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# Mediation's Coming of (Legal) Age

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I am pleased to have the privilege of introducing this symposium on mediation. The symposium is an outgrowth of a conference on alternative dispute resolution sponsored by the Northern Illinois University Law Review and held at the NIU campus in Naperville, Illinois, on March 8, 2001.[2] The content of both the conference sessions and the articles in this symposium suggest that the modern mediation movement is entering a new era.

In this new era, mediation is becoming more institutionalized, regularized and uniform.[3] Or, expressed in different terms, mediation is now reflecting the interests and values of the legal order. During the past two decades we have witnessed an explosion of interest in mediation among judges and lawyers. Many court-sponsored mediation programs have been established in state and federal courts across the country.[4] With the advent of these institutionalized, court-sponsored mediation programs, we have witnessed an increasing interest on the part of the legal community

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1. Professor, Northern Illinois University College of Law.

2. The title of the conference was "Hot Topics in Dispute Resolution: What Advocates, Neutrals and Consumers Need to Know."

3. Mediation's institutionalization is analyzed in Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903 (1997); *see also* James J. Alfini (moderator), *What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307 (1994).

4. More than 40 states in which courts or state agencies are authorized to mandate mediation are identified in NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY & PRACTICE app. B (2d ed. 1994 & Supp. 1998); *see also* Alternative Dispute Resolution Act of 1998, 28 U.S.C.A. § 652 (West Supp. 1999) (encouraging establishment of ADR programs in federal district courts). Perspectives on court-sponsored mediation programs and their growth are analyzed in Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029 (1992-93); John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813 (1999); Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999). For critiques of these developments, see Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987); Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75 JUDICATURE 34 (1991); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

in not only representing parties in this alternative forum, but also in developing mediation skills and adding the role of the mediator to their legal practices. We are thus entering a new era where mediation settings and practices will more clearly reflect the values and interests of the legal profession.

Mediation's coming of legal age is reflected in the articles in this symposium. Judge Michael Getty's article on the drafting of the Uniform Mediation Act (UMA) describes the paradigm example of a major effort to bring uniformity to the mediation field. The essays by Philip Harter and Gregory Firestone place the UMA in a broader context and suggest that mediation's coming of age is not without costs. Finally, the empirical evaluation of the Lanham Act mediation program by Jennifer Shack and Susan Yates is an excellent example of the kind of "self-assessment" that will help to avoid the potential dangers involved in mediation's institutionalization.

The Uniform Mediation Act is the premier example of the heightened interest in mediation on the part of the legal establishment. As Judge Getty points out, the drafting of the UMA was a joint undertaking of two interlocking drafting committees, one appointed by a major law reform organization - the National Conference of Commissioners on Uniform State Laws (NCCUSL) - and the other by a section of the major lawyers organization - the Dispute Resolution Section of the American Bar Association (ABA). Judge Getty served as Chair of the NCCUSL committee and was a member of the ABA committee. The drafting process took four years, culminating in the adoption of the UMA by NCCUSL at its annual meeting in August, 2001. The Act will be presented for adoption by the House of Delegates of the ABA at its midyear meeting in February 2002.[5] Getty, Harter and Firestone all describe a very open drafting process in which official observers from various organizations played very active consultative roles. Philip Harter was the official observer from the ABA Section of Administrative Law and Regulatory Practice and Gregory Firestone represented first the Academy of Family Mediators and then the Association for Conflict Resolution.

Philip Harter's article, *The Uniform Mediation Act: An Essential Framework for Self-Determination*, is an excellent interpretive essay of key provisions of the UMA. In connection with his analyses of these UMA provisions, Professor Harter identifies certain dilemmas that are created by the wording of certain provisions that may create "very large traps for the

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5. As the Chair of the ABA Dispute Resolution Section during 1999-2000 and currently as a Delegate from the Dispute Resolution Section to the ABA House of Delegates, I have been an interested observer of the drafting of the UMA and its adoption.

unwary." Accordingly, he offers suggestions as to how these provisions might be interpreted to resolve these dilemmas. Although he also identifies weaknesses in the drafting process, Harter ultimately describes the UMA's development as "a heroic effort" and, in statesman-like fashion exclaims: "In the end, it is no one's ideal approach ... [b]ut it reflects the results of robust discussions and careful deliberations over a broad range of issues developed by widely divergent interests."

Similarly, Dr. Gregory Firestone assesses key provisions of the UMA in *Principled Advocacy in the Development of the Uniform Mediation Act.* Dr. Firestone's analysis, however, is based on eleven "principles" endorsed by the organizations represented by Dr. Firestone. Applying these principles, Firestone is critical of certain aspects of the UMA. Particularly telling are his expressions of concern over his fifth principle: "Be easily understandable to mediation participants." Dr. Firestone characterizes the UMA as "complicated and hard to understand" and containing "many ambiguities." Thus, in their efforts to satisfy numerous competing interests, the drafters may have sacrificed a measure of understandability. Of perhaps greater concern are Dr. Firestone's concerns with respect to the UMA's recognition of certain core values of mediation; namely party self-determination (Principle 2) and impartiality (Principle 10). Professor Firestone finds inadequate substantive references to these values in the text of the UMA.

Although Dr. Firestone's critique of the UMA may, on the one hand, reveal that mediation's coming of legal age has certain costs, it also reveals certain positive aspects of this new era. In particular, I think we are entering a new era of mediation (and more generally ADR) criticism. The old criticism of ADR, and mediation in particular, was very generalized and relatively uninformed. Scholars such as Owen Fiss[6] and Judith Resnik[7] worried that the increasing use of informal processes like mediation threatened to turn our justice system topsy-turvy, but they offered this criticism at a very abstract level. The new criticism of mediation is much more informed because it is essentially self-criticism. We now have experienced mediators offering critiques of our current practices.[8]

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6. Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

7. Resnik, *supra* note 4.

8. *See, e.g.*, Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to do With It?*, 79 WASH. U. L.Q. (forthcoming 2002); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1 (2001). Professor Welsh is an experienced mediator, having directed the Mediation Centers in both Minneapolis and St. Paul, Minnesota.

We also have experienced mediators who are willing and able to evaluate existing mediation programs. An excellent example is *Mediating Lanham Act Cases: The Role of Empirical Evaluation* by Jennifer Shack and Susan Yates. The research design for the study was clearly informed by the authors' experiences in mediation practice. The result is a program evaluation that not only makes important contributions to our understanding of the effectiveness of court-sponsored mediation programs, but also offers a guide for future research.

Thus, mediation's coming of legal age is cause for both celebration and concern. We need to be concerned, on the one hand, that lawyer colonization of the mediation field will not lead to an erosion of mediation's core values. On the other hand, this coming of age is also marked by an increased capacity for self-evaluation and criticism among practitioners. Symposia such as this one will assist in allowing the field to mature without compromising its basic principles and values.