Mediation: An Overview of Alternative Dispute Resolution

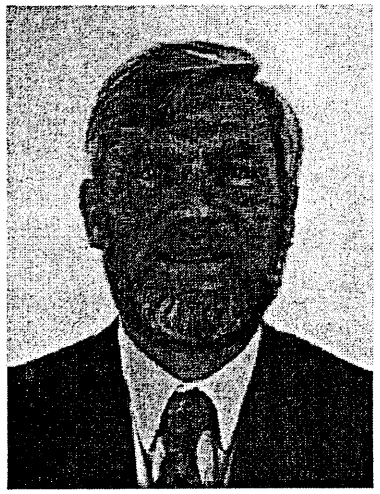
by Robert A. Goodin

Mediation has become perhaps the most popular procedure in the alternative dispute resolution area, an area that is revolutionizing the handling of cases in the U.S. legal system. In this overview of mediation, Robert A. Goodin, president of the board of directors of the Institute for the Study and Development of Legal Systems and a partner in the San Francisco law firm of Goodin, MacBride, Squeri, Ritchie & Day, looks at the process and how it has reduced the burden of costly litigation in U.S. courts.

BY THE LATE 1980s and particularly beginning and continuing through the 1990s, mediation has become an increasingly popular procedure in all types of civil cases. In fact, it is now probably the most popular form of alternative dispute resolution used by litigants in civil cases in the United States. Moreover, because of its flexibility, it is increasingly used not only in civil disputes but also criminal cases and in cases that are on appeal.

Mediation is a structured negotiation presided over by a facilitator with the skill, training and experience necessary to help the parties reach a resolution of their dispute. It is a process that is confidential, non-binding and geared to assisting the parties in structuring a mutually acceptable resolution to whatever dispute has prompted the mediation.

Because the process leaves control of the settlement in the hands of the disputants, and because it is oriented to producing solutions



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that accommodate the fundamental needs of each side, mediation is a dispute resolution technique particularly appropriate for circumstances where the parties to the dispute have had or expect to have, a continuing relationship. It is also, however, well suited to disputes that do not involve such relationships.

Emergence of Mediation in the U.S.

In many cultures mediation, or "conciliation" as it is sometimes known, has been a staple of alternative dispute resolution for generations, typically presided over by a town elder or respected figure in the community.

The emergence of mediation as a device to resolve litigation in the United States can probably be traced to the seminal work in negotiation theory done by Roger Fisher and William Ury of the Harvard Negotiation Project, popularized in their 1981 book *Getting to Yes.*

The central insight of Fisher's and Ury's work was that most negotiations are conducted by bargaining over positions and can result in either impasse or an agreement that is perceived by one of the parties to have been imposed simply through superior strength of the other.

Fisher and Ury suggested that instead of being based on positions, bargaining should focus on the underlying interests that motivate parties to take these positions. In this manner, creative solutions can be developed that meet, at least in part, the underlying interests of each of the parties, thus permitting a principled and mutually advantageous resolution of the conflict.

A simple illustration, used by Fisher and Ury relies on the concept of interest-based bargaining. Two men are seated at a library desk and cannot agree about whether the window above the desk should be open or shut. After much wrangling and no solution, they summon the librarian who asks each party the reason behind his position. The man who wishes the window open explains that he wants fresh air. The man who wishes it closed explains that he wants to avoid a draft. Armed with this information, the librarian arrives at a solution—opening the window in an adjacent room—that accommodates the interests of each of the parties and which would not have been possible if the parties had simply continued to bargain over their positions.

Because mediators are trained to explore the interests underlying each party's position in a mediation, and because the process itself is conducive to that exploration, mediation is an

ideal forum in which to use the negotiation philosophy advocated by Fisher and Ury.

Mediation in the Courts

Many courts in the United States, both state and federal, have mediation programs. This has been particularly true since the 1990 Civil Justice Reform Act (P.L. 101-650) required federal courts to design and implement alternative dispute resolution programs.

Mediation typically arises in one of two contexts in U.S. litigation. The first is through court-ordered or court-annexed mediation. Typically, such courts maintain a panel of approved mediators who offer their services to litigants, at either the court's direction or the litigants' request.

The second context in which mediation arises is private mediation. In these cases the parties to a dispute decide that mediation would be appropriate and select a mediator from among the many private providers who have gone into the business of offering these services.

Mediation as a technique for resolving disputes first began in the area of family law, probably because the nature of the emotions involved often led to serious problems with positional bargaining and because the parties, like it or not, were often forced to have a continuing relationship because of children.

Mediation in family law disputes was quickly recognized as a valuable tool, and courts and litigants soon realized that using mediation was not limited to family disputes but could be extended to other civil disputes as well.

The reasons for mediation's growing popularity in all areas of civil litigation are abundantly clear:

- Mediation is non-threatening. It is non-binding and thus permits client control of the outcome.
- Mediation is relatively inexpensive. Most sessions last no more than one or two days.
- Mediation works. Most mediators report 80– to 90–percent success rates.

The Mechanics of Mediation

One of the advantages of mediation is its flexibility. A mediation session can be designed in any way that the parties believe would be most useful to the resolution of their dispute.

Before the mediation actually begins, each side will submit a brief or statement to the mediator, which consists of a short summary of the party's position and includes any critical written material, e.g., contracts, etc.

The mediation begins with a joint session attended by the mediator and all of the parties and their lawyers. The mediator hears a presentation by each party outlining its particular view of the case and why it believes it is entitled to prevail in the dispute. Although the lawyers usually take the lead in this presentation, it is important to also allow—and mediators encourage—the clients directly to express their views.

Frequently, after a party's presentation is concluded the mediator restates the position to ensure he has not missed anything. After the mediator has heard presentations from each side, the joint session is ended.

The purposes for the joint session are several. First, it allows the mediator to hear firsthand each party's statement of its position. Second, by accurately reciting back the positions to each of the parties, the mediator can build credibility with both sides by demonstrating that he has truly understood any contentions. Finally and importantly, the joint session allows each side to hear the other side's arguments directly, without the "filtering" that typically occurs when cases are reported only through the lawyers.

Following the joint session, the mediation breaks into individual meetings where the mediator meets with each side privately in an attempt to bridge the gaps that exist. It is in these private sessions where the mediator spends substantial time candidly identifying with the parties what their true interests are and developing options that might satisfy those interests. At the same time, the mediator is looking for common ground between the parties.

As a motivation for developing creative alternative solutions, the mediator will often explore some of the legal strengths and weaknesses of the party's case. Typically, multiple private meetings with each side are held that increasingly narrow the differences between the parties. At the conclusion most cases are resolved.

Training and Compensation

At the present time there are no licensing or certification requirements for mediators in the United States and no formal training is required to offer those services. Nevertheless, most people who offer mediation services have received some training.

Most courts that have court-annexed mediation programs require training of the people who wish to be members of the mediation panel and also offer the training to others who wish to receive it. In addition, many private, continuing legal education providers offer mediation programs. Court training usually consists of a multi-day program comprised of lectures and demonstrations. Role-playing sessions during training allow students to play the mediator in a mock case using the skills they have learned.

Compensation varies depending on the context in which the mediation arises. Most court-annexed mediation programs ask that the mediators on the panel volunteer their services for a portion of the time devoted to the mediation (for example, the first four hours) and require the parties to compensate the mediator thereafter at a court-established hourly rate..

In the case of private mediation, the compensation is a function of the agreement between the parties and the mediator. Typically, private mediators offer their services at an agreed daily rate, which can be rather substantial. Private mediators are able to ask for and receive more compensation because the litigants realize the potential value of their services. For example, most privately mediated disputes have much smaller amounts in controversy than potential future legal fees that would result if a case went to litigation.

Reducing the Burden on the System

Because mediation is so effective, it offers tremendous cost savings and other benefits to the parties involved. By resolving cases and getting them out of the court system, mediation also

reduces the burden on that system and promotes speed and efficiency in the processing of cases.

Since most court systems worldwide have cost and delay problems similar to those in the United States, and because mediation is culturally familiar in so many countries, the alternative dispute resolution movement appears destined to attain tremendous international currency as the new millennium progresses.