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The Nature, Scope and Use of Mediation in Resolving Student and Campus Employment Disputes

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THE NATURE, SCOPE AND USE OF MEDIATION IN RESOLVING EMPLOYMENT DISPUTES

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The Nature, Scope and Use of Mediation In Resolving Employment Disputes

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I. INTRODUCTION

The search for new methods of resolving employment disputes, aside from the traditional lawsuit approach, is becoming a major focus of congress, legislatures, judiciaries, employers, administrators, faculties and employees. It is being widely recognized that adjudication of employment issues in the traditional lawsuit model no longer meets the needs of all concerned. The harsh facts that litigation of employment disputes takes too long, costs too much and has unpredictable results has motivated many to find different ways to resolve these issues. While litigation will always be necessary for certain employment cases, its utilization as a method of first resort is falling into disuse.

The new methods being studied and used fall under the general label of "Alternative Dispute Resolution". Alternative dispute resolution includes various approaches such as negotiation, mediation, arbitration, mini-trial, summary jury trial, special master, ombudsman, early neutral evaluation and private judging. Each have their own unique aspects which make them applicable to various situations, issues and employment cultures. This paper will address mediation as a method of resolving employment disputes.

II. WHAT IS MEDIATION?

Mediation has been defined as a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, the decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem-solving, and exploring settlement alternatives.

One of the key aspects of mediation is that it embodies the use of a third person who has no personal stake in the outcome of the dispute. Absent this neutral intervenor, parties are often

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unable to objectively engage in meaningful discussion. The mediator serves in part as an umpire to make sure the process proceeds effectively without degenerating into positional bargaining and associated advocacy. All parties must have confidence and respect for the mediator selected and the role of the position.

The mediation conference is conducted in an informal manner. There are no rules of law or evidence which must be met. None of the formalistic requirements for proof are necessary. Mediation does not require witnesses to be present. The mediation conference can be conducted at informal locations at flexible times. Conferences can be rescheduled, continued, recessed or reconvened as the needs of the parties require.

Because mediation is nonadversarial, it is susceptible to being conducted without attorneys or other advocates being present. In fact, many mediations are conducted without attorneys being present even though the parties are presently represented. Pre–mediation agreements are regularly made that assure both sides that before any settlement becomes final, they will be given an opportunity to review it with an attorney.

Pre–mediation agreements can also provide that the mediation will be privileged and confidential. Privileged means that the mediation conference is in the nature of settlement negotiations and nothing said at the mediation by anyone will later be used in a court of law in the event the dispute does not settle. Confidentiality means that no one involved in the mediation process, including the mediator, will ever discuss what was said in the mediation with anyone. This includes any judge which may preside in a subsequent unresolved case.

Chief among the virtues of mediation is that any settlement reached must be by mutual agreement voluntarily made by the parties. The mediator lacks authority to mandate a settlement. Neither party has power or authority to impose settlement terms upon another. The resolution is therefore consensual.

The mediator's role is that of identifying the issues which must be resolved, focusing the discussion and negotiation toward those issues using problem solving techniques which foster win–win solutions.

The ultimate goal of the mediation is to have the parties resolve their dispute without the necessity of resorting to litigation. The resolution needs be one which all parties believe to be in their interest. The settlement must be durable and practical. Because the process is not limited to judicial remedies, the parties are able to be creative and inventive in arriving at solutions. The final agreement should be reduced to writing and signed by the parties thereby becoming a binding commitment for resolution of the dispute.

III. LEGISLATION WHICH SUPPORTS MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION PROCESS

Alternative Dispute Resolution, including mediation, is being fostered by recent state and federal legislation. As of this time, at least thirty states have enacted legislation providing for some form of alternative dispute resolution systems.

Florida has been a leading state in the passage of enabling legislation. Chapter 44, Florida Statutes, entitled, "Mediation Alternatives To Judicial Action" provides a comprehensive system of alternative procedures which can take place before litigation, during litigation and after trial. The Florida act provides procedures for arbitration, mediation, appellate court mediation, circuit court mediation, county court mediation and family mediation. It embraces court–ordered mediation, court–ordered nonbinding arbitration, voluntary binding arbitration and citizen dispute resolution centers. Further, the statute provides standards for mediator and arbitrator qualifications, procedures, rules of professional conduct, discipline and training.

Because the Florida judiciary has been proactive in supporting the use of alternative dispute resolution, it has gained wide acceptance by attorneys and the public.

Various federal legislation and executive orders have been passed or signed which are providing great impetus to the use of mediation and arbitration. These include:

A. **The Civil Rights Act of 1991** which encourages alternative dispute resolution in employment discrimination cases, . . . "including settlement negotiations, conciliation, facilitation, mediation, minitrials, factfinding, and arbitration. . . ." 42 U.S.C. 1981a(1993), Pub. Law No. 102–166, 105 Stat. 1081.

B. **Exec. Order No. 12778**, 56 Fed. Reg. 55,195(1991) signed by President Busch on October 23, 1991, which requires federal litigation counsel to make reasonable efforts to resolve civil disputes involving the United States Government before trial. Counsel should be trained in dispute resolution skills and, where feasible and appropriate, ADR techniques (except binding arbitration) are authorized.

C. **Administrative Dispute Resolution Act of 1990**, Public Law 101–552, 104 Stat. 2736, 5 U.S.C. 581 *et seq.*(1990). The Act authorizes and encourages Federal agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes, and for other purposes. This legislation directs federal agencies to implement an ADR policy for formal and informal adjudications, rulemaking, enforcement actions, issuing and revoking licenses or permits, contract administration, litigation, and other agency actions. The Act requires agencies to designate a senior official as a dispute resolution specialist and provide ADR training for the specialist and for other employees involved in implementing the policy.

D. **Civil Justice Reform Act of 1990**, Public Law 101–650, 101 Stat. 5090, 5092, 28 U.S.C. 471, 473(a)(6)(A) & (B). Among the principles established by Congress for an effective litigation management and cost/delay reduction management program in the federal district courts is authorization to refer appropriate cases to alternative dispute resolution programs that include mediation, minitrial, and summary jury trial. In developing caseload assessment and management plans, district courts are encouraged to implement or expand existing ADR programs.

E. **The Judicial Improvement Act of 1990**, Pub. L. No. 101–650, 104 Stat. 5089 (1990), authorizes federal district courts to refer cases to ADR.

F. **HR 1102** (Court Authorization Act) has been passed by the U.S. House of Representatives. This bill would require federal district courts to devise non–binding arbitration procedures for all civil cases in which less that $150,000 is at stake. The bill would extend to all district courts what stated as an experiment under the Judicial Improvements and Access to Justice Act of 1988, which established a pilot program through the Federal Judicial Center in which 20 district courts set up arbitration procedures for cases in which less that $100,000 was in dispute. The pilot program expired November 19, 1993.

IV. MEDIATION OF EMPLOYMENT DISPUTES

Disputes which arise from the employer–employee relationship are particularly susceptible to resolution by mediation. Often these disputes are highly personal and the parties are emotionally upset. The deeply felt emotions of disappointment, betrayal, loss of faith and damaged self esteem cannot always be adequately accommodated in litigation. The venting and free following discussion necessary to constructively resolve highly personal employment issues may not appropriately take place in a litigation format. Mediators skilled in dispute resolution can manage these dynamics while also moving the parties toward resolution of issues.

Further, because mediation is a flexible process that can be adapted to fit the varying needs of the persons involved, it can be used at any stage of a conflict.

A. **Before Adverse Employment Action is Taken.** Mediation can be utilized when an adverse employment action is contemplated by not yet taken. Its use at this juncture may give rise to alternative options and creative solutions which can avoid "harsh" decisions from ever becoming necessary. This participative approach to problem solving may head off an administrative charge because the employee is involved in the decision, thereby knowing "why" and "how" action must be taken.

B. **Before the filing of an administrative charge.** Mediation before the filing of an administrative charge can result in avoidance of the formal legalities necessarily triggered by such action. Further, it can avoid expansive legal costs by achieving settlement by the parties without the intervention of government regulators. Often, adverse publicity and better overall employment relations can be achieved.

C. **After the filing of an administrative charge.** Mediation after an agency charge has been filed affords both parties the opportunity to resolve the dispute before an adviser decision is rendered by the agency. Presently, this remains a voluntary option which is not mandated by agency rules. An early disposition of the charge through voluntary resolution can inure to the benefit of all concerned.

D. **Before the filing of a Lawsuit.** Pre-suit mediation is becoming increasingly popular with both plaintiffs and defendants. The pressure of an impending lawsuit frequently generates a more realistic assessment of the legal positions and cost-benefit ratios.

E. **After the filing of a Lawsuit.** Mediation may occur after the filing of a lawsuit if mutually agreed upon or ordered by the court. Frequently a party who refuses to mediate up to the point of suit will be ordered to do so by the court. Although court-ordered mediations often results in settlement, it occurs after numerous expenses are incurred, thereby making settlement more costly.

Although mediation can occur at any time, one should be mindful that the earlier it occurs, the more time and costs it will save. When an early mediation does not result in settlement, nothing prohibits further mediation as the matter progresses. Because the costs of mediation are modest when compared to trial, it can be used sequentially as the case matures.

The Civil Rights Act of 1991 amended various federal discrimination laws including Title VII of the Civil Rights Act, the Americans With Disabilities Act, Age Discrimination in Employment Act, and The Rehabilitation Act of 1973. For violations of any of these laws, an employee can be awarded monetary damages. Different monetary limits are established for employers of different sizes: (a) 15 – 100 employees – $50,000; (b) 101 – 200 employees – $100,000; (c) 201 – 500 employees – $200,000; (d) over 500 employees – $300,000. These limits do not apply to backpay and frontpay. Further, this act permits jury trials in federal court.

This legislation has dramatically changed the stakes involved for employers facing claims for employment discrimination. Because the monetary limits apply to each violation, a plaintiff may make each violation a separate claim and recover damages to the limits allowed for each. The costs to an employer in preparing and defending such a claim in a federal jury trial can be enormous. Therefore, a mediation settlement of these claims before and during pending litigation

offers great financial saving opportunities. Further it removes the uncertainty attendant to a jury trial.

V. COMPARISON OF TRIAL, ARBITRATION, INTERNAL GRIEVANCE, AND MEDIATION

A. TRIAL

1. A trial is a public, formal, rule–oriented process, usually requiring many witnesses and documents.
2. Attorneys, judges, and juries are the key players.
3. A "win–lose" decision is made by a judge/jury.
4. Decisions may be appealed, by on limited legal grounds.
5. Remedies are limited.
6. Litigation is costly, with substantial expenses arising from attorney's fees, court costs, discovery, expert witnesses, and lost time from work for litigants and witnesses.
7. Litigation usually requires months or years before a final court hearing, longer for appeals.
8. Hostility between the parties tends to remain high throughout the adversarial process.

B. ARBITRATION

1. Arbitration is a relatively formal, rule–oriented process, although more relaxed than a trial especially with respect to rules of evidence and procedure; substantial numbers of witnesses and documents are often required. Cf., voluntary binding arbitration, where Florida Evidence Code applies. [Fla. Stat. §44.104(9)]
2. Attorney advocates and arbitrators are the key players.
3. Arbitrators are impartial decision–makers, often possessing special expertise in the subject matter of the dispute, who render "win–lose" decisions; although there may be opportunities for "compromised" results, i.e., reinstatement without backpay, arbitrators do not bargain with the parties or assist them in reaching an agreement.
4. Tensions and anger may be heightened by the adversarial nature of the process.
5. Arbitration usually costs each party $1,000 – $5,000 in addition to attorney's fees and costs, but is still probably less expensive than a trial.
6. Studies of non–court ordered arbitration indicate the average time elapsed between the filing of a grievance to receipt of the arbitrator's award to be nearly seven months. *See,* Caraway, Grievance Mediation: Is it Worth Using?, 18 J. L. & Educ. 495, 498(1989).
7. Private arbitration may be scheduled and completed at the convenience of the parties; court–order arbitration may be subject to specific schedules.

8. Private arbitration is more confidential than a trial.
9. The decision is usually binding (cf., court–ordered non–binding arbitration, Fla. Stat. §44.103) and final, with very limited grounds for judicial review.

C. INTERNAL GRIEVANCE

1. An employee internal grievance system is a somewhat formal, rule oriented process established unilaterally by the employer.
2. The employee and a series of ever higher management levels are the key players. Usually there is no advocate permitted.
3. There is no neutral outside problem solver or decision maker. Management retains the sole power to decide the dispute.
4. Only disputes identified as grievable are processed.
5. It is an appeal process that is reactive by nature thereby allowing little creative problem solving.
6. Management's decision is final and no opportunity for further review is permitted.

D. MEDIATION

1. Mediation is an informal, privileged, confidential, non–adversarial, negotiation–oriented process in which a "win–win" resolution is possible as parties focus on their own and each other's interests. It is in the nature of settlement negotiations, and therefore what is said cannot be used at trial in the event the case does not settle.
2. Mediators are neutral, impartial facilitators, not decision–makers. They help the parties focus on areas of agreement and common interests. They help the parties objectively view <u>both</u> the strengths and weakness of their cases. They assist the parties in exploring options and choices, but they do not impose their wills or values.
3. Mediation may be "information–centered" (i.e., mediator has having special experience or training in the subject matter of the dispute) or "process–centered" (i.e., mediator has special skills and training in interpersonal relations, communications, and/or generic conflict resolution, or a combination of the two orientations. *See,* Brand, <u>Learning to Use the Mediation Process: A Guide for Lawyers</u>, ARB. J. 6,8–9 (Dec., 1992).
4. Witnesses or documents are rarely needed.
5. Attorneys may be present and play important roles, especially in pending court cases.
6. The process is characterized by negotiating, bargaining, and trading.
7. Mediation, to an extent, may be a preview of the trial or arbitration.
8. Agreement can be reached on mutually acceptable terms, including creative options such as an apology or alternative agreement, i.e., new work assignment; a written

agreement can be signed at the time of the mediation session or shortly thereafter.

9. The parties may seek redress in more formal proceedings (arbitration or trial) if no agreement is reached.
10. Mediation costs less than arbitration or litigation; mediator fees are usually paid by the hour or on a per diem basis.
11. Mediation may be set within days after a request is made at the convenience of the parties, without interfering with due process rights, and may be completed in hours rather than days, weeks, or months.
12. The non–adversarial setting provides opportunities for compromise and conciliation, thus relieving tension, anger, and hostility, enabling the parties to rebuild the relationship for mutual benefit.
13. Mediation may have added benefit in employment discrimination cases of improving interpersonal relationships and negotiating skills between employees and supervisors (if the parties have not already ended their relationship at the time of the mediation). *See,* generally, Dispute Management, Inc., Dispute Resolution Handbook, section F (1990).
14. Concerns: Unequal bargaining power between employers and employees; the relationship may already be irretrievably broken or one or both of the parties does not wish to preserve it; employers may view mediation as simply an additional expense on top of other benefits paid out incident to the termination; managers may view mediation like settlement, i.e., a questioning of their judgement or tacit acknowledge that they handled the employment dispute improperly. *See,* e.g., Middlebrook, Mediation Can Resolve Employee Disputes, New York Law Journal, Nov. 19, 1987, at 5, col.1.

VI. THE PROCESS OF MEDIATION

As mediation matures as an alternative to litigation, practitioners are constantly experimenting with different procedures. Although there is no mandated procedures and because the process is deliberately informal, substantial flexibility exists.

Further, each dispute is unique and may cause a mediator to depart from what might be called common procedures. Also, because mediation is a highly personalized process, different mediators find that different styles and procedures better fit their own personalities. This is particularly true in the mediation of employment disputes.

Mediation steps and procedures commonly followed include at least the following steps:

1. Agreement to Mediate

Before any mediation can take place, the disputants must first agree to participate in a mediation process. This can be accomplished by either party suggesting the process as a good faith effort to achieve settlement. If neither party wishes to be the one to suggest it, the American Arbitration Service or certain

private mediation services are willing to contact both sides. Once consent to mediate is reached, the agreement to mediate should be confirmed in writing.

2. **Selection of a Mediator**

The parties may select a mediator from the American Arbitration Association, a private mediation service, a mediator engaged in private mediation practice, or from a list provided by a local judiciary. The mediator selected for an employment discrimination case should be one who is knowledgeable in aspects of employment law. The parties may want to select only a mediator who has been certified by the court of the state where the mediator practices or is otherwise trained and experienced in dispute resolution. Parties should ask for background, experience and training of any mediator they are considering for use. The mediator's fee schedule and method of payment should be determined.

The parties should stipulate to the specific mediator to be selected. This stipulation should assure all concerned of the neutrality and impartiality of the person to serve.

3. **Establishing a Mediation Date, Time and Place**

Once the mediator is selected, the parties must notify the mediator of the selection and coordinate the date, time and location for the mediation conference. Although there are different preferences, many parties will agree to hold the mediation at one of their facilities. Some parties prefer a neutral location. If a neutral location is desired, it can be at the mediator's office, a court reporter's office, a hotel conference room, or any other neutral facility. This should be coordinated with the mediator. Once the location and the date and time are selected, the mediator will send a confirmation of same to all parties. Further, the mediator may request each party to provide a pre-mediation summary.

4. **Preparing for the Mediation**

Before the actual mediation conference, each party will want to separately prepare. It is helpful for a party to identify what their best alternative is to a mediated settlement. This alternative will serve as a benchmark for evaluating settlement proposals presented at the mediation. If a party is represented by an attorney, there needs to be a pre-mediation conference with the attorney who will participate in this process. The particular individual with final authority to settle the dispute should participate in this preparation. All persons necessary for settlement of the dispute should participate in this preparation. Further, it is most important that the person with complete authority to settle the dispute be designated to attend the mediation conference.

In any pre-mediation planning conference, a party and their representative should cover all matters which will be taken up at mediation. Understandings should be reached on negotiation strategy, tactics, contested factual issues. A statement of a party's position on all issues should be discussed. The goals for the

mediation should be defined. Varying settlement options should be identified. Further, the procedures for mediation should be covered with all persons who are going to attend.

Each party should provide a separate confidential pre-mediation summary to the mediator well in advance of the conference. This pre-mediation summary should contain a fair statement of the facts, identify the dispute(s), identify the individuals involved and state any settlement negotiations which have already taken place. Any additional matters that a party believes would be helpful to the mediator should also be included.

5. **<u>The Mediation Conference</u>**

At the mediation conference, certain common mediation procedures and processes are followed.

(A) The mediator will greet the parties, introduce everyone, and will determine if persons with authority to settle are present.
(B) The mediator will explain his background, training and experience as a mediator.
(C) The mediator will assure the parties of the privilege and confidentiality of the process.
(D) The mediator asks the parties or counsel to state their views of the dispute, recapping each party's statement to assure him/her that the position is understood and key points emphasized.
(E) After the parties have made full opening statements, the mediation may break up into separate private sessions (caucuses) with each party, with the mediator moving back and forth.
(F) The parties, in private sessions, may provide additional information to the mediator, in order to enable the mediator to assess the case more fully. This information can be kept confidential and not be disclosed, if a party so requests.
(G) The mediator explores interests and "hidden agendas" and focuses the parties on options for resolution of their cases. The mediator serves as an agent of reality to help the parties gain a realistic financial assessment, and alternative settlement possibilities.

VII. FEDERAL EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PILOT MEDIATION PROGRAM

Agreement was reached in 60% of the Title VII, ADEA, and ADA claims mediated through the Equal Employment Opportunity Commission pilot programs for the period April 1 – June 30, 1993. Of the 43 cases scheduled for mediation during that time period, 28 were completed, with 17 being settled. <u>Fair Employment Practices: Summary of Latest</u>

Developments, July 19, 1993, p.79.

More recent preliminary statistics provided by the EEOC from the four field offices participating in the pilot programs indicate that, of the 611 cases in which mediation was offered, more than twice as many charging parties (82%) accepted than did respondents (37%). Of the 122 mediations reported completed through November, 1993, agreements were reached in 54 (44%).

According to officials of the EEOC and the Center for Dispute Resolution, which is implementing the program, the pilot project has been extended through March, 1994. A full study will be undertaken upon completion.

VIII. SUMMARY

Parties to employment disputes should not be reluctant to use mediation. Its privileged and confidential nature makes the process particularly suited for resolution of highly emotional employment issues. Many difficult situations which could not result in great personal, professional and institutional embarrassment can be privately resolved through this process.

The escalating number of employment discrimination claims, along with the high costs of litigation, time involved and uncertain results make mediation an appealing option.

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The Nature, Scope, and Use of Mediation In Resolving Student Disputes

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Introduction

America is a "litigation happy" society. It has been estimated that civil suits in federal courts had increased by 300% since 1960, and suits filed in state courts have risen by more than 4 million since 1986 (Galen, Cuneo, & Greising, 1992). These dramatic increases in court dockets have caused many to call for legal reform. In 1985, Chief Justice Warren E. Burger urged the legal community to use alternative dispute resolution (ADR) to reduce the case backlog in the federal and state courts (Beeler, 1986). Recently, the American Bar Association conferred full "section" status to its Standing Committee on Dispute Resolution. According to the Arbitration Journal, the overwhelming vote to "create a new dispute resolution section in ABA ... reflects not only the bar's increasing commitment to the field of ADR, but the bar's acknowledged need to join the larger players in an ever expanding field" ("ABA Approves," p. 6). The expansion of the field of ADR is further supported by a survey conducted by the National Mediation Academy in Dallas, Texas, which indicates that 46 of the 50 states have, or are developing, some type of legislation that includes mediation and other dispute resolution methods in their state court system (National Mediation Academy, 1992).

While ADR appears to be making significant advances in the legal community, the use of alternative dispute resolution methods in resolving campus disputes has been limited. On college campuses, student disputes are typically addressed through the student judicial process. Much like the courtrooms of larger society, these proceedings can be adversarial, and sometimes focus more on assessing responsibility for a particular behavior, rather than resolving the underlying dispute which may have caused that behavior. The emphasis on due process and student rights lends a courtroom aura to student judicial proceedings. A

number of individual institutions and a few small groups of interested faculty and professionals, however, have made attempts to encourage the use of mediation and other forms of alternative dispute resolution on college campuses. Perhaps most noteworthy are the efforts of the Mediation Project at the University of Massachusetts - Amherst. According to Waters (1991), the mediation program at the University of Massachusetts, which was established in 1981, is one of the earliest ADR programs to have been implemented on a college campus. Unfortunately, according to a study released in 1990, there does not appear to have been any significant growth in the number of formal college mediation programs in the United States over the past decade. Hayes and Balogh (1990) surveyed over 1,000 member institutions of the National Association of Student Personnel Administrators (NASPA) and identified only 29 institutions with formal mediation programs.

With the growth of ADR in the legal community, why has there been such little attention given to the application of ADR methods to student disputes in higher education? Perhaps it is because student affairs administrators have not fully understood what mediation is and how it works. The purpose of this paper is to provide a clearer understanding of the mediation process and its application to student disputes. Included is a discussion of the types of cases which are conducive to a mediated resolution, and those which may be better suited for traditional forms of resolution. Lastly, three potential approaches for applying mediation to a student affairs program will be reviewed.

Mediation

Before discussing the use of mediation to resolve student disputes, it is important to clarify what mediation is, and what it is not. Mediation is an independent form of dispute resolution which should not be confused with other methods of alternative dispute resolution. Mediation is not negotiation or arbitration. Rather, it is one method on a continuum of ADR processes.

"Mediation is a forum in which an impartial third person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or an understanding among them" (Texas Alternative Dispute Resolution Act, 1987). Unlike arbitration, the mediator has no decision making authority. The involvement of the mediator as a neutral and impartial third party is one of the significant distinguishing factors between mediation

and negotiation. The role of the mediator is to assist the disputing parties to reach a mutually acceptable settlement of the issues, with the decision making power left to the parties directly involved in the dispute.

The mediation process is often described as a series of steps or stages. As noted by Beeler (1986), the American Bar Association's Special Committee on Dispute Resolution [now the Dispute Resolution Section] has identified six stages of mediation: "introduction, problem determination, problem identification, generation and evaluation of alternatives, and agreement" (p. 41). Although the identification of the individual stages of mediation varies from one author to another, the stages identified by the ABA provide a good overview of the mediation process.

To provide a more in-depth explanation of the process of mediation, the following narrative from the Campus Mediation Service at the University of Maryland, College Park (1983) is provided:

> At the beginning of the session, the mediator explains to the disputants the role of the mediator, what to expect during the process, and reaffirms that they are there voluntarily and in good faith to try to work out their own solution to their conflict. Ground rules pertaining to future meeting times and places, caucusing, confidentiality, and matters of courtesy also are discussed and agreed upon. Each disputant is then given a pre-determined amount of uninterrupted time to explain his/her perceptions of the conflict. During these exchanges the mediator encourages the parties to listen to each other and to explain how they feel about the conflict.
>
> After the opening statements of each party have been heard, the disputants are encouraged to hold an open exchange about all the issues and feelings involved, during which all parties will be allowed to express any anger and frustration they may be feeling. The mediator, during this phase, functions primarily as an observer, listening for additional information not brought out in the opening statements, watching for areas of possible common interests and negotiable issues, and keeping the venting of emotions from becoming destructive to the process. The mediator at all times remains sensitive to the timing involved and will gradually draw the parties into more serious negotiation of the issues involved, facilitating the communication between the disputants, and encouraging a problem-solving atmosphere.
>
> In assisting the parties to reach agreement, the mediator will help identify and prioritize specific negotiable issues, see each other's point of view, recognize their common interests, derive and test the feasibility of alternative solutions, look for ways to expand their available resources, and ultimately, assist them in coming to and writing up an agreement satisfactory to both sides. Throughout the process, the mediator will attempt to teach and demonstrate skills of principled negotiation in order to prepare the parties to

> better handle conflicts on their own. ...
>
> The final agreement will be phrased simply and clearly and will detail specific behavior. The tone of the agreement will be positive, focusing on what the parties will do rather than what they won't do. A future dispute resolution clause will be included, detailing steps to be taken should the agreement break down or should future conflict arise. The mediator will do a follow-up two to three weeks later to determine if the agreement is being kept and if additional mediation services are required. (cited in Beeler, 1986, pp. 41 - 42)

The mediator's job is one of intense concentration on the disputing parties, listening to not only what is being said, but also to what is not being said. Often the identification of an underlying issue can be a significant determining factor in the settlement of a case. It is with this goal in mind that the issue of caucusing arises.

Caucusing involves the mediator meeting privately with each of the parties during the course of the mediation. All information discussed with the mediator during private caucus is confidential and will not be disclosed to the other party unless the party providing the information expressly approves its disclosure. In A Student's Guide to Mediation and the Law, Rogers and Salem, note that private caucuses are used to:

> provide an opportunity for a party to vent and cool down when emotions flare; encourage candor and get to the root of the dispute; clarify an issue; spend time alone with a party to build trust; provide time to review issues and alternatives; encourage movement when a party is unyielding; help a party determine if a position is unrealistic; remind a party of the consequences of not reaching an agreement; get information that may help generate or shape new alternatives; check whether a party has thought through the potential consequences of a probable agreement or separate one party from the threatening or intimidating conduct of the other. (cited in Goldberg, Sanders & Rogers, 1992, p. 110)

Generally a mediator will caucus with both parties, paying close attention to the time spent with each, before returning to joint session. Despite the advantages caucusing may provide, it also presents some dangers. Folberg and Taylor (1984), point out that it is difficult for a mediator to maintain the appearance of absolute impartiality when private caucuses are utilized. If a party in a dispute is aware that the mediator knows some "secret" information which is not shared with each side, the party may perceive some partiality between the mediator and the other side. Further, private caucuses create problems of confidentiality, because although a party may agree that the mediator may disclose specific information, the

same party may disagree with the way in which the mediator presents the information in joint session. Whether or not a mediator chooses to use private caucuses depends on the individual dispute being mediated and the mediators style, but it is an important mediation tool which should be considered.

Overall, the mediation process provides the disputing parties with an opportunity to have a direct impact on the outcome of the conflict. It not only provides the parties with an opportunity to be heard, but an opportunity to develop a better understanding of the other side's point of view. Such an understanding may provide a framework from which future disputes may be resolved, and in this way, serves as an educational process for students. According to Folberg and Taylor (1984), "unlike the adjudicatory process, the emphasis is not who is right or wrong or who wins and who loses, but rather upon establishing a workable solution that meets the participant's unique needs. Mediation is a win/win process" (p. 10).

When To Mediate

Although mediation can provide significant advantages over traditional judicial processes, it is equally important to recognize that not all conflicts are appropriate for mediation. Both in society and the college community, violent or criminal behavior must be addressed and should entail appropriate consequences. Thus, in addition to understanding the mediation process, it is also necessary to understand when a case should or should not be mediated.

Lovenheim (1989), identifies a series of factors which were adapted from A Student's Guide to Mediation and the Law (Rogers & Salem, 1987) to consider when determining whether a case should be mediated. A number of these factors are applicable to the student affairs setting and are worthy of discussion. Some of the factors favor the use of mediation in a particular case, and others oppose the use of mediation. One of the most significant factors favoring the use of mediation is when **the law, or institutional policies do not provide a remedy**. Frequently a conflict will arise which does not involve the violation of a law or university policy. For example, two roommates might decide to share long distance telephone service. One of the roommates establishes the service in his/her name, and the other roommate agrees to pay his/her portion of the monthly bill. At some point in the

semester, the roommate in whose name the service was established stops receiving payments from the other roommate, and the long distance company threatens to cut off service. In most cases, university policies would offer no solution, because there is no regulation addressing the payment of debts to other students. Yet, left unchecked, the situation might escalate and result in a fight or some other altercation which would be a violation of university policies. Mediation would provide for the roommates to sit down and work out an agreement before the situation escalated to a disciplinary matter.

Another factor, identified by Lovenheim (1989), is when you want to **end a problem, and not a relationship.** When by choice or circumstance the parties involved are likely to have a continuing relationship, mediation may be a more desirable solution. Consider the case of two residence hall students that live in adjacent rooms and have an on-going dispute about how loud a stereo should be played. One resident claims that the other student plays the stereo too loud, and whenever the resident attempts to contact a residence hall staff member to report a violation of the hall's "quiet hours policy" the resident is unable to find a staff member. Further, none of the other residents on the floor seem to be experiencing any difficulties with the other residents stereo. Although the staff could be to placed on "alert" to try and catch the noisy resident in the act, and address the matter through the student discipline process, such a resolution is unlikely to assist the residents in resolving any future conflicts that might arise because of their close living arrangements. Mediation, however, could provide a more lasting resolution.

Lovenheim (1989) also notes that when the **dispute is no one else's business - and you want to keep it that way,** mediation may be the best alternative. Although student disciplinary records are confidential and protected by the Buckley Amendment, some disputes are of a very personal nature and may be difficult for both the parties and any hearing board or panel to discuss. One example might be a relationship dispute. The girl-friend discovers that her boy-friend has been intimate with another woman, and she tells him she never wants to speak with him again. The boy-friend calls her repeatedly, sends her flowers and candy and continues to ask for the opportunity to explain the situation. The boy-friends actions might be just enough to be considered harassment, but the girl-friend really doesn't want him to face any disciplinary action. She just wants him to leave her alone, and she certainly doesn't want to discuss the matter in front of a hearing panel or any

other group of people. Again, mediation may be a more desirable approach to dealing with this situation.

Having considered a number of factors which favor mediation, let's turn to the factors which oppose mediating a particular case. According to Lovenheim (1989) a case should not be mediated when the **dispute involves a serious crime.** Violence or abusive behavior should not be mediated. Lovenheim (1989) notes that "in Massachusetts, for example, district attorneys are instructed that no crime for which the state would normally recommend a jail sentence should go to mediation" (p. 29). However, misdemeanor offenses such as simple assault, personal harassment, and minor property damage might be appropriate cases to mediate.

Another factor identified by Lovenheim (1989) which opposes the mediation of a case, is when it is important **to prove the truth or set a precedent.** Some cases may be of such a nature or importance that the student/institution may determine that mediation is not a viable alternative. From the student perspective this situation may be readily apparent - a student is accused of some wrong-doing and wants to clear his/her name. Therefore, mediation may not be the best alternative in the student's case. From the institutional perspective, however, the situation is a little less clear and requires careful consideration. For example, in an acquaintance rape situation, where the case has not been accepted for criminal prosecution, and the survivor as well as the accused would prefer to address the incident through mediation, should an institution proceed with mediation or adjudicate the case through the student judicial process? Some institutions may view such cases as inappropriate for mediation. Because of the prevalence of acquaintance rape on college campuses, there may be a need to send a clear message to the campus community that acquaintance rape simply will not be tolerated. Further, some administrators may fear that handling such cases through mediation may be perceived as an attempt to hide such incidents from the campus community, and in no way want to support such a perception.

On the other hand, some institutions may feel that acquaintance rape situations are slightly different from other incidents of sexual assault, although none the less serious. Since the case was not accepted for criminal prosecution, and since acquaintance rape cases often revolve around the interpersonal communication of the students, or lack thereof, then the rights of the victim are paramount. Provided that the survivor has voluntarily decided to

address the incident through mediation after having been fully informed of the alternatives available, mediation of the case may be appropriate. Obviously, sexual assault cases are very serious, and the implications of utilizing mediation in such situations should be carefully considered by administrators before choosing a particular course of action.

Campus judicial processes are necessary and valuable components for resolving student conflict. The rights of students and due process protections must be maintained. Serious student misconduct must be addressed, and should incur appropriate consequences. Yet, mediation may offer an alternative for addressing some types of student conflict in a more effective and lasting way.

Applying Mediation to the Student Affairs Setting

Unfortunately, the literature concerning college mediation programs is fairly limited, and offers few models for the application of a mediation program to a student affairs setting. Based upon a review of a variety of campus mediation center brochures and training materials from institutions across the United States, three potential approaches for applying mediation to a student affairs setting appear to exist.

One potential approach to mediating student disputes is through peer mediation. Peer mediation programs may be totally student operated, or they may receive some assistance from the university administration. Students may mediate disputes, as well as coordinate some of the other related functions of the program. In a peer mediation program, student's would be trained in basic mediation skills and techniques, but generally would not receive state certified mediation training. Ideally, a staff or faculty advisor with some background in mediation would be beneficial. A peer mediation program could be associated with a particular office in a division of student affairs or with an academic department. Two examples of institutions with peer mediation programs are Brown University, and St. Mary's University.

Peer mediation services provide an excellent training ground for students. Nowhere is the concept of a community dispute resolution center more alive than when students mediate student disputes. Peer mediation programs could be extremely effective in resolving roommate disputes and simple student conflicts. This would be particularly true if the program is associated with a residence life office or commuter student services center.

Referrals from such offices could represent a significant portion of a peer mediation program's caseload.

One disadvantage to peer mediation programs can be the credibility of the program with students. Students involved in serious disputes, which may involve large sums of money or have the potential for litigation, may feel that their situation is beyond what a peer mediation service can handle and seek out other avenues for resolution of their case. In addition, a student run peer mediation service might experience difficulties with the visibility of its program. Such programs could be overlooked as a viable means for resolving serious disputes.

Another approach can be the creation of a separate office or center offering mediation services for students. A student mediation center could be staffed by one to two professional staff members that would coordinate the operations of the office. These professional staff would not only conduct intake sessions, but also personally serve as mediators in student disputes. Although their individual academic backgrounds might vary, staff in such offices should complete state certified mediation training programs, and may even become approved mediation trainers. If establishing such a mediation center within a student affairs division is not feasible, it could be established jointly between a segment of student affairs and an academic department, such as a communications or psychology department. If the institution has a law school, such a center could also be associated with the college of law. Institutions having separate student mediation centers include the University of Massachusetts - Amherst, the University of Oregon, and the University of North Dakota.

An individual office devoted to providing mediation services to students can provide a number of advantages. A separate mediation service would provide students with a centralized office where a dispute may be brought. Staff in these offices could devote full attention to student disputes. Because the center would be operated by professional staff, perceived credibility of the center with students may be much greater than with a peer program. Students involved in serious disputes may be more likely to pursue mediation with professional mediators than with peer mediators. Such a center could also provide training to members of the campus community (faculty and staff, as well as students) and utilize these individuals in various mediation cases. The combination of professional and peer

mediators could enhance the program by capitalizing on the advantages of both approaches. The availability of trained mediators from throughout the campus community may not only serve to reduce the caseload of the professional mediators, but might provide other advantages in situations where such mediators may offer a greater perceived level of impartiality or where their individual technical knowledge or experience could be beneficial to a particular dispute.

As with peer mediation, students must be informed about the seperate office or center offering mediation services. To seek out the service, students must not only be cognizant of the service, but be familiar with the mediation process and the types of disputes for which it is best suited. Mediation services could increase their effectiveness if relationships can be built with other offices and services that would be likely to make referrals. Such offices or services might include: judicial affairs, student legal services, university police, residence life offices, and commuter student services centers. Without such referrals and a well publicized program, it may be only by accident, that students find their way to mediation.

The third approach, is to integrate mediation services with other dispute resolution services all ready available on campus to create a campus dispute resolution center. This approach is based on what has been termed "The Multi-Door Courthouse". This concept was first introduced in 1976 at the *Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (National Institute of Justice, 1986). In "The Multi-Door Courthouse", a variety of alternative dispute resolution services are housed in one facility. Individuals with a dispute or grievance can go to the "courthouse" and meet with a trained intake clerk. The clerk reviews their individual cases and refers them to the process most appropriate for their situation. This approach has been utilized at Penn State University, and Portland State University, and Texas A&M University.

One of the significant advantages that may be offered by a campus dispute resolution center established on "The Multi-Door Courthouse" approach, is that it could reduce the "run-around" students can experience in attempting to get their conflict or dispute resolved. Knowledge of, or familiarity with, any one particular service is not vital since such a program could connect a student with any one of a variety of dispute resolution processes that would be appropriate to their needs. Not only could a campus dispute resolution center increase

the likelihood of students utilizing mediation services, but it might also decrease the demand and caseload of more traditional services. A campus dispute resolution center using the "Multi-Door Courthouse" approach might include judicial affairs, legal services, ombudsperson, as well as mediation services. It could be staffed by professional staff and peers.

Certainly, one of the key difficulties to "The Multi-Door Courthouse" approach is obtaining the space to house all the various components of the center in one facility. Further, each of the components that might comprise the campus dispute resolution center may be operated by different departments or divisions within a given institution. Assimilating each of these components into one unit may pose a number of practical, or political difficulties. However, where two or more components exist in one department or division, a campus dispute resolution center does offer some interesting potential.

Summary

The legal community has come to recognize the value of alternative dispute resolution methods in resolving conflicts. Mediation is one form of ADR, which provides an impartial third party to facilitate communication between disputants and reach a mutually acceptable agreement. A variety of student disputes can frequently be resolved more effectively with mediation than with other, more traditional, campus dispute resolution services. Campus mediation programs can take the form of peer mediation programs, student mediation centers, or mediation services can be integrated with other dispute resolution services to form a campus dispute resolution center. Each approach holds certain advantages and disadvantages, but despite the approach, mediation can be a powerful method for resolving campus conflict.

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