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Pre-litigation Mediation as a Privacy Policy: Exploring the Interaction of Economics and Privacy

by [TJ Costello](#)

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Privacy is often discussed in economic terms (retention, cost, scarcity, value, opportunity), yet economics is rarely part of the privacy policy debate. Alessandro Acquisti points out, "Economics is about allocating scarce resources among competing uses. Economics is about trade-offs." He continues to point out that even if a privacy concern is not measured by monetary criteria, "most [privacy discussions] do raise trade-offs - and economics can be used to analyze those" (2002, p. 2). With the legal structure of privacy comparable to a patchwork quilt (Gellman, 1998, p. 193), decision makers need to recognize how privacy can benefit consumers, businesses, and the overall economy and how privacy policy can directly interfere with and affect those benefits (Cate, 2001, xv).

Pre-litigation mediation is a perfect example of the economic trade-offs that exist in privacy policy. In pre-litigation mediation, costs and confidentiality work independently. However, there is a precarious balance that exists where, if either confidentiality or cost became less effective the entire mediation process might be damaged.

While the idea of mediation as privacy policy may seem odd, the implementation of mediation to resolve a dispute offers privacy protection that most other dispute resolution methods do not. It is precisely because of the privacy associated with mediation that an economic benefit exists. By looking at the privacy associated with mediation in terms of economic trade-offs, policy decisions in the public and private sectors can be made that will help ensure privacy and maximize economics.

Pre-litigation Mediation

It is widely agreed that the United States Constitution guarantees one's right to a trial. That right, however, can be waived through contract or separate agreement. Over time, the legal community has struggled with the fact that the courts have become adversarial, not conducive to preserving relationships, potentially very costly, and open to public review. This struggle has led to the increased use of alternative dispute resolution (ADR).

ADR is "a method for out-of-court resolution of conflict through the interventions of third parties" (American Arbitration Association [AAA]-Consumer Due Process, 1998, p. 8). ADR options include, but are not limited to, mediation, arbitration, mini-trials, and partnering. Of the ADR methods, mediation offers the most flexibility and greatest benefit for privacy retention and cost savings.

Mediation ^[1] has been described by the American Arbitration Association (AAA) and the courts as a process in which a non-aligned (neutral) third party (mediator) facilitates communication between disputants and assists disputing parties in reaching a mutually acceptable resolution to their dispute (AAA-Guide, 2000, p. 3; Stong, 2002, p. 5). In mediation, the mediator does not have the authority to impose a binding decision. The goal of mediation is for a mediator, utilizing skills such as facilitation, confidential individual conferences with the parties, and cost valuation, to get the parties involved to agree on a binding resolution.

Mediation as a method of resolving disputes is gaining more respect and use.^[2] In fact, mediation has become the fastest growing form of ADR (Stamato, 2000; Personal Correspondence, Claire Gutekunst, December 4, 2002).

Pre-litigation mediation is one of the three main mediation methods; the other two are court-mandated mediation and post-filing mediation.^[3] Of the three, pre-litigation mediation is the most productive offering the greatest amount of privacy as well as opportunity cost and other economic benefits.^[4]

Privacy in Pre-litigation Mediation

Since Warren and Brandeis wrote "The Right to Privacy" in 1890, numerous definitions have been introduced to help explain, clarify, or institute privacy as a policy. Yet no agreement has been reached on what privacy means or encompasses. "The right to be left alone" - these six simple words have been the center of discussion for over one hundred years. Warren and Brandeis stated in their article "The Right to Privacy" (Harvard Law Review, 1890) that "Political, social, and economic changes entail the recognition of new rights; Gradually the scope of the legal rights broadened, and now the right to life means the right to enjoy life "C the right to be left alone" (1890, 1). The authors also suggest that every individual has the right to determine whether or not to withhold private information and thoughts from public scrutiny.

The definition by Warren and Brandeis that privacy is "the right to be left alone" has been noted continuously as a benchmark (Alderman & Kennedy, 1995). In discussing an economic view of privacy however, going beyond Warren and Brandeis is necessary. Varian, for instance, states that privacy is the "right not to be annoyed" (1996, p. 3). Varian's definition could be considered a summary of Samarajiva's definition, which is "the capability to explicitly or implicitly negotiate boundary conditions of social relations" (1998, p. 283). While Varian and Samarajiva both look at privacy as a social interaction that should be defined on one's own terms, Richard Posner argues that privacy can be very selective and manipulative (1981a, p. 234). In commerce, the power to control selective disclosures of information about oneself is the "conceptual core of privacy" (Texas Advisory Commission, p. 11). Arthur Miller, in *The Assault on Privacy*, offers his own definition pertaining to public records: "Each individual is entitled to exercise reasonable control over what information about him is collected by government; its use; how it will be safeguarded; and when, to whom, and for what purpose it will be disclosed" (Texas Advisory Commission, 1977, p. 11). Privacy in a pre-litigation mediation comes in two forms. The first is the privacy retained by not filing court papers, for when a lawsuit is filed with the courts the dispute becomes a matter of public record. The second form is the confidentiality of the mediation process.

A dispute heard in pre-litigation mediation has not been filed with the courts, thus information about the dispute is not public. The privacy retained by not having the case in the public eye can be important especially when claimants do not want their identities disclosed and/or a business wants to avoid unnecessary scrutiny. If the potential exists for all phases of a trial and evidence presented to be available to the public, privacy is a strong incentive for disputing parties to enter the mediation process early in a legal dispute.

Confidentiality^[5] is one of the greatest benefits of mediation, and this benefit is intensified through the use of pre-litigation mediation. In mediation, discussions can be held where both sides can feel comfortable revealing information to the mediator. Confidentiality in mediation is essential to allow the parties to candidly and thoroughly discuss all possible avenues of settlement (Sharp, 1998, 4). The knowledge that an informal, honest, and confidential discussion can take place with the mediator adds to the speed and success of mediation (Stamato, 2000, p. 38).

A strong confidentiality component within the mediation process has been criticized by some lawmakers and consumer advocacy groups (Maharaj, 2000; Berman, 2000). The courts, however, have recognized the importance of confidentiality during mediation. The Court of Appeals for the Second Circuit reasoned that if the parties:

[C]annot rely on confidential treatment of everything that transpires during these [mediation] sessions, then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high stakes game than adversaries attempting to arrive at a just solution of a civil dispute (Sharp, 1).

On July 9, 2001, the Supreme Court of California reaffirmed the confidentiality of all mediation communications when it ruled on *Foxgate Homeowners' Association v. Bramalea California, Inc.* (No. S087319 (Cal. July 9, 2001))(Madison, 2001). This decision upheld sweeping protection for the confidentiality of mediation. In doing so, however, the court recognized that a mediator's independent role "is also of paramount importance and should not be compromised" (Madison, p. 11). Conrad notes "guarantees of confidentiality facilitate an atmosphere of fairness and trust between the parties and the mediator, which is essential to an effective mediation" (1998, p. 46). ^[6]

In the State of Texas, confidentiality plays a major role in mediation. The Texas ADR Procedures Act, Chapter 154, Civil Practice and Remedies Code Sections 154:053(b) and 154.073, strongly protects the confidentiality of mediation (Fagan, 2002). Additionally, Texas addresses confidentiality in mediation in the Texas Governmental Dispute Resolution Act of 1997. Section 2008.054 of this Act states that confidentiality of certain records and communications applies "to the communications, records, conduct, and demeanor of the impartial third party and the parties" (Texas SB 694, 1997). This legislation helps ensure the frank exchange of information between the parties and the mediator.

Parties might be less willing to discuss embarrassing or problematic situations with a mediator if either party believes information revealed during a mediation will become public knowledge either voluntarily or through a court order. With confidentiality protected by a mediator, parties are able to utilize the mediator's talents fully. Olivella pointed out, "If we ever have information that we do not want the other side to know, but we want the mediator to know it exists, we simply tell him not to divulge it" (Personal Correspondence, 2003). With enhanced confidentiality protections for communication within mediation, an increased use of the mediation process is likely to result (Stong, 2002, p. 6).

Confidentiality is not just a matter of a mediator or parties divulging information or keeping information out of the courts. Mediation is a private process (Stong, p. 5) designed to foster a more open and amicable setting, to which Stamato reminds us, it helps "individuals achieve better and more lasting resolutions of value to themselves, and to assist corporations in meeting and protecting their interests as well" (p. 29). A business participating in the mediation process usually does not wish to discuss its internal problems in an open forum, nor is there a wish to encounter the stress, embarrassment and impersonal features of the courts.

Important Stakeholder Groups

Courts: Potentially all civil matters can enter the court system. ^[7] Pre-litigation mediation offers the courts a means of having non-criminal cases resolved before they enter an already overburdened court system. Courts are overburdened by their caseloads and are actually encouraging parties to enter mediation when a case is filed (Keating, 1995, 26; Lande, 1998, p. 22). The reduction of cases and the potential for an amicable decision has led the courts to look with favor on pre-litigation

mediation, and they have worked to preserve the integrity and confidentiality of the mediation process.

Private Business: Many of the civil cases that enter the courts involve corporations and private businesses. Corporations can utilize pre-litigation mediation for all non-criminal disputes including contractual and employment disputes. Businesses have the most to gain by the confidentiality of mediation and the potential cost savings associated with the process.

Individuals: The use of pre-litigation mediation by individuals has become more common especially with the growing popularity of employment ADR programs. Additionally, pre-litigation mediation is gaining popularity for divorce settlements and other civil problems (such as neighbor-against-neighbor disputes). While the confidentiality within the mediation process could have a potential negative effect on society and the general public's access to information, on an individual basis the confidentiality of mediation allows for a positive, more creative, less time consuming, and mutually agreed upon resolution.

Costs

The societal costs of pre-litigation mediation must be considered. When a lawsuit is filed with the courts, the dispute becomes a matter of public record and is available to the press, corporate analysts or any other member of the public who might be following court matters. While it can be argued that public record of a lawsuit can be embarrassing, create questions, and potentially hurt future or current relationships, without a public record there is no public discussion about the cause of the lawsuit nor is there discussion over what the outcome might be. This discussion can be important in cases involving questionable business practices. It can be argued that, if a business is allowed to utilize a legal mechanism to avoid public scrutiny, privacy and confidentiality work against the public interest. In September 2000, a controversial article in the Los Angeles Times written by Davan Maharaj pointed out numerous companies who have "secretly" settled product liability cases in mediation thus denying the public the right to know about corporate practices and product defects (2000). Maharaj implies that the confidentiality of mediation was the principal reason for this lack of information. The point made in this article is correct; the American people do have a right to know about such complaints (Berman, 2000, 6).

Another cost is the fact that mediation is reliant upon the good will of the concerned parties. As mediator Michael Shane has pointed out, "The end result is totally up to the parties involved" (1997). As Flemming puts it, "empirical evidence has shown that [some] parties tend to have an 'overconfidence bias' as to their side of the case"; he later states that it is also possible for a party's expectations to be unknowingly low (Personal Correspondence, July 11, 2003). The lack of discovery and depositions in mediation may prove a disadvantage to the mediation process and the parties.

The mediator has no power to impose an outcome on disputing parties. Mediation in any form is not binding on any party unless all parties agree to a specific settlement. One's right to a trial by court is not waived by agreeing to mediate. Either party may end the mediation process at any time. If any of the parties enter into mediation without a reasonable expectation of settlement, the cost of a pre-litigation mediation could include the time spent preparing and attending the mediation, any cost associated with the mediation (e.g., mediators' fees, lawyers' fees, opportunity cost), and in the end the case would simply go to the courts anyway. If mediation is to be successful, the parties must come together with an understanding of the problems each side faces. Shane points out that if parties do cooperate, "a plethora of ideas can exist to find a resolution [and] a mediation settlement is almost guaranteed" (1997).

Benefits

Pre-litigation mediation has two very important benefits, economic cost reductions and confidentiality. From an economic standpoint, mediation, if conducted prior to filing a formal lawsuit, is a cost-effective form of dispute resolution. Pre-litigation mediation reduces direct costs and indirect costs, saves time, and more than likely helps retain relationships. With regards to confidentiality, as discussed earlier, pre-litigation mediation offers opportunities to utilize a third party mediator's skills to come to a binding agreement. Confidential information and private situations can be shared and discussed during the process without fear of public disclosure or scrutiny. If pre-litigation mediation fails to bring about an agreement, the mediation process can lead to a case being settled independently before a formal filing. If the case is filed with the courts, the confidentiality of the mediator and the mediation process, having been affirmed by the courts, disallows any discussion of matters discovered during the mediation.

Mediation has grown as a method of choice to resolve disputes. The growth in mediation is especially evident in matters that can be resolved before a lawsuit is filed, including employment ADR, business-to-business agreements, and many other civil disagreements. Governmental authorities have recognized the benefits of pre-litigation mediation. For instance, the state of North Carolina has taken advantage of the comparatively quick resolution time and the confidentiality of pre-litigation mediation by authorizing pre-litigation mediation in the case of farm nuisance disputes and for Y2K disputes (North Carolina, 2000, p. 7).

Legal costs for businesses, governmental institutions and individuals alike have the potential of being burdensome and can be reduced through pre-litigation mediation. As Michael Olivella puts it, "The costs that are saved by mediation flow from avoidance of costly litigation. Mediation at the courthouse steps doesn't save anywhere near as much because the bulk of the costs have been incurred by that time" (Personal Correspondence, Olivella, 2003).

Resolving a dispute early does not just save direct costs (e.g. direct legal fees, lost labor hours) and time lost in the legal process (e.g. depositions, court delays). Because mediation is informal, it preserves long-standing relationships. Pre-litigation mediation's success can be seen in employee retention and in the maintaining of business and personal relationships. For instance, a long-term employee can work through a mediator to achieve an amicable solution to a dispute with his employer, or a business might use mediation to settle a problem with a valued customer. In each case, parties may have been doing business with each other for years. Neither party wants to dissolve the relationship. The result of a successful mediation is an agreement that both parties believe to be fair.

The indirect savings from an amicable resolution through mediation are invaluable. For example, in schools, the potential of lawsuits being filed against teachers adds to the stress shown to be a cause to teachers leaving the profession (Bradley, et al., 2001). "When there is a situation where a parent's feelings need to be heard and a teacher's rebuttal is [essential], confidentiality of the neutral is of the utmost importance. The use of [mediation] for disputes is a real and viable option" (Personal Correspondence, Jack Elrod, March 31, 2002). Mediation can bring schools and parents closer together and help construct positive relationships. It often results in educators and parents reaching an agreement that pleases both parties and helps each party gain a deeper understanding of the other's views -- at a fraction of what the overall cost would have been if this dispute were not resolved amicably (Council for Exceptional Children, 1996, 3). The parents have to decide if solving a problem amicably is their goal.

Pre-litigation mediation as a means of resolving employment disputes has gained popularity since the United States Supreme Court decided that a mandatory arbitration clause does not preclude the

Equal Employment Opportunity Commission (EEOC) from filing a suit against an employer (EEOC v. Waffle House, Inc, 2002). Mandatory arbitration clauses were popular in the early 1990's as a way to discourage lawsuits. The thought, at that time, was that if a lawsuit did arise the dispute would at least stay out of the courts.

The new approach is to keep an internal dispute from getting to a point where a suit even needs to be filed -- to resolve a problem at its earliest stage. Utilizing a professional mediator to review all the information provided and work with the parties should, in the end, help the parties agree on an amicable and sometimes creative solution. Pre-litigation mediation has proven very successful in employment disputes, since these cases typically involve valued employees who are not looking to establish blame but rather to resolve a situation and to be heard. ^[8] Mediation can be used to resolve the problem, retain an employee, and avoid having an internal problem escalate to a point where one of the parties believes his only recourse is filing a lawsuit. With costs associated with hiring employees (opportunity costs, training costs, lost time) so high, employment mediation programs are being utilized by many organizations including, UBS PaineWebber, Brown and Root, AAA, and Starwood.

Final Thoughts

Mediation, in particular pre-litigation mediation, is uniformly recognized as the best opportunity to resolve a dispute (Stong, 2002, p. 5; Olivella, 2003; Glenn, 1993, p. 36). Mediation is an alternative to litigation that "not only saves disputants time and money, but also permits them to work together to settle disputes and remain amicable afterward" (Conrad, pp. 58-59). This amicable outcome is what drives mediation. As Keating has said, "Mediation preserves the privacy of the disputants' concerns during the continuing dispute. If the mediation occurs prior to recourse to the courts, the conflict need never be subjected to public scrutiny at all" (1995, 19).

With regard to privacy within mediation, the protection of confidentiality is of utmost concern. Confidentiality, which has been challenged by some, is the key to continued use and success of pre-litigation mediation. As shown earlier, the courts in California and the legislature in Texas are examples of how policy professionals can reinforce confidentiality within the mediation process. Other states and the federal government need to reinforce the confidentiality of mediators and of the mediation process through legislation of their own.

Additionally, to answer the critics who say privacy associated with pre-litigation mediation denies the public the right to know, the answer is not the mediation process; rather it again lies with stronger legislation. Stronger legislation about product disclosure and corporate responsibility, such as requiring businesses to report complaints against them will help relieve this controversy, not a weaker mediation process (Berman, 2000).

Most legal experts agree that legal costs can be reduced substantially if a problem can be resolved early. In litigation there can be significant direct costs associated with a dispute, including costs associated with attorneys and court costs. Additionally there are indirect costs such as an employee's time, loss of an employee, loss of a customer, loss of a business relationship, or just a loss of faith between parties.

If both parties' goals are to resolve the dispute quickly and avoid high legal costs, mediation provides a means of achieving those goals. "The issue is not whether individual litigants can achieve cost savings by using ADR in specific disputes -- the answer to that question is almost certainly yes" (Hensler 1994, 2).

Jack Elrod, General Counsel for the Dallas (Texas) Independent School District (DISD) believes there are a sizable number of disputes within the DISD that should and could be resolved at an earlier stage than they are. "There is too much litigation and too many lawyers making too much money off of school districts," stated Elrod. "I see hundreds of thousands of dollars going out every couple of months that could be used for teachers and in the schools" (2002).

Table 4.1 illustrates how pre-litigation mediation can reduce litigation costs. Glenn (1993) provides the numbers based on a fictitious case between an accountant and his client. The accountant has mishandled a corporate tax return. He is trying to rectify the situation as fast as possible and is comparing the cost of mediating the case or allowing it to go to litigation. The assumption is that damages will be the same with either option.

Table 1 - Example of Mediation Savings

Stages of Dispute Resolution	Lawsuit filed in Court	Mediation
Initial consultation	\$3,500	\$3,500
Discovery	\$25,000	\$1,000
Experts before trial	\$5,000	\$3,000
Depositions before trial	\$8,000	\$0
Trial preparation	\$10,000	\$0
Settlement discussions	\$5,000	\$5,000
Trial (three days)	\$15,000	\$0
Post trial (no appeal)	\$2,500	\$0
Cost of disruption to company	\$40,000	\$5,000
Total Resolution Costs	\$114,000	\$17,500

Source: Glenn, 1993, p. 37

The Law Firm of Katz, Kutter, Alderman & Bryant formed a practice area specifically designed to manage pre-litigation mediation cases. ^[9] According to Mike Olivella, who chairs this section of the firm: Statistically, one of our clients has documented a reduction in costs amounting to over 70% when comparing claims handled prior to pre-litigation mediation as compared to claims handled in the traditional method. A side benefit is the documented reduction in the amounts paid to resolve the claims, which also exceeds 70%. In the way of hard numbers, prior to 1991, this client spent \$115,000 on average, per claim, on attorney's fees, costs, expenses, verdicts and settlements. Between 1992 and 2000, the average spent by the client to handle the same type and number of claims dropped to approximately \$35,000. That meant \$80,000 less was spent over a 9-year period and almost 1,000 claims were handled during that time frame. If you do the math, the company saved \$80 Million over that time frame (2003).

Numerous businesses, governmental bodies, as well as the courts, have utilized or offered positive opinions about mediation, especially pre-litigation mediation. Each describes the various economic benefits as a reason for their use and positive opinions of mediation, but they also claim confidentiality as the linchpin to mediation's success. Without the free and open discussion encouraged in mediation, there would be no reason to mediate disputes, and the option to resolve disputes in a non-adversarial, solution-finding manner would disappear. ^[10]

Pre-litigation mediation's opportunity costs need to be as low as possible for claimants. Many pre-litigation mediations revolve around having both parties willing to utilize the confidential aspect of mediation. For instance, in employment mediation, when an employer absorbs the initial costs, the employee is much more willing to accept the mediation process and is more comfortable discussing the situation surrounding the dispute and accepting the final agreement. If one of the main goals of pre-litigation mediation is retaining relationships, making the process as simple and cost effective for employees, clients, and customers will make achieving that goal more likely.

Organizations such as the American Institute of Architects have suggested that their members include mediation clauses in all contracts. Other industry and trade associations need to encourage their members to incorporate pre-litigation mediation clauses in their contracts. Organizations should keep the clauses simple, and emphasize privacy and confidentiality. The clauses need to be "customer friendly," and provide equal participation in choosing the venue and the mediator.

Samarajiva notes, "Public attitudes are affected by laws and regulatory processes as well as by corporate practices" (1998, p. 302). Rubin and Lenard point out that "it is easy for individuals to say they want more of a particular good (e.g., privacy) when not being made aware of potential costs" (p. 49). If costs and benefits of a privacy policy are understood, the economic trade-offs associated with a particular privacy concern will seem more worthwhile. Clearly, pre-litigation mediation saves costs, direct and otherwise. Also clear is how mediation offers privacy protection. In this case, economic factors and privacy concerns work side by side. The confidentiality has no direct cost and legal savings are not due directly to enhanced confidentiality. Yet mediation would not be successful without both confidentiality and cost savings.

Understanding pre-litigation mediation as a privacy policy as well as from an economic perspective is important, and moreover a strategy that works. The privacy surrounding mediation can be improved or strengthened by looking at the trade-offs brought about by this interaction of privacy and economics. This article has shown how economics (lower costs, retained relationships, etc.) and privacy (confidentiality and lack of public disclosure) can be reliant on each other to be effective yet be independent in development. A lack of understanding of the issues surrounding mediation or an unwillingness to implement privacy policies effectively will have economic consequences on all parties involved.

Appendix A.

Defining Terms:

Mediation Source: The State of North Dakota "C Office of Administrative Hearings offers this comprehensive definition of mediation and its uses.

Source: the North Dakota "C Office of Administrative Hearings.

Mediation is the most popular form of ADR, in which a third-party neutral, a mediator, guides the interaction of the participants. A mediator will:

- Maximize communication between the parties, ensuring all parties are treated with dignity and respect.
- Identify the interests behind the positions the parties have taken in the dispute.
- Meet with all parties in one group and/or talk to each party individually and move back and forth between the tables if that is helpful. Information shared with the mediator in these sessions will not be relayed to the other party unless the mediator is given specific permission to do so.

- Assist parties in the generation and evaluation of options which may resolve the dispute to the satisfaction of all parties.
- Assist in writing any agreement which may remain confidential unless otherwise required by law.

Communications are confidential.

- Communications in a mediation or between the parties and the mediator are confidential. Each party can give the mediator confidential information knowing that the mediator will not share that information with anyone else unless the party gives permission to do so. Sharing information in a mediation does not, however, protect information if it is otherwise discoverable in litigation, or public information as required by law.

Participants have the ultimate control over the outcome.

- Parties, who have the most knowledge about the dispute, can fashion an agreement to resolve it.
- Parties may create solutions satisfactory to all parties that may not be available through a formal legal or administrative process.
- The mediator cannot force the parties to reach any agreement.
- The mediator cannot enter any orders in any pending case related to the mediation.
- Participants do not give up any right they have to litigation or a hearing by participating in a mediation.

Mediation often works because the process allows the parties to:

- Express their feelings and interests.
- Be heard in a confidential process.
- Identify what is really important to them.
- Get feedback from a neutral outsider about the dispute.
- Formulate options for resolving the dispute and evaluate the pros and cons of each option.
- Have absolute control over whether agreement is reached.

Mediation is particularly appropriate when:

- The parties have an ongoing relationship.
- The consequences of not resolving the dispute are negative, i.e., expensive, time consuming, risky, or otherwise unsatisfactory.
- There is a wide range of potential resolutions to the dispute.

Mediation is probably not appropriate when:

- An agency needs a legal interpretation by a judicial body to guide future actions.
- An agency is seeking to establish an important precedent.

Personal Correspondence

Throughout the course of writing this article, a number of interviews, letters, e-mails, discussions, and workshops were utilized. Below is a list of those whose expertise is incorporated in this article either directly or indirectly. Their time and assistance is greatly appreciated.

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- Brown, Laura, Chief Librarian, American Arbitration Association, New York (December 27, 2002)
- Doty, Philip, Professor, School of Information, University of Texas at Texas (Fall 2002 and Spring 2003)
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End Notes

1 For a comprehensive definition of mediation, see Appendix A.

2 For example, the Equal Employment Opportunity Commission's use of mediation cut its backlog of pending cases from 111,451 in 1995 to just over 52,000 in 1999 (Stamato, p. 29).

3 Court-mandated mediation is implemented by a trial judge after a case has been filed. Mediators are typically court-chosen or recommended. Post-filing mediation takes place after a case has been filed and the parties agree to utilize an outside mediation service while the case is making its way through the legal system. Pre-litigation mediation occurs before any papers have been filed with a court.

4 Economic savings might include opportunity costs associated with time spent in a deposition, client relationships saved, retained employees, and lower direct payments to attorneys.

5 Confidentiality is defined as privacy within the legal system. In other words, one's privacy during a lawsuit or other legal proceeding is based on the amount of confidentiality that exists.

6 Conrad continues by noting that the flow of information will be enhanced when parties are assured that what is discussed in mediation will remain confidential and will not be used later against the parties. In *NLRB v Macaluso*, the 9th Circuit Court noted that "parties involved in mediation sessions must have the confidence that information disclosed will not subsequently be divulged, voluntarily or by compulsion... The complete exclusion of mediator testimony is necessary to the preservation of an effective system of labor mediation."

7 The court system offers no real ADR option for criminal matters. In some very rare situations, however, the use of Restorative Justice Processes takes place for juvenile and young adult offenders (Flemming, Personnel Correspondence, July 11, 2003).

8 Employment mediation might follow this typical path. An employee is having a disagreement with her manager. Nothing illegal has taken place, but the employee feels uncomfortable with the manager's attentiveness. The manager has been asked to stop but disregards the request. The employee asks to implement the company's mediation program. The employee wants to keep her job; the company wants to retain both employees; all parties want to keep this incident from reaching

the courts, letting this private dispute become public, and incurring unnecessary legal costs. The manager has had a sparkling record with the company. The mediator asks for three-party mediation (employee, manager, corporate decision maker). The flexibility and confidentiality of the mediation process allows the mediator to facilitate an agreement allowing for a mutually agreed upon binding decision.

9 Katz, Kutter, Alderman & Bryant claims to have created and implemented the first national Pre-Litigation Mediation Program in the U. S. in 1991 as a means of cost reduction in claims handling.

10 While Keating (1995) describes mediation as a solution-finding method for resolving disputes, the effectiveness of finding that solution is based on the quality of the mediator and the willingness of the parties to resolve the dispute. The success of a pre-litigation mediation is based on the balance between cost and confidentiality. If the confidentiality of mediation weakens too far, the cost would have to drop to a point where the effectiveness of pre-litigation mediation would be diminished and rendered ineffective.