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# Does Your Mediator Measure Up?: Standards of Practice for Family and Divorce Mediation

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The rapid growth of family and divorce mediation has triggered a demand for quality control, both to protect the consumer and to protect the credibility of an evolving profession. This demand underscores mediation's importance as well as the serious damage to participants from unprofessional practice. Creating quality control standards inevitably means defining what constitutes good practice.

In most states, mediators are largely self-regulated. However, a variety of means have been developed to ensure that mediation services are provided in a competent and professional manner. Some regulation has been undertaken by state governments, courts, and professional associations. In addition, the *Model Standards of Practice for Family and Divorce Mediation* have been adopted by the American Bar Association (ABA), the Association of Family and Conciliation Courts (AFCC), and other state and local family and divorce mediation groups.

## Regulating mediators

Mediators may be licensed, certified, accredited, registered, and/or designated as subscribing to formal standards of practice or a code of ethics.

- **Licensure.** At present, few states license mediators to practice. Those that do, license a mediator upon completion of a training program and an examination. The license is revoked for unprofessional conduct. A number of states and jurisdictions require mediators to have a certain level of training or a particular professional background.
- **Certification.** Typically, a mediator is certified by a government agency, a court, or an independent board. Certification indicates a specified level of training and work experience. Professional associations also certify members based on standards they create.
- **Accreditation.** Unless it is required by

the state, not all mediators are accredited. An accredited mediator is one who has met a standard of performance and training.

- **Registration.** A registered mediator is one who is listed on a roster of individuals who provide a service. A register may establish minimal qualifications, but not every mediator who meets those qualifications will be listed. Some courts provide litigants with a list of mediators in the area. If yours does, ask what, if any, criteria are required for a mediator to be listed.
- **Subscription to a standard of practice.** An individual who subscribes to a certain standard of practice or ethical code voluntarily agrees to practice in a certain way. This is the least restrictive method of regulating a profession.

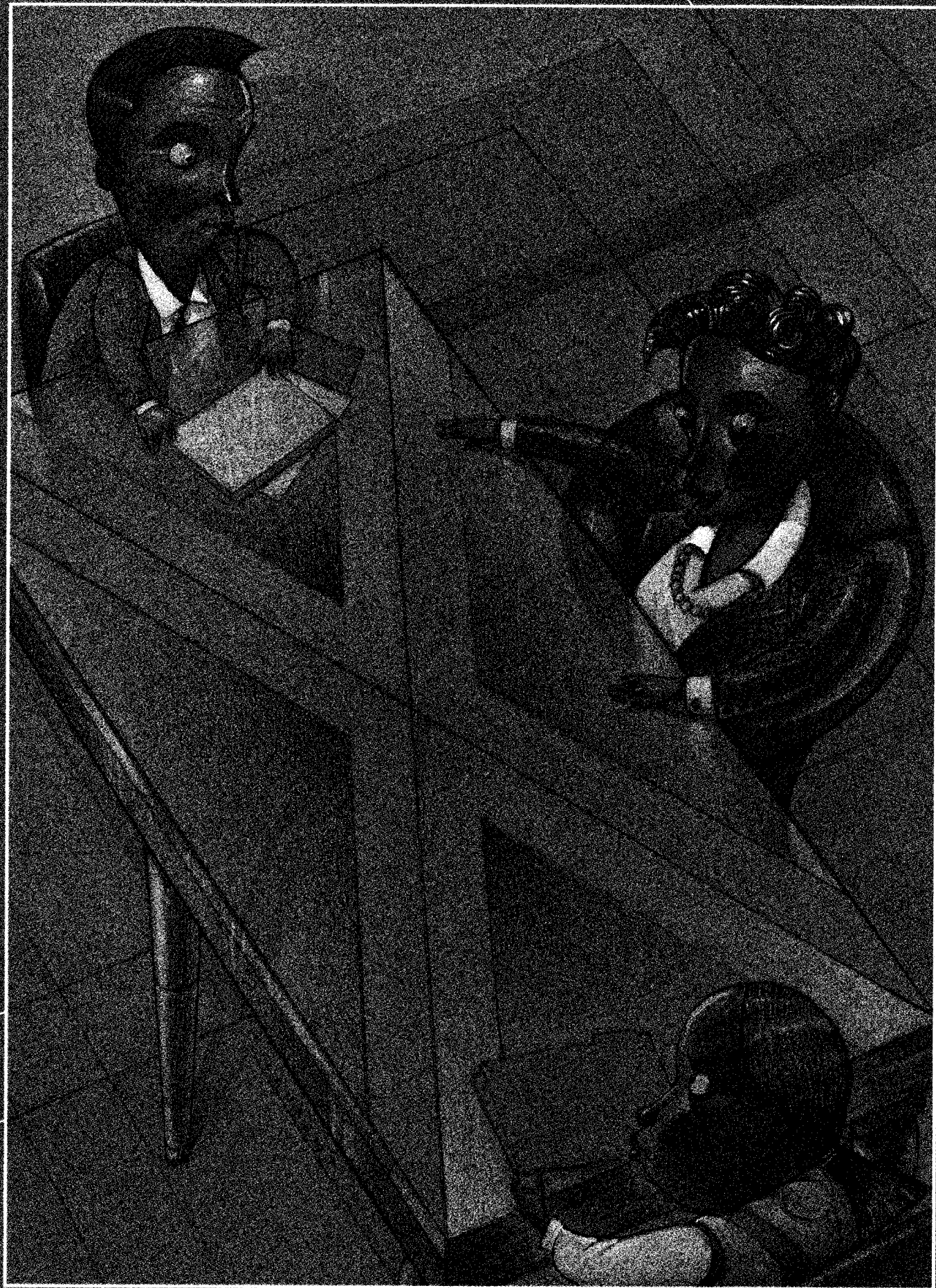
## Mediation standards

The *Model Standards of Practice for Family and Divorce Mediation* (2000) are the product of extensive and thoughtful deliberations over two decades by the family mediation community with input from other groups. (For a history of these standards, see page 24). They consist of 13 general principles designed to guide family and divorce mediators and train future mediators. The *Model Standards* apply to mediators in both private practice and in court-based mediation programs, regardless of the mediator's profession of origin.

These standards are, however, aspirational rather than regulatory. They do not pretend to address every

Does Your Mediator Measure Up?

**Standards of  
Practice for  
Family and  
Divorce  
Mediation**







# The Birth of Model Standards

The family and divorce mediation profession has a long history of developing standards of practice. *Model Standards of Practice for Family and Divorce Mediation* were first promulgated in 1984 when 30 organizations, convened by the Association of Family and Conciliation Courts (AFCC), developed a consensus document for state and national mediation organizations. The American Bar Association's Family Law Section expanded on the 1984 *Model Standards* and produced *Standards of Practice for Lawyer Mediators in Family Law Disputes*.

The 1984 ABA *Standards* were developed for lawyers who wished to be mediators, a role some thought of that time inconsistent with standards of professional responsibility for lawyers. The 1984 ABA *Standards* helped define how lawyers could serve as family mediators and adhere to ethical guidelines of the legal profession. The Academy of Family Mediators promulgated its own standards based on the 1984 *Model Standards*.

Other organizations, such as The American Arbitration Association, American Bar Association, and the Society of Professionals in Dispute Resolution (SPIDR), formed a joint task force and developed *Model Standards of Conduct for Mediators* in 1995.

In 1996 the ABA Family Law Section concluded that interest in and knowledge about family mediation had expanded dramatically since the 1984 ABA *Standards*, and a fresh look was required. The earlier iterations of the

*Model Standards* did not address issues of domestic violence, child abuse, and the best interests of children. The AFCC, together with the ABA Family Law Section and the National Council of Dispute Resolution Organizations (an umbrella organization that included the Academy of Family Mediators, the ABA Section of Dispute Resolution, the AFCC, the Conflict Resolution Education Network, the National Association for Community Mediation, the National Conference on Peacemaking and Conflict Resolution, and the Society of Professionals in Dispute Resolution) served as the convener of three national symposiums to update and redraft the 1984 *Model Standards*.

A final version of the revised standards was completed in August 2000. To date, they have been adopted by the ABA upon the recommendation of both its Section of Family Law and its Section on Dispute Resolution, the AFCC, the Connecticut Council for Divorce Mediation, Family and Divorce Mediation Council of Greater New York, the Mediation Association of Northwest Ohio, the Michigan Council for Family and Divorce Mediation, and the Wisconsin Association of Mediators.

The revised *Model Standards* were the result of exhaustive deliberation by the family mediation community with wide input from a variety of voices, including experts in the field of domestic violence. The revised *Model Standards* provide a consensus statement about good mediation practice to which practitioners can subscribe and a framework for defining and refining family and divorce mediation.

—A. M. & A. S.

question that could arise regarding a mediator's style or model of practice, such as a "facilitative" approach versus an "evaluative" approach, or stylistic issues, such as whether mediators draft a memorandum of understanding at the conclusion of mediation or summarize agreements in a summary letter. Rather, they are designed to help the public and professionals define what generally can be expected from a family mediator.

## Choosing a mediator

The *Model Standards* begin by defining mediation and affirming its importance and the core values that should help guide consumers in their choice of a mediator:

Family and divorce mediation is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants' voluntary agreement. The family mediator assists communication, encourages understanding, and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions, and reach their own agreements.

Family mediation is not a substitute for family members' obtaining independent legal advice or mental-health therapy. Nor is it appropriate for all families. However, experience has



established that family mediation is a valuable option for many families because it can:

- increase the self-determination of participants and their ability to communicate;
- promote the best interests of children; and
- reduce the economic and emotional costs associated with the resolution of family disputes.

## Participants decide

Self-determination is the fundamental principle of family mediation. Voluntary settlements reduce the emotional and economic costs of resolving family disputes. Divorcing couples often feel that once litigation starts, it quickly caroms out of control. Decisions are made for them—by lawyers, judges, and custody evaluators. They feel little control or no “voice” in the outcome and often describe themselves as bystanders in their own divorce. Mediation limits intrusion into the family through court orders, promotes family autonomy, and allows participants to craft agreements that reflect their own family needs and values.

## Children's best interests

Divorce and separation can be a chaotic time for families. While the marriage or partner relationship is ending, parental responsibilities continue, often for years. Parents will need to communicate about the children and their activities, schedules, school work, recreational activities, health care, and much more. Mediation provides parents with the opportunity to forge a new relationship based on the continuing parental relationship rather than on spousal ties. Mediation can reinforce what parents continue to have in common—their children—and send a potent message to children that they still have two par-

ents who are working together on their behalf. During a time of conflict and strife, mediation can be a safe harbor for parents who want to get beyond their differences for their children's sake.

For many parents, marital conflicts seem all consuming. There is little debate, however, that prolonged conflict over issues relating to divorce or separation can seriously damage children emotionally, economically, socially, and educationally. Through mediation, parents can begin to see that they have common interests, want similar things for their children, and can collaborate about parental matters.

Mediation is generally in the best interests of children because it emphasizes self-determination, voluntary agreements, conflict containment, and a shift in focus from parents' self-interest to children's interests. Parents are able to think “outside the box” and develop parenting plans that are unique and reflect their family traditions and idiosyncracies. Mediators can help parents gain access to community resources and use child development information in their decision-making. Parenting plans can be revised as a child's needs change and as parental circumstances evolve over time. Unlike court orders, which tend to be cast in concrete, mediated agreements can be flexible, recognizing that family circumstances change over time.

## Reducing costs

When compared with the adversarial process, mediation generally results in greater consumer satisfaction, less expense, and a more cooperative relationship between the parents. Studies show that parents in mediation resolve disputes more quickly than do parents in litigation. Mediated agreements tend to be more specific and detailed than stipulations negotiated by attorneys alone, and mediated agreements often result

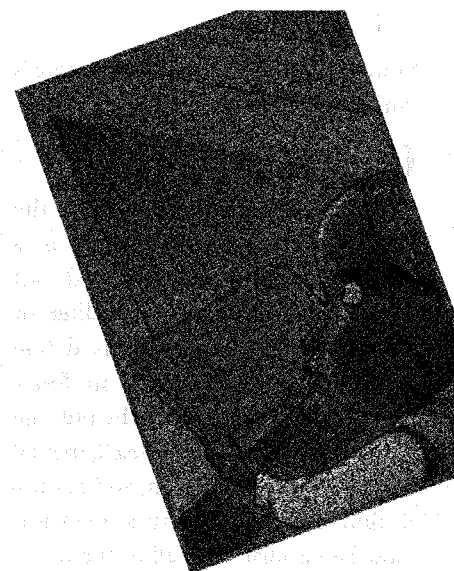
in higher levels of contact with children and higher rates of compliance with parenting plans and child support.

Many parents recognize that they are angry and hostile. They also acknowledge that the legal process often reinforces those feelings. Even parents who fail to reach a mediated agreement are more likely to settle prior to trial than are parents who litigate.

## Entering mediation

The *Model Standards* rely on the principle of “informed consent.” This means that participants must be educated about mediation as an option and that they should make an informed choice before forgoing the benefits and costs of litigation.

The *Model Standards* require participants to be fully informed about the nature of mediation and consent to participate in it. They require the mediator to “facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.” The mediator also must conduct an introductory orientation, which includes a detailed description of what mediation is and how it differs from other dispute resolution processes, and informs the participants that they are entitled to seek independent advice



from lawyers and other professionals during mediation.

## Qualifications

The *Model Standards* are based on the understanding that mediation is a dispute resolution process and not mental health therapy, counseling, or legal services. The standards define a mediator's qualifications in functional terms, starting with the premise that family disputes have legal, mental health, dispute resolution, and cultural dimensions and that a mediator must be familiar with all of them.

The *Model Standards* identify four basic qualities a mediator should have: (1) knowledge of family law; (2) knowledge of and training in the impact of family conflict on parents, children, and others, including knowledge of child development, domestic abuse, and child abuse and neglect; (3) mediation education and training; and; (4) the ability to recognize the impact of culture and diversity on families. Consumers should ask potential mediators to discuss any training or experience that prepares them to meet these challenges.

## Fairness

Mediators promote a fair and balanced negotiation process. The *Model Standards* set forth procedures that make it less likely that an unscrupulous participant will use mediation to take advantage of the other participant. For example, the rules require the mediator to be alert before mediation begins and throughout the process to the participants' capacity and willingness to mediate.

The mediator must facilitate full and accurate discovery and disclosure of information so that the participants can make informed decisions. This is designed to ensure informed decision-making and may include encouraging participants to consult with appropriate experts.

The *Model Standards* require the mediator to consider suspending or

terminating mediation "if the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable." He or she must inform participants of their right to independent legal counsel and to have their counsel participate in mediation. Consumers should be wary of engaging a mediator who discourages them from retaining consulting counsel.

## Neutrality

The *Model Standards* require the mediator to be neutral toward the parties and the mediated outcome; hence the mediator has no real or potential conflict of interest. For example, a mediator should not mediate a dispute involving a business partner or family member for fear of being perceived as favoring one party over the other. Likewise, a mediator should not provide mediation to anyone for which he or she has provided other professional services, such as marriage or individual counseling or legal services.

Although an experienced mediator may intellectually separate prior professional services from mediation, the parties may not, and their perceptions are as important as reality. A mediator's prior relationship with one or both parties may haunt mediation if either party perceives that the mediator is not acting impartially. For example, one party may suspect that a lawyer who has drafted a will for the parties has financial information that may prejudice a mediated property division. Another party may perceive that a mediator who once provided marriage counseling to the parties may be biased in favor of the other spouse.

Neutrality also requires that the mediator not lead the parties toward a particular outcome, such as selling the house or joint custody. The participants are responsible for the outcome, not the mediator. Despite these cautions, a mediator must ensure

fundamental fairness and a careful and reasoned consideration of options. A mediator should not, for example, sit idly by while one party attempts to intimidate the other into a settlement or passively facilitate an agreement that is unlikely to be upheld over time. In such a circumstance, a mediator may advise the parties to seek legal counsel and terminate the process.

Confidentiality is a central principle of the *Model Standards* and the *Uniform Mediation Act* (UMA), endorsed by the National Commission on Uniform State Laws and the American Bar Association. Mediators shall not testify in court for or against a party and shall not disclose the parties' mediation discussions. The only exception is to protect the safety of children and participants. A mediator is required to report incidents of child abuse, neglect, a credible threat of imminent danger to a party, or a threat of suicide.

Communications between participants and the mediator must be confidential for the same reason that communications between a patient and a doctor or an attorney and a client are confidential—to promote candor and open discussion. Confidentiality promotes the exchange of information and the discussion of options without fear that something said will come back to haunt one in future litigation.

Confidentiality also ensures that the mediator will focus on dispute resolution rather than on future litigation testimony. A mediator who expects to be subpoenaed to testify will be forced to gather information to support his or her testimony rather than to facilitate a discussion of shared interests. Participants who know that a mediator may be called to testify or make recommendations to the court may try to manipulate the mediator. Confidentiality helps to ensure that mediation will not degenerate into an adversarial process.

In recognition of this need for con-

fidentiality, many states have enacted protective legislation. Before initiating mediation, participants should ask the mediator whether such provisions apply. If statutory protection or administrative rules do not exist, participants should ask the mediator what protections can be put in place in the agreement to mediate to protect the confidentiality of the process.

## Children and third parties

The *Model Standards* do not definitively state whether children should participate in mediation. Instead, they rely on parental decisions. The *Model Standards* state that children should not participate in mediation except in extraordinary circumstances and with the consent of both parents and any court-appointed representative for the child. The mediator should inform parents of their full range of options (e.g., that children may participate personally and directly or indirectly through a letter or an advocate or representative) and the pluses and minuses of each option.

The *Model Standards* do not preclude the participation of others, such as new spouses, grandparents, other relatives, and live-in companions. The rules state clearly that 'nonvoting' individuals may be allowed to participate only by unanimous consent of the parties and the mediator, thus underscoring the consensual nature of mediation and preempting any grandstanding or power imbalance.

## Domestic abuse and child abuse

The *Model Standards* provide concrete guidance in confronting domestic abuse and child abuse and neglect in mediation. Domestic abuse is defined to include "issues of control and intimidation." The standards explicitly state that some cases are not suitable for mediation because of safety, control, or intimidation issues.

Mediators are required to adopt a four-part approach to domestic violence: training, screening, safety precautions, and reporting.

**1. Training.** Mediators must be trained to recognize and address domestic violence and child abuse and neglect before undertaking any mediation in which those elements are present.

**2. Screening.** Mediators must make reasonable efforts to screen for domestic abuse. A family mediator must be trained to recognize the symptoms of domestic abuse and respond with appropriate safety measures.

**3. Safety precautions.** Mediators must structure the process to ensure the physical safety of participants. If domestic violence exists, the *Model Standards* provide a list of interventions that mediators may employ to ensure victim safety, including:

- Establish appropriate security arrangements;
- Hold separate sessions;
- Allow a friend, representative, advocate, counselor, or attorney to attend mediation;
- Encourage participants to be represented throughout mediation by an attorney, counsel, or an advocate;
- Refer the participants to appropriate community resources; and
- Suspend or terminate the process, taking appropriate steps to protect the safety of the participants.

**4. Reporting.** The *Model Standards* modify guarantees of confidentiality in light of the vital public policy to protect participants and the process from abuse. Mediators are required to inform participants of any reporting requirements before mediation begins, such as the requirement to report child abuse and neglect. The mediator also must report a participant's threat of suicide or of violence to the targeted person and appropriate authorities if the mediator believes a threat is likely to be acted on and disclosure is permitted by law. Finally, the mediator should consider sus-

pending or terminating mediation if "the safety of a participant or the well-being of a child is threatened."

## The future

The *Model Standards* are a commitment by the mediation profession and the organized bar to continuously improve the path of peacemaking for families and children. The court system and the organized bar recognize that participants in family disputes benefit from high-quality mediation. Indeed, all available research indicates that as lawyers become more familiar with family mediation, their support for it grows. For example, a recent survey of the Florida bar (a state with a long history of mandatory mediation in child-custody disputes) reveals that 91 percent of Family Law Section members described the positive impact of mediation on the family court. The development of *Model Standards* will help continue this positive trend by generating more public confidence in the process and the mediation profession. ■

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