



## August 2010

The Court ADR News section this month reports on new appellate mediation rules approved by the Florida Supreme Court, as well as a medical malpractice mediation program that will soon be tested by five hospitals in New York City. A new report on foreclosure mediation programs is also highlighted, along with updates on foreclosure mediation programs in Vermont, Maryland, Connecticut and Nevada.

The New Research section discusses the findings of two new studies on mediation of family cases involving intimate partner abuse. The authors use the same set of data from Pima County, Arizona, in different ways to assess the screening process used by the court. Recommended Resources for this month include a general guide to ADR processes, Massachusetts' guidelines for developing qualifications standards for neutrals, and a guide for monitoring and evaluating court ADR programs. Finally, the *From Just Court ADR* section highlights the latest posts on RSI's blog. Topics covered include recent media coverage of Nevada's foreclosure mediation program that illustrates the tension between fairness and neutrality in mediation. Posts also discuss a recent decision by the Missouri Court of Appeals and a call from the Department of Labor to define the qualities of an "expert mediator."

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## Court ADR News

[Florida Supreme Court Approves Appellate Mediation Rules](#)

The Florida Supreme Court adopted new rules in July governing appellate mediation. The rules were recommended by the court's Committee on Alternative Dispute Resolution Rules and Policy. The rules authorize all courts with appellate jurisdiction to refer cases to mediation. Parties may also request mediation. With some exceptions, all cases are eligible for mediation. Mediators will be selected from a court roster and, unless otherwise agreed to by the parties, must be licensed to practice law in the United States. Parties, or their representative or counsel with full settlement authority, are required to attend the mediation. The rules also include guidelines for scheduling, communications, mediator compensation, and reporting mediation outcomes to the court.

Click [here](#) to read the full version of the appellate mediation rules.



## New York City Hospitals Plan Medical Malpractice Mediation Pilot Program

Five hospitals in New York City will participate in a new pilot program that will use “health courts” to reach faster settlements in medical malpractice cases. The program will use judges to mediate cases prior to trial. The federal government will fund the program over three years with a \$3 million grant.

The program was originally reported by the [Wall Street Journal](#) (subscription required). Read more about the plans for the program at [Fierce Health Care](#) and [Indisputably.org](#).



## Report Pushes for Mandatory Foreclosure Mediation Programs

A report published by the Center for American Progress (CAP) in July urges states to increase their use of mediation to handle foreclosure cases. The report, *Now We're Talking*, is a follow-up to an earlier report CAP published in June 2009. It reviews foreclosure mediation programs in 21 states, describing the programs' structures and providing settlement statistics, where available. CAP particularly promotes mandatory mediation, arguing that mandatory programs have proven to be more effective than voluntary ones. The two types of programs have similarly high settlement rates, but mandatory programs obviously have higher participation rates. CAP also argues that courts should shorten the mediation screening process, foregoing in-person eligibility hearings and sending cases that meet broad guidelines on paper straight to mediation.

Click [here](#) to read the report. CAP is a liberal think tank based in Washington, D.C.



## Foreclosure Mediation Program Updates

A brief update on foreclosure mediation programs around the country:

**Vermont:** A [new law](#) went into effect on July 1 that gives homeowners who are facing foreclosure and whose loans qualify under the federal Home Affordable Modification Program the option to request mediation with their lender. Homeowners may request mediation when entering an appearance or up to four months after a judgment is entered. Cases will be mediated by attorneys who

have taken a Vermont Bar Association course on foreclosure prevention or loss mitigation.

**Maryland:** A foreclosure mediation law went into effect on July 1. Homeowners may request mediation after foreclosures are filed. Cases are mediated by administrative law judges. More information and resources for homeowners are available on the [Maryland HOPE Initiative](#) and the [Maryland Office of Administrative Hearings](#) websites.

**Connecticut:** The statewide foreclosure mediation program hit the two-year mark in July. The state judicial branch website provides [statistics](#) on the number of mediations held in that time, as well as settlement rates. During fiscal year 2009, 37% of eligible cases were mediated. In July 2009, new state legislation made mediation mandatory. During the following fiscal year, the mediation rate for eligible cases increased to 47%. Between the start of the program in July 2008 and April 2010, 60% of mediations resulted in settlements that allowed homeowners to stay in their homes. Another 15% resulted in agreements that required homeowners to leave their homes, but allowed for short sales, deeds in lieu, graceful exits, or other alternatives to foreclosure.

**Nevada:** The state's foreclosure mediation program was launched last July. According to the [Reno Gazette-Journal](#), the court reports that the program received more than 11,700 requests for mediation in its first year, out of about 90,200 foreclosure filings. Of those requests, 3,860 mediations were held. Agreements that allowed homeowners to stay in their homes were reached in 43% of mediated cases, and another 16% resulted in agreements where homeowners left their homes. In 29% of the cases that were mediated, homeowners were allowed to stay in their homes because lenders did not attend the mediation or otherwise violated mediation rules. In those cases, lenders were not allowed to go forward with foreclosure, but could re-file the case.

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## New Research

### Studies Examine Screening and Mediation of Cases Involving Intimate Partner Abuse

There is a long-standing argument as to whether divorce cases involving intimate partner abuse (IPA) should be mediated. This argument has been made to a certain extent in a vacuum of knowledge about how such cases are screened into or out of mediation. Two new studies of child custody mediation in Pima County, Arizona, provide some data to fill that void.

In a study of 1,015 child custody cases filed in Pima County between 1998 and 2001, Connie J.A. Beck, et al., examined screening documents, court records and mediator notes to determine what percent of cases involved allegations of IPA and how individual mediators responded to those allegations ("Mediator Assessment, Documentation, and Disposition of Child Custody Cases Involving Intimate Partner Abuse: A Naturalistic Evaluation of One County's Practices," 34 *Law & Hum. Behav.* 227 (June 2010)). They found self-reported IPA by at least one spouse in 90% of the cases. Corroborated IPA (reported by both spouses) was found in 71% of cases. The mediators, who identified fewer cases as involving IPA (59%), screened out 7% of cases due to IPA concerns, 4% before mediation and 3% after mediation began. Of those cases, 63% were screened out when both IPA and another concern (substance abuse, mental illness, child abuse, etc.) were identified.

Almost all cases for which a Critical Incident Report Form was completed (by

mediators “for cases requiring immediate attention”) were screened out of mediation. Mediators were also very likely to make accommodations in cases when one spouse called to request them. In 84% of those cases, the accommodations were made or the cases were screened out. In all, the mediators made accommodations in 28% of cases they identified as involving IPA. Accommodations included using shuttle mediation, escorting one parent to the parking lot, parents leaving separately, separate waiting rooms, separate screening days and use of an expert mediation team. Mediators were more likely to screen out a case in which the wife alleged IPA than if the husband did.

Beck, et al., believed the screening process to exceed the norm in most jurisdictions. Therefore, this represents a best case scenario for screening of IPA cases. While they laud the efforts of the mediators, they note that there is a need for more reliable and valid screening approaches that standardizes a process that is “more qualitatively and quantitatively sophisticated.”

Connie Beck and Chitra Raghavan used the same population sample to examine whether coercive control was a better indicator of a relationship in distress than physical abuse when screening cases for mediation (“Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control,” 48 Fam. Ct. Rev. 555 (July 2010)). The mediation program in Pima County employed a screening instrument that included nine questions regarding coercive control. Using those, Beck and Raghavan found that the presence of coercive control was a good indicator of the presence of physical abuse, but that the reverse was not true. Given that coercive control can impact a partner’s safety in mediation and the fairness of the process, the authors recommend use of a rigorous screening instrument that assesses that aspect of the potential mediation participants’ relationship.

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## On CourtADR.org

### Recommended Resources

» **Alternative Dispute Resolution: Options for Resolving Your Dispute**

This publication by the California Judicial Council provides a quick overview of mediation, arbitration and settlement conferences, including benefits of these processes and when they are and are not appropriate. A useful guide for those new to court ADR, this could be a helpful hand-out for client meetings, bar functions, community events, etc.

» **Guidelines for Implementation of Qualifications Standards for Neutrals**

Developed by the Massachusetts Supreme Court Standing Committee on Dispute Resolution, these guidelines provide good direction for other courts looking to establish training and evaluation standards for mediators, arbitrators and other neutrals.

» **Monitoring and Evaluating Court-Based Dispute Resolution Programs: A Guide for Judges and Court Managers**

This guide by the National Center for State Courts provides overall considerations and specific measurements to use in monitoring and evaluating ADR programs in courts. It offers sample questionnaires, worksheets and a list of ADR resources.

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# From *Just Court ADR*

## Pushing Fairness, Failing Mediation

“What is the proper role of a mediator? Is it appropriate for mediators to recommend sanctions against one party for not negotiating in good faith? Should mediators attempt to get similar outcomes for similar cases? These two questions, which arose from two [articles](#) on the Nevada Foreclosure Mediation Program, highlight that age-old question of whether mediators can be fair and neutral at the same time.” Click [here](#) to read the rest of the post.



## Court-Ordered Mediation Agreement Must Be Written

“The Missouri Court of Appeals has issued a [decision](#) that is instructive as to what can happen when an agreement reached in a court-ordered mediation is not reduced to writing before everyone leaves the mediation. The decision also highlights the potential tension between an emphasis on good faith participation and confidentiality, although it never discusses good faith.” Click [here](#) to read the rest of the post.



## Mediator's Defining Moment

“There has been quite a bit of hubbub online about a message circulating from NAFCM’s (National Association for Community Mediation) executive director, Justin Corbett. The message, copied [in the post], asks for input on a definition of ‘mediator’ for the U.S. Department of Labor. It will be used ‘by the federal government, and will be accessible online for all those considering a career or a volunteer commitment as a mediator.’” Click [here](#) to read the rest of the post.

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