Twenty-third Annual National Conference on Law and Higher Education
Stetson University College of Law

February 17 – 19, 2002

A Legal Perspective of Mediation

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Mediation is one form of alternative dispute resolution. Mediation involves using a third party to facilitate communication between the parties so they may reach a mutually acceptable resolution. Mediation is most successful if the parties' participation is purely voluntary. To the extent it is voluntary, the parties are free to end the mediation if either party wishes or if they are unable to reach a mutually acceptable resolution. Once the parties have reached a resolution, it is usually committed to writing and may become legally enforceable.

In contrast, arbitration, whether or not part of a collective bargaining process, involves the use of a neutral third party to make a determination about the outcome of a dispute. It is usually less formal and less costly than litigation or other enforcement processes, partially because the parties spend little or no time gathering information (discovery) from the other party prior to the arbitration proceeding. Usually, the parties agree to be bound by the arbitrator's decision and waive rights to a lawsuit. However, arbitration can be a non-binding procedure to give the disputants an opportunity to see how a neutral third party will evaluate their claims

Courts have become increasingly supportive of mediation and arbitration. Although many judges and others in the court system conceptually support mediation and arbitration, their support also arises from a need to reduce the docket of matters pending before the courts, preventing or reducing judicial backlog. A number of cases regarding alternative dispute resolution methods involve mandatory arbitration since both parties

usually agree to mediation. However, a review of these cases provides useful insights of the boundaries and requirements of effective alternative dispute resolution procedures.

1. Legal Limits on Implementing Mediation Procedures

Despite the general acceptance of alternative dispute resolution, there may be limits when mediation or arbitration procedures can be implemented. Most of these limits occur in settings where a hearing or other fact-finding procedure is required or when a participant is entitled to a court adjudication of rights.

Employment

Mediation and arbitration have long been an accepted part of collective bargaining. In fact, since soon after World War II, the federal government has operated the Federal Mediation and Conciliation Service, providing mediation services as part of private sector collective bargaining. Use of mediation and arbitration for disputes outside collective bargaining were more limited. During the late 1960's and throughout the 1970's and 80's, employment discrimination complaints were the basis of an increasingly large proportion of employment disputes.

In 1974 the United States Supreme Court, in *Alexander v. Gardner-Denver*, [1]held that a collective bargaining agreement provision requiring mandatory binding arbitration of all employment disputes could not prevent an employee from filing a discrimination complaint alleging race, sex, religion or national origin complaint under Title VII of the 1964 Civil Rights Act. As a result, courts were unwilling to enforce provisions in any employment agreement requiring some type of compulsory resolution of employment discrimination claims.

But, in 1991 when it decided *Gilmer v. Interstate/Johnson Lane Corp.*,[2] the Court seemed more supportive of non-judicial resolution of employee complaints. As part of his application to become a securities representative, Mr. Gilmer signed an agreement to

[1] 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974).
[2] 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

submit any disputes with his employer to binding arbitration. Despite Mr. Gilmer's argument that under *Gardner-Denver* such a provision when applied to his age discrimination complaint was unenforceable, the Supreme Court concluded differences in Mr. Gilmer's situation led to the opposite conclusion. The Court pointed out Mr. Gilmer's employment agreement applied directly to claims of statutory violations not merely violations of a collective bargaining agreement which might include a claim of prohibited employment. Further, any decision would not occur in a labor relations proceeding but in a proceeding designed to consider discrimination claims. Also, Mr. Gilmer, not the union, would be responsible for representing his position, preventing any conflict between his personal rights and the rights of all represented employees.

Since *Gilmer*, the Court has considered other cases involving mandatory arbitration of employment discrimination. In *Wright v Universal Maritime Service*, 525 U.S. 70, 119 S.Ct. 391, 142 L.E.2d 361 (1998), the Court further clarified its distinction between *Gardner-Denver* and *Gilmer*. In deciding an employee could not be required to submit a disability claim under the Americans with Disability Act to mandatory arbitration as required by the employee's collective bargaining agreement, the Court concluded that a waiver of statutory rights, especially under a collective bargaining agreement must be clear and unmistakable. The agreement at issue was not. The Court declined to decide expressly if such a waiver could occur in a collective bargaining agreement.

More recently, in March 2001, the Court took another step supporting the enforcement of mandatory arbitration of employment disputes. In *Circuit City Stores, Inc. v. Saint Clair Adams*, the court considered the effect of a 1925 federal statute, the Federal Arbitration Act (FAA), on employment agreements. Under the FAA, any contract "involving commerce" containing a mandatory arbitration provision is enforceable. The Court concluded this applied to employment contracts and pre-empted any state statutes restricting enforcement.

But a Supreme Court decision in January 2002, *EEOC v. Waffle House, Inc.*[3] may cause some employers to re-assess their use of alternative dispute mechanisms to resolve discrimination complaints. As a condition of employment, Eric Baker agreed that any "dispute or claim" regarding his employment would be "settled by binding arbitration."[4] When Waffle House terminated him, he filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging Waffle House had discriminated against him on the basis of disability. EEOC conducted an investigation and an unsuccessful attempt to reach a resolution. EEOC then filed suit rather than issuing a right-to-sue letter, requiring Baker to pursue litigation on his own, which would have been barred by his agreement to arbitrate. Waffle House challenged EEOC's action, trying to force the matter to arbitration or seeking a dismissal. The U.S. Supreme Court, in a 6-3 decision, held the EEOC was not bound by the arbitration agreement signed by Baker and could sue Waffle House, alleging discrimination against Baker. The Court noted EEOC was not a party to the agreement. Further, when EEOC chooses to litigate a claim it is exercising its statutory grant of authority and is not representing the complainant or acting on his behalf. It has sole jurisdiction and can proceed even if the complainant has no desire to seek relief.[5]

Student Matters

Colleges and universities have broad latitude in their relationships with students. For example, many colleges have procedures designed to resolve disagreements between students, between a student and an employee, or between a student and the college or university. While some of these procedures must ultimately result in a fact-finding, others are merely an attempt at resolution that could easily be modified to emphasize mediation. Even those that require the opportunity for fact-finding may include mediation either as an alternative or as an early attempt at resolution, consistent with the key component of the voluntary nature of mediation.

[3] 534 U. S. ____ (2002), slip op. No. 99-1823.
[4] Id. at 1-2.
[5] Id. at 11.

Prohibited Discrimination

Federal laws prohibiting discrimination on the basis of sex, race, religion, national origin and disability require all colleges and universities receiving federal funds, including tuition from students who receive federal grants or loans, to establish procedures for student complaints of prohibited discrimination. Colleges and universities may offer mediation as a means to handle such complaints but each college and university has an obligation to investigate and, if discrimination has occurred, to take remedial action. Colleges and universities offering mediation as a means of resolving discrimination complaints must be mindful they do not overlook instances of repeated discrimination by an individual or program, or the discriminatory effects of college or university policies merely because an individual complaint may be resolved to the satisfaction of the complaining student. In fact, a college or university that is aware of discrimination and fails to take action may be subject to a finding of discrimination by a subsequent student even though the student who brought the original complaint believes the matter has been handled appropriately.

Although mediation is often a very successful tool in resolving complaints of harassment, colleges and universities should take special care with harassment complaints. Unless mediation is but one step in the process, it is important for a student who believes she has been subjected to harassment to understand that use of a mediation process will not necessarily result in college officials learning of the alleged harassing behavior. Resolution of a complaint of harassment may not necessarily be recorded in the file of the alleged harasser. Similarly, colleges should decide in advance whether they are willing to forego knowledge of such charges or forego the ability to take disciplinary action against someone the college believes has acted inappropriately. Although mediation can be very effective in helping a student who has been harassed regain a sense of control and personal respect, it may leave a university without the necessary information to respond to prevent further future harassment.

Challenges to Student Records

Under the Family Educational Rights Privacy Act (FERPA) students have the right to challenge the content of their education records if they believe information in the record is inaccurate, misleading or in violation of the privacy rights of the student. Under U.S. Department of Education regulations, students have a right to a hearing conducted by someone without a direct interest in the outcome of the hearing, a right to present relevant evidence and a right to legal counsel at their own expense. The college or university must decide, based on the evidence at the hearing, to amend the record or to deny the request. Although a college or university could offer students an opportunity to mediate their dispute about their records, a student could not be required to participate in mediation nor could mediation replace the hearing for students preferring a hearing rather than mediation.

Student Discipline

Mediation may be used effectively as part of the student disciplinary process if a college or university is willing to accept the mediation resolution as fully meeting its disciplinary and educational needs. There are some circumstances when mediation, although a legitimate alternative to developing a mutually agreeable resolution to a disciplinary matter, should not or cannot be the only method available.

At public colleges and university, if a student faces a disruption in enrollment (suspension or expulsion), the U.S. Constitution entitles the student to certain procedural protections (full notice of the charges and a chance to present exonerating or mitigating evidence). In addition, state laws and constitutions may provide other protections to students such as a formal hearing with specific requirements. Thus, although a student may be offered an opportunity to mediate the resolution of a disciplinary matter, a student cannot be forced to give up her legal entitlements and participate in a mediation process. A student entitled to a hearing and other legal protections may participate in mediation but must also be allowed to choose, instead, a hearing process that meets legal requirements.

Generally, private colleges or universities may establish procedures that have few, if any, of the requirements required of public colleges and universities providing discipline is imposed consistent with established procedures and reviewing courts believe the process is fundamentally fair. Colleges and universities, whether private or public, that meet the minimal standards when implementing student discipline find courts unreceptive to students challenging the sanctions imposed.

In considering whether and how to implement mediation as part of student disciplinary procedures, it is important to consider that the misbehaving student and the college or university are not the only individuals interested in the discipline imposed. Mediation procedures often include other students and members of the campus community. The Campus Security Act[6] requires campus disciplinary proceedings for alleged sex offenses give the accuser and the accused the same right to have others present during a disciplinary proceeding.[7] Colleges and universities that establish a mediation component to student discipline must be certain procedures provide this participation.

The Campus Security Act also requires each college or university to include statistics on campus crime in its annual report. Those statistics must reflect reports of certain crimes to any "campus security authority."[8] Campus security authorities include "an official … who has significant responsibility for student and campus activities, including…student discipline, campus judicial proceedings."[9] Crimes that must be reported are criminal homicide, forcible and nonforcible sex offenses, robbery, aggravated assault, burglary, motor vehicle theft, arson, any crime showing evidence of prohibited prejudice (based on race, sex, religion, sexual orientation, ethnicity or disability) and arrests or reference to campus discipline for violations of drug, alcohol and weapons laws. Reporting of this information requires aggregate statistical data but does not require disclosure of personally identifiable information.[10] Colleges and universities must include information

[6] 20 U.S.C. 1092(f).
[7] 34 C.F.R. 668.47(a)(12).
[8] 34 C.F.R. 668.46(b).
[9] Id.
[10] Id.

learned during the course of mediation, when the mediation is part of student discipline, in their annual campus security report.

2. Confidentiality of Mediation Procedures and Records

Mediators almost universally believe strongly that confidentiality of the mediation process, including the records developed as part of the mediation process, is essential to the success of individual mediations as well as mediation in general. In his article "Toward Candor or Chaos: The Case of Confidentiality in Mediation,[11]" Michael L. Prigoff identifies five reasons mediation requires confidentiality. First, effective mediation requires candor. Because mediation is voluntary, mediators must try to reach agreement by finding solutions acceptable to all parties. This will only occur if mediators understand the parties underlying positions and interests, and parties will only share those positions and interests if they need not fear those will be disclosed to opposing parties. This sometimes requires parties to disclose facts or beliefs that a party does not wish to be publicly known.

Second, fairness to the parties requires confidentiality. By ensuring confidentiality, parties who are not represented or less sophisticated need not worry they will harm their position in subsequent proceedings if no resolution is reached. This is especially applicable in the university-college setting where students may perceive themselves as at a disadvantage due to the age and experience of administrators, even if counsel does not participate.

Third, a mediator must be neutral both in fact and in perception. Participation in subsequent proceedings would, inevitably be viewed as favoring one side or, perhaps by each, as favoring the other side. Parties believing the mediator might later testify would more likely try to curry the favor of the mediator rather than working cooperatively toward resolution of the disagreement.

[11] 12 Seton Hall Legis. J. 1, 1-3 (1988), cited in *Mediation Theory and Practice*, James J. Alfini, Sharon B. Press, Jean R. Sternlight, Joseph B. Stulberg, LEXIS Publishing, 2001.

Fourth, privacy can be an incentive to participate in mediation. Although that is not always the case in matters involving student and employment records that carry additional privacy protections, it should be since confidential student and employment records are regularly subject to disclosure by subpoena. [12]

Fifth, mediators and mediation programs need protection against the time-consuming aspects of testifying and otherwise providing information. Also, mediation programs and mediators can be properly evaluated only if they keep thorough records. If records were subject to disclosure, many mediators would refuse to keep records or keep records that are so skeletal as to be useless to conduct proper evaluation.

The first step in ensuring confidentiality of mediation records is to gain the agreement of the participants that they will not use or seek to use records from the mediation or the testimony of the mediator in any subsequent matters between the parties. This is usually accomplished by use of an agreement signed by the parties. Such an agreement generally does not require the participants to forego any discussions of the process but rather focuses on their agreement not to seek mediation records or testimony of the mediator. An example of a mediation agreement from a university-operated program is at the end of this paper.

State and federal laws also provide some protection against the use of statements made during mediation or documents used as part of mediation during subsequent court proceedings. Rule 408 of the Federal Rules of Evidence states that evidence that a party has offered or accepted or promised to accept something of value in return for resolving a claim is not admissible in federal court proceedings to prove liability or invalidity of a claim or the amount of the claim. It also prohibits the admission of conduct or statements made during settlement negotiations. This rule is not limited to mediation or even mediation and arbitration proceedings. It applies to all settlement discussions whether in a formal setting or merely discussions between the parties and their lawyers.

[12] 34 C.F.R. 99.31(a)(9). Also see, *University of Pennsylvania v. EEOC*, 110 S.Ct. 577 (1990).

But this rule is not absolute. A party cannot "hide" evidence or protect it from further use merely by presenting it during settlement discussions. Also, the rule allows evidence offered for another purpose than establishing liability, lack of liability or the value of a claim, such as evidence of bias, misdeeds occurring during settlement negotiations, or, in theory, to impeach a witness. Some courts have allowed evidence from mediations for these purposes, usually over the objection of mediators. The federal Alternative Dispute Resolution Act of 1998 directs federal district courts to enact local rules requiring parties to federal litigation to consider use of alternative dispute resolution processes and providing for confidentiality both regarding the processes and communications that occur during alternative dispute resolution.[13]

Some states already have statutes providing a specific evidentiary privilege for mediators and parties to mediation. Such a privilege, much like that for physicians, psychologists and lawyers, allows mediators and mediation participants to decline to testify regarding what occurred during the mediation or information they learned during the mediation unless all parties agree. In August 2001, the National Conference of Commissioners on Uniform State Laws and the American Bar Association issued the Uniform Mediation Act that could be adopted by states as part of their rules of evidence.[14] Under the Act, anyone who participates in mediation may refuse to disclose or may prevent any other participant from disclosing a mediation communication[15] in a judicial, administrative, arbitral or other adjudicative process or any legislative or similar process.[16] A non-party participant's privilege is limited to her or his own mediation communication.[17] A mediation communication also is not subject to discovery. The privilege may be waived if all parties agree, plus, if it involves the privilege of the mediator or a non-party participant, the person holding the privilege agrees. There are certain other waivers or preclusions mostly involving commission of a crime or involving misconduct or

[13] 28 U.S.C. 652.
[14] Uniform Law Commissioners, The National Conference of Commissioners on Uniform State Laws, Chicago, Ill. October 3, 2001. See, http://www.nccusl.org/nccusl/pubndrafts.as
[15] A "mediation communication" is any type of statement, oral or recorded, verbal or nonverbal, that occurs during or is made for a mediation. Section 2 (2).
[16] See Section 4.
[17] Id.

prejudice.[18] No states currently have proposed statutes modeled after the Act. However, it provides an opportunity for states to resolve another barrier to facilitating mediated resolutions.

Issues Affecting Campus Mediation

FERPA gives students and, if the students are dependents, their parents the opportunity to review their education records. What does this mean for mediation records? FERPA does not expressly consider mediation records. Because "education records" are records directly related to a student and maintained by the institution or a party acting for the institution, any records created and maintained as part of a university mediation or dispute resolution program are probably education records. This means records may not be disclosed without the student participants' consent unless the information is not personally identifiable. It also means student participants may not have access to records containing information regarding other students. However, the use of a waiver by student participants is required to make certain that a student cannot gain access to the mediator's records regarding the student herself. It is important to remember that FERPA, while allowing parents of dependent students access to their child's student records does not entitle them to such access. College and universities should have clear policies establishing that a student's waiver of access to his mediation records shall also preclude disclosure to the student's parents despite the student's dependent status.

The Campus Crime Act[19] creates two other issues regarding the confidentiality of student mediation records. First, it requires that procedures for campus disciplinary action in cases of an alleged sex offense allow the accusing student be informed of the school's final determination of any disciplinary proceeding and any sanction that is imposed.[20] Usually, the student would be a party to the mediation and know the outcome. However, if that is not the case, institution procedures must provide for disclosure of that information.

[18] See Sections 5 & 6.
[19] 20 U.S.C. 1092(f).
[20] 34 C.F.R. 668.46(b).

Second, the Campus Crime Act requires colleges and universities to give timely warning to the campus community when a campus security authority learns of an occurrence of a reportable crime that is considered to represent a continuing threat to students and employees.[21] Campus mediation procedures need to establish procedures to handle such warning if the circumstances requiring it arise during the mediation process and participants must be informed that could occur.

3. External Mediation Procedures

In addition to procedures initiated or operated by a college or university to resolve differences between members of the campus community, colleges and universities may themselves be parties to disputes in which they are invited or ordered to participate in external mediation procedures. This may involve the college or university voluntarily agreeing with an opposing party to secure the services of a third-party mediator who can help them resolve their differences. Frequently, the suggestion for mediation will come from an outside entity or as a contract requirement.

Contractual Obligations

Contract provisions may require parties to use alternative dispute resolution to settle contract disputes. Most frequently, dispute resolution provisions require the parties to submit to binding arbitration often under the procedures of the American Arbitration Association. Public colleges and universities should review contracts carefully before agreeing to be bound by the findings of an arbitrator if the arbitrator could be required to rule on issues involving state sovereignty or other matters revolving around its public status.

Occasionally contract provisions, especially in agreements between colleges and universities or between college and universities and governmental or non-profit entities include provisions expressing the parties' willingness to participate in non-binding mediation prior to commencing litigation. Although it may be useful to provide little definition regarding the specific action the parties will take to allow flexibility to use

[21] 34 C.F.R. 668.46(e).

whatever procedure fits the circumstances of the specific dispute, it can be useful to incorporate some minimal procedures so the parties will not waste time and much needed goodwill negotiating a process when a dispute has arisen.

Enforcing agencies such as the Office for Civil Rights and the Equal Employment Opportunity Commission often provide an opportunity for complainants and respondents to mediate their dispute. These mediations are fully voluntary. During the mediation, the agency's investigation will be suspended. Typically, the enforcing agency identifies and pays for the mediator. As a result, participating in mediation as part of an investigation is a simple and inexpensive (for the parties) means of attempting to reach a settlement. Communications provided as part of the mediation are not included in the investigation file, which means, if the mediation is unsuccessful, the communications may not later be discoverable by either party and the investigator will not see the evidence or comments made by the parties. Because the parties do not select the mediator, they have no way of ensuring the skill or ability of the mediator they are assigned. The risk to the parties is that events occurring during the course of the mediation further antagonize one or more of the parties and increase their hostility.

Court-Ordered Mediation

Ideally mediation is a purely voluntary process undertaken by parties who wish to resolve their differences by reaching a mutually acceptable resolution. However, increasingly courts are ordering parties to participate in mediation programs. Frequently, the mediator is a judge, although usually not the judge who will hear the case if it goes to trial. Sometimes, volunteer mediator panels will serve as mediators. The type of proceedings may vary greatly. Some court-ordered mediations are carried out exactly as a purely voluntary mediation. In others, parties are required to continue their participation, despite their own belief the mediation is not producing a desired result, until the mediator concludes mediation has become unproductive. Because court-ordered mediation is conducted or overseen by a judge, the mediator may exercise extraordinary power over the parties. Participants should prepare by learning the process the court is likely to use

and should seek the assistance of someone who has experience with the approach of the specific court or mediator.

4. Preparing for Mediation

Regardless of whether mediation is purely voluntary or court-ordered, or of the nature of the dispute, or of whether the mediator is external or a college or university employee, success often depends on the parties' preparation. Preparation involves more than gathering facts and data to support your institution's position. It involves understanding your institution's needs, thinking of various ways those needs could be met, separating your emotions about those involved with the dispute from the disputed issues, and identifying what you know about the other party's needs.

Because mediation is the process of finding a resolution that meets all parties' needs rather than a determination of which party is "right," focusing on "building your case" has only limited value in reaching a successful resolution. First, it is important to understand your institution's needs and the reasons for those needs. In fact, it is often helpful to spend some time prior to a mediation questioning and re-thinking your institution's needs, identifying and understanding the basis for your institution's position. This leads naturally to brainstorming various ways those needs identified can be met. A useful pre-mediation session should include an opportunity for this and provide time to gather information, data or opinions to evaluate each option. Many mediators request the participants suggest multiple resolutions as part of pre-mediation communications.

Understand your emotions about those involved. In their well-known book on negotiating, "Getting to Yes,"[22]Roger Fisher, William Ury and Bruce Patton devote a chapter to separating the people from the problem. As they point out, the parties' relationship often becomes inseparable from the substance of their dispute. Instead, the relationship problems should be treated separately from the underlying dispute.[23] As a party, it is important to focus on those issues in your institution's position that may create

[22] Second Edition, Penguin Books USA Inc., New York, 1991.
[23] Id. at 21.

obstacles to resolution as fully as those issues you believe will affect the other party's ability to reach agreement.

Remembering that mediation is not a determination of right or wrong but a mutual problem-solving exercise, it is useful to try to understand what you and others representing the university actually *know* about the other party's position, perceptions and beliefs about the dispute as opposed to what you suspect, surmise and assume. Sometimes, it is useful to imagine how the other party may perceive the dispute; always separating the assumptions that arise from such a mental exercise from information known to you and others.

Having spent some time trying to understand the other party's needs, think of solutions that meet your institution's needs and might meet the other party's needs. Don't limit ideas to those either party has previously suggested. Instead, think as creatively as possible, focusing on values and needs both parties' share. Don't discard solutions unless, on further reflection, they are completely unworkable; they may contain a kernel that could form the basis for a resolution.

At the mediation, try to be as objective as possible. Listen carefully to the mediator and, if the parties meet, the other party. If the other party speaks, focus on the information he provides about his interests and objectives, not on emotions, either the other party's or your own. One way of doing that is to remind yourself that the goal is to create a mutually acceptable resolution, not to outdo the other party. As Fisher, Ury and Patton describe, "Be hard on the problem, soft on the people.[24]" By being clear about your own side's interests, you insure any resolution will meet your institution's needs. By respecting the other party, you set a tone of cooperation that allows each party to hear and understand the other's interests and needs.

[24] Id. at 54.

5. Enforcing the Mediation Agreement

Once the parties have reached an agreement in principle, the dispute is resolved only if the parties live up to the terms of their agreement. Mediated agreements are not universally enforceable. Their enforceability may depend on a number of factors including whether there is proof the parties actually reached agreement, the jurisdiction where the agreement was reached and evidence the parties reached agreement without undue duress or misrepresentation by either party.

Court-ordered or -supervised mediation agreements are usually enforceable by the court presiding over the underlying litigation. Even mediation agreements that may be enforced by a court involved in their negotiation will not be enforced if the court believes the parties never actually reached an agreement. See, e.g. *The Thermos Company v. Starbucks Corporation*,[25](settlement terms agreed to by parties included the requirement that the parties would subsequently identify a commercially acceptable method of production that would not infringe the patent at issue which parties were never able to accomplish). On the other hand, courts will enforce oral mediation agreements[26] and agreements to agree[27] so long as the terms are definite enough to be enforced and it appears they had actually shared a mutual understanding of the meaning of the terms of their agreement.[28]

States vary in their willingness to enforce mediation agreements developed through outside mediation. Some states have statutes either establishing the enforceability of mediation agreements[29] or consider them to be enforceable as contracts.[30] However, failure to follow the precise requirements of a statute or fulfill contractual requirements

[25] 1998 WL 299469 (N.D. Ill. 1998).
[26] See, e.g. *Wilson v. Wilson*, 46 F.3d 660 (7th Cir. 1995).
[27] See, e.g. *S and T Mfg. Co. Inc. v. County of Hillsborough*, 815 F.2d 676 (Fed. Cir. 1987).
[28] See, e.g. *The Thermos Co.*, supra, and *United States v. Orr Construction Co.*, 560 F.2d 765 (7th Cir. 1977).
[29] See, e.g. Tex. Civ. Prac. & Rem. Code Ann. • 154.071(a) Vernon Supp. 1993, and Indiana Rules of Alternative Dispute Resolution, A.D.R. 2.7(E) (1996).
[30] See, e.g. *Martin v. Black*, 909 S.W.2d 192 (Tex. Ct. of App. 1995), *Cain v. Saunders*, __ So.2d __, 2001 WL 499167 (Ala. Civ. App. 2001)

can make the agreement unenforceable.[31] In general, courts look more favorably at agreements reduced to writing and signed by the parties. In fact, institution procedures should focus on reducing the agreement to writing, if possible before the parties leave the mediation session.

Institutions can adapt procedures to enforce mediation agreements internally. Where institutions use mediation as part of the student disciplinary process, it is especially important to include procedures for institutional enforcement of the agreement. The costs and delays associated with relying on court enforcement are unnecessary if the institution itself establishes an effective procedure to enforce mediation agreements. This may require the imposition of sanctions against those who do not abide by their agreements. At public colleges and universities, this may require notice and hearing procedures be followed, as would the imposition of sanctions in all other student conduct proceedings.

In summary, there are many opportunities to use mediation within the campus community. While there are some limitations and requirements, mediation provides a useful tool to resolve campus disputes in an informal setting with a solution that is acceptable to all involved.

[31] Compare *Ali Haghighi v. Russian-American Broadcasting Co.*, 577 N.W.2d 927, (Minn. S.Ct. 1998) (replying to a certified question from the federal appeals court) and 173 F.3d 1086 (8th Cir. 1999) (remanding the case for further proceedings in light of the Minnesota Supreme Court's answer) to *Silkey v. Investors Diversified Services, Inc.*, 690 N.E.2d 329 (Ind. Ct of Appeals 1997).

Conflict Resolution Services
Agreement to Mediate Form

I understand that the mediator's role is to help the parties work through a process, not to make judgments of present solutions. It is the responsibility of the parties to create any solutions related to their situation.

I understand that the mediation is a voluntary process and I choose to participate. In order to make competent decisions and participate in meaningful discussion, I agree to attend the session(s) alcohol and drug free.

I understand that the mediator and all CRS staff will keep the content and records of the mediation confidential. There are, however, situations that require the mediator to share information with the appropriate individual(s) within the university or the university community. These situations include ones in which the mediator has reason to believe that someone is in danger or behavior poses a continuing and serious threat to students or employees or situations involving any form of discrimination, including harassment.

I understand that no agreement can be forced upon me and that I am responsible for carrying out any agreement I make. I commit myself to a good faith effort towards finding a solution that is acceptable to all parties involved.

I agree that statements made during mediation will not be used in future court or hearing procedures.

I agree that I will not at any time before, during, or after the mediation session(s), call the mediator(s) as a witness in any legal or administrative proceeding concerning these discussions. To the extent that I may have a right to demand these documents, that right is hereby waived.

I agree that I will not subpoena or demand the production of any records, notes, or work products of the mediator in any legal or administrative proceeding concerning these discussions. To the extent that I may have a right to demand these documents, that right is hereby waived.

I understand that any mediated written agreement that is signed by all parties to the mediation may be used in any relevant proceedings, unless those involved sign a written agreement not to do so.

I understand that at its discretion, Conflict Resolution Services may decline to mediate this dispute or terminate with appropriate notice to the parties.

_____ _____

Signature Date Mediator Date

_____

Please print your name