

A Goldilocks Approach for Mediation Standards
Theory-of-Change Symposium
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[Kimberly Taylor](#) argues that it is important to maintain flexible mediation standards that provide appropriate guidance for mediators and parties while avoiding over-regulation that would restrict their ability to tailor the process and outcomes to meet parties' needs. She is the senior vice president and chief legal and operating officer of JAMS.

When Frank Sander proposed the “multi-door courthouse” at the Pound Conference in 1976, he probably could not have imagined how widespread the use of mediation would be today in the United States and around the world. As just one example, last year, JAMS mediators handled over 10,000 matters in the United States and abroad.

As the use of mediation has grown across this country and internationally, standards have been developed to guide mediation practice. With the recent adoption of the [United Nations Convention on International Settlement Agreements Resulting from Mediation](#) (commonly known as the Singapore Convention), a question has arisen whether the creation of uniform mediation standards and training guidelines is desirable and practical. I believe that it is important to have standards and guidelines – and that they should be flexible, permitting mediators, parties, and lawyers to decide how to handle each case.

In the decades since the Pound Conference, mediation has become a standard – and also flexible – process throughout the United States. It provides disputing parties greater control over the outcome of their matters and the opportunity to preserve relationships in a confidential process, ideally in a cost-effective and efficient manner. The marketplace has become increasingly sophisticated regarding the selection of mediators. Parties in mediation do not expect or want mediators to adhere to one particular process or approach. Mediators often rely on their creativity and experience to tailor each mediation to meet the needs of the parties.

Mediation in the United States has thrived with flexible regulation of the profession. Standards of conduct for mediators have been developed that guide mediation practice while allowing needed flexibility. For example, the ABA / AAA [Model Standards of Conduct for Mediators](#) covers topics such as self-determination, impartiality, conflicts of interest, competence, confidentiality, quality of the process, and fees. The [Uniform Mediation Act](#) covers similar topics. The [JAMS Mediation Ethics Guidelines](#) require that all parties are informed about the mediator's role and mediation process and that everyone understands the terms of settlement. They also require voluntary participation, competence of the mediator, confidentiality, and impartiality. And they

require the mediator to refrain from providing legal advice, withdraw if the mediation is being used to further illegal conduct, and avoid using misleading marketing.

The Singapore Convention is intended to provide a framework for the enforcement of international settlement agreements resulting from mediation, hopefully leading parties involved in cross-border disputes to use mediation to resolve their disputes. According to Article 5(1)(e), one of the grounds for refusing to enforce a mediated settlement agreement is that “[t]here was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement.”

The Singapore Convention does not define “standards applicable to the mediator or the mediation.” Organizations such as the American Bar Association, International Bar Association, JAMS, and the International Mediation Institute have promulgated standards. To the extent the mediation community determines that a uniform set of standards is needed for cross-border mediations, these existing guidelines are a good starting point. Where mediation is nascent outside the United States, some form of credentialing or a set of uniform standards may be useful in persuading users that the mediator has been properly trained and vetted, and that users can expect a certain level of quality. Even within the well-established U.S. mediation market, mediators who are just beginning their careers may benefit from some form of credentialing or adherence to uniform standards to assure prospective users of their competence.

As the mediation community discusses uniform standards contemplated by the Singapore Convention, it should consider the risk of over-regulation causing sophisticated users to forgo mediation if it blocks experienced mediators from using their own wisdom, judgment, and creativity to help parties come to resolution. Any standards that are adopted should provide flexibility for mediators to determine the best approach in a given case, permit them to be facilitative and evaluative, structure creative (sometimes non-monetary) solutions, and adhere to generally accepted ethics standards such as disclosing potential conflicts of interest.

In the near term, the Singapore Convention – with or without uniform standards – will most likely not lead to the widespread use of mediation for cross-border disputes. However, it has put the spotlight on mediation and all of its positive attributes, and that will further the development of the profession. In doing so, it is important that mediators, working with their clients, retain the flexibility to structure a process that they believe best meets clients’ needs.