

5-15-1989

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### Recommended Citation

Kenneth R. Feinberg *Mediation - A Preferred Method of Dispute Resolution*, 16 Pepp. L. Rev. 5 (1989)

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# Mediation—A Preferred Method of Dispute Resolution

Kenneth R. Feinberg\*

## I. INTRODUCTION

Burgeoning court dockets, spiraling litigation costs, and dissatisfaction with the traditional adversarial process have caused increased interest in and use of alternative dispute resolution mechanisms. A wide variety of such mechanisms has developed, including mediation, arbitration, mini-trials, summary jury trials, and numerous hybrid dispute resolution proceedings. Each of these methods of dispute resolution offers certain advantages over conventional litigation in particular cases.

Among the various alternative dispute resolution methods, mediation stands out as particularly advantageous. Mediation has several special features, including its informality, its flexibility and its completely voluntary and non-binding nature, that make it preferable not only to litigation but often to other alternative means of dispute resolution as well.

In this article, I will first direct the special advantages of mediation as a method of resolving disputes. I will then outline a specific procedure for the mediation of disputes that optimizes these advantages and that can serve as a model. The procedure is one that I developed and that I have used successfully on several occasions in a variety of disputes. Finally, I will discuss some remaining problems in the area of dispute resolution through mediation, that, unfortunately, act as

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obstacles to the more widespread use of this method of conflict resolution.

## II. ADVANTAGES OF MEDIATION

### A. *Advantages Over Litigation*

The problems associated with litigation are well documented.<sup>1</sup> Court costs and escalating legal fees make litigation a very expensive endeavor. The expense is compounded by the long delays caused by overcrowded court dockets and, sometimes, by dilatory procedural and legal tactics.

Even more problematic than the costs and delays associated with litigation are its inherent limitations as an effective means of dispute resolution. Litigation focuses on narrow issues determined by prefabricated legal doctrines. The outcome is limited by prior decisional criteria and by narrow, predefined legal remedies. These limitations rarely permit a full exploration of the factors underlying the dispute and a resolution of the problems in the relationship that led to the dispute between the parties. Indeed, the objective of litigation is not to resolve the dispute so much as it is to arrive at a decision about who is right and who is wrong.

Mediation, on the other hand, does not limit its focus to the discrete legal claims asserted by the parties. Mediation looks beyond the legal issues to explore the relationship between the parties in an attempt to find a true resolution to the problem between them. Furthermore, the potential outcomes of the mediation process are not limited to preexisting legal remedies, or by the requirement that one or the other party be found in the wrong. Thus, a wide range of creative "win-win" resolutions of the problems are possible.

Furthermore, the solution crafted through mediation is designed specifically for and will apply only to the particular dispute at hand. The outcome of a judicial procedure, on the other hand, will have binding legal effect on future related disputes. There are several reasons why parties may seek to avoid the establishment of judicial precedent, especially in new and uncertain areas of the law. Mediation offers the parties the desired ability to focus on resolution of a specific dispute without worrying about its impact on future disputes.

Another problem with litigation is that it places the parties in an

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1. See generally NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, *Paths to Justice: Major Public Policy Issues of Dispute Resolution, Report of the Ad Hoc Panel on Dispute Resolution and Public Policy* (Oct. 1983), in ACUS, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 5-53 (1987); DAUER, REPORT OF THE COMMITTEE ON CONFIDENTIALITY IN ALTERNATIVE DISPUTE RESOLUTION (CPR Oct. 1985); Hart, *Alternative Dispute Resolution: Negotiation, Mediation and Arbitration*, 37 FED'N INS. & CORP. COUNS. Q. 113, 114-16 (1987).

extremely adversarial process over which they have little control. Litigation is controlled largely by the parties' lawyers, and proceedings are conducted using language unfamiliar to the parties. Encounters between the parties are rare and usually emotionally charged, tending to antagonize them further. Parties also feel alienated by the fact that the ultimate decision is not in their control, but rather in the hands of a single adjudicator—the judge.

Mediation, on the other hand, is a cooperative process through which the parties themselves fashion a mutually acceptable resolution to their dispute with the help of a neutral third party. Mediation is essentially a negotiation process that seeks a convergence among the parties rather than the polarization that characterizes litigation. It also gives the parties control over the outcome. In sum, mediation is preferable to litigation as a method of dispute resolution because, unlike litigation, mediation offers the parties to a dispute the opportunity to participate actively in a cooperative process designed to achieve a resolution to their problem that is not circumscribed by preexisting legal theories or remedies.

### *B. Advantages of Mediation Over Other Alternative Methods of Dispute Resolution*

In addition to the qualities discussed above, mediation has several special features that make it preferable not only to litigation, but also to other forms of alternative dispute resolution.<sup>2</sup> Primary among these features are mediation's voluntary and non-binding nature, its informality, its flexibility, and its cost-effectiveness. The advantages of each of these qualities is discussed below.

#### 1. Participation in Mediation is Voluntary and Nonbinding

Perhaps the most attractive feature of mediation is the fact that participation in the process is completely voluntary and nonbinding. Both the initial decision to try mediation and the decision to continue participation in the process are left entirely to the parties. They retain complete control of the process from beginning to end. If either party is dissatisfied at any time with any aspect of the proceeding,

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2. For descriptions and comparisons of various forms of alternative dispute resolution, see ACUS, *supra* note 1; Cooley, *Arbitration v. Mediation: Explaining the Differences*, 69 JUDICATURE 263 (1986); Hart, *supra* note 1; Sacks, *The Alternative Dispute Resolution Movement: Wave of the Future or Flash in the Pan?*, 26 ALBERTA L. REV. 233 (1988); AM. JUR. 2D, NEW TOPIC SERVICE, *Alternative Dispute Resolution* §§ 7-16 (1985).

that person can withdraw. The only commitment involved is to give it a try.

Furthermore, if the attempt at mediation fails, no alternative options have been foreclosed. Parties are free after mediation to engage in litigation or in other alternative methods of dispute resolution. Thus very little, if any, risk is involved. As one commentator put it, "[i]f it is going to work, it is going to work with some rapidity. If it's not going to work, you don't lose a lot finding out."<sup>3</sup>

The fact that the decision to participate in mediation is risk-free makes people more willing to try it. This gives mediation a significant advantage among alternative dispute resolution techniques. As will be discussed in greater detail in section IV, the single greatest obstacle to successful development of alternative dispute resolution techniques is an unwillingness, especially among lawyers, to try alternatives to litigation. The voluntary and nonbinding nature of the mediation process helps overcome this unwillingness and therefore makes mediation especially attractive.

## 2. Mediation is Informal

Another advantageous feature of mediation is the informality of the process. The exchange of thoughts and ideas through mediation is not constrained by predetermined rules of evidence or other rules that structure the presentation of information and other aspects of the proceedings. In mediation, parties are free to set their own rules and procedures and usually choose to forgo much of the formality associated with other forms of dispute resolution.

Mediation is considerably less formal than arbitration, for example. Arbitration involves several formal stages and in many respects resembles a trial.<sup>4</sup> The parties make formal presentations of evidence and of arguments and sometimes submit briefs. Furthermore, ex parte communications between the arbitrator and the parties is prohibited. The mediator of a dispute, on the other hand, can communicate freely with each of the parties and can gather information in any form.

A mediation is also less formal than a summary jury trial, the structure of which, as indicated by its name, is modeled on a trial.<sup>5</sup> In a summary jury trial, attorneys present formal arguments to a real judge and a real jury in court. The difference between such a proceeding and an actual trial is the lack of witness testimony and the advisory nature of the jury's verdict, not a lack of structure and for-

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3. Hart, *supra* note 1, at 121 n.14.

4. See Cooley, *supra* note 2, at 264-66.

5. See Lambros, *Summary Jury Trials*, 13 LITIGATION 52 (1986); AM. JUR. 2D, *supra* note 2, § 12.

mality. Similarly, the format of a mini-trial resembles a judicial proceeding. A mini-trial does not involve a judge or jury. Rather, presentations of the case are made by attorneys to the parties' executives in an effort to advance subsequent negotiations. The process, however, is highly structured. While the parties to a mediation can choose to incorporate a formal exchange of information or arguments, the parties are free to forgo such formalities and all trappings of courtroom proceedings.

### 3. Flexibility and Adaptability

Another advantageous feature of mediation is its adaptability to a vast, wide-ranging variety of disputes. There is a long history of using mediation to address labor and employment disputes.<sup>6</sup> More recently, mediation has been applied successfully to resolve family disputes, community disputes, environmental disputes, landlord-tenant disputes, and even criminal matters. In my own particular experience as a mediator, cases involving commercial contractual disputes, construction defects, product liability claims arising out of government use of Agent Orange in Vietnam, antitrust claims, as well as allegations of larceny, embezzlement and RICO violations have all been satisfactorily resolved through mediation. Mediation can be tried in any kind of dispute. No law governs its availability or restricts its use. Moreover, it is suitable not only for disputes between two parties but also for multiparty disputes and even in class actions.<sup>7</sup>

Mediation also can be employed at any stage in a dispute, whether or not litigation is already pending. The parties can schedule a mediation soon (even within days) after the dispute arises. On the other hand, the parties can enter mediation after litigation commences. If litigation has already commenced and proceeded into discovery, the parties can draw on discovery materials. If mediation is begun before the parties reach the discovery stage, they can choose to incorporate a "mini-discovery" schedule into the mediation process.

This kind of procedural flexibility is one of mediation's foremost qualities and is one reason that mediation is adaptable to a wide variety of disputes. As one commentator has put it, "[a] mediation can proceed along any path and according to any format depending upon

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6. See generally M. BERNSTEIN, *PRIVATE DISPUTE SETTLEMENT* 315 (1968).

7. See generally Phillips & Piazzva, *The Role of Mediation in Public Interest Disputes*, 34 HASTINGS L.J. 1231 (1983); Susskind & Ozawa, *Mediated Negotiation in the Public Sector*, 27 AM. BEHAV'L SCIENTIST 255 (1986).

the circumstances of the case and the predilections of the mediator.”<sup>8</sup> Furthermore, as indicated previously, a mediator is not constrained by rules governing formation of a record or appropriate forms of communications with the parties. A mediator is free to adopt operating procedures that fit the precise needs of the parties and can change those procedures at any time during the process if necessary.

Another reason that mediation is adaptable to a vast range of disputes is the ability of the parties to choose the mediator. The parties may, for example, seek out an individual who has had prior experience in resolving similar disputes. Or the parties in a dispute involving detailed technical issues may want to employ a mediator with technical expertise. This enables the parties to save the time they would otherwise spend on educating a factfinder, be it a judge, jury or arbitrator, about the technical aspects of their case.<sup>9</sup>

#### 4. Cost-Effectiveness

The cost-effectiveness of mediation as a dispute resolution device is another attractive feature of mediation. Mediation is cost-effective in several respects. First, mediation generally requires little time when compared to such means of dispute resolution as litigation and arbitration.<sup>10</sup> Examples from my own experience as a mediator illustrate this: It took only three months to settle a ten-year-old antitrust dispute between competitors in the telephone paging business. It took only ten days to resolve another dispute between a shipper and supplier. By saving time, the parties to the dispute minimize the costs—such as lost revenues and lost business opportunities—associated with diversion of staff and attention from ongoing business activities. Moreover, minimizing time means minimizing legal fees, which are often the most costly aspect of a business dispute.<sup>11</sup>

Mediation helps parties to minimize legal fees in other ways as

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8. Hart, *supra* note 1, at 119.

9. On the other hand, even in a case involving complex technical issues, the parties may not need a mediator with technical expertise. In mediation, it is the parties themselves who already have the requisite knowledge and make all the decisions. Unlike a judge or arbitrator, the mediator cannot impose a decision; thus, the mediator's technical understanding of the issues may not be crucial.

10. Estimates of the average duration of litigation and arbitration vary. *American Jurisprudence* reports that the average arbitration takes four to five months, while litigation may take several years. AM. JUR. 2D, *supra* note 2, § 7. Another source reports that the average duration from filing to trial in civil cases in federal courts throughout the United States is one and one-half years. Sacks, *supra* note 2, at 233. It can take up to six years to litigate a business dispute. THE FIRST ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (May 20, 1983), reprinted in 100 F.R.D. 499, 521 (1984).

11. See ROGERS & SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 45 (1987) (reporting that researchers have found that, on average, some 98% of a party's civil litigation expenses are attorney's fees).

well. Unlike both litigation and other alternative means of dispute resolution, mediation emphasizes participation by the parties themselves, rather than giving control over the process to lawyers. The parties may not even find it necessary to hire outside counsel. Indeed, my own experience in the mediation of business disputes indicates that direct dealings with the parties, as opposed to their attorneys, is more effective. Of course, the fee paid to the mediator, who is often a lawyer, may be substantial. This cost, however, is shared by the parties. Similarly, the parties can share other costs by, for example, mutually agreeing on experts to be consulted.<sup>12</sup>

Mediation also allows parties to avoid the emotional costs associated with such adversarial dispute resolution methods as litigation and arbitration. As one of my clients has commented publicly: "You don't expend as much emotional energy as you do in court, and that's a huge cost savings."<sup>13</sup>

The nonadversarial, cooperative nature of mediation and its focus on the needs of the parties also help parties to avoid the costs associated with damage or destruction of their business relationship. Adversarial processes often increase antagonism among the parties and damage or destroy the potential for a positive relationship. Mediation, on the other hand, seeks to encourage cooperation among the parties, not only with regard to the immediate dispute, but also with regard to structuring their relationship in the future. It thus leaves open the possibility of profitable future business among them. Some have suggested that going through the mediation process may even help parties avoid future disputes:

Many commentators have compared the mediator to a catalyst, one who prompts action by others through identification of issues, clarification of facts, reason, and persuasion. In doing so, the mediator will help educate each party (at least those with a continuing relationship) not merely for the resolution of the present dispute, but for the resolution and even prevention of further disputes.<sup>14</sup>

Mediation's ability to help parties preserve opportunities for future business and to avoid the cost of future disputes is further evidence of its cost-effectiveness.

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12. See Liepmann, *Confidentiality in Environmental Mediation: Should Third Parties Have Access to the Process?*, 14 ENVTL. AFF. 93, 103 (1986).

13. Abramson, *Kenneth Feinberg Prospers by Getting Firms to Resolve Disputes Out of Court*, Wall St. J., Oct. 20, 1988, at B6, col. 1 (quoting William Von Glahn, an attorney for Williams Cos. in Tulsa, Okla.).

14. Henry & Lieberman, *Mediation: The Sleeping Giant of Business Dispute Resolution*, in THE MANAGER'S GUIDE TO RESOLVING LEGAL DISPUTES 59-60 (1985), reprinted in CPR LEGAL PROGRAM, PRACTICE GUIDE ON MEDIATION A1, A3-A4 (1988).



Finally, there are some indications that agreements arrived at through mediation have greater durability than those arrived at through adjudicatory proceedings, such as litigation or arbitration.<sup>15</sup> Unlike a court decree or arbitrator's award, the outcome of a mediation is one fashioned, and agreed to, by the parties themselves. No coercion is ever used since the mediator has no power to impose a settlement. Thus, as one commentator has stated: "By definition, a settlement reached through mediation is an efficient outcome; all the disputants and stakeholders prefer it to no agreement at all, or to any other feasible outcome."<sup>16</sup> In other words, mediation results in more stable agreements and, therefore, may enable parties to avoid costs associated with future noncompliance.

In sum, mediation is cost-effective because the process itself is economical and because the result of a successful mediation is often not only a durable agreement but a more stable relationship between the parties as well.

### III. THE FEINBERG MEDIATION PROCEDURE

While there is certainly no set procedure for how a mediation must be conducted, my own experience as a mediator has led me to develop and refine a four-phase procedure that can serve as a useful blueprint for voluntary mediation of disputes. The mediation procedure I employ reflects and maximizes the general advantages of mediation discussed above. It is private, purely voluntary, and informal. It features a structured exchange of information through the use of a mutually acceptable third party mediator and uses a nonbinding, mediator-generated proposal as a starting point for the negotiations. It also allows the parties to integrate into the mediation schedule a mini-discovery procedure, including deposition testimony and document production.

The proposed method is sufficiently flexible to address a wide range of situations and has proven to be readily adaptable to a variety of disputes, including breach of contract, unfair competition, allegations of construction defects, toxic torts (including allocation of financial responsibility among joint defendants), insurance coverage allocations, proprietary rights, and any number of other claims.<sup>17</sup>

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15. See Rogers & Salem, *supra* note 11, at 46; Susskind & Weinstein, *Toward a Theory of Environmental Dispute Resolution*, 9 BRIT. COLUM. ENVTL. AFF. L. REV. 311, 312-13 (1980-81); Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 444 n.25 (1984).

16. L. SUSSKIND, L. BACOW & M. WHEELER, *RESOLVING ENVIRONMENTAL DISPUTES* 2 (1983).

17. A sampling of successful mediations in which I have employed some variation of the procedure outlined here includes: *American Reins. Co. v. Commercial Union Ins. Co.* (asbestos insurance coverage dispute involving a primary insurer and a reinsurer); *Industrial Risk Insurers v. The Williams Cos.* (insurance coverage dispute in-

And the process is not limited to situations where pending litigation already exists among the various parties. Indeed, a major advantage of the mediation process set forth below has been its success in heading off the initiation of formal litigation.

*A. Phase I: Retaining a Mediator to Resolve the Dispute (and Setting the Ground Rules)*

The initial step in any mediation is getting the parties to agree to participate. This initial step is critical. Once the parties have taken this step and agreed to the effort, their attitudes shift toward problem-solving and cooperation.

Any party involved in a dispute may unilaterally initiate the mediation process by contacting the other parties and suggesting the use of a neutral third party mediator to hear the dispute, recommend settlement terms, and, if necessary, attempt to facilitate a settlement. A meeting with the proposed mediator and all parties may then be held to give the parties an opportunity to "size up" the proposed mediator and to discuss the proposed rules governing the mediation. A number of points should be addressed at this meeting.

First, there should be some discussion of the role of the mediator. It should be emphasized that, although one party may have recommended a particular person be retained as the mediator, any person ultimately selected must be mutually acceptable to all parties to the dispute.<sup>18</sup> Once retained, the mediator will be strictly neutral and

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volving property damage and business interruption claims); *In re Agent Orange Product Liability Litigation*, MDL No. 381 (E.D.N.Y. 1984) (product liability litigation and allocation of market share financial responsibility among seven chemical companies); *D.P.R.S., Inc. v. New England Tel. & Tel. Co.*, C.A. 75-2054-K (D. Mass. 1985) (private antitrust litigation); *Coltrans Sys. v. Nissan Motors* (contract dispute involving shipper and supplier); *J.C. Penney Life Ins. Co. v. Response Sys. Int'l* (contract dispute involving an insurance consultant relationship); *Villa Monterey Condominium Owners Ass'n v. Ponderosa Homes* (condominium construction and insurance coverage dispute involving homeowners and over 50 insurance carriers, contractors and subcontractors); *ISDC v. Aetna Casualty & Surety Co.* (private antitrust litigation); *Liquid Carbonic v. Osborne* (commercial dispute involving ownership of compressed gas cylinders); *Russell v. Venamon* (commercial dispute involving termination of insurance brokerage partnerships).

18. The Center for Public Resources (CPR) has developed a list of attributes that parties should consider in selecting a capable mediator. The mediator should be: impartial and fair; able to inspire trust and confidence; able to understand and relate to people; civil and considerate in dealings with others; a good listener; able to understand the law and the facts of a dispute and to quickly analyze complex problems; knowledgeable about when to intervene and when not to; creative and imaginative; articulate and persuasive; knowledgeable about the negotiation process; persistent and "upbeat" in the face of difficulties; and an energetic leader. CPR LEGAL PROGRAM,

scrupulously fair to all sides. Unless all parties otherwise agree, no party will unilaterally communicate with the mediator except as specifically provided.

Second, there should be some discussion of the mediator's payment through an agreed-upon cost-sharing arrangement. In the interest of moving the process forward, the party initiating the process and recommending a particular mediator may (or may not) agree to pay the mediator's initial fees and expenses associated with Phase II of the mediation process—familiarizing the mediator with the facts of the dispute—without requesting contribution from the other parties. Only if all sides consent to proceed with Phase III (and, if necessary, Phase IV) will the costs of the mediation be borne in a manner determined and agreed to by the parties. The mediator's per diem or hourly charge should be established at the time of appointment.

Third, the mediator should summarize the procedures governing the mediator's efforts to settle the dispute (Phase II, Phase III and Phase IV). The mediator should emphasize the voluntary, nonbinding nature of the process by making it clear that, at any phase of the process, even at the very end of the mediation, any party may withdraw without giving a reason and pursue more traditional remedies.

Fourth, the mediator should explain that the entire mediation process is a compromise negotiation and, therefore, confidential. Accordingly, all offers, promises, conduct and statements, whether oral or written, made in the course of the mediation process by any of the parties or their representatives, are confidential. Such information is inadmissible and not discoverable for any purpose in litigation among the parties. By agreement of the parties, the mediator is also disqualified as a litigation witness for any party, and the mediator's oral and written opinions are deemed inadmissible for all purposes. All written submissions presented to the mediator and all discussions between the mediator and a particular party will not be transmitted to any other party unless designated by the mediator as worthy of transmission and only if the permission of the party providing the information is obtained in advance.

Fifth, if the dispute (or group of disputes) giving rise to mediation is already the subject of pending litigation among the parties, the mediator may ask the consent of all parties to notify the court of the mediator's retention.<sup>19</sup> Unless the consent of the parties is given, however, no such notification should be made. The mediator may re-

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MODEL ADR PROCEDURE FOR MEDIATION OF BUSINESS DISPUTES 6, *reprinted in* CPR LEGAL PROGRAM, PRACTICE GUIDE ON MEDIATION, *supra* note 14, at B1, B9.

19. The parties may also decide to present a joint motion to the court requesting a stay of all proceedings pending the conclusion of the mediation process.

new this request at any time. Again, however, the mediator would have to gain the consent of all parties.

Finally, a proposed schedule is discussed and agreed to for the completion of the mediation, including, if necessary, a "mini-discovery" process for obtaining documents or certain deposition testimony or both.

The advantage of the above approach to retaining a mediator is that it encourages the parties to accept both the particular mediator and the entire mediation process. Generally, parties are open to the education afforded by Phase I. No side is bound in advance by the proposed process, and the initiating party may agree to shoulder the initial costs, thereby giving the other parties a cost-free preview of the process. Acceptance of the mediator recommended by the initiating party is also rarely a problem. The noninitiating parties are aware that the entire process is voluntary and nonbinding and, from a negotiation perspective, may actually anticipate some bargaining leverage in agreeing to a mediator recommended by the initiating side. This is because the mediator cannot easily be accused by the noninitiating party of being unfair or biased if the proposed settlement terms are perceived by the initiating party as unacceptable.

*B. Phase II: Familiarizing the Mediator with the Facts of the Dispute*

Once the mediator has been selected with the consent of all parties, the actual mediation process commences. The first step in this process is to educate the mediator about the dispute both by submission of written materials and through oral presentations.

First, the mediator asks each party to provide, pursuant to an agreed upon schedule, such materials as each party deems necessary to familiarize the mediator with the facts and issues in dispute. For example, this submission may consist of a written summary accompanied by already available court documents, a letter, a formal memorandum, a legal brief, etc. Upon studying the documents and reviewing the facts, the mediator may contact any party separately, requesting further clarification and additional information. The parties are to comply promptly with all reasonable requests by the mediator for further information relevant to the dispute. Written materials submitted to the mediator are considered confidential and may not be disseminated to anyone without the consent of the submitting party.

After the mediator has had an opportunity to review the written submissions of the parties, the mediator will preside over an initial mediation session with all sides present. Each party may be represented by whomever it wishes: outside counsel, in-house counsel, a corporate official, or a combination of persons. My own experience, however, proves that an in-house representative is more likely to move the mediation process forward in an efficient, effective manner. In any event, the chosen representative must have appropriate authority to negotiate a settlement on behalf of the party he or she represents.

A series of such public mediation sessions may be necessary in the event of a complex, multi-party dispute or if a group of similar cases is targeted for mediation. For example, one session might involve plaintiffs and defendants, a second session might involve insurance carriers, a third might involve subcontractors. Or it may prove useful to have different sessions devoted to consideration of one or more of a group of similar cases.

Before beginning the mediation session, the mediator first asks whether, in fact, each party seriously desires to settle the dispute. If the answer is negative—because, for example, the parties wish to litigate the case—the mediator declines to go forward, and the process terminates at this point.

The mediator also explains at the outset that this initial public meeting will likely be the only time that the parties will all meet, unless the case is particularly complex or unless a group meeting is deemed by the mediator to be necessary near the end of Phase IV. Remaining meetings or discussions will be held separately between the mediator and each party; communications between the various parties concerning settlement terms will be made only by the mediator.

After these introductory remarks by the mediator, the parties can begin the public session. First, a statement is made by each party in the presence of the mediator and the other parties—in effect, a summation. This statement of between thirty and forty-five minutes (which can be waived) gives all other parties (especially the principals) and the mediator an opportunity to hear a summarized first-hand account of the strengths of each party's position. Thereafter, each side is given an agreed upon time (usually two to four hours in a straightforward, less complex mediation) to present its case. Each side should present the merits of its position in what it perceives to be the most effective manner. This can be done through the presentation of witnesses or through statements of the principals or their attorneys. Traditional rules of evidence do not apply, and no formal transcribing of the presentation occurs.

If necessary, time may be set aside during the public session to permit the parties to engage in "mini-discovery." Examples include permitting examination of witnesses or authorizing the exchange of certain documents. The procedures for such "mini-discovery" must be agreed to in advance, including time limitations. Furthermore, the mediator presides over the process and makes sure that the parties adhere to the agreed upon schedule.

At the conclusion of the public session, the mediator meets privately and confidentially with each party in order to (1) gather additional facts not brought out during the public session and (2) elicit further confidential information thought necessary in light of the written submissions and public statements. During the private, confidential meetings, the mediator may also raise legal arguments and questions of law in an effort to evaluate the party's ultimate likelihood of success or failure if the dispute were resolved through litigation. Sharing legal considerations with individual parties is important, because legal uncertainty has proven to be a critical variable promoting settlement.

After receiving all relevant materials, reviewing all of the facts, analyzing all of the various key legal issues, and permitting each party an opportunity to present its best case, the mediator is prepared to declare Phase II of the process at an end and to proceed to Phase III, in which the mediator presents proposed settlement terms for separate consideration by each party. Before proceeding to Phase III, however, the mediator awaits the consent of each party. Experience indicates that if the parties perceive that Phase II of the mediation process was fair, and they believe that the mediator is competent and neutral, the parties, curious to learn of the mediator's non-binding settlement terms and the rationale for fashioning those terms, will agree to proceed to Phase III.

### *C. Phase III: The Mediator's Presentation of Settlement Terms and the Initial Reaction of the Parties*

During Phase III, the mediator prepares and presents a written settlement recommendation and a private written analysis for each party. The mediator separately explains in writing to each party both the proposed settlement terms and the confidential reasons underlying the mediator's proposal.

There are two key features of the mediator's Phase III presentation of a proposed settlement. First, the presentation is based on a

good faith effort by the mediator to offer the fairest settlement terms at the very outset. In other words, the mediator is not engaging in an opening negotiation gambit or offering terms in anticipation of further negotiation. Further negotiation may indeed occur as a part of Phase IV (Shuttle Diplomacy), but the purpose of the mediator's Phase III proposal is to give all parties the immediate opportunity to accept what the mediator has concluded to be the fairest resolution of the dispute without the necessity of further negotiation. The mediator's goal is to settle the dispute promptly by offering optimum settlement terms that will prove immediately acceptable to all sides.

The second key feature of Phase III is that the separate, private reaction of each party to the mediator's proposed terms is sealed and is not communicated to the other parties (unless, of course, all parties agree to the proposed terms, thereby settling the dispute). Accordingly, no side knows the reaction of the other parties to the mediator's proposed terms or of any counterproposal offered by others to the mediator. The mediator, and the mediator alone, communicates among the parties when the process moves to Phase IV.

Thus, Phase III procedures give all parties the opportunity to react candidly in confidence to the proposed settlement terms and rationale that the mediator hopes will bring the dispute to an immediate, successful conclusion. The parties need not be concerned that their candid reaction to the various terms will become known prior to formal litigation or trial, thereby compromising their public posture.

If Phase III is successful, the mediator's proposed settlement terms are accepted by all parties and the process moves to a relatively quick conclusion. In my experience, this happens about twenty-five percent of the time. If, on the other hand, the Phase III settlement terms are rejected but the parties desire to continue the mediation, the mediator retains the flexibility to attempt to bridge differences among the parties through Phase IV shuttle diplomacy. In my experience, this happens about seventy-five percent of the time.

#### *D. Phase IV: Shuttle Diplomacy*

Phase IV is the final phase of the mediation process and commences only if the mediator's Phase III presentation of proposed settlement terms proves unacceptable to any party. Phase IV is essentially the mediator's attempt, through shuttle diplomacy, to forge a consensus based on each party's confidential communication of its negotiating position.

There are two critical aspects in this final phase of the mediation process. First, the mediator meets separately with each party and then shuttles among the various parties (by telephone and, if necessary, in face-to-face meetings) in an effort to bridge the differences

and reach accommodation. Until and unless the mediator sees an advantage to a group meeting of the parties, no such meeting occurs. Instead, the mediator attempts to fashion a mutually acceptable settlement proposal through separate meetings and communications with the other parties.

Second, as already indicated, the substantive conversations with each party are confidential and are not conveyed to the other parties. Instead, the mediator listens to each party's settlement terms and transmits only such information to the other parties as is agreed upon and that the mediator believes will foster settlement of the dispute.

The shuttle diplomacy called for by Phase IV may take place in a concentrated period of time. Throughout the shuttle diplomacy phase of the mediation, the mediator is guided by the "best" settlement proposal presented in Phase III. The mediator uses the Phase III proposal as a starting point and attempts to convince the parties to minimize their differences with respect to it.

If the parties remain unable to agree on settlement terms, the mediator may eventually suggest that the pressure be intensified in an effort to secure a settlement. For example, if formal litigation is already pending, the mediator may again suggest that the court be notified of the mediation process and that its assistance be solicited. Or the mediator may call for a non-stop group meeting to resolve remaining disagreements face-to-face. In the alternative, the mediator may suggest that the in-house corporate officials meet to discuss obstacles to settlement and attempt to reach a settlement without any further assistance from the mediator. The mediator might also suggest that a new group of senior corporate officials be brought into the negotiations in an effort to resolve remaining issues. As a last resort, the mediator may suggest that the parties agree to accept, as final and binding, new settlement terms proposed by the mediator.

Of course, no such Phase IV mediation option may be imposed unilaterally by the mediator. Rather, any such procedure requires the consent of all parties. Furthermore, as emphasized earlier, a party may withdraw at any time during the process and pursue more traditional remedies.

Phase IV concludes when a settlement is agreed to. If a settlement is reached, one of the parties (or the mediator) is designated to draft a written document reflecting all settlement terms. This document is circulated among the parties, edited to reflect their exact understanding, and formally executed. If formal litigation is pending and the



court has not yet been made aware of the mediation process, it is notified so that it may dismiss the case.

#### IV. REMAINING PROBLEMS

Despite the many advantages of mediation as a method of dispute resolution, certain problems remain. Three problems in particular act as impediments to the more widespread use of mediation: (1) unwillingness to try mediation, (2) lack of institutionalized consideration of mediation as a dispute resolution option, and (3) legal uncertainty about the confidentiality of mediation.

##### A. *Unwillingness to Try Mediation*

The single greatest obstacle to the successful development of mediation in general, and to the initiation of any particular mediation, is unwillingness to try it. Despite repeated complaints about litigation, there is still a great deal of reluctance, especially among attorneys, to try such alternative methods of dispute resolution. There are several factors that may account for this unwillingness, including what one commentator termed "the deadening drag of status quoism."<sup>20</sup>

Perhaps the primary factor contributing toward unwillingness to try mediation is simply unfamiliarity with the process. This unfamiliarity stems largely from the lack of education, particularly in law school, about nonadversarial methods of dispute resolution.<sup>21</sup> The standard law school curriculum trains students to be staunch advocates in an adversarial system and offers little, if any, opportunity to develop negotiating skills.

Law schools' adversarial emphasis as well as the litigious orientation of legal practice creates a mindset that is incompatible with mediation and negotiation. As one commentator explained:

The lawyer's standard philosophical map is useful primarily where the assumptions upon which it is based—adversariness and amenability to solution by a general rule imposed by a third party—are valid. But when mediation is appropriate, these assumptions do not fit. The problem is that many lawyers . . . tend to suppose that these assumptions are germane in nearly any situation that they confront as lawyers. The map, and the litigation paradigm on which it is based, has a power all out of proportion to its utility. Many lawyers, therefore, tend not to recognize mediation as a viable means of reaching a solution; and worse, they see the kinds of unique solutions that mediation

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20. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 132 (1976) (address delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice).

21. See generally 4 ALTERNATIVES TO HIGH COST OF LITIGATION, *Academic Mismatch* 7 (Aug. 1986) (reporting on a recent survey of 6800 law students at seven north-eastern law schools in which 58% responded that knowledge of negotiation and mediation was vital to practice but generally agreed that they did not learn about it in law school); Special Project, *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 987-88 (1984).

can produce as threatening to the best interests of their clients.<sup>22</sup>

This predisposition among lawyers against nonadversarial means of dispute resolution is a major impediment to the successful initiation of individual mediations and to the future growth of mediation as a dispute resolution technique.

Another reason that lawyers, and sometimes their clients, are hesitant to try mediation of a dispute is the fear of appearing weak to the other side. The above discussion of the many advantages of mediation, particularly among parties with an ongoing relationship, demonstrates that there are many reasons for preferring mediation over litigation, even for a party who would have a strong position in court. Nonetheless, there is a popular perception that suggesting any alternative method of dispute resolution implies a fear of the potential outcome of litigation. The underlying assumption of this perception is that litigation is the norm and that any alternative to litigation is the exception, reserved for exceptionally weak cases. If, however, alternatives to litigation were routinely considered and initiated by a given party, the other party would have no reason to associate an offer of mediation with weakness.

This brings us to the next issue—the need for businesses and other organizations to institutionalize consideration of mediation as a means of resolving a dispute.

### *B. The Need for Institutionalization*

There has been a good deal of institutionalization by the courts and other governmental organizations of alternative methods of dispute resolution, including mediation.<sup>23</sup> Court-associated alternative dispute resolution programs, however, are focused primarily on the resolution of family disputes, neighborhood or community disputes, and criminal matters. They do not usually address commercial or business disputes.

Among corporations and other business entities, alternative methods of dispute resolution are generally used only on a piecemeal, case-by-case basis. Thus, mediation continues to be largely a “hit or miss” experimental device, alien to the normal decisionmaking pro-

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22. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 45 (1982).

23. See generally Pou, *Federal Agency Use of “ADR”: The Experience to Date*, in ACUS, *supra* note 1, at 101 (1987); Ray, Kestner, & Freedman, *Dispute Resolution: From Examination to Experimentation*, 65 MICH. B.J. 898 (1986); Smith, *Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government*, 1984 MO. J. OF DISPUTE RESOLUTION 9.

cess of a company or other organization. The challenge faced by advocates of mediation is to institutionalize it and make its consideration and use an integral part of an organization's process of decisionmaking about both pending and anticipated disputes. In particular, what is needed is an in-house procedure to assure that every dispute is considered for mediation.

Institutionalization of such alternative dispute resolution techniques as mediation will, of course, depend on both the particular company structure that exists for resolving disputes, as well as the nature and quantity of the disputes themselves. Within the confines of these two overriding considerations, however, the following blueprint can and should be evaluated by any company or organization that is looking for efficient and effective means of resolving disputes. It sets forth guidelines for the development of an alternative dispute resolution program through which every dispute is considered for resolution through mediation or through some other alternative method before proceeding to litigation.

#### 1. Commitment of the Company's Management

A successful alternative dispute resolution program within a company will need a high-level commitment by the company. Without such a commitment from top management, particularly the general counsel, neither in-house business officials nor outside counsel will be confident in referring a matter to Alternative Dispute Resolution (ADR).

One way of demonstrating this commitment is by signing a statement expressing general support for alternative methods of dispute resolution. The Center for Public Resources (CPR) has developed a program called the "Corporate Policy Statement on Alternative Dispute Resolution," widely known as the "ADR pledge." Signatory companies are obliged to explore ADR as an option before resorting to litigation. To subscribe, the company's chief legal officer and chief executive officer must sign the pledge. Such an explicit expression of high level support for ADR not only sends a signal to other companies that raising ADR as an option is not to be interpreted as a sign of weakness, but also sends a signal to lower-level employees in the company that the company's policy is to try to work out disputes before resorting to litigation.<sup>24</sup> In order to ensure that companies' outside counsel are considering ADR in lieu of traditional litigation,

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24. One corporate official of a signatory company has indicated publicly that participation in the program has encouraged the use of ADR by relieving the fear that raising ADR will be interpreted as a sign of weakness. Rich, *Alternative Dispute Resolution-Opening Doors to Settlements*, CHEMICAL WEEK (Aug. 14, 1985), at 28, 30 (quoting Robert A. Butler, chief litigation counsel for Union Carbide).

one commentator has recommended that the ADR pledge be adapted for law firm use, drafted in terms of recommending consideration of ADR to their clients.<sup>25</sup>

The commitment of the company to ADR methods must go beyond merely signing a statement, however. The company must demonstrate its commitment actively through frequent use of a variety of ADR techniques to resolve disputes. Only an actual commitment to ADR will create the proper atmosphere for prompt resolution of a dispute and quell the natural concerns and suspicions that opponents may harbor.

Publicizing the fact that a company automatically considers use of ADR in all cases, regardless of the size of the case or the strength of its legal position, will further alleviate the concern that willingness to initiate use of various ADR techniques will be perceived by adversaries as a sign of weakness. A company can publicize the fact that consideration of ADR is an inherent part of its natural decisionmaking process by including, in all of its commercial contracts and dealings with outside parties, a provision that mediation, arbitration, or other forms of ADR will automatically be considered in the event of a dispute.<sup>26</sup> In addition, the company can undertake a public relations campaign notifying consumers and business partners that ADR will be available as a first-step consideration in resolving any future dispute. The goal is to make clear to those dealing with the company that resorting to ADR is not reserved for the occasional "bad" case and should not, therefore, be considered a sign of weakness. Rather, it is a standard technique that will be considered in all cases.

## 2. Responsibility for In-House ADR Screening of Disputes

As part of its commitment to the ADR process, a company must involve high-level, in-house personnel in the ADR screening of disputes. A single individual, at the general counsel or assistant general counsel level, should have primary responsibility for screening all real and potential disputes to determine their suitability for ADR.

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25. CPR LEGAL PROGRAM PROCEEDINGS 66 (Feb. 1984) (quoting E. Judge Elderkin of Brobeck, Phleger & Harrison), *reprinted in* CPR LEGAL PROGRAM, INFORMATION PACKAGE ON CONFIDENTIALITY OF ADR PROCEEDINGS (1984).

26. Sample mediation clauses for inclusion in standard contracts are provided in CPR LEGAL PROGRAM, MODEL ADR PROCEDURES FOR MEDIATION OF BUSINESS DISPUTES 11 (1987), *reprinted in* CPR LEGAL PROGRAM, PRACTICE GUIDE ON MEDIATION, *supra* note 14, at B14; AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL MEDIATION RULES 2 (1986), *reprinted in* CPR LEGAL PROGRAM, PRACTICE GUIDE ON MEDIATION, *supra* note 14, at C2; *A Short-Form Mediation Clause*, NAT'L L.J., Feb. 27, 1989, at 5.

By designating a particular in-house official for this task, systematic consideration will be assured and consistent in-house guidelines established. Over time, a body of in-house standards for consideration of ADR will evolve.

The company should also designate a non-attorney member of top management (or a group of non-attorneys) to be actively involved in the ADR screening process. This individual should be a substantive expert in the area of dispute resolution and should also be educated about the strengths and weaknesses of various ADR techniques. This business representative should also bring a business orientation to the ADR table and offer practical business considerations about why a particular dispute should or should not be referred to ADR. The level of business judgment necessary for the job will depend on the types of disputes a company includes in its screening process. If the company limits ADR to a particular class of disputes, such as consumer complaints for example, a high level of business judgment may not be necessary. More sophisticated business judgment would be required in the ADR assessment process, however, if more complex corporate or commercial disputes are included in the process. The objective is to involve an individual in the process who will view a given dispute as a business problem rather than a legal one and who may be able to see settlement options other than the payment of money.

In addition to the active involvement of certain high-level personnel, all members of the in-house general counsel's office should be familiar with the strengths and weaknesses of various ADR techniques. Appropriate outside counsel—particularly in the substantive area involved in the dispute—should also be familiar with various ADR options and, most importantly, should understand the company's commitment to the use of ADR.

Everyone involved in the ADR process should be kept up to date on current developments. In order to obtain the full benefits of ADR and develop an evolving awareness of its advantages and uses, the company should expend the necessary resources to keep its management and inside and outside legal staff apprised of ADR successes and failures. Seminars and training programs should be used to maximize effective use of ADR and to learn from past uses of various ADR techniques. Preparation and in-house distribution of an ADR primer should also be considered.

### 3. The Formal Structure of ADR Decisionmaking

Consideration of various ADR options must be integrated into the existing formal decisionmaking structure of the company. Accordingly, any ADR screening procedure will have to be tailored to the

decisionmaking process already in place. Nevertheless, there are some specific steps that can likely be implemented regardless of the particular decisionmaking process.

The official (or officials) who initially review all litigation (potential or real) directed against the company should immediately consider the viability of ADR as a way to resolve a given dispute. Similarly, when the company is a potential plaintiff, the official with responsibility for filing the complaint should consider the applicability of ADR techniques. A recommendation should then be made to a centralized decisionmaking authority. Depending on the size of the company, this may be the general counsel or an assistant general counsel in charge of litigation. In some companies, a small ADR committee may be appropriate and could consist of the initial screening official, a high-level representative of the general counsel, and a business official familiar with the ongoing business relationships at stake in the dispute. By concentrating ultimate decisionmaking authority in one individual or a small working committee, the company will ensure that all cases receive similar consideration. In addition, the company will get the benefit of the judgment of a designated official (or group of officials) who is aware of the entire range of disputes that have been referred to ADR and understands the business considerations involved in the effort to resolve the dispute promptly (in many cases before litigation is even commenced).

Even if a matter is rejected for ADR after completion of the screening process, periodic monitoring of the dispute should continue. At regular intervals (for example, every six months), the official or committee should conduct a brief review of every pending case to determine whether references to ADR would now be appropriate. Such periodic monitoring is necessary because disputes that are not initially deemed appropriate for ADR may become so after the completion of limited discovery or motions practice. Before the company commits additional resources to a particular case, for example, before preparing a major motion, engaging in massive, expensive discovery, or preparing witnesses for trial, the company should once again evaluate whether ADR might present an appropriate alternative for resolving the dispute. At times, it may be appropriate to submit certain aspects of a case rather than the entire case to ADR. This is likely to occur, in particular, with respect to neutral expert fact-finding.

#### 4. Substantive Criteria for Referring Cases to ADR

Ultimately, successful institutionalization of the use of ADR will require companies to establish a presumption that all cases, with the very limited exceptions in which settlement is inappropriate and would convey the wrong message to potential adversaries, can be resolved through one or more ADR techniques. Realistically, however, it is helpful to develop substantive criteria that can be used in designating certain types of cases as particularly suitable for ADR treatment. My firsthand experience at mediation demonstrates that the following variables are critical in the decision to engage in ADR:

1. *Uncertainty of result.* Disputes in which the parties are either unsure of the likelihood of success after protracted litigation or confront the potential for great exposure (or minimal recovery) are well-suited for ADR consideration.

2. *Inefficiencies in time and money.* The likelihood of protracted litigation, with its attendant costs and diversion of lawyer and company official time, often corroborates the advantages of ADR. This factor is particularly important in contingent fee cases where the plaintiff's attorney sees advantages to a prompt settlement without the need to "bankroll" the litigation.

3. *A desire to expedite discovery, depositions or both.* ADR is often effective when the parties see an advantage to short-circuiting extensive discovery and/or depositions and desire to undertake "mini-discovery" followed by a settlement proposal. This mini-discovery approach is particularly welcome in disputes where the settlement recommendation is nonbinding, thus offering the parties a "free preview" of the case.

4. *The amount or importance of the controversy.* Most of the largest cases are eventually settled, in part because of reluctance to leave the decision to a court. High litigation costs, however, usually seem less important in a case involving very high stakes or a vital company interest. Thus, either or both parties may be reluctant to take part in a collaborate effort at an early stage. If so, the prospects are likely to be better after extensive discovery has taken place or the imminence of trial exerts pressure for settlement.

5. *Setting parameters for future conduct.* A settlement agreement can include provisions in the nature of injunctive relief that are enforceable as contractual obligations. If litigation is pending, such provisions can be incorporated in a consent decree.

6. *Suitability for neutral expert factfinding.* Whenever the parties find it necessary to retain technical, economic, or other experts, it may well be in their mutual interest to avoid the traditional battle of the experts by jointly retaining a neutral whose findings are advisory. These findings are likely to bring the parties much closer to

settlement and, indeed, may enable the parties to avoid litigation altogether.

The above criteria can serve as useful guidelines in assessing the appropriateness of ADR techniques to a given dispute. Together with a presumption in favor of use of ADR in all cases, these considerations will help identify numerous cases in which a company can experiment with various ADR devices. The company's experience with ADR techniques can then be applied to modify or refine the above criteria for assessing the ADR potential of a given dispute as well as other aspects of the company's ADR program.

##### 5. Establishing a Company Pilot Program

A useful ADR experiment and step toward full-scale institutionalization of ADR is the establishment of an in-house pilot program for the voluntary nonbinding mediation of certain corporate disputes. Such a program allows a company to experiment with the systematic consideration of ADR.

The way to start implementing such a pilot program is to define a class of real and potential disputes for which nonbinding mediation will most likely succeed. This means identifying a category of cases in which the primary obstacle to mediation—the other side's reluctance to try it—is minimized. My own experience indicates that the cases most conducive to such a pilot program are so-called "family disputes" in which, because of the relationship of the company to the real or potential adversary, it will be less difficult to convince the other side to participate. Such cases include employer-employee disputes, disputes involving on-going business relationships, such as disputes with distributors, suppliers, franchisees, subcontractors, and disputes between insurers and their insureds.

To launch a pilot program, one or more company officials would meet with a mediator to select a group of cases that will be the subject of the pilot program. This process of identifying a class of particularly suitable cases may also prove beneficial in establishing criteria for subsequent systematic review of cases for ADR potential after the expiration of the pilot program. The company official or officials would also work with the mediator at this stage to develop a budget for the pilot program.

The actual implementation of the pilot program would involve the following steps: First, the company announces its decision to establish the pilot program in an effort to encourage existing and potential



litigants to participate. The company then agrees on the rules and criteria governing the program, making it clear that the mediation process involved is voluntary, nonbinding, confidential and informal. The mediation of disputes subject to the pilot program should be limited to thirty days from start to finish. The company should agree to pay any and all costs associated with the pilot program. The mediation procedure employed in the pilot program should be a streamlined version of the Feinberg Mediation Process outlined in section III, scheduled to fit within a thirty-day limitation, unless the parties agree to extend the limitation in order to allow for mini-discovery.

During and after the pilot program, the mediator would meet with the representatives of the company to evaluate its strengths and weaknesses. The program could then be modified to make it as effective as possible, given the needs of the particular company experimenting with it. Ideally, the mediation program would eventually become an institutional part of the company's dispute resolution process and act as a catalyst for similar treatment of disputes outside of the particular class of cases selected for purposes of experimentation.

### C. Confidentiality

Another problem associated with mediation as a method of dispute resolution is the legal uncertainty about the confidentiality of communications made in the mediation process. As a practical matter, the mutually agreed upon confidentiality of the mediation process is both an incentive for participation in the process and a critical ingredient for its success. Yet, as a legal matter, there is still considerable uncertainty about the extent to which communications made during the process of mediating a dispute are protected from disclosure in subsequent legal proceedings. This uncertainty about the confidentiality of mediation proceedings is cause for concern and may act as an impediment to the future development of mediation as a widespread method of dispute resolution.<sup>27</sup>

#### 1. The Need for Confidentiality

Why is confidentiality critical to the success of mediation? First, the mediator of a dispute needs a broad and comprehensive understanding of the case, particularly if the mediator is called upon to fashion a settlement proposal (as is the case in my own mediation

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27. A 1981 A.B.A. survey of mediation programs identified the question of whether statements made by participants during the mediation session could be used as evidence in subsequent legal proceedings as a predominant practical concern to alternative dispute resolution programs. Freedman, *Confidentiality: A Closer Look*, in A.B.A. SPECIAL COMMITTEE ON DISPUTE RESOLUTION, CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE 47, 49 (1985).

procedure outlined in section III). In order to acquire this comprehensive understanding of the case, the mediator must look beyond the specific issues in dispute in an effort to illuminate and resolve the underlying causes of the dispute. This may require knowledge of proprietary information and/or information about internal corporate politics, which parties may be unwilling to share absent a credible assurance of confidentiality. The mediator must also understand the motives of the parties and their true needs, not merely their public bargaining positions. The parties must, therefore, feel free to advance tentative solutions and to make statements without fear that they will later be used as a basis for liability or as a measure of damage. This is particularly true in disputes involving uncertain areas of law, where limited abandonment of a firmly held legal position could be interpreted by others outside of the process as a tacit concession of the legal point.<sup>28</sup> In sum, the success of a mediation hinges on candid, unrestricted dialogue and a free flow of information. In the absence of confidentiality, the exchange of information and ideas will be inhibited, severely curtailing the chance of fashioning a successful resolution to the dispute.

Second, the mediator must be perceived by the parties as completely neutral and impartial. This is necessary not only to ensure openness, but also to preserve the integrity of the mediation process. The presence of a neutral intermediary is, after all, the primary feature distinguishing mediation from conventional negotiation. Any suspicion that the mediator may become an adversary or witness against one of the parties in future litigation will undermine the parties' trust in the mediator. Such suspicions will cause parties to a mediation to take a cautious, adversarial stance vis-a-vis the mediator, making it difficult if not impossible for the mediator to create the cooperative atmosphere necessary for successful mediation.

Ultimately, the fear that mediators may be required to divulge information after a mediation would discourage people from entering into mediation at all. Thus, ensuring confidentiality is linked directly to the public policy of encouraging resolution of disputes without resort to litigation.

This public policy, and the need for confidentiality of mediation proceedings, has been recognized formally in many contexts. The statutes and regulations governing mediation programs affiliated with the federal government, for example, provide for confidentiality

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28. DAUER, *supra* note 1, at 2.

of the mediation proceedings.<sup>29</sup> Several state statutes enacted to advance the use of alternative dispute resolution techniques have also recognized the need to assure confidentiality.<sup>30</sup> Several organizations, including the Society of Professionals in Dispute Resolution, have issued rules governing the conduct of mediation that include express confidentiality provisions.<sup>31</sup> Most recently, in December 1988, the Administrative Conference of the United States approved a model rule on mediator confidentiality for federal agencies that use mediation.<sup>32</sup> In recommending the adoption of the model rule, the Chairman of the Conference recognized that "many of the benefits of ADR can be achieved only if the proceedings are held confidential."<sup>33</sup>

## 2. Means of Protecting the Confidentiality of Mediation

Despite these formal recognitions of the importance of protecting the confidentiality of mediations, there is still considerable uncertainty about whether communications made during mediation are legally protected from disclosure, particularly in subsequent litigation. The following discussion of this issue will demonstrate that there are several legal and practical tools that can be used to prevent disclosure of mediation proceedings. Each of these tools, however, has certain weaknesses that might make it less than totally effective, especially in a situation in which someone who was not a party to the mediation seeks disclosure of some aspect of the proceedings. The resulting legal uncertainty about the inviolability of mediation proceedings gives mediators and potential parties to mediation some cause

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29. See, e.g., 42 U.S.C. § 2000e-5(b) (1982) (informal conciliation efforts of the Equal Employment Opportunity Commission); 42 U.S.C. § 2000g-2(b) (1982) (confidentiality clause in statute governing Department of Justice Community Relations Service); 29 CFR § 1401.2 (1988) (Federal Mediation and Conciliation Service regulations, upheld in *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980)); 29 C.F.R. § 1601.26 (1987) (provisions governing informal conciliation efforts of Equal Employment Opportunity Commission); 45 C.F.R. § 90.43 (1987) (regulation governing mediation of age discrimination disputes).

30. See generally A.B.A., *State Legislation on Dispute Resolution: Laws Providing for Informal and Non-Judicial Processes in the 50 States and the District of Columbia*, Monograph Series No. III B (1988); *infra* notes 69-77 and accompanying text.

31. AMERICAN ARBITRATION ASSOCIATION, *COMMERCIAL MEDIATION RULES 12* (1987); CENTER FOR DISPUTE RESOLUTION (Denver, Colo.), *Code of Professional Conduct for Mediators*, reprinted in S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* 116, 119 (1985); SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, *Ethical Standards of Professional Responsibility* para. 3 (1986), in 1 *Alternative Dispute Resolution Rep.* (BNA) 55 (May 28, 1987).

32. ACUS RECOMMENDATION 88-11, *Encouraging Settlements by Protecting Mediator Confidentiality* (1988) (to be codified at 1 C.F.R. § 305.88-11). See also Harter, *Neither Cop nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, in REP. TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (Nov. 15, 1988); ACUS Approves Model Rule on Mediator Confidentiality, 3 *Alternative Dispute Resolution Rep.* (BNA) 20 (Jan. 19, 1989).

33. ACUS RECOMMENDATION, *supra* note 32.

for uneasiness. Recent efforts by state legislatures to guarantee the confidentiality of mediation are encouraging, however, and alleviate some of the uncertainty in this area.

Readers should also bear in mind that, ultimately, the issue of confidentiality of mediation must be viewed in practical, relative terms. As a practical matter, mediation still provides parties with considerably more confidentiality than litigation. Concerns about the confidentiality of mediation should, therefore, be addressed, but should not act as a major deterrent to participation in mediation. With that in mind, I will proceed to discuss the strengths and weaknesses of various practices and theories for protecting the confidentiality of mediation.

*a. Confidentiality Agreements*

One important means of protecting the confidentiality of communications made during mediation is for the parties to the mediation and the mediator to enter into an explicit agreement setting for their expectations and obligations with regard to the confidentiality of the proceedings. The ground rules for my own mediation procedure address the issue of confidentiality directly and comprehensively: The parties agree that all offers, promises, conduct, and statements, whether oral or written, made in the course of the mediation process by any of the parties or their representatives are confidential, and that such information is neither admissible nor discoverable for any purpose in litigation among the parties. The parties also agree that the mediator is disqualified as a litigation witness for any party and that the mediator's oral and written opinions are deemed inadmissible for all purposes.<sup>34</sup> Such agreements can be formally reduced to writing and theoretically are enforceable against a contravening party in a private suit for damages.

Unfortunately, however, the effectiveness of such an agreement to bar discovery or admission of evidence in court is largely a matter of judicial discretion and will involve a balancing of public policy concerns. Despite the public policy in favor of dispute resolution outside

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34. For examples of the terms of other confidentiality agreements recommended for use in mediation, see AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL MEDIATION RULES 5 (1986), reprinted in CPR LEGAL PROGRAM, PRACTICE GUIDE ON MEDIATION, *supra* note 14, at C3; CPR SAMPLE CONFIDENTIALITY AGREEMENT, *CPR Model ADR Procedures in Technology Disputes*, ANNEX J. (1987), reprinted in CPR LEGAL PROGRAM INFORMATION PACKAGE ON CONFIDENTIALITY OF ADR PROCEEDINGS (1986-1987) (available from Center for Public Resources, 608 Fifth Avenue, New York, NY 10019).

of court, there is a risk that courts will refuse to enforce confidentiality agreements when competing public policies favor disclosure.<sup>35</sup> This is particularly true in cases in which the court believes that enforcing the agreement would be unfair, or where an inquiry into criminal conduct is involved.<sup>36</sup>

Furthermore, even if confidentiality agreements are enforceable between the parties, they do not bind nonparties and, therefore, will have little effect on the ability of a nonparty to discover or introduce evidence of mediation proceedings. Two recent cases illustrate this point and demonstrate judicial hostility to private agreements to foreclose court access to evidence.

In *Grumman Aerospace Corp. v. Titanium Metals Corp.*,<sup>37</sup> the District Court for the Eastern District of New York permitted a third party to obtain discovery of a report prepared by the neutral factfinder on the effects of certain price-fixing activities, despite the fact that the report contained a confidentiality provision limiting the use of the report in litigation. The court rejected the argument that the confidentiality agreement immunized the report and related material from discovery, stating that parties may not be permitted "to contract privately for the confidentiality of documents, and foreclose others from obtaining, in the course of litigation, materials that are relevant to their efforts to vindicate a legal position."<sup>38</sup>

Similarly, in *Bennett v. La Pere*,<sup>39</sup> the District Court for Rhode Island allowed a non-settling defendant to discover settlement documents despite what the court called a "boilerplate paragraph" calling for confidentiality of the agreement.<sup>40</sup> The court stated that "litigants cannot so easily colloquy to screen themselves from the rigors of pretrial discovery" and pointed out that "[w]hatever suppressive effect the confidentiality clause may have had as between the [parties to the agreement], it cannot be allowed to bar the nonsettling defendant's right to inquire into the settlement."<sup>41</sup>

Thus, as a legal matter, confidentiality agreements entered into within the framework of a mediation will not guarantee that aspects of the mediation will not be disclosed in subsequent litigation. In-

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35. See Murphy, *In the Wake of Tarasoff: Mediation and the Duty to Disclose*, 35 CATH. U.L. REV. 209, 227 n.109 (1985) (and cases cited therein); Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 451 n.72 (1984) (and cases cited therein).

36. See Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L. J. 955, 1027-28 (1988).

37. 91 F.R.D. 84 (E.D.N.Y. 1981).

38. *Id.* at 87-88.

39. 112 F.R.D. 136 (D.R.I. 1986).

40. *Id.* at 140.

41. *Accord Magnaleasing, Inc. v. Staten Island Mall*, 76 F.R.D. 559, 562 (S.D.N.Y. 1977).

deed, they are unlikely to have any impact when a nonparty to the agreement tries to gain access to covered information. Nonetheless, these agreements are useful because they may serve as a deterrent to the disclosure of information by parties to the agreement, and further, because they may influence the way in which a court exercises its discretion when confronted with an attempt by a party to the confidentiality agreement to compel testimony by the mediator or otherwise access mediation materials.<sup>42</sup>

*b. Rules of Evidence and Civil Procedure*

The rules and principles governing the admissibility and discovery of evidence can also provide some protection against disclosure of mediation proceedings in subsequent litigation.

*i. Rule 408*

One approach to protecting the confidentiality of mediation is to look to the protection afforded to settlement negotiations by Federal Rule of Evidence 408, which restricts the admissibility of conduct and statements made during compromise negotiations.<sup>43</sup> The purpose of the rule is to promote "free and frank" discussions of settlement pro-

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42. See *Drukker Communications, Inc. v. NLRB*, 700 F.2d 727 (D.C. Cir. 1983) (holding that testimony of NLRB agent should have been admitted in proceeding below, but stating that explicit notice to parties that Board agent would not be permitted to testify would affect court's view of matter); *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980) (participant in Federal Mediation and Conciliation Service proceeding charged with acceptance of restriction on the subsequent testimonial use of the mediator).

43. The text of the rule is as follows:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408. This restriction on the admissibility of compromise negotiations appears in some form in the evidence code of every state. DAUER, *supra* note 1, at 4. Some state versions may, however, be more limited than the federal version which covers not only the settlement itself but also any discussions during the negotiations. Trout, *Confidentiality in Alternative Dispute Resolution Mechanisms* 9, reprinted in CPR LEGAL PROGRAM, INFORMATION PACKAGE ON CONFIDENTIALITY OF ADR PROCEEDINGS (1986-87).

posals in an effort to encourage the nonjudicial settlement of disputes.<sup>44</sup> This purpose is entirely consistent with the goal of encouraging the resolution of disputes through mediation by protecting the confidentiality of mediation proceedings. Thus, the protection of confidentiality provided by rule 408 would logically extend to mediation proceedings.

Unfortunately, however, the protection afforded by rule 408 is limited in several significant respects, making the rule "an insecure basis for protection" of mediation proceedings.<sup>45</sup>

One significant limitation of rule 408 is that it bars the admission of evidence only when it is offered to prove the validity or amount of the disputed claim. It would not therefore prevent admission of settlement negotiations in an effort to prove or challenge the actual settlement agreement arising out of the negotiations or to challenge the conduct of the negotiations. It would also not bar evidence offered to impeach a nonparty witness. Evidence offered to support or rebut a related, but technically different, claim would also not be barred.

A related issue is that, while the rule clearly prevents the admissibility of statements made in settlement negotiations in subsequent litigation between the parties, it is less clear with regard to the admissibility of settlement negotiations in litigation between one of the parties and an unrelated third party.<sup>46</sup> Generally, however, courts have recognized the need to protect against disclosure of settlement of similar cases involving co-plaintiffs or co-defendants.<sup>47</sup>

Another very significant limitation of the rule is that, by its terms, it applies only to the admission of evidence at trial, not to pre-trial discovery. The policy behind the rule would appear to support preclusion of discovery as well as admissibility of compromise negotiations because fear of disclosure through discovery could also discourage compromise discussion. Courts, however, are split on whether rule 408 precludes discovery of settlement discussions. The

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44. FED. R. EVID. 408 advisory committee's note ("a more consistent ground [for exclusion] is the promotion of public policy favoring the compromise and settlement of disputes"); H.R. REP. NO. 650, 93d Cong., 1st Sess. 8 (1973) (rule seeks to "promote nonjudicial settlement of disputes"); S. REP. NO. 93-650, 93d Cong., 1st Sess. 10 (1973) ("The purpose of this rule is to encourage settlements which would be discouraged if [evidence of settlement or attempted settlement] were admissible."); 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE*, ¶ 408[01], at 408-09.

45. Harter, *supra* note 32, at 11 (outlining exceptions to and limitations of rule 408). For more comprehensive discussions of the limitations of rule 408 as well as suggested strategies to overcome them, see Brazil, *supra* note 36; Comment, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 448-50 (1984).

46. See generally Restivo, Jr. & Mangus, *Alternative Dispute Resolution: Confidential Problem Solving or Every Man's Evidence?*, in 2 ALTERNATIVES TO THE HIGH COST OF LITIGATION 5, 7-8 (May 1984).

47. See Reichenbach v. Smith, 528 F.2d 1072 (5th Cir. 1976); Young v. Verson All-steel Press Co., 539 F. Supp. 193 (E.D. Pa. 1982); Scaramuzzo v. Glenmore Distilleries, Co., 501 F. Supp. 727 (N.D. Ill. 1980).

majority view appears to be that rule 408 does not create a general privilege for settlement discussions that would exempt them from the broad scope of permissible discovery,<sup>48</sup> which is defined as "any matter, not privileged, which is relevant to the subject matter of the pending action."<sup>49</sup>

However, while not extending a general privilege, several cases have applied the public policy considerations underlying rule 408 to bar discovery, at least in the absence of a particularized showing that discovery of the settlement negotiations would be likely to reveal admissible evidence.<sup>50</sup> On the other hand, at least one federal court has squarely rejected the notion that rule 408 bars discovery of compromise negotiations as well as the contention that the public policy considerations underlying the rule apply to discovery as well as admissibility at trial.<sup>51</sup>

In sum, while the policy considerations underlying rule 408 will provide fuel for the arguments of those seeking to maintain the confidentiality of mediation proceedings, the limitations of the rule make it an inadequate source of protection.

*ii. Rule 403*

Rule 403 of the Federal Rules of Evidence may also be helpful in preventing the disclosure of communications made during mediation.<sup>52</sup> Regardless of the applicability of other specific rules of evidence, rule 403 requires courts to balance the probative value of the evidence sought to be introduced against the harm likely to result from its admission.<sup>53</sup> This requirement offers proponents of the confidentiality of mediation proceedings the opportunity to make a variety of arguments based on such factors as the risk of prejudice, the availability of other means of proof, as well as the policy argument

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48. Brazil, *supra* note 36, at 988, 990-99.

49. FED. R. CIV. P. 26(b).

50. See *Branch v. Phillips Petroleum Co.*, 638 F.2d 873 (5th Cir. 1981); *Weissman v. Fruchtman*, No. 83-8958 (S.D.N.Y. Oct. 31, 1986) (WESTLAW, Allfeds); *Bottaro v. Hatton Assoc.*, 96 F.R.D. 158 (E.D.N.Y. 1982).

51. *Bennett v. La Pere*, 112 F.R.D. 136, 139-40 (D.R.I. 1986). In addition, the court suggested that the discovery of a settlement agreement could be justified on the basis of rule 408's exception allowing admission of settlement discussions if offered for a purpose other than to prove liability for or invalidity of the claim or its amount made: "There is, of course, no satisfactory way for [the party seeking access to the settlement agreement] to determine whether it can slip within the integument of the Rule 408 exception unless it gains discovery access to the settlement documents." *Id.* at 139.

52. See Brazil, *supra* note 36, at 982-87 and cases cited therein.

53. FED. R. EVID. 403 advisory committee's note.



behind rule 408—namely, the importance of promoting the nonjudicial resolution of disputes by protecting the confidentiality of settlement discussions.

Again, however, the applicability of the rule is limited to the admissibility, as opposed to the discovery, of mediation proceedings and lies wholly within the discretion of the court. Thus, rule 403 is not a reliable and predictable source of protection for communication made in the course of mediation.

### *iii. Work Product Doctrine*

Rule 26 of the Federal Rules of Civil Procedure, which governs discovery during litigation, offers other potential means of protecting the confidentiality of mediation proceedings. Rule 26(b)(3) of the Federal Rules of Civil Procedure, for example, which codifies the work product doctrine enunciated in *Hickman v. Taylor*,<sup>54</sup> may provide some limited protection. This doctrine limits the discovery of materials prepared in anticipation of litigation by a party or his representative, including “his attorney, consultant, surety, indemnitor, insurer, or agent.”<sup>55</sup> Its applicability to a mediator is unclear, especially because it applies only to materials prepared “in anticipation of litigation” and is designed to protect the adversary system. One commentator, however, has remarked that a mediator, while not acting as an attorney for either party, is an agent, representative, and consultant to all the parties to a mediation. Therefore, “it would be only a short step to apply the workproduct doctrine to a mediator, and indeed its contours fit remarkably well.”<sup>56</sup>

One lower court decision barring discovery of documents prepared by an “environmental” mediator, except to the extent that they had been made public, referred to the mediator’s “work product,” indicating that the doctrine may be applicable to mediation.<sup>57</sup> In another case, however, the District Court for the Eastern District of New York held the doctrine inapplicable to a report prepared by a neutral factfinder for use in settlement without prospect for use in litigation.<sup>58</sup> The court emphasized that “the work product doctrine derives from the notion that ‘a common law trial is and always should be an adversary proceeding’” and observed that the report at issue “was intended to be the common foundation for settlement of the

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54. 329 U.S. 495 (1947).

55. FED. R. CIV. P. 26(b)(3).

56. Harter, *supra* note 32, at 14.

57. *Adler v. Adams*, No. 673-73C2, magistrate’s order (W.D. Was. 1979), *aff’d*, June 7, 1979 (unreported but reproduced along with underlying pleadings in A.B.A. SPECIAL COMMITTEE ON DISPUTE RESOLUTION, CONFIDENTIALITY IN MEDIATION: A PRACTITIONER’S GUIDE 245 (1985)).

58. *Grumman Aerospace Corp. v. Titanium Corp.*, 91 F.R.D. 84 (1981).

claims of three sets of adversaries . . . . It did not embody an adversary's competing view of the effects of asserted . . . violations."<sup>59</sup> Such language casts considerable doubt on the usefulness of the doctrine in mediation.

Furthermore, the protection afforded by the doctrine is not complete. Litigants can still gain access to covered materials upon a showing of substantial need for the materials or undue hardship in obtaining the sought information from other sources.

*iv. Protective Orders*

Another potential source of confidentiality is rule 26(c) of the Federal Rules of Civil Procedure, which authorizes the issuance of protective orders precluding discovery.<sup>60</sup> Thus, parties to a mediation arising out of a case already filed in court may seek a protective order to prevent disclosure of the mediation proceedings. The protection afforded by this procedure, however, is unpredictable because courts enjoy enormous discretion in issuing the order and in establishing its scope. Those seeking a protective order against the disclosure of mediation proceedings can assert the strong public policy favoring the nonjudicial settlement of disputes. This may well influence the court's balancing of the prejudice caused by disclosure against the needs of other parties for the information.

The effectiveness of court protective orders is severely limited by the fact that the court has the power to modify existing protective orders so as to allow disclosure in later proceedings.<sup>61</sup> The likelihood that a protective order will be ineffective has led one knowledgeable commentator to advise parties to a mediation not to file with the court any settlement that is reached: "If you file it under seal with the court, it's pretty clear that seal is going to be full of holes."<sup>62</sup>

*c. Protecting the Mediator*

While the above discussion demonstrates that federal rules of evidence and civil procedure may offer some protection to mediations,

59. *Id.* at 88. The court also observed that disclosure to an adversary waives the work product protection as to items actually disclosed, even where disclosure occurs in settlement. *Id.* at 90.

60. FED. R. CIV. P. 26(c).

61. See, e.g., *Janus Films, Inc. v. Miller*, 801 F.2d 578 (2d Cir. 1986); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339 (3d Cir. 1986). But see *Palmieri v. State of New York*, 779 F.2d 861 (2d Cir. 1985).

62. CPR LEGAL PROGRAM, *Proceedings, ADR Confidentiality*, reprinted in 5 ALTERNATIVES TO THE HIGH COST OF LITIGATION 16, 96 (June 1987).

they do not address specifically the issue of whether a mediator and/or a mediator's notes are subject to subpoena. The issue of whether a mediator will be entitled to an evidentiary privilege preventing him or her from being forced to testify requires courts to balance the need for the information against the harm from its disclosure.<sup>63</sup>

While no general privilege for mediators has been established, several courts have excluded mediator testimony on public policy grounds. For example, the immunity of federal labor mediators from subpoena was established in *NLRB v. Joseph Macaluso, Inc.*<sup>64</sup> In that case, the Ninth Circuit upheld the National Labor Relation Board's revocation of a subpoena of a Federal Mediation and Conciliation Service mediator capable of providing information crucial to resolution of a factual dispute between the parties. The court held that the public interest in maintaining the perceived and actual impartiality of federal mediators outweighs the benefits to be derived from the mediator's testimony. The court focused, however, on the public interest in ensuring industrial stability and the legislative framework under which the Federal Mediation and Conciliation Service operates. Thus, while the case provides a helpful analogy, its reasoning is technically limited to government labor mediators.<sup>65</sup>

The issue of whether private labor mediators are entitled to an evidentiary privilege was addressed by the United States District Court for the District of Columbia in *Mack Trucks, Inc. v. United Auto Workers*.<sup>66</sup> The mediators' testimony was sought after a dispute arose between the parties to the mediation about whether a bargaining agreement had been reached. The court granted a protective order limiting discovery of the mediator's notes and allowing deposition examinations only with regard to public statements and documents

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63. See *Drukker Communications, Inc. v. NLRB*, 700 F.2d 727, 731 (D.C. Cir. 1983).

64. 618 F.2d 51 (9th Cir. 1980). See also *Pipefitters Local No. 208 v. Mechanical Contractors Ass'n of Colorado*, 90 Lab. Cas. 12,647, 1980 Westlaw 2169 (D. Colo. 1980). But cf. *Drukker Communications, Inc. v. NLRB*, 700 F.2d 727 (D.C. Cir. 1983) (holding that testimony of NLRB agent who assisted party in drafting stipulation should have been required based on balance of need against harm under specific facts, despite recognition that agent's action was akin to agency mediation protected by evidentiary privilege).

65. Mediators working within the framework of other governmental programs have also been protected. See, e.g., *City of Port Arthur, Texas v. United States*, No. 80-0648, court order quashing subpoena (D.D.C. Nov. 12, 1980) (U.S. Department of Justice Community Relations Service), reprinted in A.B.A. SPECIAL COMMITTEE ON DISPUTE RESOLUTION, CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE 223 (1985); *Adler v. Adams*, No. 673-73C2, magistrate's order (W.D. Wash. 1979), *aff'd*, June 7, 1979 (Washington State Office of Environmental Mediation) (unreported decision reproduced along with underlying pleadings in A.B.A. SPECIAL COMMITTEE ON DISPUTE RESOLUTION, CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE 245 (1985)). The district court's summary affirmation of the magistrate's order in *Adler* is commented on in Liepmann, *supra* note 12, at 111-29.

66. No. 87-265 (D.D.C. 1987) (order without written opinion commented on in 1 ADR Rep. (BNA), at 212-13 (Sept. 17, 1987)).

that have been made available to the public. Ruling from the bench, the court stated that "the whole mediation process could be brought into question" by allowing the litigants to question the mediators and that this would call into question "severe public-policy issues . . . as to the mediation process."<sup>67</sup> The court stressed, however, that the ruling did not establish a mediator's privilege, stating "I am not barring their depositions from being taken totally. I want that understood. I don't believe in the privilege situation, [or] that that is the appropriate procedure."<sup>68</sup> The attorney representing the mediators, however, characterized the case as staying only "'half a step away' from fully establishing a privilege for private, as opposed to public, mediation."<sup>69</sup>

Such cases demonstrate that the public policy favoring dispute resolution outside of court can be very influential in protecting a mediator from being forced to testify. Case by case balancing of the public interest in favor of protection against the need for the particular information sought, however, does not offer reliable and predictable results. Thus, as with reliance on the evidentiary and procedural theories discussed above, current case law on mediator immunity offers less than satisfactory assurance of the confidentiality of mediation proceedings.

#### *d. Statutory Protection*

The uncertainty associated with relying on current case law and existing evidentiary procedural rules has led several legislatures to enact statutes that provide explicit protection to mediation proceedings.<sup>70</sup> Many of these statutes are linked to governmental mediation programs and therefore provide protection to private mediators only by analogy and by evidencing a public policy in favor of confidentiality in mediation.<sup>71</sup> Others, however, contain general confidentiality provisions that apply to private civil mediations as well.<sup>72</sup> Such general statutes often require mediators to have certain qualifications as

67. 1 ADR Rep. (BNA), at 213 (Sept. 17, 1987).

68. *Id.*

69. *Id.*

70. See generally A.B.A., *supra* note 30; Harter, *supra* note 32, at 24-25; C. MCEWEN & N. ROGERS, *MEDIATION: LAW, POLICY AND PRACTICE* (1989 Lawyer's Coop.) (forthcoming).

71. See, e.g., Colorado Dispute Resolution Act, COLO. REV. STAT. § 13-22-301-11 (1987 & Supp. 1988); N.Y. JUD. LAW § 849-b(6) (McKinney Supp. 1983-84).

72. See, e.g., VA. CODE ANN. § 8.01-581.22 (1988).

a condition to coverage under the legislation.<sup>73</sup>

The relevant statutes vary widely in scope and must be examined carefully to ascertain the exact measure of protection afforded. Several contain various exceptions to the confidentiality of mediation proceedings in certain cases, such as in an action against a mediator for damages.<sup>74</sup> Some allow the parties to waive the confidentiality of the proceeding.<sup>75</sup> Under others, however, the confidentiality privilege belongs exclusively to the mediator.<sup>76</sup>

The strength of the protection offered by such statutes is illustrated by the case of *People v. Snyder*,<sup>77</sup> in which the court refused, despite compelling circumstances, to breach the strict confidentiality provision of the New York statute that established a Community Dispute Resolution Center program.<sup>78</sup> The case involved a plea of self-defense by a defendant who had previously participated in a mediation with the murder victim. The District Attorney sought access to the records of the mediation, which took place prior to the fatal shooting. The court, however, held that even if the defendant could be found to have waived the confidentiality of the records, the statute permitted no such waiver, and that allowing access to the records would subvert the legislature's clear intention to guarantee the confidentiality of all such records and communications.<sup>79</sup>

Such strong legislative assurances of the confidentiality of mediation procedures provide much stronger protection than theories based on existing case law and evidentiary rules. They also provide further evidence of the strong public policy in favor of ensuring the confidentiality of mediation. Thus, such statutes, even if not directly applicable, help to strengthen the arguments available under the rules of evidence and civil procedure. They are therefore an encouraging development in this uncertain area.

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73. See, e.g., MASS. GEN. L. ch. 233, § 23(c) (1985).

74. See, e.g., OKLA. STAT. tit. 12, § 1805 (Supp. 1985); VA. CODE ANN. § 8.01-581.22 (1988).

75. See, e.g., CAL. EVID. CODE § 1152.5 (West Supp. 1988); VA. CODE ANN. § 8.01-581.22 (1988).

76. See, e.g., MASS. GEN. L. ch. 233, § 23(c) (1985).

77. 129 Misc. 2d 137, 492 N.Y.S.2d at 890 (1985).

78. *Id.* at 139, 492 N.Y.S.2d at 892.

79. *Id.* Compare *Florida v. Castellano*, 460 So. 2d 480 (Fla. Dist. Ct. App. 1984), in which the court compelled mediator testimony in support of contention of self-defense where arguments for the exclusion of such testimony were not based on a special statutory confidentiality provision, but rather were based on a privilege rationale, a state equivalent of rule 408, and on an agreement regarding confidentiality. The court stated that "[i]f confidentiality is essential to the success of the [community mediation] program, the legislature is the proper branch of government from which to obtain the necessary protection." *Id.* at 482.

*e. The Bottom Line on Confidentiality*

The above discussion demonstrates there is no iron-clad guarantee that the confidentiality of mediation proceedings will be respected in subsequent litigation. This is particularly true where nonparties to the mediation seek access to the mediation proceedings or its results because confidentiality agreements and relevant rules of evidence and civil procedure may not apply. However, strong public policy arguments based on the public interest in encouraging nonjudicial dispute resolution can be asserted to persuade a court to protect confidentiality and courts have been responsive to such concerns. Furthermore, legislatures are increasingly recognizing the value of protecting the confidentiality of mediation.

Finally, even in the current atmosphere of legal uncertainty, parties considering mediation must bear in mind that, as a practical matter, mediation offers considerably more confidentiality than alternatives such as litigation. Information provided to the court during litigation or offered into evidence at trial is generally subject to public examination and even media coverage.<sup>80</sup> In mediation, on the other hand, all of the participants, including the mediator, place a high premium on confidentiality and are likely to take all possible practical steps to protect it.

## V. CONCLUSION

Those interested in using mediation to resolve disputes and in seeing mediation develop into a widely used means of conflict resolution still face problems, including the unwillingness of many to try mediation, the lack of institutionalized consideration of mediation as an alternative to litigation, and legal uncertainty about the confidentiality of the process. These problems, however, are not insurmountable and do not outweigh the important advantages of mediation as a means of resolving disputes. The many advantageous features of mediation include its cost-effectiveness, its informality, its flexibility, its adaptability to a variety of disputes, and its fully voluntary and non-binding nature. Section III of this article outlines a procedure that maximizes these advantages and that has a proven record of success.

In the final analysis, parties to a dispute should not hesitate to try mediation. Its potential for successfully resolving the dispute is great

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80. See *In re Application of National Broadcasting Co.*, 653 F.2d 945, 952 (2d Cir. 1980) (presumption in favor of public inspection of items offered into evidence at public civil trial).

and the risk of failure is no more than to resort to the familiar course of litigation.