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MEDIATION AND OKLAHOMA'S NEW DISPUTE RESOLUTION ACT

I. INTRODUCTION

On July 1, 1983, Oklahoma's new Dispute Resolution Act became operative.¹ The Act was passed in response to the increasing number of mediation programs available in the state and a desire on the part of mediation advocates to clarify legal issues such as mediator liability and confidentiality, as well as to set legislative standards and guidelines in the field.² Project Early Settlement, Tulsa's mediation program, was a major factor in the city being chosen as a pilot site for the American Bar Association's Multi-Door Dispute Resolution Centers Program (Multi-Door Program).³

This Comment will discuss Project Early Settlement and the

1. OKLA. STAT. tit. 12, §§ 1801-06 (Supp. 1983). The Dispute Resolution Act gives Oklahoma counties and municipalities the authority to establish mediation programs to be administered and supervised under the direction of the Administrative Director of the Courts. *Id.* § 1803. Furthermore, the Administrative Director is to establish jurisdictional guidelines for mediation programs and to promulgate rules and regulations to effectuate the purposes of the Act. *Id.* §§ 1803-04. Such rules are then subject to the approval of the Oklahoma Supreme Court. *Id.* § 1803. Rules prepared by the Administrative Office of the Judiciary were approved as to form by the Oklahoma Supreme Court on January 16, 1984. Oklahoma Rules, Regulations and Guidelines for the Dispute Resolution Act (Oct. 1983). These rules provide for: (1) the establishment of a Dispute Resolution Advisory Board to assist the Administrative Director of the Courts; (2) the qualification of mediators; (3) a general outline of a referral policy to govern the referral of disputes between dispute resolution programs; (4) the development of initial interview procedures; (5) rules of practice for attorneys of clients involved in mediation; (6) a code of professional conduct for mediators; (7) procedures regarding continuances of criminal or civil actions to allow parties to the action to pursue mediation; and (8) the submission of reports by dispute resolution programs established under the authority of the Oklahoma Dispute Resolution Act to the Administrative Director of the Courts. *Id.* Rules 2, 4-10.

2. See Mitchell, *Tulsa's Mediation Plan Helps Unclog Courts*, J. REC., March 5, 1983, at 4; ABA SPEC. COMM. ON DISPUTE RESOLUTION, LEGISLATION ON DISPUTE RESOLUTION 127 (1984). Among the mediation programs available in Oklahoma are: Dispute Services operated from the psychology department at Oklahoma State University in Stillwater; Citizen's Dispute Settlement Program operated under the Probation Services Division of Oklahoma City; and Project Early Settlement initiated by the Municipal Court of the City of Tulsa. ABA SPEC. COMM. ON ALTERNATIVE DISPUTE RESOLUTION, DISPUTE RESOLUTION PROGRAM DIRECTORY 154-57 (L. Ray ed. 1983). See also ABA SPEC. COMM. ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION, *Mediation Services Available in Oklahoma*, DISPUTE RESOLUTION, Spring 1982, at 6 (discusses Dispute Services and Project Early Settlement).

3. Speech by W. Riley, Reception for Multi-Door Dispute Resolution Centers Program, Tulsa Club (June 22, 1983); see also *Program May Settle Legal Disputes*, Tulsa World, June 24, 1983, at 10, col. 3. Mr. Riley commented that the commitment local civic leaders have shown toward Project Early Settlement and that program's success rate are what attracted the ABA to choose Tulsa for Multi-Door. *Id.* at 10, col. 4.

Multi-Door Program in relation to the concept of mediation. Inasmuch as a major function of the Multi-Door Program in Tulsa will be the channeling of disputes into mediation, particularly Project Early Settlement's mediation program, the second part of this discussion will concentrate on mediation as a means of settling disputes and the effect of Oklahoma's Dispute Resolution Act on mediation issues. These issues include the confidentiality of mediation sessions, the enforceability of mediation settlements, and the scope of mediator liability.

II. PROJECT EARLY SETTLEMENT AND THE MULTI-DOOR PROGRAM

The concept of dispute resolution centers was developed by Professor Frank E. A. Sander and presented in 1976 at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.⁴ Dispute resolution centers are intended to act as "multi-door courthouse[s]" with "many doors directing disputants to the most appropriate dispute-resolution process."⁵ Ideally, such a program would have one intake center which would direct complaints to several different processes within the same building.⁶ These processes could include arbitration, mediation, ombudsman,⁷ medical malpractice screening, or small claims or juvenile court proceedings.⁸

Sander's proposal pointed out that the key feature of the multi-door concept is intake screening,⁹ the purpose of which is to analyze

4. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976). Professor Frank E.A. Sander is a Bussey Professor of law at Harvard University and a member of the American Bar Association Special Committee on Dispute Resolution.

5. Sander, *The Multidoor Courthouse*, 63 NAT'L FORUM-PHI KAPPA PHI J. 24, 25 (1983). See also Sander, *supra* note 4, at 130-31, in which he states: "[w]hat I am thus advocating is a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes."

6. ABA, *Multi-Door Dispute Resolution Center*, Tulsa, Oklahoma 2, (May 1983) (unpublished report). Information throughout this Comment which was obtained from unpublished reports and memoranda is available through the ABA, Spec. Committee on Dispute Resolution, 1800 M. Street N.W., Washington, D.C. 20036. See also Sander, *supra* note 4, at 131 (examples of processes which could be made available).

7. The ombudsman concept is one designed to deal with complaints against governmental agencies, officials, and employees. The concept operates by having a public official screen and investigate such complaints before making a recommendation as to resolution of the complaint. See Frank, *State Ombudsman Legislation in the United States*, 29 U. MIAMI L. REV. 397, 397-98 (1975); see also Cooke, *The Highways and Byways of Dispute Resolution*, 55 ST. JOHN'S L. REV. 611, 623 (1981) in which the author stated: "Complaints against governmental activities could be processed through an ombudsman who would make recommendations for action through a milieu of informal and speedy procedures."

8. See Sander, *supra* note 5, at 25; Sander, *supra* note 4, at 131.

9. See Sander, *supra* note 5, at 25. In fact, Sander notes that the success of the multidoor courthouse will largely depend on the skill of the intake official and that one real danger of this

the nature of a dispute in order to determine the most effective mechanism for resolving it.¹⁰ In so directing a dispute, the program would increase both the economic efficiency and the expeditious handling of dispute settlement and, in turn, decrease citizen frustration in locating the most appropriate mechanism for resolving conflicts.¹¹

The American Bar Association became actively involved in the study of alternative methods of dispute resolution through its sponsorship of a national conference on Minor Dispute Resolution in 1977.¹² Following this conference, the ABA established the Special Committee on the Resolution of Minor Disputes, now called the Special Committee on Dispute Resolution.¹³ The Committee "serves as the coordinating entity for alternative dispute resolution activity within the American Bar Association"¹⁴ and has set forth five objectives which it intends to promote: (1) providing comprehensive clearinghouse services and technical assistance to all interested entities; (2) developing and implementing a plan for increasing state and local bar involvement; (3) conducting legal, judicial, and public education programs; (4) developing law school curriculum; and (5) conducting research and experimentation.¹⁵ In furtherance of these goals, the Committee implemented Sander's "multi-door courthouse" concept through the development of a Multi-Door Dispute Resolution Centers Program.¹⁶ On January 27, 1983, the ABA selected Tulsa and Houston as initial sites for Multi-Door Centers.¹⁷ The District of Columbia was later added as

"administrative innovation" is the possibility of disputants being referred from one door to another with no genuine effort to resolve their problems. *Id.*

10. *Id.*

11. *Id.* One further advantage of the multidoor concept "is that it will help . . . to gain a better understanding of the peculiar advantages and disadvantages of particular dispute-resolution processes for specific types of disputes." *Id.*

12. ABA, REPORT ON THE NATIONAL CONFERENCE ON MINOR DISPUTE RESOLUTION, Introduction (May 1977).

13. See Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 31 n.13; ("The American Bar Association sponsored a national conference on Minor Dispute Resolution in 1977 . . . [and] subsequently established a Special Committee on the Resolution of Minor Disputes."); but see ABA SPEC. COMM. ON DISPUTE RESOLUTION, ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND THE LAW: WILL REASON PREVAIL? Introduction (L. Ray ed. 1983) ("The Special Committee on Alternative Means of Dispute Resolution (at the time of publication, the Special Committee for Dispute Resolution) was created out of the Pound Revisited Conference of 1976.")

14. Spec. Comm. on Dispute Resolution, ABA Tactical Planning 1 (Jan. 1984) (unpublished memorandum).

15. ABA SPEC. COMM. ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION, *ABA Board Approves Three-Year Plan*, DISPUTE RESOLUTION, Spring 1982, at 1.

16. ABA SPEC. COMM. ON DISPUTE RESOLUTION, *supra* note 13.

17. See Simonson, *Tulsa's Project Early Settlement is ABA'S First Choice*, TULSA CTY. B. A. NEWS, April 1983, at 1.

a third site.¹⁸

Tulsa was chosen as a site for a multi-door center because of its “progressive legal system, its innovative Project Early Settlement Program, and [its] energetic Mayor and Court Administrator.”¹⁹ Project Early Settlement was initiated in February, 1982, by the Municipal Court of the City of Tulsa²⁰ for the purpose of “utiliz[ing] mediation and conciliation as alternative means to dispute resolution.”²¹ The Project, which operates by training volunteers who then serve as out-of-court mediators,²² was established to channel less serious disputes of a civil, criminal, consumer, housing or domestic conflict nature into resolution by mediation as opposed to litigation.²³ In the first eleven months of the Project’s operation, the program attracted seven hundred cases, eighty-five percent of which were settled by the agreement of the parties involved.²⁴ Inasmuch as Tulsa’s Multi-Door Program will be aimed at referring similar types of disputes to alternative resolution processes, Project Early Settlement is expected to be a major recipient

18. ABA Meeting of the Special Committee on Dispute Resolution, Los Angeles, Calif. (June 16, 1983) (unpublished memorandum). See also ABA SPEC. COMM. ON DISPUTE RESOLUTION, *supra* note 13 (notes that, as of date of publication, Washington, D.C., Tulsa, and, Houston were chosen as sites for Multi-Door Centers).

19. Speech by W. Riley, *supra* note 3.

20. ABA SPEC. COMM. ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION, *Mediation Services Available in Oklahoma*, DISPUTE RESOLUTION, Spring 1982, at 6. The Project’s first mediation session was held on March 28, 1982, and full operations were developed by April, 1982. OK. STATE UNIV. & CITY OF TULSA, OK., PROJECT EARLY SETTLEMENT-A REVIEW OF THE FIRST SIX MONTHS, Introduction at 2 (1983). The Tulsa Municipal Court initially acted as coordinator of the Multi-Door Center in Tulsa. ABA, Multi-Door Dispute Resolution Center, Tulsa, Oklahoma 4 (May 1983) (unpublished report). The Multi-Door Center is currently operated by the Tulsa County Bar Association under the direction of Terry Simonson. Telephone call to Tulsa County Bar Assoc. (Oct. 15, 1984).

21. Simonson, *supra* note 17, at 1.

22. See Simonson, *supra* note 17, at 1. By April, 1983, the Project had trained 130 volunteers to serve as mediators. *Id.* Initial training sessions were held in March and May, 1982, and involved 25 and 40 participants, respectively. OK. STATE UNIV. & CITY OF TULSA, OK., *supra* note 20, at 9-10. Each session involves 20 hours of training, focusing on how to conduct the mediation hearings, how to prepare a written agreement between the parties, and how to prepare comments on the hearing for recordkeeping purposes. *Id.* at 10-11.

23. See Simonson, *supra* note 17, at 1. Simonson notes that prior to the development of Project Early Settlement, consumer, family, business, and neighborhood disputes were channeled to small claims or misdemeanor courts. Mitchell, *supra* note 2, at 4. Thus, the Project “clears up congestion for the cases that need to be there [the courts] and need to be dealt with in a timely manner.” *Id.* Studies compiled over the first six full months of operation show that 50% of Project Early Settlement disputes involved money or property, 15% involved harassment and 15% were termed “relationship” disputes. OK. STATE UNIV. & CITY OF TULSA, OK., *supra* note 20, at 18. Furthermore, 34% of the disputes involved neighbors, 33% were between consumers and merchants and 12% were between “mates.” *Id.* at 21.

24. Mitchell, *supra* note 2, at 4.

of the Multi-Door Center's cases.²⁵

The choice of Houston and the District of Columbia as additional sites for pilot multi-door centers was also influenced by those cities' progress in the field of dispute settlement alternatives.²⁶ Houston's Neighborhood Justice Center handles approximately 350 cases per month,²⁷ and the District of Columbia has a variety of dispute processing forums, including the D.C. Complaint Center and Mediation Service and the Superior Court's Voluntary Civil Arbitration Program.²⁸

The pilot centers in the selected cities will follow three phases in the implementation of the dispute resolution procedures. These phases are estimated to take more than three years to complete.²⁹ The first phase of the Multi-Door Program is the development of Dispute Screening and Diagnostic Centers,³⁰ where trained intake counselors will refer citizens to the most appropriate available dispute resolution mechanism.³¹ The second phase of the project will encompass the creation or improvement of dispute resolution mechanisms within the community.³² In the third and final phase, the ABA will undertake a

25. ABA, Multi-Door Dispute Resolution Center, Tulsa, Oklahoma 4 (May 1983) (unpublished report).

26. See Simonson, *supra* note 17.

27. ABA, Multi-Door Dispute Resolution Center, Houston, Texas 4 (August 1983) (unpublished report).

28. ABA, Draft-District of Columbia Multi-Door Dispute Resolution Center 1 (Aug. 10, 1983) (unpublished memorandum on ABA Meeting of Spec. Comm. on Dispute Resolution, Los Angeles, Calif., June 16, 1983).

29. Eder, *Justice Department Backs Multi-Door Center*, DISPUTE RESOLUTION, Winter 1984, at 1, 2.

30. ABA, Multi-Door Dispute Resolution Center, Tulsa, Oklahoma 3 (May 1983) (unpublished report); see also *Program May Settle Legal Disputes*, Tulsa World, June 24, 1983, at 10, col. 4-5 ("The first phase of Multi-Door will be . . . 'diagnostic screening service[s] . . . where it will be decided how best to resolve a problem."); Eder, *supra* note 29, at 2 (discusses three phases of the Multi-Door Program). Phase one was initiated in Tulsa in April, 1984, by the opening of three Citizen's Complaint Centers where trained Intake Specialists are available to screen complaints and make referrals. Interview with Terry A. Simonson, Director of Tulsa Multi-Door Program (June 25, 1984). These centers are located at the Better Business Bureau, for handling consumer related disputes; the Police/Prosecutor Complaint Office, for referring disputes which are criminal in nature; and KJRH's Channel 2 Troubleshooter, for handling a variety of complaints. *Id.*; see also, *Pilot Program Aimed at Easing Resolution of Disputes*, Tulsa Tribune, Feb. 15, 1984, at D.1, col. 5-6 (intake specialists will refer complaints to Project Early Settlement, Small Claims Court, the city prosecutor's office, or to social agencies). During the first phase of the multi-door program, the ABA tentatively plans on operating the intake centers for 18 months as a "test of dispute screening, diagnosis, and referral mechanisms." ABA, Multi-Door Dispute Resolution Center, Tulsa, Oklahoma 5 (May 1983) (unpublished report). The first phase in Tulsa, Houston, and the District of Columbia will be assessed by the Institute for Social Analysis. Eder, *supra* note 29, at 1.

31. ABA, Multi-Door Dispute Resolution Center, Tulsa, Oklahoma 4, 5 (May 1983) (unpublished report); Eder, *supra* note 29, at 2.

32. ABA, *supra* note 31, at 3-4; Eder, *supra* note 29, at 2.

detailed evaluation of the Program.³³

III. MEDIATION AND OKLAHOMA'S DISPUTE RESOLUTION ACT

A. *Mediation in General*

Mediation is a process whereby a neutral party acts to facilitate the resolution of a dispute.³⁴ A mediator, however, lacks the power of a judge or an arbitrator to make a binding decision for disputing parties.³⁵ As a result, the basic focus in mediation is to assist parties in solving disputes among themselves.³⁶

In accordance with the early development of mediation programs in the United States, which were directed at the resolution of minor disputes,³⁷ Oklahoma's Dispute Resolution Act is aimed at less serious disputes.³⁸ Nonetheless, new efforts are being made to use mediation as a tool in resolving major disputes, particularly in the areas of racial,³⁹ environmental,⁴⁰ and domestic conflicts.⁴¹ This rapid increase in

33. ABA, Multi-Door Dispute Resolution Center, Tulsa, Oklahoma 4 (May 1983) (unpublished report); accord Eder, *supra* note 29, at 2.

34. Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System—An Overview and Legal Analysis*, 29 AM. U.L. REV. 17, 21 (1979); BLACK'S LAW DICTIONARY 885 (5th ed. 1979). See generally Cooke, *Mediation: A Boon or a Bust?*, 28 N.Y.L. SCH. L. REV. 3 (1983) (discussion of the benefits of mediation and the types of disputes most amenable to mediation); Cooke, *The Highways and Byways of Dispute Resolution*, 55 ST. JOHN'S L. REV. 611 (1981) (discussion of dispute resolution alternatives, including mediation, in the civil and criminal arena and legislative means to facilitate such alternatives); Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) (discussion of the mediation function and the role of mediators); Goldbeck, *Mediation: An Instrument of Citizen Involvement*, 30 ARB. J. 241 (1975) (discussion of mediation in relation to New York City's West Side Highway Project); Greason, *Humanists as Mediators: An Experiment in the Courts of Maine*, 66 A.B.A. J. 576 (1980) (mediation of small claims cases in Portland, Maine); Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982) (discussion on role lawyers can play in mediation processes and potential problems of altering a lawyer's traditional adversarial role); Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 26 AM. J. COMP. L. 205 (Supp. 1978) (presents reasons for the increase of mediation in the United States).

35. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 29 & n.1 (1982).

36. *Id.* at 34.

37. *Id.* at 31.

38. [M]any disputes arise between citizens of this state which are of *small social or economic magnitude* and can be both costly and time consuming if resolved through a formal judicial proceeding. Many times such disputes can be resolved in a fair and equitable manner through less formal proceedings. . . . It is therefore the purpose of this act to provide to all citizens of this state convenient access to dispute resolution proceedings which are fair, effective, inexpensive, and expeditious.

OKLA. STAT. tit. 12, § 1801 (Supp. 1983) (emphasis added).

39. Riskin, *supra* note 35, at 32 & n.29.

40. *Id.* For a discussion of various forms of environmental dispute resolution, see Bellman, Bingham, Brooks, Carpenter, Clark & Craig, *Environmental Conflict Resolution*, ENV'TL CONSENSUS 1 (Winter 1981). See also Schoenbrod, *Limits and Dangers of Environmental Mediation: A Review Essay*, 58 N.Y.U. L. REV. 1453 (1983) (critique of private parties attempting to resolve

alternative methods of dispute resolution generally, and mediation specifically,⁴² has, however, left unresolved a number of legal issues.

B. Confidentiality

One key issue in the field of mediation is whether or not the mediation session itself should remain confidential. Professor Paul Rice stated that "[w]ithout some assurance of confidentiality, prospective participants may be reluctant to enter mediation/arbitration programs, or to cooperate fully because of the fear that any statements they make or information they provide will be used to their disadvantage in subsequent civil or criminal proceedings."⁴³ Thus, a method of guaranteeing confidentiality is essential in order to assure that all parties involved are free to discuss any issues they feel are relevant without the concern that discussions intended as confidential will later be used to their detriment.⁴⁴ The assurance of confidentiality should also aid in preventing the transformation of a mediation session from a resolution device to a fact-finding expedition for a party intent on litigation,⁴⁵ and in preventing the use of mediation records as a means of prosecutorial discovery in criminal mediations.⁴⁶

The problem of confidentiality in mediation programs has already

environmental disputes through mediation); Straus, *Mediating Environmental Disputes*, 33 ARB. J., Dec. 1978, at 5 (discussion of benefits of using a facilitator in environmental disputes).

41. Riskin, *supra* note 35, at 32; *see also* Coombs, *Noncourt-Connected Mediation and Counseling in Child-Custody Disputes*, 17 FAM. L. Q. 469 (1984) (sets forth various methods of mediating child custody disputes); Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L. Q. 497 (1984) (analyzes short and long-term effects of the Denver Custody Mediation Project); Comment, *The Best Interest of the Divorcing Family-Mediation Not Litigation*, 29 LOY. L. REV. 55 (1983) (discussion of Louisiana divorce law, domestic relations mediation and ethical considerations of divorce mediation).

42. *See generally* Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 26 AM. J. COMP. L. 205 (Supp. 1978). Smith concludes: "The decade of the 1970's has provided the setting for a remarkable series of developments that are changing the way in which Americans settle disputes The emergence of . . . mediation centers and the extension of . . . mediation to the settlement of disputes . . . are, perhaps, the most dramatic of these developments." *Id.* at 205.

43. Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System-An Overview and Legal Analysis*, 29 AM. U.L. REV. 17, 30 (1979).

44. *See* Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 CAP. U.L. REV. 181, 196 (1982).

45. *Id.* at 200. Friedman emphasizes this point and states:

If the parties know they will be unable to use facts acquired in the hearing in later litigation, there will be less probing for such facts. This will free the hearing officer from the fact finding tasks at an earlier point, and enable him or her to move on to the important mediation phase of the hearing. If the parties speak freely in the hearing, it will also aid the hearing officer in reaching a settlement.

Id.

46. *Id.* at 198-99.

presented itself in several jurisdictions, particularly in relation to medical malpractice mediation.⁴⁷ It has been argued that allowing a mediation panel's written conclusions into evidence at a subsequent trial or permitting mediators to testify at a later trial usurps the jury's function and, therefore, violates the plaintiff's right to a trial by jury under the state's constitution.⁴⁸ Other courts have admitted the findings of mediators under the theory that the jury remains free to decide what weight should be given to the panel's decision.⁴⁹ Some courts have

47. See *McCarthy v. Mensch*, 412 So. 2d 343, 346 (Fla. 1982) (court held plaintiffs were not denied right to a jury trial, to due process of law, or to equal protection by the trial court's admission into evidence of a medical malpractice mediation panel's written decision despite a later ruling that the Florida Medical Malpractice Act was unconstitutional); *Davison v. Sinai Hosp. of Baltimore*, 462 F. Supp. 778, 781 (D. Md. 1978) (court held that the Maryland Health Care Malpractice Claims Act did not deprive claimants of a right to a jury trial despite the fact that the findings of the arbitrators made prior to trial are presumptively valid at trial); *Prendergast v. Nelson*, 199 Neb. 97, —, 256 N.W.2d 657, 666 (1977) (admitting medical review panel's report into evidence does not unconstitutionally interfere with right to trial by jury); *Halpern v. Gozan*, 85 Misc. 2d 753, —, 381 N.Y.S.2d 744, 748-49 (Sup. Ct. 1976) (court allowed admission of a medical malpractice panel's decision based on the premise that the jury was free to decide what weight should be given to the panel's findings); *Simon v. Saint Elizabeth Medical Center*, 3 Ohio App. 3d 164, —, 355 N.E.2d 903, 908 (1976) (court held Ohio's Medical Malpractice Act relating to compulsory arbitration of medical malpractice claims was unconstitutional and the "arbitration provisions . . . which permit the introduction into evidence and exposure to the jury of the arbitrator's decision, are a violation of the right to trial by jury.") See generally *Freedman, Confidentiality: A Closer Look*, in ABA SPEC. COMM. ON DISPUTE RESOLUTION, ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND THE LAW: WILL REASON PREVAIL? 68 (L. Ray ed. 1983) (general outline of confidentiality issues); *Friedman*, *supra* note 44 (discussion of issues of confidentiality and how they relate to Night Prosecutor Program in Columbus, Ohio); Note, *Medical Malpractice Mediation Panels: A Constitutional Analysis*, 46 FORDHAM L. REV. 322 (1977) (survey of medical malpractice mediation legislation, and constitutional issues presented therein).

48. See, e.g., *Simon*, 355 N.E.2d at 908 (use of panel's findings as evidence at a later trial "effectively and substantially reduces a party's ability to prove his case, because that party must persuade a jury that the decision of the arbitrators was incorrect, a task not easily accomplished in view of the added weight which juries have traditionally accorded the testimony of experts.") See also Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655, 681 (1976) ("At a subsequent trial, the prejudicial effect of an admissible, adverse panel report could be virtually impossible to overcome, thus carrying over an unjust panel determination into a judgment."); Note, *supra* note 47, at 331-32 ("While the effect of a divided panel's opinion may be minimal, a unanimous decision may be considered controlling by the jury."). Inasmuch as the Seventh Amendment right to a jury trial in civil cases under the Constitution is not applicable to the states under the Fourteenth Amendment, such arguments must be advanced under the applicable state constitutional guarantees. See *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1875).

49. See *McCarthy*, 412 So. 2d at 346; *Prendergast*, 256 N.W.2d at 666; *Halpern*, 381 N.Y. 2d at 748-49. See also *Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979). The Fifth Circuit Court of Appeals would admit both the findings and testimony by the panel members under the theory that the United States Supreme Court permits the admission of expert findings into evidence at a jury trial. *Id.* at 1179-81. The Court of Appeals cited *Meeker v. Lehigh Valley R.R.*, 236 U.S. 412, 430 (1915), in which the Supreme Court permitted the findings and orders of the Interstate Commerce Commission to be admitted as prima facie evidence of the facts stated therein in a suit to enforce a reparation award. *Id.* at 1180. The Circuit Court quoted from the decision that "[the admission of the ICC's findings] interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury It does not abridge the

gone so far as to grant such panel's findings a presumption of validity.⁵⁰

At least one court has held that a mediator's findings or recommendations are not admissible unless the mediator is available to testify as to the basis of the recommendation.⁵¹ In *McLaughlin v. Superior Court for San Mateo County*,⁵² the California Court of Appeals considered the constitutionality of the California Family Law Act⁵³ and, in particular, rules of the Superior Court of San Mateo County, as they related to the Act. The California Family Law Act requires prehearing mediation of child custody and visitation disputes in marital dissolution proceedings.⁵⁴ The Act, though providing for the confidentiality of mediation proceedings,⁵⁵ leaves to local court rules the issues of admissibility of a mediator's recommendation and availability of the mediator for cross-examination by the parties at a later hearing.⁵⁶ The defendant court exercised that option by adopting a policy which required that the mediator make a recommendation to the court if the mediating parties failed to agree on child custody or visitation; by requiring that the mediator not state his or her reasons for the recommendation; and, because the basis of the recommendation had not been disclosed to the court, by denying the mediating parties the right to cross-examine the mediator.⁵⁷ The Court of Appeals held that to permit "the court to receive a significant recommendation on contested issues [while denying] the parties the right to cross-examine its source" was a denial of due process of law and, thus, a combination which could not be constitutionally enforced.⁵⁸

right of trial by jury, or take away any of its incidents." *Id.* (quoting *Meeker v. Lehigh Valley R.R.*, 236 U.S. 412, 430 (1915)).

50. See *Davison*, 462 F. Supp. at 781.

51. *McLaughlin v. Superior Court for San Mateo Cty.*, 140 Cal. App. 3d 473, 189 Cal. Rptr. 479 (1983).

52. *Id.*

53. CAL. CIV. CODE §§ 4000-5174 (West 1983).

54. *Id.* § 4607(a) provides that:

[W]here it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of a child or children that either or both such issues are contested . . . , the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing.

(Emphasis added.) (Current version at CAL. CIV. CODE § 4607(a) (West Supp. 1984)).

55. CAL. CIV. CODE § 4607(e) (West Supp. 1984).

56. CAL. CIV. CODE § 4607(e) (West Supp. 1984), provides that "[t]he mediator may, consistent with local court rules, render a recommendation to the court as to the custody or visitation of the child or children." (Emphasis added.)

57. *McLaughlin*, 140 Cal. App. 3d at 480, 189 Cal. Rptr. at 484.

58. *Id.* at 480, 189 Cal. Rptr. at 485. See also *Freedman*, *supra* note 47, at 89-90 (discussing *McLaughlin* and the desire to balance the need for confidentiality of hearings with the value to the court of a mediator's recommendation). The Fifth Circuit Court of Appeals in *Woods* was not,

Because the issue of confidentiality is in dispute, several alternatives are available and should be carefully examined in order to protect the confidentiality of mediation sessions. One alternative is to have the parties enter into a written agreement not to litigate settlements reached in mediation.⁵⁹ Such an agreement must, however, be made on a voluntary basis and with full awareness and understanding of any rights being waived.⁶⁰ In jurisdictions involved in criminal mediation, this written agreement/waiver should be augmented by an agreement "signed by the prosecutor, promising not to seek out information from the [mediation] program."⁶¹ These agreements may then prevent the parties from using what was intended as confidential information against each other and also prevent a prosecutor from obtaining access to mediation records.

Mediators could further protect against forced disclosure by maintaining no written records⁶² and thus avoid a subpoena of documentary evidence.⁶³ The lack of written records combined with evidentiary rules on hearsay,⁶⁴ which would possibly prevent the mediator from testifying as to statements made during mediation, could keep a substantial portion of a session confidential. A lack of written records, however, would deter the efficiency and continuity of a program and hinder follow-up work on mediation settlements as well as research efforts for the sake of the program.⁶⁵ Furthermore, if statements made

however, concerned with this problem. *Woods*, 591 F.2d at 1179-81. The applicable statute in *Woods* provided that:

[I]f any party rejects the decision of a mediation panel [under Florida's Medical Malpractice Law] he may institute litigation based on his claim in an appropriate court. The panel findings are admissible into evidence in any subsequent litigation, but specific findings of fact are inadmissible. . . . Panel members may not be called to testify as witnesses concerning the merits of a case.

Id. at 1168 (discussing FLA. STAT. § 768.47 (1977)). The court upheld the constitutionality of this procedure stating that "[t]he panel finding is a particularly relevant, but not conclusive, form of evidence." *Id.* at 1180. The court further held that "[t]he mere unavailability of panel members for testimony at the subsequent trial does not render section 768.47 unconstitutional." *Id.*

59. See Friedman, *supra* note 44, at 203. Such an agreement may, however, present problems in the event a resolution is reached in mediation but is later breached and the non-breaching party then desires to litigate his mediation settlement. For a discussion of the enforcement of mediation agreements, see *infra* notes 91-102 and accompanying text.

60. See *id.* at 203-04. Friedman argues that such agreements, "like verbal expressions of confidentiality, would probably have greater psychological than legal force." *Id.* at 204.

61. *Id.* at 202.

62. Prof. Rice points out that an additional problem in keeping mediation records confidential is the public's right of access to public documents and the "trend . . . toward policies that favor and encourage access rather than impede it." Rice, *supra* note 34, at 77.

63. See Friedman, *supra* note 44, at 202.

64. See FED. R. EVID. 801.

65. See Friedman, *supra* note 44, at 202. Professor Rice notes that "[a]ccurate and compre-

during mediation are construed as admissions against interest, such admissions, which are not within the scope of the Federal Rules of Evidence definition of hearsay,⁶⁶ would arguably be admissible in courts which have adopted the Federal Rules.

Another means of protecting the confidentiality of mediation programs would be to treat the sessions and their outcome as offers to compromise.⁶⁷ Federal Rule of Evidence 408, which prohibits the use of "conduct or statements made in compromise negotiations,"⁶⁸ reverses the common law rule which protected only the offer itself and not independent admissions of fact made during settlement negotiations.⁶⁹ For states which have adopted Federal Rule of Evidence 408, or a form similar to it, mediation programs could gain protection under the premise that mediation, though ideally not a pre-litigation process, fits the rationale of an offer to compromise because it encourages settling disputes without a trial.⁷⁰

Federal Rule of Evidence 501 offers still another possible method

hensive records are essential to the success of the programs, for without them complete and informed service from intake through follow-up is jeopardized." Rice, *supra* note 34, at 76. Project Early Settlement's procedures provide for a written mediator report of all sessions for follow-up and evaluation purposes. OK. STATE UNIV. & CITY OF TULSA, OK., *supra* note 20, at XVI. The report is recorded on a pre-printed form. *Id.* at XIX. Mediation agreements are also recorded on a pre-printed form and maintained by the program. *Id.* at XVI-XVII. However, "[i]t is the policy of Project Early Settlement to require the mediator to oversee the destruction of all notes taken by the disputants at the mediation session" and "[t]he mediator is also to destroy his or her own notes." *Id.* at XV-XVI.

66. See FED. R. EVID. 801(d)(2).

67. See Friedman, *supra* note 44, at 204-07.

68. FED. R. EVID. 408 provides:

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.

69. See S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 170 (2d ed. 1977). FED. R. EVID. 408 would still be somewhat limited in the scope of protection it provides as it does not require the exclusion of offer to compromise evidence which is used for "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.

70. The Domestic Relations Committee of the Civil Litigation Task Force in Alaska proposed a rule ("Proposed Civil Rule 90.2") in October, 1983, which would permit court-ordered mediation of divorce, child custody and visitation, and other domestic relations issues. ABA SPEC. COMM. ON DISPUTE RESOLUTION, LEGISLATION ON DISPUTE RESOLUTION 3 (1984). Proposed Civil Rule 90.2 utilizes Alaska's evidence rule, which was patterned after FED. R. EVID. 408, in its confidentiality provision. *Id.* at 12. Under the rule, all mediation proceedings would be confidential and "deemed to be within the meaning of Evidence Rule 408." *Id.* Furthermore, a proposal has been made to amend Alaska Rule of Civil Procedure 408 to make specific reference to mediation or dispute resolution services as constituting an offer or attempt to compromise a disputed claim. *Id.* at 8.

of protecting confidentiality.⁷¹ Rule 501 protects the privilege of persons and witnesses according to the “principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”⁷² Thus, if a problem of confidentiality arose in a state law context, mediation programs could be protected by privileges fashioned by a court or state legislature to protect pretrial diversion processes or social workers, or by a privilege directed specifically at mediation.⁷³ By so creating a mediator privilege, no statements made to the mediator intended to be used in the mediation process could later be introduced as evidence in subsequent litigation.

Finally, legislation could be specifically tailored toward protecting the confidentiality of a variety of dispute resolution programs.⁷⁴ On

71. See Friedman, *supra* note 44, at 207-11.

72. FED. R. EVID. 501. Friedman points out that courts may rely on Wigmore's four conditions to establish a privilege against the disclosure of communications. Friedman, *supra* note 44, at 208-09. These conditions are:

- (1) The communications must originate in a *confidence* that they will not be disclosed;
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties; (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

J. WIGMORE, EVIDENCE § 2285 (2d ed. 1923). The first two factors are met because of the expectations of parties involved in mediation, particularly parties who have made written agreements not to disclose information brought out in the mediation process. The third objective is supported by the public policy in favor of mediation, including saving court time and encouraging the peaceful resolution of disputes. The fourth factor would involve balancing the protection of a free and open mediation program against the court's interest in having all available information to fairly adjudicate a dispute. Courts may find that without the guarantee of confidentiality, however, a mediation program would not gain the confidence of its participants and would, therefore, not operate at its full potential.

73. Friedman, *supra* note 44, at 209. Friedman notes that the rationale for the limited protection available to social workers in some jurisdictions “clearly applies to the human relations counselors on mediation program staffs.” *Id.*

74. See, e.g., COLO. REV. STAT. § 13-22-307 (Supp. 1983), which provides:

Dispute resolution meetings may be closed at the discretion of the mediator. Mediation proceedings shall be regarded as settlement negotiations, and no admission, representation, or statement made in mediation not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery. In addition, a mediator shall not be subject to process requiring the disclosure of any matter discussed during mediation proceedings.

See also MICH. COMP. LAWS ANN. § 552.513(3) (West Supp. 1984-1985) (communications between a domestic relations mediator and a party to the mediation or between the parties in the presence of the mediator are privileged communications and shall not be admitted in evidence in any proceedings); N.Y. JUD. LAW § 849-b(6) (McKinney Supp. 1983-1984) (unless otherwise provided in the Community Dispute Resolution Centers Program Act, the work products of a mediator are confidential, as are communications relating to the subject of the resolution made during the resolution process); OR. REV. STAT. § 107.785 (1983) (all communications in child custody and visitation dispute mediation proceedings shall be confidential; parties and individuals engaged in mediation shall not be examined in civil or criminal actions as to communications, nor shall such communications be used in civil or criminal actions without consent of mediating parties; excep-

the federal level, the Federal Mediation and Conciliation Service gives mediators a privilege by prohibiting them from producing documents or from testifying in regard to mediation proceedings.⁷⁵ The Oklahoma legislature addressed the problem of confidentiality in the Dispute Resolution Act by creating a privilege as to information received by a mediator and by disclaiming that mediation records are public.⁷⁶ Section 1805 of the Act reads in part as follows:

- A. Any information received by a mediator or a person employed to assist a mediator, through files, reports, interviews, memoranda, case summaries, or notes and work products of the mediator, is privileged and confidential.
- B. No part of the proceeding shall be considered a matter of public record.
- C. No mediator, initiating party,⁷⁷ or responding party⁷⁸ in a mediation proceeding shall be subject to administrative or judicial process requiring disclosure of any matters discussed or shall disclose any information obtained during any part of the mediation proceedings.⁷⁹

Subsection A thus creates a mediator privilege, thereby alleviating the need to rely on Oklahoma's Rules of Evidence which contain no mediator, pre-trial diversion, or social worker privilege.⁸⁰

A mediator's records are protected from public access through subsection B of the Oklahoma Dispute Resolution Act. This provision is particularly important because Project Early Settlement is coordinated by the Municipal Court of the City of Tulsa,⁸¹ and it could be argued that its records should be characterized as public records. Professor Rice states:

The characterization of the records of mediation/arbitration programs as public records will turn not only on the legal responsibility of the programs to maintain records, their general recordkeeping

tions to testimonial privilege under Oregon law do not apply to communications made during mediation; and all court records with respect to mediation shall be closed).

75. 29 C.F.R. § 1401.2(b) (1983); *see also* Friedman, *supra* note 44, at 204. Friedman explains that "[f]ederal mediators [in the Federal Mediation and Conciliation Service] are prohibited from producing documents or testifying concerning information obtained in the course of their duties. Some exceptions to this rule may be made with written permission from the Director of FMCS." *Id.*

76. OKLA. STAT. tit. 12, § 1805(A), (B) (Supp. 1983).

77. "Initiating party" is defined by the statute as the "party who first seeks mediation." *Id.* § 1802(1).

78. "Responding party" is defined by the statute as the "party who is named by the initiating party as the other party in a dispute where mediation is sought." *Id.* § 1802(6).

79. *Id.* § 1805(A)-(C).

80. *See* OKLA. STAT. tit. 12, §§ 2501-2513 (1981).

81. OK. STATE UNIV. & CITY OF TULSA, OK., *supra* note 20, at 4.

practices, and the attitude of the courts in the jurisdiction in question, but also, and more fundamentally, on whether the programs themselves are public agencies. . . . In making such a determination, courts undoubtedly will assess such factors as the source of their funding, the nature of their powers, and the public character of the responsibilities which they have undertaken, as reflected in their relationship to the courts and executive law enforcement agencies and in their impact on legal rights and conventional "public proceedings."⁸²

Subsection B thus eliminates any questions which could arise concerning the public nature of any written documents or reports which will result from the mediation process.

Subsection C of the Act provides that participants in mediation shall not disclose the information obtained in a mediation session in an administrative or judicial process.⁸³ This subsection, therefore, eliminates the need to rely on Federal Rule of Evidence 408 or a written agreement to prevent the disclosure of information obtained by the various parties during mediation.

Confidentiality of information obtained in mediation in Oklahoma is not without its limit. Subsection F strips the mediator of his privilege if one of the parties to the mediation "brings an action for damages against a mediator arising out of mediation."⁸⁴ The scope of this limitation must, however, be considered in conjunction with Subsection E which provides that civil actions against a mediator for statements or decisions made during the process of mediation are limited to actions which are a result of "gross negligence with malicious purpose" or those taken in a "manner exhibiting willful disregard of the rights, safety, or property of any party to the mediation."⁸⁵

The mediator's privilege is further limited by the Oklahoma Rules, Regulations and Guidelines for the Dispute Resolution Act which provide that:

The mediator shall disclose information to the proper agencies upon learning that a child under the age of eighteen (18) years has had physical injury or injuries inflicted upon him or her, by other than accidental means, where the injury appears to have been caused as a

82. Rice, *supra* note 34, at 78. In fact, Project Early Settlement receives a major portion of its funding from the Oklahoma Crime Commission and receives referrals from the Tulsa City Police Department, the Tulsa City Prosecutor's Office and the Tulsa District Attorney's Office. OK. STATE UNIV. & CITY OF TULSA, OK., *supra* note 20, at 2, 5.

83. OKLA. STAT. tit. 12, § 1805(C) (Supp. 1983).

84. *Id.* § 1805(F).

85. *Id.* § 1805(E). See also *infra* notes 118-20 and accompanying text (discussion of liability under the Oklahoma Dispute Resolution Act).

result of physical abuse or neglect.⁸⁶

This limit, however, will rarely arise and should be of little or no consequence to a party refusing to mediate for fear of losing confidentiality.

Despite these limitations placed upon the mediator's privilege, Oklahoma's new Dispute Resolution Act will clearly aid Project Early Settlement because of its straightforward confidentiality provisions. As such, mediators and mediating parties will not have to rely on more tenuous means to protect the confidentiality of discussions within mediation and records produced as a result of mediation. All parties should, therefore, be more willing to cooperate with and use the services available through the mediation program.

C. *Enforceability*

In addition to the problems related to confidentiality, additional problems arise when the parties involved in mediation reach a settlement with mutual obligations and incorporate those obligations into an oral or written agreement which is subsequently breached by one or more of the parties. Professor Rice suggests four options in the event of breach of a mediation agreement.⁸⁷ The first option is to ignore the breach and let the parties proceed as they choose.⁸⁸ This would, however, diminish the effectiveness of the mediation and create inefficiency in that the same dispute must then be channeled elsewhere for resolution. A second option is that, if parties are willing, the agreement can be renegotiated in further mediation.⁸⁹ The second option is only useful where the parties are cooperative, which is unlikely if one agreement has already been breached. The third option involves the revocation of participation in the mediation program, leaving the parties to settle the dispute in litigation, through the criminal justice system, or other administrative or judicial channels.⁹⁰ As with the first

86. Oklahoma Rules, Regulations and Guidelines for the Dispute Resolution Act, *supra* note 1, at Rule VIII(B)(5)(a)(3). This rule mirrors the obligation of health care professionals and "every other person" in Oklahoma who has knowledge of physical injuries inflicted upon a child by abuse or neglect to report the matter to the Department of Human Services. OKLA. STAT. tit. 21, § 846 (1981). Furthermore, a mediator may be obligated to report the intention of a mediation participant to commit a crime or any information necessary to prevent a crime. Though such a provision is not currently encompassed in the Code of Professional Conduct for Mediators (see Oklahoma Rules, Regulations and Guidelines for the Dispute Resolution Act, Rule VII), such information may be disclosed by an attorney, even when it is a client secret or confidence. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 4-101(C)(3) (1981).

87. *See Rice, supra* note 34, at 26.

88. *Id.*

89. *Id.*

90. *See id.* Professor Rice points out that revocation of a defendant's participation in a crimi-

option, this would not be the most efficient method of handling a breach. Finally, the parties could attempt to enforce the agreement reached in mediation.⁹¹ The advantage of this option is that it would encourage the disputing parties to approach settlement seriously the first time around and thereby promote efficiency. This fourth option, however, raises additional issues concerning enforceability.

The agreement, pursuant to this fourth option, could be enforceable under a number of theories including contract,⁹² compromise and settlement,⁹³ accord and satisfaction,⁹⁴ or arbitration,⁹⁵ or could be

nal mediation program presents due process problems, with such due process rights arising from the diversion process. *Id.* at 51. In *State v. Lebbing*, 158 N.J. Super. 209, 385 A.2d 938 (1978), the New Jersey Superior Court held that a criminal defendant was entitled to the minimal requirements of due process before being terminated from a pretrial intervention program. *Id.* at 941. The court based its reasoning on *Morrissey v. Brewer*, 408 U.S. 471, 480-84 (1972), in which the Supreme Court held that a criminal defendant is entitled to due process protection prior to having his parole revoked, and on *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), where the Court extended this reasoning to probation terminations. *Lebbing*, 385 A.2d at 941. The court went on to hold that the defendant was entitled to:

(a) written notice of the claimed violations of the conditions of PTI [pretrial intervention]; (b) disclosure to defendant of the evidence relied on; (c) the opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and examine adverse witnesses; [and] (e) a statement of reasons for termination by the presiding judge.

Id. at 942. The hearing does not, however, have to "implicate the 'full panoply' of due process rights" since it is not a part of the criminal prosecution. *Id.* (quoting *Morrissey*, 408 U.S. at 480).

The same problems may present themselves in a mediation program where a criminal defendant is referred to mediation prior to being prosecuted for an offense. If the parties fail to come to an agreement, or an agreement is reached but it is claimed that the defendant breached the agreement, the defendant would appear to be in a position to demand minimal due process rights to protect his conditional liberty interest prior to being prosecuted on the original criminal charges. Statutes providing for pretrial mediation of disputes do not appear to be addressing this potential problem. Under Connecticut's statute, when a criminal mediation is successful, the prosecutor is to enter a *nolle prosequi* and prosecution is to be terminated. CONN. GEN. STAT. ANN. § 54-56m.(b) (West Supp. 1984). If, however, the mediation is unsuccessful, or the defendant fails to comply with the mediation agreement, prosecution of the defendant may be initiated. *Id.* § 54-56m.(c). The statute does not expressly provide for the right of the defendant to a hearing. Likewise, under the Oklahoma statute, a defendant entering mediation is deemed to have waived his right to a speedy trial, but the statute does not provide for any rights the defendant will have in the event the mediation process fails. OKLA. STAT. tit. 12, § 1806 (Supp. 1983).

91. See Rice, *supra* note 34, at 26.

92. If a mediation agreement is entered into voluntarily and the agreement meets the legal requirements of a valid contract, including consideration, the agreement would appear to be enforceable as a contract. See generally Freedman, Legal Issues in Mediation-Are Mediation Agreements Enforceable? 5-9 (undated) (unpublished memorandum to ABA Spec. Comm. on Dispute Resolution) (discussion of enforcement of mediation agreements under theories of general contract law, compromise and settlement, and arbitration). Professor Rice argues that "[o]pposing the enforcement of mediated or arbitrated contracts on the basis that enforcement converts a cause of action in tort to one in contract intolerably exalts form over substance." Rice, *supra* note 34, at 28. He goes on to note that the objective in mediation is to reach an agreement which remedies the dispute and the technical means in which the remedy is given effect is irrelevant. *Id.*

93. Compromise and settlement is defined as "[a]n agreement or arrangement by which, in consideration of mutual concessions, a controversy is terminated." BLACK'S LAW DICTIONARY

made enforceable by statute.⁹⁶ The primary problem in the enforcement of a mediation agreement would be the assessment of damages. An award of money damages would undermine the goal of mediation, i.e., the parties fashioning their own agreement to avoid a court-imposed solution.⁹⁷ Furthermore, a question would arise as to whether damages should be awarded based on the original dispute as opposed to the self-imposed agreement which failed.⁹⁸

As an alternative to damages, specific performance, though a well-suited remedial device for mediation agreements in some cases, could prove difficult to enforce in others. First, the terms of the agreement must be specific enough to be enforceable.⁹⁹ This presents a problem

260 (5th ed. 1979). Successful mediation results in an agreement to settle claims against each other by mutual promises or performances and thus fits well within the definition of compromise and settlement. Compromise and settlement agreements are upheld under the premise of encouraging the private resolution of disputes over litigation. 15A AM. JUR. 2D *Compromise and Settlement* § 5 (1976).

94. In mediation involving the breach or possible breach of a former contract, the principle of accord and satisfaction may come into play. If the mediation agreement constitutes a new contract, and such contract is entered after the breach of a former contract, the mediation agreement could be considered an "accord" and "the acceptance of it, or its performance in discharge of the original contract," a "satisfaction." J. MURRAY, MURRAY ON CONTRACTS § 253, at 513 (2d rev. ed. 1974). If, however, the original contract had not yet matured, the mediation agreement, under general principles of contract law, could be considered a substitute contract. *Id.* Either way, "[i]t is now the law that a later, unperformed agreement, be it a technical accord or a substitute contract, if it embodies the essential requisites of an informal contract, is legally enforceable." *Id.* at 515. Moreover, if it is the intent of the parties, the second agreement will operate to discharge the parties' obligations under the prior contract. *Id.* Whether or not the obligations under the first contract are discharged the moment the new contract is consummated or when the new contract is fully performed will depend on the parties' intent. *Id.* at 515-16. Generally, however, without "affirmative evidence of a contrary intention," it will be presumed that the parties did not intend to exchange one cause of action for another, and, therefore, "it was their intention that the old obligation should be discharged only on performance on the new." *Id.* at 516. Thus, if the parties manifest an intent that upon entering the mediation agreement it is to act as a discharge of all obligations under the previous contract, under the principles of accord and satisfaction, the parties technically should be barred from suing under the first contract and held instead to have only a remedy under the mediation agreement.

95. An arbitration award "is regarded as the judgment of a court of last resort . . . and it will be given full effect in any appropriate proceeding." 5 AM. JUR. 2d *Arbitration and Award* § 151 (1962). The major obstacle in applying this theory of enforcement to mediation agreements is the fact that arbitrators have the power to make binding agreements for the disputants. *See supra* notes 35-36 and accompanying text. That mediators have no such power, however, may not necessarily preclude a court from holding that the parties themselves have made the agreement binding if the courts will construe the mediation agreement as a new and binding contract which discharged any previous obligations between them.

96. *See, e.g.*, COLO. REV. STAT. § 13-22-308 (Supp. 1983) (written agreements approved by the parties, their attorneys and the court, are enforceable as an order of the court); N.Y. JUD. LAW § 849-b(5)(e) (McKinney Supp. 1983-84) (the dispute resolution process under the Community Dispute Resolution Centers Program Act is final and binding on the parties).

97. *See* Freedman, *supra* note 92, at 7.

98. *Id.*

99. "Specific performance or an injunction will not be granted unless the terms of the con-

because mediators, though trained, are not necessarily attorneys¹⁰⁰ and therefore would not be versed in the drafting of contracts. Second, the agreement must be of such a nature that money damages are inadequate and thus an equitable remedy is in order.¹⁰¹ Finally, the agreement could not be unduly burdensome for a court to enforce and could not require the court's constant supervision.¹⁰² Since it is likely that the mediation agreements would not be fashioned in a traditionally commercial sense and may even involve commitments of a more personal nature, court supervision could prove to be quite difficult. As a result, awarding specific performance could prove to be totally inadequate for the mediation process.

Oklahoma's statute leaves open the question of enforceability. The statute, though prohibiting the admission of mediation discussions or information obtained during mediation,¹⁰³ does not expressly prohibit the admission of a mediation agreement.¹⁰⁴ Moreover, the statute gives neither the mediator nor the mediation program the ability to enforce an agreement,¹⁰⁵ or to compel the disputants to re-mediate the dispute if the initial agreement fails.¹⁰⁶

tract are sufficiently certain to provide a basis for an appropriate order." RESTATEMENT (SECOND) OF CONTRACTS § 362 (1979).

100. Though Tulsa's Project Early Settlement has trained attorneys to serve as mediators, it is the policy of the Project that mediators refrain from giving legal advice. OK. STATE UNIV. & CITY OF TULSA, OK., *supra* note 20, at 11 & Appendix E, at 18, Policy E13. The Project has also trained housewives, law students, Department of Human Rights personnel, and volunteers from Tulsa churches to serve as mediators. *Id.* at 11. Attorneys may serve as domestic relations mediators under the Michigan Friend of the Court Act provided they have completed the training program of the friend of the court administrative bureau. MICH. COMP. LAWS ANNOT. § 552.513(4)(iv) (West Supp. 1984-1985). For a discussion of the problems facing lawyers who mediate disputes, see generally Riskin, *supra* note 34.

101. "It still continues to be the stated rule of law that specific performance of a contract will not be decreed unless the remedy in money damages is an inadequate one." 5A CORBIN, CORBIN ON CONTRACTS § 1139, at 109-10 (1964).

102. "A promise will not be specifically enforced if the character and magnitude of the performance would impose on the court burdens in enforcement or supervision that are disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from its denial." RESTATEMENT (SECOND) OF CONTRACTS § 366 (1979); *see also* 5A CORBIN, CORBIN ON CONTRACTS § 1138, at 106 (1964) ("[A]lthough there may be no serious difficulty in compelling a defendant to perform a non-continuing, ministerial act, such difficulty . . . often exists in the specific enforcement of promises involving . . . judgment . . . and honesty.")

103. OKLA. STAT. tit. 12, § 1805(C) (Supp. 1983).

104. Michigan's Friend of the Court Act expressly exempts domestic relations' mediation agreements from its provisions on confidentiality so that such agreements may be incorporated into a consent order. MICH. COMP. LAWS ANN. § 552.513(2), (3) (West Supp. 1984-1985). *See also* OR. REV. STAT. § 107.765 (1983) (written mediation agreements in child custody and visitation disputes are to be "incorporated in a proposed order or decree provision prepared for the court").

105. "No adjudication sanction or penalty may be made or imposed by the mediator or the program." OKLA. STAT. tit. 12, § 1805(D) (Supp. 1983).

106. *Id.*

Section 1806 appears to favor revocation of the mediation agreement with the parties being left free to pursue more traditional means of dispute resolution based on the original complaint and not on the breached mediation agreement. This section provides for the tolling of any applicable civil statutes of limitation as to the mediation participants from the time they agree in writing to commence mediation¹⁰⁷ until the mediation is officially terminated.¹⁰⁸ If the mediation involves a criminal defendant, that defendant is deemed to have waived his right to a speedy trial if he has consented to participate in mediation.¹⁰⁹ This section is apparently treating the mediation process as a kind of formal settlement procedure: if the parties attempt and then fail to settle their differences, their right to litigate is not thereby prejudiced. This treatment, however, does imply that the mediation agreement itself is not enforceable.

Inasmuch as Oklahoma's Act does not adequately address the problem of enforceability, the Act may not encourage the most efficient handling of mediation agreements. Professor Rice argues that without "enforcement procedures for non-compliance . . . , an incongruous situation is created where parties seeking relief are required to relitigate their dispute in the costly, time-consuming, and sometimes unfair system from which they had hoped to escape".¹¹⁰ In addition, parties who may have already invested considerable time and energy in the mediation process and who may have even partially or fully performed their part of an agreement may be forced to return to square one in order to resolve their disputes.

Nonetheless, without a statutory provision governing the enforcement of mediation agreements, the courts have more flexibility and can thus decide the issues on a case-by-case basis, taking into consideration the nature of the dispute, the form of the agreement, and the method of mediation, each of which has a bearing on what type of remedy is preferable. As a result, the absence of enforceability provisions may not prove to be a problem.

107. Section 1803 provides that the Administrative Director of the Courts is to promulgate rules and regulations to effectuate the purpose of the Act. The rules are to include "[a] form for a written agreement for participation in mediation." *Id.* § 1803(A), (C)(5).

108. *Id.* § 1806. Section 1803 also provides that rules are to include "[a] form for a written record of the termination of mediation." *Id.* § 1803(C)(6).

109. *Id.* § 1806.

110. Rice, *supra* note 34, at 27.

D. *Liability of the Mediator*

Another issue in the field of mediation is the extent of liability of a mediator for his role in the mediation process. A mediator has no authority to impose an agreement upon the parties but may play an active role in helping the parties reach a settlement agreement and in putting it in written form.¹¹¹ Thus, a mediator may be placed in a position of having his discretion questioned by the disputants. A party to the mediation could claim that the mediator exceeded his role by using coercion, that he gave advice he was not qualified to give, or that he lost his neutrality in conducting the session.¹¹² The extent to which a mediator will be protected by his professional actions depends upon the nature of the alleged wrongdoing, the available protective legislation in his jurisdiction, and the various common law theories which may be applied to protect him.

One common law protective device is the qualified immunity granted public officers and employees who are protected when exercising their discretionary duties without malice, bad faith or improper purpose.¹¹³ The difficulty in applying this immunity to mediators, however, would be determining whether the mediator, particularly one who volunteers his time, is in fact a public officer or employee,¹¹⁴ and if

111. "There are . . . enormous differences in procedures and in roles that mediators adopt. Some will act merely as go-betweens, keeping open lines of communication. . . . Some mediators will urge that the parties propose solutions; others will make their own proposals and try to persuade the parties to accept them and may even apply economic, social, or moral pressure to achieve a "voluntary" agreement.

Riskin, *Mediation and Lawyers*, *supra* note 34, at 35-36.

112. See Freedman, *Legal Issues in Mediation-Are Mediators Liable for their Actions in Mediation?* 2 (undated) (unpublished memorandum to ABA Spec. Comm. on Dispute Resolution).

113. In most states, "officials and employees enjoy no immunity at all for ministerial acts and only a qualified immunity on matters calling for the officer's discretion." W. PROSSER & W. KEETON, *PROSSER AND KEETON ON TORTS* § 132, at 1059 (5th ed. 1984). Discretionary acts are those which "involve some fairly high level of policymaking." *Id.* at 1060. Ministerial acts include those which "create direct personal risks to others and acts involving ordinary considerations of physical safety . . . where there are no serious governmental concerns." *Id.* Moreover, liability is more likely to be found if a plaintiff has suffered physical injury, has been physically restrained or has had his property subject to restraint "as an immediate result of official action." *Id.* at 1062. "[C]ourts have been noticeably more reluctant to impose liability for many kinds of purely economic loss which is unaccompanied by physical harm." *Id.* at 1063. A claim that a mediator was not neutral or exceeded his role either through coercion or by giving advice he was not qualified to give, would not result in any physical harm to a disputing party, nor likely result in a restraint of property and thus would probably not subject him to any liability. Furthermore, courts would not favor holding a mediator liable if a disputing party was complaining of only an economic harm. See generally Freedman, *supra* note 112, at 3-6 (discusses doctrine of qualified immunity and concludes it would appear to be available to mediators in a great deal of cases).

114. A "public official" has been defined as one "among the hierarchy of government employees who have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," and "where a position in government has such apparent impor-

determined to be so, whether in fact his duties are discretionary in nature. It could be argued that although the mediator is not paid with public funds, he is performing a function for the public and should, therefore, be considered a public official. In addition, since a mediator's role involves more discretionary duties, such as choosing the most appropriate means of controlling a mediation session, it appears that the mediator would be protected when exercising his duties in good faith.¹¹⁵

Another possible common law protection would be to grant mediators a quasi-judicial immunity,¹¹⁶ a protection frequently afforded arbitrators.¹¹⁷ This immunity appears to more closely fit the

tance that the public has an independent interest in the qualifications and performance of the person who holds it . . ." *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101,1103 (Okla. 1978) (quoting *Rosenblatt v. Baer*, 383 U.S. 75 (1966)). The Dispute Resolution Act defines mediator as "any person certified pursuant to the provisions of the Dispute Resolution Act to assist in the resolution of a dispute." OKLA. STAT. tit. 12, § 1802(3) (Supp. 1983). Under Section 1803 of the Act, the Administrative Director of the Courts is to "promulgate rules and regulations, subject to the approval of the Supreme Court of the State of Oklahoma, to effectuate the purpose of the . . . Act." *Id.* § 1803. Such rules and regulations are to include "qualifications to certify mediators". *Id.* This certification by the state may qualify the mediator as a public officer or employee regardless of whether he receives compensation from the state.

115. The greater the possibility that an officer's decision will adversely affect someone and the range of free choice needed to effectively execute his job, are considerations in determining whether or not an act is discretionary or ministerial. W. PROSSER & W. KEETON, *supra* note 113, at 1065. If it is likely that an officer will be unjustly sued for honest decisionmaking and yet it is important that he be given more freedom in carrying out his duties, his acts will probably be considered discretionary. *Id.* However, where a duty is more specific, such as properly registering a deed, it will more likely be considered ministerial and thus subject to liability if executed improperly. *Id.* at 1066. The standards are difficult to apply to mediation, where the mediator is granted considerable freedom in conducting a session yet technically is not engaged in decision-making for the parties. Nonetheless, a mediator's responsibilities would more closely approximate discretionary acts than specific duties.

116. Judges are generally granted an immunity as long as their acts are "judicial" . . . in nature and within the very general scope of their jurisdiction." W. PROSSER & W. KEETON, *supra* note 113, at 1057. This immunity is absolute and protects official acts even if they are executed "in bad faith, or with malice or corrupt motives." *Id.* Furthermore, "judicial immunity has been extended to prosecuting attorneys, grand juries and a number of other adjuncts of the judicial process." *Id.* at 1058. In Michigan, "friends of the court," who make written reports to the court and to parties in domestic relations matters on issues of child custody, visitation and support, have been granted a judicial immunity based on their quasi-judicial duties. *Johnson v. Granholm*, 662 F.2d 449 (6th Cir. 1981). Freedman notes that judicial immunity might be extended to mediators because they are closely associated with the judicial process and because "[t]he act of mediation could be argued to be an integral part of the judicial process in those situations where mediation is firmly established as a part of court operation." Freedman, *supra* note 112, at 7.

117. *See, e.g., Lundgren v. Freeman*, 307 F.2d 104, 117-18 (9th Cir. 1962) (court held that architects acting as quasi-arbitrators were immune from suit providing they are acting in good faith); *Cahn v. International Ladies' Garment Union*, 311 F.2d 113, 114-15 (3d Cir. 1962) (court held that appellee, while operating in the capacity of an arbitrator, was "clothed with an immunity, analogous to judicial immunity, against actions brought by either of the parties arising out of his performance of his . . . duties." (quoting *Cahn v. International Ladies' Garment Union*, 203 F. Supp. 191, 194 (E.D. Pa. 1962)); *see also* 6 C.J.S. *Arbitration* § 74 (1975) (arbitrators "cannot be

role of mediator since he is clearly performing a quasi-judicial act. Though mediators do not render judgments per se, their role is, in essence, an extension of the judicial system since the ability to impartially direct a dispute leads to its eventual resolution. The immunity given to arbitrators would merely be extended one logical step further.

Oklahoma's Dispute Resolution Act saves the mediator from having to rely on these various common law modes of protection. Section 1805(E) provides:

No mediator, employee, or agent of a mediator shall be held liable for civil damages for any statement or decision made in the process of mediating or settling a dispute unless the action of such person was a result of gross negligence with malicious purpose or in a manner exhibiting willful disregard of the rights, safety, or property of any party to the mediation.¹¹⁸

Thus, in Oklahoma, a mediator will not be liable for actions which prove to be a breach of discretion or which do not rise above mere negligence, involving no manifestation of malicious intent or willfulness.¹¹⁹ The mediator is therefore protected from a civil lawsuit for malpractice unless his conduct is beyond negligence. At the same time a disputing party is protected from the mediator acting beyond the scope of his authority because the mediator has no means of enforcing the agreement or forcing the parties to continue mediation.¹²⁰ Moreover the disputants continue to have protection against any acts of gross negligence.

IV. CONCLUSION

The proliferation of mediation programs in Oklahoma in the last five years parallels a national concern to provide a more effective means of handling disputes.¹²¹ This national concern is reflected in the

held liable in damages to either of the parties for failure to exercise care or skill therein, or, . . . are not liable for the actions taken in good faith. . . . In any event, immunity applies only to action taken in the role of arbitrator.").

118. OKLA. STAT. tit. 12, § 1805(E) (Supp. 1983).

119. *Id.* Colorado's Dispute Resolution Act similarly limits mediator liability to misconduct which is "willful or wanton." COLO. REV. STAT. § 13-22-306(2) (Supp. 1983).

120. OKLA. STAT. tit. 12, § 1805(D) (Supp. 1983).

121. Chief Justice Warren E. Burger noted this concern in his keynote address at the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice by stating:

Ways must be found to resolve minor disputes more fairly and more swiftly than any present judicial mechanisms make possible. . . . [T]here are few truly effective remedies for such everyday grievances as usury, shoddy merchandise, shoddy services on a TV, a washing machine, a refrigerator, or a poor roofing job on a home. . . . [L]awyers

ABA's formation of the Special Committee on Dispute Resolution and that committee's development of the Mutli-Door Program. The choice of Tulsa as a pilot site for this program, along with the already established mediation programs operating in Oklahoma, may bring many new issues regarding mediation and other means of dispute resolution to the Oklahoma courts.

Oklahoma's new Dispute Resolution Act should provide a satisfactory means of dealing with the legal issues of confidentiality in mediation sessions¹²² and mediator liability.¹²³ The enforceability of mediation agreements, however, will remain an issue to be decided by the courts, as the Act provides no clear guidelines on the subject.¹²⁴ Nonetheless, Oklahoma, through its adoption of the Act and its establishment of several programs, has made progress in the newly developing field of alternative means of dispute resolution.

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must reexamine what constitutes practice of law, for if lawyers refuse minor cases on economic grounds they ought not insist that only lawyers may deal with such cases.

70 F.R.D. 83, 93 (1976).

122. *See supra* notes 76-86 and accompanying text.

123. *See supra* notes 118-20 and accompanying text.

124. *See supra* notes 103-10 and accompanying text.