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Mediation: The Future of Legal Problem Solving & Conflict Resolution

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**Lem Mediation: The Future of Legal Problem Solving & Conflict Resolution**

**I. Introduction:**

*What is Mediation and how does it work?*

The gradual recognition of the inefficiencies, insurmountable expenses and grave setbacks to unity that accompany traditional adversarial litigation has brought about the introduction to a new chapter in the pursuit for justice and dispute resolution. As justice begins to resurface as the goal in resolving conflicts, mediation- a form of alternative dispute resolution- is becoming more common and is frequently being recognized as a preferable alternative to litigation. Former Chief Justice of the Supreme Court, Justice Warren Burger has referred to traditional litigation as “a mistake that must be corrected... For some disputes trials will be the only means, but for many claims trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for really civilized people.”¹ Mediation offers this corrected alternative to traditional litigation and addresses these problematic issues with the current adversarial litigation system.

Mediation is a “negotiation conducted with the assistance of a third party.”²

In mediation, the opposing parties come together, sometimes with their attorneys, and engage in a consultation of sorts conducted by the mediator who assists the parties to come to an agreement “without judging the merits of the case.”³ As mediation becomes more common and popular to resolve conflicts between parties as an alternative to traditional litigation, it becomes important to create a more structured and functional system of mediation in order to ensure greater rates of success. Part Two of this paper will take us through the history of mediation and

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how the process generally works today. Part Three will go on to suggest a revised version of our current mediation structure as a means to successful dispute resolution. This proposed revision to our mediation structure will allow it to reach its true potential as a great tool for problem solving and conflict resolution within the framework of our legal system.

II. Mediation Today:
A Look at the History and Current Status of Mediation

Modern day mediation stems from the notion of settlement conferences that were being held in California superior courts in the 1950s and 1960s. Most of these mediators were retired judges who had seen the drawn out and painful process of litigation first hand and had recognized the overall value of mediating cases in order to reach a settlement outside of the courtroom. It was not until the 1980s that mediation began to become more common place for dispute resolution in the legal world. Even today, it is still clear that mediation has a long way to go to become nationally accepted as a means to resolve disputes outside of our traditional litigation setting. Despite the many benefits of mediation such as parties controlling the outcome, being directly engaged in the negotiation of the settlement, offering settlement earlier and faster than litigation can, enhancing the likelihood of continuing relationships, cost benefits, productivity, efficiency, less stress for all involved, and generally a more pleasant process to settlement, there are many attorneys who are still quite opposed to this shift in method for fear that they will lose the opportunity to charge their fees and do what they do best: fight. For those

5 Id.
6 Id.
attorneys who recognize that mediation is actually in their best interest too, they embrace the process and many attorneys today are also including mediation in their own private practice.  

Mediation is not heavily regulated in the way that, for instance, arbitration is by federal statutes. There is the Uniform Mediation Act which establishes the relevant definitions, process and goals of mediation; however, mediation is generally non-binding to parties. Parties enter into the mediation process voluntarily unless the mediation has been sanctioned by a court meaning that a judge has ordered the disputing parties to enter into a court ordered mediation. The entire process is private and confidential meaning that unless there is a threat of harm to any of the parties, nothing shared or discussed at the mediation will be shared outside with any other party. The disputing parties will sign a confidentiality agreement attesting this point. Also, if the dispute is not resolved at the mediation, the mediator may not be called upon to testify in court and none of the things discussed in the mediation may be brought up in court. Finally, with regard to confidentiality, there are times that the mediator may choose to “caucus” or meet with one side privately. If that party shares something with the mediator that they do not want shared with the other side, the mediator is under the obligation to abide by that party’s wishes.

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mediator should be a neutral party, acting without bias, with the only goal being to attain settlement without any coercion or intimidation.\textsuperscript{14} There are different mediator styles or methods used in mediation. The general three styles are facilitative, evaluative and transformative although the first two seem to be the most prominently used.\textsuperscript{15} Regardless of the style that the mediator is choosing to employ, the goals are always to encourage communication, try to reach some sort of settlement and to focus on the future. One major benefit of mediation is that a mediator, by setting the agenda or framework for the discussion, will always seek creative options for settlement and will think past mere monetary solutions since most problems involve more than just a dispute over money but rather involve emotions, a desire for improved communication, future relationships and so on. Facilitative mediators work to create an environment where the parties themselves work collaboratively as problem solvers to arrive at a solution but will abstain from offering an opinion of any sort.\textsuperscript{16} Evaluative mediators will assist the parties in breaking impasses by offering their views on the merits of the case, consequences of failure to settle, and benefits of settlement, but will still act as a neutral party.\textsuperscript{17} Finally, transformative mediators will focus on the communication and interaction between the parties and allow them to do more of the directing themselves.\textsuperscript{18} Again, the most common approaches are either facilitative or evaluative; however it is up to the mediator to decide what approach they will employ. There is no administrative body or agency that regulates the methodology or the mediator. This may be part

\textsuperscript{16} Id.
\textsuperscript{17} Id.
of the reason that mediation is often not taken seriously in the legal field or otherwise. More about this will be discussed in the subsequent section.

The American Arbitration Association reports that over 85% of all mediations result in a settlement.\(^\text{19}\) Despite these statistics, there are many people in the legal field and outside of the field that are nevertheless hesitant to admit its potential for success; however, it should be acknowledged that with any new concept, there will always be people who are opposed to change. To reassure the expert litigators out there, Caroline Vincent, a mediator in California offered the following, “If we want to become a collaborative society, we have to change the system. We’ll probably always need a civil way to have a duel, so we don’t kill each other! But we need that to be our last, not first, resort.”\(^\text{20}\) I argue that we do want to become a more collaborative society, and with that, mediation can find a great place in our world of dispute resolution. However, with mediation being a newer approach to dispute resolution and one that is generally in contrast to litigation or other adversarial approaches, it is necessary to recognize its strengths but also the areas that are in need of improvement in order to shape it into a more structured, nationally and legally accepted method of dispute resolution.

**III. Mediation Restructured:**
*What can be done to make it better?*

Senior Federal Court Judge for the United States Court of Appeals for the Ninth Circuit Dorothy Nelson said that “We need to build on this work and explore how good dispute resolution and problem-solving skills can take the lawyer’s role as process architect to new levels of innovation that will at times involve nonlawyers as well…We need to develop new processes


and more creative solutions with more heads and hearts at the table.” We have already reviewed the major strengths of mediation and have determined that having a system of mediation in place that is structured, functioning and recognized within the legal and otherwise greater community is a necessity. Now in considering this new process, there are three areas where improvements can be made to better establish the system and allow it to reach its true potential as a necessary tool for dispute resolution within the framework of our legal system.

The three main suggestions for improvement are (1) In order to gain recognition and respect within the legal community, mediation or alternative dispute resolution should become a mandatory course in order to graduate from law school, (2) There should be a centralized means of training mediators and mediators should either have a legal, social work or otherwise relevant background and (3) Mediation settlement agreements should be held to be binding as any other express contract. Under these two main suggested areas of improvement fall various other details that will be positively impacted by the implemented changes.

(1) Make Alternative Dispute Resolution a Mandatory Course in Law School

The skills that one gets from taking a simple introductory Alternative Means to Dispute Resolution or a Counseling and Negotiation course while in law school is invaluable. Mediation offers a new cooperative vision of dispute resolution which is a refreshing change from the other adversarial courses that are mandatory in law school such as Civil Procedure or Trial Advocacy. Having the skills to bring opposing parties together is a powerful tool in one’s advocacy tool belt and should be made mandatory in order to complete a degree in law. In doing so, it is hoped that more respect will be given to the field amongst professors, faculty and amongst students. It will equip law students with the modern approach to dispute resolution that is conducive to unity and

the resolution of conflicts rather than just preparing to “wage war”\textsuperscript{22}. As many lawyers have also admitted, becoming trained and working as a mediator often makes them better lawyers\textsuperscript{23}.

\textbf{(2) Make Mediation a State-Sponsored and Regulated Means of Dispute Resolution}

There is value in having different schools of thought; however, since mediation is so new, it would be significant to have a centralized means of training the mediators so that they are all getting the same information and the same tools. This would mean maybe having a State sponsored program that certifies people as mediators. In this vain, all mediators will be trained in the same way and will have to pass a certain amount of training in order to be certified. This offers some regulation on the part of how trained and qualified mediators are. The better the quality of mediators that are out there, the greater the chances of success there are and the greater respect will be given to the field. As such training is provided; it should not be as easy to become a mediator. For instance, someone with a legal background or a background in social work or counseling would be qualified to pursue this path. Others should not be turned away but should be evaluated and trained accordingly so that they are equipped with the right knowledge and skills to be effective at their job as a mediator. Lawyers and judges are ideal because they also carry with them knowledge of the law and would be able to assist in drafting the settlement agreements at the end as well.

\textbf{(3) Give Mediation the Respect It Deserves: Make Settlement Agreements Binding}

Also, with mediation being regulated by a State sponsored agency, it would ideally be advocated more in the court system. Trial courts may choose to implement a system where for certain types of disputes such as small claims, divorces, child custody issues, employment issues


\textsuperscript{23} Id.
and so on, that mediation is automatically the first resort and trial is secondary only if necessary. The process of mediation and the trial court level should be more in line with one another. Likewise, if mediation does work, then it should not be brushed aside at the trial court level if the parties choose to go to litigation afterwards. This way, a settlement agreement that arises out of a mediation should be treated as any other express contract would be treated— as binding— and thus could be brought into court if litigation arises after the settlement had been reached without breaching any confidentiality that the parties are bound to from the mediation. More would have to be put into place to perfect this system of State-sponsored regulation, but this is just a plenary idea in order to ensure better trained mediators, more respect from the legal community and more binding power for the process itself.

**IV. Conclusion**

"It is tremendously rewarding to help people and groups resolve conflict of all kinds through consultation, mediation, and dialogue," says Judge Nelson, whose goal is "to always have a win-win situation rather than a win-lose situation."24 This should be the goal of the legal system as a whole. As we begin to embrace the notion of cooperative problem-solving as shown through the practice of mediation, our goal in dispute resolution changes from an adversarial “win-lose” situation to one that is a “best for all parties involved” situation. To imagine a system where we are working together to resolve issues rather than to fight over minute and trivial things is truly inspiring. All of this is not to say that there is no room for an adversarial forum for litigation— some cases need the fact finding and disputing in order to attain justice; however, we should never lose sight that justice is our ultimate goal. Giving our current form of mediation a

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makeover of sorts is in order to make it more structured, systematic and recognized. This will only further the goal of attaining justice through a means of coming together to resolve our disputes rather than relentlessly defaulting to fight through them.