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Dispelling the Myths of Modern Mediation

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DISPELLING THE MYTHS OF MODERN MEDIATION

I. INTRODUCTION

The Courts and legal practitioners are beginning to use mediation to settle a variety of disputes beyond the established mediation realms of labor disputes, international conflicts, and family law.¹ In conjunction with this expansion, mediation has grown in popularity as an effective means of settling commercial disputes.² Many attorneys, however, remain hesitant to incorporate mediation into their repertoire of services.³

This note serves as an introductory analysis of mediation's potential to resolve commercial disputes. It will briefly explain the conceptual framework of mediation and attempt to address any prejudice attorneys may have towards using mediation to settle commercial disputes.

II. MEDIATION IN GENERAL

A. OVERVIEW

In the broadest sense, mediation is the use of a neutral third party to settle disputes.⁴ Mediation can also be defined in relation to other forms of alternative dispute resolutions, such as

1. S. LEESON & B. JOHNSTON, *ENDING IT: DISPUTE RESOLUTION IN AMERICA - DESCRIPTIONS, EXAMPLES AND CASES* 133-143 (1988) [Hereinafter *ENDING IT*]. N. ROGERS & R. SALEM, *A STUDENT GUIDE TO MEDIATION AND THE LAW*, 3 (1987) [Hereinafter *A STUDENT GUIDE*]. S. GOLDBERT, E. GREEN, & F. SANDER, *DISPUTE RESOLUTION* 91-93 (1985) [Hereinafter *Dispute Resolution*]. Phillips & Piazza, *The Role of Mediation in Public Interest Disputes*, 34 *HASTINGS L.J.* 1231, 1235 (May/July 1983). Cooke, *Mediation, Boon or Bust?*, 28 *N.Y.L. SCH. L. REV.* 3, 15 (1983).

2. Coombe, *Dispute Resolution and the Corporate Law Firm: Toward a Full-Service Legal Practice*, 45 *ARB.J.* 29, 33 (Mar. 1990).

3. Goldberg, Green, & Sander, *Litigation, Arbitration, or Mediation: A Dialogue*, 75 *A.B.A.J.* 70, 70-72 (June 1989).

4. Fuller, *Mediation - Its Forms and Functions*, 44 *S. CAL. L. REV.* 305, 308 (1971) (equating mediation to "marriage therapy"). *Id.* Feinsod, *When is Mediation or Arbitration For You?*, 35 *PRAC. LAW.* 19, 20 (July 1989).

voluntary arbitration.⁵ Mediation is an extension of the negotiation process, but, unlike arbitration, the neutral third party does not render a decision.⁶

B. THE LOGISTICS OF MEDIATION

In practice, the logistics of a mediated settlement are defined by the disputants. Several mediation services, such as the American Arbitration Association, have set rules of procedure which establish the parameters of the settlement process.⁷ These rules are flexible and may be tailored to the disputants' case.⁸ As mediation is shaped to meet the disputants' needs, its overall form can range from a three to a five stage process, with the number of stages dependent upon the nature of the dispute.⁹

5. ENDING IT, *supra* note 1, at 47. Voluntary arbitration is the submission of a dispute to a neutral, non-governmental decision maker. *Id.* Arbitration can also be court-annexed in which the court assigns selected cases to arbitration as a precondition to or a substitute for trial. *Id.* at 77.

6. See DISPUTE RESOLUTION, *supra* note 1, at 8 (table 1-1 compares the different aspects of various forms of alternative dispute resolutions). Phillips & Piazza, *supra* note 1, at 1234-1235 (chart directly comparing mediation to arbitration).

7. R. COULSON, BUSINESS ARBITRATION - WHAT YOU NEED TO KNOW 41 (1986). Included in this book is a list of 16 basic rules for commercial mediation as set forth by the American Arbitration Association. These rules involve the appointment of a mediator, qualification of the mediator, the time and place of mediation, the authority of the mediator, the privacy of mediation session, confidentiality of information, and termination of mediation.

8. See *Id.* at 41. Rule number 16 states "Interpretation and Application of Rules - The mediator shall interpret and apply these Rules insofar as they relate to the mediator's duties and responsibilities. All other rules shall be interpreted and applied by the AAA." *Id.*

9. Feinberg, *Mediation - A Preferred Method of Dispute Resolution*, 16 PEPPERDINE L. REV. s5, S12-S20 (1989). For private, voluntary, informal mediation the author suggests a four-phase procedure:

Phase 1 - Involves getting the parties to agree to participate in mediation, retaining a mediator, and setting forth the ground rules. *Id.* at S13.

Phase 2 - The goal is to educate the mediator about the dispute both by submission of written materials and through oral presentations. *Id.* at S15.

Phase 3 - Here the mediator presents proposed settlement terms for separate consideration by each party. *Id.* at S17.

Phase 4 - If the proposed settlement terms prove unacceptable to any party, the mediator attempts to forge a consensus by negotiating back and forth between parties in private sessions. Ideally, this process of "shuttle diplomacy" is concluded when a settlement is agreed to.

Id. at S18. A STUDENT GUIDE, *supra* note 1, at 14-39. As labor mediation tends to be more competitive, the authors divide mediation into a five stage procedure:

Phase 1 - Pre-mediation or "getting the parties to the table."

C. THE ADVANTAGES OF MEDIATION

Cost-effectiveness, resolution of the dispute, and the "forward looking"¹⁰ nature of mediation are a few of the reasons why mediation may be superior to litigation in some disputes.¹¹

The biggest expense in litigation is the legal fee, which often goes beyond discovery and court expenses into a myriad of post-trial motions.¹² In mediation, the disputants may split expenses,¹³ or choose to represent themselves directly.¹⁴ Mediation can also save time. Whereas litigation may take years or months, mediation may resolve disputes in a matter of weeks or days.¹⁵

This is achieved through walk-ins, referrals, or statutes which proscribe mandatory mediation. *Id.* at 14.

Phase 2 - The opening of mediation. Here the mediator gives an opening statement explaining mediation and its rules, as well as establishing a rapport with the disputants. *Id.* at 20.

Phase 3 - Opening presentations. During this phase the disputants relate their stories. The mediator may cautiously intervene with questions to fill in the gaps. *Id.* at 22.

Phase 4 - Mediated negotiations. Here the mediator may prioritize the issues, identify alternatives, and create a cooperative environment by holding private caucuses. *Id.* at 27.

Phase 5 - Agreement. During the whole process the mediator should be summarizing areas of consensus to motivate the parties to a final agreement. At this final stage the mediator aids in the drafting of an agreement, which can be oral, but is more commonly written.

Id. at 39. See also Marcus & Marcus, *Fact Based Mediation For The Construction Industry*, 42 Arb.J. 6 (Sept. 1987). This article describes the specific techniques used in the mediation of construction disputes.

10. ENDING IT, *supra* note 1, at 133. The authors describe mediation as "forward looking" as mediated settlements often include a framework to aid the disputants in resolving problems in the future. *Id.*

11. Feinberg, *supra* note 9, at S6-S7.

12. A STUDENT GUIDE, *supra* note 1, at 45 (on average, 98% of a party's civil litigation expenses are attorneys' fees). *Id.* Green, Marks, & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 Loy. L.A.L. REV. 493, 498-501 (1978). In this section of the article the authors provide a complete breakdown of the legal fees that attorney's incur right before trial - additional paralegals, associates, and expert witness. The authors also give the example of a 1977 antitrust suit against Xerox, in which the combined legal costs amounted to over a million dollars a month. *Id.*

13. Mounteer, *All Things In Mediation*, 10 CAL. LAW. 128, 128 (Nov. 1990).

14. Feinberg, *supra* note 9, at S11 (in mediating business disputes, it is more effective to have the disputants deal with each other directly than to achieve a settlement through attorneys). *Id.*

15. Feinberg, *supra* note 9, at S10 n. 10. Furthermore, in saving time parties minimize lost revenues and lost business opportunities associated with the diversion of staff and attention from business activities. *Id.* at S10.

Of tantamount importance, mediation focuses on the resolution of the conflict between the disputants.¹⁶ In litigation, the resolution of the issue may become entangled in the web of rigidly enforced procedural and evidentiary rules.¹⁷ In addition, the adversarial principles upon which litigation is based tend to aggravate the differences between the disputants, and inevitably designate one party as the loser. Mediation, on the other hand, uncovers the disputants' underlying interests and finds common ground.¹⁸ Based upon this common ground, a settlement between the disputants can be reached. Whereas the process itself enables the disputants to confront tensions underlying the dispute, mediated settlements often include a framework which aids the disputants in resolving problems in the future. This is why mediation has been called a "forward looking" process.¹⁹

However, mediation is by no means a panacea for all disputes. Problems may occur if the disputants choose a mediator who is inexperienced in the field of the dispute, or if the mediator has had insufficient training.²⁰ Because mediation is a settlement process outside of the judicial system,²¹ it is not appropriate for those disputants who wish to establish legal precedent.²²

III. DISPELLING THE MYTHS

A. OVERVIEW

To maintain their competitive edge, attorneys should educate themselves about mediation. Law firms that offer a variety of services to the client prevent their clients from going to com-

16. Feinsod, *supra* note 4, at 21.

17. ENDING IT, *supra* note 1, at 7 (or in some cases the dispute, without ever being settled, may be dismissed as a result of a procedural error).

18. *Id.* at 139. See Feinberg, *supra* note 9, at S11. For the disputants who are in mediation to terminate their relationship, the cooperative nature of mediation provides a more constructive path to dissolve their ties. Alternately, existing relationships between the disputants can be salvaged instead of severed. *Id.*

19. ENDING IT, *supra* note 1, at 133 (in contrast to litigation which requires findings of fact about events which occurred in the past, mediation focuses on the future conduct of the parties required to resolve their present dispute).

20. Phillips & Piazza, *Using Mediation to Resolve Disputes*, 3 CAL. LAW. 11, 12 (Oct. 1983).

21. Feinsod, *supra* note 4, at 22. See also Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). This article provides a comprehensive argument against the use of alternative dispute resolution techniques to resolve disputes.

22. N. ROGERS & C. McEWEN, *MEDIATION - LAW, POLICY, PRACTICE* 18 (1989).

peting firms. The reason is simple: a satisfied client is a returning client.²³

In conjunction with retaining clients, mediation offers attorneys the opportunity for personal growth without leaving the legal profession. Attorneys may expand upon their negotiation skills by representing their clients in mediation, or capitalize upon diplomatic skills by becoming mediators.²⁴

However, only a limited number of attorneys use mediation to resolve commercial disputes because many are ignorant of the technique.²⁵ This ignorance manifests itself in several attitudes. Some attorneys assume that going to mediation in lieu of litigation will make them look weak and ineffectual.²⁶ Others believe that mediation is a form of negotiation completely void of structure, and that settlements are not enforceable. In addition, attorneys feel that should they become mediators, their capacity as advocates will subject them to a higher standard of care. As a consequence of this higher standard of care, attorneys who become mediators fear they will ensue additional liability.

B. MEDIATION IS FOR THE WEAK

Law school instills a "winner takes all" mentality into attorneys.²⁷ Hence, an attorney who suggests taking a case to mediation may be perceived by the opposing counsel as admitting that his arguments could not withstand the rigors of court.²⁸ Similarly, numerous attorneys surmise that mediation is suitable for the resolution of "touchy-feely" family law cases, but would not be successful in the stoic domain of commercial litigation.²⁹

These perceptions are invalid. There is a trend for corpora-

23. Coombe, *supra* note 2, at 33. THE RECORDER, Aug. 22, 1988, at 4, col. 2.

24. N. ROGERS & C. McEWEN, *supra* note 22, at 166 n. 82 (a survey of programs listed in the 1983 ABA directory indicated that twenty one percent of mediators were lawyers). *Id.*

25. See Ehrman, *Why Business Lawyers Should Use Mediation*, 75 A.B.A.J. 73 (June 1989). See also Mahan, *Why Corporations Hesitate to Mediate*, 9 CAL. LAW. 42, 43 (Feb. 1989).

26. Ehrman, *supra* note 25, at 73. Mahan, *supra* note 25, at 43.

27. Green, Marks, & Olson, *supra* note 12, at 496. Fiss, *supra* note 21, at 1073.

28. Mahan, *supra* note 25, at 44. Phillips & Piazza, *supra* note 1, at 1236-1237.

29. Mahan, *supra* note 25, at 45 (the term "touchy feely" refers to the high degree of sensitivity required to resolve emotionally charged domestic law cases).

tions to use mediation as an alternative to litigation. A 1987 survey of Fortune 1000 companies indicated that 30 percent of the responding companies had used one form or another of alternative dispute resolution within the last year.³⁰ In 1989, about 200 large New York corporations adopted a policy of trying mediation before other procedures.³¹ Likewise, in Colorado, businesses are taking the "Colorado Pledge", which is an oath to take disputes to arbitration or mediation before going to court.³² This trend indicates that, regardless of how attorneys may feel about representing clients in mediation, their corporate clients view it as a viable option to litigation.³³

C. MEDIATION IS VOID OF ALL RULES OF PROCEDURE

Attorneys also hesitate to represent clients in the mediation of commercial disputes because mediation has acquired a reputation of being "all process and no structure."³⁴ Without the rigid rules and regulations of litigation, attorneys may feel vulnerable.³⁵ In mediation, the rules of evidence and procedure are substantially less formal than in litigation.³⁶ Still, the process of mediation is limited by the rules agreed upon by the disputants as well as a variety of federal and state legislation.³⁷

30. *Id.* at 43. This 30 percent resulted in the resolution of 6.8 percent of their total cases, and represented 20 percent of their financial exposure. *Id.*

31. Ehrman, *supra* note 25, at 74 (these corporations adopted this policy because they found mediation to be faster, cheaper, and more flexible than the other dispute resolution alternatives in resolving commercial cases).

32. SAN FRANCISCO DAILY JOURNAL, Oct. 23, 1990 at 5 col.1.

33. Ehrman, *supra* note 25, at 74. Sometimes, however, the corporations themselves demand litigation. If a corporation judges an executive's performance by the executive's victories, such corporations are more likely to opt for a solution which clearly designates a winner, like litigation, and not mediation, which entails compromise.

34. Fuller, *supra* note 44, at 307.

35. Ehrman, *supra* note 25, at 74.

36. See R. COULSON, *supra* note 7, at 41. As to the issue of what evidence is admissible, Rule 9 of the American Arbitration Association's Commercial Mediation Rules merely states "At the first session, the parties will be expected to produce all information reasonably required for the mediator to understand the issues presented. The mediator may require either party to supplement such information." *Id.*

37. See 28 U.S.C. § 408 (West 1984). See N. ROGERS & C. MCEWEN, *supra* note 22, at 243-291 (appendix A and B give a breakdown of each state statutes by topic). Furthermore, every state has passed legislation pertaining to mediation ranging from the qualifications of mediators to the mandatory usage of mediation in certain fields. A majority of the statutes pertain to specific areas of the law that utilize mediation, like labor law, family law, automobile warranties (commonly known as "lemon laws"), agricultural debts, and civil rights. *Id.*

For example, most attorneys are concerned that should they use mediation, information disclosed during the proceedings may be used against their client if there is subsequent litigation.³⁸ These fears are generally unfounded.³⁹ As mentioned before, when disputants decide to take a dispute to mediation, they usually enter into an agreement which outlines the rules of procedure.⁴⁰ Included in these agreements may be a promise from all the disputants to honor the privacy of mediation sessions and the confidentiality of the process.⁴¹

However, provisions not to disclose, subpoena, or offer in evidence may not prove to be one hundred percent effective against nonparties to the agreement.⁴² Such agreements are not binding on a nonparty,⁴³ and may be held against public policy.⁴⁴ However, the courts have been less hesitant to enforce a nondisclosure agreement against a signatory.⁴⁵

In federal cases, confidentiality in mediated settlements is subject to the Federal Rule of Evidence 408.⁴⁶ This rule outlines that evidence of furnishing or offering to compromise a disputed claim "is not admissible to prove liability for or invalidity of the claim or its amount."⁴⁷ Furthermore, "evidence of conduct or statements made in compromise negotiations is likewise not admissible."⁴⁸ Although the initial part of the statute appears to

38. Allison, *Mediation and Legal Problems*, 60 Fla. B.J. 15, 16 (Dec. 1986).

39. For example, in California, Evidence Code section 1152.5 expressly protects against such disclosure.

40. See R. COULSON, *supra* note 7, at 41.

41. *Id.* Rules 11 and 12 address the issue of the privacy of mediation sessions and the confidentiality of information disclosed to the mediator and the parties. *Id.*

42. N. ROGERS & C. McEWEN, *supra* note 22, at 135.

43. *Id.*

44. Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 451 (1984). See *Cronk v. State*, 100 Misc. 2d 680, 686, 420 N.Y.S. 2d 113, 117-18 (Ct. Cl. 1979).

45. N. ROGERS & C. McEWEN, *supra* note 22, at 136. See *Simrin v. Simrin* 233 Cal. App. 2d 90, 95, 43 Cal. Rptr. 376, 379 (1965).

46. 28 U.S.C. § 408 (West 1984). See also Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 AD. L. REV. 315 (1989); Note, *Rule 408: Maintaining The Shield For Negotiation In Federal and Bankruptcy Courts*, 16 PEPPERDINE L. REV. 237 (1989); Brazil, *Protecting The Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988); Note, *supra* note 43, at 448-450.

47. FED. R. EVID. 408 (West 1984).

48. *Id.* See also *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356 (1987) (in which the court held that when an issue is doubtful, the better practice is to exclude evidence of compromises or compromise offers).

grant a great deal of immunity, the statute was consequently amended so that a party can not "immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation."⁴⁹ Nevertheless, the stated purpose of the rule is to further the public policy of encouraging the non-judicial settlement of disputes.⁵⁰

D. MEDIATED AGREEMENTS ARE UNENFORCEABLE

In conjunction with the perception that mediation is void of procedural rules, attorneys are wary of the enforceability of mediated settlements.⁵¹ Without the ability of courts to coerce, attorneys may wonder how mediated settlements are to be enforced.⁵²

Although the enforceability of settlement agreements is an issue yet to be fully resolved⁵³ in most jurisdictions it is a standard practice to reduce mediated settlements to writing, and submit the agreement to the court as a consent judgement.⁵⁴ These consent judgements have been upheld by the United States Supreme Court as enforceable contracts.⁵⁵

If a settlement agreement is not approved as a consent judgement, the question then centers on how a breach of a settlement agreement should be adjudicated.⁵⁶ For the most part, the action becomes subject to all the rules of common law contracts.⁵⁷ However, the enforceability of mediated settlements without consent decrees does vary from state to state. Although

49. S. REP. No.1277, 93rd Cong., 1st Sess. 10 (1974).

50. H.R. REP. No. 650, 93rd Cong., 1st Sess. 8 (1973). See also *Olin Corp v. Insurance Co. of North America*, 603 F. Supp. 445 (1985) (in which the court held the purpose of Rule 408 is to encourage full and frank disclosure between parties in order to promote settlements rather than protracted litigation).

51. Allison, *supra* note 38, at 16.

52. Fiss, *supra* note 21, at 1084 (the court's coercive powers to punish violations of a consent decree usually takes the form of a contempt decree).

53. Payne, *Enforceability of Mediated Agreements*, 1 OHIO ST.J. DIS. RES. 385, 385 (1986).

54. N. ROGERS & C. McEWEN, *supra* note 22, at 198.

55. Payne, *supra* note 55, at 402. See *United States v. I.T.T. Con. Baking Co.*, 420 U.S. 223, 236 (1975).

56. Allison, *supra* note 38, at 16. See Payne, *supra* note 55, at 385.

57. Payne, *supra* note 55, at 388. The agreement must meet all the common law elements of an enforceable contract such as offer and acceptance, mutual assent, and consideration. The disputants also have the option of ignoring the breach or re-negotiating. *Id.*

subject to the rules of common law contracts, most states have provided statutes which indicate the degree of enforcement mediated settlements will have if there is not a consent decree.⁵⁸

E. ATTORNEY-MEDIATORS HAVE INCREASED LIABILITY

Should attorneys choose to mediate a dispute themselves, they may be concerned that they will be exposed to greater liability.⁵⁹ Their rationale is that as an attorney-mediator, their legal background will subject them to a higher standard of care than the average mediator, therefore it would be easier for unhappy disputants to sue them.⁶⁰

In actuality, there are very few cases of any mediator, regardless of their training, being held liable for malfeasance.⁶¹ This may be, in part, due to the high degree of user satisfaction in mediation. User satisfaction is illustrated by the fact that disputants are nearly twice as likely to comply voluntarily with mediated agreements than with court-imposed judgements.⁶² Others in the field of mediation report that the success rate of mediation in resolving business disputes is about eighty percent.⁶³ Because disputants have been pleased with their experiences in mediation, malpractice suits against mediators, whether they are attorneys or non-attorneys, have been limited.⁶⁴

58. N. ROGERS & C. McEWEN, *supra* note 22, at 197-200. Section 10.4 gives an extensive explanation of the enforceability of mediated agreements by comparing and contrasting the policies of several states. *Id.*

59. See Blumberg, *Risk Management - Preventing Malpractice Claims*, 13 LEGAL ECON. 52 (Sept. 1987) (as malpractice suits are on the rise, attorneys are increasingly concerned about being named to one). For additional information on mediator liability, see Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 *Cin. L. Rev.* 731 (1984); Note, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 *Harv. L. Rev.* 1876 (1986); Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 *Ohio St.J. Dis. Res.* (1986).

60. NOTE, *supra* note 65, at 1882 (outlining the theories on which mediators may be held liable, including a general duty of mediators to prevent procedural unfairness, a fiduciary standard, and substantive responsibility).

61. N. ROGERS & C. McEWEN, *supra* note 22, at 197 n. 87 (the authors state they know of no recoveries against mediators due to the difficulty of proving damages from mediators' negligence).

62. Payne, *supra* note 55, at 385.

63. Ehrman, *supra* note 25, at 73. The author is a dispute resolution professional in Monterey, California.

64. N. ROGERS & C. McEWEN, *supra* note 22, at 186-197. Additional reasons for the low rate of mediator liability is statutory immunity granted to mediators, and the lack of

However, problems may arise if an attorney-mediator agrees to provide legal services to the disputants as well as mediate their dispute. In such instances, the attorney-mediator will probably be held to the standard of a "reasonably prudent" lawyer.⁶⁵ If hired solely as a mediator, the attorney-mediator is arguably relieved of the standard of a "reasonably prudent" lawyer.⁶⁶ By distinguishing between the attorney-mediator who provides legal services and the attorney-mediator who only mediates disputes, the ethical problem of an attorney representing several parties at the same time is alleviated.⁶⁷

Once again, a few state Bar Associations have developed their own guidelines in this matter.⁶⁸ Compare the conservative policies of the Washington State Bar and the New Hampshire State Bar to that of the more lenient policy of the Maryland State Bar.⁶⁹ The Washington State Bar and New Hampshire State Bar have ruled that an attorney-client relationship exists between the mediator and both parties, hence an attorney may not ethically engage in certain activities connected with mediation because the attorney would be unable to adequately protect the individual interests of his clients. On the other hand, in Maryland, impartial advisory attorneys in structured divorce mediation programs may represent more than one client in the same matter if the attorney can adequately protect the disputants' interests. The committee obligated the lawyer to make the determination whether multiple representation was permissible in a given case.⁷⁰

a negligence standard for mediator malpractice. *Id.* at 187. An example of statutory immunity is Fla. Stat. Ann. § 44.201 which makes any mediator from the state's Citizen Dispute Settlement Center immune from civil damages for any act or omission in the scope of his employment or function, unless such person acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of the rights, safety, or property of another. Fla. Stat. Ann. § 44.201 (West 1988).

65. N. ROGERS & C. McEWEN, *supra* note 22, at 192.

66. *Id.* at 193.

67. See Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 *Ariz. L. Rev.* 329 (1984). In this article Professor Riskin outlines the existing ethical guidelines for lawyers employed as mediators. *Id.* at 337-342. Professor Riskin also proposes the development of a new standard of "neutral lawyer" for those lawyers employed as mediators. *Id.* at 353.

68. *Id.* at 339.

69. *Id.*

70. *Id.* at 340.

In comparing these state Bar Associations' guidelines, it becomes apparent that even those with more lenient policies are willing to hold attorney-mediators who agree to provide legal services directly responsible to the disputants. By advocating the standard of the "reasonably prudent" lawyer, the disputants' interests, in the long run, are protected.

IV. CONCLUSION

Although mediation was initially received with skepticism by attorneys, their attitudes are beginning to change.⁷¹ For example, in the early 1970's, mediation was thought as appropriate exclusively for disputes concerning two parties.⁷² But as the field developed, attorneys began to extend their services to encompass larger disputes in a variety of areas.⁷³ Today, attorneys successfully mediate large commercial disputes that contain numerous disputants. These cases cover the whole gambit of legal issues and can involve 3-50 disputants at a time.⁷⁴ This change of attitude, in part, may be due to the increased attention mediation has received in legal publications.⁷⁵

Although the trend towards utilizing mediation to resolve commercial disputes is encouraging, it is of tantamount importance to remember that mediation is not a replacement for the existing legal structure. It is only one of several methods that

71. GOLDBERG, GREEN, & SANDER, *supra* note 3, at 70-72.

72. See Fuller, *supra* note 4, at 309.

73. See Cooke, *supra* note 1, at 13-16 (citing mediation as appropriate for landlord-tenant disputes, neighborhood disputes, consumer-merchant disputes, domestic disputes, and the criminal arena).

74. Data supplied by Gregorio, Haldeman & Piazza, a San Francisco firm specializing in mediated negotiations. One of the cases Gregorio, Haldeman & Piazza mediated, for example, was a securities fraud lawsuit for ten million dollars involving 17 parties.

75. For the period of September 1979-August 1980 the INDEX TO LEGAL PERIODICALS listed 9 articles under the heading of "Arbitration and Award" that directly addressed mediation. For the period of September 1989-August 1990, the INDEX OF LEGAL PERIODICALS listed 20 articles addressing mediation under the newly formed heading "Dispute Resolution". It is also interesting to note that for September 1979-August 1980 the number of articles listed under "Arbitration and Award" barely filled a page, whereas for the period of September 1989-August 1990 the number of articles listed under "Dispute Resolution" filled more than three pages.

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can be used to settle a dispute.⁷⁶ Hence mediation should be viewed as a tenable complement to litigation and not as a replacement.⁷⁷

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76. See DISPUTE RESOLUTION, *supra* note 1. This book provides a comprehensive overview of adjudication, arbitration, meditation, negotiation, and med-arb.

77. THE RECORDER, *supra* note 23, at 4, col. 2.

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