
D. Conn.	Local Rules > Rule 16(h).	No. Rule 16(h)(1).			
D. Del.	Local Rules > Rule 72.1(a)(1).	No. Rule 72.1(a)(1) provides for ADR by magistrate judge.			
D.D.C.	Attorney Information > Court Mediation Program.	Yes. Rule 84.4(a)(2).		Rule 84.6.	
M.D. Fla.	For Lawyers > Mediation and Settlement.	Yes. Rule 4.03.			
N.D. Fla.	Local Rules > Rule 16.3.	Yes. Rule 16.3.			
S.D. Fla.	Attorney Resources > Mediation.	Yes. Rule 16.2(d).		Rule 16.2(d)(1)(C).	
M.D. Ga.	Programs and Services > ADR.	No. Rule 16.2.			
N.D. Ga.	Local Rules > Rule 16.7.	No. Rule 16.7(D)(1).		Rule 16.7(H).	
S.D. Ga.	Local Rules > Rule 16.7.	No. Rule 16.7.5(b).		Rule 16.7.6(b).	
D. Guam	Local Rules > Civil Rule 16-2.	Yes. Rules 16-2(b)(2)(B), 16-2(c)(2).			
D. Haw.	Local Rules > Rule 88.1.	Yes. Rule 88.1(e)(2).			
D. Idaho	For Attorneys > ADR.	Yes. Rules 16.4(b)(1), 16.4(b)(3)(C), 16.4(c).	Rule 16.4(c)(1)(A).		
C.D. Ill.	Local Rules > Rule 16.4.	No. Rule 16.4(E)(2).		Rule 16.4(E)(5).	
N.D Ill. gen.	Local Rules > Rule 16.3 (voluntary mediation for trademark cases).	No. Rule 16.3(a).			

N.D Ill. W. Div.	Home > Alternative Dispute Resolution (Western Division).	Yes. Rules 2-3(a), 4-2.	Rule 3-1.	Rule 4-7.	Rule 4-6.
S.D. Ill.	Administrative Orders > Order 301 Mandatory Mediation Plan.	Yes. Admin. Order 301 ¶ 2.1.A.1.	Admin. Order 301 ¶ 3.1.C.1.	Admin. Order 301 ¶ 3.4.	Admin. Order 301 ¶ 3.5.
N.D. Ind.	Attorneys > Mediation / ADR.	Yes. Rule 16-6(b).		Indiana Rule for ADR 2.7.C.	
S.D. Ind.	Local Rules > Local Rules of ADR.	No. Rule 2.2.		Rule 2.6(c).	
N.D. Iowa	Programs and Services > ADR.	No. Rule 72B.a.			
S.D. Iowa	Local Rules > Rule 72B (jointly with N. Iowa).	No. Rule 72B.a.			
D. Kan.	For Attorneys > ADR.	Yes. Rule 16.3(c).			
E.D. Ky.	Local Rules > Rule 16.2.	Yes. Rule 16.2.			
W.D. Ky.	Local Rules > Rule 16.2.	Yes. Rule 16.2.			
E.D. La.	Local Rules > Rule 16.3.1.	No. Rule 16.3.1.			
M.D. La.	Local Rules > Rule 16.3(b).	No. Rule 16.3(b)(1).			
W.D. La.	Local Rules > Rule 16.3.1.	No. Rule 16.3.1.			
D. Me.	Local Rules > Rule 83.11.	No. Rule 83.11(c).	Rule 83.11(b).		
D. Md.	Local Rules > Rule 607.	No. Rule 607.			
D. Mass.	Local Rules > Rule 16.4.	No. Rule 16.4(c)(2)(A).			
E.D. Mich.	Local Rules > Rule 16.3, 16.4.	No. Rule 16.3.		Rule 16.4(e)(3).	
W.D. Mich.	Home > ADR. The court offers Voluntary Facilitative Mediation (VFM) and Prisoner Early Mediation (PEM).	No in VFM. Program Description ¶ V.B.		Yes in VFM. Program Description ¶ VI.E.	
		Unclear in PEM.		Yes in PEM. Admin. Order 18-RL-091 ¶¶ VI, VII.	
D. Minn.	Local Rules > Rule 16.5.	Yes. Rule 16.5(c)(1).			
N.D. Miss.	Local Rules > Rule 83.7.	Yes. Rule 83.7(e)(1).	Rule 83.7(f)(1).	Rule 83.7(f)(4).	

S.D. Miss.	Local Rules > Rule 83.7.	Yes. Rule 83.7(e)(1).	Rule 83.7(f)(1).	Rule 83.7(f)(4).	
E.D. Mo.	Home > ADR.	Yes. Rule 6.01.	Rule 6.02(A)(1).	Rule 6.02(C)(3).	Rule 6.04(B).
W.D. Mo.	District Court Local Rules > Mediation and Assessment Program.	Yes. General Order ¶ IV.A.		General Order ¶ V.G.	General Order ¶ V.H.
D. Mont.	Attorneys > ADR.	Yes. Rule 16.5(c)(1).			
D. Neb.	Public *and* Attorneys > Mediation.	Yes. Plan ¶ I.B.			
D. Nev.	Local Rules > Rule 16-5.	Yes. Rule 16-5.			
D.N.H.	Case Management > ADR.	Yes. Rule 53.1(c)(3).	Rule 53.1(c)(1).	Mediation Guidelines ¶ (3)(b).	
D.N.J.	Programs and Services > Mediation.	Yes. Rule 301.1(d).		Rule 301.1(e)(2).	App. Q ¶ II.A.
D.N.M.	Information > Local Rules and Orders.	Apparently, No. Rule 16.2 provides for mandatory settlement conferences.			
E.D.N.Y.	Programs and Services > ADR.	Yes. Rule 83.8(b)(1).		Rule 83.8(b)(5).	
N.D.N.Y.	Programs and Services > ADR.	Yes. General Order 47 ¶ 2.1.A.		General Order 47 ¶ 3.4.	General Order 47 ¶ 3.5.
S.D.N.Y.	Programs > Mediation / ADR > Rule 83.9 *and* Mediation Program Procedures.	Yes. Rule 83.9(e)(3), 83.10(8).		Mediation Program Procedure ¶ 9.	Mediation Program Procedure ¶ 7.b.
W.D.N.Y.	Attorney Information > ADR.	Yes. ADR Plan ¶ 2.1.	ADR Plan ¶ 4.2.	ADR Plan ¶ 5.7.	ADR Plan ¶ 5.8.
E.D.N.C.	Attorneys > Mediators.	Yes. Local ADR Rule 101.1a-- referring to mediation as "mediated settlement conferences."		Local ADR Rule 101.1d(c).	
M.D.N.C.	Local Rules > Rules 16.4, 83.9a-g.	Yes. Rules 16.4, 83.9b - referring to mediation as "mediated settlement conferences."		Rule 83.9e(c).	Rule 83.9e(e).
W.D.N.C.	Programs and Services > ADR and State Mediation Rules.	Yes. Rule 16.2(a)-- referring to mediation as "mediated settlement conferences."	State Mediation Rule 1(b).		State Mediation Rule 6(a)(2).
		State Mediation Rule 1(c)(1).			
D.N.D.	Local Rules > Rule 16.2.	No. Rule 16.2(B).	Rule 16.2(B).		

D.N. Mar. I.	Local Rules > Rule 16.4.	No. Rule 16.4.a.	Rule 16.4.	Rule 16.4.b.3.C.	
N.D. Ohio	Home > ADR.	Yes. Rule 16.6(a).		Rule 16.6(e).	
S.D. Ohio	Attorneys > ADR (Mediation).	Yes. Rule 16.3(a)(1). Supplemental Procedure ¶ 2.3.		Supplemental Procedure ¶ 5.5.	
E.D. Okla.	Programs and Services > ADR (under construction).	Yes. Rule 16.2(k).			
N.D. Okla.	Home > ADR.	Yes. Rule 16-2(k).			
W.D. Okla.	Local Rules > Rules 16.1, 16.3.	Yes. Rule 16.3(a).	Rule 16.1(a)(1).	Rule 16.3(d).	
D. Or.	Attorneys > ADR.	Yes. Rule 16-4(e)(3).	Rule 16-4(c).	Rule 16-4(f)(4).	Rule 16-4(f)(4).
E.D. Pa.	Programs and Services > Mediation.	Yes. Rule 53.3.4.	Rule 53.3.1.		
M.D. Pa.	Home > ADR.	Yes. Rules 16.7, 16.8.1.			
W.D. Pa.	For Attorneys > ADR > ADR Program Information.	Yes. Policies & Procedure ¶ 3.2.			Policies & Procedure ¶ 3.6.
D.P.R.	Local Rules > Rule 83J.	Yes. Rule 83J(b)(1).		Rule 83J(e)(2).	
D.R.I.	For Attorneys > ADR > ADR Plan.	No. ADR Plan ¶ III, X.		ADR Plan ¶ X.1(B).	
D.S.C.	Home > Mediation / ADR Guidelines.	Yes. Rule 16.01(B)(3).		Rule 16.08(B).	
D.S.D.	Local Rules > Rule 53.1.	No. Rule 53.1.			
E.D. Tenn.	Court Information > Mediation/Arbitration.	Yes. Rules 16.3(a), 16.4(a).			
M.D. Tenn.	Local Rules > Rules 16.02-16.05.	Yes. Rule 16.02(b)(1).			
W.D. Tenn.	Local Rules > ADR Plan.	Yes. ADR Plan ¶ 2.1.	ADR Plan ¶ 4.2(a).	ADR Plan ¶ 5.6.	ADR Plan ¶ 5.7.
E.D. Tex.	Attorneys > Court-Annexed Mediation Plan.	Yes. Mediation Plan ¶ VI.			
N.D. Tex.	Attorneys > ADR.	Yes. ADR Use by the Court.			
S.D. Tex.	General Information > ADR.	Yes. Rule 16.4.C.	Rule 16.4.B(1).		
W.D. Tex.	Local Rules > Rule CV-88.	Yes. Rule CV-88(a) -for some form of ADR.			
D. Utah	Court Information > ADR Program.	Yes. Rule 16-2(e). ADR Plan ¶ 6(j).	Rule 16-2(d).	ADR Plan ¶ 6(c).	

D. Vt.	Local Rules > Rule 16.1 (authorizes early neutral evaluation).	No provision for mediation.			
D.V.I.	Programs and Services > ADR.	Yes. Rule 3.2(b).			
E.D. Va.	Local Rules > 83.6.	Unclear. Rule 83.6(A).			
W.D. Va.	Programs and Services > ADR.	Yes. Rule 83(b).			
E.D. Wash.	Local Rules > Rule 16(a)(5).	No. Rule 16(a)(5)(C), but court may "refer" case to "mediation" by a judge.			
W.D. Wash.	Attorneys > ADR.	Yes. Rule 39.1(c)(1).		Rule 39.1(c)(5)(C).	
N.D. W. Va.	Attorney Info > Local Rules > Rule 16.06.	Yes. Rule 16.06(a).		Rule 16.06(d).	
S.D. W. Va.	Local Rules > Rule 16.6-16.6.8.	Yes. Rule 16.6(a).		Rule 16.6.5.	
E.D. Wis.	For Attorneys > Mediation.	No. Rule 16(d)(1).			
W.D. Wis.	For Attorneys > Mediation.	No. Rule 16.6.A.			
D. Wyo.	Programs and Services > ADR.	No. Rule 16.3(b) authorizes settlement conferences.			

*138 Appendix 2. Publications for Parties

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

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

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

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

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

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

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

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

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

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

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

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

Nina Khouri, Mediation Plan Worksheet. [202]

MWI, Mediation Preparation. [203]

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

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

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

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

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

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

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

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

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

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

U.S. District Court for the Western District of Tennessee, Introduction and Overview:

ADR Plan and Mediation Program. [217]

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

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

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

Appendix 3. Videos for Parties

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

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

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

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

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

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

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

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

Michigan Courts, ODR Video Resources. [235]

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

Appendix 4. Court Websites

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

Northern District of California [237]

District of the District of Columbia [238]

Western District of Missouri [239]

District of New Hampshire [240]

Eastern District of New York [241]

The following state court systems provide helpful information about mediation:

***143** Alaska [242]

Connecticut [243]

Florida [244]

Maine [245]

Maryland [246]

Michigan [247]

Nebraska [248]

New Hampshire [249]

New Mexico [250]

New York [251]

Ohio [252]

Tennessee [253]

Utah [254]

***144** Virginia [255]

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

Second Circuit [257]

Third Circuit [258]

Fourth Circuit [259]

Sixth Circuit [260]

Ninth Circuit [261]

Eleventh Circuit [262]

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

Appendix 5. Publications for Practitioners

There are many articles written for professionals about how to prepare effectively for mediation. A search of the Westlaw Law Reviews and Journals database yielded almost 2800 results. Of course, many of the articles mentioned preparation only in passing, but it still reflects a significant focus on this important topic. Many of the articles provide generic advice and some deal with specific types of cases such as divorce, employment, or construction. Many books about mediation ***145** and advocacy

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

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

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

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

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

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

Chuck Doran, Preparing Mediation Statements. [269]

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

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

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

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

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

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

Elayne E. Greenberg, Starting Here, Starting Now: Using the Lawyer as Impasse

Breaker During the Pre-Mediation Phase. [276]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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***150 Appendix 6. Technological Resources**

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

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

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Footnotes

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17 *See infra* Parts III.C.5, 3.C.6.

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19 *See infra* Parts III.C.2, 3.D.3.

20 *See infra* Parts III.C.3, 3.D.8.

21 *See infra* Parts III.C.4, 3.D.8.

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

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

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2024 JDR 82

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What is Access to Justice?

Alan S. Gutterman

Research on access to justice has moved through a series of thematic waves that began with focusing on equality of access to legal services and continued with addressing structural inequalities within the justice system, establishing informal justice processes to prevent disputes from occurring and escalating, focusing efficiency and competition to drive down the costs associated with the justice system and understanding and meeting the actual legal needs of communities. Access to justice has been described as "a cross-cutting right that must be understood and interpreted in line with other principles such as equal recognition before the law" and which "enables and enhances other rights such as the right to health as it guarantees judicial and administrative protection of that right". As noted by Lima and Gomez, "access to justice guarantees that people can go before the courts to demand their rights be protected, regardless of their economic, social, political, migratory, racial, or ethnic status or their religious affiliation, gender identify, or sexual orientation". Another definition of access to justice focuses on the ability of people to seek and obtain a remedy through formal or informal institutions of justice and in conformity with human rights standards. Requirements for effective access to justice include legal framework, legal protection, legal awareness and knowledge, legal aid and representation, access to justice institutions, fair procedure and adjudication, enforceable solutions and civil society and parliamentary oversight.

Sage-Jacobson described the evolution of research on access to justice as moving through a series of thematic waves that began with focusing on equality of access to legal

services, structural inequalities within the justice system, informal justice and preventing disputes from occurring and escalating and efficiency and competition to drive down the costs associated with the justice system. She observed that each of these waves were "based on universalist ideals" and "focused on levelling the playing field by recognizing the impact of social disadvantage on access to existing justice system institutions and removing the barriers to these services".[1] She also noted the emergence of a new "fifth wave" of research and reform activities relating to access to justice that shifted attention away from "normative notions of substantive justice within the community" to identifying and analyzing "what the community actually wants from the justice system and what they need in order to claim and protect their rights"—in other words, understanding not only who should have access but also which justice should be prioritized in order to fulfill the actual "legal needs" in the community.[2] Sage-Jacobson cautioned that "legal needs" was a complex issue that should not be limited only to considering what the community believes that it wants.

Byrnes et al. described access to justice, also sometimes referred to as the right to "access justice", as "a cross-cutting right that must be understood and interpreted in line with other principles such as equal recognition before the law" and which "enables and enhances other rights such as the right to health as it guarantees judicial and administrative protection of that right".[3] They also noted that access to justice often includes the concept of legal needs, but pointing out that while the concepts are related they are different because persons do not need legal services in and of themselves but may have a need for such services in order to achieve the ends those services can bring about (e.g., specific legal remedies, reconciliation with another party or achievement of a sense of fairness or closure relating to a dispute).[4]

The United Nations Development Programme ("UNDP") defined access to justice as "[t]he ability of people to seek and obtain a remedy through formal or informal

[1] S. Sage-Jacobson, "Access to Justice for Older People in Australia", Ageing and the Law, 33(2) (2015), 142, 143.

[2] Id. (citing R. MacDonald, "Access to Justice and Law Reform", 10 Windsor Yearbook of Access Justice, 10 (1990), 287).

[3] A. Byrnes, I. Doron, N. Georgantzi, W. Mitchell and B. Sleap, Access to Justice: A discussion paper for the 11th session of the United Nations General Assembly Open-ended Working Group of Ageing (January 2020), 2 (citing L. Pautassi, "Access to Justice in Health Matters: An Analysis Based on the Monitoring Mechanisms of the Inter-American System", Health and Human Rights, 20(1) (2018), 185). The OHCHR has used similar words in discussing the UN Convention on the Rights of Persons with Disabilities ("Access to justice under the Convention is a cross-cutting right that should be interpreted in line with all its principles and obligations") and went on to specifically cite rights to equality and non-discrimination (i.e., to ensure that persons with disabilities enjoy access to justice on an equal basis with others), equal recognition before the law and accessibility (i.e.., multiple means of communication and access to information). Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities, UN Doc. A/HRC/37/25 (2017), 5.

[4] Id. (citing L. Schetzer, J. Mullins and R. Buonamano, Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in (NSW Background Paper, August 2002), 5). A slide show presentation of the information presented in the article is available at https://rightsofolderpeople.org/wp-content/uploads/2019/08/Bill-Mitchell-GAROP-Webinar-on-Access-to-Justice-In-Older-Age.pdf.

institutions of justice, and in conformity with human rights standards" and noted that access to justice is "much more than improving an individual's access to courts, or guaranteeing legal representation … [and] ... must be defined in terms of ensuring that legal and judicial outcomes are just and equitable".[5] The UNDP is among the many who have called for viewing access to justice from a human rights-based perspective and describing it as "the ability of people from disadvantaged groups to prevent and overcome human poverty by seeking and obtaining a remedy, through formal and informal justice systems, for grievances in accordance with human rights principles and standards."[6] A human rights-based approach to access to justice incorporates the following elements: (a) focusing on the immediate, as well as underlying causes of the problem, which in the case of access to justice might include factors such as a lack of safeguards to access or insufficient mechanisms that uphold justice for all under any circumstances; (b) identifying the "claim holders" or beneficiaries including the most vulnerable (e.g., rural poor, women and children, people with diseases and disabilities, older persons and ethnic minorities); (c) identifying the "duty bearers", which include the institutions, groups and community leaders who should be held accountable for addressing the issues/problems; and (d) assessing and analyzing the capacity gaps of claim-holders to be able to claim their rights and of duty-bearers to be able to meet their obligations and then using the analysis to focus capacity development strategies.[7]

The UN Convention on the Rights of Persons with Disabilities and its Optional Protocol, which was adopted on December 13, 2006 and entered into force on May 3, 2008[8], includes Article 13 relating to Access to Justice:

> "1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
> 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."

The OHCHR noted that by including witnesses and, implicitly, jurors, judges and lawyers, access to justice became for the first time an entitlement belonging to persons other than the parties concerned in legal proceedings, and pointed out that by requiring

[5] Practice Note: Access to Justice (New York: UNDP Democratic Governance Group: Bureau for Development Policy, 2004), 6.
[6] Sharing Experience in Access to Justice Engaging with Non-State Justice Systems & Conducting Assessments (Bangkok: Asia-Pacific Regional Centre United Nations Development Programme, January 2012).
[7] Practice Note: Access to Justice (New York: UNDP Democratic Governance Group: Bureau for Development Policy, 2004), 5. According to the UNDP, the capacities needed in order to achieve access to justice include: legal protection, legal awareness, legal aid counsel, adjudication, enforcement and oversight. Programming for Justice: Access for All—A Practitioner's Guide to Human Rights–Based Approach to Access to Justice (United Nations Development Programme, 2005).
[8] A/RES/61/106

promotion of training the Convention affirmed that the justice system should be considered an integral part of governance that requires the contributions and participation of society to function effectively.[9] The OHCHR also observed that the Convention call for substantive equality, which includes both equality of opportunities and equality of outcomes, and that "[t]he right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law".[10]

Article 12 of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas adopted by the General Assembly on December 17, 2018 provides[11]:

> "1. Peasants and other people working in rural areas have the right to effective and non-discriminatory access to justice, including access to fair procedures for the resolution of disputes and to effective remedies for all infringements of their human rights. Such decisions shall give due consideration to their customs, traditions, rules and legal systems in conformity with relevant obligations under international human rights law.
> 2. States shall provide for non-discriminatory access, through impartial and competent judicial and administrative bodies, to timely, affordable and effective means of resolving disputes in the language of the persons concerned, and shall provide effective and prompt remedies, which may include a right of appeal, restitution, indemnity, compensation and reparation.
> 3. Peasants and other people working in rural areas have the right to legal assistance. States shall consider additional measures, including legal aid, to support peasants and other people working in rural areas who would otherwise not have access to administrative and judicial services.
> 4. States shall consider measures to strengthen relevant national institutions for the promotion and protection of all human rights, including the rights described in the present Declaration.
> 5. States shall provide peasants and other people working in rural areas with effective mechanisms for the prevention of and redress for any action that has the aim or effect of violating their human rights, arbitrarily dispossessing them of their land and natural resources or of depriving them of their means of subsistence and integrity, and for any form of forced sedentarization or population displacement."

Elements of access to justice can also be identified and measured through the substantial research that has been conducted on "indicators" of access to justice. For example, a 2003 paper on access to justice indicators in the Asia Pacific region focused on three indicators: existence of a remedy, capacity to seek remedies and capacity to provide

[9] Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities, UN Doc. A/HRC/37/25 (2017), 5.
[10] Id. at 6.
[11] A/RES/73/165. Notably, the Declaration specifically mentions of older persons in Articles 2(2) and 3(1).

effective remedies.[12] A few years earlier, Parker suggested a list of indicators that included accessibility of court processes for resolving disputes over mutual rights and responsibilities; availability of adequate legal representation in criminal trials; access to more informal legal processes such as small claims courts and administrative tribunals; availability of legal advice; and public legal education.[13] In 2016, the OECD conducted workshops and published materials on how measurement of access to justice can be more reliable and suggested that three components of measuring effective access to justice were the nature and extent of unmet legal and justice needs and methodologies to understand people's access to justice; the impact of unmet legal and justice needs on individuals, the community and the state; and the effective of specific models of legal assistance in meeting these identified needs.[14] The indicators selected and discussed by the OECD represent a shift in the lens used to assess access to justice to a "citizen-based" focus, as explained in an OECD background paper[15]:

> "A citizen-oriented access to justice framework requires a conceptualisation of legal and justice needs of people. Meeting legal and justice needs is a distinct policy objective from the general modernisation goal of increased efficiency within the broader justice sector as a main mechanism for fostering access to justice. It shifts attention away from identifying the "right" institutions in the justice system and an emphasis on courts and formal dispute resolution towards a citizen-based focus on everyday legal and justice problems, their connection with other problems, common paths for advice and to resolution and to outcomes measured from the individual's perspective."

In 2019, the World Justice Project provided the following explanation of a "people-centered assessment" of unmet justice needs around the world[16]:

> "Because there are a multitude of ways to conceptualize and measure justice, the justice gap assessment follows a practical approach and categorizes people around three broad types of unmet needs that arise when people cannot defend or enforce their rights, or obtain a just resolution of their justiciable problems: 1) people who cannot obtain justice for everyday civil, administrative, or criminal justice problems; 2) people who are excluded from the opportunities the law provides; and 3) people who live in extreme conditions of injustice. Having established these key categories, the justice gap can be understood as the number of people

[12] Background Paper on Access to Justice Indicators in the Asia Pacific Region, La Salle Institute of Governance (October 2003), 1.
[13] C. Parker, Just lawyers: Regulation and access to justice (Oxford: Oxford University Press, 1999).
[14] Understanding Effective Access to Justice, OECD Workshop Background Paper (November 2016).
[15] Id. at 3.
[16] Measuring the Justice Gap, A People-centered Assessment of Unmet Justice Needs around the World (Washington DC: World Justice Project, 2019), 4. See also the 2019 recommendations of the Taskforce on Justice relating to improvement of access to justice which called for a "people-centered approach" and included "access to people-centered justice services" that are "responsive to their needs". Task Force on Justice, Justice for All – Final Report (New York: Center on International Cooperation, 2019), 16 and 21-22.

> who have at least one unmet justice need. These are people who are ultimately not getting the justice they need for both everyday problems and severe injustices."

Development of indicators specifically relating to access to justice for older persons is still at an early stage. Two commonly used international indices relating to the wellbeing of older persons are the Global AgeWatch Index and the Active Aging Index; however, Spanier and Doron have called for adoption of an International Older Persons' Human Right Index ("IOPHRI") that uses access to justice as a critical measure of the status of the rules concerning the human rights of older persons.[17] The IOPHRI is based on a multi-dimensional model of elder law that was first presented by Doron for use in Israel and then expanded for use in an international context.[18] Among the laws, legal systems and core principles and values embedded among the dimensions are prohibition of all forms of discrimination and guarantees of equal treatment under the law for all persons; laws and legal systems that provide special protection for older adults taking into account the goals of providing security and responding to the special needs of older persons; laws and other means for providing older persons with the legal tools they need in order to plan for their futures and exercise control over their lives; and laws and legal structures designed to help older persons realize their rights and implement them including laws and practices that directly assist older persons to receive legal assistance or representation in order for them to access the rights that are afforded to them under other types of laws (i.e., "access to justice").[19]

Requirements for Effective Access to Justice

As discussed above, the UNDP has advocated for a human rights-based approach to access to justice and has argued that effective access to justice should be based on the identification of the grievances that call for remedies and redress, explaining that a grievance should be "defined as a gross injury or loss that constitutes a violation of a country's civil or criminal law, or international human rights standards.[20] The UNDP noted that the actions needed include recognition, awareness, claiming, adjudicating and enforcing and that the capacities needed in order to support and accomplish each of these actions effectively include the following[21]:

Legal Protection: The justice system must provide and guarantee legal standing for disadvantaged persons and groups in order to ensure that their rights to remedies through either formal or traditional mechanisms are recognized. Legal protection determines the

[17] B. Spanier and I. Doron, "From Well-Being to Rights: Creating an International Older Persons' Human Rights Index (IOPHRI)", The Elder Law Journal, 24(2) (2016), 101.
[18] See I. Doron, "A Multi-Dimensional Model of Elder Law: An Israeli Example", 28 Ageing International, 242 (2003), 245 and I. Doron, "A Multi-Dimensional Model of Elder Law" in I. Doron (Editor), Theories on Law and Ageing: The Jurisprudence of Elder Law (Berlin: Springer, 2009), 59.
[19] Id.
[20] Practice Note: Access to Justice (New York: UNDP Democratic Governance Group: Bureau for Development Policy, 2004), 6.
[21] Id. at 7. The publication includes guidance/pointers on programming and policy advice in each of the recommended capacities required to support access to justice.

legal basis for all other support areas on access to justice and can be established and enhanced through ratification of treaties and their implementation in the domestic law; implementation of constitutional law; national legislation; implementation of rules and regulations and administrative orders; and traditional and customary law. The formal justice system should serve the needs of all persons, not just settlement of disputes between the powerful and the rich.

Legal Awareness: Disadvantaged people must have ready access to information that will help them understand their right to seek redress through the justice system; the various officials and institutions entrusted to protect their access to justice; and the steps involved in starting legal procedures. Public legal education and awareness programs should be established and supported by adequate resources. Lima and Gomez noted: "Information needs vary significantly depending on local context. For instance, labor rights tend to be more important in urban areas, whereas land rights are the main concern in rural areas. Linking judges, prosecutors, and police with community groups can enhance community legal awareness, increase public trust in the state, and improve the capacity of the legal apparatus to respond to the needs of the poor."[22]

Legal Aid and Counsel: Disadvantaged persons and groups must have access to the technical expertise and representation tools and service that would allow them to initiate and pursue justice procedures including legal aid and counsel from professional lawyers (i.e., public defender services and pro bono representation), laypersons with legal knowledge (i.e., paralegals), or both (i.e., "alternative lawyering" and "developmental legal aid"). Legal aid should be available, affordable and adequate and provided through a good balance of support from both governmental sources and civil society. Legal aid should be available in all parts of the country, particularly rural areas, and should be tailored to the specific legal problems that disadvantaged persons commonly face such as forced evictions and forced labor under unsafe and inequitable conditions.[23]

Adjudication: Disadvantaged people must enjoy the benefits of capacities to determine the most adequate type of redress or compensation, which can be regulated by formal law, as in the case of courts and other quasi-judicial and administrative bodies, or by traditional legal systems. Adjudication should be provided through an independent judiciary in a system that includes meaningful accountability mechanisms for lawyers, prosecutors and police officials who are properly trained in the principals and norms of human rights. Alternative dispute resolution and justice through traditional legal systems should be available and adequately supported.

Enforcement: A justice system is not effective unless it produces outcomes that can be readily enforced without delay or unnecessary additional expense and legal action. Prosecutors and police officials must be willing to recognize and enforce laws that afford

[22] V. Lima and M. Gomez, "Access to Justice: Promoting the Legal System as a Human Right" in W. Leal Filho et al. (Editors), Peace, Justice and Strong Institutions: Encyclopedia of the UN Sustainable Development Goals (Springer Publishing), 9.
[23] Id.

legal protections to disadvantaged persons and disadvantaged persons themselves must be able to enforce orders, decisions and settlements emerging from formal or traditional adjudication and institute reasonable appeal procedures against arbitrary actions or rulings.

Civil Society and Parliamentary Oversight: Accountability of and within the justice system must be overseen using civil society's watchdog, monitoring and advocacy capacities, the investigatory and reporting tools of the media, independent, non-partisan parliamentary select and permanent committees and national human rights institutions. The public must be guaranteed access to and participation in programs leading to improvements and reforms in the justice system (e.g., mechanisms for making complaints about participants in the justice system that are promptly vetted and reported in a fair and unbiased manner).

Similar perquisites to effective access to justice have been suggested by the ABA's Rule of Law Initiative ("ROLI"), which is dedicated to promoting justice, economic opportunity and human dignity through the rule of law. ROLI has declared: "Access to justice requires that citizens are able to use justice institutions to obtain solutions to common justice problems. Unless citizens have access to justice, the rights and duties enshrined in international treaties, constitutions, and laws are meaningless, and fail to provide any protection to vulnerable groups."[24] To assist civil society organizations in analyzing access to justice, ROLI developed an Access to Justice Assessment Tool based on the following elements that it considers to be essential to access to justice[25]:

- ***Legal framework***, which is assessed by measuring the extent to which there is a legal framework that establishes citizens' rights and duties and provides citizens with mechanisms to solve their common justice problems looking at factors such as the clarity of rules and standards regarding implementation of constitutional provisions and the level of discrimination in the legal framework
- ***Legal knowledge***, which is assessed by measuring the extent to which citizens are aware of their rights and duties and the mechanisms available to them to solve their common justice problems looking at factors such as education, availability information from government and non-state institutions, trust of relevant institutions and the existence of social networks in the community
- ***Advice and representation***, which is assessed by measuring the extent to which citizens can access the legal advice and representation that they need in order to solve their common justice problems looking at factors such as accessibility of legal advice and representation in remote areas and cost and citizen trust of lawyers
- ***Access to justice institutions***, which is assessed by measuring the existence of justice systems, whether formal or information, that are affordable and accessible and which process cases in a timely manner looking at factors such as direct and opportunity costs, "up-front" costs, number and distribution of justice institutions, transport

[24] Access to Justice Assessment Tool: A Guide to Analyzing Access to Justice for Civil Society Organizations (American Bar Association Rule of Law Initiative, 2012), vii.
[25] Id. at 4-42.

infrastructure, insecurity, restrictions on travel, threatening nature of justice institutions, caseloads and case management procedures

- ***Fair procedure***, which is assessed by measuring the extent to which justice institutions, whether formal or informal, ensure that citizens have an opportunity to effectively present their case, disputes are resolved impartially and without improper influence and, where disputes are resolved by mediation, the ability of citizens to make voluntary and informed decisions regarding settlement looking at factors such as procedures during hearings, language difficulties, powers to ensure witness attendance, institutional guarantees (e.g., independence), oversight mechanisms, delivery of reasoned decisions, power imbalances and the role of mediators
- ***Enforceable solutions***, which is assessed by measuring the extent to which justice institutions are able to enforce their decisions looking at factors such as the nature of sanctions for non-compliance and enforcement through coercive force

ROLI explained that an access to justice assessment analyzes whether citizens are able to use justice institutions to solve their common justice problems, what factors affect whether they can do so and what reforms and programs could make justice institutions more responsive to citizens' needs.[26] While the assessment should cover general conditions, special emphasis should be paid to protection of vulnerable groups, such as women and indigenous peoples. ROLI's assessment guidance includes questions and suggestions regarding the general areas of inquiry for each of the elements, such as the following for "legal knowledge"[27]:

- How would you rate citizens' level of familiarity (i.e., good, average, not good, do not know) with:
  - How to access legal information?
  - Functions of the formal justice system?
  - Functions of the informal justice system?
  - Functions of lawyers?
  - Functions of paralegals?
  - Functions of the court?
  - Functions of the prosecutor?
- What are the amount and quality of legal information available to citizens?
- What is the extent to which legal information is produced in local languages?
- What activities do state and non-state actors undertake to enhance legal knowledge among citizens?
- How would you rate the level of information dissemination by the state (i.e., good, average, not good, do not know)?
- What media are used to communicate legal awareness messages?
- What are the main obstacles to raising legal awareness of citizens?

[26] Id. at 1.
[27] Id. at 15.

The efficacy of each of the elements depends on how well other basic human and civil rights of citizens are being respected and protected. For example, the legal framework should explicitly include protections against racial injustice and other forms of discrimination and access to justice system should be expansively interpreted to include reasonable means for citizens to participate in decisions regarding justice institutions such as the right to vote on officials charged with administration of those institutions (e.g., district attorneys, public defenders and judges).

In their comprehensive review of the issues surrounding access to justice for persons living in poverty Carmona and Donald argued that steps would need to be taken across several fronts. First of all, interventions would be required in the structure and functioning of legal and judicial systems, including reforms of the normative framework, improvement of the capacity of courts and other institutions to provide justice-based remedies without discrimination and implementing rules and procedures to ensure that the process and the resulting final outcomes are fair. In addition, however, changes the systems must be accompanied by steps to empower those seeking justice, people living in poverty in the context of their arguments, to effectively use the tools that are being made available. Empowerment includes strengthening legal awareness among poor people and providing them with access to affordable legal assistance and also requires increasing their overall social and political power so that they can have a voice to ensure that the justice works in ways that meet their specific needs.[28]

Access to Justice in International Human Rights Law

[28] M. Carmona and K. Donald, Access to Justice for Persons Living in Poverty: A Human Rights Approach (Ministry for Foreign Affairs of Finland, 2014), 12.

Lima and Gomez explained the important role that access to justice plays in protecting the spectrum of human rights guaranteed to individuals as follows[29]:

> "In general, access to justice guarantees that people can go before the courts to demand their rights be protected, regardless of their economic, social, political, migratory, racial, or ethnic status or their religious affiliation, gender identity, or sexual orientation. Access, to be real, must be broad and free from discrimination. Proper access to justice allows individuals to protect themselves from violations of their rights, offering a remedy to the consequences of tort and holding executive power accountable. … [Access to justice] is much more than improving an individual's access to courts or guaranteeing legal representation, but it can be defined in terms of ensuring that legal and judicial outcomes are just and equitable."

They went on to argue that access to justice "is both a right and the means of restoring the exercise of rights that have been disregarded or violated", thus making it "an indispensable component of specific rights, such as the right to liberty and to personal safety".[30] Similarly, the International Covenant on Economic, Social and Cultural Rights (adopted on December 16, 1966 and entered into force on January 3, 1976) ("ICESCR"),[31] which covers a broad range of civil and political rights (including fair treatment of people by the judicial system), contains dual freedoms: freedom *from* the State and freedom *through* the State. This means, for example, that individuals not only have the right to be free from forced evictions carried out by State agents, but they also have the right to expect assistance from the State in certain situations in order for them to be able to access adequate housing including the availability of effective judicial remedies or administrative remedies that are "accessible, affordable, timely and effective" and access to "appropriate means of redress, or remedies and appropriate means of ensuring governmental accountability".[32]

According to the Office of the UN High Commissioner for Human Rights ("OHCHR"), the right of access to justice has developed over time in international and regional human rights instruments, although it was not explicitly formulated until the adoption of the UN Convention on the Rights of Persons with Disabilities.[33] Initially, the Universal

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[29] V. Lima and M. Gomez, "Access to Justice: Promoting the Legal System as a Human Right" in W. Leal Filho et al. (Editors), Peace, Justice and Strong Institutions: Encyclopedia of the UN Sustainable Development Goals (Springer Publishing), 1 (citing Practice Note: Access to Justice (New York: UNDP Democratic Governance Group: Bureau for Development Policy, 2004)).

[30] Id. at 3.

[31] https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx For further information on the ICESCR, see OHCHR, Fact Sheet No 16: The Committee on Economic, Social and Cultural Rights (Rev 1) and UN Committee for Economic, Social and Cultural Rights homepage.

[32] OHCHR, Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Cultural Rights and General Comment No 9 (1998) on the domestic application of the Covenant, paragraph 9.

[33] Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities, UN Doc. A/HRC/37/25 (2017), 4. See also Substantive inputs on the focus area "Access to justice"

Declaration of Human Rights ("UDHR") recognized a broad range of civil and political rights relevant to access to justice including:

- Article 6: Right to recognition as a person before the law.
- Article 7: Right to equality before the law and equal protection against any discrimination.
- Article 8: Right to remedy by competent tribunal for acts violating the fundamental freedoms granted by constitution or law.
- Article 10: Right to a fair public hearing by an independent and impartial tribunal.
- Article 11: Right to be considered innocent until proven guilty.

The UDHR has been linked to two important UN human rights treaties, the International Covenant on Civil and Political Rights (adopted on December 16, 1966 and entered into force on March 23, 1976) ("ICCPR")[34] and the ICESCR, to form the so-called "International Bill of Human Rights." The ICCPR includes and expands upon almost all of the civil and political rights laid out in the UDHR including:

- Article 2(1), which calls on states to respect and ensure that all individuals within their territories can enjoy the rights contained in the ICCPR without discriminatory distinctions on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status
- Article 2(3), which requires that states ensure that any person whose rights or freedoms established by the ICCPR are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity
- Articles 14 to 16, which cover a variety of topics relating to the fair treatment of people by the judicial system including the right of everyone to recognition everywhere as a person before the law (e.g., all persons shall be equal before the courts and tribunals and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law and everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law)
- Article 26, which affirms that all persons are equal before the law and are entitled without discrimination to the equal protection of the law

In its commentaries on the ICCPR, the Human Rights Committee has affirmed that the right to equality before courts and tribunals included in the ICCPR apply whenever domestic law entrusts a judicial body with a judicial task and that States must ensure that individuals have "accessible and effective remedies" to vindicate those rights and that such remedies should be appropriately adapted so as to take account of the special

(Working document submitted by the Office of the High Commissioner for Human Rights to the Open-ended Working Group on Aging, 2021), A/AC.278/2021/CRP.4, Paragraphs 4-8.

[34] https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx. For further information on the ICCPR, see OHCHR Fact Sheet No 15: Civil and Political Rights: The Human Rights Committee.

vulnerability of certain categories of person, including in particular children.[35] In addition, States are expected to implement such administrative mechanisms as may be required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.[36]

The ICESCR is also based on principles originally outlined in the UDHR, providing additional details in many instances, and affirms the right of all peoples to self-determination and their freedom to pursue and enjoy their economic, social, and cultural rights without discrimination of any kind. States are responsible for taking the steps necessary to the maximum of their available resources to achieve progressive, and ultimately full, realization of the rights enumerated in the ICESCR, including particularly the adoption of legislative measures. Generally, the ICESCR covers workers' rights; the right to social security and protection; the right to social security and social protection; protection of and assistance to the family; the right to an adequate standard of living including the rights to food and to be free from hunger, to adequate housing, to water and to clothing; the right to health; the right to education and cultural rights.[37] It is important to note that each of the listed rights listed contain dual freedoms: freedom *from* the State and freedom *through* the State. This means, for example, that individuals not only have the right to be free from forced evictions carried out by State agents, but they also have the right to expect assistance from the State in certain situations in order for them to be able to access adequate housing including the availability of effective judicial remedies or administrative remedies that are "accessible, affordable, timely and effective".[38]

Article 13 of the Convention on the Rights of Persons with Disabilities, which provides that "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others"[39], was recognized by the OHCHR as the first explicit formulation of access to justice in an international human rights instrument and upheld equal and effective participation at all stages of and in every role within the justice system as a core element of the right to access to justice, a formulation that went beyond "the notions of a fair trial and effective remedies which have been the principal features put forward by human rights instruments and their monitoring bodies".[40]

[35] See General Comment 32 (2007) on the right to equality before courts and tribunals and to a fair trial, paragraph 7 and General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, paragraph 15.
[36] Id.
[37] OHCHR, Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Cultural Rights.
[38] Id. and General Comment No 9 (1998) on the domestic application of the Covenant, paragraph 9 (noting that "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone can enjoy his economic, social and cultural rights, as well as his civil and political rights", which includes "appropriate means of redress, or remedies and appropriate means of ensuring governmental accountability").
[39] A/RES/61/106
[40] Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities, UN Doc. A/HRC/37/25 (2017), 3.

Elements of effective access to justice were frequently mentioned in the UN General Assembly's comprehensive 2012 Declaration of the High-Level Meeting on the Rule of Law.[41] Paragraph 12 of the Declaration included an affirmation of the importance of "effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice, commercial dispute settlement and legal aid". Paragraphs 13 and 14 of the Declaration called for an independent and impartial judicial system and a commitment to equal access to justice for all, including members of vulnerable groups, and providing fair, transparent, effective, non-discriminatory and accountable services that promoted access to justice for all, including legal aid. Other topics covered in the Declaration included support for informal justice mechanisms operated in accordance with international human rights law and ensuring that women fully enjoyed the benefits of the rule of law and were allowed to fully and equally participate in institutions of governance and the judicial system and have access to legal and legislative frameworks that prevented and addressed all forms of discrimination and violence against women.

In addition to the UN Convention on the Rights of Persons with Disabilities and the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas mentioned above, the UN Declaration on the Rights of Indigenous Peoples provides that indigenous peoples "have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights" with the additional requirement that such decisions "give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights".[42]

Notably with respect to protections for members of a vulnerable group defined by age, the UN Convention on the Rights of the Child protects children from being deprived of their liberty unlawfully or arbitrarily and affords them with right to prompt access to legal and other appropriate assistance, as well as the right to "challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action".[43] Children are also guaranteed certain procedural protections in criminal matters[44] and the UN Committee on the Rights of the Child has noted the need for States to implement effective, child-sensitive procedures for children and their representatives as they pursue remedies for breaches of their rights.[45]

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[41] Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/67/L.1 (2012).

[42] UN Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295 (2007), Article 40.

[43] UN Convention on the Rights of the Child, Article 37.

[44] Id. at Article 40 (i.e., presumption of innocence, right to be informed promptly and directly of charges, right to have legal or other appropriate assistance in the preparation and presentation of defenses and right to a fair hearing without delay according to law by a competent, independent and impartial authority or judicial body).

[45] See General Comment No. 5 (2003) on general measures of implementation of the Convention, paragraph 24 (e.g., provision of child-friendly information, advice, advocacy, including support for self-

The UN's International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted in 1965 and went into force in 1969, provides for the rights to equality before the law and equal treatment before tribunals and all other organs administering justice with distinction as to race, color, or national or ethnic origin (Article 5(a)) and recognizes that States must assure that everyone has effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate the human rights and fundamental freedoms set forth in the Convention (Article 6).[46] The UN's Convention on the Elimination of All Forms of Discrimination against Women, which was adopted in 1979 and went into force in 1981, focuses its broadest attention on the legal status of women including Article 15 asserting the equality of women with men before the law and the right of women, in civil matters, to a legal capacity identical to that of mean and the same opportunities to exercise that capacity.[47] Years later, the General Assembly noted: "We recognize the importance of ensuring that women, on the basis of the equality of men and women, fully enjoy the benefits of the rule of law, and commit to using law to uphold their equal rights and ensure their full and equal participation, including in institutions of governance and the judicial system, and recommit to establishing appropriate legal and legislative frameworks to prevent and address all forms of discrimination and violence against women and to secure their empowerment and full access to justice."[48] The UN Committee on the Elimination of Discrimination against Women has noted the obligations of States to ensure that women and girls have access to justice that encompasses justiciability, availability, accessibility, good-quality and accountability of justice systems and provision of remedies for victims.[49]

In addition to the treaties and declarations mentioned above, there have been a range of instruments and statements that focus on specific themes or issues related to the justice system and the rights of persons who may get caught up therein. Examples include various instruments on the treatment of prisoners and detained persons, protection of persons from enforced disappearance, cruel or inhuman treatment or punishment, access to justice for the purpose of enforcing rights to housing, access to justice for migrant workers, access to justice by people living in poverty and access to justice in order to promote and protect the rights of indigenous peoples.[50]

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advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance).

[46] International Convention on the Elimination of All Forms of Racial Discrimination.

[47] Convention on the Elimination of All Forms of Discrimination against Women.

[48] Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, UN Doc. A/RES/67/1 (2012), Paragraph 16.

[49] See general recommendation No. 33 (2015) on women's access to justice, paragraphs 1 and 2. See also the OECD Riga Statement noting that failure to provide access justice for women can have intergenerational effects on children or older people as women often take responsibility for their care. OECD Riga Statement "Investing in Access to Justice for all!", High-Level Panel: OECD Roundtable on Equal Access to Justice Riga, Latvia (July 2018), paragraph 4.

[50] A. Byrnes, I. Doron, N. Georgantzi, W. Mitchell and B. Sleap, Access to Justice: A discussion paper for the 11th session of the United Nations General Assembly Open-ended Working Group of Ageing (January 2020), 10-11 (including citations to specific instruments).

Other instruments addressing various aspects of access to justice include the Basic Principles on the Independent of the Judiciary (requiring that the independence of the judiciary be guaranteed by national law and prohibiting the inappropriate and unwarranted interference with the judicial process and protecting due process through established legal procedures that are fair and respect the rights of the parties); the Basic Principles on the Role of Lawyers (requiring governments to ensure that efficient procedures and responsive mechanisms for equal access to lawyers are provided, including the provision of sufficient funding and other resources for legal services to the poor and other disadvantaged persons); the Guidelines on the Role of Prosecutors (identifying the responsibility of prosecutors in protecting human dignity and upholding human rights and ensuring due process); the Code of Conduct for Law Enforcement Officials (requiring officers of the law to uphold the human rights of all persons and to provide particular assistance to those who, by reason of personal, economic, social or other emergencies, are in need of immediate aid); and the Basic Principles for the Treatment of Prisoners (prohibiting discrimination, insisting upon respect for human rights as contained in international instruments and supporting reintegration of ex-prisoners into society under the best possible conditions and with due regard to the interests of victims).[51]

In addition, while much of the attention regarding international human rights law focuses on the activities of the UN and the various human rights-related instruments promulgated as a result of UN activities, notably the UDHR, notice must be taken of other influential regional intergovernmental organizations that have been active in the establishment of mechanisms to promote and protect human rights including non-binding declarations or binding treaties. For example, the Council of the European High Commissioner for Human Rights, the European Committee of Social Rights and the European Court of Human Rights all seek to enforce the European Convention on Human Rights, which includes standards relating to the right to a fair trial (Article 6), right to an effective remedy (Article 13), admissibility criteria (Article 35) and binding force and execution of judgments (Article 46).[52] Chapter VI of the Charter of Fundamental Rights of the European Union recognizes the right to an effective remedy and to a fair trial (Article 47), presumption of innocence and right of defense (Article 48), principles of legality and proportionality of criminal offenses and penalties (Article 49) and the right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50).[53] In 2014, the Council of Europe's recommendations to Member States on the promotion

[51] Practice Note: Access to Justice (New York: UNDP Democratic Governance Group: Bureau for Development Policy, 2004), 5.
[52] European Convention on Human Rights.
[53] Charter of Fundamental Rights of the European Union (2000/C 364/01). See also Substantive inputs on the focus area "Access to justice" (Working document submitted by the Office of the High Commissioner for Human Rights to the Open-ended Working Group on Aging, 2021), A/AC.278/2021/CRP.4, Paragraph 8 (noting that the Charter "stipulates that everyone is equal before the law (article 20) and includes the prohibition of age discrimination (article 21)" and that "[p]ersons who have been subject to discrimination, including age-based discrimination, should have adequate means of legal protection as per article 47 of the Charter").

of the human rights of older persons addressed various aspects of administration of justice as follows[54]:

> **"VII. Administration of justice**
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> 51. In the determination of their civil rights and obligations or of any criminal charge against them, older persons are entitled to a fair trial within a reasonable time within the meaning of Article 6 of the European Convention on Human Rights. Member States should take appropriate measures to accommodate the course of the judicial proceedings to the needs of older persons, for example by providing, where appropriate, free legal assistance and legal aid.
> 52. The competent judicial authorities should display particular diligence in handling cases in which older persons are involved. In particular, they should duly take into account their age and health.
> 53. Member States shall ensure that detention of older persons does not amount to inhuman or degrading treatment. The assessment of the minimum level of severity for a treatment to be considered inhuman or degrading depends on several factors, including the age and health of the person. Consideration should be given to alternatives to detention of older persons.
> 54. Member States shall safeguard the well-being and dignity of older persons in detention. In particular, they should ensure that the health of older persons is monitored at regular intervals and that they receive appropriate medical and mental health care. Moreover, member States should provide older persons in detention with conditions appropriate to their age, including appropriate access to sanitary, sports, education and training and leisure facilities. Member States should ensure social reintegration of older persons after release."

The world's first international human rights instrument of a general nature, the American Declaration of the Rights and Duties of Man, also known as the Bogota Declaration, was adopted by the Member States of the Organization of American States ("OAS") on May 2, 1948, seven months before the UDHR and includes rights to a fair trial and due process of law (Articles XVIII and XXVI).[55] The foundation of the human rights system in Africa is the African (Banjul) Charter on Human and Peoples' Rights, which came into effect on October 21, 1986 and provides that every individual shall be equal before the law and entitled to equal protection of the law (Article 3) and have the right to have his cause heard (Article 7).[56] Development of a regional human rights system among the ten Member States of the Association of Southeast Asian Nations ("ASEAN") has been

[54] Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons

[55] http://www.oas.org/en/iachr/mandate/Basics/declaration.asp

[56] African (Banjul) Charter on Human and Peoples' Rights. Article 7 provides that the right of an individual to have his cause heard comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

slower than in other parts of the world; however, the Member States unanimously adopted the ASEAN Human Rights Declaration in November 2012 which, although not a binding treaty, was intended to establish the commitment of the ASEAN Member States to certain fundamental human rights in line with the UDHR including the right of every person to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law (Article 5) and the right of every person charged with a criminal offence shall be presumed innocent until proved guilty according to law in a fair and public trial, by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defense (Article 20(1)).[57]

Additional Resources

- A. Byrnes, I. Doron, N. Georgantzi, W. Mitchell and B. Sleap, Access to Justice: A discussion paper for the 11th session of the United Nations General Assembly Open-ended Working Group of Ageing (January 2020)
- V. Lima and M. Gomez, "Access to Justice: Promoting the Legal System as a Human Right" in W. Leal Filho et al. (Editors), Peace, Justice and Strong Institutions: Encyclopedia of the UN Sustainable Development Goals (Springer Publishing)
- S. Sage-Jacobson, "Access to Justice for Older People in Australia", Ageing and the Law, 33(2) (2015), 142
- Access to Justice Assessment Tool: A Guide to Analyzing Access to Justice for Civil Society Organizations (American Bar Association Rule of Law Initiative, 2012)
- Practice Note: Access to Justice (New York: UNDP Democratic Governance Group: Bureau for Development Policy, 2004)
- Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities, UN Doc. A/HRC/37/25 (2017)
- Substantive inputs on the focus area "Access to justice" (Working document submitted by the Office of the High Commissioner for Human Rights to the Open-ended Working Group on Aging, 2021), A/AC.278/2021/CRP.4
- Understanding Effective Access to Justice, OECD Workshop Background Paper (November 2016)

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[57] ASEAN Human Rights Declaration.

About the Author

This Work was written by Alan S. Gutterman, whose prolific output of practical guidance and tools for legal and financial professionals, managers, entrepreneurs and investors has made him one of the best-selling individual authors in the global legal publishing marketplace. His cornerstone work, *Business Transactions Solution*, is an online-only product available and featured on Thomson Reuters' Westlaw, the world's largest legal content platform, which includes almost 200 book-length modules covering the entire lifecycle of a business. Alan has also authored or edited over 100 books on sustainable entrepreneurship, leadership and management, business law and transactions, international law and business and technology management for a number of publishers including Thomson Reuters, Practical Law, Kluwer, Aspatore, Oxford, Quorum, ABA Press, Aspen, Sweet & Maxwell, Euromoney, Business Expert Press, Harvard Business Publishing, CCH and BNA. Alan has extensive experience as a partner and senior counsel with internationally recognized law firms counseling small and large business enterprises in the areas of general corporate and securities matters, venture capital, mergers and acquisitions, international law and transactions, strategic business alliances, technology transfers and intellectual property, and has also held senior management positions with several technology-based businesses including service as the chief legal officer of a leading international distributor of IT products headquartered in Silicon Valley and as the chief operating officer of an emerging broadband media company. He has been an adjunct faculty member at several colleges and universities, including Berkeley Law, Golden Gate University, Hastings College of Law, Santa Clara University and the University of San Francisco, teaching classes on corporate finance, venture capital, corporate governance, Japanese business law and law and economic development. He has also launched and oversees projects relating to sustainable entrepreneurship and the civil and human rights of older persons. He received his A.B., M.B.A., and J.D. from the University of California at Berkeley, a D.B.A. from Golden Gate University, and a Ph. D. from the University of Cambridge. For more information about Alan and his activities, please contact him directly at alangutterman@gmail.com, follow him on LinkedIn, subscribe to his newsletter and visit his website at alangutterman.com. Many of Alan's research papers and other publications are also available through SSRN and Google Scholar.

Alan launched and leads the Older Persons' Rights Project, which is a California nonprofit public benefit corporation with tax exempt status under section 501(c)(3) of the Internal Revenue Code dedicated to advancing awareness of the challenges and opportunities associated with increased longevity; combatting and eliminating prejudice against older persons and age discrimination in all its forms; defending the human and civil rights of older persons secured by law, with particular attention to the rights of members of vulnerable groups; and promoting and advancing the interests of older persons in society as a whole through education and efforts to enhance intergenerational solidarity. The Project engages in high-quality, independent research with the goal of providing innovative, practical recommendations for policymakers, businesses and civil society on addressing ageism and improving the lives of older persons.

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BEST PRACTICE GUIDE FOR THE ESTABLISHMENT, IMPLEMENTATION AND PROMOTION OF THE JUDICIAL DISPUTE RESOLUTION (JDR) PROCESS

1 January 2023

Table of Contents

A. PURPOSE OF THE GUIDE 3

B. WHAT IS THE JDR PROCESS? 4

C. OBJECTIVES OF THE JDR PROCESS 4

i. Desired Outcome 1 – Early, amicable resolution of the court dispute 4

ii. Desired Outcome 2 – Amicable settlement that aids in the preservation of commercial or personal relationships 4

iii. Desired Outcome 3 – Cost-effective resolution of the court dispute 5

iv. Desired Outcome 4 – Enforceable outcome for parties 5

v. Desired Outcome 5 – Promoting the effective use and deployment of scarce judicial resources 5

vi. Desired Outcome 6 – Effective management of judicial caseload 5

D. KEY FEATURES OF THE JDR PROCESS 6

i. Early and ongoing application of the JDR process during the judicial proceedings 6

ii. The integral nature of the JDR process 7

iii. Cost containment and management 7

iv. Timeliness 7

v. Creative solutions and options 8

E. THE HEART OF THE JDR PROCESS – JUDGE-LED CASE MANAGEMENT 9

F. COURT ADR MODALITIES EMPLOYED DURING THE JDR PROCESS 10

i. Early Neutral Evaluation 10

ii. Mediation 10

iii. Judge-facilitated negotiations 11

iv. Appointment of assessors / experts / referees to help determine complex factual issues 11

G. ESTABLISHING AN INTEGRATED AND SUSTAINABLE JDR PROCESS IN THE COURTS 13

i. Visionary leadership 13

ii. Strategic planning 14

iii. Legal framework for the JDR process 14

iv. Operational policies and processes 15

v. Judicial and administrative resources 15

vi. Stakeholder engagement and support 16

vii. Public education 16

viii. Measurement of desired outcomes 17

H. HARNESSING TECHNOLOGY IN THE JDR PROCESS 18

I. CONCLUSION 19

BEST PRACTICE GUIDE FOR THE ESTABLISHMENT, IMPLEMENTATION AND PROMOTION OF THE JUDICIAL DISPUTE RESOLUTION (JDR) PROCESS

A. PURPOSE OF THE GUIDE

1. The overarching objective of this Best Practice Guide is to provide a set of standards, guiding principles and a practical roadmap for a justice system to develop an effective and robust Judicial Dispute Resolution (JDR) process that will promote the early, amicable, cost-effective and fair resolution of court disputes in full or in part so that judicial time is saved through pro-active, judge-led management of cases, coupled with the employment of the whole suite of Court Alternative Dispute Resolution (ADR) modalities such as (a) early neutral evaluation, (b) mediation, (c) judge-facilitated negotiations, and (d) the appointment of assessors/experts/referees to help determine complex factual issues, as a core case management strategy.

2. These guidelines represent some of the best practices in the establishment, development, implementation and conduct of the JDR process and aim to promote:

   (i) an understanding of the role the JDR process plays in the resolution and adjudication of disputes brought in court;

   (ii) the creation of an integrated dispute resolution system within the court;

   (iii) the importance of the role of the judge in driving the JDR process through effective case management and the conduct of Court ADR modalities;

   (iv) access to information and resources for capacity building and developing of judicial competencies in the JDR process; and

   (v) the adoption of the JDR process to further the administration of justice.

3. These guidelines should be implemented and adapted in each jurisdiction in such manner as the jurisdiction deems fit and appropriate in order to promote the objectives of these guidelines wherever possible.

4. These guidelines are not intended to be exhaustive and consideration ought to be given, where applicable, to the requirements of law under different legal systems.

B. WHAT IS THE JDR PROCESS?

5. The JDR process refers to the proactive, judge-led management of cases, twinned with the use of a range of Court ADR modalities to achieve the resolution of court disputes in full or in part so that judicial time is saved.

C. OBJECTIVES OF THE JDR PROCESS

6. An effective justice system is one that delivers justice in a fair and timely manner, delivering optimal and proportionate outcomes for parties. It is one which adopts processes that facilitate the following desired outcomes:

(i) An early, amicable resolution of the court dispute;

(ii) An amicable settlement that aids in the preservation of commercial or personal relationships;

(iii) A cost-effective resolution of the court dispute;

(iv) An enforceable outcome for parties;

(v) Promotes the effective use and deployment of scarce judicial resources; and

(vi) Effective management of judicial caseload.

i. Desired Outcome 1 – Early, amicable resolution of the court dispute

7. Legal disputes arise out of a wide range of transactions and interactions between people. These can happen in different contexts, from simple consumer contracts to large-scale commercial arrangements, from conflict between family members and neighbours to online harassment, from claims arising out of workplace injuries to compensation for injury and vehicle damage in motor accidents. They may involve complex issues of law, or be straightforward factual disputes, but all disputes will benefit from an early resolution.

8. The early and active involvement of the court and parties would be critical in facilitating an early, amicable resolution of the court dispute, which will in turn secure savings in legal costs and time for parties.

ii. Desired Outcome 2 – Amicable settlement that aids in the preservation of commercial or personal relationships

9. Parties should actively participate in the JDR process in good faith, and strive to negotiate a settlement in the spirit of compromise. This is key to achieving an amicable, consensual outcome that does not necessitate a determination of the merits of parties' positions, thereby preserving the commercial or personal relationships of parties. The terms of a consensual outcome are also more likely to be successfully enforced or adhered to. This in turn aids in the preservation, if not reconciliation, of the relationships involved.

iii. Desired Outcome 3 – Cost-effective resolution of the court dispute

10. Litigation can be a time-consuming and expensive process, and the legal costs expended may be disproportionate to the value of the claim.

11. The application of the JDR process at appropriate junctures throughout court proceedings will assist parties to either resolve the whole dispute or narrow the issues in contention. An early settlement of the dispute will result in cost savings as legal costs in preparing a case for trial or hearing will not be incurred. There will also be savings in legal costs if the issues in dispute can be narrowed and well-defined as there will be a consequential reduction in the preparatory work required. In this regard, the JDR process facilitates the cost-effective resolution of disputes.

iv. Desired Outcome 4 – Enforceable outcome for parties

12. A resolution reached through the JDR process will usually take the form of a settlement agreement or a consent order. Such an outcome will be enforceable, providing certainty to parties in respect of the effectiveness of the result.

v. Desired Outcome 5 – Promoting the effective use and deployment of scarce judicial resources

13. Scarce judicial resources can be conserved through the effective use of the JDR process. This includes the narrowing of the issues in contention and the appointment of assessors/experts/referees to help determine complex factual issues.

vi. Desired Outcome 6 – Effective management of judicial caseload

14. The ability of the court to manage its caseload efficiently and fairly is important in order to deliver timely and high quality justice. Cumbersome and expensive court processes will impact the court's ability to effectively manage its caseload.

15. Through the early, proactive management of cases, the judge-led JDR process will enable cases to be managed effectively and disposed of expeditiously, while achieving cost-efficient outcomes.

D. KEY FEATURES OF THE JDR PROCESS

16. The JDR process facilitates the early, amicable resolution of disputes in whole or in part, thereby saving judicial time and ensuring that scarce judicial resources are optimally utilised. While parties may have undertaken private negotiations before commencing legal action, that the dispute reached the court is an indication that parties might need assistance and guidance in arriving at a consensual resolution.

17. Case management is an integral component of the judicial process. In this regard, as part of rigorous case management, the judge overseeing the JDR process needs to ensure that the case is managed in a timely manner. Second, the judge will also be able to propose the use of appropriate dispute resolution strategies and Court ADR modalities depending on the type and stage of the dispute. Third, when parties engage in protracted discussions or court applications, the judge is best placed to step in to stem the wastage of time and costs in pursuing unfruitful avenues.

18. It is hence important for the JDR process to be fully integrated into the justice system. The key features of the JDR process are set out in the following paragraphs.

i. Early and ongoing application of the JDR process during the judicial proceedings

19. To secure the greatest savings in legal costs, time, and judicial resources, the JDR process should commence at an early stage in the judicial process and should be considered throughout the judicial proceedings along with any other means available to the judge to reduce issues requiring adjudication, such as timely referral to an assessor/expert/referee. The underlying rationale for the early application of the JDR process is to give parties the opportunity to attempt and achieve an early, amicable resolution in whole or in part before large amounts of legal costs and time are incurred.

20. During case management hearings conducted under the JDR process, aside from managing timelines for the filing of court documents and the submission of evidence, the judge should assess and identify the most appropriate Court ADR modality that will aid in the amicable resolution of the dispute.

21. One size does not fit all. Depending on the nature of the dispute, factual matrix and legal positions held by parties, the potential application of different Court ADR modalities may result in vastly different outcomes. At the case management hearing, the judge will be best placed to assess the dispute, understand parties' positions, interests and needs, and suggest the use of the most appropriate Court ADR modality.

22. The success of the JDR process depends on the active involvement of parties. Depending on the applicable legislation, the consent of parties to attempt any of the Court ADR modalities may or may not need to be sought.

23. Undergirding the application of the different Court ADR modalities remains rigorous case management. The judge must control the process at all times, setting firm and realistic timelines to ensure that each case is managed in an effective and timely manner, while allowing parties sufficient time for negotiations.

ii. The integral nature of the JDR process

24. The JDR process is an integral part of the life cycle of a court dispute. With an experienced judge helming the JDR process, employing the variety of Court ADR modalities concurrently with proactive case management, the interests of parties are served more effectively as the full range of case management strategies and Court ADR modalities within the justice system can be applied by the court where appropriate.

iii. Cost containment and management

25. Throughout the JDR process, the judge must remain mindful of the need to guide parties in ways that will assist in cost containment.

26. An important objective in the management of a case is to ensure that justice is delivered through proportionate means. This entails the concept of cost proportionality, which is reflected when the nature, complexity and cost of the processes undertaken by parties bear a suitable relation to the nature, complexity and value of the dispute before it. In cases where the value of the claim is not high, it is particularly important for the judge to draw parties' attention to the need to contain costs such that the cost of litigation does not end up being disproportionately higher than the value of the claim.

iv. Timeliness

27. The advantage of an early, amicable resolution of a court dispute is that parties will have early closure without the uncertainty and associated stress of a legal dispute for an extended period of time. This is why it is important that the judge overseeing the JDR process must be continually mindful about the efficiency and timeliness of the entire JDR process. Delay in any stage of judicial proceedings will only exacerbate the feelings of anger and frustration that parties already feel.

28. If early, amicable resolution is unlikely, the judge should give timelines for the filing of the requisite court documents and other preparatory steps for the trial or hearing as part of overall case management. Throughout the whole JDR process, the judge would need to keep a close eye on the length of time taken to ensure that the judicial process is not delayed by virtue of the JDR process.

v. Creative solutions and options

29. A unique feature of the JDR process which makes it particularly effective in helping parties to settle a case is the empowerment and flexibility accorded to the judge. This allows the judge to work with parties on novel and creative ideas, and to propose the best solutions and options for parties to consider. The negotiated outcome agreed upon by parties can also be broader and contain terms which are not limited to remedies available under the law.

E. THE HEART OF THE JDR PROCESS – JUDGE-LED CASE MANAGEMENT

30. At the heart of the JDR process is judge-led, proactive, innovative case management.

31. Case management here does not simply refer to ensuring that the legal procedures are followed, that court documents are filed or timeline management alone. The judge performs two essential functions during case management conferences during the JDR process. The judge's key mission is to help parties resolve their differences and come to an early settlement in a non-confrontational setting. At the same time, the judge exercises robust case management to ensure that the case proceeds in a timely manner through the justice system. A balance needs to be struck between creating opportunities and the best circumstances for parties to negotiate and review their positions, whilst ensuring that parties continue to do the necessary to get the case ready for trial or hearing if the dispute is not resolved.

32. To arrive at the best solution for parties, the judge having conduct of the JDR process should lead the case management process and twin it with the use of appropriate Court ADR modalities.

F. COURT ADR MODALITIES EMPLOYED DURING THE JDR PROCESS

What are Court ADR Modalities?

33. Court ADR modalities refer to the range of dispute resolution tools such as early neutral evaluation and mediation which the judge may employ during the JDR process to help parties to resolve their differences and work together towards an effective, practical and cost-proportionate solution which all parties can agree on. The specific Court ADR modality to be used is dependent on the nature and circumstances of the case, and parties' interests and concerns. The judge may employ more than one Court ADR modality in a case.

i. Early Neutral Evaluation

34. Early Neutral Evaluation (ENE) is a process by which the judge or a third-party neutral (Evaluator) provides an early and non-binding assessment of the strengths and weaknesses of each party's case, and states a considered view on the likely outcome at the trial or hearing. The ENE gives a realistic indication of the merits of a party's case, which in turn helps to manage parties' expectations. The Evaluator's assessment is usually based on the submissions and documentary evidence tendered by parties. A critical component of the JDR process, the ENE given by the Evaluator often forms the basis for parties to commence settlement negotiations.

35. The ENE process is useful in a wide variety of civil disputes, from contractual claims to actions in tort such as personal injury claims. It is particularly effective in cases which involve substantial documentary evidence, e.g. construction and contractual disputes, and in cases where there is conflicting expert evidence, e.g. medical negligence cases. It also gives clarity to and helps narrow the issues in dispute between parties.

ii. Mediation

36. Mediation is a process by which the mediator facilitates discussions between parties and guides them towards a mutually acceptable settlement which addresses the interests and underlying concerns of disputing parties rather than focussing on the legal and evidential merits of each party's case. During the mediation session, the mediator focuses on working with parties to propose and craft solutions rather than dwelling on the problem and assigning blame. It is a forward-looking process which helps parties to extricate themselves from the ongoing dispute and be able to move on after reaching a mutually amicable settlement.

37. Mediation is appropriate in cases in which there are disputes in parties' versions of facts for which documentary evidence is inconclusive. It is particularly effective in saving or maintaining a cordial relationship between parties who may continue to have business or familial connections. It ensures that negotiations and the eventual settlement can be conducted in a private and confidential way, where publicity is avoided. Mediation allows parties to find solutions which may be business-driven or to design a creative solution suited to their unique situation, instead of the normal legal remedies which may not best address their underlying concerns.

iii. Judge-facilitated negotiations

38. The proactive judge is at the centre of the JDR process. There is direct and active involvement by the judge at every stage of the process, not only in terms of case management or the application and conducting of the appropriate Court ADR modality such as ENE or mediation, but also in facilitating and encouraging parties to negotiate in the best possible environment.

39. The proactive judge overseeing the JDR process is well-apprised of the case and is in the best position to determine how to balance the competing objectives of moving the case forward expeditiously and allowing parties to negotiate and settle the case in the interests of saving costs and time. Through the close monitoring of the progress of their negotiations, the judge can give constructive suggestions on how to further negotiations, and propose creative solutions for parties to overcome hurdles and limitations that they face.

iv. Appointment of assessors / experts / referees to help determine complex factual issues

40. Substantial judicial time can be saved if complex factual issues are referred to an assessor/expert/referee (collectively referred to as "referee") for an inquiry to render a determination or opinion to facilitate the adjudication process at the trial or hearing. The court may give directions on how the inquiry is to be conducted or it may leave it to the referee to decide how best to conduct the inquiry. Usually, the inquiry would be conducted in a less formal way than court proceedings and would therefore take significantly less time. In addition, as the referee would usually have expertise in respect of the factual issues that have to be decided, the referee would be able to manage the inquiry in a more robust and efficient manner.

41. The referee would be required to produce a report which is provided to the parties and to the court for consideration. The court may adopt, vary or reject the report, in whole or in part, or require a further report from the referee.

42. While the saving of judicial time is obvious when a court adopts a referee's report (in whole or in part), the inquiry process can also save judicial time in other ways. For example, the inquiry process may lead parties to resolve or narrow the issues that the court needs to determine. Where the referee's report addresses a central or critical issue in the proceedings in a fair and comprehensive manner, it may also lead to parties using the report as a foundation to negotiate a resolution of the whole matter.

G. ESTABLISHING AN INTEGRATED AND SUSTAINABLE JDR PROCESS IN THE COURTS

43. The essential building blocks and critical success factors for the establishment and sustainability of an effective and efficient JDR process have been identified in (i) – (viii) below. Practical pointers to guide courts which are looking into establishing a JDR process within their jurisdiction are also suggested.

(i) Visionary leadership;

(ii) Strategic planning;

(iii) Legal framework for the JDR process;

(iv) Operational policies and processes;

(v) Judicial and administrative resources;

(vi) Stakeholder engagement and support;

(vii) Public education; and

(viii) Measurement of desired outcomes.

i. Visionary leadership

44. The establishment of any JDR process must be driven by visionary leaders in the justice system. These leaders must believe in the ethos, objectives and the role of a non-adversarial approach in the litigation process in the courts, as well as have the long-term vision of developing a culture of proactive, judge-led case management towards achieving amicable, consensual outcomes. They must map the strategic direction and develop sound, forward-looking policies to implement, maintain and improve the system. They must also develop a robust monitoring and review system to ensure that the desired outcomes of the JDR process are met and sustained.

- *Practical pointers*
  (a) Identify a core team of senior judges and court administrators who believe in the vision and role of the non-adversarial approach to dispute resolution to drive and take ownership of the undertaking.

ii. Strategic planning

45. The articulation of clear strategies is crucial for the development and implementation of the JDR process. The leaders must first identify the current needs and problems, as well as the limitations of the current legal and operational framework. This will be key to developing the right solutions to meet these challenges. Strategies must then be mapped to focus on the identified needs and proposed solutions.

46. To this end, in launching any new initiative such as the establishment of a new dispute resolution framework, it is best to kick off with a pilot programme so that operational issues can be addressed early and the process refined before scaling it up in phases, culminating in the institutionalisation of the whole process in the longer term.

- *Practical pointers*
  - (a) Identify the types of cases for which the JDR process would be most effective in addressing current needs, e.g. small-value, high volume cases; types of cases which represent a significant portion of the case backlog.
  - (b) Identify suitable Court ADR modalities as part of the overarching case management strategy for these types of cases.
  - (c) Plan a small-scale pilot scheme to introduce the new process to stakeholders and court users.

iii. Legal framework for the JDR process

47. It may be necessary to put in place a legislative framework to support the JDR process. It is important that the JDR process is enabled and supported by law. The legislative framework can come in the form of primary legislation (e.g. statutes passed by parliament or congress) or secondary legislation (e.g. the court's procedural rules, practice directions or any other legally binding guidelines issued by the court).

- *Practical pointers*
  - (a) Consider if it will be useful to have legal rules to mandate the use of the JDR process for certain types of disputes.
  - (b) Consider if it will be useful to have legal rules to expressly empower judges to carry out their judicial role in the JDR process.
  - (c) Consider enacting legislation to ensure that outcomes reached during the JDR process (e.g. by way of a settlement agreement) can be enforced (usually as a court order). This gives parties the confidence that their settlement is backed by the court's authority.

iv. Operational policies and processes

48. Clear, practical and workable operational policies and processes are necessary to operationalise and implement the strategies through the strategic planning process. They are also crucial for the long-term sustainability of the new process. The new JDR process must be clear and easy to understand. It is important to be prepared for teething problems and to be flexible in adjusting the process accordingly. Most importantly, it must allow for the involvement of the judge as early in the life cycle of the case as possible in order to ensure that the full benefits of judge-led case management can be reaped.

- *Practical pointers*
  - (a) Identify the earliest possible point in the judicial process where the JDR process can be implemented so as to optimise prospects for an early, amicable resolution of the dispute.
  - (b) Determine whether the application of the JDR process is to be made compulsory, be implemented as a default option (which parties can opt out of) or if an entirely voluntary use of the process is preferred. A single approach for all disputes is usually not ideal.
  - (c) Design a simple process, taking into account the needs and challenges of the jurisdiction, and the identified solutions and strategies.

v. Judicial and administrative resources

49. Having well-trained judges and court administrators with the right attitude and aptitude is key to the successful establishment and implementation of the JDR process. The selected judges should be experienced judges and trained to acquire the necessary dispute resolution and case management competencies. Court administrators should similarly be trained and be adept as case managers. Where available and applicable, technology is another useful resource which would enhance the efficiency and accessibility of the JDR process.

- *Practical pointers*
  - (a) Identify and train suitable judges and court administrators.
  - (b) Identify and harness suitable technological tools, e.g. electronic case management and tracking systems, online dispute resolution platforms, to support the new process.

vi. Stakeholder engagement and support

50. The JDR process seeks to achieve fair, practical and effective outcomes for litigants. It is hence essential that litigants and their legal advisers are well-informed and are familiar with the process. Without their support and buy-in, the new process will not succeed. There must be adequate feedback and communication channels with the courts so that their expectations and challenges can be heard and addressed.

- *Practical pointers*
  - (a) Acquaint legal advisers and potential court users on the necessity, desirability and advantages of the JDR process.
  - (b) Invite feedback from lawyers and litigants and incorporate suitable suggestions into the design and enhancement of the JDR process.
  - (c) Engage lawyers and litigants in the pilot scheme.

vii. Public education

51. It is important that there be sufficient public education and outreach in relation to the JDR process, underlining the objectives and key features of the JDR process as a critical component of the justice process. If the public recognises that the JDR process is a primary and appropriate mode of managing and resolving court disputes, this will in turn result in greater acceptance of and confidence in its application and effectiveness. In this regard, it is important that the larger community moves away from the notion that they need to have their "day in court" through the trial process to obtain justice.

- *Practical pointers*
  - (a) Provide information about the JDR process that is readily accessible and available to the public at large.
  - (b) Collaborate with other organisations or government bodies who regularly encounter court users or litigants to create greater awareness about the JDR process and its benefits.

52. A corollary to the JDR process to achieve the resolution of court disputes is to put in place conflict avoidance measures even before cases are filed in court so that parties have the opportunity to address, reduce or avoid conflict altogether without having to invoke the formal judicial process. Such upstream measures can take many forms, e.g. pre-action ADR efforts, diversionary programmes, Artificial Intelligence-enabled outcome simulators. Public education efforts can also be channelled to create awareness of these measures.

viii. Measurement of desired outcomes

53. To maintain trust and confidence in the administration of justice, disputes before the court must be resolved fairly, effectively and in a timely manner. The JDR process must be accessible, easily comprehensible and affordable. The public must have trust and confidence in the new JDR process.

- *Practical pointers*
  - (a) Develop empirical and qualitative key performance indicators to keep track of the effectiveness of the JDR process.
  - (b) Conduct a survey for lawyers and litigants to obtain views and suggestions on the JDR process, which can be used to refine and improve it.
  - (c) Inject innovative solutions when fine-tuning and improving the JDR process – be bold in trying out new ideas.

H. HARNESSING TECHNOLOGY IN THE JDR PROCESS

54. Providing equal and adequate access to justice is a challenge. The challenge can come in different forms. The relevant legal information may not be readily accessible. A large country may not be able to provide the same level of access to justice to parts of its population living in remote and geographically inaccessible areas. Language barriers may also make access to justice difficult, e.g. if the courts do not have a sufficient pool of interpreters who can assist litigants. The cost of legal representation is also high and state-funded legal aid may be insufficient. The courts may also face challenges in obtaining sufficient resources (e.g. human and financial resources; modern physical infrastructure).

55. Leveraging technology can go a long way to meet these challenges. For example, technology can be utilised in the following areas:

(i) Legal knowledge and public education/awareness: Tools can be created to provide information about the legal framework, justice system and the JDR process, as well as provide basic legal information or access to legal advice.

(ii) Case management: Electronic, online case management systems can be developed to allow the court, litigants and lawyers quick and easy access to the case file and other court information anytime, anywhere.

(iii) Conducting hearings: Hearings can be conducted remotely. Tools can be created to assist in the verification of parties' identities, submission of documents and transcription of hearings. Technology can also assist in creating online negotiation platforms or asynchronous hearings (i.e. the conduct of hearings in which parties do not have to be physically present at the same time and where parties can file submissions, and the court can make its orders and directions, at different times).

I. CONCLUSION

56. Over the years, cases brought before the courts have increased in volume and complexity. The expectations of court users in respect of the efficiency, effectiveness and standard of the administration of justice have also increased. The ability of the courts to manage their caseload in a timely and fair manner, and to deliver a high quality of justice, is critical to maintain the public trust and confidence in the court process.

57. By setting out common standards, principles and features which are integral to the effectiveness and quality of the JDR process, as well as the building blocks and practical pointers for courts which seek to establish a JDR process within their jurisdiction, it is hoped that this Best Practice Guide will be useful for judiciaries around the world as they strive to achieve the desired outcome of resolving court disputes early, amicably, fairly and in a cost-effective manner.