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A COMPARISON OF COURT-CONNECTED MEDIATION IN FLORIDA AND KOREA

*Kwang-Taeck Woo**

I. INTRODUCTION

A. Mediation as an Alternative Dispute Resolution Method

Disputes among human beings have existed since the beginning of time. Accordingly, various means for resolving disputes have been developed. Among them, mediation by agreement on the basis of the parties' mutual concessions through the intervention of a neutral third party, is one of the oldest.¹ Over the years, both litigation and mediation have played an important role in resolving disputes.

Mediation offers many advantages as compared to litigation. Those who choose mediation are often motivated by a variety of factors: speediness, as disputes can be scheduled for a hearing within a very short period of time;² confidentiality;³ low cost;⁴ fairness;⁵ and high success rate.⁶ The mediation process gives the parties the capacity to resolve future disputes without the need for external intervention.⁷ Moreover, from the standpoint of the court's responsibilities, the use of mediation reduces the heavy caseload so common with litigation.⁸

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1. Mediation in the broadest sense has existed since long before recorded history, for as long as there have been conflicts. Mediation may even be older than the use of litigation through a judicial system. See KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 18 (1994).

2. "[M]ost disputes at public mediation centers can be scheduled for a hearing within two to three weeks." PETER LOVENHEIM, *MEDIATE, DON'T LITIGATE* 10 (1989).

3. Generally, communications made during mediation are confidential. See *id.*; see also *infra* Parts II.G, III.F, IV.D.

4. Typically, services at most public mediation centers are either free or available for a nominal charge. See LOVENHEIM, *supra* note 2, at 10.

5. "[T]he solution to a dispute can be tailored to the needs of each party." *Id.*

6. In more than 80% of cases that reach the mediation stage, both parties obtain what they view as a successful result. See *id.*

7. See STEPHEN GOLDBERG ET AL., *DISPUTE RESOLUTION* 92 (1985).

8. See Sharon Press, *Building And Maintaining A Statewide Mediation Pro-*

Despite such merits, the importance of mediation as a means of dispute resolution has been recognized only recently. In the United States, mediation as a process of resolving conflict has gained popularity and acceptance only in the last two decades.⁹ Although the use of mediation can be traced to historical methods of providing community justice and providing settlements in labor disputes,¹⁰ the embodiment of mediation as a general means of dispute resolution came into use as part of the alternative dispute resolution (ADR) movement, which began in the late 1970s.¹¹ Dissatisfaction with the traditional litigation system, its expense, and its slow and ineffective response to many disputes gave rise to the ADR movement.¹² The Pound Conference was held in 1976, specifically to address the overall dissatisfaction with the legal system, and it is considered to be the birth of the current ADR movement.¹³ As a part of the ADR movement, and in order to determine whether mediation would be effective as a means of resolving general minor disputes, three pilot programs, termed Neighborhood Justice Centers (NJC's) were created: one in Kansas City, one in Los Angeles, and one in Atlanta.¹⁴ Because of the success of the three centers, a number of other centers were established throughout the country.¹⁵ Gradually, many centers have expanded to handle more complicated matters and have developed as court-linked or bar-sponsored Dispute Resolution Centers.¹⁶ The development of these centers, together with the idea of a "multi-door" courthouse,¹⁷ led to the increased

gram: *A View From The Field*, 81 KY. L.J. 1029, 1035 (1993).

9. See KOVACH, *supra* note 1, at 1 n.1.

10. See *id.* at 19.

11. See Sharon Press, *Introduction to Mediation*, in 2 ALTERNATE DISPUTE RESOLUTION IN FLORIDA § 1.1, § 1.3, at 1-4 (Continuing Legal Educ. Comm. of the Florida Bar ed., 2d ed. 1995).

12. See *id.*

13. See KOVACH, *supra* note 1, at 21.

14. See *id.* at 21-22.

15. Over 400 centers have since been established, with at least one in each state. See *id.* at 22.

16. See *id.*

17. The concept of a "multi-door" courthouse, first proposed by Professor Frank Sander at the Pound Conference, essentially consists of a process by which an individual can find the "most appropriate method" of resolving a dispute among a variety of resolution services. See Frank E.A. Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 84 (A. Leo Levin & Russell R. Wheeler eds., 1979).

use of mediation in pending lawsuits during the late 1980s.¹⁸ The current court-connected mediation mechanism is the result of over ten years of developing and experimenting with alternatives to litigation.

B. Development of Court-Connected Mediation in Florida and Korea

In Florida, mediation has been used for many years in the private sector.¹⁹ Florida's first court-connected mediation program, in the broad sense, was the Citizen Dispute Settlement (CDS) Center in Dade County, which began in 1975²⁰ and grew to ten local CDS centers by 1978.²¹ These centers were similar to the NJCs and were established to "handle neighborhood-type disputes ranging from misdemeanors . . . to small claims actions" in the community area.²² Parties are not required to file a case with a court to utilize a CDS center. These centers were organized and designed to function with various court-affiliated institutions such as the State Attorney's Office, private nonprofit corporations, and local bar associations, as well as with the courts themselves.²³ Referrals to CDS programs come from these sources including law enforcement agencies, state attorney's offices, the courts, and also from individuals.²⁴

The next phase of court-connected mediation programs was a family mediation program, which began in Broward County in 1978.²⁵ Family mediation refers to domestic relations cases in general and divorce in particular. In the same year, a special committee on dispute resolution alternatives was created by the Florida Supreme Court.²⁶ Subsequently, in 1985 a Legislative Study Commission on Alternative Dispute

18. See KOVACH, *supra* note 1, at 23.

19. See Press, *supra* note 11, § 1.5, at 1-6.

20. See *id.*; Press, *supra* note 8, at 1042.

21. See Press, *supra* note 8, at 1042.

22. Risetete Posey, *Citizen Dispute Settlement Centers*, in 2 ALTERNATE DISPUTE RESOLUTION IN FLORIDA, *supra* note 11, § 8.1, § 8.2, at 8-4.

23. *Id.* § 8.2, at 8-3.

24. *Id.* § 8.4, at 8-5. Thus, CDS centers can be considered state-connected mediation programs rather than court-connected mediation programs.

25. See Press, *supra* note 8, at 1043.

26. See *id.* at 1042.

Resolution was created.²⁷ As a result of its study, the Commission "recommended a comprehensive [court-connected] mediation and arbitration program" in its final report.²⁸

Finally, in 1987 comprehensive ADR legislation was passed and became effective January 1, 1988,²⁹ supplemented by the Rules of Civil Procedure (adopted in 1987)³⁰ and the Florida Rules for Certified and Court-Appointed Mediators (adopted in 1992).³¹ Four types of comprehensive mediation programs were established as court-connected mediation programs in Florida: the Citizen Dispute Settlement Center, family mediation, circuit civil mediation (which receives non-domestic civil case referrals from circuit courts), and county mediation (which receives civil case referrals from county courts).³²

In Korea, mediation was established as a court-connected or court-annexed process.³³ Voluntary mediation by parties' agreement without the court's intervention was available, but very rare. Accordingly, mediation in Korea is generally a court-connected procedure in which the court intervenes and leads. In contrast to the United States, the Korean court system has only recently adopted the use of mediation as an alternate form of dispute resolution. Before 1990, there were several individual statutes that provided for mediation procedures, but they were hardly used in practice.³⁴ However, in 1990, recognizing the importance of the role of mediation in complement-

27. See Press, *supra* note 11, § 1.5, at 1-7.

28. *Id.*

29. 1988 Fla. Laws ch. 87-173 (current version at FLA. STAT. ANN. §§ 44.1011-.106 (West Supp. 1996)).

30. FLA. R. CIV. P. 1.700-.830.

31. See RISETTE POSEY ET AL., *FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM* at iv (8th ed. 1995).

32. See Press, *supra* note 11, § 1.6, at 1-8. For a more detailed review of the history of the Florida mediation program, see James J. Alfini, *Trashing, Bashing, and Hashing it out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 50-59 (1991).

33. Mediation legislation in Korea was first enacted in 1962. See Chaji Chaka Chojeong Beop [Land and House Lease Mediation Act], Law No. 969 (Jan. 15, 1962), *repealed by* Minsa Chojeong Beop [Civil Mediation Act], Law No. 4202 (Jan. 13, 1990).

34. See, e.g., Land and House Lease Mediation Act, *supra* note 33; Soaek Sakeon Simpan Beop [Small Claims Act], Law No. 2547 (Feb. 24, 1973), *amended by* Law No. 3246 (Jan. 4, 1980); Kanyi Cheolchae Euihan Minsa Punjaing Sakeon Cheori Teukbyul Beop [Special Act Regarding Civil Dispute Resolution by Summary Procedure], Law No. 2254 (Dec. 31, 1970) [hereinafter Special Act], *amended by* Law No. 3992 (July 12, 1987).

ing litigation, the Korean government established the Civil Mediation Act as a uniform civil mediation procedure.³⁵ The Act essentially replaced previously used mediation procedures and established a uniform system of civil mediation in all civil matters, except family and collective labor disputes.³⁶ In 1992, the Act was amended for the purpose of more actively promoting the use of mediation.³⁷ As a result, in 1993 the number of mediation cases greatly increased.³⁸

C. Purpose and Scope of This Article

The purpose of this article is to examine the Korean civil (non-domestic) mediation procedure and Florida's court-connected mediation procedure, to compare some of their elements, and to explore some ways of improving each procedure. Part II presents the Korean civil mediation procedure together with a simple examination of the history and structure of the Korean legal system and Korean civil procedure. A description of court-connected mediation in Florida is presented in Part III. This description only focuses on circuit civil mediation and county civil mediation in order to make comparisons with corresponding elements of Korean civil mediation.³⁹ Part IV provides a comparative analysis and criticism of both mediation systems. This article concludes with suggestions for improving both Korea's and Florida's mediation systems.

35. Civil Mediation Act, *supra* note 33, amended by Law No. 4505 (Nov. 30, 1992) and Law No. 5007 (Dec. 6, 1995).

36. Civil Mediation Act, *supra* note 33, Addenda art. 2. The mediation of family matters is governed by Kasa Sosong Beop [Family Procedure Act], Law No. 4300 (Dec. 31, 1990) (amended 1992). Labor disputes are mediated under the rules set forth in Nodong Chaingeui Chojeong Beop [Labor Dispute Mediation Act], Law No. 1327 (Apr. 17, 1963), amended by Law No. 3967 (Nov. 28, 1987), translated in 6 CURRENT LAWS OF THE REPUBLIC OF KOREA 3523 (Ministry of Legis. ed., 1989).

37. See Civil Mediation Act, *supra* note 33, art. 1, amended by Law No. 4505 (Nov. 30, 1992).

38. See Kong Hyun Lee, *Minsa Chojeong Chedo* [Civil Mediation Procedure], INKWON KWA JEONGEUI [HUM. RTS. & JUSTICE], Jan. 1994, at 45, 49. In 1990, there were only 27 mediation cases in the Civil District Court of Seoul. That number increased to 66 in 1992, dropped to 57 in 1993, then jumped dramatically to 1,567 cases during the period from March 1993 to November 1993. See *id.*

39. Where necessary, an explanation of the CDS center and family mediation will be made.

II. MEDIATION IN KOREA

A. Background

The modern independent judicial system in Korea, which started in 1894, was disrupted by Japanese colonial rule from 1910 until 1945. During that period Korea was forced to adopt the Japanese legal system which had been received from the modern European countries that used civil law. That adoption resulted in modern Korea's eventual assimilation of the European civil law system.⁴⁰

Korea is not a federal state and the ordinary Korean courts are organized in a unitary system of three levels: District Courts (including the specialized Family Court), which are the courts of original jurisdiction; the High Courts, which are the intermediate appellate courts; and the Supreme Court, which is the highest court.⁴¹

The Code of Civil Procedure,⁴² which was enacted in 1960 and revised extensively in 1990, is the primary source of law in the area of civil litigation.⁴³ Civil lawsuits may be initiated in any District Court, branch court of a District Court, or municipal court.⁴⁴ The parties are required to present oral arguments⁴⁵ and evidence in support of their arguments.⁴⁶ The court may conduct an ex officio examination of evidence only when it is impossible to prove the case with evidence presented by the parties.⁴⁷ It is noteworthy that fact-finding authority is vested exclusively in the judge.⁴⁸ At the end of a trial, the judge enters a written judgment stating the reasons for the decision. Judgments rendered by a single judge on any question of fact or law may be appealed to the appellate division of

40. See MINISTRY OF COURT ADMINISTRATION OF THE SUPREME COURT, JUDICIAL SYSTEM OF KOREA 4 (1995).

41. See *id.* at 6.

42. MINSA SO SEONG BEOP [CODE OF CIV. P.], Law. No. 547 (Apr. 4, 1960), amended by Law No. 4931 (Jan. 5, 1995), translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA, *supra* note 36, at 753.

43. See INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA 1023 (Sang Hyun Song ed., 1983).

44. See *id.* at 1024, 1028.

45. See *id.* at 1025.

46. See *id.* at 1026.

47. See *id.*

48. See *id.* at 1027.

the District Court.⁴⁹ An appeal against the judgment of a three-judge panel of a District Court is lodged with a High Court,⁵⁰ and again, questions of both law and fact may be grounds for appeal.⁵¹ Appeals from the rulings or judgments of either the High Court or the appellate division of the District Court must be filed with the Supreme Court, where only questions of law may be heard.⁵²

B. Definition and Nature

The civil mediation procedure is a method of dispute resolution in which the court intervenes in disputes regarding civil matters, and settles those disputes by promoting an agreement on the basis of mutual concessions in accordance with reason, equity, and the actual circumstances of the case.⁵³

The characteristics of civil mediation are: (1) the voluntary nature of the process; (2) the decision-making authority of the mediator (also known as a mediation agency);⁵⁴ (3) the informality and simplicity of the process; and (4) the confidentiality of the procedure. Disputes must be settled by the parties voluntarily on the grounds of mutual concessions. At the same time, disputes must be settled in accordance with reason, equity, and the actual circumstances of the case. A mediator must ultimately conclude whether these elements have been satisfied.⁵⁵ Although the parties reach their agreement by a process of voluntary concessions, the agreement must be approved by a mediator. In mediation, parties may state their own views freely and produce any documents or information in support of their argument. Procedural law, including evidentiary law, is not required as it is in litigation. The statements of the parties or interested persons made during mediation proceedings are

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

53. Article 1 of the Civil Mediation Act provides that the purpose of the Act is to settle disputes about civil matters by a simple procedure in accordance with reason, equity, and the actual circumstances of the case, on the basis of mutual concessions. Civil Mediation Act, *supra* note 33, art. 1.

54. *See* Yong Kuk Chang, *Minsa Chojeong Chedoeui Hyunhwangkwa Daichaik* [Present and Future of Civil Mediation], in 14 MINSA PANRYAE YEONKU [STUDY OF CIVIL CASES] 521 (1992).

55. *See id.*

inadmissible in subsequent civil litigation.⁵⁶

Two of the most distinguishing characteristics of Korea's mediation procedure are the extent of the court's involvement in the action and the nature of the ultimate decision. Generally, mediation in the United States is conducted by a neutral third person called a mediator. The court does not intervene in the mediation procedure directly nor does a mediator does have decision-making authority.⁵⁷ However, in Korea's civil mediation procedure, the court intervenes in and plays a leading role. Furthermore, in Korea, a mediator has substantial decision-making authority.

C. Jurisdiction

Provided that as disputes involve only civil matters, they can be covered in civil mediation without regard to the type of dispute or monetary amount in controversy.⁵⁸ Commercial matters are included in the meaning of "civil." However, in the context of mediation, civil matters do not involve domestic relations cases,⁵⁹ nor do they include administrative or criminal matters. Collective labor disputes are not subject to civil mediation, but individual labor disputes, such as a claim for wages, are considered "civil" for mediation purposes.⁶⁰

The District Court and its branches have subject matter jurisdiction over civil mediation cases.⁶¹ The court must also have jurisdiction over the defendant, which is determined essentially by domicile. Jurisdiction over the defendant can also be determined by the location of an office or place of business,⁶² the place where the property in dispute is located,⁶³ or the place where the damage occurs.⁶⁴ Additionally, the parties in dispute can agree on an alternative jurisdiction.⁶⁵

56. See Civil Mediation Act, *supra* note 33, art. 23.

57. See FLA. STAT. ANN. § 44.1011(2) (West Supp. 1996) (defining mediation as "a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties," and specifying that "decisionmaking authority rests with the parties").

58. See Civil Mediation Act, *supra* note 33, art. 2.

59. See Chang, *supra* note 54, at 520.

60. See *id.*

61. See Civil Mediation Act, *supra* note 33, art. 3(1).

62. See *id.* art. 3(1), para. 2.

63. See *id.* para. 4.

64. See *id.* para. 5.

65. See *id.* art. 3(2).

D. Commencement of Civil Mediation Procedure

There are two ways in which a civil mediation procedure may be initiated: by motion of a party or by referral of the court. A party may make a motion for mediation orally or in writing,⁶⁶ and must pay a fee equivalent to one fifth of the cost of a regular trial, according to the rules established by the Supreme Court of Korea.⁶⁷ In lieu of filing suit for a regular trial, a plaintiff may choose mediation from the onset of a dispute, regardless of whether prior agreement for mediation had been made with the opposing party. The trial court (the court of the suit in the first instance) may decide to refer a pending case to civil mediation at any point in the litigation, without the parties' consent, whenever it is deemed necessary.⁶⁸ The court making a decision of referral can conduct the mediation itself if it is deemed reasonable to do so.

If a plaintiff moves for mediation and thereafter files suit for a trial concerning the same dispute, the court taking charge of the suit may suspend the trial until the mediation procedure is completed.⁶⁹ On the other hand, if a case is pending on a trial procedure and is subsequently referred by the court for mediation, the trial procedure must be suspended until the mediation is completed.⁷⁰ When an agreement is reached through mediation or a decision in lieu of an agreement is finalized without objection, the pending suit is considered to be dismissed voluntarily.⁷¹

E. Mediators

There are three types of mediators (also called mediation agencies) in Korea. The first is a mediation judge. It is a general rule that mediation cases are conducted by a judge in charge of the mediation.⁷² The mediation judge may conduct a mediation case solely or direct a mediation committee to conduct the

66. *See id.* art. 5(1).

67. *See* Minsa Chojeong Kyuchik [Civil Mediation Rule], Supreme Court Rule No. 1120 (Aug. 21, 1990), art. 3, *amended by* Supreme Court Rule No. 1275 (Dec. 28, 1993).

68. *See* Civil Mediation Act, *supra* note 33, art. 6.

69. *See* Civil Mediation Rule, *supra* note 67, art. 4(1).

70. *See id.* art. 4(2).

71. *See id.* art. 4(3).

72. *See* Civil Mediation Act, *supra* note 33, art. 7(1).

case if the judge determines it to be proper. However, the judge should direct a mediation committee if the parties have made such an application.⁷³ The second type of mediator is a mediation committee. A mediation committee consists of two neutral non-judge commissioners and one judge who chairs the committee.⁷⁴ The commissioners are selected by the chair judge from a commissioners' list approved by the head of the District Court or by an agreement of the parties.⁷⁵ Every year the head of the District Court appoints knowledgeable and respectable laypersons as mediation commissioners.⁷⁶ It is generally recommended that the mediation commissioners be appointed from among persons who have some special knowledge and experience in particular fields, such as property appraisers, architects, and medical practitioners, because their expertise can be more persuasive to the parties in leading them towards an agreement. The commissioners receive an allowance in accordance with the rules established by the Supreme Court, and may receive travel and lodging expenses, and a daily fee, if necessary.⁷⁷

The third type of mediator is the court where a lawsuit is initiated and pending. When a pending lawsuit is referred to mediation, the referring court may conduct the mediation itself. Therefore, if a court makes a decision to refer a pending case to civil mediation, the court should decide as a threshold question whether it will conduct the mediation itself, rather than refer it to a mediation committee.

Allocation of cases among the three types of mediators is based on some standardized criteria.⁷⁸ Among cases referred by the court, tort cases resulting from car accidents or industrial accidents are undertaken directly by the court initially taking charge of the suit, because the court is the exclusive panel in such cases. Among the remaining cases, those which have complicated facts or which need expert knowledge are allocated to a mediation committee. A mediation judge takes

73. *See id.* art. 7(2).

74. *See id.* arts. 8-10.

75. *See id.* art. 10. However, it is only in very rare cases that the commissioners are selected by an agreement of the parties.

76. *See Civil Mediation Act, supra* note 33, art. 10(1).

77. *See id.* art. 12.

78. *See Guide for Activation of Use of Civil Mediation, Supreme Court Suit Regulation 1994, SONGMIN NO. 94-1, arts. 4-5.*

the rest of the cases.⁷⁹

F. Process of Mediation

The mediation judge⁸⁰ designates a conference date for mediation and notifies the parties of the date.⁸¹ If the plaintiff fails to appear on the conference date in a mediation case commenced by a motion, the mediation judge fixes another date and notifies both parties of the date.⁸² If the plaintiff fails to appear on the new fixed date or another subsequent date, the motion is considered to be dismissed voluntarily.⁸³ On the other hand, when the defendant fails to appear, the mediation judge must make a decision in lieu of an agreement.⁸⁴ In the event of a mediation case commenced by referral, when the conference fails to take place because of one or both parties' non-appearance two times or more, the mediation judge similarly must make a decision in lieu of an agreement.⁸⁵

The relative informality and flexibility of a mediation procedure is evident in Korea's system. The mediation conference is informal, and the choice of location is virtually unrestricted—it may be held in the “judge's chambers, a mediation conference room, a hearing room, or any other proper place such as the location relating to the dispute.”⁸⁶ Moreover, the judge is not required to wear a robe, as required for a regular trial;⁸⁷ in fact, the judge is encouraged not to wear a judge's robe in a mediation procedure in order to promote an agreement in a more relaxed atmosphere.

79. See *id.* art. 4. From March to November of 1993, among all the mediation cases which were conducted in the Seoul District Court, 63.2% were court-directed mediation cases, 13.4% were mediation committee cases, and 23.4% were mediation judge cases. See Lee, *supra* note 38, at 50.

80. All three types of mediators are vested with the same authority. For efficiency purposes, the following explanation will focus only on the mediation judge; however, the discussion is equally applicable to mediation committees and referring courts.

81. See Civil Mediation Act, *supra* note 33, art. 15(1)-(2).

82. See *id.* art. 31(1).

83. See *id.* art. 31(2).

84. See *id.* art. 32.

85. See *Methods of Handling Civil and Family Mediation*, Supreme Court Suit Regulation 1991, SONGIL NO. 91-2, art. 14.

86. *Id.* art. 8(1); see also Civil Mediation Act, *supra* note 33, art. 19.

87. See Judge and Court Clerk's Robe Rules, Apr. 4, 1973, Supreme Court Rule No. 516, art. 2, amended by Supreme Court Rule No. 1219 (July 28, 1992).

It is a general rule that the mediation procedure should be conducted in public. However, in the mediation judge's discretion, it is possible to close it to the public.⁸⁸ This factor is one of the more distinguishing features of Korean mediation.

A mediation judge may hear the statements of the parties or interested persons, and investigate the facts or evidence in a proper way as he deems necessary.⁸⁹ Upon a motion by a party, when it is deemed especially necessary, the court may issue an injunction prohibiting the other party or other interested persons from changing anything about the situation in dispute or from disposing of things involved in the dispute.⁹⁰

G. Confidentiality

The parties to the mediation may not use statements of opposing parties or interested persons made during the proceedings as evidence in subsequent civil litigation. This provision guarantees the parties' free statements by removing the fear that the statements might unduly prejudice a subsequently transferred trial procedure. Furthermore, a mediation commissioner will be severely punished if he discloses, without good cause, secrets obtained during the process.⁹¹ On the other hand, the mediation procedure is conducted publicly, in principle, although it can be closed to the public at the discretion of a mediator.⁹²

H. Completion

1. Dismissal Without Prejudice

When a motion for mediation is made, the written application should be served upon the defendant without delay.⁹³ If the service cannot be made, the mediation judge should set an

88. See Ill Yung Min, *Kaijeong Minsa Chojeongbeop Haiseol* [Explanation of Revised Civil Mediation Act], HUM. RTS. & JUSTICE, Apr. 1993, at 104, 111; Civil Mediation Act, *supra* note 33, art. 20. Actually, it is very rare that a mediation procedure is conducted in public. However, the mediation judge has the discretion to permit proper persons to observe the mediation. *See id.*

89. *See* Civil Mediation Act, *supra* note 33, art. 22.

90. *See id.* art. 21(1).

91. *See id.* art. 41(2).

92. *See* Min, *supra* note 88, at 111; Civil Mediation Act, *supra* note 33, art. 20.

93. *See* Civil Mediation Act, *supra* note 33, art. 14.

appropriate deadline and order the plaintiff to report the defendant's exact address or to give the court some other means of serving the documents. In the event that the plaintiff fails to follow the order, the mediation judge must dismiss the motion without prejudice.⁹⁴ The mediation judge may also dismiss the motion without prejudice when the parties cannot be notified of the conference date.⁹⁵

2. Withdrawal (Voluntary Dismissal)

The plaintiff may withdraw a motion for mediation at any time before the completion of the mediation procedure.

3. Decision to Reject the Motion

The mediation judge may decide to reject the motion for mediation if either the nature of the case is improper for mediation, or the purpose of the plaintiff's motion is unfair.⁹⁶

4. No Agreement

The mediation judge must terminate a mediation procedure when: (1) the parties do not reach an agreement or the agreement between the parties is unreasonable; and (2) the judge does not make a decision in lieu of an agreement. In this event, the case is transferred to the regular trial system.⁹⁷

5. Agreement

Agreement in mediation has the same effect as a settlement in court.⁹⁸ Both are considered as a final and conclusive judgment according to the Code of Civil Procedure.⁹⁹ Consequently, an agreement in mediation is effectively a final and conclusive judgment.

94. See Civil Mediation Rule, *supra* note 67, art. 2(2).

95. See Civil Mediation Act, *supra* note 33, art. 25(1).

96. See *id.* art. 26.

97. See *id.* art. 36(1).

98. See *id.* art. 29.

99. See CODE OF CIV. P., *supra* note 42, art. 206.

6. Decision in Lieu of Agreement

If the parties do not reach an agreement or if the agreement is unreasonable, the mediation judge may make a decision in lieu of an agreement, within the scope of the plaintiff's motion, for the purpose of resolving the case impartially.¹⁰⁰ The mediation judge must consider the interests of the parties and other circumstances, as long as there is no reasonable hindrance.¹⁰¹ As mentioned earlier, the same result occurs when the defendant fails to appear on the first conference date in a mediation commenced by a motion or when a conference fails to take place because of the parties' non-appearance two times or more in a mediation by the court's referral.¹⁰² If, however, an objection is filed within two weeks, the decision becomes void, and the case is transferred to the regular trial calendar or returned to the original trial court. If there is no objection, the decision has the same effect as a settlement in court.¹⁰³

III. COURT-CONNECTED MEDIATION IN FLORIDA

A. *Definition and Nature*

Florida's system of mediation is characterized by the retention of primary decision-making authority in the parties themselves.¹⁰⁴ Mediation is defined as "a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties," and is an "informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement."¹⁰⁵ Florida has various forms of mediation, such as circuit court mediation, which involves cases in civil matters other than family issues;¹⁰⁶ county court mediation, which involves small claims and other civil cases within the jurisdiction of county courts;¹⁰⁷ and

100. See Civil Mediation Act, *supra* note 33, art. 30.

101. See *id.*

102. See *supra* text accompanying notes 84-85.

103. See Civil Mediation Act, *supra* note 33, art. 34(1)-(4).

104. See FLA. STAT. ANN. § 44.1011(2) (West Supp. 1996).

105. *Id.*

106. See *id.* § 44.1011(2)(b).

107. See *id.* § 44.1011(2)(c).

family mediation, which involves disputes of a familial nature, such as divorce, property settlements, child custody, support, visitation and like matters.¹⁰⁸ Each form of mediation provides that the parties themselves act as the primary negotiators.¹⁰⁹

The general features of mediation, include: (1) the mediator's non-decisionmaking role; (2) the voluntary participation of the parties; (3) a nonadversarial and informal process; and (4) confidentiality. In mediation, the mediator "never renders a decision of any type."¹¹⁰ The mediator's non-decision-making role is an important feature in achieving Florida's objective of "helping the disputing parties reach a mutually acceptable and voluntary agreement."¹¹¹ This process, whereby the parties are the ultimate decision makers, will likely lead to more favorable results for both parties and an agreement that, because of its collaborative nature, will be honored by the parties.¹¹² The second feature of mediation is that it is a voluntary process. Through the parties' voluntary participation, mediation tends to maintain or repair relationships by ensuring that the parties' interests are preserved.¹¹³ Although mediation may be mandated by the court, "the parties are asked only to attempt to reach a . . . voluntary agreement."¹¹⁴ The third feature of mediation is its informality. "[T]here are no procedural or evidentiary rules governing the . . . mediation proceeding,"¹¹⁵ and the parties are free to say anything they want, and present any documents or information that they think would be relevant to the resolution of

108. See *id.* § 44.1011(2)(d). Additionally, the Florida mediation statute provides for appellate court mediation. *Id.* § 44.1011(2)(a); see *infra* Part VI.F.

109. See FLA. STAT. ANN. § 44.1011(2) (West Supp. 1996). However, if a party is represented by counsel in circuit court mediation, the counsel of record must appear in the proceedings unless otherwise ordered by the court, or unless the parties stipulate that they do not wish to be represented by counsel during circuit court mediation. See *id.* § 44.1011(2)(b).

110. Press, *supra* note 11, § 1.8, at 1-11.

111. FLA. STAT. ANN. § 44.1011(2) (West Supp. 1996). Although the mediator does not render a decision in the process, his or her role includes "identifying issues, fostering joint problem solving, and exploring settlement alternatives." *Id.*

112. See Press, *supra* note 11, § 1.8, at 1-12.

113. See *id.*

114. *Id.* §§ 1.9-10, at 1-12 to 1-13.

115. John Paul Jones, *Circuit Civil Mediation*, in 2 ALTERNATE DISPUTE RESOLUTION IN FLORIDA, *supra* note 11, § 6.1, § 6.15, at 6-13.

the dispute.¹¹⁶ The last feature of mediation is the confidentiality of the proceedings. In a court-ordered mediation proceeding "[e]ach party . . . has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding."¹¹⁷

B. Jurisdiction

As of 1995, circuit civil mediation programs operate in ten of the twenty circuits in Florida.¹¹⁸ The cases that are conducted in circuit civil mediation are non-domestic civil cases over which the circuit court has jurisdiction. That is, all cases with an amount of \$15,000 or more in dispute can be mediated in circuit civil mediation.¹¹⁹ The types of circuit cases that can be referred to mediation include personal injury, contract, construction, malpractice, real estate, and products liability.¹²⁰ Overall, the most common types of cases are automobile negligence cases.¹²¹

Thirty-six of sixty-seven counties have county civil mediation programs.¹²² As the county court has jurisdiction over actions where the amount in controversy does not exceed \$15,000, the cases referred to the county civil mediation program are limited in the same way. Therefore, it can be said

116. *See id.*

117. FLA. STAT. ANN. § 44.102(3) (West Supp. 1996).

118. *See* POSEY ET AL., *supra* note 31, at 3. 1995 figures show that circuit court mediation programs existed in the 4th circuit (Clay, Duval, and Nassau counties), as well as the 6th (Pinellas and Pasco counties), 10th (Hardee, Highlands, and Polk counties), 11th (Dade county), 13th (Hillsborough county), 15th (Palm Beach county), 16th (Monroe county), 17th (Broward county), 18th (Brevard and Seminole counties), and 20th (Charlotte, Collier, Glades, Hendry, and Lee counties). *See id.* at 1, 3.

119. FLA. STAT. ANN. § 26.012(2)(a) (West 1988 & Supp. 1996) provides that the circuit court has jurisdiction over "all actions at law not cognizable by the county courts . . ." Under section 34 of the Florida statutes, county courts have jurisdiction over cases in which the amount in dispute is valued up to \$15,000. *See id.* § 34.01(1)(c)(4) (West Supp. 1996). Thus, the circuit court has jurisdiction over all cases valued at or above \$15,000.

120. *See* POSEY ET AL., *supra* note 31, at 82.

121. *See id.* at 94-97.

122. County civil mediation programs operate in Alachua, Bay, Brevard, Broward, Charlotte, Citrus, Collier, Dade, DeSoto, Duval, Escambia, Glades, Hendry, Highlands, Hillsborough, Indian River, Lake, Lee, Leon, Manatee, Marion, Martin, Okaloosa, Okeechobee, Orange, Osceola, Palm Beach, Pasco, Pinellas, Polk, Santa Rosa, Sarasota, Seminole, St. Lucie, Volusia, and Wakulla counties. *See id.* at 1-3.

that there are two kinds of cases in county civil mediation; small claims cases (\$2,500 and under)¹²³ and cases which exceed the small claims amount (over \$2,500 but under \$15,000). Generally, the types of cases in county civil mediation involve landlord/tenant disputes, auto repair and contract claims, and consumer complaints.¹²⁴

C. Commencement of Mediation

A court-connected mediation procedure starts from the court's order of referral. A court may refer to mediation all or any part of a pending suit¹²⁵ in any of three circumstances: (1) party stipulation;¹²⁶ (2) motion by a party to the dispute; and (3) motion by the court. In the first situation, parties involved in a pending civil suit may seek mediation by filing a written stipulation to such effect at any time during the pendency of the action.¹²⁷ In this event, the order of referral is mandatory¹²⁸ and must point out such stipulation clearly.¹²⁹ In the second and third situations,¹³⁰ mediation may be ordered if, in the judge's discretion, the nature of the action is such that mediation would be beneficial to the litigants or the court.¹³¹ In the referral of small claims disputes in county mediation, there is a specific procedure¹³² wherein the matters are automatically referred to mediation. The mediation conference is held either at the time of or soon after the pretrial hearing, unless the court orders otherwise.¹³³ However, the mediation conference may not be held more than fourteen days

123. FLA. SMALL CLAIMS R. § 7.010(b) (small claims actions mean "all actions at law of a civil nature . . . in which the demand or value of property involved does not exceed \$2,500 . . .").

124. See Sharon Press, *County Civil Mediation*, in 2 ALTERNATE DISPUTE RESOLUTION IN FLORIDA, *supra* note 11, § 7.1, § 7.2, at 7-3.

125. See FLA. STAT. ANN. § 44.102(2)(a) (West Supp. 1996); FLA. R. CIV. P. § 1.700(a).

126. See FLA. R. CIV. P. § 1.700(a).

127. See *id.*

128. See *id.* § 1.710(b).

129. See *id.* § 1.700(a). This section provides that "[s]uch stipulation shall be incorporated into the order of referral." *Id.*

130. See *id.* § 1.710(b).

131. See *id.*

132. See *id.* § 1.750(c).

133. See *id.*; Press, *supra* note 124, § 7.4, at 7-5.

after the pretrial conference.¹³⁴ In any case, disputants are required to file a case in court in order to use circuit or county mediation.¹³⁵

D. Mediators

One of the most important elements contributing to successful mediation is the quality and ability of the mediator who has control over the mediation procedure. Establishing standards for qualifications, training, and professional conduct for mediators is essential for attracting and maintaining mediators of quality and ability. Florida has abundant provisions in this area. First, the Florida Code provides that mediators be certified by the Supreme Court.¹³⁶ The chief judge of each judicial circuit is required to maintain a list of certified mediators, as well as those who have registered for appointment.¹³⁷ The Supreme Court is responsible for establishing "standards and procedures for qualifications, certification, professional conduct, discipline, and training for mediators."¹³⁸ A mediator appointed according to these statutes has the same judicial immunity as a judge.¹³⁹ Second, the Florida Rules of Civil Procedure set forth the appointment procedure for mediators,¹⁴⁰ their compensation,¹⁴¹ and special directions for county court actions.¹⁴² Third, the Florida Rules for Certified and Court-Appointed Mediators (the Rules) specify mediator qualifications,¹⁴³ standards of professional conduct,¹⁴⁴ and discipline procedures.¹⁴⁵ Fourth, a set of mediation training

134. See FLA. R. CIV. P. § 1.750(c).

135. Complaints filed in CDS centers are, however, an exception. The parties are not required to file a case in court, and court intervention is unnecessary, provided that all parties voluntarily agree to proceed directly to the CDS center for mediation. See Posey, *supra* note 22, § 8.5, at 8-5.

136. FLA. STAT. ANN. § 44.106 (West Supp. 1996).

137. See *id.* § 44.102(5).

138. *Id.* § 44.106.

139. See *id.* § 44.107. For a more detailed review of judicial immunity of mediators, see J. Sue Richardson, Comment, *Mediation: The Florida Legislature Grants Judicial Immunity to Court-Appointed Mediators*, 17 FLA. ST. U. L. REV. 623, 623-47 (1990).

140. FLA. R. CIV. P. § 1.720(f).

141. *Id.* § 1.720(g).

142. *Id.* § 1.750.

143. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS § 10.010.

144. *Id.* §§ 10.020-150.

145. *Id.* §§ 10.160-300.

program standards are adopted separately as an administrative order by the Supreme Court¹⁴⁶ in accordance with the three types of mediation programs.¹⁴⁷

The qualifications for mediators are distinct for each of the mediation programs because each mediation program has a different structure, thereby requiring different skills.¹⁴⁸ For example, in circuit court mediation, mediators are required to: (1) complete a forty-hour training program certified by the Florida Supreme Court; (2) be either a member of the Florida Bar for a minimum of five years or a retired trial judge from any United States jurisdiction; and (3) complete a mentorship consisting of the observation of two circuit mediations and the conducting of two supervised circuit mediations.¹⁴⁹ County court mediators are required to: (1) complete a twenty-hour training program; and (2) complete a mentorship consisting of the observation of a minimum of four county mediations and the conducting of four supervised county mediations.¹⁵⁰ The circuit mediator requirements reflect the fact that circuit mediation cases usually involve legal arguments that warrant additional education and experience as "threshold requirements" for mediators.¹⁵¹

Because a mediator holds a unique position of trust, he or she must protect that trust while assisting the parties in the resolution of their conflict. Accordingly, the mediator must adhere to high standards of integrity and professional conduct as reflected in the Rules, whose "overall structure . . . emphasizes a mediator's duties to the public, to the parties, to the

146. See *id.* § 10.120; Sharon Press, *Mediator Qualifications and Training*, in 2 ALTERNATE DISPUTE RESOLUTION IN FLORIDA, *supra* note 11, § 4.1, § 4.11, at 4-13.

147. Namely, the circuit civil mediation, county civil mediation, and family mediation programs. See *supra* text accompanying notes 106-08.

148. See Press, *supra* note 146, § 4.4, at 4-6.

149. See FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS § 10.010(c)(1)-(3).

150. See *id.* § 10.010(a)(1)-(2). Certification as a circuit court or family mediator constitutes automatic qualification as a county court mediator. See *id.* § 10.010(a).

151. Press, *supra* note 146, § 4.6, at 4-8. In family mediation, mediators are required to have some specific professional degree or license, or specific period of family mediation experience in addition to completing a training program and a mentorship. See FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS § 10.010(b)(1)-(3). However, in the CDS program, "[t]here are no formal education or experiential requirements for CDS mediators." Posey, *supra* note 22, § 8.5, at 8-5.

court, and to the mediation process.”¹⁵² The Rules also provide procedures for disciplining mediators who violate the standards of conduct. The standards of conduct and disciplinary rules apply to all mediators, whether they are certified or non-certified mediators, and whether or not the mediation is court-sponsored. This includes mediators who are selected by the parties.¹⁵³ The Rules provide for a formal complaint procedure, hearings, and sanctions. Publication of any sanctions imposed, and the reasons therefor, is mandatory.¹⁵⁴

Training and education standards are imposed on the mediator as well. In addition to the qualification requirements, a mediator is “obligated to acquire knowledge and training in the mediation process, including an understanding of appropriate professional ethics, standards, and responsibilities.”¹⁵⁵ Additionally, mediators are encouraged to continue their professional education and are “personally responsible for ongoing professional growth.”¹⁵⁶ The Supreme Court appointed a Committee on Mediation and Arbitration Training in 1988, which has become a standing committee, and charged it with the function of developing, reviewing, and monitoring training programs and standards.¹⁵⁷ Mediation training program standards provide criteria regarding methodology, subject matter, program evaluation, student-to-faculty ratio, as well as specific trainer qualifications and program standards for the three types of mediation.¹⁵⁸

Finally, a mediator may be compensated for his or her services and expenses, but he or she must endeavor to keep the charges reasonable and consistent with the case.¹⁵⁹ If the

152. Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 706 (1994). For a more detailed review of the rules and standards of discipline, see generally *id.* at 706-23.

153. See FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS §§ 10.020(a), -.160.

154. See *id.* §§ 10.220-.240.

155. *Id.* § 10.120(a).

156. *Id.* § 10.120(b).

157. See Press, *supra* note 146, §§ 4.11-.12, at 4-13 to 4-14.

158. See *id.* § 4.13, at 4-15. For a more detailed review of the training standards, see *id.* §§ 4.11-.31, at 4-12 to 4-21.

159. See FLA. R. CIV. P. § 1.720(g); FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS § 10.100(a). Most small claims mediators and CDS mediators are volunteers. See Press, *supra* note 124, § 7.6, at 7-6; Posey, *supra* note 22, § 8.5, at 8-5.

mediator is compensated by the parties, the reasonableness of the fees may be determined by the presiding judge, and absent written agreement, the fees are fixed at the hourly rate set by the presiding judge.¹⁶⁰ However, if a qualified, volunteer mediator is available, that mediator must be appointed whenever possible.¹⁶¹ The Rules provide detailed standards regarding mediator's fees, including a written explanation, itemized records, and rules on referral and contingent fees.¹⁶²

E. Process of Mediation

The mediator who conducts a specific mediation case is chosen by the parties' mutual agreement or by the court's appointment.¹⁶³ The parties may choose their own mediator by agreement within ten days of the order of referral.¹⁶⁴ The mediator, although not certified, may be deemed otherwise qualified to mediate, as determined by the presiding judge and by the parties.¹⁶⁵ If the parties cannot agree upon a mediator, the court must appoint a certified mediator selected by rotation or by another procedure adopted in advance.¹⁶⁶ This provision allows the parties additional autonomy in mediation—"in [approximately] 95% of the cases in circuits keeping such statistics, the parties are exercising their right and choosing the mediator."¹⁶⁷ In contrast, small claims mediation does not involve an absolute right of the parties to choose their own mediators. Small claims mediators are generally volunteers and are assigned cases as they arise.¹⁶⁸

The mediation process is relatively swift, as the first conference must be held within sixty days of the order of referral.¹⁶⁹ The court or the designated mediator must notify the parties of the date, time, and place of the conference in writing

160. See FLA. R. CIV. P. § 1.720(g).

161. See FLA. STAT. ANN. § 44.102(5)(a) (West 1996). Such volunteers may be entitled to reimbursement for expenses if a mediation program is funded. See *id.*

162. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS § 10.100.

163. See FLA. R. CIV. P. § 1.720(f).

164. See *id.* § 1.720(f)(1).

165. See *id.* § 1.720(f)(1)(B).

166. See *id.* § 1.720(f)(2).

167. Jones, *supra* note 115, § 6.8, at 6-8.

168. See Press, *supra* note 124, § 7.6, at 7-6.

169. See FLA. R. CIV. P. § 1.700(a)(1).

within fifteen days after the designation of the mediator.¹⁷⁰ Within fifteen days after the order of referral, a party may move to dispense with mediation or file motions to defer mediation or to disqualify the mediator.¹⁷¹

The parties are required to attend the initial conference.¹⁷² Failure to appear without good cause can subject a party to sanctions, including the fees and costs of the mediator. If a motion is made, the court must impose the sanctions against the absent party.¹⁷³ However, once the parties appear at the initial conference, their continued presence at the conference is voluntary.¹⁷⁴ In circuit court mediation, if a party is represented by counsel, counsel must appear at the conference,¹⁷⁵ but mediation may proceed in the absence of counsel at the discretion of the mediator and with agreement of the parties.¹⁷⁶ In county mediation, counsel's presence is not required, but he or she may participate in the mediation conference.¹⁷⁷

The mediator is to be in continual control of both the mediation session and the procedure to be followed. He or she also has discretion to reschedule or adjourn the mediation at any time, or to consult privately with any party or party's counsel.¹⁷⁸ Moreover, the mediator shall assess the appropriateness of mediation and present alternative methods of dispute resolution available to the parties.¹⁷⁹

170. *See id.* § 1.700(a)(2).

171. *See id.* § 1.700(b)-(d).

172. In circuit and county mediation, it is possible for the party's representative to attend the conference in place of the party if the representative has "full authority to settle the dispute without further consultation." *Id.* § 1.720(b)(1). However, in family mediation, the party's own presence is required unless otherwise stipulated. *See* FLA. FAM. LAW R.P. § 12.740(d).

173. *See* FLA. R. CIV. P. § 1.720(b).

174. *See* Jones, *supra* note 115, § 6.14, at 6-13; FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS §§ 10.050(b), -110(b)(1). This is in accord with the consensual nature of the mediation process.

175. *See* FLA. STAT. ANN. § 44.1011(b) (West 1996); FLA. R. CIV. P. § 1.720(b)(2).

176. *See* FLA. R. CIV. P. § 1.720(d).

177. *See* FLA. STAT. ANN. § 44.1011(c). It appears as if FLA. R. CIV. P. § 1.720(b), which requires counsel's presence, applies to county civil mediation as well; however, the Florida Code prevails over the Rules.

178. *See* FLA. R. CIV. P. § 1.720(c)-(e).

179. *See* FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS § 10.050(b).

F. Confidentiality

The Florida Code creates a privilege of confidentiality for each party involved in a mediation proceeding. Additionally, it provides that "all oral or written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the disclosure requirements of [Florida Statutes] chapter 119."¹⁸⁰ Additionally, all communications are to be kept confidential and inadmissible as evidence in any subsequent legal proceeding.¹⁸¹ The privilege of non-disclosure and confidentiality may be invoked by the parties and can be waived only with their full consent.¹⁸² Furthermore, mediators may not disclose any information obtained in individual meetings unless the parties permit disclosure.¹⁸³ Accordingly, "mediators cannot be called to testify regarding statements made during a mediation session unless all parties waive the privilege."¹⁸⁴ However, in disciplinary proceedings for mediators violating the standards of conduct, exceptions to this privilege can be made.¹⁸⁵ Even so, if privileged communications are used in a disciplinary proceeding, they must be used only for the internal use of the body conducting the investigation, and are inadmissible as evidence in any subsequent legal proceedings.

G. Completion

Mediation must be completed "within [forty-five] days of the first mediation conference unless extended by order of the court or by stipulation of the parties."¹⁸⁶ This provision is intended to make mediation a faster and less expensive means of case disposition.¹⁸⁷ If the parties attend the mediation session but no agreement is reached, the mediator must report the lack of an agreement without any comment or recommendation

180. FLA. STAT. ANN. § 44.102(3). Section 119 is the Public Records Law. This law provides that all public records must be "open for personal inspection by any person." *Id.* § 119.01(1).

181. *See id.* § 44.102(3).

182. *See Jones, supra* note 115, § 6.16, at 6-14.

183. *See* FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS § 10.080(b).

184. *Press, supra* note 11, § 1.12, at 1-16.

185. *See* FLA. STAT. ANN. § 44.102(4).

186. FLA. R. CIV. P. § 1.710(a).

187. *See Press, supra* note 11, § 1.13, at 1-20.

to the court.¹⁸⁸ However, the mediator, with the consent of the parties, "may identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement."¹⁸⁹ When it is clear that the parties wish to withdraw from the mediation proceeding, the mediator must permit withdrawal.¹⁹⁰ Moreover, the mediator must suspend or terminate the proceeding if the parties are unable or unwilling to participate meaningfully or where an agreement is unlikely.¹⁹¹ Accordingly, prolonged, unproductive discussions which would result in emotional and monetary costs to the participants are prohibited.¹⁹²

If a partial or full agreement is reached, it must be reduced to writing and signed by the parties and their counsel.¹⁹³ In the event of full agreement, the mediator must ensure that the terms of the agreement are recorded appropriately and must discuss with the parties the process for formalizing and implementing the agreement.¹⁹⁴ However, this does not give the mediator license to write the agreement.¹⁹⁵ On the contrary, to ensure the mediator's impartiality, "it would not be advisable for the mediator to be the scribe."¹⁹⁶ With the parties' consent or when required by law, the agreement is filed with the court.¹⁹⁷ A joint notice of dismissal will be entered if the agreement is not filed.¹⁹⁸ When a mediation agreement is breached, or a party fails to perform, sanctions may be imposed by the court, including costs, attorneys' fees, or entry of judgment.¹⁹⁹

188. See FLA. R. CIV. P. § 1.730(a).

189. *Id.*

190. See FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS § 10.110(b)(1).

191. See *id.* §§ 10.050(b), -110(b)(2).

192. See *id.* § 10.110(b)(2).

193. See FLA. R. CIV. P. § 1.730(b).

194. See FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS § 10.110(a)(1).

195. See Jones, *supra* note 115, § 6.17, at 6-15.

196. *Id.*

197. See FLA. R. CIV. P. § 1.730(b).

198. See *id.*

199. See *id.* § 1.730(c). In the CDS program, an agreement is regarded as a contract. Therefore, if there is a breach of an agreement, the party must file a formal suit in contract against the violator of the agreement in order to enforce the agreement. See Posey, *supra* note 22, § 8.7, at 8-7. In small claims mediation, an agreement must be written in the form of a stipulation, which may be entered as an order of the court. See FLA. R. CIV. P. § 1.750(f).

IV. COMPARISON AND CRITICISM

A. *Definition and Nature*

It may appear as though there is no essential difference in the definition of mediation in Korea and Florida. In both systems the proceeding is conducted by a neutral third person, the objective is to encourage the parties to reach a voluntary agreement, and it is an informal and nonadversarial process. However, the systems are distinguishable in their respective approaches to the relationship between mediation and the court. Florida's court does not often intervene directly except for the order of referral, which initiates the mediation procedure. In contrast, the Korean court takes part in the mediation proceeding as an essential supervisor, from beginning to end, allowing the judge to take an active part in mediation as a mediator. When a pending case is referred to mediation, the referring court may decide to conduct the mediation itself.²⁰⁰ The Korean mediation model may be properly viewed as "court-contained" mediation rather than as "court-connected" mediation. Accordingly, the disposition of mediation cases is the responsibility of the court in addition to litigation. Although the judges take charge of the work of mediation, the court's participation is unlikely to affect the nature of mediation conducted by the neutral third person, because the court is deemed to possess the highest degree of neutrality. As a result of compulsory court participation, however, Korean courts do not enjoy a reduction in their heavy caseloads, one of the merits of the Floridian model. In this regard, the Korean courts would benefit from establishing a mediator system independent from the judge.

The most distinguishing difference between the Floridian and Korean systems is the role of the mediator. In Florida, a mediator never renders a decision of any type. Decision-making authority rests solely with the parties.²⁰¹ In Korea, however, a mediator must decide the reasonableness of the agreement even though the agreement is reached between the parties. If the mediator reviews the agreement and finds it to be unreasonable,²⁰² or if the parties do not reach an agreement,

200. See *supra* Part II.E.

201. See *supra* text accompanying notes 104, 110.

202. While it is theoretically possible, there are no recent examples where an

the mediator must either terminate the mediation, treating the case as having reached no agreement, or make a decision in lieu of an agreement.

Although there are a variety of definitions for the term "mediation," "most people agree on the purpose of the process: to assist people in reaching a voluntary resolution of a dispute or conflict."²⁰³ Since the Korean mediator renders a decision, its authority clearly exceeds the agreed-upon scope of mediation. However, even when a decision in lieu of an agreement is made, the decision becomes null and void if either of the parties files an objection within two weeks.²⁰⁴ There is no penalty for filing an objection, and it is up to the parties whether or not to follow the decision. In this way, it can be said that the parties' autonomy is preserved. To summarize, Korean civil mediation is not mediation in the strictest sense, but a special process in which mediation is combined with non-binding arbitration. It is better described as a kind of transformed mediation-arbitration (med-arb).²⁰⁵ In other words, if the parties do not come to an agreement, the mediator must make a decision in lieu of an agreement, although the decision has no binding effect.

B. Commencement

In Florida, a court-connected mediation procedure begins with the court's order of referral. Referral is based upon the parties' written stipulation, a motion of a party, or the court's own motion. In any case, Florida requires that disputants first file a suit in court in order to use court-connected mediation.

By contrast, the Korean civil mediation procedure begins with either the court's order of referral or a party's unilateral motion without filing a suit. If a party wants to avoid damaging a relationship with the opposite party or to resolve the dispute with a simple, speedy, and inexpensive procedure, he or she can achieve this end by making a motion for direct me-

agreement has been judged to be unreasonable.

203. KOVACH, *supra* note 1, at 16.

204. *See supra* text accompanying note 103.

205. In the original med-arb process, a neutral third party begins the proceeding as a mediator. If no agreement is reached between the parties, then the mediator works as an arbitrator and usually makes a binding award. *See KOVACH, supra* note 1, at 248.

diation without filing a suit. If an agreement is not reached in a mediation procedure, the case is transferred to a regular trial procedure. When the case is transferred to trial, the plaintiff is considered to have filed suit for trial at the time when the plaintiff made the motion for mediation. The fee required at this time is the remaining four-fifths of the original filing fee.²⁰⁶ Therefore, there is no great disadvantage to a direct motion for mediation compared with a direct trial suit.

It may be advisable for Florida's court-connected mediation to allow a party to make a motion for mediation without filing a suit even though there is no agreement to mediate between the parties.²⁰⁷ This can save time and money for both the parties and the court. As for the opponent, there seems to be no more disadvantage to being a defendant in a mediation proceeding than being the defendant in a trial procedure.²⁰⁸ If there is no agreement for mediation, the matter of fees can be determined by the court and all the other matters can follow the statutes and rules concerning court-connected mediation. On the other hand, in civil mediation in Korea, the parties should be given the right to make a motion for referral to mediation in a pending trial procedure. This can promote the parties' voluntariness in mediation.

Whether parties have the right to make a motion to forgo mediation after being referred to mediation is a different question in the two systems. Florida's mediation system allows such a motion while Korea's does not. The result is that mediation in Florida gives greater control to the parties than the Korean system.

206. See Civil Mediation Act, *supra* note 33, art. 36. The first fifth of the filing fee is paid when the mediation application is made.

207. In the CDS program, a direct referral without filing a suit is available, but an agreement between the parties is required as stated earlier. See *supra* note 135. In medical malpractice cases, "the possibility of a mediation during the pre-suit screening period is an idea which should be given serious consideration." Frank Strelec, *A Trial Lawyer's Guide to Mediation*, FLA. B.J., July-Aug. 1991, at 68, 69; see also FLA. STAT. ANN. §§ 766.106, -.106(3)(b)(3), -.106(10) (West Supp. 1996) (setting forth the procedure for pre-suit notification to insurers in medical malpractice claims, and the possibility of arbitration on the issue of damages).

208. The opponent would be destined to be the defendant at a trial procedure in any case.

C. Mediators

Florida has three mediator systems, none of which uses the trial judge. People who want to be court-certified mediators must have set qualifications and complete standardized training and mentorship programs. After they are certified by the Florida Supreme Court, they may conduct specific mediation cases by the appointment of either the parties or the court. By contrast, in Korea, the principal mediator is the judge. Among the three types of mediators, the chair of a mediation committee is also a judge, as is the mediation judge and the court taking charge of the lawsuit.

The judge's role as a mediator in Korea raises a number of issues. First, one of the merits of mediation—to reduce the heavy caseload of the court—is lost. The fact that judges act as mediators means that the extra caseload of mediation is imposed on the judge who is already burdened by a heavy litigation caseload. If mediation is seen as nothing but a simple means of disposing of litigation, it will lose its value as an independent dispute resolution mechanism. Accordingly, the establishment of a separate mediator system is essential to the further development of mediation in Korea. In order to do so, Korean legislators could convert the present nature of the mediation commissioner to an independent mediator. The present mediation commissioner could be certified by the Supreme Court after some specified training, as in Florida.

Second, arguably, a judge is not suitable as a mediator because the original duty of a judge is not to mediate but to decide a case by applying the law to the facts. The role of a mediator is that of a facilitator and a negotiator.²⁰⁹ During the course of the mediation process the role of the mediator changes; he or she is a supervisor, teacher, clarifier, advocate, catalyst, orchestrator, deal maker, and translator.²¹⁰ The successful mediator must know how to: (1) communicate both by sending and receiving messages; (2) take notes and organize the important messages and information; (3) counsel and calm the parties in order to promote positive feelings; and (4) read and understand human behavior and motivation.²¹¹ However,

209. See KOVACH, *supra* note 1, at 28.

210. See *id.*

211. See *id.* at 30-38.

judges in Korea have few opportunities to learn or to be trained in these roles and skills. Of course, as almost all Korean judges complete a four-year university education in law and an additional two years of mandatory practical training in the Judicial Research and Training Institute (JRTI) of the Supreme Court before being appointed as judges,²¹² it can be said that all Korean judges have some competence as mediators. However, the content of a university education is mainly the theory of law, while the content of the JRTI emphasizes precedents and clerical court skills.²¹³ Even after appointment, there is no education in mediation for judges.²¹⁴ Of course, judges could be competent mediators because they can understand the issues in dispute and they have a great deal of experience in communicating at hearings in various types of cases. However, in order to prepare them better and enhance the Korean mediation system, programs for training mediation judges should be established as soon as possible.

The position of the Korean mediation commissioner is inferior to that of a court-appointed mediator in Florida.²¹⁵ First, the standard for appointing mediation commissioners is too abstract in Korea. The Civil Mediation Act only requires appointees to be "knowledgeable and respectable."²¹⁶ This stands in striking contrast to the Florida Rules, which provide detailed standards for all types of mediators. Second, in Korea, there is no special mechanism or system concerning the training of mediation commissioners. Some district courts have a meeting for training commissioners, the content of which usually is insubstantial. This also stands in striking contrast to Florida's mediation training program standards, which provide for detailed training in each of the three types of mediation.

212. Qualifications for judges require the completion of a two-year training program at the JRTI of the Supreme Court, after passing the national judicial examination. See Chang Soo Yang, *The Judiciary in Contemporary Society: Korea*, 25 CASE W. RES. J. INT'L L. 303, 304 (1993).

213. See *id.* at 308.

214. The JRTI also takes responsibility for retraining judges. For that purpose, some programs in the form of group discussion or seminars are provided a few times every year. But the retraining is of minimal length and is provided to only a small number of judges. See *id.* at 309.

215. However, since Korean commissioners are not independent mediators, it is arguably unreasonable to compare the two by assuming they are in the same position.

216. Civil Mediation Act, *supra* note 33, art. 10(1).

Third, compensation for the Korean mediation commissioner is merely a nominal sum. It is too small compared to the hourly fee paid to Florida's mediators. In civil mediation in Korea, it is critical to set up more concrete standards for appointing mediation commissioners, to establish some training program standards for mediation commissioners, and to take some proper measures in order to improve a Korean mediation commissioner's position, including the provision of a more reasonable fee.

D. Confidentiality

In both Korean civil mediation and court-connected mediation in Florida, communications in mediation proceedings are inadmissible in a subsequent civil trial procedure. However, Florida protects confidentiality more thoroughly than Korea to the extent that any person present at the mediation proceeding is prevented from disclosing communications. Communications are inadmissible in any subsequent legal proceeding except for disciplinary proceedings filed against mediators. Furthermore, the principle of open procedure in Korea's civil mediation is likely to conflict with the confidentiality of mediation. In order to promote the merits of mediation, it is preferable to conduct mediation proceedings in private.²¹⁷

E. Completion

The most notable difference between the completion of mediation in Florida and Korea is whether the mediator has the authority to make a decision in lieu of an agreement. As noted earlier, it is questionable whether a decision in lieu of an agreement is contrary to the nature of mediation, but the parties' right of objection guarantees the settlement's voluntary nature.

Additionally, Korean civil mediation does not have any provision concerning a partial agreement. The Florida Rules for Certified and Court-Appointed Mediators provide that the mediator must "discuss the procedures available to resolve the remaining issues" if the participants reach a partial agree-

217. In Florida, there are no specific statutes or rules to direct whether the mediation proceedings should be conducted in private or not.

ment.²¹⁸ In many cases, especially those having several legal issues, agreement can be reached only on some of the issues. Under these circumstances, it is unreasonable to regard the mediation as having reached no agreement concerning the whole case because of the lack of full agreement. Accordingly, it is advisable to provide for the possibility of a partial agreement in civil mediation in Korea.

V. CONCLUSION

This article presents several differences between Korean civil mediation and Floridian court-connected mediation. Compared with Korean civil mediation, Florida's court-connected mediator has no decision-making authority. Additionally, Florida's mediation allows the parties to participate in mediation proceedings more voluntarily than does Korea's. For example, in Florida's mediation, the referral order may be entered upon the parties' stipulation or by a party's motion, and a party may make a motion to dispense with mediation, to defer mediation, or to disqualify the mediators. A more important element is that the parties have the right to select their own mediator regardless of whether he or she is certified by the Supreme Court. If a suggestion may be made to Florida's court-connected mediation, it is to allow a party to make a direct motion for mediation before filing a lawsuit. If there is no agreement after conducting mediation, the proceedings can be transferred to a trial procedure. This can save time and money for both the parties and the court.

Moreover, compared with Florida's court-connected mediation, the most important element in Korean civil mediation is the fact that a mediator has non-binding decision-making authority and that the courts participate as mediators. In addition, Korean civil mediation has more mandatory elements than Florida's. There is no means to object to the court's referral order and the parties' right to select a mediator is very limited.²¹⁹ Civil mediation in Korea is a kind of transformed

218. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS § 10.110(a)(2).

219. Of the three existing kinds of mediators, there is no opportunity for the parties to select the "mediation judge" or the "court taking charge of the lawsuit." Although in a "mediation committee" proceeding the parties have the right to select the commissioners who become members of the committee, as stated earlier it is very rare for parties to actually select mediation commissioners. *See supra*

med-arb process. It is no exaggeration to say that the actual operation of civil mediation is nothing more than a supplementary means of disposing of litigation in a rapid and simple manner.²²⁰ But mediation has played an important part in complementing and replacing litigation as a form of civil dispute resolution. Korea was late in its 1990 adoption of a uniform mediation procedure. Moreover, it was not until 1993, after the amendment of the Civil Mediation Act in 1992, that mediation was used on a large scale. In order to establish civil mediation firmly as an alternative means of dispute resolution, it is necessary to adopt a mediator system independent of judges. The present mediation commissioner can be converted to an independent mediator. If it is impossible to adopt an independent mediator system in the near future, at the very least it is necessary to establish standards for appointing commissioners and training programs for judges and commissioners. The rules and standards of Florida concerning mediation should serve as a good model for appointing and training these mediators.

note 75.

220. This is becoming all the more true as judges continue to exert more influence on the mediation process.