

# **TOWARD A PROTOCOL FOR ADMINISTRATIVE AGENCY MEDIATION IN OHIO**

February 27, 2009, Draft

Carly Lane Morgan, Editor

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## ACKNOWLEDGEMENTS

The authors wrote this book in the spring 2008 as a part of Advanced Issues in Dispute Resolution at The Ohio State University Moritz College of Law, taught by Professor Nancy H. Rogers.

The use of alternative dispute resolution methods to efficiently resolve conflicts has continued to expand as people look for resolutions that are not only fair, but also flexible and user-friendly. The Ohio Department of Administrative Services is exploring the use of alternative dispute resolution methods during hearing procedures to make the hearing processes currently in place more consistent, predictable and fair. Students from the Moritz College of Law were asked to provide research on the inclusion of alternative dispute resolution methods in hearing process by members of the Governor's Regulatory Reform Initiative as part of Advantage Ohio.

The authors explored the application of dispute resolution processes within state administrative procedures. They suggest that a quality mediation program could be implemented without new state expenditures. They believe that such a initiative could preserve fairness and holds promise for decreasing the parties' expenses while making the administrative process more user-friendly.

This book is a compilation of the papers written by these students. It is intended to serve as a resource for the Alternative Dispute Resolution Process Working Group, which has been given the task of offering recommendations for the inclusion of alternative dispute resolution procedures in the hearing processes of the Ohio Department of Administrative Services.

Heartfelt appreciation goes out to the individuals who acted as resources for this publication. The authors would like to express their gratitude to Scott North, Christopher McNeil, Tony Logan, Tom Wang, Elizabeth Collis, Maria Mone, Ed Krauss, Greg Schultz, Rebecca Albers, and Susan Jeghelian for their generosity in sharing ideas and information.

Carly Lane Morgan, Editor

# CHAPTER ONE: IMPLEMENTATION OF UNIFORM MEDIATION PROCEDURES IN OHIO'S STATE AGENCIES: HOW AND WHY?

By Lana Momani

## Executive Summary

### Introduction:

- Ohio has the opportunity to lead the states in implementing uniform, effective ADR for state agency disputes.
  - Other states have made strides toward uniform, centrally organized state agency ADR systems, but have not fully succeeded for numerous reasons, including lack of funding and inability to prove the benefits of a more uniform ADR system in state agencies.
  - Examples from the various states and from the federal government provide helpful guidance and examples for a protocol.
- Fortunately, there are ways to implement a system in a cost-neutral manner that has the potential to save money in the future.
  - By using the resources already in place, like the Ohio Commission on Dispute Resolution and Conflict Management, Ohio can use the expertise it already has in a new and fruitful manner.
    - The Ohio Commission on Dispute Resolution and Conflict Management already possesses the knowledge and experience to help agencies move towards more unified, effective ADR procedures.
  - Making cost savings apparent to agencies, the government, attorneys, and litigants will increase support for the process.

How can a more uniform, centrally organized system of ADR in state agencies help Ohio reach the goals of cost saving and user-friendliness?

- Uniformity among agencies will help provide transparency of process—something lacking in the current system.
  - This transparency will result in a clearer system, making agency procedures easily accessible to litigants.
    - Thus, both time and money will be saved.
- Although uniformity is important to establishing quality of process and confidence in the system, there are some aspects of the system that would work best if left flexible. Such flexibility will allow agencies to tailor the mediation process to their needs.
- The federal ADR agency system is the most viable system currently in operation. Ohio can draw from its strengths in order to develop its own agency ADR system.
  - The Administrative Dispute Resolution Act of 1996 sets up an effective system for agency ADR. The following are the most crucial aspects of a well-organized, efficient ADR system design:
    - Under the Act, each agency must appoint a director to report back to a central agency which oversees the ADR process within all of the

- agencies. This person is charged with the duty of monitoring the use of ADR in his respective agency. The overseeing ADR agency consults with and provides agencies with advice for ADR implementation.
- The Act allows for certain circumstances in which agencies can opt out of using mediation, especially when the ultimate decision in the dispute is needed to set or follow precedent or when a public record of the dispute is required.
  - The success of this Act is perhaps a result of the checks and balances of the system; having individuals in charge of ADR in their agencies and requiring them to report to a commission on ADR allows for continuous surveillance of the processes by ADR experts.
- Several states, through their policy rationale in implementing ADR, more specifically mediation, in state agencies, provide interesting and provocative examples for Ohio.
    - Ohio can learn the following positive protocol from other states:
      - Massachusetts had a centralized organization; one of the most positive aspects of this was that each agency was required to provide input on the successfulness of ADR in their agency. This type of analysis and feedback, and the publishing of such data, is important for evaluating the progress of a uniform ADR system.
      - Virginia implemented ADR in state agencies by requiring each agency to provide a written ADR policy. Like the federal statute, the statutes in Virginia establish a council/commission as the central organization in charge of overseeing the process. The statute also provides flexibility for agencies in implementing ADR systems.
      - Alabama has a central organization that set out both short and long term goals for ADR in the state and for the organization itself. This type of planning in Ohio will be particularly helpful in focusing the tasks of the Ohio Commission on Dispute Resolution and Conflict Management in relation to state agency mediation.

Implementation of a uniform ADR system requires organization and determination, but it can be done.

- Ohio should consider, for the afore-mentioned reasons, requiring that all agencies develop ADR procedures, more specifically, mediation.
  - Past experience in Ohio agencies, especially the Board of Tax Appeals, indicate that this type of strong encouragement may be the only way to implement new ADR procedures.
- States have implemented or encouraged the use of mediation in state agencies through statute or executive order. There are several benefits of using executive orders including the following:
  - Executive orders can be implemented expediently.
  - Additionally, using an executive order will avoid the usual debate between parties over the wording of the law/statute.
- Ohio could benefit from redirecting the attention of the Ohio Commission in Dispute Resolution and Conflict Management toward overseeing the use of mediation in state agencies.

- The Commission, if given the task of overseeing the mediation process, should review and approve each agency’s ADR system plans through a recommendation to the Governor.
- If a mediation process is implemented, it is recommended that each agency have a point person who must report back to the Commission on the progress of the mediation procedures.
- The Commission can use the information provided by the agencies in order to assess the strengths and weaknesses of the uniform ADR program.

## **Introduction**

Ohio has the potential to lead the nation in promoting a business-friendly, cost-saving alternative dispute resolution (ADR) system if it can establish an effective, ongoing mediation program in state agencies. Over the past years, several state agencies across Ohio have successfully adopted ADR procedures in order to deal with internal conflicts, conflicts among agencies, and conflicts involving agencies and outside parties. These procedures often include mediation, a conversation facilitated by a third party neutral, or informal processes similar to mediation. As stated in the Uniform Mediation Act, “ ‘mediation’ means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”<sup>1</sup> Mediation presents a powerful alternative to traditional litigation and administrative hearings because it can be less costly, less time-consuming, and can help preserve relationships among disputing parties, as explained in the following chapters of this report.

Although Ohio has adopted the Uniform Mediation Act, which ensures the quality of mediation practices and mediator ethics in the state, Ohio does not have a uniform procedural standard for the use of mediation in state agencies. In the view of the task force proposing the change in state agencies towards uniformity, Advantage Ohio Regulatory Reform Initiative, a uniform system will help businesses as a result of the increased clarity and consistency it could provide.<sup>2</sup> Moreover, a uniform system that includes early mediation has the potential to help reduce costs, provide clarity, save time, and increase the number of settled cases. Members of the task force have shown concern for *pro se* litigants who lack information on the agencies’ processes and an outlet for discovering such information—a uniform system will provide the clarity these litigants need in order to prepare for the resolution of disputes.

Members of the task force<sup>3</sup> have indicated several goals for the implementation of mediation in state agencies: 1) increasing awareness of the mediation processes used among agencies 2) saving time and money for *pro se* litigants and attorneys who already spend an ample amount of time attempting to decipher the processes individual agencies utilize and 3) settling cases that could easily be settled before the hearing process. Mediation not only has the potential

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<sup>1</sup> Uniform Mediation Act (U.M.A) § 2.1.

<sup>2</sup> Some background information throughout this report is the product of various meetings with members of the task force and others who provided input on the current state of mediation in agencies throughout Ohio.

<sup>3</sup> Interview with Beth Collis (March 11, 2008).

to decrease costs, the increased use of mediation may both encourage and expedite settlement.<sup>4</sup> At this point in time, several of Ohio’s state agencies utilize ADR, but each one may employ different procedures and standards—frequent players in the system, including administrative lawyers, do not know what to expect from one agency to another.

The absence of consistency also hurts *pro se* litigants who have less access to information on the workings and process of the law. The lack of a universal rule book, or a place for disputants to discover agency mediation and dispute procedures, renders it difficult for litigants to plan ahead or know what to expect.<sup>5</sup> Some members of the task force<sup>6</sup> have also pointed out problems with the current scheme: 1) there is not a particular system in place, which is frustrating for *pro se* litigants and attorneys alike 2) for each new case involving a different agency, the attorney must discover its individual dispute resolution procedures 3) some agencies do not have a designated point person to settle cases, creating issues of who has the ultimate authority to settle and whether the representative of the agency present in mediation has the authority to make proposals. Some agencies frequently employ mediation while others only resort to hearings; in the least, these systems should be transparent to the consumer if the goal is to increase the transparency of the dispute process. While being more cost efficient, a uniform system has the potential of being both user and business friendly—aiding the people who interact with agencies most.

In order to structurally integrate mediation into the administrative agency setting, several questions must be answered: 1) How will the program be implemented, by statute or executive order? 2) Who will oversee administration of the program? 3) Will each agency be required to have a mediation program? 4) How uniform should ADR system design be across the agencies and what are pros and cons of uniformity? 5) How can the dispute resolution process of each agency be made more transparent? The unique situation of Ohio today, as well as Ohio’s characteristics, create challenges for implementing an ADR system in state agencies. However, the state has seen success across agencies, even those that initially resisted implementing mediation procedures, creating a positive outlook for a universal ADR system. This chapter explores the use of mediation in agencies both federally and across the states while proposing an overarching structure for an ADR system in Ohio’s state agencies.

### **ADR in Federal Agencies**

The Administrative Dispute Resolution Act of 1996 mandates each federal agency to adopt policies addressing the use of ADR, mainly mediation, in certain circumstances, training for dispute resolution specialists, and funding for ADR projects.<sup>7</sup> In doing so, each agency shall, “consult with the agency designated by, or the interagency committee designated or established by, the President under Section 573 of title 5, United States Code, to facilitate and encourage agency use of alternative dispute resolution.”<sup>8</sup> Each agency is further required to designate a

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<sup>4</sup> Nancy H. Rogers and Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 837-838 (1998).

<sup>5</sup> Interview with Beth Collis (March 11, 2008).

<sup>6</sup> *Id.*

<sup>7</sup> The Administrative Dispute Resolution Act of 1996, Pub. Law 104-320, (amending Pub. Law 101-552 and Pub. Law 102-354), available at [www.epa.gov/adr/adra.pdf](http://www.epa.gov/adr/adra.pdf).

<sup>8</sup> *Id.* §. 3 a (1).

“specialist” of their ADR program; this individual is charged with ensuring that his/her agency follows the rules of the Act and any ADR procedures the agency puts in place.<sup>9</sup> Agencies must provide training for those involved in the mediation and negotiation programs.<sup>10</sup> The agencies must then review any contracts entered in to and evaluate whether or not mediation or other ADR processes would be appropriate if they were included.<sup>11</sup> The Act, setting clear guidelines for participation in mediation, also describes ethical standards guiding neutrals and parties to a dispute.<sup>12</sup>

Under 5 U.S.C. § 572, agencies may consider not using ADR in certain circumstances which make it inappropriate including situations in which precedential value is needed or certain values must be maintained or in situations where a full public record of the proceeding is needed and mediation cannot provide such a record.<sup>13</sup> Thus, the Act does not mandate the use of mediation for every case. Mandating mediation in every case would be counterproductive, as there are various situations in which mediation is not appropriate or useful. Forcing parties to participate in these scenarios undermines the goals and benefits of mediation.

According to a review conducted by the Interagency Alternative Dispute Resolution Working Group Sections and Steering Committee with agencies within the Executive Branch, ADR has been used across agencies in a myriad of effective ways.<sup>14</sup> The Interagency Alternative Dispute Resolution Working Group has monitored the cost-savings and use of ADR through studies of the various agencies, both cabinet and independent, that are successfully using ADR.<sup>15</sup> Some of the results of the survey are summarized in an excerpt from the Interagency Alternative Dispute Resolution Working Group’s report, located below.

At both Cabinet and independent agencies, ADR processes are being used to meet agency – and government – goals of security, safety, and responsiveness, to name just a few. The agencies are using a spectrum of dispute resolution tools which are flexibly applied to meet the wide range of their needs. Here are a few examples of the types of success stories that are seen in Cabinet agencies:

The Department of Commerce/National Oceanic and Atmospheric Administration used consensus building and public participation throughout the development of the natural resource damage assessment regulations promulgated pursuant to the Oil Pollution Act of 1990.

The Department of Education/Office of Federal Student Aid Ombudsman works with federal student aid recipient loan holders, guarantee agencies, and schools to prevent loan foreclosures.

The Department of Health and Human Services/Departmental Appeals Board uses ADR to provide less contentious and quicker resolution of disputes involving Medicare and Medicaid program exclusions, imposition of civil sanctions against health care providers and nursing homes, and disputes with grantees (including States and universities) concerning disallowances of funds.

<sup>9</sup> *Id.* §. 3 b.

<sup>10</sup> *Id.* §. 3c.

<sup>11</sup> *Id.* §. 3 d (1).

<sup>12</sup> The Administrative Dispute Resolution Act of 1996, Pub. Law 104-320, (amending Pub. Law 101-552 and Pub. Law 102-354), available at [www.epa.gov/adr/adra.pdf](http://www.epa.gov/adr/adra.pdf).

<sup>13</sup> 5 U.S.C. § 572.

<sup>14</sup> Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government, (April 2007), available at [http://www.adr.gov/pdf/iadrsc\\_press\\_report\\_final.pdf](http://www.adr.gov/pdf/iadrsc_press_report_final.pdf).

<sup>15</sup> *Id.* at 3-4.

The Department of Homeland Security/Federal Emergency Management Agency provided arbitration for more than 130 Los Alamos fire claim victims who wanted an alternative to court proceedings.

The Department of Justice/Civil Rights Division's Americans With Disabilities Act Mediation Program uses ADR to resolve, quickly and voluntarily, discrimination complaints about architectural, communication, and attitudinal barriers for people with disabilities throughout the country.

The Department of Transportation/Federal Aviation Administration has integrated a Neutral Evaluation program into the negotiated grievance process for all labor disputes between the Air Traffic Controllers Association and the Federal Aviation Administration. The program promotes collaboration and resolution early in the process by presenting disputes to an independent neutral, with expertise in the particular subject matter at issue, to provide a non-binding advisory decision.

The Department of the Treasury/Office of the Comptroller of the Currency's Office of the Ombudsman, through the Customer Assistance Group, addresses disputes between consumers and national banks or their subsidiaries, and provides a user-friendly Web site of resources, answers, and formal complaint forms for consumers.<sup>16</sup>

Mediation, as the table illustrates, has been used in differing ways across agencies to meet the goals of each agency.<sup>17</sup> The result—each agency can accomplish more in a congenial manner, without the hassle of costly litigation, in less time and using less money.<sup>18</sup> The success of the Act is perhaps a result of the checks and balances of the system; having individuals in charge of ADR in their agencies and requiring them to report back to a commission or workgroup on ADR allows for continuous surveillance of the processes by ADR experts. Thus, the process is consistently being monitored and evaluated for strengths and weaknesses. Moreover, the transparency of the process and the requirement of having a mediation policy for each agency promote user-friendliness.

Another important aspect of the federal system, as mentioned previously, is that it allows agencies to exclude cases which are not appropriate for mediation.<sup>19</sup> If cases which are not conducive to mediation are brought into the process, it could potentially produce negative opinions of mediation, discouraging disputants from thoughtfully participating and destroying the usefulness of the system. Screening procedures are needed to ensure that this will not occur; our protocol for Ohio accounts for this.

### **Overview of ADR in state agencies across the United States**

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 10:

The Department of Defense/Department of the Air Force reports that its "ADR First" policy in contract disputes has enabled it to avoid an average of \$57.6 million in liability in each of the most recent five years (FY 2002 through FY 2006).

The Department of Transportation/Federal Aviation Administration reports that the use of ADR has resulted in shorter resolution timeframes for the agency: bid protests are resolved through ADR in an average of 24 calendar days, while contract disputes have been resolved by ADR in an average of 67 calendar days.

<sup>19</sup> 5 U.S.C. § 572.

If Ohio can establish a consistent ADR policy for agencies, it will be a ground-breaking program that could perhaps learn from other states that have tried to implement programs. Many states have benefited from promoting mediation among state agencies for various policy reasons previously mentioned, including resource (time and money) conservation and the creation of a user and business-friendly environment. Some of these states, including Ohio, have separate statutes organizing use of ADR in larger state agencies. This can be problematic, as the statutes do not cover every agency. Thus, the procedures of smaller agencies are harder to find because they are not located in statutory form. Other states have general statutes and/or executive orders promoting or mandating the use of ADR among all state agencies. Many of these states with general guidelines allow agencies to choose their own mediation methods, tailored to their needs, while having an ADR commission review the procedures and provide training. These commissions often take on various roles including creating pools of mediators, training mediators and agency mediation coordinators, and providing input on the implementation of mediation in state agencies.

In evaluating the strengths and weaknesses of state agency ADR systems across the country, it becomes apparent that states require a stable body to oversee the mediation procedures in agencies to ensure quality, promote effective use of the best processes for specific agencies, and to establish widespread use of the system. Without a centralized body, few agencies may be compelled to comply and others may adopt ineffective techniques that foster bias. This consultation with state agencies is crucial to promoting awareness of the effective use of mediation. The survival of overseeing bodies may be a key factor in establishing widespread appropriate use of mediation in state agencies. Additionally, such a body, as commissions do in some states, can track the progress and shortcomings of the ADR systems in agencies across the states and provide feedback crucial to improvement.

Many of the states that have tried to implement uniform standards for mediation procedures have not fully met their goals due to decreased funding and support for their commissions. In Massachusetts, one state that exemplifies the need for a strong body overseeing mediation, an executive order was used to supplement an existing statute that established a state office of dispute resolution, which is similar to what is recommended in our protocol for Ohio. Executive Order 416, issued in 1999, supported the use of ADR in agencies across the state; this order was modeled after the Federal system.<sup>20</sup> The order called for each agency head or director to appoint an ADR Coordinator who must attend training offered by the Massachusetts Office of Dispute Resolution (MODR) and promote ADR within the agency.<sup>21</sup> MODR provided consultation and technical support to agency coordinators (representatives from each agency), who are in charge of their agency mediation plans. MODR, a state agency, was created in 1985 to serve as a state department of dispute resolution which aids both government agencies and their constituents with dispute system design, services, and training.<sup>22</sup> Additionally, the Executive Order calls for feedback on the use of ADR in each agency annually.<sup>23</sup> The data that follows is an excerpt of a report on progress for 2002.

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<sup>20</sup> <http://www.umb.edu/modr/index.html#history>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

Data Highlights:

Of the 77 agencies that submitted ADR Plans & Reports for fiscal year 2002,

- 68% reported that they used ADR in the past year and 39% had offered ADR training to staff
- 68% reported that they had a system for reviewing conflicts/disputes for ADR potential
  - An additional 18% reported that they were planning to implement one
- 73% reported that ADR saved staff time compared to litigation
- 64% reported that ADR produced outcomes that better satisfied the participants than litigation
- 67 % reported that ADR produced outcomes that better met the agency's policy goals
- 74% identified personnel matters as their biggest source of conflict and of these 26% planned to make this area their highest priority for ADR use in the coming year
- 79% reported lack of funding as the biggest barrier to increasing ADR use and their ability to implement ADR programs and practices As a result of MODR's efforts, and those of the many agencies participating in this initiative, significant progress has been made toward the goal of integrating ADR into the culture and practice of state agencies.<sup>24</sup>

This type of progress report sets an example for Ohio; the Ohio Commission on Dispute Resolution and Conflict Management could produce such reports in order to protect the quality and integrity of the system. While it is difficult, because of the confidential nature of mediation, to have peer reviews of mediators in an actual mediation, there are other methods of collecting information on the usefulness of mediation—like surveys and feedback questionnaires for both mediation participants and the agencies themselves. More importantly, connecting with each agency annually allows more transparency—something to strive for as it will make potential problems more visible, provide advertisement of the strengths of the program, and increase public awareness, confidence, and understanding of the program.

The history of ADR in state agencies in Massachusetts exemplifies the many challenges states face when implementing a new program. MODR has recently moved to the University of Massachusetts. The Executive Director of MODR, Susan Jeghelian, commented that “MODR’s move represented a policy decision that the University provided a better institutional base for MODR as a neutral forum and resource for state and local government and a better platform for fundraising.”<sup>25</sup> Monetary issues as well as changing state government structures can have an impact on new programs.<sup>26</sup> From 2000-2002, MODR led the state through the beginning steps of establishing an agency mediation program.<sup>27</sup> In 2000, each state agency had designated coordinators; these coordinators were trained in clusters throughout 2001, based upon the subject matter of their agency.<sup>28</sup> This was done to foster the sharing of success stories and the communication of ideas on the effective use of mediation among agencies with similar duties and purposes.<sup>29</sup> By 2002-2003, the agency coordinators were filing annual reports indicating their potential needs for mediation procedures and explaining how mediation was already being

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<sup>24</sup> Progress Report: Massachusetts Office of Dispute Resolution, (hereinafter “Progress Report”) 8, (2005), [http://www.umb.edu/modr/publications/documents/MODRProgRep02\\_05.pdf](http://www.umb.edu/modr/publications/documents/MODRProgRep02_05.pdf). (last accessed February 26, 2009).

<sup>25</sup> E-mail exchange with Susan Jeghelian, Executive Director of MODR (February 23, 2009).

<sup>26</sup> Telephone Interview with Susan Jeghelian, Executive Director of MODR (May 5, 2008).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

used within their agencies.<sup>30</sup> In order to file the reports, each coordinator was given a planning document for assessing agency needs.<sup>31</sup>

By 2003, the Massachusetts state government leadership had changed, leaving MODR with few resources to complete the tasks from the executive order; MODR's budget was cut by 80% and the government no longer provided the support or resources for implementation.<sup>32</sup> The executive order for the implementation of mediation in state agencies issued in Massachusetts was not backed with additional funding or staffing for the already established MODR.<sup>33</sup> Moreover, MODR had the task of implementing mediation in all of the state agencies, no matter their size.<sup>34</sup> Without the continued support from the executive office, despite its successes, MODR was unable to spread the use of mediation across all agencies.<sup>35</sup> Jeghelian commented that, in order for this type of program to function successfully, there must be abundant support from influential government officials and stakeholders.<sup>36</sup> MODR continues to provide consultation for public agencies from its new home at the University, since its statutory mission has not changed.<sup>37</sup>

Massachusetts modeled the use of mediation in state agencies after the Federal Agency ADR Act and has been successful in the respect that MODR continues to operate, on a smaller scale, and provide quality consultation on the use of mediation. Many programs across the nation have died out due to lack of funding. In Massachusetts, both decreased funding and changes in the government impeded upon successful implementation of the complete mediation program across agencies. Given the current state of the economy, such a program, if it comes into existence in Ohio, must be as closely evaluated as possible for cost efficiency and cost neutrality. In keeping a record of cost savings as a result of the use of mediation in agencies, Ohio will be capable of demonstrating the efficacy of the program. Publication of this success could even result in the widespread use of mediation across agencies, one of the main goals in Ohio, if agencies realize the potential and proven benefits of mediation. Moreover continuous reports of cost-saving will contribute to establishing support within the government, which is crucial to the life of the ADR system.

Oregon's overseeing body, much like MODR, is housed in a university.<sup>38</sup> In 1989, the Oregon Dispute Resolution Commission (ODRC) was created to help agencies develop ADR programs.<sup>39</sup> Since then, the duties of the ODRC have been moved to The Hatfield School of

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Telephone Interview with Susan Jeghelian, Executive Director of MODR (May 5, 2008); *Progress Report*, *supra* note 24 at 6.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* Jeghelian commented that many smaller agencies frequently inquired why mediation procedures were needed in such small agencies that reported few disputes. In our protocol, we have allowed the option of having tailor-made mediation procedures for individual agencies that do not fit into the typical agency mold. For these agencies, it may be helpful to establish written procedures with the help of the Ohio Commission on Dispute Resolution and Conflict Management, in the event that a dispute should occur, that are specifically designed for smaller-scale settings.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Oregon Consensus Program, <http://www.odrc.state.or.us/about.php>, (last accessed February 26, 2009).

<sup>39</sup> *Id.*

Government at Portland State University, which established the Oregon Consensus Program (OCP) that now carries out a similar function.<sup>40</sup> The statute which enabled this change supports the use of ADR in state agencies while explaining the role of the OCP.<sup>41</sup> Over the past few years, the OCP, in collaboration with the Oregon Department of Justice, Department of Administrative Services, and the Governor, has continued to help state agencies develop mediation systems and served as a forum for accessing mediation in individual disputes involving agencies.<sup>42</sup> Under O.R.S. § 183.502, state agencies are given the authority to use mediation procedures and the option to consult with the OCP.<sup>43</sup> The statute states that all agencies “shall” inform the Hatfield School of Government OCP, the Department of Justice, and the Oregon Department of Administrative Services of the use of ADR in their agencies.<sup>44</sup> However, the statute does not mandate the use of ADR in all state agencies. In order for a truly uniform and frequently-used system to exist, which is one of the goals in Ohio, widespread use and promotion of mediation must occur. For this reason, requiring every agency to have, in the very least, a written proposal of a mediation system would be beneficial. Along the same lines, if agencies are not required to at least consider mediation procedures, many will never discover the benefits of using mediation.

Virginia took a different approach than Oregon by requiring each state agency to have a written ADR policy.<sup>45</sup> A council, the Virginia Administrative Dispute Resolution Act Interagency Advisory Council, evaluates the procedures that the agencies choose to use while also providing consultation and training.<sup>46</sup> The statute, while extensive enough to set a general framework for use of ADR, provides flexibility for each agency to implement the appropriate ADR design for their unique set of circumstances. The statute<sup>47</sup> also discusses confidentiality; the key features of this portion of the statute are summarized below.

The following, in general, are considered confidential:

- memoranda, work products, and other materials in the possession of the mediator are confidential
- communications relating to the dispute made in mediation, as well as communications made for scheduling purposes

Written settlement agreements are *not* confidential, unless parties agree otherwise in writing.

The inclusion of confidentiality features is important to success of the process we propose in Ohio because it ensures quality of process and uniformity; users of the system will know what they can expect.

Alabama<sup>48</sup> currently has a state agency ADR support group, similar to those in Virginia and Massachusetts, which began meeting in 2002. In 1998, Executive order 42, encouraging the use of ADR among state agencies, was signed.<sup>49</sup> This order established the Alternative Dispute

<sup>40</sup> *Id.*

<sup>41</sup> O.R.S. § 183.502.

<sup>42</sup> Oregon Consensus Program, <http://www.odrc.state.or.us/about.php>, (last accessed February 26, 2009).

<sup>43</sup> O.R.S. § 183.502 :2.

<sup>44</sup> *Id.*

<sup>45</sup> <http://www.vadra.virginia.gov/policy.htm>. (last accessed February 26, 2009); *See* V.A. ST §§ 2.2-4115 -4119.

<sup>46</sup> *Id.*

<sup>47</sup> V.A. ST § 2.2-4119.

<sup>48</sup> Information in this paragraph from <http://www.alabamaadr.org/> (last accessed February 26, 2009).

<sup>49</sup> *Id.*

Resolution Task Force which was later succeeded by the Alabama State Agency ADR Support Group.<sup>50</sup> After a successful pilot program ran its course, the then Governor of Alabama issued Executive Order 7<sup>51</sup>, which charged agencies to consider using mediation in several types of disputes and required each agency to establish an ADR coordinator.<sup>52</sup> The Alabama State Agency ADR Support Group collaborates with agencies in implementing ADR in their grievance processes.<sup>53</sup> When the Support Group was created, the members discussed some of its goals, which are geared towards training programs, providing information to agencies, and implementation of ADR into state agencies.<sup>54</sup> The following table,<sup>55</sup> an excerpt from Alabama's ADR website, explains some of the goals:

**Long Term goals included:**

- The integration of ADR options in the working framework for dispute resolution for all state agencies, boards, and commissions;
- Preparing a negotiated rulemaking informational brochure with training [for] those agencies which could benefit from this ADR method;
- Identifying and applying for funding with private and public sources to continue long term training goals;
- Continuing the fellows program initiated by the ADR Task Force; and
- Create new website and expand existing website options to provide access to ADR information to all state governmental employees.

**Short term goals discussed included:**

- Conducting monthly ADR training/educational seminars for employees of the nine agencies participating in the state workplace dispute resolution pilot program beginning in late September 2002;
- Providing training and information packets for state representatives and state senators by dearly December 2002;
- Obtaining exposure in the RSA Advisor Publication disseminated to all RSA employees;
- Obtaining an advertising representative to handle marketing and advertising strategies for the

<sup>50</sup> *Id.*

<sup>51</sup> Alabama Executive Order 7, (2003) available at <http://www.alabamaadr.org/>, In relevant part, it states,

BE IT FURTHER ORDERED that each state agency, board or commission's executive office is charged with implementing and utilizing, where appropriate, the Workforce Mediation Program to resolve workplace disputes in the earliest possible stages and to consider mediation prior to or after, the institution of any lawsuit against the agency.

BE IT FURTHER ORDERED that each state agency, board or commission should consider mediation and other collaborative ADR processes in other administrative areas including, but not limited to, licensing and permitting, policy-making, rulemaking, regulation and enforcement, and intergovernmental relations and coordination.

BE IT FURTHER ORDERED that each state agency, board or commission is directed to designate a permanent ADR coordinator to interface with the Alabama State Agency ADR Support Group.

<sup>52</sup> *Id.*

<sup>53</sup> <http://www.alabamaadr.org/> (last accessed February 26, 2009).

<sup>54</sup> *Id.*

<sup>55</sup> Table from [http://www.alabamaadr.org/index.php?option=com\\_content&task=view&id=35&Itemid=51](http://www.alabamaadr.org/index.php?option=com_content&task=view&id=35&Itemid=51). (last accessed February 26, 2009).

The brainstorming that occurred in Alabama could be quite useful in Ohio, if Ohio decides to have one commission looking over the work of the agencies. Having a detailed plan of the steps to implementation will keep the project moving, focused, and ensure longevity. Without a list of goals, both short term and long, the commission itself will lack the guidance it needs to stay on track and fully implement ADR policies across the state.

### **The specifics: What can Ohio learn from the rest of the nation?**

#### **Implementation: Executive Order**

Executive orders, which are issued by governors, have “the force and effect of law” and last past the duration of the issuing governor’s term of office.<sup>56</sup> Although governors cannot change laws, they have the power to affect policy in an expedient manner. Many states have relied upon executive orders in establishing dispute resolution programs for their state agencies, perhaps because it is a quick way to bring about change while issuing an explanation of the policy behind the changes. Having a more unified place to find the standards for mediation in Ohio would help frequent users, both lawyers and *pro se* litigants, prepare for mediation and know what standards to expect, regardless of which agency they are disputing. Because of the urgency associated with establishing uniform mediation procedures and the potential cost-savings benefits, an executive order may be the best choice for Ohio. Unlike statutes, executive orders can be issued without the partisan quibbling over wording.

So long as an executive order does not conflict with the laws of the state, it can be used to establish an ADR system among state agencies. According to the Ohio Constitution, the Governor, “may require information, in writing, from the officers in the executive department, upon any subject relating to the duties of their respective offices; and shall see that the laws are faithfully executed.”<sup>57</sup> Thus, it is in the inherent power of the Governor to ask that each agency submit written plans for mediation processes—something that is in accord with promoting beneficial policies and cost savings for the State of Ohio and is in the best interest of its citizens. As the Ohio Commission on Dispute Resolution and Conflict Management is established by statute and is already dedicated to helping agency mediation programs, their role will not change under the proposed executive order. Using his power under Section 3.06 of the Ohio Constitution, the Governor could also require the agency to explain in writing why their agency requires procedures other than those listed in the protocol—thus allowing for the option between a standard protocol or one tailor-made, with the help of the Commission, to suit individual needs of the agency.

There are potential problems, many of which were explored above, associated with implementation of a state agency ADR program through executive orders, like decreased support and lack of funding. While executive orders can establish policy quickly, they may lose strength

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<sup>56</sup> CJS State § 242.

<sup>57</sup> OHIO CONST. § 3.06.

after the governor who issues them leaves office—the case in Massachusetts. Thus, there must be substantial buy-in to the procedures listed in the executive order.<sup>58</sup> Moreover, the order must be written in an effective manner which explains the process in great detail. The Policy Consensus Initiative has issued a report on implementing effective executive orders which states that, in the implementation of ADR procedures in state government, the executive order must state how implementation will occur in agencies and who will oversee the implementation.<sup>59</sup> As mentioned by the Policy Consensus Initiative, “Lack of resources is identified consistently as a significant barrier to greater use of collaborative problem solving and dispute resolution in government. Funding affects how a program will be carried out or whether it can be carried out at all. State agencies particularly struggle with the resource issue.”<sup>60</sup>

Ohio must implement cost-neutral mediation in state agencies; the increased support of key stakeholders may keep the system alive where funding is absent. Funding issues are accounted for in the offered protocol, as existing resources will be utilized to the fullest. The Policy Consensus Initiative raises another problem associated with executive orders used to implement mediation in state agencies—many have failed to include quality controls.<sup>61</sup> The proposed protocol throughout this report deals with this issue in detail, promoting the key policies of mediation—fairness, lack of biases, and ethical communication—in mediator selection while Ohio’s adaptation of the UMA covers other important ethical grounds.

### **Administration of the program: A new face for the Ohio Commission on Dispute Resolution and Conflict Management.**

At this point in time, there are few quality controls in the use of ADR procedures across state agencies. Other states have implemented stronger agency ADR commissions which oversee the progress of the ADR systems in agencies and provide consultation. The Ohio Commission on Dispute Resolution and Conflict Management currently helps state agencies that come to it voluntarily with questions about implementing mediation programs, but agencies are not required to seek out its services. Moreover, few agencies and government workers know of the resources that the Commission has to offer. Commissions in other states are given the

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<sup>58</sup> Policy Consensus Initiative. Solutions to Establishing Sound Government DR Practices: Executive Orders, How Governors can Promote Collaborative Processes and Dispute Resolution for more Effective Governance. 5 (September 2005), available at <http://www.policyconsensus.org/publications/reports/docs/Solutions.pdf>. The article explains:

Before approaching a governor about issuing an executive order, it is important to understand who will support such an idea and who will resist it, whose interests must be taken into consideration, and the timing of the order. If the governor is about to leave office, what are the chances that the EO can actually be implemented?

<sup>59</sup> *Id.* at 8-9. “If the purpose of the executive order is to integrate dispute resolution in state government or to establish a statewide initiative, there are two levels at which implementation must occur: 1) the agency level, and 2) the cabinet level.”

<sup>60</sup> *Id.* at 8.

<sup>61</sup> *Id.*

In drafting an EO, it is important to ensure that the programs and services will be developed and carried out responsibly...Existing EOs have fallen somewhat short in specifying responsibilities in this area. The Oregon Executive Order that established the Steering Committee charges it with providing overall policy coordination with respect to use of collaborative processes, but it does not mention establishing standards to ensure fairness, impartiality, and quality.

responsibility of evaluating the procedures of all the state agencies and providing training. While the Ohio Commission provides training and consultation, a stronger centralization of a state agency ADR system may help increase the efficacy of mediation in agencies. This can be achieved if every agency must consult with the Commission on the use of mediation.<sup>62</sup> Without a body to oversee the work, proposed legislation will have no force—no one will be able to ensure that new rules or guidelines for mediation are being implemented and correctly followed.

The Ohio Commission on Dispute Resolution was created by statute in order to “provide, coordinate, fund, and evaluate dispute resolution and conflict management education, training, and research programs...and to consult with, educate, train, provide resources for, and otherwise assist and facilitate other persons and public or private agencies, organizations, or entities that are engaged in activities related to dispute resolution ...”<sup>63</sup> Given that cost-neutrality is a goal in implementing ADR in agencies, using the current Commission to implement ADR into agencies instead of creating a new group to oversee the process is the most resourceful choice. This group has experience with consultation and training in the field of ADR; our suggestions will not stretch the use of the Commission beyond its statutory authority.

Other states have moved their commissions to universities in order to raise money from other resources. While university programs are a great source of new ideas and theories, they may not have the manpower, time, or consistency (in terms of people) to oversee a permanent ADR evaluation across the agencies. Moreover, this recent trend of moving state government into collaboration with universities is often the result of a lack of state funding and support for entities formed solely for the purpose of implementing ADR and providing education on the process.<sup>64</sup>

The Commission currently dedicates one individual to intake for workplace mediation and facilitation. Two other members also work on some of these issues while all three frequently provide training for state and local government officials. Agencies are not currently required to report to the Commission with ADR program plans, but if they contact the Commission, there are two members that provide consultation with the implementation of an ADR program. If an agency shows interest, the current Commission may also initiate discussions on ADR and how the Commission could provide assistance.<sup>65</sup> Ideally, in taking on implementation of mediation in state agencies, the Commission would also evaluate the progress of ADR processes, through the collection of survey information from state agencies, in order to ensure that ADR in agencies is actually successful and worthwhile. In order for this to work, Ohio can follow the example of the federal government, which requires every agency to designate an ADR point person, or ADR coordinator, to report back to the commission overseeing the ADR processes. Process evaluation will ensure that what is planned to happen with ADR is actually occurring. This type of consistent evaluation is needed to oversee the process and detect issues with system design that

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<sup>62</sup> ORC § 179.01-.03. The current statutory scheme establishes the Commission as a body to provide consultation to state agencies, but does not require agencies to seek their advice.

<sup>63</sup> ORC § 179.02.

<sup>64</sup> Telephone Interview with Maria Mone, Executive Director of the Ohio Commission on Dispute Resolution and Conflict Management (March 12, 2008).

<sup>65</sup> *Id.*

may have more efficient solutions. Without this guidance, there is no assurance that any policy favoring ADR in agencies will actually come to fruition.

Alabama's ADR commission's long term goal of developing a website is one recommendation that may be beneficial to Ohio agencies, as it would provide frequent players in the system with the information they would need in order to attend mediation. A website developed through the executive order could include the general guidelines proposed in this paper for uniformity as well as the individual system designs for each agency. This would give both transparency and organization to the program and, as a result, promote public confidence in the system. The Ohio Commission on Dispute Resolution and Conflict management could potentially arrange a link to information on each agency's mediation plan on their website. MODR's website<sup>66</sup> includes information and statistics on the success of their mediation program; while some of the statistics in the annual report are simplistic, the idea of providing feedback to the public might also promote confidence and uniformity. It is recommended that the website contain periodic reports on progress and cost-savings as well as individual agency plans. Agencies should also include information about their mediation processes on their websites. The more visible the process, the easier it will be to reach our goals of consistency, uniformity, and fairness.

In the past, the Ohio Commission on Dispute Resolution and Conflict Management has used outside consultation, when the funding was available to do so, in order to evaluate the ADR program.<sup>67</sup> The Commission itself, by asking each agency to return informational surveys (as was the case in Massachusetts) could provide evaluation of the actual processes used in agencies across the state and help solve system design problems if they occur while an outside evaluator agency examines the cost savings.<sup>68</sup> Maria Mone, the executive director of the Commission, reports that the Commission has felt that outside evaluation would provide a less biased, more accurate evaluation of the program and its cost savings.<sup>69</sup> Having an outside evaluator also ensures to the public that the information is not biased or skewed in order to present the Commission in the best light possible. This type of evaluation is very important to ensuring that the cost-saving goals of the ADR process are met. The evaluation techniques of our protocol will be discussed further in later sections of this report.

Currently, not enough people are knowledgeable of the services of the Ohio Commission on Dispute Resolution and Conflict Management, as agencies are not required to use its services.<sup>70</sup> While the Commission strives to provide education about ADR, it is difficult for it to implement a unified program if agencies are not required to consult with the Commission. Moreover, without a commission overseeing the processes used, the processes will continue to be unclear, inconsistent, and difficult for attorneys and *pro se* litigants alike to discover. The Commission has been informed of the cost-savings of ADR and of its benefits from some agencies; promotion and publication of these benefits will greatly improve public knowledge and

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<sup>66</sup> [http://www.umb.edu/modr/publications/documents/MODRProgRep02\\_05.pdf](http://www.umb.edu/modr/publications/documents/MODRProgRep02_05.pdf) (last accessed February 26, 2009).

<sup>67</sup> Telephone Interview with Maria Mone, Executive Director of the Ohio Commission on Dispute Resolution and Conflict Management (March 12, 2008).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

confidence in the agency ADR system.<sup>71</sup> The current Commission, given its small size, could be given an extra boost and provide even more help than it already does if its services are more highly promoted or even required for agencies.

### **Should Ohio require the use of mediation in state agencies?**

There are varying degrees of “required” mediation; our protocol suggests requiring written mediation procedures from each agency. Requiring written mediation processes of state agencies is not the same as mandating each individual dispute to go to mediation. The latter would mean that each case on an agency docket must be referred to mediation; this paper does not promote that idea. However, having set, transparent processes for cases that have the option of going to mediation would greatly benefit *pro se* litigants and attorneys. In that sense, each agency should be required to have written procedures that have been examined by the Commission, which will point out any potential problems and provide feedback.

Requiring each agency to establish written mediation procedures may be the only way to achieve uniformity and widespread use of the system. For example, the Ohio Board of Tax Appeals would not have met as much success in creating a mediation program if it had not been required to by its director.<sup>72</sup> According to Tom Wang, who administered the Ohio Board of Tax Appeal’s mediation program, “The combination of a strong director and a good administrator/marketer caused the program to be one of the more recognized for mediation in an administrative agency.” Upon implementation, the program faced much contention; Wang reports that the majority of the board, if not everyone, was opposed to it. If it had not have been required, the Board of Tax Appeals may have never implemented a mediation program that has served as an example for many.<sup>73</sup>

If Ohio requires the use of ADR in state agencies, it would benefit from providing a general plan allowing flexibility so that the individual needs of agencies are taken into account. A more detailed example of how to use ADR could be given for agencies to choose to adopt. If agencies wish to take the general guidelines and make their own specific processes, they would benefit from a requirement to report to the Commission for consultation. It is recommended that each agency report to the Commission with its plans, whether it decides to follow a model protocol or opts in to general guidelines that must be followed and develops its own specific plan. Mediation is a less expensive alternative if it is done correctly. If Ohio requires the use of ADR, the benefits and cost savings need to be clearly presented to agencies in order to ensure support. This will provide incentive for adopting good procedures and following through with the implementation. Thus, Ohio may benefit greatly in requiring that agencies each adopt procedures, but in doing so, it must create options, incentives, and explanations.

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<sup>71</sup> Telephone Interview with Maria Mone, Executive Director of the Ohio Commission on Dispute Resolution and Conflict Management (March 12, 2008).

<sup>72</sup> E-mail exchange and Interview with Tom Wang, Administrator of the Ohio Board of Tax Appeals mediation program.

<sup>73</sup> Wang indicated that the Board of Tax Appeals has been called upon, from agencies in Ohio to tax boards in other states, to share how it implemented the program.

## What are the benefits of having a uniform, centrally organized ADR system?

Some core reasons of supporting a uniform, centrally organized ADR system include: 1) the promotion of business in Ohio 2) easy access to procedures for lawyers and *pro se* litigants 3) a boost in public confidence and awareness of agency ADR 3) saved costs for agencies interested in implementing ADR and 4) the reduction of costs and time for *pro se* litigants and attorneys. A transparent, unified system has the potential to bring more people to the mediation table, as general guidelines will set minimum standards for ethical and other crucial procedures which promote fairness.

In the realm of mediation, the Uniform Mediation Act, and its well-documented drafting process, can serve as an example for our task in Ohio. Uniform laws provide clarity to repeat players of the legal process by providing general guidelines of operation. These repeat players are often businesses; thus uniformity could help promote business in Ohio.<sup>74</sup> This is not to say that each agency in Ohio should operate their mediation programs identically. While uniformity is crucial to quality, it must be tempered with the importance of some agency autonomy. Uniformity in the crucial aspects of mediation will help reduce confusion and establish quality that, in turn, will lead to public confidence in the system—goals worthy of striving towards. If Ohio agencies are required to follow minimum guidelines and then adopt specific procedures of choice, a balance between uniformity and autonomy can be struck. Uniformity, while reducing both costs to parties and complexity, will grant people more access to mediation.<sup>75</sup>

Uniformity guidelines for agencies will help save costs, if agencies already are exerting effort to find the best methods of ADR, because agencies will have to conduct less independent research on ADR procedures. Agency ADR coordinators may look to the professionals at the Ohio Commission on Dispute Resolution and Conflict Management and to this report for information on effective and ethical mediation practices. If all agencies are required to report to the Commission, they will save money in designing ADR systems as they will not have to find outside sources of information on ADR design. Mandatory guidelines on the most crucial aspects of good mediation—like ethics, confidentiality, and the binding nature of agreements—will help reduce the amount of energy an agency will have to put in to developing their own system. Moreover, implementing mediation procedures will save the agencies time and money in the long run because mediation will likely reduce the load of cases that are sent to hearings, which are inherently time consuming and costly. Without standards and guidance, there is no assurance that mediation programs will succeed or be cost-efficient.

As stated previously, another benefit of uniformity is that it would ensure *pro se* litigants and attorneys that they will be able to understand the process and evaluate their options much earlier in the process. This would save both time and money—lawyers and *pro se* litigants alike could easily access any agency mediation procedure plans that they require. If Ohio adopts a

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<sup>74</sup> James J. Brudney, *The Uniform State Law Process*, 8 No. 4 DISP. RESOL. MAG. 3, 4 (2002). While this article discusses uniform law with reference to the UMA, it points out potential benefits of uniform laws. These benefits include the “enhance[ment of] commercial and business development.” This is in reference to interstate business, but, analogously, uniform mediation procedures could help businesses across the state know what to expect when dealing with various state agencies.

<sup>75</sup> *Id.* at 5.

general uniform policy on mediation in agencies and allows the agencies to tweak the process to their particular characteristics, these individual plans could be distributed to employees or even posted online. If potential litigants are informed of a mediation option, it could be an enticing offer because mediation may potentially occur much earlier than a hearing.

The drafters of the UMA offer guidance on the specificity of uniform acts; “The Drafters sought to avoid including in the Act those types of provisions that should vary by type of program or legal context and that were therefore more appropriately left to program-specific statutes or rules.”<sup>76</sup> There are several reasons for leaving some of the specifics of an ADR system design, like choice of mediator qualifications, to individual agencies; some agencies will resist highly-structured procedures that would go against their current policies and, moreover, some structures may work for certain agencies and not others depending on the subject matter of the cases. The drafters, similarly, realized this when writing the UMA as they, “operated with respect for local customs and practices by using the Act to establish a floor rather than a ceiling for some protection.”<sup>77</sup> One must find a balance between creating a system uniform enough to be user-friendly, but flexible enough to be acceptable to and appropriate for individual agencies. However, a uniform system must also be strict enough to set quality controls—in that sense, one must be cautious not to provide too much flexibility.

It may prove beneficial to create an executive order following the protocol in this report because it would require agencies to adopt policies and thus, further Ohio’s goals of early settlement, time savings, and cost savings. However, mandatory procedures are often met with criticism and disdain because they can be costly to implement and too strict, not leaving autonomy for the people they are forced upon. Since there is some tension between providing flexibility and ensuring quality, it may be helpful to provide example provisions or options in the finished protocol, as we have done.<sup>78</sup> In a past Symposium issue of the Ohio State Journal on Dispute Resolution, Frank Sander discusses the differences between a model law and a uniform law, noting some benefits pointed out by Jim Brudney: “Some of us who are academics are more drawn to a model act because it seems to respond better to the present diversity of practice and even conceptualization of the mediation process. But Jim Brudney tells us we may be able to have the best of both worlds by opting for a uniform act covering some of the basic issues (such as privilege) and then adding in an array of optional provisions on such unsettled and controversial topics as the qualification of mediators.”<sup>79</sup> Analogously, this paper suggests that an Act or uniform guidelines, or in this case an executive order, could have optional provisions to allow diversity and flexibility in programs, but still provide guidance and ensure quality for the most crucial aspects of ADR system design.

Any adopted executive order must provide flexibility, but ensure quality operation, in order to establish widespread usage. Overly specific provisions and safeguards may cause agencies and parties to incur more costs than they are worth; “Regulation of mediation may make it so rigid and expensive that it is not better than the processes it was designed to replace.

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<sup>76</sup> UMA Prefatory Note “Drafting Philosophy.”

<sup>77</sup> UMA Prefatory Note “Drafting Philosophy.”

<sup>78</sup> Frank E. Sander, *Symposium on Drafting a Uniform/Model Mediation Act Introduction*, 13 OHIO ST. J. ON DISP. RESOL. 791 (1998).

<sup>79</sup> *Id.*

Statutes that create qualifications and standards for mediators should be imposed only if clearly shown to be worth their cost in terms of their benefits for the quality and fairness of the process or public confidence...<sup>80</sup> For example, requiring every agency to hire outside mediators may be more harmful and expensive than helpful; some agencies, like the Tax Board of Appeals, use inside mediators and perhaps even find that people with backgrounds in the subject matter of the dispute are very helpful to the process. It would cost more time and money to educate outside mediators and supplement them with knowledge of specific fields that they would need to know in order to mediate a case.

With the added costs of hiring outside mediators, this type of system would not be beneficial to agencies like the Tax Board of Appeals. Alternatively, some agencies may benefit by having an outside, neutral perspective. For example, some employee-agency disputes may hit too close to home for mediators from that particular agency while also threatening neutrality. In this circumstance, it makes sense for an agency to be free to choose an outside, more neutral third party. Also of importance, it is advisable that a requirement of ADR in agencies not mandate the use of mediation for every case. Like the Federal Act, uniform guidelines in Ohio need to include screening processes for cases which go to mediation. Uniformity must not, in that sense, be over inclusive. Agencies in the state government must be able to exclude cases which would not usually be settled—in other words, cases that must result in an outcome because of important agency-specific values and precedential values. Allowing cases that are unsuitable for mediation to continue through the process would inevitably damage the reputation and integrity of the process.

While mediator qualifications are often best left to individual agencies, other issues with ADR design must be standardized. Some of these issues include confidentiality, a code of ethics, and perhaps even the binding nature of any agreement reached in the mediation session. The uniform portions that each agency must adopt must include the most quintessential aspects and quality checks that would be expected in any mediation in order to sustain a quality uniform system that repeat players can rely upon. While the UMA covers many aspects of confidentiality and ethics, our suggested protocol adds to the standards set forth in the UMA in a number of important ways mentioned in the portions of this paper that follow while proposing a specific structural framework for the state agency ADR system.

## **CHAPTER TWO: PROCESS SELECTION – CHOICE OF MEDIATION RATHER THAN OTHER DISPUTE RESOLUTION PROCESSES**

By Rachel Chodera

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<sup>80</sup> Nancy H. Rogers and Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 864 (1998).

## Executive Summary

Only a few of Ohio agencies use consensual dispute resolution processes in matters pending before them. Currently, approximately ninety Ohio agencies are covered by the Ohio Administrative Procedures Act, which sets up an adjudicative hearing process for disputes heard by these agencies. A protocol that adds mediation in Ohio agency procedures that do not currently include mediation will, if well-planned, serve the following goals:

- Increase uniformity,
- Increase consistency and predictability,
- Preserve fairness in the process,
- Maintain finality,
- Lower costs for both agencies and non-agency parties, and
- Increase efficiency.

Ohio would be well-served if Ohio agencies provided mediation before the adjudicative hearing. The inclusion of mediation across each covered Ohio agency would increase uniformity, consistency, and predictability of process for any party in a dispute before one of these agencies. In addition, mediation is a process that uses experienced neutrals to put parties at ease and give them confidence in the fairness of the process. Because of this, mediation has high levels of party satisfaction. In addition, mediation has high levels of settlement with low levels of re-adjudication. These factors are important in increasing efficiency and lowering the costs of resolving disputes.

It is recommended that the mediation process be mostly facilitative, as there are some concerns of both process and cost associated with mediator evaluation. Despite these concerns, there are circumstances in which evaluation is both appropriate and useful. In these situations, which will be expanded upon below, this author would not recommend forbidding the use of evaluation by a mediator.

### The Current Process of Adjudicative Hearings

Any discussion of potential change should begin with a discussion of the status quo. Ohio has hundreds of agencies that regulate a broad spectrum of activities. These agencies have powers ranging from licensing, to regulating, to advising, and beyond.<sup>81</sup> Although agencies are technically a part of the executive branch, many perform functions that could easily be classified as legislative or judicial.<sup>82</sup> Approximately ninety of these agencies hold some type of power that requires a dispute resolution process. In other words, the agency decisions affect the rights of others, and the agencies therefore have some standard procedure by which issues may be decided or unhappy citizens can protest. Most of these agencies follow the adjudication structure laid forth in the Ohio Administrative Procedure Act (OAPA), which is found in Chapter 119 of the

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<sup>81</sup> For a full list of Ohio Agencies, *see* State of Ohio: Agencies, <http://www.ohio.gov/agencies/>.

<sup>82</sup> Christopher B. McNeil, *Due Process and the Ohio Administrative Procedure Act: The Central Panel Proposal*, 23 OHIO N.U. L. REV. 783, 784 (1997).

Ohio Revised Code.<sup>83</sup> The jurisdiction of OAPA is very broad, and encompasses agencies across a full range of substantive topics.<sup>84</sup>

Regardless of which agency it is being applied to, OAPA proscribes the same general process.<sup>85</sup> This process has remained relatively unchanged since 1942,<sup>86</sup> when it was enacted to offer parties a uniform procedure for dispute resolution across agencies.<sup>87</sup> Hearings conducted under this Act use the following process:

1. An action is initiated, usually by the agency. These actions are often matters such as license suspensions.<sup>88</sup>
2. Notice of hearing is given by registered mail and with a return receipt requested. This notice should include the charges, or other reasons for the proposed action, the law or rule that is directly involved, and a statement that informs the party that they are entitled to a hearing within thirty days of the notice. The party may appear in person, or by sending an attorney or other representative, as is permitted by the rules of each agency.<sup>89</sup>
3. The location, date, and time is determined by the agency. If the party resides more than fifty miles from the agency, he or she may request in writing that the hearing be held in the county in which the person resides, or within fifty miles of their residence.<sup>90</sup>
4. During the hearing, parties may present their case and bring evidence and witnesses. The agency also has the power to subpoena witnesses and evidence for the hearing, or take and use relevant depositions.<sup>91</sup>
5. After the hearing has been completed, any person adversely affected by the decision of the agency may appeal the case to the court of common pleas either in that person's own county or in Franklin County, depending upon the type of hearing performed.<sup>92</sup>

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<sup>83</sup> *Id.* at 785.

<sup>84</sup> *Id.* at 786. With only a few exceptions, OAPA applies to: any official, board, or commission having authority to promulgate rules or make adjudications in the bureau of employment services, the civil service commission, the department or, on and after July 1, 1997, the division of liquor control, the department of taxation, the industrial commission, the bureau of workers' compensation, the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses. *Id.* at 785-86.

<sup>85</sup> *Id.* at 786.

<sup>86</sup> *Id.* at 785.

<sup>87</sup> *Id.* at 786.

<sup>88</sup> Ohio Rev. Code Ann. 119.061 (Westlaw 2008).

<sup>89</sup> Ohio Rev. Code Ann. 119.07 (Westlaw 2008).

<sup>90</sup> Ohio Rev. Code Ann. 119.08 (Westlaw 2008).

<sup>91</sup> Ohio Rev. Code Ann. 119.09 (Westlaw 2008).

<sup>92</sup> Ohio Rev. Code Ann. 119.12 (Westlaw 2008).

Those who practice administrative law before these agencies may feel that the practice falls short of the Act's goal of uniformity.<sup>93</sup> There is a feeling of frustration among some of those who routinely appear before agencies because the OAPA leaves ample room for agency variation in procedures and agencies have taken advantage of this to create vastly different processes.<sup>94</sup> This means that the exact procedure of resolving a dispute in any given agency is unpredictable. Often, it is not even fully clear who within the agency has the final authority to make adjudicative decisions.<sup>95</sup> In addition, information regarding the procedure can be difficult to obtain and understand.<sup>96</sup> If the processes used by any given agency are a source of frustration or confusion for those experienced in the practice of administrative law, one can only imagine the difficulty a novice would face in understanding and navigating their dispute.

### **Goals of Instituting a New Process**

A conscientious proposal for change should take into account the desire to create uniformity, consistency and predictability, fairness, finality, lower costs, and efficiency. Although each goal will be discussed in turn, they are all connected and depend upon the others. Working together, the overall goal of this proposal is to create a process that allows agencies to resolve disputes effectively while reducing the burden of time and cost on both the agency and the non-agency parties.

#### **Uniformity**

Uniformity is not a new goal, but is a continuation of the original purpose of the OAPA. While the OAPA made great strides towards this goal, as is often the case, adjustments will bring practice closer to the goal. Uniformity is important because it eases the burden of non-agency parties. With approximately ninety agencies covered by the OAPA, it can be extremely difficult for these parties, or even their counsel if they are represented, to determine how their dispute will be resolved, and what is expected of them.<sup>97</sup> A common procedure among all agencies would aid this difficulty in two ways. First, it would be easier for parties to receive accurate answers when they inquired as to the dispute resolution process, because there would be only one procedure used by all agencies. In addition, the use of one common procedure would make it possible for agencies to use common resources to educate the public about the procedures so that inquiry would not be required.

#### **Consistency and Predictability**

The goals of consistency and predictability are closely related. Each of these goals is focused on easing the burden of non-agency parties to a dispute. As the process currently stands, a person's experience in one agency will have little relevance in regards to a dispute in another agency. Creating a uniform process would increase the consistency of procedural mechanisms and outcomes, thereby making the entire process more predictable.

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<sup>93</sup> Interview with Beth Collis, Tuesday March 11, 2008.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

Consistency is important to maintain the perceived fairness of the system. There is a general feeling in the U.S. that those in similar situations should have similar experiences. It seems inherently wrong that two parties in similar situations with similar disputes could end up with drastically different processes and outcomes for no apparent reason. As the result, this type of inconsistency could easily lead to distrust of the system generally.

Predictability, which will increase as consistency increases, helps parties to make informed choices. Rational parties will always want to weigh the potential benefits and costs of any particular course of action before proceeding with a strategy. This is extremely difficult when it is hard or impossible to predict the outcome of one or more alternatives. Being unable to accurately predict these outcomes will lead to societal inefficiency, as parties routinely choose the “wrong” course of action for lack of better information.

### **Fairness in the Process**

Regardless of the attentiveness with which a process is designed, it will fail if it is unfair or is perceived as being unfair. Fairness is a core value in our society, and will be discussed in detail in Chapter 3. The idea that perceived fairness is also important may require more attention. This idea is recognized in the judicial code of ethics, by admonishing judges from engaging in any activity that has the “appearance of impropriety,” regardless of whether or not the activity actually is improper.<sup>98</sup> For the same reason that judges should maintain their conduct to always appear proper, public confidence will rise if an administrative process always appears fair.

This goal may be especially important when we consider that many parties will have a choice of venue. Although some parties coming before agencies have little choice, as the agency has the sole jurisdiction of their dispute, that is not always the case. Businesses weigh a variety of factors, including the ease and fairness of agency processes, when deciding which jurisdiction to do business in. Take, for example, Delaware: Many businesses are incorporated in Delaware despite principal places of business in other states due to Delaware’s favorable incorporation laws. If Ohio is perceived as a state that resolves its administrative disputes in a fair manner, businesses may be more likely to do business in our state.

### **Finality**

A good outcome loses its luster if enforcing that outcome becomes difficult or impossible. Under the current system, any party whose rights are adversely affected by the agency outcome may appeal.<sup>99</sup> This can lengthen the process significantly, lower confidence in the award of any particular case, and create additional costs to agencies. While the right to appeal must be preserved to protect rights, a process that increases the percentage of matters that are not appealed would shorten the process, provide peace of mind for more parties, and save costs for agencies.

### **Lowering Costs**

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<sup>98</sup> Code of Judicial Conduct Rule 1.2, Comment 5.

<sup>99</sup> Ohio Rev. Code Ann. 119.12 (Westlaw 2008).

Lowering costs is important for both agencies and individual parties. Agencies currently waste money by using an inefficient system in which both their time and resources are stretched thin. A process that is shorter, produces a final outcome, and does not require the addition of new paid staff will significantly reduce the use of agency resources. Agencies will highly value a lower cost system because it will allow them to reallocate funds to other programs.

Parties will find lower costs to be important to their perception of the overall process. A high price tag attached to a process will likely make a party feel as though any outcome, even favorable, is tainted. Parties will have reduced costs under a new system that allows for a resolution earlier in the process, does not require the use of an attorney, and gives them decision-making power.

### **Efficiency**

The goal of efficiency, although closely tied to that of lowering costs, is distinct in some ways. Efficiency will be achieved for agencies when costs are lowered and staff is being used in the most productive way possible. A process which resolves disputes on average more quickly and with more certainty and gives the parties confidence in each step, will allow agencies to allocate their internal resources as efficiently as possible. As is common of most government entities, Ohio agencies are busy. Creating a stream-lined process by which claims could easily be assigned and resolved would save not only money, but also valuable employee time that could be devoted to other tasks.

### **Recommended Process**

As discussed below, it is recommended that a facilitative-type mediation process be included in Ohio agencies' dispute resolution protocol. Mediation best meets the goals outlined above. The widespread use of this process would create the desired uniformity, consistency, and predictability of process. Parties could be educated as to the process used for all agencies, and could fully understand the options before them. In addition, mediation helps to provide an image of fairness to Ohio agencies by instituting a process that produces high settlement rates with low rates of re-litigation, high party satisfaction, and complete party determination. If parties are unable to come to an agreement about settlement by the end of their mediation session, they may proceed to the statutorily guaranteed Chapter 119 adjudicative hearing, without having wasted much money or time.

Facilitative mediation is recommended because it will be more realistic for agencies to implement, and because it increases party candor and participation. Despite this general recommendation; however, it is recognized that evaluative mediation can be helpful in resolving disputes in some circumstances. For this reason, it is not recommended that mediators who happen to have a level of subject-matter expertise on the claim they are mediating be forbidden from participating in some level of evaluation.

Due to the concerns raised below, it is recommended that the mediator refrain from engaging in evaluation unless the parties have reached a point of impasse and have asked the

mediator for his or her opinion. In this way, the level of candor should not be lowered because parties will not expect the mediator to play a role in evaluating the case. Additionally, if the mediator waits until the parties are at a point of impasse and would be ready to end the session without evaluation, there is less to lose by evaluating and potentially upsetting one of the parties.<sup>100</sup>

### Evidence of Mediation Success

Studies show that mediation can be successful in increasing party satisfaction, increasing compliance with settlement agreements, and lowering costs.<sup>101</sup> Although social scientists have advised against holding any one study as definitive, examination of the findings of multiple studies can shed light on common experiences.<sup>102</sup>

One common experience is that of high party satisfaction.<sup>103</sup> Studies of parties in private mediation, small claims court mediation, state civil court mediation, and federal court mediation

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<sup>100</sup> Switching mediation techniques mid-mediation must be done with caution, however. One publication suggested that unless specifically protected, a mediator may face some liability for completing services different than the parties had expected, although no cases supporting this theory were cited. John W. Cooley & Lela P. Love, *Midstream Mediator Evaluations and Informed Consent*, 14 No. 2 Disp. Resol. Mag. 11, 12 (Winter 2008). It was recommended that a mediator experienced in the substantive law of a claim manage these risks by preparing a statement which fully explains the advantages and disadvantages of evaluating the parties' case, and receive consent from each party before proceeding. *Id.* at 13. This article contains a good example of a thorough statement in response to a request for an evaluation:

You have asked me to give an opinion on the likely court outcome of this matter, and I am willing to do that if you both agree to my providing that service. However, you should understand that at least one of you may not like my opinion and may feel I am no longer impartial. If that happens, I may be unable to assist you further or may be less effective as a mediator. Also, particularly if you think my opinion is wrong, you may be disadvantaged by it in subsequent negotiations.

While I will do my best to give you a thoughtful opinion, you should understand I might be wrong--different lawyers come to different conclusions--and my analysis will be based on information that is different from what a judge, arbitrator, or jury would hear. While I have practiced in the area of [substantive law topic], I do not consider myself a specialist. Also, my opinion will be based on more limited evidence than the evidence available in adjudication, since you have not completed discovery. In addition, because I have learned information in caucus and from confidential submissions that you have not heard or seen and hence cannot rebut, you must rely on me to separate that out from information I hear in joint session.

In any case, it is very speculative to predict what a particular judge might do. I advise you to listen to your own counsel (or to get legal counsel) to inform you and protect your legal rights.

Also, to the degree we focus on legal rights and the likely court outcome, it may distract you from looking for more creative solutions that might serve your interests better. . . .

Are you sure you want me to give an evaluation?

*Id.* If the parties fail to come to a settlement at the end of mediation, they would continue through the agency's protocol and attend the adjudicative hearing. For a more thorough discussion of mediator liability, see Chapter 4, *infra*.

<sup>101</sup> See STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH RUDOLF COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 154-56, 401 (4th ed. 2003).

<sup>102</sup> *Id.* at 154.

<sup>103</sup> *Id.* at 154-55.

show that an overwhelming majority of parties were satisfied.<sup>104</sup> One study showed that ninety-two percent of participants were happy enough with the process to recommend it to friends with similar problems.<sup>105</sup> The studies also reported that over ninety percent of participants would rate their mediator as neutral and/or even-handed.<sup>106</sup> Studies of party satisfaction have not been completed on Ohio agencies, but anecdotal stories from those familiar with the process suggest that there is significant room for improvement.<sup>107</sup>

Studies also show that when compliance has been measured, the rates of compliance with mediated agreements is as high or higher than adjudicated outcomes.<sup>108</sup> It does not appear that the subject matter of the dispute has any bearing on the settlement rate or rate of compliance.<sup>109</sup>

It is also likely that mediation will lower costs for both agencies and parties. Studies show that mediation is at minimum a cost-neutral alternative to adjudication, and at best a true cost-saver.<sup>110</sup> Mediation will decrease costs when it is used early in a dispute, thus reducing discovery time and attorney's fees.<sup>111</sup>

### **Exploring Alternative Dispute Resolution Options**

Before recommending mediation for the administrative process, careful consideration was given to a multitude of common alternative dispute resolution processes. Some processes were clearly inappropriate to meet the goals outlined above, and some required more analysis to evaluate their potential usefulness.

#### **Mediation**

Mediation is a process focused on party self-determination.<sup>112</sup> It gives the parties process control, and allows them to shape substantive outcomes.<sup>113</sup> The parties come together to meet with a neutral mediator who attempts to encourage the parties to talk about their interests, as opposed to their positions.<sup>114</sup> An interest is a goal that a party is trying to meet. For example, a party with a claim for a car accident may have an interest in getting his car repaired. A position is what a party is demanding. Using the same car accident example, the party's position may be that the at-fault party needs to pay \$3,000 today to have the car repaired.

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Interview with Beth Collis, Tuesday March 11, 2008.

<sup>108</sup> See Goldberg, et al., *supra* note 101 at 401.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 401.

<sup>111</sup> *Id.*

<sup>112</sup> Frank E.A. Sander, *Achieving Meaningful Threshold Consent to Mediator Style(s)*, 14 No. 2 Disp. Resol. Mag. 9, 9 (Winter 2008).

<sup>113</sup> Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 890-91 (1998).

<sup>114</sup> Kenneth M. Roberts, *Mediating the Evaluative-Facilitative Debate: Why Both Parties are Wrong and a Proposal for Settlement*, 39 LOY. U. CHI. L.J. 187 (2007) (suggesting that pure mediation is rare, if it exists, and that the most effective mediators use a combination of these tactics for the best results).

By focusing on interests instead of positions, it is hoped that parties can understand each other better and work together to find a solution that each of them can live with. The involvement of the mediator in the discussion varies based on which type of mediation style is utilized. The most common types of mediation will be discussed below. If parties are unable to reach agreement at the end of a mediation session, no agreement is forced upon them. They may continue the mediation in another session, or move on to the next step of the dispute resolution process.

Mediation generally begins with the mediator explaining the process of mediation to the parties and affirming his or her own neutrality as to the claim. The mediator then allows each party to tell his or her “story,” so that the party may feel that he or she has been heard and can be more receptive to listening to the others. After each party has spoken, the mediator will begin to try to guide the discussion in a way that helps the parties come together to find a common workable solution.

Mediators may also use the tool of “caucusing,” which just means to meet with each party out of the presence of another. Often, mediators will use this tool when the parties seem frustrated with each other and no progress is being made. In the private meeting with each party, the mediator can assure the party of the confidentiality of their discussion, and perhaps learn more facts than the party is willing to share with the whole room. By learning what each party is keeping secret from the other, the mediator can often be more effective in guiding the discussion when group session resumes. Should the parties come to an agreement about the resolution of their dispute, they will generally put their agreement in writing, signed by each, and it becomes enforceable as a written contract.

Mediation would not pose statutory concerns, as any agreement between the parties would be voluntary and a hearing would follow if settlement could not be reached. Mediation has been found to be effective in helping parties to reach settlement at high rates, between sixty and ninety percent, and has a good record in terms of compliance with the agreed settlements.<sup>115</sup> The parties in mediation must both agree to any settlement, and this means that they are less likely to be resentful of the settlement. These high levels of compliance lead to low re-litigation rates,<sup>116</sup> which helps to meet the goals of both finality, and cost savings.

Mediation is also credited with being a “value added” process.<sup>117</sup> Traditional dispute resolution methods such as litigation focus only on legal rights and obligations, and on compensation owed. Mediation helps parties to discover what other criteria might hold value, and to use these other criteria in making settlement decisions.<sup>118</sup> Using the car accident example from above, a court would be likely to rule only on who was at fault and how much money is owed to whom. Mediation would help the parties explore other valuable criteria, such as: the time necessary to reach settlement, the time in which money will be paid, the publicity of the claim, and the relationship between the parties.

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<sup>115</sup> Guthrie & Levin, *supra* note 113 at 887 n.7.

<sup>116</sup> *Id.*

<sup>117</sup> Kimberlee Kovach, *Privatization of Dispute Resolution: In the Spirit of Pound, But Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future*, 48 S. TEX. L. REV. 1003, 1017 (2007).

<sup>118</sup> *Id.*

Let us assume that Party A caused the accident and Party B is looking to be compensated for the damages. Perhaps Party A acknowledges fault, but simply cannot afford to pay a lump sum for compensation. If Party B is in a position to pay the repair costs up-front, he may wish to make an agreement with Party A whereby compensation equal to 125% of the repair costs are paid over a course of one year. This is an example of a situation in which both parties could come to an agreement that is better than an order given by a court.

The most common types of mediation are discussed below. It is important to note, however, that in practice mediation is rarely an example of one pure style or another.<sup>119</sup> More commonly, mediation falls somewhere on the continuum between two styles.<sup>120</sup> Any discussion relating to the virtues or dangers of a mediation style below assumes a pure model. As discussed above, this protocol recommends a mediation model that strives to fall somewhere close to the facilitative end of the spectrum, while allowing some evaluative aspects in certain situations.

### **Facilitative Mediation**

Facilitative mediation focuses on the interests of the parties and seeks to increase the understanding between the parties by exploring these interests instead of promoting the parties' positions.<sup>121</sup> The facilitative mediator's only job is to facilitate and guide the discussion so that the negotiation between the parties may continue.<sup>122</sup> The mediator is responsible for guiding the process, but not for providing opinions or predicting the outcomes of any course of action.<sup>123</sup> It may be difficult, but regardless of the claims made by each party, the mediator must operate under the assumption that all claims made have an equal possibility of being true.<sup>124</sup>

Facilitative mediation holds all of the benefits of mediation discussed above, without many drawbacks. Parties in facilitative mediation are free to participate with a high level of candor because the mediator will make no judgments, and no settlement will be binding unless agreed upon by both parties. Often the communication that occurs during a mediation is superior to that in other settings because the parties are able to discuss the facts and their interests in an honest way, without the "tint" of legal posturing.<sup>125</sup> In addition, parties are often conscious of the fact that this may be the only time when all those with decision-making authority are in the same room before a hearing, and this may enhance the possibility that they will work hard at reaching settlement.<sup>126</sup> These settlements are particularly valuable because, as stated earlier, an agreement created by the parties themselves is more likely to be final, thus reducing appeals.<sup>127</sup>

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<sup>119</sup> E. Patrick McDermott & Ruth Obar, "What's Going On" in *Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit*, 9 HARV. NEGOT. L. REV. 75, 95 (2004).

<sup>120</sup> *Id.*

<sup>121</sup> Roberts, *supra* note 114 at 193.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 194.

<sup>124</sup> Sarah E. Burns, *Thinking About Fairness & Achieving Balance in Mediation*, FORDHAM URBAN L. J. 39, 75 (2008) (describing tactics to be used by mediators in an effort to achieve real fairness and balance in practice). For an in depth discussion on the innate biases of all people and strategies to combat the same, *see id.*

<sup>125</sup> Richard M. Calkins, *Mediation: The Gentler Way*, 41 S.D. L. REV. 277, 279 (1996).

<sup>126</sup> *Id.* at 280-81.

<sup>127</sup> *Id.* at 282.

Awards agreed upon in a mediation settlement are also likely to be received more quickly than those awarded after a hearing, because the settlement agreement is a private contract as opposed to an agency order.<sup>128</sup>

Another benefit which is particularly important to this analysis is that facilitative mediators need little substantive knowledge.<sup>129</sup> A facilitative mediator must only be trained to “ask questions; validate and normalize parties’ points of view; search for interests underneath the positions taken by parties; and assist the parties in finding and analyzing options for resolution.”<sup>130</sup> This means that one list of mediators could serve a wide variety of agencies, thus easing the burdens of recruitment, scheduling, and costs. One final noteworthy benefit is that facilitative mediation also receives higher marks for party satisfaction than evaluative mediation.<sup>131</sup> Higher satisfaction with the process will mean more perception of fairness and approval of Ohio’s agency system.

## Evaluative Mediation

Evaluative mediation operates under the belief that a major roadblock to party settlement is the unrealistic opinions of parties regarding the validity and worth of their claims.<sup>132</sup> It is assumed that parties will benefit from the knowledge of an objective and neutral third party who has the expertise to provide guidance about the substantive issues at the core of parties’ claims.<sup>133</sup> Based on this belief, evaluative mediators attempt to perform the role of an “agent of reality.”<sup>134</sup> The evaluative mediator will focus on the legal rights and obligations of each party, and provide an analysis of the merits of each party’s claim.<sup>135</sup>

The extent of the mediator’s evaluation varies. Some mediators provide evaluation of the parties’ claims early in mediation session, while others reserve comment until after mediation has reached an impasse and it appears that the parties will be unable to settle alone.<sup>136</sup> There is also a split between directive and non-directive evaluative mediators. Directive evaluative mediators assess the strengths and weaknesses of cases, predict the outcome of the dispute if it were to continue to a trial or hearing, propose position-based resolutions, and urge the parties to accept a specific proposal.<sup>137</sup> Non-directive evaluative mediators educate themselves about each party’s interests, predict the outcome of failing to reach settlement, develop broad interest-based proposals, and urge the parties to accept these proposals.<sup>138</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> Roberts, *supra* note 114 at 194.

<sup>130</sup> Brien Wassner, *A Uniform National System of Mediation in the United States: Requiring National Training Standards and Guidelines for Mediators and State Mediation Programs*, 4 CARDOZO ONLINE J. Conf. Res. 3, Part B.III.B. (2002).

<sup>131</sup> McDermott & Obar, *supra* note 119 at 96. For an in-depth analysis of the factors that contribute to party satisfaction and to higher monetary awards, *see id.*

<sup>132</sup> *Id.* at 196.

<sup>133</sup> *Id.* at 195-96.

<sup>134</sup> *Id.* at 196.

<sup>135</sup> *Id.* at 195.

<sup>136</sup> Cooley & Love, *supra* note 100 at 14.

<sup>137</sup> Roberts, *supra* note 35 at 194-95.

<sup>138</sup> *Id.*

There are several benefits of using evaluative mediation. First, the mediator will be able to provide each party with more information regarding the outcome of their claim.<sup>139</sup> As noted above, predictability is useful to a party so that they may make educated decisions regarding the path they would like their claim to take. Parties may appreciate the opinion of a non-biased third party who has listened to both sides of the case but has no authority to impose settlement. More information may also be a “reality check” for overconfident parties.<sup>140</sup> It is possible, or likely, that a party with unreasonable expectations about the outcome of their claim will be more willing to discuss settlement with the other party once a neutral third party assures them that their claim is not worth as much as they had hoped. Evaluative mediation may also save costs for stubborn parties. If two parties are unable to reach settlement due to their unrealistic expectations, they will continue at impasse until they receive the opinion of a third party.<sup>141</sup> Providing this opinion during mediation would prevent the necessity of a later process, saving both time and money.

Evaluative mediation is not without its drawbacks, however. Overconfident parties may be upset when faced with evaluations that do not meet their expectations.<sup>142</sup> This may lead to hostility, or doubts about the mediator’s neutrality.<sup>143</sup> Parties with a hostile or distrustful attitude will be less likely to settle, and may be less likely to work with the other party to come to a self-determined resolution. In addition, parties that are aware that the mediator will be evaluating their claims may participate with less candor than they otherwise would.<sup>144</sup> Instead of working honestly with the mediator, they may commit themselves to their positions and withhold important information to try to convince the mediator that their position is correct.

Evaluative mediation also would require each mediator to be trained in both mediation tactics and in the substantive law of the agency.<sup>145</sup> Because the parties would be relying on the mediator’s analysis of the facts and potential outcomes, it would be critical that the mediator be an expert on the subject matter. This creates a difficulty with the vast array of agencies that would be covered by this protocol. Each agency would have to maintain its own list of qualified mediators, which may be hard to recruit and maintain.

### **Transformative Mediation**

Transformative mediation focuses on communication between the parties and their ongoing relationship, as opposed to focusing on settlement.<sup>146</sup> The mediator’s role is to try to help each party achieve a greater degree of clarity about themselves, and a greater degree of responsiveness to the other party.<sup>147</sup> The mediator is less concerned about using neutral language, and instead focuses on reflecting back the vocabulary and feelings of each party.<sup>148</sup> The goal of transformative mediation is to empower the parties and transform the way the parties

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<sup>139</sup> Cooley & Love, *supra* note 100 at 12.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 13.

<sup>145</sup> Roberts, *supra* note 114 at 195.

<sup>146</sup> Carol Pauli, *News Media as Mediators*, 13 No. 4 Disp. Resol. Mag. 8, 10 (Summer 2007).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

relate to each other.<sup>149</sup> To work towards this goal, the transformative mediator is “supposed to act as a catalyst for moral growth of parties in the hope that it will lead to substantive results in terms of outcomes.”<sup>150</sup>

Because disputes handled by Ohio agencies are generally between the agency and another party, there are less interpersonal issues than many other types of disputes. As moral growth and transformation of the relationship between the parties is the main purpose of transformative mediation, it is probably not appropriate for the types of cases that will be common between our parties. To successfully meet the goals outlined above, including efficiency, finality, and cost savings, it is important to choose a process that will deliver good results in terms of settlement rates.

## **Arbitration Options**

Arbitration, while a popular form of dispute resolution, would likely be an ineffective addition to Ohio agencies’ dispute resolution protocol because it is too similar to the current process. Arbitration began as an adversarial process that was faster, cheaper, and more informal than traditional litigation. The process is aimed at having a neutral third party make a decision regarding the outcome of the case,<sup>151</sup> as opposed to the options discussed above in which parties are in control of the resolution of their dispute. Although arbitration began as an informal process, over the years it has evolved into something closer to litigation. As lawyers began to become more experienced and involved in arbitration, they brought with them legal procedure and complexity.<sup>152</sup> In arbitration, there is always a balance to be struck between protecting the rights of the parties, and making the process fast and efficient. Recent years have shown a surge of litigation-type procedures being used in arbitration, such as discovery and expert witnesses.<sup>153</sup>

In general, arbitration operates as a less-formal trial.<sup>154</sup> Each party, or the party’s attorney, will make an opening statement, followed by a presentment of a case.<sup>155</sup> They may bring evidence and witnesses to show the arbitrator or arbitrators. Depending upon the arbitration, the number of witnesses or the amount of evidence may be limited. Upon conclusion of both sides’ cases, there will be closing statements and the arbitrator(s) will retire for consideration of the case. The decision made can be either binding or non-binding upon the parties. Even in circumstances of binding arbitration, court intervention is often necessary to enforce awards.<sup>156</sup> Below are some common types of arbitration used in a variety of circumstances.

## **High-Low Arbitration**

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<sup>149</sup> Kovach, *supra* note 117 at 1046.

<sup>150</sup> Howard J. Vogel, *The Restorative Justice Wager: The Promise and Hope of a Value-Based, Dialogue-Driven Approach to Conflict Resolution for Social Healing*, 8 *Cardozo J. CONFLICT RESOL.* 565, 580-81 (2007).

<sup>151</sup> Daniel E. Klein, Jr., Kaye A. Allison, Perry F. Sekus, & MICPEL, *Mediation: A Handbook for Maryland Lawyers*, Chapter 1 (1999).

<sup>152</sup> Kovach, *supra* note 117 at 1023.

<sup>153</sup> Kovach, *supra* note 117 at 1023-24.

<sup>154</sup> Klein, et al., *supra* note 151 at Ch. 1.

<sup>155</sup> *Id.*

<sup>156</sup> Kovach, *supra* note 117 at 1023

High-low arbitration is a variation used by parties who agree on liability, but have reached impasse during negotiations regarding the compensation owed. An example of this type of situation would be if one party hit another party's legally parked car. Clearly, the party who caused the accident is at fault, however the amount of money that the at-fault party should pay for this accident may be a point of contention. In this variation, the parties agree before arbitration to a maximum and minimum settlement amount.<sup>157</sup> After a presentment of the case from both parties, the arbitrator(s) must award some amount between the minimum and maximum previously agreed upon.<sup>158</sup>

High-low arbitration is a process focused on deciding the amount of money that one party will pay another, and is thus inappropriate for inclusion in this protocol. Many cases that will come before Ohio's many agencies will involve no money at all. Often they will deal with non-monetary items such as licenses, or suspensions from one's employment. In these situations, this process would be inappropriate because there is little or no "middle ground" for settlement.

### **Fixed High-Low Arbitration**

Fixed high-low arbitration may be viewed as the mirror image of high-low arbitration. This process is often used when damages are not in dispute, but liability is.<sup>159</sup> An example of this situation would be a lost property claim. There may be no dispute as to the value of the lost item, but there is a dispute as to whether the defendant party was responsible for the loss.

While fixed high-low arbitration certainly has important uses, it cannot be assumed that the "amount" at stake will be known in every claim of every agency. This would be useful to some claims, such as a licensing case where the options would be to license or not to license, however there will undoubtedly be other circumstances when two fixed points cannot be reasonably established. Due to this, fixed high-low arbitration is not an appropriate process for our purposes.

### **Baseball (style) Arbitration**

Baseball (style) arbitration gets its name from its most popular use--baseball player salary arbitration. In this process, each party begins by choosing an amount that they feel is fair.<sup>160</sup> This number is recorded, but not disclosed to the arbitrator. The arbitrator then hears the cases of each party, and decides on an amount to award.<sup>161</sup> Whichever party has an amount that is closest to the arbitrator's decision, that amount is awarded.<sup>162</sup> In theory, this forces parties to fairly assess both sides of their dispute and come up with a reasonable proposed outcome. It is known to the parties that if their amount is vastly different than the one a neutral outsider would award, they will be stuck with the other party's amount.

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<sup>157</sup> Calkins, *supra* note 125 at 284.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 285.

<sup>160</sup> *Id.* at 285-86.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

This concept may prove troublesome in the agency context, however, due to the nature of the parties to agency disputes. It is likely that many parties will be approaching the agency dispute resolution process for the first time, and will therefore be novices to the type of dispute at issue. It would likely be challenging for a party to amass enough relevant information to make an educated estimate as to what a fair outcome would be. Further, the agency in the dispute will always be a “repeat-player.” This puts the agency at a significant advantage over the individual party. This could be perceived badly by the public, and appear as though the process is unfair and weighted in favor of the agency.

### **Non-binding Arbitration**

Non-binding arbitration differs from the general description above only in its outcome. Parties still meet, argue their cases, and receive an award from an arbitrator.<sup>163</sup> The difference is that after an award is made, the parties may choose to accept the award or not.<sup>164</sup> If the parties both agree to accept the award, they may make it binding at that point. If one or both of the parties does not accept the award, it is not binding and they may request a jury trial.<sup>165</sup>

One benefit of this process is that it would be adaptable to awards of both monetary and non-monetary significance, such as licensing and rights to practice. First we must consider where in the current process non-binding arbitration would be placed. If one of our goals is to increase the speed and decrease the costs of the current adjudicative hearing process, it would be necessary to put any new processes before the current hearing proscribed by the OAPA. If the non-binding arbitration was a process placed before the Chapter 119 adjudicative hearing, instead of a jury trial being the contingency for failure to accept an award, the hearing would become the contingency.

This seems like a workable structure thus far; however this process is not without potential problems. Upon careful examination, this process fails to meet at least two of the goals described above. The first major concern with this process is that it would probably not provide finality in a great number of cases. One needs only to look to the number of court cases that are appealed each year to know that parties are often unhappy with the decision following an adversarial contest and wish to receive a second opinion.

The fact that both parties would need to be in agreement about accepting the non-binding award makes it likely that many cases would result in a request for an adjudicative hearing. If this is the result, the parties have gained nothing by the use of the process except an extra hurdle to overtake before finality can finally be reached at the level of appeal. In addition to creating an extra hurdle, this will result in higher costs in many circumstances. If a claim will still proceed through an adjudicative hearing under Chapter 119, and possibly an appeal, adding the step of a non-binding arbitration only adds to the total cost of a claim.

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<sup>163</sup> *Id.* at 286.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

Another, perhaps less important, problem with the addition of this process is one of repetitiveness. The differences between an arbitration and an adjudicative hearing may not be readily detectable by the average party. Parties may feel frustrated that they are forced to proceed through two similar processes in front of two different neutrals. Party frustration is not fatal to an otherwise sound process, but party satisfaction can be critical to the survival of a new process and should not be totally discounted.

### **Binding Arbitration**

Binding arbitration is the “traditional” arbitration that is probably most familiar to the general population, and has several advantages. It is an adversarial process, but has the advantage of being more informal and flexible than trials.<sup>166</sup> Another advantage of this process is that it can guarantee a binding resolution through an adversarial process without the potential publicity of a trial.<sup>167</sup> In addition, this process can be much quicker than a trial, if the complex legal procedures can be kept to a minimum.<sup>168</sup>

Despite these advantages, binding arbitration does create significant concerns. One such concern is that of protecting party’s rights. It is necessary to curb much of the formality of trials in the interest of cost and time, however this can mean that evidence that would not otherwise be admissible is permitted, or parties are “surprised” because they were not allowed sufficient time for discovery.<sup>169</sup> This problem may be amplified by the fact that the agency-party will be a repeat player and will know exactly what he or she can and cannot get away with. The other party, meanwhile, will be at a disadvantage trying to “play by the rules” while being unsure of how exactly to conduct a proper case. This issue would not be so worrisome if the result were not binding, but when rights are being affected this concern cannot be ignored. This may also affect the public’s perception of fairness of the process, and discourage those who may be considering doing business here.

Another potential concern is the violation of Ohio statutory law. Chapter 119 of the Ohio Revised Code seems to mandate that parties to disputes in Ohio agencies be given the opportunity to have their claim heard at an adjudicative hearing. If this process were mandatory, it would essentially replace the current process and require a change of law. The other alternative would be to make this a voluntary process that parties could opt into instead of an adjudicative hearing. This is a workable solution however, as discussed above, arbitration and adjudicative hearings look very similar to the general population. Parties may not know or understand the differences between the two processes to make an educated decision. Further, it may not be worth the state’s resources to institute a new process so similar to the current status quo.

### **Mediation/Arbitration**

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<sup>166</sup> Calkins, *supra* note 125 at 284.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

Mediation/arbitration involves a hybrid of these two well-known alternative dispute resolution processes. It begins with the parties engaging in mediation with a neutral mediator.<sup>170</sup> If the parties reach impasse and the mediation can progress no further, the mediator then assumes the role of the arbitrator and subsequently makes a binding decision.<sup>171</sup> One huge advantage of this process is cost and time savings. By the time an impasse is reached, the mediator is already fully immersed in the case, and generally needs only to hear closing statements from each of the parties. The result is a process that takes little more time or money than mediation, but results in a binding decision every time.

A concern regarding this method, as discussed for binding arbitration above, is violation of statutory law. Because this would result in a binding decision with every case, the law would need to be changed to fully institute the process. One alternative would be to make this process voluntary, where parties could opt to go either to an adjudicative hearing or to a mediation/arbitration. Another alternative would be to make the arbitration portion of the process non-binding. If mediation did not produce settlement, the mediator would become the arbitrator and make a non-binding decision. If one or both of the parties requested at that point, they would move on to the adjudicative hearing process.

This process may also present a logistical concern. An effective neutral in this type of process would have to be trained not only in the procedural aspects of mediation, but would also need to have training and experience in the substantive law at issue. Because each agency deals with a different area of substantive law, there would need to be a group of mediator/arbitrators skilled in each area. This would require there to be a large number of neutrals, and would likely require a significant amount of training at the expense of the agency or state.

One final concern is that parties may not be as forthcoming due to the neutral's dual role, which hinders the opportunity for settlement and for a fair disposition of the case. As was discussed above, a key feature of mediation is that parties feel comfortable sharing their full spectrum of interests because the session is confidential and the mediator has no power to compel or influence the outcome. In this process, the mediator will be the ultimate decision-maker. This will likely stifle the level of candor one hopes to find in a mediation. Parties will be mindful of the fact that the mediator will be using their words to decide the case at a later point, and therefore might maintain a more adversarial posture than they otherwise would. This harms the parties in several ways. First, the mediation is less likely to bring about a voluntary settlement agreement because the parties will be acting in an adversarial manner. This in turn means that it is more likely that the neutral will end up deciding the case for them. Not only will he or she be deciding the case, but will likely be doing so with incomplete information, as neither party is likely to be forthcoming and there is no process for the examination of evidence, witnesses, or discovery for this process.

### **Mini-trial or Summary Jury Trial**

A mini-trial or summary jury trial can be used by parties to see what the outcome of a real trial may be, and thus help private negotiations to succeed. The timeline of either of these

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<sup>170</sup> *Id.* at 287.

<sup>171</sup> *Id.*

“trials” is usually condensed to one day.<sup>172</sup> Each party presents their case, and may use limited evidence and witnesses, and after the verdict has been decided the parties continue their negotiations.<sup>173</sup> Mini-trials are tried before a single judge who makes his or her ruling as though it were a bench trial.<sup>174</sup> A summary jury trial is tried before a real jury who does not know that the case is not real.<sup>175</sup>

In the context of agency disputes, a mini-trial would be more appropriate than a summary jury trial because a hearing is more like a bench trial than a jury trial, but would likely be a poor choice for inclusion in this protocol. It may still be hard for a party to make decisions about a potential adjudicative hearing based upon the decision of a judge. Trials are more formal and rigid than adjudicative hearings, so the judge may be using different criteria in deciding the mini-trial than would be used at the later hearing. This lessens the benefit of any predictability sought from the mini-trial, and may not successfully move negotiations along. In addition it would require the recruitment and training of a large number of judges so as to ensure that there are mini-trial judges available for each area of substantive law.

### **Early Neutral Evaluation**

Early neutral evaluation is the process in which a neutral with subject matter expertise provides parties with an assessment of their case at an early stage in the dispute.<sup>176</sup> The process is generally informal, and the neutral may or may not attempt to encourage the parties to come to an agreement before giving an evaluation of the case.<sup>177</sup> One advantage of this process is that each party has an opportunity to have an expert evaluate their case and help them better understand their position and options. Early neutral evaluation differs from some other alternative dispute resolution processes, such as mediation, in that it exclusively uses legal criteria in making evaluations.<sup>178</sup>

Early neutral evaluation has three goals: 1) to find the legal and evidentiary basis of the case, 2) to use the information available to give the best possible evaluation, and, when necessary, 3) to help the parties make a plan to gather the information needed to make responsible judgments about the likely outcome of a litigated case.<sup>179</sup> The goal of the session is to provide an accurate evaluation, not to help the parties work together for a resolution. There may be an opportunity for the parties to discuss possible settlement options, but it would generally be after the evaluation has already taken place.<sup>180</sup> If there is no opportunity to discuss

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<sup>172</sup> *Id.* at 289-90.

<sup>173</sup> *Id.*

<sup>174</sup> Klein, et al., *supra* note 151 at Ch. 1.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Wayne D. Brazil, *Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?*, 14 No. 1 Disp. Resol. Mag. 10, 11 (2007). Other processes, such as mediation, focus on a variety of criteria in working towards a resolution. An example of these criteria would be: legal, social norms, family relationships, and religious values.

<sup>179</sup> *Id.* (discussing the factors to consider when choosing between early neutral evaluation and mediation for a given dispute).

<sup>180</sup> *Id.*

settlement after the evaluation has been given during the session, it is hoped that parties will use the information provided to them to negotiate settlement privately at a later date.

As discussed with mediation/arbitration and mini-trials however, this process would require neutrals with expertise in each of the many agencies that would be using this process.<sup>181</sup> This will result in a very large number of neutrals, each of which may only perform a few cases per year. There is also a concern in this specific context about the appearance of fairness. Parties entering any process are likely to be wary of the fact that the agency is a repeat player in these disputes and the party is likely a novice. These parties in particular may be searching for any indication of unfairness. Because neutrals would be required to have subject matter expertise, there would likely only be one or a few neutrals that worked with any given agency. These neutrals would get to know the representative for the agencies very well, and this type of relationship could seriously damage the confidence the individual party has in the fairness and neutrality of the process.

### **Conclusion**

Facilitative-type mediation best meets the goals outlined above. The inclusion of this process before an adjudicative hearing would give parties an opportunity to sit down with an appropriate representative of an agency to attempt to work out a settlement before one is forced upon them. If done early, this will decrease the costs of both the agency and the non-agency party. It will also increase pre-hearing settlement rates, compliance rates, and party satisfaction. If implemented in accordance with this protocol, it is likely to be cost-neutral initially and cost-saving in the future.

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<sup>181</sup> *Id.* Subject matter expertise is important both for making an accurate evaluation of the claims, and also for gaining the confidence of the parties. *Id.*

## CHAPTER THREE: ENSURING QUALITY AND FAIRNESS IN THE OHIO AGENCY MEDIATION PROTOCOL

by Erik J. Stock

### Overview of Final Recommendations

#### **Recommendation 1:** Protect Party Decision-making in Mediation

- Expect mediators to be non-coercive.
- Allow sufficient time in the process for parties to fully consider their settlement decisions.
- Clearly inform parties that they may bring counsel to the mediation.

#### **Recommendation 2:** Address Power Imbalances

- Protect parties' right to bring counsel to the mediation.
- Expect mediators to adhere to basic formalities and establish ground rules for behavior.
- Screen cases to limit power imbalances.

#### **Recommendation 3:** Ensure Mediator Neutrality and Information Confidentiality

- Erect a firewall between a mediator and any agency personnel responsible for hearing the merits of the case.
- Utilize a mediator from outside the agency where the dispute arose, where possible.

#### **Recommendation 4:** Ensure Mediators are Trained

- To be discussed fully in the accompanying Chapter by Jessica Clarke.

#### **Recommendation 5:** Maintain Low Costs of Services to Participants

- Offer mediation early in the dispute.
- Create resources to educate parties about the process (i.e., brochures, websites, telephone consultations).
- Maintain consistency in program administration to lower information costs for repeat-players.

#### **Recommendation 6:** Protect Reliability of Settlement Agreements

- Maintain the current practice of: (1) reviewing settlements before entering them as final orders, and (2) ensuring that an agency attorney or assistant attorney

general with full knowledge of the agency's settlement authority is present at the mediation.

### **Ensuring Quality and Fairness in the Ohio Agency Mediation Protocol**

Quality and fairness are keys to a successful mediation program. These characteristics are deeply intertwined with numerous other program elements, and as such, persons responsible for mediation programs should carefully consider the implications of any attempt at regulating for quality and fairness.<sup>182</sup> However, such regulation is not only critical to the success of any mediation program,<sup>183</sup> it is also the subject of much research and scholarly thought, making it possible to implement principled measures to ensure quality and fairness.

This Chapter is organized into four sections. Section I lists six recommendations for ensuring quality and fairness in mediation programs. Section II discusses the theory and relevant scholarship underlying the fairness recommendations, while Section III does the same for the quality recommendations. This Chapter's recommendations flow directly from the various indicators of mediation fairness and quality examined in detail in Sections II and III. Finally, Section IV offers some concluding remarks.

### **The Recommendations**

These six recommendations extend directly from the theory and scholarly research discussed in Sections II and III. They reflect a balancing of the many variables involved in establishing and maintaining a fair and high-quality mediation program. These recommendations have in common a significant advantage for program managers: they don't require large investments of capital to achieve, but rather will stem naturally from careful program planning and management.

#### **Recommendation 1: Protect Party Decision-making in Mediation**

Party autonomy and free choice are cornerstones of a fair mediation process. Protections should be put into place to ensure these cornerstones are left on solid ground. No matter what

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<sup>182</sup> SARAH R. COLE, NANCY H. ROGERS, & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, & PRACTICE* § 2:1 (2d ed. 2001) ("[E]fforts to achieve fairness may clash with the production of efficient settlement, and attempts to promote high quality may limit access to mediation."). The number and interrelated nature of variables in a mediation system make regulation a tricky matter. Regulating to incentivize one variable might have adverse effects on other variables. See generally Craig McEwen, *Examining Mediation in Context: Toward Understanding Variations in Mediation Programs*, in *THE BLACKWELL HANDBOOK ON MEDIATION: BRIDGING THEORY, RESEARCH, AND PRACTICE* 81–98 (Margaret S. Herrman, ed. 2006) (discussing a number of variables present in various mediation systems and noting several possible adverse effects of regulating for desired behavior and program characteristics).

<sup>183</sup> See Bryan W. Husted & Robert Folger, *Fairness and Transaction Costs: The Contribution of Organizational Justice Theory to an Integrative Model of Economic Organization*, 15 *ORGANIZATION SCIENCE* 719, 726 (Nov.–Dec. 2004). If there are transactional costs created by perceived unfairness in a dispute system, there is arguably a higher probability that the system will fail. *Id.* Furthermore, there is evidence that "overly legalized, formalistic procedures" actually erode perceptions of fairness by those who interact with a governance system. *Id.* at 725. It follows that users of a dispute system will feel likewise, further supporting the decision to choose mediation as the dispute resolution mechanism of choice in the Ohio Agency Mediation Protocol. See *id.*

theoretical stance is taken by the mediators,<sup>184</sup> they should be trained and expected not to directly or subtly coerce parties into a particular settlement. Furthermore, mediators ought to be familiar with the indicia of high-quality consent and maintain a mediation environment where such consent is possible.

Parties should be free to bring their counsel to the mediation, and counsel should be able to participate. While not only protecting party autonomy, allowing parties to be represented by counsel at mediation also is a way to address power imbalances and provide efficient participant education about the mediation system.

## **Recommendation 2: Address Power Imbalances**

There are three primary ways to address potential power imbalances within mediations:

- (1) Allowing parties to be represented by counsel at the mediation.
- (2) Requiring mediators to establish a certain level of formality in mediations, including establishing ground rules and expectations for participant behavior.
- (3) Selecting cases to screen out power imbalances. Screening out cases that present a potential for serious imbalances or that run counter to particular agency policy objectives is contemplated here.

## **Recommendation 3: Ensure Mediator Neutrality and Information Confidentiality**

Participants will not perceive a mediation program as fair if the mediators are not neutral. Therefore, maintaining confidentiality is critical if a mediation system is to be perceived as fair to participants. An example of successful confidentiality protection measures are currently in place at the Ohio Tax Appeals Board. The Board has erected a firewall between hearing examiners that are acting as mediators for a case and hearing examiners that are judging that same case on its merits.<sup>185</sup> Additionally, Ohio has adopted the Uniform Mediation Act, Ohio Rev. Code § 2710.01, 2701.03, which applies to agency mediations and grants participants a privilege from being compelled to disclose mediation communications. Another possibility for protecting confidentiality is to create a pool of mediators comprised of employees from an agency different from the agency in which the dispute has arisen, which would give participants the assurance that the mediator's neutrality has not been compromised by agency loyalty.

To ensure confidentiality of information disclosed in the mediation, the mediator should be familiar with Ohio's open public records law and be able to advise the parties that any information memorialized in an agreement could be subject to an open records request.<sup>186</sup> It

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<sup>184</sup> This recommendation anticipates that the mediators employed by the system will use a facilitative style; however, one should be cognizant of the fact that mediators often borrow techniques from a number of mediation styles. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 857 (1997).

<sup>185</sup> Wang, *infra* note 201.

<sup>186</sup> Cole et al., *supra* note 182, at § 6:5.

should be noted, however, that confidentiality concerns are somewhat ameliorated due to the adoption of the Uniform Mediation Act in Ohio, which provides statutory protection for information disclosed within mediation proceedings. For a full discussion of the Uniform Mediation Act as adopted in Ohio, please see Chapter 7.

#### **Recommendation 4: Ensure Mediators are Trained**

For a full discussion of recommendations for mediator training, please see Chapter 4.

#### **Recommendation 5: Maintain Low Costs of Services to Participants**

Two steps should be taken to keep program participants' costs to a minimum:

- (1) Provide mediation early in the dispute to reduce costs incurred when participants invest resources to entrench their positions.
- (2) Provide educational resources about the process to lower information costs and help maintain unrepresented participants' ability to effectively and fairly participate in the program.

Additionally, agencies could adopt non-traditional methods of mediation to assist parties in keeping costs low. The Board of Tax Appeals is currently successful in conducting telephone mediations,<sup>187</sup> and computer-assisted mediation is becoming more popular in different contexts. Such non-face-to-face mediations, however effective, should be adopted only after careful consideration and planning.

#### **Recommendation 6: Protect Reliability of Settlement Agreements**

Third-party review of mediated agreements leads to fairer agreements. Current practice in Ohio agencies is that a mediated agreement is submitted to the relevant adjudicative board for approval and entry as a final order.<sup>188</sup> These final orders can range from a single-line entry reflecting the outcome of the case<sup>189</sup> to an entire mediated agreement being accepted as a consent decree by the agency.<sup>190</sup> Maintaining this practice of reviewing agreements before entering them as final orders will nicely support the agreements' fairness.

### **Mediation Fairness: Theory and Research**

#### **A. Party-Choice Measure of Fairness**

A mediated outcome is substantively unfair if "it [leaves] some parties much worse off from their starting position than they would have been had they participated in any other dispute

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<sup>187</sup> Wang, *infra* note 201.

<sup>188</sup> Wang, *infra* note 201; Collis, *supra* infra 237.

<sup>189</sup> Wang, *infra* note 201.

<sup>190</sup> Collis, *infra* note 237.

resolution process."<sup>191</sup> Fairness has two dimensions, substantive and procedural.<sup>192</sup> Within these two dimensions, the most useful measure of fairness is the degree of party choice available.<sup>193</sup> Fair mediation should support both substantive outcomes and procedural values.<sup>194</sup> Therefore, a process that adversely affects a party's sense of self is unfair.<sup>195</sup> For example, the mediator's imposition of a requirement that all arguments must be couched in legal terms would be procedurally unfair for parties who are not well versed in the law.<sup>196</sup>

The extent to which parties have free choice in mediation is a measure of fairness adopted by the majority of scholars. Under this measure, a mediation process is fair when it:

- (1) Allows the parties to make choices;
- (2) Is freely chosen by the parties as a way to settle their dispute;<sup>197</sup> and
- (3) Does not block the parties' ability to adjudicate the dispute if that is how they choose to fully protect their interests.<sup>198</sup>

Each of these three measures aligns with the majority approach of insisting that parties to mediation have the same ability to make choices as they would in an unrestricted negotiation.<sup>199</sup>

This Chapter embraces the majority approach to thinking about mediation fairness as described above. However, there are two distinct minority approaches to fairness that do not focus on party choice, but rather (1) emphasize the interests of certain interested nonparties and (2) compare mediated outcomes to the likely outcome had the dispute been resolved in litigation.<sup>200</sup>

The first minority approach to mediation fairness focuses on the interests of third parties. The prominent category of relevant third parties in the agency mediation context is the general public.<sup>201</sup> Designing a mediation system that is sensitive to the interests of third parties

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<sup>191</sup> Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 911–12 (1998) (describing this way of thinking about substantive fairness as "the functional equivalent of . . . [Rawls'] difference principle").

<sup>192</sup> *Id.*

<sup>193</sup> A mediation system may arguably be procedurally fair but also compel parties to attempt to mediate; however, any requirement in the system for good faith bargaining must be carefully tailored. *See id.* at 944.

<sup>194</sup> Stulberg, *supra* note 191, at 912.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 915. Being attuned to procedural fairness is particularly important where diversity—i.e., of sex, gender, race, ethnicity—is present at the mediation. A mediation process insensitive to the unique ways of thinking and speaking that might be present at the table runs the risk of doing violence to the parties' sense of self. *Id.*

<sup>197</sup> Cole et al., *supra* note 182, at § 2:2.

<sup>198</sup> *Id.* ("[M]ediation should result in no undue costs or burdens that restrict the options to litigate that are otherwise available to defend the interests of the parties.").

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* Public interests are most likely implicated in disputes with a significant public policy component, such as would be found in a natural resources or public utility mediation. Under current mediation practice at the Ohio Tax Appeals Board, local school boards are often represented at mediations where property tax valuations are at issue. Interview, Tom Wang, Attorney Examiner, Ohio Board of Tax Appeals (Feb. 26, 2008). The school board representative can be viewed as a protector of the public interest, which would comport with this secondary measure of fairness.

necessarily will impact how active the mediator must be.<sup>202</sup> Furthermore, regulating mediation to protect the interests of third parties in general, and of the public in particular, might have significant impacts on the confidentiality of the mediation proceedings.<sup>203</sup> While the protection of interests of third parties is not on its face incompatible with measuring fairness based on party choice, its implementation may have adverse effects on the desired role of the mediator as a neutral third party.<sup>204</sup>

The second minority approach to mediation fairness compares mediation with trials—either trial procedures or outcomes, or sometimes both.<sup>205</sup> An example of this approach is the insistence by some jurisdictions that mediated settlements comport with the substantive law underlying the dispute.<sup>206</sup> However, such a comparison is problematic because it might: undervalue personal choices, beliefs, and community values; overvalue the financial component of a given outcome; and reflect a preference for the certainty of a trial outcome over the possibility that a party may not win.<sup>207</sup> Often espoused by those critical of mediation, this minority approach is presumably incompatible with party-choice measures of fairness.<sup>208</sup>

## B. Perceived Mediation Fairness

A procedure that produces a result, such as mediation, must be fair or "procedurally just" for participants to willingly accept the result.<sup>209</sup> Six factors have been found to be important to parties' willingness to accept a decision resulting from a given procedure:

### (1) Actual outcome.

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<sup>202</sup> Cole et al., *supra* note 182 at § 2:2. For example, protecting the interests of children might cause the mediator to halt the mediation or take an active advocacy role. *Id.*

<sup>203</sup> *Id.* (discussing Minnesota Statute § 325F.665(12) which allows the attorney general to review records in automobile warranty disputes).

<sup>204</sup> See *id.* (citing Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 115 (1981)). Furthermore, Professor Stulberg feels mediator intervention on behalf of third-party interests threatens the very role of that person as an independent neutral. Joseph B. Stulberg, *Mediator Immunity*, 2 OHIO ST. J. ON DISP. RESOL. 85, 86 (1986).

<sup>205</sup> Cole et al., *supra* note 182, at § 2:2. Professor Stulberg completely rejects this measure of fairness as being insufficient. All a comparison of a mediated settlement with a judicial outcome can provide is an evaluation of whether the mediated settlement provided the parties all they were *legally* entitled to, which does not necessarily match up with what a fair outcome would be. Stulberg, *supra* note 23, at 910–11.

<sup>206</sup> Cole et al., *supra* note 182, at § 2:2 (discussing a California statute "that requires settlements in special education mediations to be consistent with state and federal law").

<sup>207</sup> *Id.* Stated another way:

Mediation, unlike litigation, may appropriately recognize the collision of "legal" norms with "person-oriented" norms. These personal norms or principles, though not legally valid in court, may be important to the participants in reaching a fair settlement within the context of the issues and characteristics of their unique dispute.

JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 245 (1984).

<sup>208</sup> Cole et al., *supra* note 182, at § 2:2 ("When trial provides the model of fair process, such a comparison inevitably yields the conclusion that mediation is unfair.").

<sup>209</sup> Klaus F. Rohl & Stefan Machura, *Preface*, in *PROCEDURAL JUSTICE* ix (Klaus F. Rohl & Stefan Machura, eds. 1997).

- (2) Anticipated outcome.
- (3) Anticipated outcome based on knowledge of how similarly situated individuals were treated.
- (4) How the outcome compares to participants' internal measures of fairness.
- (5) The legitimacy of the authority mandating the process.
- (6) Perceived fairness of the procedure.<sup>210</sup>

Each of these factors has implications for how a mediation system is perceived and the legitimacy of the results that it produces. However, it is the last factor, perceived fairness of the procedure, that is most relevant and important to examine because of the interrelatedness of the six factors. The importance of perceived fairness is compounded by the fact that it impacts the parties' feelings about the outcome, their willingness to comply with the outcome, and their perceptions of the legitimacy of authority.<sup>211</sup>

Studies have begun to show that parties "value mediation primarily for the procedural justice it provides."<sup>212</sup> Pennsylvania State University Professor of Law Nancy Welsh found at the end of a recent study that more important than the theoretical stance of the mediator<sup>213</sup> was the parties' perceptions of the mediator's ability to assist the parties toward settlement in a procedurally just way.<sup>214</sup> Her interviews revealed that mediation participants value the procedural justice of the mediation as much as they value the settlement of the dispute.<sup>215</sup> Therefore, she contends that mediation system designers need to take procedural justice into account just as much as settlement rates.<sup>216</sup>

Scholars have suggested four possible indicia of perceived fairness in a mediation system:

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<sup>210</sup> Klaus F. Rohl, *Procedural Justice: Introduction and Overview*, in *PROCEDURAL JUSTICE 6* (Klaus F. Rohl & Stefan Machura, eds. 1997) (citation omitted) (acknowledging that procedural justice scholars are in disagreement about which of these factors deserves the most prominence).

<sup>211</sup> Samuel J. Imperati et al., *If Freud, Jung, Rogers, and Beck were Mediators, Who Would the Parties Pick and What are the Mediator's Obligations?*, 43 *IDAHO L. REV.* 643, 681 (2007).

<sup>212</sup> See Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and Its Value*, 19 *OHIO ST. J. ON DISP. RESOL.* 573, 663 (2004). Professor Welsh's paper is the result of a qualitative study involving interviews with participants in a special education mediation program. *Id.* at 580.

<sup>213</sup> See *infra* notes 250–53 and related discussion.

<sup>214</sup> Welsh, *supra* note 212 at 671.

<sup>215</sup> *Id.* at 663. But see Neil Vidmar, *Procedural Justice and Alternative Dispute Resolution*, in *PROCEDURAL JUSTICE 128* (Klaus F. Rohl & Stefan Machura, eds. 1997) ("Procedural justice is not consistently related to any one type of resolution or any one type of dispute . . ."). While Vidmar's criticism of mediation may be true, his argument does not contend that mediation is *incapable* of obtaining procedural justice, it's just not *necessarily* so. A result of Vidmar's meta-analysis of various studies examining procedural justice aspects of both mediation and litigation concludes that participants will feel that either process is fair so long as "the dispute is treated with dignity, neutrality, and importance." *Id. Accord.* Roselle L. Wissler, *The Role of Antecedent and Procedural Characteristics in Mediation: A Review of the Research*, in *THE BLACKWELL HANDBOOK ON MEDIATION: BRIDGING THEORY, RESEARCH, AND PRACTICE 137* (Margaret S. Herrman, ed. 2006) (finding that "disputants were more likely to say the mediation process was fair if they felt they had a chance to tell their side of the dispute; they had input into the outcome; and the mediator understood their views, was neutral, and treated them with respect").

<sup>216</sup> See Welsh, *supra* note 212 at 663.

- (1) The extent to which disputants—rather than solely their attorneys—have a role in the mediation.
- (2) The extent to which mediators use facilitative techniques in the mediation.
- (3) The extent to which mediators employ joint session, rather than caucus.
- (4) The extent to which settlements are perceived as creative.<sup>217</sup>

Inclusion of the disputants in the process to the greatest degree possible is the clear theme that unifies these four measures of perceived fairness. Keeping parties involved and talking to one another, and not allowing attorneys to take over the mediation might very well be sound ways to ensure that participants perceive the mediation system as procedurally just.

### C. Indicators of Fairness

Flowing from the party-choice model of fairness and the procedural justice research discussed above are a number of objective indicators of fairness. This Chapter will take each of those objective indicators in turn and describe the underlying relevant theory and research.

#### 1. Party Autonomy Within the Proceeding

Protecting party autonomy means the mediator should: be aware that parties need to make their own decisions within mediation; allow parties to form and adhere to their own proposals; refrain from evaluation; fully explain to the parties that they are adverse to each other during the proceeding; and ensure that the parties' rights to bring counsel to the proceeding are not infringed.<sup>218</sup>

Mediators need not bluntly push the parties to settle in order to directly threaten party autonomy.<sup>219</sup> Through choices that a mediator may make throughout the process, the parties may be guided toward particular outcomes gently and indirectly, a process called "selective facilitation."<sup>220</sup> Though the mediator may appear to the parties to be outwardly neutral, such selective facilitation is a threat to party autonomy, and therefore fairness.<sup>221</sup> While assessing and regulating mediator behavior within the mediation session is problematic,<sup>222</sup> being mindful of a given mediator's attitude toward party autonomy in making a choice whether or not to settle might be a key component in selecting which persons ought to mediate in Ohio agencies.

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<sup>217</sup> See Imperati et al., *supra* note 211, at 682 (citing Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Go to Do with It?*, 79 WASH. U. L.Q. 787 (2001)). The source material argues that the lack of these four items threatens perceived fairness. This Chapter takes the view that by phrasing the four items in the positive, rather than the negative, they become potential metrics for an evaluation of the mediation system.

<sup>218</sup> Cole et al., *supra* note 182 at § 2:2 (citing Stulberg, *supra* note 23, at 944–45).

<sup>219</sup> Lande, *supra* note 184, at 864–65.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* Presumably, a mediator who "gently coerces" the parties need not even be consciously aware of it. If a mediator's biases are strong enough so that the mediator is aware of them, it follows that subtle changes in behavior during the mediation could result in selective facilitation. *See id.*

<sup>222</sup> It might very well be possible to assess a mediator's behavior in during a mediation session through the use of exit interviews or surveys which ask parties to candidly and anonymously answer a series of questions. Such exit surveys are currently employed in the workplace mediations conducted by the Ohio Commission on Dispute Resolution and Conflict Management. Interview, Maria Mone, Executive Director, Ohio Commission on Dispute Resolution and Conflict Management.

Additionally, attempting to regulate mediation to achieve higher settlement rates at the expense of decreased party autonomy is recognized as a threat to the fairness of the process.<sup>223</sup> Historically, there has been pushback against the institutionalization of mediation practices focused too narrowly on directing settlement.<sup>224</sup> Since mediator behavior that pushes the parties toward settlement tends to seriously undermine the fairness of the process by weakening the parties' autonomy, zealous encouragement of higher settlement rates might very well incentivize mediator behavior that does not promote fairness.<sup>225</sup>

## 2. Coercion-Free Settlement

Mediators can encourage party consent through properly structuring the mediation session. University of Missouri Professor of Law John Lande, who has written extensively about mediation fairness, has proposed the term "high-quality consent" to represent the "condition in which a [party] has exercised his or her responsibility for making decisions in a dispute by considering the situation sufficiently and without excessive pressure."<sup>226</sup> To help address the inherent ambiguity in his definition, Lande lists seven factors that might indicate the presence of high-quality consent:

- (1) Explicit identification of the principals' goals and interests.
- (2) Explicit identification of plausible options for satisfying these interests.
- (3) The principals' explicit selection of options for evaluation.
- (4) Careful consideration of these options.
- (5) Mediators' restraint in pressuring principals to accept particular substantive options.
- (6) Limitation on use of time pressure.
- (7) Confirmation of principals' consent to selected options.<sup>227</sup>

The idea of high-quality consent offers a way in which dispute designers may regulate a dispute system for fairness by attempting to eliminate coerced settlements. Lande's seven factors might easily be translated into a mediator training regime or evaluative instruments such as exit interviews and surveys.

## 3. Skilled and Neutral Mediators<sup>228</sup>

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<sup>223</sup> Cole et al., *supra* note 182, at § 2:7 ("[L]awmakers have chosen procedures that result in lower settlement rates but preserve the parties' ability to choose between settlement and adjudication without pressures imposed by the mediation process."); ENSURING COMPETENCE, *infra* note 251, at 12.

<sup>224</sup> Lande, *supra* note 184, at 858–59.

<sup>225</sup> *See id.* at 861.

<sup>226</sup> *Id.* at 868. Lande is explicit that consent that adheres faithfully to his definition is more of an ideal than a practical requirement. *Id.* However, the idea of high-quality consent makes for an interesting and useful way to think of non-coerced agreements.

<sup>227</sup> *Id.* at 869. Lande does go so far as to assert that the failure to include particular factors would make a mediation a failure: "Unlike the legal test for fraud, in which the absence of any element negates the existence of fraud, these factors are suggestive, and not every factor is essential." *Id.*

<sup>228</sup> For a fuller discussion of mediator qualifications, please see the accompanying Chapter 4 by Jessica Clarke.

Mediator skill and neutrality are viewed by many regulators—as reflected in statutes, regulations, and rules—as being central to a fair process.<sup>229</sup> Additionally, there is evidence that parties view mediator skill and experience to be paramount to the quality of the mediation.<sup>230</sup> Not only is mediator skill and neutrality important to policymakers, it is important in the perception of users of the system. To ensure themselves of highly qualified mediators, many jurisdictions control for these indicia of fairness through mediator qualification standards.<sup>231</sup>

Mediator neutrality is key to any mediation system.<sup>232</sup> As discussed above, both overt mediator behavior and the more subtle act of selective facilitation not only pose a threat to party autonomy, but also are central to destroying mediator neutrality. Requiring and enforcing mediator neutrality is an essential fairness concern of any mediation system. However, in their seminal mediation book *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*, Jay Folberg and Alison Taylor offer the reminder that neutrality does not equate to lack of concern for the parties and the dispute—on the contrary, the mediator "has a responsibility to promote reasonableness" through being an "agent of reality" to the parties.<sup>233</sup>

#### 4. Party Education about the Process Utilized by the Mediation Program

In this context, party education refers "to the extent and character of provision of information to parties about mediation in advance of the process."<sup>234</sup> There are two main avenues through which parties receive education about mediation systems: (1) from the mediation program itself, and (2) from their lawyers.<sup>235</sup> The more institutionalized the mediation system, the more prominent the role that information flowing from lawyers to clients will take.<sup>236</sup> Once lawyers learn how the system works, they will become a ready source of information for clients who will probably be participating in the system for the first time. However, for parties that are unrepresented by counsel, the mediation program will have to bear the brunt of educating parties both about how to access the system and about what is expected of them in mediation. After speaking with a local attorney who practices extensively in front of Ohio agencies, it seems that this could simply mean the inclusion of a brochure with the other paperwork comprising the official hearing notice.<sup>237</sup>

It is important to keep in mind that party education about the mediation system has serious implications for fairness where unrepresented parties are concerned. Unrepresented parties that don't have access to program-provided information will be at a serious disadvantage as compared to parties represented by lawyers who are repeat players and have sophisticated

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<sup>229</sup> Cole et al., *supra* note 182, at § 11:1 (neutrality) and 11:2 (skill).

<sup>230</sup> See BENNETT G. PICKER, *MEDIATION PRACTICE GUIDE: A HANDBOOK FOR RESOLVING BUSINESS DISPUTES* 24 (2d ed. 2003) ("[S]electing a *skilled* and *experienced* mediator is the single most important step a party can take to enhance the likelihood of a successful outcome.") (emphasis in original).

<sup>231</sup> COLE et al., *supra* note 182, at § 11:2.

<sup>232</sup> See FOLBERG & TAYLOR, *supra* note 207, at 247 ("The mediator serves as a check, though not necessarily a guarantor, against intimidation and overreaching.")

<sup>233</sup> *Id.*

<sup>234</sup> McEwen, *supra* note 182, at 85.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Beth Collis, attorney-at-law, Interview (Mar. 11, 2008). Likewise, having telephone and website support will most likely be the other primary means of educating parties, represented and unrepresented alike.

knowledge about the system.<sup>238</sup> Furthermore, providing education about the mediation system in advance of the mediation, through as many channels as possible, will likely have the positive impact of better preparing parties to make informed choices and achieve high-quality consent to both the process and the outcome.

### 1. Keeping Power Imbalances in Check<sup>239</sup>

Mediation opponents have argued that the very informality that makes mediation attractive also threatens the fairness of the process.<sup>240</sup> Perhaps the line that must be walked is to overcome informality to the point of protecting fairness, while not falling into a trap of imposing a structure on the process that destroys the flexibility that is key to mediation. Putting into place basic expectations of procedure and behavior, for both mediators and parties, is arguably an effective way to protect against over-informal proceedings that might also be unfair proceedings.<sup>241</sup>

Not infringing upon the parties' right to be represented by counsel clearly not only addresses party choice in the mediation, but it also is a straightforward way to try to ensure that power imbalances are minimized, if not eliminated. However, there might be some danger, especially in an institutionalized mediation system, of mediators becoming captured by repeat-player lawyers who have an interest both in pressuring adverse parties to settle and in pressuring their own clients to re-think closely-held, but possibly unreasonable, positions.<sup>242</sup> This outcome has the potential to threaten the neutrality of the mediator.<sup>243</sup> Whatever the position one takes on how involved the mediator should be in leveling power imbalances, it is clear that any threat to mediator neutrality should be fiercely resisted.

While most likely not being in a position to cure power imbalances, the mediator plays an important role in protecting fairness by maintaining an environment where inappropriate compromises are not struck.<sup>244</sup> It is the mediator's job to help the parties to understand that "demands and expectations that . . . are so . . . productive of harm or evil" ought not be

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<sup>238</sup> *Id.*

<sup>239</sup> Power imbalances are of some interest here, as the mediations being described involve state actors mediating with private citizens. Presumably, agency-parties acting with the sanction of the state government pose a greater threat of imbalanced mediation that would exist if all parties to the mediation were private citizens.

<sup>240</sup> Cole et al., *supra* note 182, at § 2:7.

<sup>241</sup> *See id.* at § 2:2.

<sup>242</sup> Lande, *supra* note 184, at 885. There are also benefits to having lawyers who are repeat players present in mediation; chiefly, lawyers can significantly reduce information costs for their clients about the process and offer a protection for standards of fairness within the process. *See* McEwen, *supra* note 1, at 87. A perceptive mediation program manager, however, always needs to be aware of the potential for adverse effects in any attempt to regulate the system—encouraging attorney participation is no different. *See id.* at 90. There is some worry that, whatever their beneficial role in protecting fairness, attorneys might be obstructive to the mediation system. *Id.* However, it seems logical that as attorneys become more educated about the mediation system and benefits such as quicker case resolution, whatever propensity they had to be obstructive will diminish. *See id.* at 82 (citation omitted). Having enough attorneys involved in the mediation system who are repeat players would also presumably reduce the education costs necessary to reduce the threat of obstructive behavior—at least at the point where new participants in the system are overshadowed by experienced ones.

<sup>243</sup> *See* Lande, *supra* note 184, at 885.

<sup>244</sup> FOLBERG & TAYLOR, *supra* note 207, at 247.

incorporated into settlements.<sup>245</sup> Beyond this role of the mediator, further involvement of the dispute system can act to mitigate power imbalances. Regulations in those jurisdictions and organizations that attempt to control for power imbalances within mediation tend to fall into four categories:

- (1) Screening cases to prevent severe bargaining imbalances from getting to mediation.
- (2) Mandating party consent to the power dynamic within the mediation.
- (3) Requiring the mediator to actively address power imbalances and to stop the mediation if such imbalances cannot be adequately addressed.
- (4) Placing the mediator in a position of assuring that whatever settlement is reached is a product of party free choice.<sup>246</sup>

## 6. Confidentiality

Because mediation lacks the formal structural protections of litigation (such as the Federal Rules of Evidence), confidentiality of the process is crucial if information revealed in mediation is to be barred from being used in subsequent proceedings to prejudice the disclosing party.<sup>247</sup> Information confidentiality alone is not sufficient to ensure a fair mediation process, but commentators, scholars, and rule makers believe that it is a necessary component.<sup>248</sup> For a discussion of the benefits of confidentiality and the interaction between the Ohio enactment of the Uniform Mediation Act and the Ohio Agency Dispute Protocol, and of the relevant policy arguments, see Chapter 7.

### **Mediation Quality: Theory and Research**

#### A. Mediation Quality Defined

The Ohio State University Professor of Law Sarah Cole and her co-authors describe quality mediation as mediation that focuses on:

- (1) Guarding users from incompetence.
- (2) Keeping users confident about the dispute system.
- (3) Maintaining user confidence in the underlying system.<sup>249</sup>

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<sup>245</sup> *Id.*

<sup>246</sup> Cole et al., *supra* note 182, at § 2:2. The belief that mediators should actively pursue and eliminate power imbalances within the mediation is widely criticized as threatening the very nature of the mediator as a neutral third party.

<sup>247</sup> Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 38 (1986).

<sup>248</sup> *Id.*

<sup>249</sup> Cole et al., *supra* note 182, at § 2:4. The American Bar Association, The Association for Conflict Resolution, and the American Arbitration Association have all endorsed a set of aspirational mediator standards that explicitly embrace the goal of maintaining user confidence in the dispute system. MODEL STANDARDS OF CONDUCT FOR

According to The Society of Dispute Resolution Professionals (SPIDR) (now known as the Association for Conflict Resolution, a national professional organization),<sup>250</sup> "competence in dispute resolution is the acquisition of skills and knowledge, the ability to use that skill and knowledge effectively and the presence of other attributes required to effectively assist others in the prevention, management or resolution of disputes."<sup>251</sup> Presumably, program managers need not only ensure that mediators are competent, but that the program design allows and encourages those mediators to provide competent and quality services.

## B. Indicators of Mediation Quality

Similar to the objective indicators of mediation fairness discussed in Section II above, there are also indicators of mediation quality. Below, each of these objective indicators is discussed in the context of the underlying relevant theory and research.

### 1. Party Empowerment

Party empowerment is the ability to make decisions within the process and the amount of power the parties maintain over the outcome.<sup>252</sup> Empowerment may come from both the parties' own exercise of free choice within the mediation and the presence of counsel to assist the parties in asserting their rights and making choices.<sup>253</sup>

### 2. Effective Negotiation

If parties are represented by counsel, such counsel should be prepared to negotiate effectively on their clients' behalf.<sup>254</sup> Strong and effective advocacy might very well obviate any perceptions on the part of the mediator that assisting parties with their negotiation skills is needed. However, it should be noted that some mediators choose to structure the mediation so as to give the parties, not the lawyers, primacy—even going so far as to seat the lawyers behind the clients, away from the table.<sup>255</sup> No matter the mediator's personal style and preferences, however, represented parties will at the very least have guaranteed assistance with their negotiation skills.

Using effectiveness of the negotiation as an indicator of quality might very well be problematic. Presumably, such a indicator would be measured by the rates of settlement achieved. However, it is worth noting again the conflicts with fairness that arise when mediation

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MEDIATORS, PREAMBLE (2005), *available at*

[www.abanet.org/dispute/documents/model\\_standards\\_conduct\\_april2007.pdf](http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf).

<sup>250</sup> Association of Conflict Professionals, [www.acrnet.org](http://www.acrnet.org) (last visited May 5, 2008).

<sup>251</sup> SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, 3 ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE 10 (April 1995) ("Competence and quality in practice is a shared responsibility.").

<sup>252</sup> Cole et al., *supra* note 182, at § 2:4.

<sup>253</sup> *See id.*

<sup>254</sup> Bruce A. Blitman, *10 Ingredients for an Effective Mediation*, in AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON MEDIATION 67 (Thomas E. Carbonneau & Jeanette Jaeggi, eds. 2006).

<sup>255</sup> Lande, *supra* note 184, at 884.

is regulated to increase settlement rates.<sup>256</sup> Any effort to regulate a mediation system to control for effectiveness of negotiation needs to be implemented with these conflicts in mind.<sup>257</sup>

### 3. Qualified Mediators<sup>258</sup>

Successful mediators are competent ones, and competent mediators provide quality mediation services.<sup>259</sup> Factors indicating competence are strong interpersonal and problem solving skills, an inclusive approach to mediation, and the ability to facilitate group discussion.<sup>260</sup> Alternatively phrased, mediators are qualified when they:

- (1) Possess some level of expertise.
- (2) Have the ability to analyze the issues at the mediation.
- (3) Are conversationally direct.<sup>261</sup>

More problematic is the proposition that mediators need substantive knowledge in the underlying dispute to be effective—authorities simply disagree on this point.<sup>262</sup> Differing opinions aside, the empirical data show that mediation experience, and no other single characteristic of the mediator, was statistically linked with higher settlement rates.<sup>263</sup>

Erecting barriers to the mediation profession is clearly the majority approach for the regulation of mediation quality.<sup>264</sup> Limiting the practice of mediation to qualified individuals is viewed by some as key to ensuring procedural quality.<sup>265</sup> However, just what constitutes appropriate and sufficient mediator qualification in order to guarantee a quality process is under much debate<sup>266</sup> and a fuller discussion is beyond the scope of this Chapter. At a minimum, it seems clear that mediators must be prepared to enforce norms and procedures that indicate mediation fairness above.

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<sup>256</sup> Cole et al., *supra* note 223, and related discussion.

<sup>257</sup> It is interesting to note that Professor Craig McEwen reports that while program training can have impacts on the techniques mediators use, those impacts might be limited in the face of willful mediators who choose to act contrary to the mediation system's professed theoretical stance. McEwen, *supra* note 1, at 87.

<sup>258</sup> For a fuller discussion of mediator qualification please see the accompanying Chapter 4 by Jessica Clarke.

<sup>259</sup> Patrice M. Mareschal, *Providing High Quality Mediation: Insights from the Federal Mediation and Conciliation Service*, REV. OF PUB. PERSONNEL ADMIN. 64 (Fall 1998).

<sup>260</sup> *Id.* (using Federal Mediation and Conciliation Service mediators as models of high competence); REPORT OF THE SPIDR COMMISSION ON QUALIFICATIONS, SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION (1989), *reprinted in* GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 169–175 (4th ed. 2003).

<sup>261</sup> Joel E. Davidson, *Successful Mediation: The Dos and Don'ts*, in AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON MEDIATION 75 (Thomas E. Carbonneau & Jeanette Jaeggi, eds. 2006) (it is worth noting that Davidson's view on what constitutes a qualified mediator is considerably more condensed than most).

<sup>262</sup> Mareschal, *supra* note 259, at 64 (arguing that substantive knowledge is necessary for a mediator to be competent); *cf.* REPORT OF THE SPIDR COMMISSION ON QUALIFICATIONS, *supra* note 95 ("[P]erformance criteria . . . are more useful and appropriate in setting qualifications to practice than is the manner in which one achieves those criteria (such as formal degrees, training, or experience).").

<sup>263</sup> Goldberg et al., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 161 (4th ed. 2003).

<sup>264</sup> Cole et al., *supra* note 182, at § 11:1.

<sup>265</sup> *See id.*

<sup>266</sup> *Supra* notes 260-263 and related discussion.

#### 4. Reliable Agreements

It is the view of some scholars that the more complex the legal issues underlying the agreement, the more important third party review is to obtain a fair and high-quality agreement.<sup>267</sup> This review need not necessarily be done by a judge, and Folberg and Taylor contemplate it being done by a third-party attorney.<sup>268</sup> Currently, mediated agreements completed at the Ohio Board of Tax Appeals are subject to final approval by the Board.<sup>269</sup> Presumably, such high rates of settlement compliance as found at the Ohio Board of Tax Appeals are attributable to many, not clearly identified, categories; however, the high compliance rate found by the Board might very well speak to the perception of fairness that the current Tax Appeals Board mediation system might be enjoying. It is also plausible that agency mediation involving repeat players has built-in quality control feedback loops.<sup>270</sup> Such feedback loops are dependent upon the reluctance of parties who will likely deal with each other again to earn a reputation as being one who does not abide by settled commitments.<sup>271</sup>

#### Conclusion

Fairness and quality are vital to a strong Ohio Agency Mediation Protocol. These characteristics are not created solely by program managers, but rather are strongly shaped by both parties and mediators, especially in the early life of the program.<sup>272</sup> Once norms of practice become institutionalized, mediators must adhere to and enforce those generally accepted definitions of fairness and quality.<sup>273</sup>

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<sup>267</sup> FOLBERG & TAYLOR, *supra* note 207, at 248.

<sup>268</sup> *Id.* Current Ohio agency practice is to present any negotiated or mediated settlement to the relevant Board members for review and entry as a final order. Wang, *supra* note 201; Collis, *supra* note 237.

<sup>269</sup> Wang, *supra* note 201.

<sup>270</sup> This has been alternatively described, outside of the alternative dispute resolution context, as the "reputation economy." The driving idea is that personal reputation can be the equivalent of cash in the "monetary economy"—forming the basis of market transactions. An example of the market value of personal reputation is the ranking given to sellers on the eBay.com auction site that drives some consumers to deal solely with highly-ranked sellers. Interview with Chris Anderson, WIRED Editor-in-Chief, *The Charlie Rose Show* (PBS television broadcast Mar. 7, 2008).

<sup>271</sup> This logic breaks down when unrepresented parties are contemplated. It is far more likely for attorneys who frequently represent different parties in agency hearings to have reputational concerns than for those individuals who are either one-time or infrequent parties to these kinds of disputes.

<sup>272</sup> Lande, *supra* note 184, at 854.

<sup>273</sup> *Id.* at 857.

## **CHAPTER FOUR: MEDIATOR SELECTION, DISCIPLINE, & LIABILITY**

By Jessica Clarke

### **Executive Summary of Recommendations for Ohio Agency Plan**

#### **Mediator Selection**

- All agencies, at a minimum, should use mediators who have completed law school and an approved training in mediation.
- For the default plan, the proposed plan for agencies that do not have a reason to pursue a plan that differs from other agencies, all willing hearing examiners should serve as mediators, but not for disputes in their own agency.
- The Ohio Commission on Dispute Resolution and Conflict Management (“OCDRCM”) should be in charge of training hearing examiners as mediators and assigning them to disputes.
- In the future, the OCDRCM should consider instituting a shared neutrals plan, in which hearing examiners would be assigned to mediations for similar agencies to their own.
- In the future, the OCDRCM should consider giving parties a choice in their mediator; if the parties do not want a hearing examiner to serve as mediator, the parties could choose to have a volunteer attorney mediator, who would also be trained by the Commission.
- In the future, the OCDRCM should consider allowing hearing examiners to conduct mediations in pairs, allowing more experienced mediators to lead the mediation and the less experienced mediators to gain exposure on how to conduct a mediation.

#### **Mediator Discipline**

- The OCDRCM should not issue formal punishment for hearing examiner mediators. Instead, the OCDRCM could simply stop assigning hearing examiners that have problems in mediations.

#### **Mediator Liability**

- The mediators should be aware that their actions could open them up to civil liability; however, it is likely that hearing examiners are immune from liability, making it unnecessary to enact a statute granting immunity for mediators.

## **Mediator Selection**

### **Recommendations for Ohio Agencies on Mediator Selection**

The recommendations are divided into those that could be immediately adopted and those that should be incorporated in the future after the agency plan is further developed.

#### *Recommendations for Immediate Enactment*

This plan offers two recommendations for immediate adoption in the default plan, the model plan from which some agencies may deviate based on separate needs. First, this author recommends that hearing examiners should serve as mediators for the agency mediations. Hearing examiners, however, should not mediate in the agency that employs them. If hearing examiners become organized into one central panel and are no longer employed by a particular agency,<sup>274</sup> hearing examiners should be allowed to mediate in any agency.

Second, the Ohio Commission on Dispute Resolution and Conflict Management (“OCDRCM”) should train all hearing examiners and assign them to particular agencies for the mediation. All hearing examiners should have the opportunity to attend mediator training and should not be prohibited from becoming a mediator based on any other qualifications.

Agencies that choose not to adopt the default plan and instead adopt their own mediation protocol should use mediators that, at a minimum, have completed law school and have been trained in mediation.

#### *Recommendations for Future Adoption*

This plan offers three recommendations for the default plan that should not be adopted immediately but could be implemented after the mediation plan has been successfully instituted in Ohio agencies. First, the Commission should consider instituting a shared neutrals plan, in which hearing examiners would be assigned to mediations for agencies that are similar to their own. If the hearing examiners are not centralized and are still attached to particular agencies, the OCDRCM could institute this shared neutrals plan. The plan would group together agencies dealing with similar areas of law (for example, the Ohio EPA and Ohio Department of Natural Resources). Those agencies would then use hearing examiner mediators from those similar agencies. In other words, the plan would ensure that hearing examiners for the EPA mediated for the Department of Natural Resources and vice versa.

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<sup>274</sup> See Agency Adjudication in Ohio and the Central Panel Plan Memorandum, Chris McNeil, March 27, 2007. Therefore, hearing examiners could be assigned to any agency.

Second, the Commission should consider giving parties a choice in their mediator; if the parties do not want a hearing examiner to serve as mediator, the parties could choose to have a volunteer attorney mediate. This plan recommends that the Commission look into the availability of volunteer mediators and advises that volunteer mediators undergo the same training as hearing examiners. The parties would then have a choice in whether they would like a hearing examiner or a volunteer attorney. If the parties cannot agree on who should serve as the mediator, a hearing examiner would mediate.

Third, the Commission should consider allowing hearing examiners to conduct mediations in pairs, allowing more experienced mediators to lead the mediation and less experienced mediators to gain exposure on how to conduct a mediation. This co-mediation plan could be instituted after hearing examiners are initially trained and more hearing examiners or volunteers are interested in being trained for agency mediations.

### **Benefits of Mediator Selection Recommendations**

This section provides the benefits of the previously discussed recommendations. Overall, these recommendations are an attempt to reconcile the interests of the citizens and businesses of Ohio, their attorneys, the Administrative Adjudication Centralization Committee (“Committee”), and the agencies. These recommendations are particularly beneficial because they serve as a compromise between ensuring a quality program for the citizens and businesses of Ohio, providing predictability for the attorneys participating in mediation, while also satisfying the Committee and Governor’s goals, which include instituting a uniform, cost neutral, and effective ADR program for Ohio agencies.

#### *Benefits of Recommendations for Immediate Adoption*

This section describes why the immediate adoption recommendations are beneficial and why they should be incorporated into the default and individual agency plans.

### **Benefits of Hearing Examiners Serving as Mediators**

Allowing hearing examiners outside of their particular agency to serve as mediators is beneficial because using them: (1) keeps the plan cost neutral, (2) lessens the fear of agency bias, (3) ensures that all mediators have legal knowledge, and (4) provides a level of predictability and uniformity for parties and attorneys to rely on.

#### *Cost-Neutral Plan*

The use of hearing examiners as mediators comports with the Committee’s goal of a cost-neutral plan.<sup>275</sup> Hearing examiners are already employees of the state and would not result in a further cost to employ them as mediators.

#### *Decreases Fear of Agency Bias*

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<sup>275</sup> January 29, 2008, Interview with members of Advantage Ohio Regulatory Reform Committee.

Using hearing examiners for mediations outside of their particular agency lessens the fear of agency bias. Procedural justice researchers repeatedly find that when a mediator appears biased, participants are less likely to view the process as fair and more likely to be unsatisfied with the mediation process as a whole.<sup>276</sup> If the parties are unsatisfied with the process they would be less willing to come back to mediation in the future, and it may be more difficult for the mediator to help the parties settle the dispute. A plan that allowed hearing examiner mediators to mediate for the same agency disputes in which they conduct investigations would lead parties to fear that the mediator was biased towards the agency. That fear, however, is reduced when the hearing examiners mediate outside of their particular agency, resulting in the mediator having no real connection to either party.

### *Ensures Legal Knowledge of All Mediators*

By using hearing examiners as mediators, the plan would ensure that all mediators have general legal knowledge and an expertise in administrative law. Although not all hearing examiners are attorneys, they all have legal experience from judging the merit of agency disputes and some have either law degrees or some form of legal training.<sup>277</sup> One might argue, however, that all mediators need thorough knowledge in area of the dispute that the mediator will be mediating. Scholars in this field are not in agreement on the necessity of the mediator having subject-matter expertise in the area of the dispute.

Some scholars argue that mediators can successfully and competently conduct mediations on subjects that they are not familiar and that mediators are often in mediation without expertise in the subject matter of the dispute.<sup>278</sup> A study conducted by Roselle Wissler, a sociologist, along with the Ohio State University College of Law Database Project examined 650 civil disputes across four Ohio counties that were mediated by court-appointed volunteer mediators. All mediators in this study had law degrees but not all had expertise in the particular subject matter of the dispute that they mediated. This study found that attorneys in those mediations were more impressed with the mediators when they had subject-matter expertise of the legal issues of the dispute.<sup>279</sup> However, the fact that the mediator had subject-matter expertise did not affect settlement rates, indicating that the depth of the mediator's knowledge in the area of the

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<sup>276</sup> Joseph P. Tomain & Jo Anne Lutz, *A Model for Court-Annexed Mediation*, 5 OHIO ST. J. ON DISP. RESOL. 1, 13 (1989); EDWARD BRUNET, CHARLES B. CRAVER & ELLEN E. DEASON, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE CASES AND MATERIALS* 155 (3d ed. 2006).; Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. of Disp. Resol. 101, 108 (2002); See Nancy Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 663 (2004); Chris Guthrie, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 891 n.19 (listing studies showing importance of procedural justice to disputants' satisfaction with mediation.); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U L. Q. 787, 820-26 (2001).

<sup>277</sup> See Agency Adjudication in Ohio and the Central Panel Plan Memorandum, Chris McNeil, March 27, 2007. Therefore, hearing examiners could be assigned to any agency.

<sup>278</sup> W. Lee Dobbins, *The Debate over Mediator Qualifications: Can They Satisfy The Growing Need to Measure Competence without Barring Entry into the Market?*, 7 U. Fla. J. L. & Pub. Pol'y 95, 100 note 39, 40 (1995).

<sup>279</sup> STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS, SARAH R. COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 155 (5th ed. 2007).

dispute had insignificant effects on the success of the mediation itself and that general legal knowledge may have been enough for the mediator to successfully conduct the mediation.<sup>280</sup>

Proponents of this requirement, however, argue that if a mediator has subject-matter expertise in the area of the dispute, the mediation process would proceed more quickly because the parties do not waste time explaining basic principles of the issues.<sup>281</sup> Ohio's Board of Tax Appeals also stresses the importance of using mediators with subject-matter expertise in the area of their disputes.<sup>282</sup> The Board uses mediation to resolve disputes, and the agency's attorney hearing examiners serve as mediators.<sup>283</sup> One of the reasons that the Board uses hearing examiners from its agency to serve as mediators for their program is because of the expertise that they already have in the area of tax law.<sup>284</sup> Tax law can be particularly complex, and the Board is convinced that this type of knowledge is necessary for the mediation process.<sup>285</sup> The Board, however, has not used mediators other than hearing examiners from their agency and cannot say with certainty that mediators without tax expertise could not successfully mediate tax disputes.<sup>286</sup>

Although some, including the Board of Tax Appeals, argue that subject-matter expertise is necessary,<sup>287</sup> these hearing examiners would likely have enough general legal knowledge and experience in agency adjudication to understand and be able to conduct the mediation. All hearing examiners have knowledge of administrative law and how the agency process works. Furthermore, the role of the mediator is not to give a ruling such that the mediator would need a thorough understanding of the legal implications of the dispute.<sup>288</sup> Instead, the role of the mediator is to assist in the negotiation between the parties by using techniques to help the parties reach a mutual agreement.<sup>289</sup> With the training requirement and the hearing examiner's background in administrative law, the hearing examiner mediators would be more than adequately prepared to successfully conduct the mediations.

For those agencies that decide not to adopt the default plan and develop an individualized plan, they should recruit and use mediators who have completed law school. By instituting such a requirement, the agencies would be ensuring that all mediators have some legal knowledge to help understand the underlying legal issues that they would potentially deal with in agency mediations. Additionally, because it may be difficult for the agency to recruit enough individuals to mediate who also have subject-matter expertise in the area that the agency covers,

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<sup>280</sup> *Id.*

<sup>281</sup> Joseph B. Stulberg, *Training Intervenors for ADR Processes*, 81 KY. L. J. 977, 990 (1993); Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalization*, 1997 B.Y.U. L. REV. 687, 704 (1997).

<sup>282</sup> February 26, 2008, Interview with Tom Wang, Attorney-Examiner & Mediation Coordinator for the Ohio Board of Tax Appeals.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> The IRS is willing to use non-IRS mediators, but some scholars claim that tax law too complex for non-IRS mediators to mediate disputes. See Amy S. Wei, *Can Mediation be the Answer to Taxpayers' Woes? An Examination of the Internal Revenue Service's Mediation Program*, 15 OHIO STATE JOURNAL ON DISP. RESOL. 549, 567 (2000).

<sup>288</sup> See Chapter 2.

<sup>289</sup> BRUNET, *supra* note 276 at 199.

agencies would have a better time finding mediators if the only requirement was completing law school.

### *Creates a Predictable and Uniform Process*

By using only hearing examiners, this recommendation creates a uniform plan that ensures predictability for the parties and their attorneys who participate in agency mediations. Both the Committee and an attorney who frequently represents clients in agency disputes mentioned the importance of having a predictable plan.<sup>290</sup> The attorney stated that such a plan would allow the attorney to easily explain to the client, regardless of the agency, who will serve as mediator, the general qualifications of the mediator, and how the mediation will be conducted.<sup>291</sup> This recommendation ensures that the information on who serves as mediator and that mediator's qualification is clear for all agencies that adopt the default plan.

### **Benefits of OCDRCM Training and Assigning Mediators**

The recommendation to have the Commission train and assign mediators is beneficial for the following reasons: (1) mediator training is a necessary requirement for potential mediators, (2) training with the Commission maintains a cost-neutral plan, and (3) having the Commission assign mediators helps with the administration of this plan.

### *Necessity of Mediator Training*

Hearing examiners and volunteer attorneys who would serve as mediators<sup>292</sup> should be trained in mediation in order to understand how they should be conducted. Trainings can help these new mediators understand the process, the importance of neutrality, ways to enhance party communications, and tips to help the parties' generate solutions, among others.<sup>293</sup> Although some studies show that training alone is not enough to ensure the success of the mediator,<sup>294</sup> many scholars in this area agree that training is a necessary requirement before one mediates.<sup>295</sup> In fact, for court-annexed mediation programs, many states have required by statute that their mediators receive training.<sup>296</sup> One survey conducted of volunteer mediation centers found that they ranked training as the most important qualification for allowing volunteers to mediate in their centers.<sup>297</sup>

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<sup>290</sup> January 29, 2008, Interview with members of Advantage Ohio Regulatory Reform Committee; March 25, 2008, Interview with Chris Schraff, Partner at Porter, Wright, Morris, & Arthur, LLP.

<sup>291</sup> March 25, 2008, Interview with Chris Schraff, Partner at Porter, Wright, Morris, & Arthur, LLP

<sup>292</sup> See Part I B.

<sup>293</sup> Charles Pou, Jr, *Assuring Excellence, or Merely Reassuring? Policy and Promoting Mediator Quality*, 2004 J. OF DISP. RESOL. 303, 308 (citing Test Design Project, Performance-Based Assessment Methodology for Use in Selecting, Training and Evaluating Mediators 1, 16-17, available at <http://www.covenor.com/madison/method.pdf>.)

<sup>294</sup> See Stephanie A. Henning, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189, 196 (1999).

<sup>295</sup> Dobbins, *supra* note 278, at 99; Society of Professionals in Dispute Resolution, Report on the Commission on Qualifications 2 (1989); Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571, 601 (2004).

<sup>296</sup> Dobbins, *supra* note 278, at 99 n. 35 (citing nine state statutes that have required mediator training).

<sup>297</sup> Henning, *supra* note 294 at 189 n. 100 (citing Bruce C. McKinney et al., A Nationwide Survey of Mediation Centers, 14 Mediation Q. 155, 164 (1996)).

Although training alone may not be sufficient enough to ensure the success of the mediator, trainings in mediation will help future mediators understand their role. In addition, the Chief Circuit Mediator for the Sixth Circuit court-annexed mediation program stated that mediator training, for this program, led to greater uniformity in how mediations were conducted.<sup>298</sup> A uniform practice allows the parties and attorneys for those parties to better anticipate what will occur in the mediation. Therefore, the examiners and volunteer mediators should receive training before mediating for Ohio agencies.

All agencies, regardless of whether they chose to adopt the default plan or whether they chose to create an individualized plan, should ensure that all mediators are properly trained in mediation. As previously explained, training in mediation is a beneficial prerequisite for becoming a mediator. Agencies could ensure that all mediators are properly trained in two ways. First, the agencies could compel potential mediators to complete the OCDRCM training. Second, if the potential mediator already has previous training in mediation, the agency could seek approval from the OCDRCM that these potential mediators has completed sufficient training to prepare them for agency mediations.

#### *Cost-Neutral Training with OCDRCM*

This recommendation supports the goal of having a cost-neutral plan. Because the Commission already conducts these trainings,<sup>299</sup> the program would not need to expend extra time and money developing a training program; instead, the Commission would only need to gear the training toward the agency mediations. These trainings would likely include information on the importance of neutrality in mediation, tips on how to enhance communication between the parties, tips on how to generate solutions for the parties, explanations on confidentiality and ethics, as well as the opportunity to participate in mock mediations or role plays.<sup>300</sup>

#### *Eases Administratrability Concerns*

Using the Commission to train and assign mediators allows the program to be easily administered. Having a centralized and separate agency assigning mediators will allow the agency to stay out of choosing the mediator. Furthermore, it allows the parties to feel at ease that the mediator is not biased in favor of the agency.

#### *Benefits of Recommendations for Future Enactment*

This section describes why the recommendations for future enactment are beneficial and why agencies and the OCDRCM should consider incorporating them into the default and individual agency plans in the future.

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<sup>298</sup> Robert W. Rack, *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, 17 OHIO ST. J. ON DISP. RESOL 609, 616 (2002).

<sup>299</sup> February 19, 2008, Interview with Maria Mone, Executive Director of the Ohio Commission on Dispute Resolution and Conflict Management.

<sup>300</sup> See Chapters 5 and 7.

## Benefits of Shared Neutrals Plan

The shared neutral plan is beneficial because it resolves the issue of subject-matter expertise. If there is opposition among agencies about using hearing examiners who have no background in the underlying law of the dispute, a shared neutrals plan might serve as a suitable compromise. Indiana uses a Shared Neutral Plan, where five Indiana agencies share mediators.<sup>301</sup> The Department of Natural Resources, Department of Environmental Management, Natural Resources Commission, Office of Environmental Adjudication, and the Emergency Management Agency all use mediation as a means to resolve dispute and participate in the Shared Neutrals Program.<sup>302</sup> This program trains employees from these five agencies and makes mediators available for any of the participating agencies.<sup>303</sup> With the Indiana Plan, all of the agencies in the shared neutrals plan deal with environmental law.<sup>304</sup> Therefore, the mediator would likely already have expertise in the area of environmental law.

This recommendation should not be adopted immediately, but could be adopted in the future. Ohio may be centralizing hearing examiners into one office as opposed to having hearing examiners attached to particular agencies.<sup>305</sup> If this move is made, then there would be no need to create a shared neutrals program because hearing examiners would no longer be attached to particular agencies. However, if this centralization effort does not occur, the Commission should consider whether agencies could be organized into groups to create a shared neutrals plan.

## Benefits of Parties' Choice of Mediator

The recommendation to give parties a choice in the mediator between a hearing examiner and a volunteer attorney mediator is beneficial because it gives the parties a stake in the mediation process. Procedural justice researchers have repeatedly found that participants are more likely to feel more satisfied with mediation when they actively participate in selecting the mediator.<sup>306</sup> These researchers have found that the converse is also true that the parties feel that the process has been imposed on them and feel less satisfied when they have no choice in who serves as mediator.<sup>307</sup>

The IRS currently provides the parties that participate in its mediation program with the opportunity to choose the mediator.<sup>308</sup> The IRS offers mediation for small businesses and self-

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<sup>301</sup> Indiana Shared Neutrals Program, Nonrule Policy Documents, *available at* <http://www.in.gov/nrc/2374.htm>.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> See Agency Adjudication in Ohio and the Central Panel Plan Memorandum, Chris McNeil, March 27, 2007.

<sup>306</sup> Jeff Kichaven, "Let Them Pick the Mediator. We Don't Care," 914 PLI/Pat 145, 149 (2007); Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GEORGIA L. REV. 431, 492 (1996); Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 902 (1998).

<sup>307</sup> See Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. OF DISP. RESOL. 101, 108 (2002) (describing empirical research on procedural justice and party satisfaction).

<sup>308</sup> Internal Revenue Service, Information on Alternative Dispute Resolution & Fast Track Settlement, *available at* <http://www.irs.gov/individuals/article/0,,id=96779,00.html>.

employed taxpayers for tax disputes.<sup>309</sup> This program started as a one-year pilot program, but after the success of the pilot, was permanently instituted.<sup>310</sup> The IRS procedure allows these taxpayers to participate in mediation and choose among available IRS employees as mediator.<sup>311</sup> Also, if they feel uncomfortable with only having an IRS employee as mediator, the parties have the option of selecting a non-IRS employee as mediator.<sup>312</sup>

Based on empirical evidence and the example of successful use in the context of the IRS agency mediations, the Commission should consider giving the parties a choice in mediator. However, this recommendation should not be enacted immediately because of the time it will take to find and train volunteer attorney mediators in addition to hearing examiners. The Commission will already have the burden of training and assigning hearing examiners; adding the duty of locating and training volunteer mediators would only further burden the Commission. Once the program is fully implemented using hearing examiners, the Commission should then consider incorporating volunteer attorney mediators into the group of possible mediators.

### **Benefits of Co-Mediation**

The recommendation to use co-mediators to help train mediators who have less mediation experience is beneficial because it allows experienced mediators to mentor new mediators and helps the new mediators better transition into the role. New mediators would have the opportunity to observe an actual mediation and put their newly acquired skills into practice without having to completely conduct a mediation on their own.<sup>313</sup> The reason that co-mediation should not be instituted immediately is that co-mediation presumes that some of the mediators that would be used have previous mediation experience, which might not necessarily be true depending on who is chosen to be a mediator. If the program does have a pool of mediators with previous experience in mediation, the program would benefit from using them to help the development of those mediators without experience.

### **Reasons for Rejecting Other Options for Mediator Selection**

The above recommendation took into consideration many factors including the role that the mediator plays in the mediation process, the goals of the Ohio agency plan, and the necessary qualifications of a mediator. There were other options that were considered, but ultimately were rejected based on those factors. This section will provide the other options that were considered and why those options were not recommended.

#### *Private Mediators*

Agencies could hire private mediators to mediate agency disputes; however, the cost of using private mediators outweighs any benefits of using them. One can find private mediators

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<sup>309</sup> *Id.*

<sup>310</sup> See Sharon Katz Pearlman, *IRS Fast Track Mediation and Settlement*, The CPA Journal, June 2003 available at <http://www.nysscpa.org/cpajournal/2003/0603/dept/d066803.htm>.

<sup>311</sup> See IRS Bulletin No. 2002-26, available at <http://www.irs.gov/pub/irs-irbs/irb02-26.pdf>.

<sup>312</sup> *Id.*

<sup>313</sup> See Roselle L. Wissler & Robert W. Rack, Jr., *Assessing Mediator Performance: The Usefulness of Participant Questionnaires*, 2004 J. OF DISP. RESOL. 229, 231 n. 17 (2004).

through various mediation services such as American Arbitration Association (“AAA”),<sup>314</sup> JAMS,<sup>315</sup> or Global Arbitration and Mediation Service (“GAMS”),<sup>316</sup> just to name a few possible organizations. Hiring private mediators can be beneficial because these mediators are already trained, which reduces any training cost. Additionally, because the mediators are not government employees, those participating in mediation would perceive the mediators as being a truly neutral party. As previously stated, parties’ perception of the mediator’s neutrality is crucial to the parties’ satisfaction with the mediation process.<sup>317</sup>

Although private mediators provide some benefits, they are not a cost efficient option. Private mediators are typically paid on an hourly basis<sup>318</sup> and if the mediators are not located in the area where the mediation is to be held, the state would also have to pay for the cost of travel for the mediator. Using private mediators would impose a huge cost for a widespread program that seeks to use mediation in over 90 agencies.

In addition to the cost issues, private mediators also require the government to relinquish some control over the process by allowing outsiders to run the process of resolving disputes in agencies.<sup>319</sup> It would require the agency to monitor non-employees to ensure the quality of their work.<sup>320</sup> Because of the costliness of private mediators and the fact that the government would have to relinquish control over the process, only using private mediators would not be the best option for the default plan or for individual agencies to use.

#### *Volunteer Mediators*

Agencies could also recruit and use volunteer attorney mediators; however, relying exclusively on volunteers might make it difficult to have enough mediators for all agency disputes. Small Claims Court in Ohio successfully uses volunteer mediators by asking lawyers in the Columbus community to volunteer to mediate disputes.<sup>321</sup> Also, the D.C. Department of Human Rights uses volunteer mediators to service its ADR program.<sup>322</sup> For the Ohio agency plan, the OCDRCM could train lawyers who would like to volunteer as mediators for the program. The benefit of using volunteer mediators is that they would not impose an additional cost. Additionally, parties would perceive that the volunteer mediators, like private mediators, as neutral and not biased in favor of the agency.

Volunteer mediators present a good option for this program to use; however, exclusively relying on volunteer mediators would pose problems. First, it is hard to determine the number of willing volunteer attorney mediators across Ohio. The program might not be able to recruit

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<sup>314</sup> For more information on AAA, *see* [www.adr.org/about](http://www.adr.org/about).

<sup>315</sup> For more information on JAMS, *see* [www.jamsadr.com](http://www.jamsadr.com).

<sup>316</sup> For more information on GAMS, *see* [www.globalarbitrationmediation.com](http://www.globalarbitrationmediation.com).

<sup>317</sup> *See supra* note 276.

<sup>318</sup> *See* Cost of AAA Mediation, *available at* <http://www.adr.org/sp.asp?id=33581>.

<sup>319</sup> Hodges, *supra* note 306 at 491.

<sup>320</sup> *Id.*

<sup>321</sup> *See* Models of Funding for Ohio Court Mediation Programs, *available at* [http://www.sconet.state.oh.us/Dispute\\_Resolution/funding](http://www.sconet.state.oh.us/Dispute_Resolution/funding) (providing a chart that indicates the type of mediation program and whether they use volunteer attorney mediators).

<sup>322</sup> Hodges, *supra* note 306 at 491 n. 320.

enough volunteers across Ohio to serve the needs of the program.<sup>323</sup> Second, the citizens of Ohio and businesses who may be party to agency disputes might be concerned with the use of volunteer mediators. There may be some concern that volunteer mediators would not have the same dedication or experience that they are used to in the agency adjudication process.<sup>324</sup> Volunteer mediators, although they do provide an inexpensive option, should not be exclusively used in this program. Instead, as previously suggested,<sup>325</sup> volunteer attorney mediators, after being recruited and trained, could be incorporated into the program with the hearing examiner mediators, giving the parties a choice in the mediator.

### *Hearing Examiners Attached to Agency*

This plan also considered proposing that hearing examiners should mediate for the agency that employs them. This option, however, creates the risk that the parties will perceive the mediator to be biased in favor of the agency. Additionally, it also creates the risk of actual bias on their part.

Some agency mediation plans use their employees to mediate. First, the federal Environmental Protection Agency uses its administrative law judges to serve as mediators.<sup>326</sup> All ALJs are trained mediators who are accustomed to hearing environmental issues, but instead of serving as a judge they serve as neutral mediators. The EPA has used this model to successfully mediate high-stake cases between the EPA and Pfizer, NIBCO, Inc., and the U.S. Navy to name a few.<sup>327</sup> Also, as previously discussed, the Ohio Board of Tax Appeals also uses hearing examiners within the agency to serve as mediators.<sup>328</sup> The Board has nine attorney hearing examiners.<sup>329</sup> The mediators have no contact with the hearing examiner that is dealing with merits of the case.<sup>330</sup> The Board stresses that it uses hearing examiners internal to the agency because of their expertise in the area of tax law.<sup>331</sup>

Although other agencies find using their employees as beneficial, there are costs associated with the use of agency-employed hearing examiners as mediators, making them a poor option for Ohio agencies. The parties might perceive the mediator as biased because of the mediator's association with the agency, and there is potentially a risk that the mediator would actually display bias in the mediation. As previously discussed, parties perception of mediation is often based on whether they feel that the process is fair.<sup>332</sup> It also raises the concern that hearing examiner mediators would be tempted to share confidential information shared in the mediation with the merits hearing examiner even though Ohio's Uniform Mediation Act

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<sup>323</sup> See *id.* at 488 n. 308.

<sup>324</sup> See Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 148 fn. 213 (2005).

<sup>325</sup> See Part I B.

<sup>326</sup> Environmental Protection Agency, About the Office of Administrative Law Judges, *available at* [www.epa.gov/oalj/about.htm#adr](http://www.epa.gov/oalj/about.htm#adr)

<sup>327</sup> Environmental Protection Agency, Alternative Dispute Resolution Enforcement/Compliance ADR Success Stories, *available at* <http://www.epa.gov/Compliance/civil/adr/success.html>.

<sup>328</sup> February 26, 2008, Interview with Tom Wang, Attorney-Examiner & Mediation Coordinator for the Ohio Board of Tax Appeals.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> See *supra* note 276.

prohibits the practice, as discussed in Chapter 7. These are substantial risks that could jeopardize the mediation program.<sup>333</sup> Instead of risking this situation, the best method would be to assign hearing examiners to agency mediations outside of the agency for which they are employed.

### *Additional Mediator Qualifications Considered*

There were additional qualifications for mediators that were considered but ultimately rejected. These considerations included requiring all mediators, before mediating for agency disputes, to have a minimum number of outside mediation experience, complete a written examination on mediation, and satisfactorily perform in a mock mediation.

There are two reasons why these qualifications were rejected. First, these qualifications may unnecessarily decrease the number of potential mediators. Although one might think that placing additional qualifications on the mediators such as these would ensure their quality, studies generally find that there is no correlation between these credentials and increased mediator performance.<sup>334</sup> Furthermore, placing additional qualifications on potential mediators before they can mediate may eliminate potentially successful mediators. In terms of requiring previous mediation experience, such a requirement would severely limit the number of available mediators for the program and limit the diversity of mediators.<sup>335</sup> In terms of a mediator examination requirement, the OCDRCM training already has an evaluation at the end of the training that allows trained mediators to receive feedback from trainers for mock mediations.<sup>336</sup> These evaluations are given without fear that they will be prevented from mediating in the program.<sup>337</sup>

Second, a requirement that all mediators pass a written examination or satisfactorily perform in a mock mediation would be costly and time consuming to administer. Written exams would need to be created, given to all potential mediators, and graded. A performance exam would require OCDRCM to watch and provide a comprehensive review for all potential mediators, which would involve a considerable amount of time to test all mediators involved in the over 90 agencies that could potentially be involved in the mediation plan. Instead, the OCDRCM could simply give feedback during mock mediations as is currently instituted. Because of the costliness and the potential to eliminate otherwise qualified mediators, these qualifications were ultimately rejected.

## **Mediator Discipline**

### **Recommendation for Ohio Agencies on Mediator Discipline**

This plan recommends that hearing examiner mediators and volunteer attorney mediators are not formally disciplined; instead, when mediators have problems or concerns are raised about

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<sup>333</sup> See Chapters 5 and 7 for further discussion on the dangers of conveying confidential information outside of the mediation.

<sup>334</sup> Wissler, *supra* note 313 at 232 n. 24 (2004); Goldberg, *supra* note 279 at 155.

<sup>335</sup> See Goldberg, *supra* note 279 at 155-57.

<sup>336</sup> February 19, 2008, Interview with Maria Mone, Executive Director of the Ohio Commission on Dispute Resolution and Conflict Management.

<sup>337</sup> *Id.*

a mediator, the OCDRCM or person in charge of assigning mediators for the agency should simply stop assigning that mediator to mediations.

### **Benefits of Mediator Discipline Recommendation**

A more lenient approach to mediator discipline is beneficial for the following reasons: (1) it maintains the goal of a cost-neutral approach, (2) it eliminates fear of discipline on behalf of the mediator, and (3) it is a process that can be easily administered.

#### *Cost-Neutral Approach*

This recommendation to enact an informal procedure for disciplining mediators observes the Committee's goal to institute a cost-neutral plan. A plan that simply requires the OCDRCM or assigning agency personnel to limit the amount that they assign the problematic mediator would not impose any cost.

#### *Eliminates Fear of Discipline*

One of the major benefits of this informal discipline procedure is that it puts mediators at ease. For the default plan, as previously recommended, hearing examiners would serve as mediators. Because hearing examiners would be required to take on additional tasks, it would be unfair to subjugate them to punishment for failing to comply with all duties of a mediator. This informal procedure would help eliminate any fear that hearing examiners might have about becoming a mediator.

#### *Eases Administrability Concerns*

An informal plan for disciplining mediators is also easily administered. Instead of instituting a formal plan that requires more time and effort on the part of the OCDRCM or the individual agency, the agencies could use an informal plan that requires minimal oversight on their part. If parties complain about a mediator or the mediator demonstrates a lack of understanding of mediator duties, the OCDRCM or assigning agency personnel could simply stop assigning the mediator to mediations, eliminating any formal procedure for them to institute and monitor.

### **Reasons for Rejecting Other Options for Mediator Discipline**

In determining what option to adopt for mediator discipline, two other options were considered. These options included: (1) a formal grievance procedure, and (2) a peer review mechanism. Because of the costliness and the formality of these processes, these options were ultimately rejected.

#### *Formal Grievance Procedure*

A formal grievance procedure was considered for Ohio agencies; however, such a procedure would not be beneficial for Ohio agencies. A formal grievance procedure would

allow parties in a mediation to file any complaints they had against the mediators. If a complaint was filed, the OCDRCM or individual agency would investigate the allegations and issue the necessary punishment. A study of the grievance procedures used court-annexed mediation programs in Florida, Georgia, Minnesota, Virginia, and Maine found that grievance procedures are rarely used.<sup>338</sup> This procedure, however, would add more duties for the OCDRCM, may be costly to administer, and would add unnecessary fear for participating mediators.

The OCDRCM would have to institute a formal procedure for parties to file a complaint against the mediator. They would also need to determine how the investigation process would work to determine what violations occurred in the mediation. Additionally, the OCDRCM would then have to determine the appropriate punishment for the mediator's actions. This process of determining the procedure and instituting it would take considerable time and effort on the part of the OCDRCM and may impose additional costs for it to be administered. Furthermore, the hearing examiner mediators may become fearful that anytime a party was unhappy with the results of a mediation, they would be subject to an investigation and possible punishment. By avoiding a more formal procedure, the hearing examiner mediators would be put at ease and could concentrate on their role as mediator.

### *Peer Review Mechanism*

A peer review mechanism was also considered for Ohio agencies but was ultimately rejected. With this mechanism, a representative from the OCDRCM or a particular agency would randomly observe the mediators to ensure that they are employing proper mediation techniques and following standards of mediator conduct.<sup>339</sup> If the person observing the mediation reports conduct that demonstrates poor mediation techniques, bias, any other ethical violations on the part of the mediator, the mediator could face punishments as a result. A peer review mechanism<sup>340</sup> may seem to be a helpful addition to the Ohio agency plan; however, like a formal grievance procedure, it would require more responsibility for the OCDRCM or the individual agency to institute and coordinate the process. Additionally, as previously discussed, it would impose unnecessary fear on the mediator and may impede their ability to successfully conduct the mediation by having someone observe them.

## **Mediator Liability**

### **Recommendation for Ohio Agencies on Mediator Liability**

This plan recommends that the OCDRCM and individual agencies inform mediators about actions that could open up mediators to liability.<sup>341</sup> Although, as discussed below, it is

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<sup>338</sup> See Paula M. Young, *Take it or Leave it. Lump it or Grieve it: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process and the Field*, 21 OHIO ST. J. ON DISP. RESOL. 721, 751-74 (2006) (examines Florida, Georgia, Minnesota, Virginia, and Maine grievance procedures to find that complaints were extremely low).

<sup>339</sup> Grace E. D'Alo, *Accountability in Special Education Mediation: Many a Slip 'Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201, 227 (2003).

<sup>340</sup> For more issues with peer review of mediators, see Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253, 290 (2006).

<sup>341</sup> See Chapters 5 and 7.

unlikely that the participating mediators would be held liable for their actions, mediators should be informed about the potential consequences of engaging in the following conduct:

- Failure to disclose a conflict of interest<sup>342</sup>
- Breach of confidentiality<sup>343</sup>
- Inflicting emotional distress on the parties<sup>344</sup>
- Committing fraud<sup>345</sup>
- Showing partiality, corruption, or misconduct that harms one of the parties<sup>346</sup>

Fortunately, mediators are likely immune from liability, particularly hearing examiner mediators. Therefore, this plan recommends that Ohio not enact a statute that would grant immunity for mediators.

### **Benefits of Mediator Liability Recommendation**

The recommendation not to enact a statute for immunity of mediators was suggested for the following reasons: (1) mediators likely already have immunity under current state law, and (2) parties are rarely successful when they sue mediators for their conduct in and surrounding the mediation, and (3) some uncertainty provides an incentive for mediators not to engage in intentional conduct that violates parties' reasonable expectations.

#### *Immunity for Mediators*

Both hearing examiners and volunteer attorney mediators would likely already be immune from liability under current state law. Section 9.86 of the Ohio Revised Code states that “no officer or employee shall be liable in any civil action that arises under law of this state for damage or injury caused in the performance of his duties.”<sup>347</sup> “Officer or employee” is defined in §109.361(a)(1)(a) and states that an employee is “a person who, at the time of a cause of action against the person arises . . . is employed by the state.”

In this case, hearing examiners, as employees of the state, could take advantage of this provision, allowing them to have immunity in civil action arising under the law. This provision would likely extend to cover hearing examiners while they perform their duties as mediators. Although mediation is not in the duties of the hearing examiner, mediating disputes in the agency is simply an extension of the work for which they are usually responsible. A court would likely agree that the immunity that hearing examiners already enjoy would extend to their work as mediators.

Volunteer attorney mediators might also be able to take advantage of this immunity provision. Although volunteers are not typically considered to be “employed,” one Ohio state

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<sup>342</sup> See Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81, 86 (2003)

<sup>343</sup> *Id.* at 107-116.

<sup>344</sup> *Id.* at 120.

<sup>345</sup> *Id.* at 122.

<sup>346</sup> See Minn. Stat. Ann. § 572.36.

<sup>347</sup> Ohio Rev. Code Ann. § 9.86 (2008).

court found that a clinical instructor who volunteered at a state university medical school was a “state employee” for immunity purposes despite the fact that the instructor worked in private practice and was not compensated by the state university.<sup>348</sup> The court nevertheless found that because the significantly close relationship between the university and the volunteer clinical instructor, the volunteer was considered an employee of the state.<sup>349</sup>

In the case of volunteer attorney mediators, a court might extend immunity to volunteer attorneys who mediate for Ohio agencies. Because the agencies, which are state entities, have such control over the mediation plan and the volunteers are essentially serving as employees for the state just without compensation, a court would likely consider them to be employees of the state. Therefore, both hearing examiners and volunteer attorneys may have immunity for their acts as mediators.

### *Parties Rarely Successful in Lawsuits*

Although mediation opens up the possibility for the mediator to get sued, empirical evidence shows that those who sue mediators are rarely successful. First, parties often do not sue mediators for their conduct in mediation.<sup>350</sup> Michael Moffitt, law professor and Director of the ADR Center, surveyed reported cases in U.S. federal courts and state courts and found that as of 2003, there had only been one suit reported against a mediator.<sup>351</sup>

Second, the parties suing the mediators often have trouble establishing liability or the mediators have immunity under state law.<sup>352</sup> Parties often have difficulty meeting professional negligence standards because the party must show that the mediator had to conform to a certain standard of conduct and that the mediator failed to meet that standard resulting in damage to the plaintiff.<sup>353</sup> It is difficult for courts to identify a particular mediator standard of conduct that applies to all mediators.<sup>354</sup> Also, fiduciary obligations do not attach to mediators; therefore, parties are unsuccessful in claiming a breach of fiduciary obligations.<sup>355</sup> Therefore, it is unlikely that mediators in the Ohio agency plan would be successfully sued while performing their duties as mediators.

### **Reasons for Rejecting Other Options for Mediator Liability**

The other option for mediator liability that was considered was the possibility of enacting a statute that explicitly provided immunity for mediators for Ohio agency disputes. A statute, however, would be difficult to enact and, as previously discussed, may be unnecessary given the current statute that provides immunity for state employees. A statute would require the Ohio legislature to draft and pass the statute, which may take a considerable amount of time. Additionally, by having the legislature enact the statute, the statute might not end up including

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<sup>348</sup> *Theobald v. Univ. of Cincinnati*, 160 N.E.2d 365, 373 (Ohio Ct. App. 10th Dist. 2005)

<sup>349</sup> *Id.*

<sup>350</sup> Michael Moffitt, *Suing Mediators*, 83 B. U. L. REV. 147, 149 (2003).

<sup>351</sup> *Id.* at 151 (citing *Lange v. Marshal*, 622 SW2d 237, 239 (Mo. Ct. App. 1981).

<sup>352</sup> *Id.* at 153.

<sup>353</sup> *Id.* at 153.

<sup>354</sup> *Id.* at 159; *See also, Chang's Imports, Inc. v. Srader*, 216 F. Supp. 2d 325 (SDNY 2002).

<sup>355</sup> Moffitt, *supra* note 342 at 167.

all provisions that the Ohio agencies would want. Based on these considerations, a statute is not the best option for establishing mediator immunity.

### **Conclusion**

This chapter covered mediator selection, discipline, and liability, offering recommendations for each for the Ohio agency plan. These recommendations took into consideration the needs of the agencies, the Committee, the citizens and businesses of Ohio, and their attorneys. The recommendations serve as a compromise that looks to protect the interests of all of these parties in order to help establish a viable mediation plan for Ohio agencies.

## CHAPTER FIVE: MEDIATION AND ETHICS

By Amy Xiaoyi Sun

### Recommendation

- To ensure the quality practice of mediation, the ABA/AAA/ACR Model Standards of Conduct for mediators should be adopted.

### Introduction

Mediation is a rapidly growing field. As mediation becomes more popular, it is important that both practitioners and disputants have a clear understanding of what constitutes appropriate and inappropriate mediator conduct. In the United States, as well as the other parts of the world, many efforts have been made to define professional standards for mediators.<sup>356</sup> One set of professional standards for mediators, developed in 2005, is the ABA/AAA/ACR Model Standards. The Supreme Court of Ohio has already adopted these standards for court mediation. To ensure the quality practice of mediation, Ohio would benefit from adopting the Model Standards to create a comprehensive set of professional guidelines to regulate mediator conduct in administrative agencies.

### The Importance of Professional Ethics Rules

Mediation has always presented significant professional responsibility issues for mediators. How much satisfaction public feel about the mediation process and result will directly influence how much they want to use and participate into mediation programs. To ensure participant satisfaction, ethical codes have become the safeguard for the quality of mediation process.

There are four fundamental professional values in mediation: self-determination, neutrality or impartiality, confidentiality and privilege, and conflicts of interest. All of these values are addressed in the Model Standards of Conduct. Self-determination means that parties control the outcome. Mediators shall not decide the agreement for parties unless both parties consent to give this authority to their mediators. Neutrality or impartiality simply means the mediator must show no bias or prejudice, which indicates the notion that a mediator shall remain neutral in the mediation and shall not take sides or conduct the mediation in a partial or biased manner. Confidentiality and privilege is very important. Under this principle, mediators shall keep all the information or statement during the mediation confidential, unless both parties agree otherwise or required by applicable law to release information. The last professional value is conflicts of interest, which stresses that “mediators shall avoid a conflict of interest or the

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<sup>356</sup> See Kimberlee K. Kovach, *Musings on Ideals in the Ethical Regulation of Mediators: Honesty, Enforcement, and Education*, 21 OHIO ST. J. ON DISP. RESOL. 123 (2005-2006)

appearance of a conflict of interest during and after a mediation”<sup>357</sup> and mediator shall disclose information any reasonable person will view as a potential conflicts.

### *Self-determination and Neutrality*

Mediation is known as “assisted negotiation”,<sup>358</sup> which makes mediation different from the traditional administrative hearing processes. In mediation, parties do not give their authority to this third party neutral to make the decision, instead using this third party neutral to facilitate communication and problem solving as the parties themselves work through the conflict. Mediators are involved to provide structure to the conversation and overcome problems in communication. Neutrality means mediators are not involved in the dispute and do not take sides. Mediators should not favor either party and are supposed to remain impartial.<sup>359</sup>

### *Confidentiality and Privilege*

Some scholars believe that confidentiality is not only a powerful and attractive feature of mediation, but it is central to mediation.<sup>360</sup> Unlike the formal administrative hearings, which are open to the public and kept on record, mediations, as private, informal and self-determine processes, should be deemed confidential as it is imperative for people to trust the process and feel free to share any information and concerns without any fears that the communication inside the mediation might be disclosed to the administrative judges.<sup>361</sup> Confidentiality provides a safe and private environment to disclose information, solution and emotions. For this reason, confidentiality is seen as a key ingredient to encourage individuals to start dialogues with state agencies in order to reach a productive settlement.

Under the Ohio UMA, any information or statement made in mediation shall be privileged unless parties consent to the release. The Model Standards have comparable provisions regarding preserving confidences. These sections of the Ohio UMA are discussed in Chapter 7.<sup>362</sup>

### *Conflicts of Interest*

The Ohio Uniform Mediation Act states that the “mediator must not mediate in situations where there is a potential conflict of interest between the mediator and the party unless the mediator and parties waive the conflict of interest”.<sup>363</sup> Therefore, mediators should disclose to

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<sup>357</sup> See Model Standards of Conduct for Mediators (September 2005).

<sup>358</sup> See Black’s Law Dictionary.

<sup>359</sup> *Id.*

<sup>360</sup> See Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?* 85 MARQUETTE LAW REVIEW 79 (2001). Available at SSRN: <http://ssrn.com/abstract=289402> or DOI: [10.2139/ssrn.289402](https://doi.org/10.2139/ssrn.289402). See Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73 (2005).

<sup>361</sup> See C. Haile & H. Bookstaff, “*Confidentiality in Mediation - A Practitioner's Guide*”, NCJ 99741-45.

<sup>362</sup> For more information on *confidentiality and privilege*, visit:

<http://disputeresolution.ohio.gov/cc/confidentialitystatute.htm>

<sup>363</sup> See *O.R.C. 2710. 08*, available at <http://disputeresolution.ohio.gov/pdfs/ORC%202710.01-2710.10.pdf>.

the parties information that may create a potential conflict of interest, in order ensure that the mediation is a neutral process without any bias and prejudice.

In order to ensure the integrity and fairness of the Ohio administrative agency mediation process, mediators should use “reasonable efforts” to conduct “a reasonable inquiry” regarding any conflicts of interest that “a reasonable person would consider likely to affect impartiality or may give rise of the appearance of bias”. “The burden of disclosure of any potential conflict of interest rests on the mediator. Disclosure shall be made as soon as practical after the mediator becomes aware of the interest or relationship giving rise to the potential conflict of interest.”<sup>364</sup> The Model standards also use a reasonableness criterion for conflicts of interests, which is consistent with academic research, practical surveys and international standards.

### **Compatibility of the Ohio UMA and the Model Standards**

Of all the professional ethics guidelines in existence, the AAA/ABA/ACR Model Standards are the best supplement to the UMA. The Model Standards are widely referenced and have served as a framework for many other ethical codes.<sup>365</sup> The Model Standards provide a thorough and well-drafted series of rules and guidelines to ensure the quality and fairness of the mediation process. In short, the Model Standards are consistent with the existing UMA but supplement more detailed and complete guidelines.

### **Conclusion**

Professional standards of conduct for mediators are necessary to ensure quality mediation programs. The ABA/AAA/ACR<sup>366</sup> Model Standards of Conduct for Mediators provide well-drafted and complete standards for mediator conduct.<sup>367</sup> These standards will help to ensure quality mediation programs for any Ohio agency integrating mediation into the administrative hearings process. Trust and satisfaction in the mediation process directly affect program participation and, ultimately, overall program success. Therefore, it is strongly recommended that these standards be adopted.

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<sup>364</sup> See Erwin I. Katz, “Guiding Principals of Mediation Ethics”, Chicago International Dispute Resolution Association, available at <http://www.cidra.org/articles/gpme.htm>.

<sup>365</sup> See Kimberlee K. Kovach, “Musings on Ideals in the Ethical Regulation of Mediators: Honesty, Enforcement, and Education,” 21 *Ohio St. J. on Disp. Resol.* 123 (2005-2006).

<sup>366</sup> AAA: the American Arbitration Association, for more information on AAA, please visit its website at <http://www.adr.org>; ABA: the American Bar Association, for more information on ABA, please visit its website at <http://www.abanet.org>; ACR: the Association for Conflict Resolution, for more information on ACR, please visit its website at <http://www.abanet.org>.

<sup>367</sup> See Charles Pou, Jr., “Embracing Limbo”: Thinking about the Rethinking Dispute Resolution Ethics, 108 Penn. St. L. Rev. 199(2003) and also see John D. Feerick, Toward Uniform Standards of Conduct for Mediators, 38 S. Tex. L. Rev. 455 (1997).

## **Chapter Six: Creating the Event: Referrals to Mediation**

By Nikiya Herron

### **Executive Summary:**

**Creating the Mediation Event:** This section will deal with the incorporation of mediation procedures into a workable program for Ohio agencies and outline the “who, what, and when” of the mediation event.

**Recommendations:** Programs have used various models and structures to institutionalize ADR, both in governmental and court systems. By using Ohio’s goals to evaluate the procedural options this chapter sets forth a set of recommendations for the “what, when, and who” of the ADR protocol.

#### **Recommendation 1: Case Selection**

Cases will be referred to mediation by a person within the agency who is independent of the mediator, such as a hearing officer or board.

All cases will be presumed to be included with the protocol unless that referring individual finds unsuitability.

Agencies shall be given right to petition case inclusion.

Criteria for exclusions should be clear and specific and posted on the agency website in order to promote a diverse case base and consistency throughout the program.

#### **Recommendation 2: Early Timing**

It is recommended that all mediation sessions be held as early as possible, ideally at the origination of the claim, however, there should be exceptions for parties to appeal for time extensions.

The criteria for time exceptions will be clear and specific and posted on the agency website in order to promote efficiency and party satisfaction throughout the program.

#### **Recommendation 3: Mandatory Participation**

It is recommended that participation in the ADR protocol be mandatory for all state agencies and claimants in order to promote consistency throughout and provide full state participation to strengthen the program.

#### **Recommendation 4: Counsel and Party Involvement:**

It is recommended that all parties and their counsel shall be invited to participate in the program in order to promote party satisfaction and fairness throughout the program.

#### **Introduction**

The institutionalization of the mediation process and how the process is incorporated within the agency structure is vital to the overall success of the program. Within the umbrella of mediation there are a plethora of procedural choices to make in implementation that can impact the process's overall effectiveness. These procedural guidelines help frame the mediation session and bring consistency and standards to the process. Proper procedures can maximize each party's satisfaction and the overall success rate for settlement. However, it is important to choose the best procedures, because they will be applied across state agencies and will need to capture the various needs and limitations of the state agencies collectively.

This chapter will look into various aspects of coordinating and creating the mediation event and recommend procedures to enhance the ADR process and make each session effective. It will present and evaluate the procedural options available in the creation of an ADR protocol. It will then evaluate these options based on the stated needs and restrictions of a state agency structure. Part I will look into the types of cases that will be eligible for mediation and the various ways that state agencies are able to refer cases to mediation. Part II will look into the issue of timing and at which stage in the adjudicatory process mediation will work best and be most effective. Part III will look into the how cases will get into mediation and how best to ensure that the procedure is being utilized effectively. Finally, Part IV will look into the logistics of the actual mediation session and the needs of the process.

#### **Interests of the State**

In dealing with case selection, the first priority for a state in the adoption of a mediation protocol is to promote consistency within the adjudicatory system. Currently, each agency has its own system to deal with claims. Some include ADR and some do not, and even those with ADR have variation in the procedures involved. This fragmentation of claim management has led to irregularity in the process and many who deal with the system to become frustrated with the lack of predictability of options available to claims and claimants. By creating a universal mediation process Ohio can publish clear guidelines for all to view, which promotes a sense of uniformity and predictability throughout the state process.

Likewise, Ohio also has a strong interest in increasing the perception and certainty of a fair and just process. The state would like all parties, especially those parties that do business within the State of Ohio, to be ensured that they are getting a fair process in their dealings with the state. It is not only important to ensure a fair process, but also to ensure that all parties are offered an equal opportunity to participate in that fair process.

Additionally, with any new development it is important for it to be viewed as successful early on so that it can survive and grow.<sup>368</sup> Many are adverse to change and because of this aversion it becomes important that everyone is satisfied with the system. The state is a naturally evolving creature, administrations can come and go, and with them so do policy supporters; in order for a policy to survive through various administrations, it must be one that was deemed to be a positive development. To generate that level of support, the program must concentrate on party satisfaction and constructive feedback.

As part of a dedication to development, the state also has a powerful interest in ensuring that parties are fully educated in the mediation process and mediation procedures.<sup>369</sup> This education impacts the parties' understanding of what they are doing and how best to maximize their options. A developing system relies heavily on the parties to provide feedback as to what aspects of the program work and what could be enhanced; informed and educated parties are in a position to provide informative feedback that could help build a truly dynamic procedure.

Finally, the state has an overarching need and interest in balancing uniformity with state agency control and autonomy. Among the state agencies there is great variance in procedure, policy, and culture, and a successful protocol will need to continually aim to balance the need for consistency throughout its policies with the practical limitations of application of those policies to state agencies.

### **Case Selection**

The case selection portion of the mediation protocol will set the groundwork for how the procedural guidelines operate. The cases included within the protocol will determine the overall scope of the process and the impact it will have on the agency adjudicatory system.<sup>370</sup> For these reasons, in creating the ADR process the first step is to determine which cases the policy will include and by what standards and criteria cases may be included or excluded.<sup>371</sup>

This paper will analyze various options of case selection available for a mediation protocol including: category based exclusion, ad hoc review, and all inclusive. It will evaluate these options based on the interests of the state and state claimants and make a recommendation that the state agencies use a broad case selection process that will incorporate all agency cases within the protocol. Case referrals will be made by a source independent of the mediators, such as a board or hearing examiner. It is recommended that state agencies use the broadest case selection possible and incorporate all agency cases, with each agency having the option to petition to exclude cases that they believe to be unsuitable for dispute resolution.

### **Options Available**

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<sup>368</sup> James P. McCrory, *Mediated Mediation of Civil Cases in State Courts: A Litigants Perspective on Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813, 844 (1999).

<sup>369</sup> James P. McCrory, *Mediated Mediation of Civil Cases in State Courts: A Litigants Perspective on Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813, 844 (1999).

<sup>370</sup> *Id.* at 844. (discussing two types of program philosophies toward mediation institutionalization: Diversion or Integration).

<sup>371</sup> Jonathon Davison, *State Agency Administrative Dispute Resolution Pilot Project: Report to the Governor* (2000), available at [http://consensus.fsu.edu/ADR\\_Project/index.html](http://consensus.fsu.edu/ADR_Project/index.html) (Evaluation of the State of Florida's pilot ADR program).

The first option is the broadest of options and would allow all cases to qualify for inclusion in the mediation protocol in order to apply it universally throughout the state. The second option would be to create categories of cases to be excluded from the mediation protocol based on amenability to settlement. Finally, the last option for case selection is to have a case by case review where each case would be subject to review and would proceed only if it received a recommendation based on conduciveness to mediation. Some ad hoc programs allow for a more general and informal review of cases similar to that of categories while other states have required a mandatory review of each individual case to recommend if it is suitable for mediation.<sup>372</sup>

## Evaluation

### *Building Success from Success*

Categorization based on amenability to early settlement could prove useful in a mediation program, especially in the first stages of implementation where success rates and endorsements could prove crucial to the survival of the program. Limiting the policy to those cases that are likely to result in the greatest success could infuse enthusiasm into the program which would be beneficial to the longevity of the protocol. Additionally, by eliminating the more complicated cases from the mediation protocol, this approach could ameliorate some of the hurdles faced in a volunteer based mediation program. The more complicated the mediation process becomes, the more training and knowledge that mediators require which complicates the training process. In regard to category based exclusion, there is some research to suggest that certain types of agency cases are more likely to reach settlement than others.<sup>373</sup> This is due to a lack of solutions available for some agency claims, as well as the fact that certain types of agency cases are far too legally technical or complicated for a mediation process.<sup>374</sup> Based on this information, the state could arrange a program in which only those cases that are likely to be conducive to settlement and the process are incorporated into the mediation protocol. For example, matters involving administrative regulation are said to be more likely to reach a mediated settlement than, say, a licensing controversy because licensing violations often have a strict set of consequences and a protocol to follow upon a finding of violation.<sup>375</sup> Under a category based selection, licensing controversies could be excluded based on the fact that they are unlikely to be amenable to settlement. However, unfortunately, within the state there is variance among agencies and a licensing case in one agency may have a different set of solutions than within another agency, making one more amenable to mediation than the other.

The process could not only categorize by subject matter, but could also employ threshold tests designed to take only cases that are deemed suited for mediation. For example, the IRS's

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<sup>372</sup> Jonathon Davison, *State Agency Administrative Dispute Resolution Pilot Project: Report to the Governor* (2000) available at [http://consensus.fsu.edu/ADR\\_Project/index.html](http://consensus.fsu.edu/ADR_Project/index.html) (Evaluation of the State of Florida's pilot ADR program).

<sup>373</sup> Amy S. Wei., Comment, *Can Mediation Be The Answer To Taxpayers Woes?: An Examination Of The Internal Revenue Services Mediation Program*. 15 OHIO ST. J. ON DISP. RESOL. 549, 566 (2000).

<sup>374</sup> Robert Jones & William Salomone, *Growth Management Mediation*. 1995 THE FLORIDA BAR 19

<sup>375</sup> Id. at 18.

mediation program only manages cases over a certain dollar amounts.<sup>376</sup> This system retains the use of mediation only for those cases in which the agency has a greater interest in settlement and the claim has greater room for creative solutions within a mediation structure.<sup>377</sup> However, there is strong criticism that processes like the IRS's place monetary limits on mediation and do not take into account the ratio of cost savings achieved when smaller cases are settled early. Without any formal mediation procedure in place, small cases can become a drain on agency resources when they are forced to expend large amounts to litigate claims where sometimes the expenses are more than the dollar amount in question.

However, categorization is inherently under-inclusive and cases that are deemed unsuitable for mediation could prove to benefit from the process. For example, throughout our research process there were various accounts from state agency employees and local attorneys who recounted that to their surprise many times even the cases which appeared to be not conducive to mediation were able find solutions and reach settlement. Particularly mentioned were complicated cases where parties might be hesitant to believe that mediation could suit their needs. It was stated that parties in these cases were able to find a joint interest in avoiding the escalating discovery costs associated with complicated issues.<sup>378</sup> These accounts weigh against eliminating large groups of cases from the mediation protocol.

Ad hoc case selection also provides the benefits of ensuring only the most amenable cases make it to mediation, although, case by case review has an added benefit of accounting for individual case characteristics, such as party willingness and specific case controversies. Unfortunately, ad hoc review falls subject to the same dangers of under-inclusiveness as category based exclusion because it qualifies cases for mediation based on factors of suitability that may not always be true in a real world setting.

### **Consistency in Application**

Inconsistency in the implementation of case management within the mediation protocol can lead to confusion over what cases qualify for mediation and what cases are not eligible for mediation services. Any kind of confusion reflects poorly on the system, but at the initial stage in particular inequity in access to protocol could be interpreted as the result of unfair or unreliable procedures. Confusion will also make it harder for parties who are dealing with the state to understand and predict the settlement options available to them for any given claim, which gives rise to declarations of the same unreliability that plagues the current system.

Category based exclusion would result in the elimination of broad categories of cases from the mediation protocol and cause inconsistency in the implementation of the ADR policy. Likewise, case-by-case review is subject to the same type of inconsistency as category exclusion because there is not readily apparent which cases qualify for mediation and which do not. Additionally, case-by-case review has a further risk of unreliability because it would be almost impossible to predict which cases will qualify for inclusion within the mediation process. One of

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<sup>376</sup> Amy S. Wei., Comment, *Can Mediation Be The Answer To Taxpayers Woes?: An Examination Of The Internal Revenue Services Mediation Program*. 15 Ohio St. J. on Disp. Resol. 549. 522 (2000).

<sup>377</sup> Id. at 566.

<sup>378</sup> Interview with Tom Wang, Examiner/Mediation Coordinator, Ohio Tax Board of Appeals (Feb. 26, 2008).

the problems with a case by case selection process is determining who decides which cases are suitable for mediation and by what criteria they make those decisions. Without a fair process that is outlined explicitly case by case review could make the entire ADR system to appear biased and unbalanced. Additionally, without clear guidelines of how to review cases, ad hoc review is subject to the same pitfalls of category based selection in that it can utilize stereotypical criteria rather than looking at specific characteristics of the case. This superficial review can lead to overly broad exclusions of cases that could have been right for mediation.

The inclusion of all cases within the mediation protocol is the only way to ensure that there is consistent and fair case management across state agencies. Agencies could attempt to increase transparency with category exclusion or an ad hoc case selection process by publishing the excluded cases or exclusion criteria; however, this would do little to diminish the effects of an overly broad exclusion system based on somewhat subjective criteria. Furthermore the process could provide for the necessary state autonomy and agency control by providing for a deferral and petition system which would place an independent board as an overseer to ensure that cases that do not belong in mediation for legitimate reasons (other than simply an arbitrary projection of their suitability to a mediation format) are kept out of mediation. For example, the board could remove from the protocol cases that might be in the public interest or safety.

### *Resolution*

Based on the state interests in consistency, fairness, and program sustainability, it is recommended that the State of Ohio adopt a mediation protocol with a broad based case selection inclusion, in which all cases qualify to be included within the protocol. A broad case selection ensures consistency and equal access to all claimants. It also ensures a diverse pool of cases for feedback from which to evaluate and the protocol.

However, to balance the broad selection process with the a need for oversight and agency input, it is recommended that an independent hearing officer or board review cases and make referrals for cases it believes unsuited for mediation for reasons of public policy or otherwise prior to the case being assigned to mediation. In addition agencies should be given the ability to petition for cases they do not believe are suited for mediation.

In reviewing petitions the reviewing officer or board should take into account specific agency practices or issues that may not be present among similar agency cases. They should also keep in mind that many times claims may benefit from mediation even though settlement seems unlikely at the outset. The following are factors that the board should take into account when granting an exclusion of a claim from mediation: public policy concerns, complexity of the claim, lack of identifiable solutions, length of agency adjudicative process, showing of exceptional cost, or any other factors viewed by the board to be a significant hindrance to successful mediation.

### *Timing of the Mediation Event*

The next step in the creation of the dispute resolution event is to determine at which point in the overall process the mediation protocol will fit. The establishment of a timing scheme is

important to the mediation session because it not only characterizes the session, but also creates an identity for the overall protocol and how it will work in conjunction with the current system. Depending upon where in the process mediation fits, the protocol could be a collaborative effort with the adjudicative system or become more of an ancillary component of the current system<sup>379</sup>

This paper will evaluate two alternative time periods available for the timing of the mediation event based on the ability of each to meet the state's interests, and it will recommend that the state adopt a protocol which calls for mediation to be held at the earliest possible date to ensure that parties are fully able to recognize and take part in the benefits of the mediation process.

### *Options Available*

The first option is to have the parties enter mediations at the origination of the claim, meaning that the session would be offered within a month (or some other standard time frame) of the initial complaint. The other option is to place the mediation sessions closer to the time of the agency hearings.

### *Reception by Parties*

The state has an interest in executing mediation sessions at the moment that they will be most effective in reception by the parties.<sup>380</sup> Timing it when parties are most willing to agree to settlement not only makes the process more fluid, but also makes it more likely that parties will feel committed and satisfied with their agreed settlement in the future. This commitment is vital in the parties performing the duties and performance of the mediated settlement.

By offering mediation early in the process, parties would be fully receptive to the mediation process as a whole and ways that it could be beneficial to their issue.<sup>381</sup> It has been shown that education gained through the mediation and its systems can have a great impact in not only with the parties being satisfied with the system, but also in how they approach it and take advantage of its conciliatory features.<sup>382</sup> In many programs, mediation is offered much later in the adversarial process and as result the parties have committed to an adversarial process and are less receptive to the education of the various aspects of mediation and what to expect from the process.

### *Separating Issues from Positions*

Another reason to hold the mediation sessions early in the overall protocol is because at that point parties are much less connected to their respective positions. Mediation is centered on the parties' ability to discuss the issues that are bringing them into the dispute in an attempt to

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<sup>379</sup> James P. McCrory, *Mediated Mediation of Civil Cases in State Courts: A Litigants Perspective on Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813, 841 (1999)

<sup>380</sup> *Id.* at 832.

<sup>381</sup> Amy S. Wei., Comment, *Can Mediation Be The Answer To Taxpayers Woes?: An Examination of The Internal Revenue Services Mediation Program*. 15 OHIO ST. J. ON DISP. RESOL. 549. 555 (2000).

<sup>382</sup> *Id.* at 555.

build solutions together that solve their issues.<sup>383</sup> Likewise, one of the strongest attributes of the mediation process is that it offers parties solutions that they could not receive from a hearing officer or a court.<sup>384</sup> Unfortunately, as parties get further into the adjudicative process they become less concerned with the issues that are fueling the claim and more concerned with the positions they have made in preparation for an adjudicative process. These positions then limit the ability for the parties to create solutions that might be less instinctive, but still meet the needs of each party and resolve the issues that are driving each position.<sup>385</sup>

The main problem with having the mediation session right before the hearing is that parties may be extremely attached to the positions they have developed throughout the course of the process. As result, parties may not entertain potential solutions that could easily mend the issues driving the claim because they are not packaged in the dollar amount or performance that they have committed themselves to receiving.

### **Cost Savings**

A mediation process at the origination of the claim can also be the option of the lowest cost, if settlement can be reached. The bulk of costs throughout the current process are incurred through discovery and carrying the case from time of hearing and trial.<sup>386</sup> If mediation is successful at the origination of the claim, parties can forgo the costs of building up and defending a case. This elimination of cost could propel the parties going into a mediation session with determination to reach an agreement and resolve the disputed issues.<sup>387</sup>

### *Pressure to Settle*

Mediation sessions later in the adjudicative process hope to capture the uncertainty parties feel prior to receiving a binding decision on their case and the pressure to avoid maximum loss. For example, many court mediation systems utilize a procedure that calls for parties to enter mediation right before or in lieu of trial. These systems follow the belief that parties are more likely to reach a settlement through mediation at times when they feel the pressure of the trial looming before them.<sup>388</sup> However, the research from these programs has shown that the pressure induced from trial makes parties no more likely to settle than they would be closer to the origination of the claim.

### *Understanding of Case*

One potential drawback of placing the mediation sessions very early in the process is that, prior to initial discovery, parties may not have time to investigate the overall merits of their

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<sup>383</sup> *Id.*

<sup>384</sup> Nancy Welsh, *Stepping Back Through The Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP RESOL. 573, 580 (2004).

<sup>385</sup> *Id.* at 581.

<sup>386</sup> *Id.*

<sup>387</sup> James P. McCrory, *Mediated Mediation of Civil Cases in State Courts: A Litigants Perspective on Model Choices* 14 OHIO ST. J. ON DISP. RESOL. 813, 832 (1999).

<sup>388</sup> *Id.*

claim and may be less willing to be completely open to settlement in a mediation settlement.<sup>389</sup> Parties who are unaware of the intricacies of their case are also unaware of its strengths and weaknesses and without these it may be hard for parties to ascertain a correct cost benefit analysis or BATNA (Best Alternative To Negotiated Agreement). Without this information, parties may be hesitant to fully engage in the mediation process. Additionally, there is a risk for attempts at settlement desertion if parties agree to a solution to discover later that they were operating under faulty information as to the strength or certainty within their case.

Mediation sessions held later in the process anticipate that parties are fully aware of their case and capable to enter into more rigorous settlement discussions. However, there is the possibility that parties are not completely informed of their case despite the late timing.<sup>390</sup> This presents a particular issue because within the state because there are a high number of *pro se* litigants in which parties go forward with a claim without assistance from counsel. In these cases it may be likely that parties remain uninformed of the specific dynamics of their case and rely on the hearing officer to make a judgment based on the facts. In this situation, mediations held later in the process might put the *pro se* party at a greater disadvantage in the session because the opposing party would likely have gained full knowledge of the case in the interim and the parties would enter the mediation session with disparate preparation.

### *Resolution*

It is recommended that the state adopt a protocol in which mediation sessions are held as close as possible to the origination of the claim. This may vary based on agency due to the knowledge and procedures necessary to enter competently into mediations, but it is recommended that each agency determine a firm timeline that best suits their needs. For example, in an agency that requires extensive fact finding may determine that all mediations should occur within thirty days of the origination of the claim, while agency with less laborious processes may require that all mediations occur within ten days of the origination of the claim.

By leaving it to agencies to create their own time requirements, the protocol is able to retain the benefits of early mediation with clear and reliable procedures, balanced with the need to accommodate the variance among agency processes. For example, in some rare instances the earliest possible time may include brief periods of discovery in order for parties to competently enter into mediation.<sup>391</sup> Agencies can accommodate for this and parties can still be just as receptive to the mediation process as they would have been four days from the origination of the claim, hopefully more so, because this was the earliest point in the process they could conceptualize the claim.

## **Getting into Mediation**

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<sup>389</sup> James P. McCrory, *Mediated Mediation of Civil Cases in State Courts: A Litigants Perspective on Model Choices* 14 OHIO ST. J. ON DISP. RESOL. 813, 829-835 (1999).

<sup>390</sup> *Id.*

<sup>391</sup> James P. McCrory, *Mediated Mediation of Civil Cases in State Courts: A Litigants Perspective on Model Choices* 14 OHIO ST. J. ON DISP. RESOL. 813, 832 (1999) (discussing recent studies have shown that in the majority of cases the cost of discovery is not as high of a cost factor as many believe and that problems during discovery that require extensive costs are in a minority of the cases).

One of the largest problems in developing any workable mediation procedure is creating a fair and reasonable way to get parties into the mediation process. The issue is a complicated one because it involves balancing interests from a variety of different directions which are often times at odds with one another. For example, there is the interest for the state to have as much participation as possible. High participation builds a diverse and dynamic case pool which will enhance the program and help to ensure its growth and survival.<sup>392</sup> However, there is also a strong interest for the parties to retain their rights to a hearing and trial. A mediation program that is too heavily pushed upon the parties may infringe on the parties' ability to go to hearing if desired.<sup>393</sup>

### *Options*

The first option is to have a voluntary program based on party willingness to participate. Voluntary programs allow parties to request mediation or consent to a recommendation for mediation. By giving the parties a choice the program tries ensure that both parties are committed to the process and do not feel cheated to their right to a hearing.<sup>394</sup> The second option is to create a system that has a built in participation mandate within the mediation program so that it is guaranteed to have full participation.<sup>395</sup>

### *Participation*

Full participation is an elemental factor in the success and growth of a mediation procedure, and lack of participation is a leading cause of failure within government mediation programs. For this reason, it is vital that the state adopt a protocol which promotes high participation.

Voluntary programs suffer from consistent lack of participation. For example, there are currently mediation programs being offered by commissions or groups within state agencies; however, they fail to provide a meaningful alternative because there is a lack of full participation. Additionally, in the case of court-connected mediation the number of parties who choose to go to mediation in the absence of a mandate is very few.<sup>396</sup>

In addition to the legitimization of the program, participation is also a fundamental component of an institutionalized mediation program because it affects so many other aspects of the program. For example, cost savings are only present if there can be widespread implementation of the program and limited participation can actually cost the state more to

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<sup>392</sup> Amy S. Wei., Comment, *Can Mediation Be The Answer To Taxpayers Woes?: An Examination Of The Internal Revenue Services Mediation Program*. 15 OHIO ST. J. ON DISP. RESOL. 549, 561 (2000).

<sup>393</sup> Bobby McAdoo and Nancy Welsh, *THE LAWYERS ROLE IN DELIBERATIVE DEMOCRACY: A COMMENTARY BY AND RESPONSES TO PROFESSOR CARRIE MENKEL-MEADOW: Look Before You Leap And Keep On Looking*, 5 NEV. L.J. 399,

<sup>394</sup> Nancy Welsh, *Stepping Back Through The Looking Glass: Real Conversations With Real Disputants about Institutionalized Mediation And Its Value*, 19 OHIO ST. J. ON DISP RESOL. 573, 580 (2004).

<sup>395</sup> *Id.* at 595 (In fact there has been some evidence that a mandate may be the only way to ensure full participation).

<sup>396</sup> *Id.* at 594 .

maintain.<sup>397</sup> Additionally, heavy participation allows for research that is necessary in determining the strengths and weaknesses of the program. This information is essential to developing the program and mending its failures.

Finally, full participation ensures consistency across the board. Under a voluntary system it is possible that some parties could be more strongly funneled into mediation than others, leaving an inconsistency in how the program is administered and unfairness as to which parties are offered which opportunities. Also, mandated programs make the overall system more transparent in its rules and guidelines because all parties will go through the same processes. Mandatory involvement in the mediation program is the only way to ensure full participation from state agencies and their claimants.<sup>398</sup> Without a standardized mandate to recruit parties to participate in the mediation process, it is left to the state to advertise and promote the program effectively. This promotion can be very difficult. There is little standard research as to what advertising techniques work and what techniques do not. In many cases the agency can include the option of mediation in the correspondence with the parties; however, the agency itself must be an active participant in the mediation program to incorporate this into their communications.

The most fundamental step in a recruitment process is educating both state agencies and litigants on the benefits of the mediation process. This information serves as the most compelling argument in persuading parties to become active and involved in the mediation process. However, education programs and distribution of materials can be expensive in both design and implementation.

### *Authority*

There has been much discussion over the legality of compulsory mediation and whether a mandated system infringes parties' rights, especially because in most instances mediation programs lack statutory authority to restrict or limit parties' right to full participation in adjudicative process.<sup>399</sup> Voluntary programs bypass this legal debate by allowing parties to opt in to the mediation protocol and thereby allowing them to retain full rights to hearing with mediation as an enhancement in resolution options.

Mediation protocols within the court systems have utilized the ability for judges and magistrates to call parties to appear before the court for foundational authority to get parties into mediation.<sup>400</sup> Similarly hearing officers also enjoy a right to call parties to appear. Additionally, the state has the added tool of the use of an Executive Order to compel state agencies to follow codes of conduct and protocol.

### *Party Autonomy*

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<sup>397</sup> James P. McCrory, *Mediated Mediation of Civil Cases in State Courts: A Litigants Perspective on Model Choices* 14 OHIO ST. J. ON DISP. RESOL. 813, 844 (1999).

<sup>398</sup> *Id.*

<sup>399</sup> James P. McCrory, *Mediated Mediation of Civil Cases in State Courts: A Litigants Perspective on Model Choices* 14 OHIO ST. J. ON DISP. RESOL. 813, 832 (1999).

<sup>400</sup> *Id.* at 849 (discusses diversion tactics in small claims court).

It is stated that voluntary mediation best allows for the retention of party autonomy. There is a concern that non-voluntary programs restrict parties' sense of self-determination and their ability to make independent choices.<sup>401</sup> Parties may feel coerced into settlement where mediation is not a voluntary program. Freedom to control the outcome is the cornerstone of the facilitative mediation process, because it gives parties the opportunity to self recommend a resolution to their issues through guided discussion. Without this independence mediation loses a major component of its value to the system.

However, it seems that the anticipated response by parties to mandated participation is overstated. A recent study of mandatory programs shows that, contrary to what many think, parties who engage in mediation through compulsory programs are overall just as satisfied with the process as those that engaged in the process voluntarily.<sup>402</sup>

### *Consistent With Mediation Principles*

Mediation is a party driven process and therefore if the parties are not dedicated to progressive discussion and generating settlement options the session will not be successful. Voluntary programs build assurance into the system that the parties are committed to the mediation process and will take the procedure seriously. Whereas, it is stated that mandated programs are inconsistent with the nature of mediations itself which is to promote control by the party over the process.<sup>403</sup> By giving the state an opportunity to dictate the when and where of mediation, decisions that many believe are up to the parties themselves, the state takes control over a party process.<sup>404</sup>

It is important to note that mandatory mediation is only a compulsion to attend the mediation session, but not a compulsion to settle. However, parties who are not aware of the mediation process overall may feel a pressure to reach settlement by the mandate imposed upon them. This pressure goes directly against the party controlled and negotiated settlement that mediation strives to achieve.<sup>405</sup>

Finally, mandated mediation sessions also incur problems with implementation. Many programs have struggled to implement mandatory mediation universally without infringing on the voluntary nature of mediation, but ensuring the process is being taken seriously. It is difficult to find bright line rules outlining what is required of mandated mediation without completely taking over the process. For example, how does the state determine if a party has fulfilled its duty to mediate if there is not a mandate for settlement? Many programs have invoked a good faith requirement, but this requirement may vary. In Georgia parties may not withdraw themselves from the mediation session. The session only concludes if parties agree to settlement or the mediator closes the session.<sup>406</sup> These types of mandates could seriously harm the overall

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<sup>401</sup> Id. at 830.

<sup>402</sup> Nancy Welsh, *Stepping Back Through The Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP RESOL. 573, 595 (2004).

<sup>403</sup> Amy S. Wei., Comment, *Can Mediation Be The Answer To Taxpayers Woes?: An Examination Of The Internal Revenue Services Mediation Program*. 15 OHIO ST. J. ON DISP. RESOL. 549. 566 (2000)

<sup>404</sup> Id. at 555.

<sup>405</sup> Id. at 566

<sup>406</sup> Id. at 566

success of the program. It has been found that mediation in which parties are not committed to the session can do more harm than good in terms of building resentment between the parties. If one party comes to the table unprepared and disengaged it drives a further rift between the two sides rather than closing the gap.

However, on the other side of the spectrum, proponents of mandatory mediation argue that the absolute need for participation outweighs the drawbacks of mandated mediation and also that the anticipated effects are one again exaggerated when compared to a real world mediation context.<sup>407</sup> Additionally, agencies could minimize the negative repercussions of implementation by employing broad requirements for meeting the good faith requirement and providing participants with generous opt out provisions. Finally, it is submitted that education of the mediation process and its goals can safeguard against parties feeling pressured or compelled to submit to the state agency or settlement.

### *Resolution*

Based on the dependence of full participation to the survival and growth of the protocol, it is recommended that state agencies employ a mandatory mediation process. This process will require that all cases, entered into the mediation protocol by the review board, be mediated in good faith. This process ensures that the protocol will have the diverse participation necessary to maintain, strengthen, fuel the proposed mediation protocol and in its efforts to provide alternative solutions to Ohio Citizens.

Additionally, in order to ease compulsion on unwilling participants, all claimants should be offered the right to petition to be removed from the mediation protocol with somewhat broad discretion.<sup>408</sup> Factors the hearing officer or board should consider in the granting of petition includes: lack of good faith by one or more parties, equity between parties, overall length of agency adjudicative process, or any other factors viewed by the board to be a significant hindrance to successful mediation.

## **Additional Mediation Logistics Resolutions**

### *Who May Enter the Session*

Based on the state interest to promote fairness and equal access to meditation services, it is recommended that parties enjoy the right to bring persons for support and/or witnesses to the mediation event; however, the mediator shall control who may enter and participate in the mediation process.

### *Where the Sessions Will Be Conducted*

In order to ensure party satisfaction and fairness it is recommended that the board create and designate neutral areas for each agency and its claimants to conduct mediation sessions.

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<sup>407</sup> Nancy Welsh, *Stepping Back Through The Looking Glass: Real Conversations With Real Disputants about Institutionalized Mediation And Its Value*, 19 OHIO ST. J. ON DISP RESOL. 573, 594 (2004)

<sup>408</sup> To the same independent hearing officer or board as mentioned in the process of case selection.

Additionally, it is recommended that the state provide the opportunity for claimants to conduct mediations via telephone upon a showing that travel would be unduly burdensome, in efforts to ensure equal access of all participants to mediation service. In granting these exceptions the board should look at the resources of the claimant, the ease of travel, and any specific circumstances that present the claimant with a significant hindrance in meeting for mediation services.

### **Conclusion**

The procedures outlined in this chapter will determine whether the program will be able to endure the scrutiny of critics and the needs of the parties by forming a protocol that is fair and consistent without infringing on parties' or agencies needs and limitations is a difficult task, but one that will shape the face of ADR in Ohio for future generations.

## CHAPTER SEVEN: PRIVACY IN OHIO AGENCY MEDIATIONS

By Ben Larrimer

### Executive Summary

Ohio law provides strong protections against disclosure of sensitive mediation communications in many adjudicatory proceedings including court level and administrative hearings. These include the right of each party to prevent disclosure of any mediation communication and the right of a mediator to refuse to testify about almost all mediation communications. Exceptions are very limited and most exceptions are for disclosure of mediation communications concerning commission of illegal acts.

Outside of judicial proceedings, mediators are prohibited from ex parte communications with a wide variety of people who might make a ruling on the dispute that is the subject of the mediation. These include any court, department, agency, or officer of this state or its political subdivisions.

Unlike mediators, parties themselves are not bound by the statute to refrain from disclosing mediation communications outside of legal proceedings. It is common and advisable for parties to contract with each other as to what information will be considered non-discloseable. Such non-disclosure contracts give necessary flexibility to mediation proceedings, allowing parties themselves to balance the need for disclosure against the need to protect crucial information. These contracts also provide necessary enforcement mechanisms outside of the court system.

There are exceptions to the mediation privilege. Mediation communications may be disclosed for the purposes of a felony prosecution or defense or if one or more parties uses the mediation session as an opportunity to commit or further a crime. They may also be disclosed if it is necessary to resolve a contractual dispute over the mediation itself or if there are allegations of misconduct against the mediator.

The success of any mediation program will depend upon the standards set out for mediators. Mediation programs must assure that any mediators qualify under and conform to the Model Standards for Mediators. This includes the mediators being free from bias and also appearing unbiased. Mediators should grasp agency rules but also be free from any actual or apparent conflict of interest. Information collected for research purposes is protected from disclosure by law. Yet it is important to assure participants that any information collected for evaluation purposes should not be traceable back to the parties involved.

As such, here are recommendations as to what Ohio should do to ensure the rights of all mediation participants are protected.

- Explicitly acknowledge Ohio's Uniform Mediation Act as the primary source for mediation privilege disclosure.

- Mandate that all parties create a contract at the beginning of the mediation session outlining how far mediation communications are to be kept confidential outside of legal proceedings.
- Ensure that all data collection for research purposes cannot be traced back to the parties or mediation.
- Set out standards to ensure that mediators are free from both from bias and the appearance of bias. If possible, this includes selecting mediators who have no affiliation with a party agency.

## **Overview**

A key part of any mediation program is the privacy protection it affords participants. Participants must be assured that sensitive information disclosed in mediation will not be used in later proceedings or disclosed to any decision makers. They must also be sure that the mediator is free from bias and will serve both parties equally. They must be confident in the skill and background of the mediator. Though rules about disclosure and mediator neutrality may be enforced by private agreement or executive order, privilege in legal proceedings must be established through statute or by common law. Ohio has an excellent set of laws designed to protect mediation participants, regulate information disclosure and govern mediator behavior. Though based upon the National Conference of Commissioners on Uniform State Laws (NCCUSL) and American Bar Association’s Uniform Mediation Act (UMA), it is in some ways more protective of participants. These laws, when properly employed, will provide a strong protection for mediation participants.

This section will first examine existing the Ohio statute and case law as it relates to privacy and privilege in mediations. It will end with some final recommendations.  
Ohio Under the UMA

Ohio adopted its Uniform Mediation Act (UMA) in 2004 as the primary law governing mediation sessions.<sup>409</sup> Most of the statutory language is identical to the UMA. As a statute, it presumably applies to any uniform mediation provision the state would implement, unless parties explicitly agree otherwise. Therefore, any departure from the UMA as enacted in Ohio would require new legislation. The UMA provides a well-constructed framework to identify key issues involving privilege and confidentiality. The following is a discussion of the UMA as enacted in Ohio and informed by both the UMA reporter’s notes and Ohio jurisprudence. Though information concerning privacy appears generally throughout the act, sections 4 through 8 of the UMA specifically address issues related to privilege and disclosure.  
Ohio’s UMA Coverage

The Ohio UMA is very comprehensive, extending to all legal “proceedings.” These are defined as: judicial, administrative, arbitral, other adjudicative processes (including related pre-hearing and post-hearing motions, conferences and discovery) and legislative hearings or similar processes.<sup>410</sup> The main purpose of the law is to prevent parties from taking advantage of the

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<sup>409</sup> An act to amend section 149.43, to enact sections 2710.01 to 2710.10, and to repeal section 2317.023 of the Revised Code to adopt the Uniform Mediation Act. H.B. 303, (2004) OH laws.

<sup>410</sup> Ohio Revised Code Annotated § 2710.01(G) (2008).

mediation process to collect evidence of sensitive information and then use that information in adjudicative proceedings. The law does not prohibit party disclosure in any other settings, such as releasing that information to the public.

On the other hand, mediators themselves are categorically prohibited from ex parte communications to a wide variety of decision makers. Applied to mediations involving state agencies, mediators are prohibited from disclosing to any decision maker or authority figure inside that agency. This would especially apply to hearing officers or other decision makers who might hear or decide a case in the events that mediations fail. This is a valuable and important provision because it allows the parties to have confidence that the mediator will keep their communications secret, even if they are government employees.

Because the Ohio UMA does not cover parties outside of proceedings, it is quite common for parties to engage in separate confidentiality agreements that limit what information may be disclosed outside of a proceeding. Yet to prevent confusion, these limitations must be explicitly agreed to in a contract.

### **Privilege under the UMA**

It is important to start any discussion of privacy by determining the limits of what is considered privileged under the UMA. Privilege is extended to any mediation communication.<sup>411</sup> A mediation communication is “a statement whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing or reconvening a mediation or retaining a mediator.”<sup>412</sup> “This generally means privilege for all contact that parties have with a mediator for the purposes of conducting mediation. Mediators, parties and non-party participants may all invoke privilege.”<sup>413</sup>

This privilege extends beyond simple dialogue inside mediation. The reporter’s notes elaborate that mediation communication protection was meant to resemble the communications protected under attorney-client privilege.<sup>414</sup> Thus mediation communications as defined by the UMA that would be privileged under attorney-client privilege are not discoverable or otherwise disclose able. This includes mental impressions, notes and any communication meant to inform. In a 1998 case concerning a petition to examine mediator records, the Ohio Supreme Court ruled that the plain meaning of the mediation privilege statute that predated the UMA was presumptive: “The words of this statute are clear. Mediation communications (including intake forms) are confidential and may not be disclosed.”<sup>415</sup> The goal is to provide parties with as much protection as possible to encourage them to be candid and open in discussion. Party privilege includes the option to refuse to disclose and the ability to prevent others from disclosing mediation communications.<sup>416</sup> It is considered a crucial aspect of the process and

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<sup>411</sup> National Conference of Commissioners on Uniform State Laws and the American Bar Association’s Uniform Mediation Act (UMA) Section § 4 (2002).

<sup>412</sup> UMA Section § 2(2), Ohio Revised Code Annotated § 2710.01(B) (2008).

<sup>413</sup> UMA Section § 4(b), Ohio Revised Code Annotated § 2710.03 (2008).

<sup>414</sup> UMA Reporters Notes Section § 2(2).

<sup>415</sup> *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 206 (1998) Though not decided under Ohio’s UMA, this case addressed issues dealing with mediation communications.

<sup>416</sup> UMA Section § 4(b), Ohio Revised Code Annotated § 2710.03 (2008).

draws on the same rationale as attorney client privilege. Much like litigation, in mediation it is difficult for a third party to be helpful in creating a solution unless he/she is aware of all the facts. Parties may refuse to share crucial information if it is embarrassing, incriminating or sensitive.<sup>417</sup> The promise of confidentiality is designed to reassure parties that they may bring forward crucial information without fear of exposure or reprisals.

### **Exceptions to Privilege**

There are limited exceptions to privilege. Privilege does not apply in the case of felony prosecutions.<sup>418</sup> Privilege is automatically waived if the mediation is used to plan or commit a crime.<sup>419</sup> Again, this reflects attorney client privilege limitations in not allowing privilege to commit illegal acts. It seems unlikely that planning or committing a crime could in any way assist the parties to come to an outcome that benefits the mediation process. Likewise, there is no privilege for mediation communications that are imminent threats or plans to commit bodily injury or commit crimes of violence. The reasoning behind this is simple: Mediation should never be used as a shield for people to threaten or commit crimes.

One crucial area of difference between Ohio law and the UMA is Ohio's privilege exception in felony cases.<sup>420</sup> Mediation communications will not be privileged if they are sought in connection to a felony prosecution. An example of this type of disclosures might be issues of tax prosecution where businesses have disclosed financial information. This is not true for misdemeanors. Ohio law has an exception for allowing evidence not otherwise available under the statute if that evidence will prevent a manifest injustice in a court proceeding involving a misdemeanor or in any case alleging liability as a result of a mediation.<sup>421</sup> Participants must be aware of this difference when they consider what sort of information to disclose inside mediation.

Written or electronic records of a mediation agreement signed by all parties to the agreement (for example, any contract resulting from mediation) are exempt from privilege.<sup>422</sup> This is necessary to compel enforcement of any agreement or to show evidence that an agreement was reached. The object is to prevent the principle of confidentiality from overriding the goal of coming to a binding agreement. If parties possessed privilege over the signed agreement, essentially a contract, any party could block its introduction in a proceeding such as litigation over the terms of the contract. Though mediation communication is confidential, that need for confidentiality should never override the ability of parties to enforce their agreement.

Similarly, privilege does not apply if there are allegations of professional misconduct or malpractice filed against the mediator.<sup>423</sup> The private and confidential nature of mediations means there is little or no oversight on the mediator because almost all mediation communications are normally privileged. Therefore, in ordinary circumstances, outside parties

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<sup>417</sup> UMA Reporter's Notes, Opening Remarks 1 Promoting Candor Paragraph 2.

<sup>418</sup> Ohio Revised Code Annotated § 2710.05(A)(9) (2008).

<sup>419</sup> UMA Section 5(C), Ohio Revised Code Annotated § 2710.04(C) (2008).

<sup>420</sup> Ohio Revised Code Annotated § 2710.05(A)(9) (2008).

<sup>421</sup> Ohio Revised Code Annotated § 2710.05(B) (2008).

<sup>422</sup> UMA Section 6(a)(1), Ohio Revised Code Annotated § 2710.05(A)(1) (2008).

<sup>423</sup> UMA Section 6(a)(6), Ohio Revised Code Annotated § 2710.05(A)(5) (2008).

do not have a chance to examine the professional behavior of the mediator. In order to give parties recourse in the case of professional misconduct, it is necessary to provide for exemptions for mediation communication. Nonetheless, evidence brought forward for the purposes of professional misconduct or malpractice may not be disclosed or admitted in a court proceeding for any other purposes such as a dispute over general issues in the mediation.<sup>424</sup>

Outside of these privileged exceptions, a mediator may only report to a very limited amount of information about sessions. This information is generally: whether mediation occurred or has been terminated; whether a settlement was reached; and who attended the mediation.<sup>425</sup> If a mediator has violated privilege under violations of the UMA, courts, arbiters and administrative agencies may not consider them.<sup>426</sup> Mediators are, of course, still able to disclose information for any of the exceptions to privilege. Mediators are also able to disclose mediation communications evidencing abuse, neglect, abandonment or exploitation of an individual to an appropriate public agency, but only to that agency.<sup>427</sup>

It is important to note that certain mediation communications are categorically excluded from public record disclosure laws, such as mediators who deal with divorce proceedings or child neglect proceedings.<sup>428</sup> Other communications might be excluded, not under the mediation exception, but because they deal with other exempted information.<sup>429</sup> Further, there are large exemptions for any investigation made by many examination boards including the state medical board, chiropractic board and many licensing boards.<sup>430</sup>

Overall, the rules emphasize that usually mediation communications are privileged unless the information is procedurally necessary to resolve certain legal issues (such as dispute about the mediation agreement or the use of mediation for some criminal end). Outside of situations involving personal danger or some other compelling public good, mediation communication may only be used in proceedings with proper consent. Even before enactment of the UMA, the Ohio courts generally affirmed these principles, in some cases applying the rules flexibly in the interests of justice.

### **Waiver of Privilege**

However, if all parties consent to waive the privilege, mediation communications they engage in are not subject to the law and hence may be used in proceedings. Even if privilege is not waived, it is important to object when opposing parties disclose mediation communications. In an unreported opinion, the First District of Ohio indicated that when the parties did not object

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<sup>424</sup> UMA Section 6(a)(6).

<sup>425</sup> UMA Section 7(b)(1), Ohio Revised Code Annotated § 2710.06(B)(1) (2008).

<sup>426</sup> UMA Section 7(c), Ohio Revised Code Annotated § 2710.06(C) (2008).

<sup>427</sup> UMA Section 7(b)(2), Ohio Revised Code Annotated § 2710.5(B)(2) (2008).

<sup>428</sup> Ohio Revised Code Annotated § 2317.2(H) (2008).

<sup>429</sup> Records might include communications relating to tax records, Income tax investigations and investigations by many of the state licensing boards. Ohio Revised Code Annotated § 5703.21(A) R.C. 4730.26(E), 4730.32(F), 4731.22(F)(5), 4731.224(F), 4760.14(E), 4760.16(F), 4762.14(E), and 4762.16(F) (2008) For additional discussion, see: <http://www.lsc.state.oh.us/membersonly/125publicrecordslaw.pdf>.

<sup>430</sup> Ohio Revised Code Annotated § 4757.38, 4734.32(F), 4734.41(C), 4734.45(B), 4725.22(C) and 4725.23(C) (2008).

to evidence of mediator communication brought out in an evidentiary hearing, they had waived the right to appeal its use.<sup>431</sup> The Ohio UMA, enacted after this case, requires an explicit waiver in most situations.

Whether explicit or implicit, waiver of privilege is likely to be regarded as narrowly as possible. Both the Ohio UMA and the NCCUSL UMA state that only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted.<sup>432</sup> The Eighth District of Ohio agreed with the plain language, confirming that when a party files suit, the only information that is automatically waived by the party is evidence relevant to the case and necessary to a party defense.<sup>433</sup>

Like party privilege, mediator privilege includes the option to refuse to disclose and the ability to prevent others from disclosing mediation communications.<sup>434</sup> Unlike party privilege, it draws upon multiple rationales. One aspect is to give an additional assurance to parties that information inside mediation is confidential and that mediators will not take sides or disclose information.<sup>435</sup> Another aspect is to allow the mediator freedom to be candid and open. If a mediator believes his/her actions inside the mediation might become discoverable it might limit how open he/she is.<sup>436</sup> Even if a mediator waives the right to privilege, parties may still block the mediator testimony in court. This principle was upheld in a Sixth District of Ohio case regarding information accidentally disclosed during court proceedings. Trial courts will not allow information without an exception for disclosure into the court record, and will strike any admitted information upon finding that it did not have an exception for disclosure.<sup>437</sup>

Nonparty participants are defined as: experts, friends, support persons, potential parties, and others who participate in the mediation.<sup>438</sup> Their privilege is limited to mediation communications they make themselves.<sup>439</sup> As they are not direct parties, it is assumed that they are less vulnerable to disclosure of information and thus do not retain a right to generally prohibit use of mediation communication. The purpose of non-party privilege is to encourage the candid participation of experts and others who may have information that would facilitate resolution of the case.<sup>440</sup>

### **Final Recommendations**

Ohio has adopted much of the language from the UMA. This affords parties, mediators and even non-party representatives substantial protection when they participate in mediation

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<sup>431</sup> *Howard v. Ramsey*, 2001 WL 228015 (Ohio App.1d.2001). This case was not decided under the current version of Ohio's UMA but has still been noted as precedent.

<sup>432</sup> UMA section 6(d), Ohio Revised Code Annotated § 2710.5(D) (2008).

<sup>433</sup> *O'Donnell Const. Co. v. Stewart*, 2006 WL 951456 at \*26 (Ohio App. 8 Dist.,2006).

<sup>434</sup> UMA Section 4(b), Ohio Revised Code Annotated § 2710.03(B)(2) (2008).

<sup>435</sup> UMA Opening Remarks 1 Promoting Candor Paragraph 3.

<sup>436</sup> UMA Reporters Notes Section 4(b).

<sup>437</sup> *Schumacker v. Zoll*, 2001 WL 1198641 at p3 (Ohio App. 6 Dist.,2001) This case was decided previous to Ohio's adoption of its UMA. Yet the rationale is still generally seen as applicable to the UMA.

<sup>438</sup> UMA Reporters Notes Section 2(4).

<sup>439</sup> UMA section 4(b)(3), Ohio Revised Code Annotated § 2710.03(B)(3) (2008).

<sup>440</sup> UMA Reporters Notes Section 4(a4).

sessions. Most mediation communications themselves are considered privileged under the Ohio statute. They include, at a minimum, the initial contact with a mediator, anything said during mediation, and any communications parties may have with a mediator outside the sessions.<sup>441</sup>

All these mediation communications are privileged outside of a set of narrow exceptions that include disputes about the mediator's impartiality, threats of violence, plans or attempts at criminal behavior, child abuse, defense of contract claims and felony proceedings. It is generally recognized that these strong protections will increase party incentive to participate in the process.

Many states have implemented less comprehensive statutory protection and this has not led to an absence of mediations in the state. It is quite possible that a statute offering less protection might still be sufficient for many participants. Privacy, while an important concern, must still be weighed against efficiency, public oversight and the future need of justice.

Yet, it seems that the broader privilege extends to mediation communications, the more likely participants are to try mediation and the more trust they will give to the process. The best predictor of a person's willingness to engage in mediation is previous experience and trust in the process seems crucial in getting participants to let go of the traditional adversarial posture common in law.

State agencies should not seek legislation to modify Ohio's version of the UMA. The law provides strong protection for participants. There are very limited circumstances where the law needs to be supplemented by contract among the parties. This protection will provide a strong incentive to parties to willingly engage in mediation.

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<sup>441</sup> Ohio Revised Code Annotated § 2710.01(B) (2008).

## CHAPTER EIGHT: INITIAL STEPS IN IMPLEMENTING AGENCY MEDIATION

By Erica Berencsi

### Developing the Pilot Program

This project, which seeks to establish a state-wide mediation program across approximately 50 of Ohio's agencies, is a massive undertaking. The magnitude of the project is intensified by the unique identity of each agency and the varying types of disputes involved. Cathy Costantino and Christina Sickles Merchant in "Designing Conflict Management Systems" suggest that a pervasive idea in the design and implementation strategy of a massive ADR project is to "think big and act small."<sup>442</sup> They indicate that an excellent way of doing this is to implement a pilot program.<sup>443</sup> In addition to initiating implementation, the pilot program will allow for the early "monitoring, evaluation, and revision" of the program which will assist in meeting the established goals of the program.<sup>444</sup>

Regardless of the amount of care and research that is put into the development of a wide-scale program, unexpected situations will inevitably arise upon implementation. A pilot program will help expose areas of the mediation program that need tweaking and may help to offer substantial credibility to the program's implementation on a bigger scale. Costantino and Merchant say this method of initial implementation has strong support by a number of practitioners and offers many benefits. They indicate that testing through a pilot program helps to

- determine the willingness of disputants to change dispute resolution methods,
- make it safer for individuals with a stake in the old system to experiment with new behaviors and rewards,
- test the suitability of the design, its fit with the organization and its members,
- uncover previously unknown costs, expectations, attitudes, practices, or other restraints to any wide-scale ADR program initiatives.<sup>445</sup>

In addition to these stated objectives, testing a pilot could provide invaluable insight into other unanticipated areas.

A number of factors that take into account the goals of the pilot program may be used to determine which agencies are most suitable for the pilot program. These factors include subject matter concerns, issues related to the size of the program, the availability of resources, agency leadership, and agencies' attitude toward mediation.

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<sup>442</sup> STEPHEN B. GOLDBERG, FRANK E. A. SANDER, NANCY H. ROGERS, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 331 (5<sup>th</sup> ed 2007).

<sup>443</sup> *Id.*

<sup>444</sup> ANN C. HODGES, DISPUTE RESOLUTION UNDER THE AMERICANS WITH DISABILITIES ACT: A REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 1091 (Washington College of Law of The American University 1996).

<sup>445</sup> Constantino quoted in *Supra* note 442.

## Representativeness

The program imagined here is expected to accommodate a variety of disputes across a diverse assortment of agencies. Since at least one purpose of the pilot is to test the schema of the overall program, one may consider selecting agencies for the pilot that represent a variety of agencies, especially with respect to subject matter and organizational structure.

A representative sample may be achieved by choosing agencies for the pilot that together cover a variety of disputes. In a memo submitted on March 27, 2007,<sup>446</sup> Chris McNeil identified four types of agency disputes that cut-across many of Ohio's agencies. While there are additional types of disputes that Ohio's agencies handle,<sup>447</sup> considering these four common types of disputes embody a good starting point for this discussion. The four types of disputes McNeil identified in his memo are listed below. A non-exhaustive list of Ohio agencies that may fit into each category is also provided. (See Appendix 1)

- “Agencies that provide benefits and entitlements.”
  - These agencies include the Bureau of Workers Compensation and the Industrial Commission.
- “Agencies that are responsible to regulate rates.”
  - These agencies include the Public Utilities Commissions, Bureau of Workers Compensation, and the Industrial Commission.
- “Agencies that regulate and license businesses, professions, and occupations.”
  - These agencies include the Medical Board, the Board of Nursing, Veterinary Medical Board Cosmetology Board, Barber Board, State Board of Orthotics, State Board of Pharmacy, Dental Board, Board of Psychology, Chiropractic Board, Occupational Therapy, Counselor, Social Worker, and Marriage and Family Therapist Board, Physical Therapy and Athletic Trainers Board, Prosthetics, & Pedorthics, Speech-Language Pathology and Audiology, and the Career Colleges and Schools Board.
- “Agencies that implement statewide regulatory mandates protecting the public health and safety.”
  - These agencies include the Environmental Protection Agency, the Ohio Department of Natural Resources, the Ohio Department of Job and Family Services, and the Liquor Control Commission.

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<sup>446</sup> Christopher McNeil memo to class, Winter 2008 (describing types of disputes).

<sup>447</sup> Tony Logan, Chief Legal Counsel, Ohio Department of Natural Resources. Interview (Mar. 12, 2008). The Ohio Department of Natural Resources (ODNR), for example, handles several types of disputes, covering a variety of subjects ranging from the inspection and regulation of dams, to issuing hunting, fishing and watercraft licenses. It also has a substantial law enforcement division that handles disputes, some of which are criminal in nature.

While some agencies fit into a number of categories, and it would be possible to cover all four of these categories with just a few agencies, the pilot program may be better served in terms of representativeness if a number of agencies were selected for the pilot program.

### **Size of the Pilot**

Although the pilot program seeks to incorporate the principle “think big and act small,” the pilot program should take care not to be too small because such a pilot may not yield sufficient data to draw helpful conclusions about the overall program. A brief look at Ohio’s Workplace Mediation Pilot Program may flush out some of the risks associated with a pilot program that is too small. In February 1997, the Ohio Commission on Dispute Resolution and Conflict Management’s Workplace Mediation Pilot Program began its tenure with three Ohio state agencies serving as pilots: the Department of Commerce, the Department of Human Services, and the Environmental Protection Agency.<sup>448</sup> The pilot was evaluated based on personal interviews and surveying individuals who participated in the pilot program,<sup>449</sup> but the pilot produced little data. At the time of evaluation, only fifteen cases were referred to mediation under this pilot program, and only nine cases actually made it through mediation.<sup>450</sup> Furthermore, only two agency coordinators and twelve mediators responded to surveys. The small amount of data gathered from the Workplace Mediation Pilot program suggests the need for a larger pilot program. To avoid a pilot that is “too small”, two size-related factors can be considered. The first size related issue pertains to the number of agencies that participate in the first wave. The second issue focuses on the number of disputes that are filtered into mediation during the early stages of the program.

As discussed in the previous section, the pilot will be most effective, if it is representative. One way of ensuring representativeness is through selecting many agencies for the pilot. However, merely selecting agencies that cover a variety of disputes is not enough for an effective pilot. As the Ohio Workplace Mediation Pilot Program shows, it is also equally important that disputes are filtered into the program. In considering pilot agencies for this program, one might consider that vast differences exist among agencies in the number of disputes and hearings they handle each year. Some agencies are faced with very few disputes each year. For example, agencies like the Ohio Board of Dietetics, the Psychology Board of Ohio, the Ohio Athletic Commission, and the Medical Transportation Board may issue fewer than ten notices of opportunity for hearing during a given year. On the other hand, agencies like the Department of Agriculture, the Ohio Board of Cosmetology, and the Ohio State Racing Commission have many disputes each year. These agencies may issue over a hundred, sometimes as high as several hundred, notice of opportunity hearing letters during a year.

In addition to “notice of opportunity for hearing” letters, one might also consider how many disputes actually get to hearing. Some agencies resolve their disputes more quickly than others. For example, the Ohio Board of Nursing frequently sends disputants consent agreement

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<sup>448</sup> L. Camille Hebert, *Establishing and Evaluating a Workplace Mediation Pilot Project: An Ohio Case Study*, 14 OHIO ST. J. ON DISP. RESOL. 415; \*410 (1999).

<sup>449</sup> *Id.* at 422.

<sup>450</sup> *Id.* at 428.

offers directly after sending out the notice of the opportunity for a hearing letter.<sup>451</sup> As such, this board quickly resolves many disputes, and the quick resolution may preempt the need for mediation in many cases.

### **Agency Staff**

Pilot agencies should have sufficient staff to sustain the mediation program. The protocol seeks to be cost neutral, and one way that the protocol achieves this is by recommending that some staff be reassigned. The program seeks to change current dispute resolution practices to a more uniform and cost-effective system. As expected, employees who currently work in dispute resolution within agencies will be affected. Often people are slow to embrace any deviation from the status quo, but the mediation program is expected to provide a host of benefits and that includes streamlining the work of state employees. Optimistic agencies that have a culture which would embrace these adjustments may be better candidates for the pilot program.

The reorganization will be left to the discretion of the individual agencies, but there are some general tasks that each participating agency may want consider incorporating into their plan to help in the sustainability of the program. Agencies that are able to adopt some or all of these of these recommendations may be good candidates for the pilot.

The first suggestion relates to coordination. Agencies might want to consider assigning either a coordinator or group of employees who would help implement and administer the program. There is an obvious need for the maintenance of the administrative tasks related to mediation. For example, coordination with representatives from the Ohio Commission on Dispute Resolution, mediators, parties to mediation, and other participating state employees would greatly aid in the success of the program.<sup>452</sup> Agency staff may also like to be involved with case filtration (see Chapter 6) given some of the unique needs of each agency. Another important role would involve the marketing of the program. Tom Wang from the Board of Tax Appeals expressed the importance of publicizing and promoting the mediation within an agency.<sup>453</sup> He indicated that the Board of Tax Appeals program was slow to get off the ground because it took some time to advertise the program and make sure that individuals were aware of the availability and the successes related to mediation. Mr. Wang suggested that the advertising efforts were minimal and not very labor intensive, but the efforts were crucial to the program's growth. Along the same lines, marketing the program to other state agencies and potential participants will also be imperative in the program's overall success. First hand testimonials about the successes agencies have observed will be pivotal in the growth of the program.

Like any new program, training is certainly to be tasks related to implementation. Obviously training will be required of mediators, but agency coordinators and other participating staff members may find training useful at the onset of the program. Training would be provided by the Ohio Commission on Dispute Resolution at no cost to the participants. The training should educate staff on the mediation program's goals and objectives, as well as ethical obligations of mediation participants and other program guidelines.

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<sup>451</sup> Beth Collis, attorney-at-law, Interview (Mar. 11, 2008).

<sup>452</sup> *Supra* note 442 at 419.

<sup>453</sup> Tom Wang, Attorney Examiner, Ohio Board of Tax Appeals. Interview (Feb. 26, 2008).

Finally, but very importantly, individuals at agencies will have some role in the monitoring and evaluation of the program. While the Department of Administrative Services will oversee the program's assessments, individuals at agencies, especially those participating in the mediations will be in the best position to gather data. Most agencies gather data for annual reports, and many gather data for other purposes. Much of this information already gathered will be useful for the program's assessment. In addition, agencies may also be asked to distribute and collect survey information and answer survey questions. As such, depending on the current standard practices of the agency regarding record keeping, this may require very little additional efforts.

### **Good Leaders**

As previously mentioned, there are a number of goals the pilot program is intended to help achieve. Among those goals is to be a pave the way for other agencies. The pilot program can be looked at as a part of a campaign, and a fundamental element of any campaign is to get the leaders on board. Not only is it often impossible to convince everyone on an individual basis, but it is also natural for people to follow leaders. In a political campaign, politicians seek endorsements and the support of community leaders, such as religious leaders, newspapers, and celebrities for that very reason. In this context, it is important to attempt to select agencies for the pilot program that enjoy the respect of individuals at other agencies and tend to set trends and standards for other agencies. Not every "leader" will be the correct fit for the pilot, but with more leaders on board, the process of moving mediation into all of Ohio's agencies will be more fluid.

Sometimes it may be difficult to select leaders. Little can be done besides trusting impressions, conducting interviews and using best judgment. Individuals within the agencies are the best persons to identify leader-agencies. Other parties who frequently deal with agencies may also be able to identify leaders. For example, Beth Collis, a private-practice administrative law attorney, suggested that the Medical Board of Ohio may be considered a leader among the health licensing agencies.<sup>454</sup> She stated that this agency "sets the gold standard" because the agency is viewed to handle its cases very well. However, determining agency-leaders in other contexts may be difficult.

### **Mediation-Friendly Agencies.**

In selecting agencies for the pilot program, the goals of the program ought to be considered. The pilot seeks to serve as a test-run for the developing protocol and help determine areas where the program should be adjusted. It is also intended to set an example for other agencies to follow. For the sake of both goals, the pilot agencies ought to be "mediation-friendly." This term encompasses a couple of ideas. First it may mean that an agency or individuals within the agency have experience with mediation, and believe it could assist the agency in dispute resolution. It could also mean that the agency as a whole or key individuals within the agency are ready for an overhaul of the current dispute resolution process, and they are optimistic and excited about attempting mediation in this capacity. Mediation-friendly also

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<sup>454</sup> *Supra* note 451.

means that there is not an overarching reason that the agency is inappropriate for mediation (i.e. statutory prohibitions or ethical implications).

The goals of the mediation pilot program are likely best achieved with the use of agencies that are mediation friendly for a few reasons. As stated in the section on “Good Leaders,” agencies that take part in the pilot are hopefully going to lead other Ohio agencies in their adoption of the mediation program. While a call for volunteers may be the easiest way to get “mediation-friendly” agencies, it may be that too few agencies volunteer. This method may also yield a pilot program comprised of agencies that are inconsistent with some of the other recommendations offered for consideration in selecting pilot agencies like representativeness. Instead, the author suggests that a list of agencies that comport with the aforementioned recommendations be compiled, and volunteers be taken from that list. These agencies may be slow to agree, though added education about the program and mediation generally may help in drawing volunteers.

### **Support for the Program**

#### Secondary Support

Since this protocol suggests a large-scale deviance from the status quo with regard to how Ohio’s agencies’ dispute resolution processes, it is important to gather as much information for the program as possible. Not only is this imperative for precautionary reasons, but it will also provide credibility to future parties when full integration occurs. Scholarship that both supports and critiques specific areas of mediation is readily available, and will be discussed in the forthcoming section.

Support for the program can be found by looking to a number of successful programs. The United States Federal Government’s initiative is the most notable since it is similar in nature and scope in many respects (see Chapter 1). The Federal Government, which has successfully incorporated mediation into disputes related to public agencies, suggests that the benefits of mediation extend to public agencies. More close to home, Ohio’s State Employment Relations Board (SERB) and the Board of Tax Appeals maintain successful mediation programs and have done so for a number of years.<sup>455</sup>

While there is evidence that other states have envisaged a wide-scale uniform dispute resolution process such as the one imagined here, Ohio expects to be the first state to successfully do what the Federal Government has already done with its agencies. The implication is that Ohio has the opportunity to become the pioneering state with its program. Although Ohio would be the first state to implement this type of large-scale mediation project, it does not do so blindly.

In addition to the successes previously mentioned, the court systems nationwide utilize and often mandate mediation. Ohio began its own celebrated system at least a decade ago and has enjoyed great success and wide support.<sup>456</sup> Besides specific examples, support for mediation

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<sup>455</sup> *Supra* note 453 and The State Employee Relations Board. Last visited May 7, 2008. <http://www.serb.state.oh.us/>

<sup>456</sup> Supreme Court of Ohio. Last visited May 7, 2008. [http://www.sconet.state.oh.us/dispute\\_resolution/default.as](http://www.sconet.state.oh.us/dispute_resolution/default.as)

comes from a variety of other sources. In the past twenty years, public support of mediation has grown considerably. Public support may stem from participants' preference of mediated agreements to traditional adjudication decisions or by the more informal process mediation offers.<sup>457</sup> Mediation also may have gained its popularity because it is often deemed "cheaper, faster, and potentially more hospitable to unique solutions" than more traditional forms of adjudication.<sup>458</sup> Like all processes, mediation does not escape some criticism, and it would be unfair to ignore such criticism. One writer suggests that mediation is inherently unsuccessful because by the time a case gets to litigation, a litigant "wants vindication" by a third party who "will uncover the 'truth' and declare the other party wrong."<sup>459</sup> Another critic notes that settlements are not "intrinsically good or bad any more than adjudication is good or bad." A third critic doubts that mediation can achieve justice the way that courts do because of power imbalances: "Law is the sole arena within which unequals can hope to achieve justice."<sup>460</sup>

### Empirical support for the program

While secondary research strongly supports mediation, there are certainly critical theories. As such, the pilot program will be instrumental in offering support sufficient for full integration. Before the pilot program can offer this kind of evidence, monitoring, evaluation, and advertising processes need to be developed and administered. Assessing the pilot program is of pivotal importance. Stakeholders on all fronts will be looking to the pilot program to determine the overall effectiveness of the program, and the empirical research will help answer many questions. According to Craig McEwen, professor of anthropology and sociology at Bowdoin College, mediation programs should be both monitored and periodically evaluated in order to help "policy-makers and program administrators . . . understand the impact and quality of mediation programs."<sup>461</sup> It is easy to conflate the terms "monitor" and "evaluate," but both serve unique purposes and may bring different results. Therefore, these two forms of assessment should be discussed separately.

### *Evaluation*

This term represents a comprehensive undertaking that is ideally conducted by outside neutral evaluators. It seeks to determine and report the overall effectiveness of the program and "relative utility of varying program strategies."<sup>462</sup> The task may require a great deal of effort, time and expense.<sup>463</sup> Evaluation may occur at periodic times or at a time set for review. While evaluation may be accompanied with great expense, it ought not to be discounted in this context because of the significant benefits it provides. Since the program seeks to be cost-neutral, the

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<sup>457</sup> Tyler quoted in *supra* note 442 at 148.

<sup>458</sup> Riskin quoted in *supra* note 442 at 148.

<sup>459</sup> Merry and Silbey quoted in *supra* note 442 at 148.

<sup>460</sup> Professor Richard Abel quoted *supra* note 442 at 150.

<sup>461</sup> *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation* (with Nancy Rogers and Richard Maiman), 79 MINNESOTA LAW REVIEW 1317-1411 (1995) (sections reprinted in LEONARD J. RISKIN AND JAMES WESTBROOK, DISPUTE RESOLUTION AND LAWYERS (1997) and in JEAN R. STERNLIGHT, JAMES J. ALFINI, SHARON P. PRESS, AND JOSEPH B. STULBERG, MATERIALS ON MEDIATION THEORY AND PRACTICE 6-40 (2001)).

<sup>462</sup> *Id.* at 6-41.

<sup>463</sup> *Id.* at 6-41.

program may be well-served by the soliciting help from volunteers. McEwen suggests that soliciting researchers at nearby universities may be a good starting point.<sup>464</sup>

### *Monitoring*

While outside neutral evaluation is desirable, program monitoring can be done by internal staff.<sup>465</sup> This protocol suggests a middle road recommendation. While staff members who participate in the mediations are in the best place to collect data for research purposes, the data can be assessed by employees within the Department of Administrative Services. While evaluation requires a large scale effort, monitoring can provide research benefits with simple survey data. Mediation surveys used by participants of the Ohio court's mediation program can be found on the Ohio Supreme Court's website. These surveys may provide a good template that can be easily adjusted to meet the monitoring purposes of this program.<sup>466</sup> In addition to mediation-specific surveys, information agencies already gather in the normal course of business may provide evaluators valuable information to assess the mediation program.

### *Qualitative and quantitative research*

Assessments should consider both numerical and qualitative data and consider all parties involved in the mediation process including the mediator.<sup>467</sup> Numerical data can be gathered on settlement rates, participant satisfaction with mediated settlements, assessment of mediator effectiveness, changes in case backlog, amount of time until resolution, agency approval rates of mediated settlements, relative costs of mediation program, and costs associated with dispute resolution.<sup>468</sup> These numbers are particularly useful when similar data for prior years is available for comparative reasons. Numerical comparisons offer the benefit of quick conclusions, and though inferences drawn from numerical data are often severely limited, they are often very convincing. Consequently, the pilot program evaluation ought to be careful to take note of the limitations and measure conclusions with other available data.

While statistics are convincing and may offer the benefit of administrative ease in the evaluation of a mediation program, correct statistical inferences have considerable limitations, and the program evaluation needs to consider those limitations. No single figure can tell the whole story, and a number of areas of analysis need to be considered for an overall assessment of a mediation program's effectiveness. Placing high value on settlement rates, for example, has a great deal of allure. However, settlement rate analysis on its own fails in at least four major respects. First it does not provide insight into specific aspects of the mediation program. Whereas evaluation techniques that probe deeper may assist in demonstrating areas of the mediation program which need improvement, settlement rate analysis only seeks to demonstrate whether the program is effective, overall. Second, settlement rate analysis may not even appropriately indicate overall success of a mediation program, and the numbers produced may

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<sup>464</sup> *Id.* at 6-46-47.

<sup>465</sup> *Id.* at 47.

<sup>466</sup> *Supra* note 453.

<sup>467</sup> ANN C. HODGES, DISPUTE RESOLUTION UNDER THE AMERICANS WITH DISABILITIES ACT: A REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 1091 (Washington College of Law of The American University 1996).

<sup>468</sup> *Id.* at 1092.

give false impressions regarding the overall mediation program. Third, overemphasis on settlement rates may cause mediators to focus on settlement to the point that they pressure parties into settling, which leads to a host of problems (see Chapters 3 and 4). Finally, settlement rate analysis cannot adequately measure all of the benefits mediation can provide.

### Conclusions

Mediation may open a line of communication that would have been slow to open or may never have been opened.<sup>469</sup> Nancy Rogers, former Dean of the Moritz College of Law at The Ohio State University, says about mediation, “[It] is usually a by-product of failure—the inability of disputants to work out their own differences. Each party typically comes to mediation locked into a position that the other(s) will not accept.” She further explains that it is the mediator’s role in a mediation to help parties “approach their conflict with clear heads and greater objectivity” and to encourage parties to “disclose information they have not disclosed before, listen to things they have not heard before, open their minds to ideas they have not considered and generate ideas that may not have previously occurred to them....”<sup>470</sup> While communication may lead to settlement during the mediation, it also may lead to an open line of communication and settlement may come later. Presumably mediation-settlement statistical analysis would not uncover this kind of success. In addition to the benefit of increased settlements, parties likely feel better about the process and their disputes when they play an active role in its resolution. Mediation facilitates this, and qualitative analysis may help get at some of these more abstract benefits.

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<sup>469</sup> David S. Winston. *Participation Standards in Mandatory Mediation Statutes: “You Can Lead a Horse to Water. . .”* 11 OHIO ST. J. ON DISP. RESOL. 187, 190 (1996).

<sup>470</sup> N. Rogers and R. Salem quoted in *supra* note 442 at 109.

**APPENDIX A**

<b>Agency</b>	<b>Adjudicatory Oversight</b>	<b>Independent Regulatory Agency</b>	<b>Areas Regulated</b>
ACC	Accountancy Board	Yes	CPAs, Public Accounting Firms drug abuse and alcohol
ADA	Drug and Alcohol	No	prevention/tx programs
AGE	Department of Aging	No	Various ambulances, medical transportation units, wheelchair vehicles, fixed wing and
AMB	Medical Transportation Board	Yes	helicopters
ARC	Architect Board	Yes	Architects
ARC	Landscape Architect Board	Yes	Landscape architects
ATH	Athletic Commission	Yes	Striking Sports
BRB	Barber Board	Yes	Barbers and Barber Shops
BTA	Board of Tax Appeals Self-insuring Employers Evaluation	Yes	Tax Appeals
BWC	Board	No	self insurance minimum levels
BWC	Hearings -- OIC	No	OIC issues
CDP	Chemical Dependency Professionals	Yes	Various levels/certifications of chemical dependency counsel
CHR	Chiropractic Board	Yes	Chiropractors and Chiropractic Practice
CIV	Civil Rights Commission	Yes	Discrimination complaints Ohio Building Code, Fire Code; appeals from Bureau of Construction Compliance
COM	Building Appeals	No	Cemetery operators must register with the Div of Real-Estate; Cemetery Dispute Resolution
COM	Cemetery Dispute Resolution Real Estate and Professional Licensing Board	No	issues
COM	Real Estate Appraiser Board	No	real estate brokers and related issues
COM	Financial Institutions	No	financial institutions; consumer finance transactions; mortgage and other lenders
COM	Division of Securities – “Blue Sky” laws	No	Require registration of securities offerings, and registration of brokers and brokerage firms
COM	State Fire Marshall Bureau of Operations and Maintenance	No	Related hearings bedding, boilers, elevators HVAC, etc.
COM	Division of Industry Licensing Board	No	Related hearings
COM	Construction Industry Licensing Board	No	Contractor licensing
COM	Credit Union Council Bureau of Occupational Safety and Health	No	financial institutions? occupational safety issues
COM	Bureau of Underground Storage Tank Regulation (BUSTR)	No	
COS	Board of Cosmetology	Yes	Beauty industry
CSR	Capital Square Review Board	Yes	Capital Square Counselor, Social Worker and

	Counselor, Social Worker and Marriage and Family Therapist Board		Marriage and Family Therapist Exam and Regulation
CSW	Marriage and Family Therapist Board	Yes	Exam and Regulation
DAS	EOD Division	No	EOD
DEN	Dental Board	Yes	Dentists, hygienists, and dentist assistant radiographers
DMH	Mental Health Mental Retardation/Developmental	No	Mental Health services and Medicaid services and payments (or does JFS handle the latter?) services, facilities, admission etc.
DMR	Disabilities services	No	etc.
DNR	Watercraft	No	boating
DNR	Wildlife Management	No	animal resource control
DNR	Conservation	No	conservation issues
DNR	Mineral Rights/mining	No	mineral rights access, oil and gas
DNR	Recreation	No	land use and services
DNR	Reclamation Commission	No	reclamation of strip mines
DOT	Department of Transportation Motor Vehicle Dealers Board – part of	No	transportation issues/permits
DPS	BMV Motor Vehicle Salvage Dealers Board	No	Motor vehicle dealers licensing Motor vehicle salvage dealers
DPS	- part of BMV	No	Licensing
DPS	Bureau of Motor Vehicles	No	No drivers' license adjudication vehicle equipment, food stamp fraud, liquor enforcement, EMA issues
DPS	Highway Safety	No	issues
DRC	Adult Parole Authority	No	Adult Parole (also assist Courts of Common Pleas w/sentencing and supervision)
DVM	Veterinary Medical Board	Yes	Veterinarians vet med
ENG	Engineers and Surveyors Board	Yes	engineers and surveyors
EPA	Environmental Protection Agency	No	environmental issues The Environmental Review Appeals Commission is an
EPA?	Environmental Review Appeals Commission	No	appellate review commission which is <u>separate</u> and <u>distinct</u> collective bargaining state
ERB	State Employees Relations Board Embalmers and Funeral Director	Yes	employees embalmers, funeral directors
FUN	Board	Yes	funeral homes, crematories
INS	Department of Insurance	Yes	insurance
JFS	Employee Services	No	Workforce development
JFS	Unemployment Compensation	No	Unemployment comp
JFS	Medicaid	No	Medicaid services and payments
JFS	Human Services	No	TANF (public welfare) issues
JFS	Child Care Licensing	No	child care types A, B & C
JFS	Foster care/group home licensing	No	State and local
JFS	Adoption Services	No	State and local
JFS	Child Support	No	State and local
JFS	Wage and hour	No	wages
LCO	Liquor Control Commission	Yes	liquor law violations
LOT	Ohio Lottery	Yes	lottery issues
MED	Medical Board	Yes	physicians, surgeons etc.
NUR	Board of Nursing	Yes	RNs and LPNs

			support to artists and arts organizations
OAC	Arts Council	Yes	organizations
OBD	Board of Dietetics	Yes	Dieticians/dietetics
ODA	Dept. of Agriculture	No	Food production issues
ODA	Dept. of Agriculture	No	Public Amusement Rides
ODA	Dept. of Agriculture	No	Livestock Production
ODA	Dept. of Agriculture	No	Livestock Exhibition
ODB	Optical Dispensers Board	Yes	opticians, ocularists, etc.
ODE	Dept of Education	Yes	teachers & schools
ODH	Department of Health	No	Community health issues
ODH	Licensing Board of Hearing Aid Dealers	No	Hearing Aid dealers
ODH	Administrators	No	Nursing home administrators Provides administrative court structure for workers comp claims and workers' comp attorney
OIC	Ohio Industrial Commission	Yes	Issues
OPP	Orthotics, Prosthetics and Pedorthics Board	Yes	Orthotics, Prosthetics and Pedorthics
OPT	State Board of Optometry	Yes	Optometrists exempt/classified state employees and local civil service
PBR	Personnel Board of Review	Yes	Commissions
PRX	State Board of Pharmacy	Yes	Pharmacies, pharmacists, Medications
PSY	Board of Psychology	Yes	Psychologists
PUC	Public Utilities Commission	Yes	utility regulation
PYT	Occupational Therapy, Physical Therapy and Athletic Trainers Board	Yes	Occupational Therapists, Physical Therapists and Athletic Training
RAC	Racing Commission	Yes	pari-mutuel wagering
RCB	Respiratory Care Board	Yes	Respiratory Care Therapy
SCR	Career Colleges and Schools Board	Yes	proprietary schools, certification and registration of agents
SEC	Elections Commission	No	political elections
SPE	Speech-Language Pathology and Audiology	Yes	speech and language services