

DRAFT 8/28/04

# **THE AUTHORIZED PRACTICE OF MEDIATION**

## **PROPOSED POLICY STATEMENT OF THE ASSOCIATION FOR CONFLICT RESOLUTION**

**Draft for Review and Comment of Members  
Issued September 28, 2004 by the  
ACR Board of Directors**

**ALL MEMBERS OF ACR ARE INVITED TO SUBMIT COMMENTS ON THIS DRAFT  
POLICY STATEMENT TO THE ACR WEBSITE BY DECEMBER 31, 2004  
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## I. INTRODUCTION

The field of conflict resolution is at a critical juncture in its development. As mediation gains in popularity and grows in use, a recurring question has arisen: could the practices and techniques of dispute resolution practitioners be interpreted as the unauthorized practice of law (UPL)?

As a diverse organization of practitioners who come from many backgrounds and professions, the Association for Conflict Resolution (ACR) is keenly aware of its responsibility to shape the field by promoting high-quality ADR practice, setting professional standards and helping our members practice their craft ethically and fairly. ACR chooses to approach the question concerning interpretation of common mediation practices by seeking to define the “authorized practice of mediation,” rather than to employ the lens of the legal profession or the unauthorized practice of law.”<sup>1</sup>

Mediation is a distinct practice with its own body of knowledge, foundational principles, values and standards of practice. Mediators do draw on the knowledge and practices of other disciplines, and many mediators are licensed or certified practitioners of other professions, such as law, clinical psychology, financial planning, accounting, planning and others (each a “source profession”). When conducting mediation, however, mediators are not operating primarily, if at all, as practitioners of those other professions.

In their capacity as mediators, practitioners should not engage in the practice of law, whether or not they are lawyers. Nor should mediators, when mediating, act in the capacity of any other profession. Although mediators may be held simultaneously to the standards of a source profession, it is within the purview of a particular source profession, not ACR, to determine those standards.

The experience, knowledge, and expertise each mediator brings to her or his practice of mediation from any source profession must not be dismissed or undervalued. Rather, it should be seen as a significant contributing factor and potential enhancement of a mediator’s practice of mediation. Ultimately, mediation practitioners should be tested against the standards of proper mediation practice.

## I. BACKGROUND

In January, 2000, the Society of Professional in Dispute Resolution (SPIDR) authorized the formation of a task force to “to explore fully the issue of the UPL as it relates to the ADR

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<sup>1</sup> See John W. Cooley, “Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR,” *Dispute Resolution Journal*, (August-October 2000), p. 7?.

practitioner, mediation, arbitration, and other pertinent hybrid ADR processes.” Anticipating the merger that has since resulted in the formation of the Association for Conflict Resolution, representatives from the other two founding organizations were members of the UPL Task Force from its inception. ACR recognizes the members of the UPL Task Force and expresses gratitude for the work of the Task Force<sup>2</sup>

This Policy Statement does not present a detailed recapitulation of the instances in which UPL charges have been brought against mediators, though such instances appear to have been relatively few to date.<sup>3</sup> Nor does it describe the facts in each instance to determine what might or might not have been UPL. Similarly, it does not attempt to catalog the law of various jurisdictions concerning UPL. The focus is mediation practice and an attempt to delineate proper and improper mediation practices. While improper mediation practices may not be UPL, such

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2 ACR’s predecessor organizations were the Academy of Family Mediators (AFM), the Conflict Resolution Education Network (CRENet), and the Society of Professionals in Dispute Resolution (SPIDR). The Task Force members were Nancy E. Peace, Chair; Jerry Bagnell; Gail Bingham; John W. Colley, Esq; Richard D. Fincher, Esq.; Gary L. Gill-Austern, Esq.; Hon. Erwin I. Katz (ret’d); Ellen M. Miller; Sharon B. Press, J.D.; Geetha Ravindra, J.D., Terrence T. Wheeler, Esq. The Board gratefully acknowledges the thoughtfulness, care and hard work of this dedicated group of dispute resolution practitioners. Task Force members were not able to reach consensus on a final report, but the draft report of the Task Force dated August, 2002 is available at the ACR website [www.acrnet.org](http://www.acrnet.org). Following further discussion and review, the ACR Board of Directors adopted this Policy Statement.

<sup>3</sup> *E.g.*, *Werle v. Rhode Island Bar Assoc.*, 755 F.2d 195 (1<sup>st</sup> Cir. 1985); *Commonwealth of Virginia v. Steinberg*, Va. Cir. Ct., Henrico Co., Case No. CL-96-504 (1996). In 2001, in unpublished opinions, the Connecticut Bar Association Statewide Grievance Committee dismissed three complaints of UPL which had been brought by Superior Court judges against non-lawyer divorce mediators involved in drafting settlement documents filed in court. Additionally, in a recent survey, the ABA reports that a mediator also has been charged with UPL in Utah. ABA Section of Dispute Resolution, *State and Local Bar Alternative Dispute Resolution Survey, 2001 Edition* at 11.

Although there are no reported decisions or written records, the Task Force also received anecdotal information concerning UPL charges brought against non-lawyer mediators in North Carolina, Texas, Missouri, California and Virginia. Finally, the section on UPL in Nancy Rogers’ and Craig McEwen’s treatise, *Mediation: Law, Policy & Practice*, states that a 1988 national survey of bar counsel indicated seven complaints regarding nonlawyer-mediators processed informally, with none resulting in formal charges. *See* § 10.05, text accompanying n. 5.

mediation practices should not be condoned even if they are conducted by members of the bar. Mediation is a distinct practice. The standards to be applied to mediators should be applied equally to all mediators, regardless of background or source profession.

Because the field of conflict resolution is still maturing, and the standards of mediation practice are still evolving, ACR's responsibility in the present context goes beyond simply mitigating potential UPL claims. There is an ongoing need to review, explicate, refine and restate standards of practice, thereby safeguarding and protecting the process of mediation. Standards do not create an environment without harm, but they do set norms and form the basis for determinations concerning mediation practice that are best made by peers-i.e., by other mediators.<sup>4</sup>

The goals of ACR in issuing this Policy Statement are to: 1) promote public confidence in mediation by assisting consumers of mediation by identifying improper mediation practice; 2) provide guidance to ACR members and other ADR practitioners concerning the sound practice of mediation; 3) educate state legislatures, courts, government officials and administrators, state and local bar associations and other professional associations concerning policy issues associated with the practice of mediation; and 4) articulate standards of mediation practice in the event that ACR should be faced with a decision whether to intervene in a charge of UPL against a member mediator.

It is important to note that there are some practices often regarded by consumers as mediation that do not constitute proper mediation practice. These practices may be appropriately conducted as part of one or more different ADR processes such as case evaluation, binding arbitration or non-binding arbitration, and, as such, are outside the scope of mediation and this Policy Statement.

## **II. DEFINING MEDIATION AND ITS VALUES**

Mediation is a unique and distinct endeavor. It is not the practice of any source profession, including law.

### **A. Definition**

ACR defines mediation as follows:

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<sup>4</sup> See David A. Hoffman and Natasha A. Affolder, "Mediation and UPL," 6 DISP. RESOL. MAG., Winter 2000 at 23 ("[T]he job of making these difficult [ethical] determinations, which implicate passionately debated principles of mediation ethics and practice, should be in the hands of mediators not prosecutors." (footnote omitted)).

Mediation is a process of dispute resolution in which one or more impartial third parties intervenes in a conflict or dispute with the consent of the participants and assists them without coercion or the appearance of coercion. In mediation, the decision-making authority rests with the participants themselves and the mediation process strongly values the parties' exercise of their self-determination. Recognizing participants' needs, cultural differences and variations in style, the mediation process allows participants to define and clarify issues, reduce obstacles to communication, explore possible solutions and, when desired, reach a mutually satisfactory agreement. Mediation presents the opportunity to express differences and improve relationships and mutual understanding, whether or not an agreement is reached.

### **B. Values**

Drawn primarily from the *Model Standards of Conduct for Mediators*,<sup>5</sup> the following values are the foundations of mediation practice:

1. Self-determination. "Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, un-coerced agreement."<sup>6</sup> "In mediation, whether private or public, decision-making authority rests with the parties."<sup>7</sup>

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<sup>5</sup> The *Model Standards of Conduct for Mediators* ("Model Standards") were prepared from 1992 through 1994 by a joint committee composed of delegates from the American Arbitration Association ("AAA"), the American Bar Association ("ABA") and the Society of Professionals in Dispute Resolution ("SPIDR"). They have been approved by the AAA, the Litigation and Dispute Resolution Sections of the ABA, and SPIDR. The *Model Standards*, its preface tells us, were intended "to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes."

<sup>6</sup> *Model Standards* § I. More recently, the *Model Standards of Practice for Family and Divorce Mediation* re-affirm that self-determination is the fundamental principle of mediation. *Model Standards of Practice for Family and Divorce Mediation*, Symposium on Standards of Practice, August 2000. (The Symposium was convened in 1998 by the Association of Family and Conciliation Courts ("AFCC"), and included among others the Family Law Section of the ABA, the Academy of Family Mediators, the ABA Section on Dispute Resolution, AFCC, Conflict Resolution Education Network, the National Association for Community Mediation, the National Conference on Peacemaking and Conflict Resolution and SPIDR. .

<sup>7</sup> *Standards of Practice for Family and Divorce Mediation*, § I, Academy of Family

2. Voluntariness. Participation in mediation is grounded on it being freely chosen by the parties. In situations where mediation is mandated, e.g., by a court, voluntariness is not negated because at most entry to the process is required, but not continued participation. Voluntariness is exercised at each moment a party chooses to remain at the table, and is best validated by the fact that “[a]ny party may withdraw from mediation at any time.”<sup>8</sup>
3. Impartiality. “A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw. A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. . . . A mediator should guard against partiality or prejudice based on the parties’ characteristics, background or performance at the mediation.”<sup>9</sup> Parties to a mediation have the right to a process that “serves all the parties fairly and equally and to mediators who refrain from perceived or actual bias or favoritism, either by word or by action.” There is, therefore, a duty upon mediators to disclose “any circumstances that may reasonably raise a question as to the neutral’s impartiality. The duty to disclose is a continuing obligation throughout the process.”<sup>10</sup>
4. Conflict of interest and disclosure. “A mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator. After disclosure, the mediator shall decline to mediate unless all parties choose to retain the mediator. The need to protect against conflicts of interest also governs conduct that occurs during and after the mediation.”<sup>11</sup>

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Mediators, 1984.

<sup>8</sup> *Model Standards* § I. A mediator assists the parties in exercising the ongoing and voluntary choice to remain at the table by informing them “that they may obtain independent advice from attorneys, counsel, advocates, accountants, therapists or other professionals during the mediation process” and by advising them, “in appropriate cases, that they can seek the advice of religious figures, elders or other significant persons in their community whose opinions they value.” *Model Standards of Practice for Family and Divorce Mediation*, §§ III.A.4. and 5.

<sup>9</sup> *Model Standards* § II.

<sup>10</sup> *SPIDR’s Ethical Standards of Professional Responsibility* (adopted June 1986).

<sup>11</sup> *Model Standards* § III.

5. Informed consent. Respect for the nature of the parties' voluntary participation in a mediation calls for that participation to be grounded in informed consent. In other words, parties have the right to "understand the nature of the process, the procedures, the particular role of the neutral, and the parties' relationship to the neutral."<sup>12</sup> This is a continuing right. "The parties decide when and under what conditions they will reach an agreement or terminate a mediation."<sup>13</sup>
  
6. Competence. "A mediator shall mediate only when the mediator has the necessary qualifications to satisfy the reasonable expectations of the parties."<sup>14</sup> Such competencies are contextual and diverse. They include core process-related skills, cultural competencies, as well as a variety of substantive area skills tied to the nature of a specific mediation. Historically, ACR's parent organizations have stated that there are multiple paths to becoming a competent practitioner. SPIDR's Commission on Qualifications consistently affirmed the importance to the field of honoring this tradition, and while not disparaging degrees or other quantifiable means of assessing an individual's training, looked to performance as the ultimate determination of competence.<sup>15</sup>
  
7. Confidentiality. "A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality."<sup>16</sup> A mediator is obliged, however, before

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<sup>12</sup> *SPIDR's Ethical Standards of Professional Responsibility*.

<sup>13</sup> *Model Standards* § VI.

<sup>14</sup> *Model Standards* § IV.

<sup>15</sup> The second report of SPIDR's Commission on Qualifications views competence as informed by the overriding value of party self-determination when it states that "dispute resolution processes are effective because they maximize the control parties exercise over their disputes and can be creatively tailored to meet the needs of the parties. Standard-setting, to the extent it is required, should enhance rather than diminish involvement of the parties and should encourage rather than constrain such creativity." *Ensuring Competence and Quality In Dispute Resolution Practice*, April 1995, at 6. The varied competencies brought to the process by mediation's many practitioners are valued because they permit mediators to address the particularities of the parties and the specific moments in which they mutually engage. Competencies serve the process and the parties.

<sup>16</sup> *Model Standards* § V.

undertaking a mediation, to “inform the participants of the limitations of confidentiality such as statutory, judicially- or ethically mandated reporting.”<sup>17</sup>

8. Commitment to the process. “A mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties.”<sup>18</sup> “Mediators have a duty to improve the practice of mediation.”<sup>19</sup>

These values are the beginning point of any analysis of what constitutes the authorized practice of mediation.

### **C. Importance of Context**

Mediation takes place in a variety of contexts. One of its hallmarks is that mediation is a flexible and informal process. The mediation process is adaptable to many different situations, but its core values do not change.

Mediators often face complex and ambiguous circumstances in the midst of mediating, and they are called upon to make a broad range of decisions concerning proper and effective practice. These decisions will be reached through an interplay of specific circumstances of the mediation with the fundamental principles of the process. When considering possible steps or interventions, the specific context requires a mediator to consider—explicitly or implicitly—a range of factors including:

- the presence of counsel (whether one, some or all parties are represented);
- the expertise of the parties, their access to information (individually or collectively) and their ability to address complex issues (e.g., substantive expertise or knowledge about legal procedure);
- the relationship of the parties (possible presence of power imbalance);
- the parties’ understanding of the mediation process and the role of the mediator;

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<sup>17</sup> *Model Standards of Practice for Family and Divorce Mediation*, § VII.B.

<sup>18</sup> *Model Standards* § VI.

<sup>19</sup> *Model Standards* § IX.

- identity factors of the parties and mediator (e.g., background, education, language of the parties, race, class, gender, ethnicity, ability, sexual orientation, age, organizational position);
- the timing of a mediator’s possible intervention and progress of the mediation process;
- the availability of traditional legal process or other forums in which parties can achieve their objectives (such as regulatory or legislative processes);
- a dispute’s path to mediation (voluntary or mandatory referral);
- type of dispute (labor mediation is different from divorce or environmental, etc.);
- the mediator’s own philosophy and style;
- the mediator’s own background, including source profession; and
- applicable rules (including state statutes, ethical standards, court rules and immunity provisions concerning mediation, as well as authority concerning UPL).

### **III. MEDIATION: A DISTINCT PRACTICE**

Against the backdrop on the definition of mediation, a statement of its essential values, and recognition of the varied contexts in which mediation is practiced, it is possible to begin to define the contours of the “authorized practice of mediation.” It is instructive to categorize mediation-related activities in three groups: 1) activities that are fully consistent with the values of mediation are generally considered proper mediation practice; 2) certain activities that are commonly understood to fall outside the realm of proper mediation practice; and 3) activities that are so highly contextual that they evade clear categorization and require additional scrutiny. Such activities, depending on the specific circumstances in which they may arise, occupy the areas that rub against the practice of law and other dispute resolution processes.

The examples included below are not intended to be comprehensive or exhaustive. The examples do not necessarily include all the activities that typically occur in mediation generally, or even all that might occur in any single mediation session. The examples are presented for their relevance to the discussion of the relationship between mediation and law, the source profession of a growing number of mediators.

#### **A. Authorized Mediation Practice**

If conducted in a manner consistent with the stated values of mediation and with careful regard for the specific circumstances, the list of activities that ACR considers to be proper mediation practice include, but are not limited to, the following. A mediator may:

- assess the willingness of the parties to engage in mediated negotiations, and in that context, if relevant to the parties, assist them in discussing their alternatives and options;
- provide information and make recommendations as to the structure and ground rules of the mediation process to assist the parties in their voluntary participation in the process at its inception and on a continuing basis;
- draft proposed agendas for discussion;
- draft mediation participation agreements;
- describe, explain and/or interpret court rules concerning the mediation process;
- describe confidentiality and its limits;
- facilitate the parties' conversation, focus on communication and assist in the process of empowerment and recognition;
- facilitate the parties' conversation about applicable law;
- provide oral and written summaries to the parties of discussions during the process;
- facilitate the parties' discussion regarding their assessments of the strengths and/or weaknesses of their respective cases;
- prepare agreements that incorporate only the terms agreed to by the parties;
- in the context of family mediation, work with parties to complete child support worksheets; and
- engage in the ministerial function of filing a settlement agreement or other settlement form with a court in a court-ordered mediation, depending on applicable law and local court rules and customs.

## **B. Improper Mediation Practice**

ACR believes that the following practices are improper activities for a mediator within a mediation process. Some of these practices may also constitute the unauthorized practice of law in some jurisdictions. Mediators must inform themselves of the definition of the practice of law in the jurisdictions in which they are practicing.

Regardless of her or his source profession, a mediator should not:

- hold himself or herself out as a legal representative of the parties;
- state that, by virtue of having a mediator, parties to a mediation do not need a lawyer;
- advise parties about their legal rights or responsibilities, or imply that a party can rely on the mediator to protect her or his legal rights;
- draft an agreement that goes beyond the terms specified by the parties;
- coerce a decision (explicitly or implicitly);
- interfere with or ignore the parties' self-determination;
- fail to act with impartiality;
- apply legal precedent to the specific facts of the dispute; or
- offer any personal or professional opinion as to how the court (judge or jury) in which a case has been filed will resolve the dispute.

Some UPL charges against mediators known to date involved complaints about written agreements drafted by non-lawyer mediators. When an agreement is reached in mediation, the parties often request assistance from the mediator in memorializing their agreement. The preparation of a written document by a mediator incorporating terms of settlement specified by the parties does not constitute the practice of law. If the mediator drafts a written document that goes beyond the terms specified by the parties, he or she may be perceived in some jurisdictions as engaged in the practice of law. Merely including language required by statute, court rule, or a mediation program as part of a written mediation document should not, in ACR's

view, be perceived as the practice of law.<sup>20</sup> Mediators should exercise caution when filing agreements as formal documents with a court, particularly if they bear the name and format of legal documents.

### **C. Mediation Practice Warranting Increased Scrutiny Depending on Context**

At this point in the development of the field of mediation, certain activities occupy the “rub areas” between the practices of mediation and law, and between the practice of mediation and other forms of ADR (such as case evaluation or arbitration). Generally, these consist of the instances in mediation practice most likely to challenge the boundaries between mediation and the practice of another discipline. The “rub areas” require more difficult decision-making by a mediator, based on careful consideration of the fundamental values of mediation in order to preserve the integrity of the process.

The intensely contextual nature of these activities influences perspectives on whether they are acceptable or unacceptable mediation practice. Such activities include:

- proposing options for parties’ consideration;
- recommending a specific course of action;
- providing any personal or professional evaluation of the strengths and weaknesses of the case, either directly or implicitly, even when it is not intended to coerce the parties or direct a resolution.

These are examples of practices still under discussion in the field. Opinions vary according to geographical custom, type of case, area of practice, institutional norms, qualifications of the mediator and the expressed desires of fully informed parties.

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<sup>20</sup> This statement is in harmony with the first paragraph of a resolution on mediation and UPL adopted by the American Bar Association’s Section of Dispute Resolution, which states: “When an agreement is reached in a mediation, the parties often request assistance from the mediator in memorializing their agreement. The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement that goes beyond the terms specified by the parties, he or she may be engaged in the practice of law.” ABA Section of Dispute Resolution, RESOLUTION ON MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW, February 2, 2002. See note 4 above. ACR has neither endorsed nor rejected a second paragraph in the same statement of the ABA Section of Dispute Resolution regarding mediator proposals.

The key to determining whether an action is properly considered to be mediation depends on the context, including the impact on one or more parties. Further, an additional contextual factor of which every mediator must be fully cognizant is the applicable rules and standards of the jurisdiction in which mediation is to be conducted. It is imperative that each mediator is fully informed of the applicable rules and standards.

If a mediator is not sure whether an action will be consistent with authorized mediation practice, it is recommended that he or she should defer the action, if possible, in order to gain time to reflect and to potentially consult colleagues. Before taking such a step in a mediation session, the mediator should exercise a higher degree of scrutiny and greater self-reflection. This perspective underscores the over-arching obligation to “do no harm” either to the parties or to the mediation process.

#### **D. Mediation and Other Dispute Resolution Processes**

Use of the term “mediation” generally affords certain statutory protections, such as a privilege that assures the confidentiality of the mediation process.<sup>21</sup> These protections have been attached to mediation because decision-making remains with the parties. As such, the mediator functions as a facilitator, retaining no authority to impose or direct a determination. A mediation conducted consistent with the principles and values articulated above is worthy of these protections because of the unlikelihood that malfeasance would occur. In fact, deference to the wishes of the parties and their freedom to make decisions provides the ultimate protection to a mediator.

During mediation, the parties may request--directly or indirectly--a change in process or the use of a technique that would no longer fit under the category “mediation.” Such a change may also arise as a result of the cumulative impact of several different interventions which independently might be permissive practice, but taken as a whole might have the impact of crossing the line from “proper” to “improper” mediation practice. When such an event occurs, the dispute resolution practitioner who has been serving in the capacity of mediator must review with the parties the implications of such a process change, including the potential loss of: confidentiality; the impartiality of the mediator; and the self-determination of the parties. In addition, the dispute resolution practitioner must point out, if relevant, the impact of providing such an evaluation based on information gained in caucus – information of which one party may not be aware and has not had an opportunity to refute. If agreed by all parties, the mediation should come to a halt, and the neutral (formerly mediator) should clearly delineate the commencement of a new process.

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## CONCLUSION

ACR will continue the process of developing and safeguarding standards of practice for the various dispute resolution processes as used in their various contexts, beginning with mediation. While this report focuses on the interplay between mediation and the practice of law, ACR may also find it important to consider the interplay between mediation and other source professions such as counseling, psychotherapy, social work, accounting and so forth.

As vital as self-development and self-regulation of the field of conflict resolution are, they are not enough. ACR is committed to educate members of the public, each of whom is a potential party, about the nature, benefits and potential drawbacks of different dispute resolution processes, so that they may become aware of the range of options available to them and make informed decisions about what type of process or processes would best meet their needs. Finally, ACR will continue to work with party representatives, program administrators, judges and policy makers, including legislatures, in the endeavor to ensure that the legal and programmatic environment in which dispute resolution is conducted fosters the best possible processes for the ultimate consumers – the disputing parties.

By maintaining a principled approach to defining mediation practice – one grounded in a commitment to the self-determination of the parties and the integrity of the process—ACR endeavors to define and preserve mediation as a distinct area of professional practice that is to be distinguished from its many source professions, including law.