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# An End to Settlement on the Courthouse Steps - Mediated Settlement Conferences in North Carolina Superior Courts

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## COMMENT

### An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts

*Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peace-maker the lawyer has superior opportunity of becoming a good [person].*

Abraham Lincoln<sup>1</sup>

Over the last several decades, both the number and length of trials have increased drastically. For example, the number of civil case filings in federal district court increased from 35,000 in 1940 to 180,000 in 1981.<sup>2</sup> As a result, the legal system has become a popular target of disparagement for commentators, politicians, and the public at large. Perhaps more disturbing, the public has begun to lose confidence in the effectiveness of the court system as a means to resolve disputes.<sup>3</sup> In an effort to reverse these trends, many courts are beginning to look for alternatives to adjudication, discarding "[t]he notion that ordinary people want black-robed judges, well-dressed lawyers, and fine paneled courtrooms as the setting to resolve their disputes."<sup>4</sup>

Several forms of alternative dispute resolution (ADR) have become popular in recent years.<sup>5</sup> This Comment focuses on mediation, which involves a third party working to facilitate conversation between the disputants in an effort to reach a mutually agreeable settlement.<sup>6</sup> Unlike an arbitrator, the mediator does not possess the authority to impose settle-

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1. Abraham Lincoln, Notes for a Law Lecture (July 1, 1850), in 2 COMPLETE WORKS OF ABRAHAM LINCOLN 140, 142 (John G. Nicolay & John Hay eds., 1905).

2. Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982). In addition, the number of federal trials which lasted more than one month saw a five-fold increase from 1960 to 1981. *Id.* at 276.

3. J. Anderson Little, *Mediated Settlement Conferences in North Carolina*, in MEDIATED SETTLEMENT CONFERENCES 5, 5 (Mediation, Inc., 1992).

4. Barbara McAdoo, *The Minnesota ADR Experience: Exploration to Institutionalization*, 12 HAMLINE J. PUB. L. & POL'Y 65, 69 (1991) (quoting Warren E. Burger, *Our Vicious Legal Spiral*, 16 JUDGES' J. 22, 49 (Fall, 1977)).

5. See *id.* at 65-66 n.2 (providing brief descriptions of mediation, mini-trials, neutral fact-finding, summary jury trials, private trials, and arbitration). Collectively, these options have come to be known as alternative dispute resolution.

6. Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 421-22 (1982). Mediation is often confused with arbitration, but these two methods of alternative dispute resolution are very different from one another. Unlike mediation, arbitra-

ment; settlement is conditioned upon the approval of both parties.<sup>7</sup> In mediation, the parties have a more substantial role than in adjudication, including the opportunity to present their sides of the controversy more personally. As a result, mediation is unique in its ability "to address the causes of disputes, reduce the alienation of litigants, inspire consensual agreements that are complied with and are durable over time and help disputants resume workable relationships."<sup>8</sup> Given these benefits, many states have enacted legislation concerning the use of mediation in their court systems.<sup>9</sup>

Generally, North Carolina has been highly receptive to the introduction of alternative dispute resolution (ADR). Mediation centers were first established by local communities.<sup>10</sup> These centers dealt largely with criminal misdemeanors, receiving the bulk of their case work as referrals from local courts.<sup>11</sup> In 1986, the North Carolina General Assembly stepped into the ADR arena when it established a pilot program for court-ordered arbitration.<sup>12</sup> In 1989, the legislature first experimented with mediation through a program for child custody and visitation.<sup>13</sup>

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tion involves a binding decision issued by a third party. For further discussion of the differences between mediation and arbitration, see *infra* notes 22-25.

7. Pearson, *supra* note 6, at 422. In some jurisdictions, however, the mediator will have the chance to recommend a settlement to the presiding judge. Where this occurs, the mediator's suggestion is often adopted as the decision of the court. See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1555 (1991) (discussing California's system of divorce mediation).

8. Pearson, *supra* note 6, at 422.

9. See, e.g., FLA. STAT. ch. 44.101 (1988) (family mediation); FLA. STAT. ch. 44.302 (1988) (court-ordered mediation); ME. REV. STAT. ANN. tit. 4, § 18 (West 1988) (court mediation service); MICH. COMP. LAWS ANN. §§ 27A.4951 to 27A.4969 (West 1988) (called a mediation program, although more similar to arbitration); MINN. STAT. §§ 572.31-572.40 (1988) (civil mediation); MINN. STAT. § 572.41 (1988) (debtor and creditor mediation); OR. REV. STAT. §§ 36.100-36.210 (1991) (mediation); WYO. STAT. §§ 1-43-101 to 1-43-104 (Supp. 1992) (mediation).

10. The first of these centers was established in Chapel Hill as the Orange County Dispute Settlement Center. In 1985, the Mediation Network of North Carolina was created to provide information on mediation and to help start new centers. By 1987, there were ten dispute settlement centers in North Carolina. All of these centers rely upon volunteer mediators for the bulk of their cases. See Dee Reid, *Community Mediation Programs: A Growing Movement*, 52 POP. GOV'T 24 *passim* (Inst. of Gov't., Univ. of N.C. at Chapel Hill, 1987).

11. *Id.* at 25.

12. See Act of Jun. 12, 1989, ch. 301, 1989 N.C. Sess. Laws 732 (codified at N.C. GEN. STAT. § 7A-37 (1991)). This statute authorizes court-ordered arbitration for all claims of money damages of fifteen thousand dollars or less. For a more detailed discussion of this statute, see William K. Edwards, Note, "No Frills" Justice: North Carolina Experiments With Court Ordered Arbitration, 66 N.C. L. REV. 395, 401-402 (1988).

13. See Act of Aug. 12, 1989, ch. 795, § 15, 1989 N.C. Sess. Laws 2915 (codified at N.C. GEN. STAT. § 7A-794 (1991)). This statute creates a statewide program. Currently, however, it exists only in Gaston, Mecklenburg, Cumberland, and Buncombe counties. J. Anderson

Recently, through the creation of a pilot program for court-ordered mediated settlement conferences in superior court civil actions,<sup>14</sup> the North Carolina legislature took a significant step toward expanding the use of mediation.

This Comment will attempt to define mediation<sup>15</sup> and will discuss its introduction to North Carolina through section 7A-38 of the North Carolina General Statutes.<sup>16</sup> The Comment will then analyze both the enabling legislation<sup>17</sup> and the North Carolina Rules of Mediated Settlement Conferences.<sup>18</sup> After briefly discussing what the practitioner can expect in a mediation session,<sup>19</sup> the Comment will discuss the criticisms and problems created by court-ordered mediated settlements.<sup>20</sup> Finally, the Comment will present early statistics and feedback on the program,<sup>21</sup> concluding from these that the pilot program should be expanded, although with some modification.

### I. WHAT IS MEDIATION?

As noted earlier,<sup>22</sup> mediation is not arbitration. While the parties agree to be bound by the decision of the arbitrator, the mediator simply has an opportunity to persuade the parties to settle on their own terms.<sup>23</sup> "Arbitration, like adjudication, involves a coercive third party who hears evidence and renders a written opinion that is rationalized by reference

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Little, *What is Mediation?*, in *MEDIATED SETTLEMENT CONFERENCES* 3, 3 (Mediation, Inc. 1992).

14. Act of Jun. 4, 1991, ch. 207, 1991 N.C. Sess. Laws 376 (codified at N.C. GEN. STAT. § 7A-38 (1991)) establishes a pilot program for court-ordered mediation in North Carolina Superior Courts. At the moment, the pilot program covers eight judicial districts and thirteen counties: 6A (Halifax), 12 (Cumberland), 13 (Bladen, Brunswick, Columbus), 15B (Chatham, Orange), 17B (Stokes, Surry), 18 (Guilford), 21 (Forsyth), and 30B (Haywood, Jackson). Prior to June 15, 1995 (the date on which the pilot program will terminate), the program will not be expanded beyond these eight districts. Although judges in other districts may not mandate mediation, mediation may be voluntarily used by the parties. Frank C. Laney, Presentation to the Dispute Resolution Committee of the North Carolina Bar Association (Oct. 23, 1992) [hereinafter Laney Presentation].

15. See *infra* notes 23-37 and accompanying text.

16. See *infra* notes 38-49 and accompanying text.

17. See *infra* notes 50-151 and accompanying text. N.C. GEN. STAT. § 7A-38 authorizes the creation of a pilot mediation program. The program is administered under rules adopted by the North Carolina Supreme Court.

18. See *infra* notes 152-202 and accompanying text.

19. See *infra* notes 203-33 and accompanying text.

20. See *infra* notes 234-45 and accompanying text.

21. See *infra* notes 246-65 and accompanying text.

22. See *supra* note 6.

23. John D. Rothman, *Mediation & Arbitration From The Attorney's Perspective*, ARK. LAW., July 1991, at 12, 12; see also John W. Cooley, *Arbitration v. Mediation—Explaining the Differences*, 69 JUDICATURE 263 (1986) (comparing mediation and arbitration).

to general principles.”<sup>24</sup> The mediator, on the other hand, “helps disputants to identify the issues, reduce misunderstandings, vent emotions, clarify priorities, find points of agreement, explore the new areas of compromise and negotiate an agreement.”<sup>25</sup> With few exceptions, both mediators and arbitrators in a court-affiliated program must have completed successfully a certification course and must have been members of the North Carolina State Bar for at least five years.<sup>26</sup>

Given the nature of mediation, one might consider it an alternative means to conduct the settlement process, rather than an alternative to adjudication.<sup>27</sup> If so, what purpose does mediation serve in a system where more than ninety percent of civil cases are either settled or dismissed prior to trial?<sup>28</sup> The best answer appears to be that court-ordered mediation speeds the settlement process.<sup>29</sup> Because many attorneys are reluctant to initiate negotiations, simply getting the parties “to the table” constitutes an important first step toward settlement.<sup>30</sup> Once the parties are in mediation, the settlement process tends to be less fragmented than traditional methods of settlement negotiation.<sup>31</sup> In addition, mediators are trained in negotiation techniques and can facilitate frank discussions that may lead to settlement.<sup>32</sup>

Apart from the systemic benefit of expediting the settlement process, mediation offers individual advantages over traditional judicial proceedings.<sup>33</sup> Given the informal procedure of mediation, it often serves as an

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24. Pearson, *supra* note 6, at 421.

25. *Id.* at 422.

26. N.C. CT. ORD. ARB. R. 2(a) (arbitration); N.C. MEDIATED SETT. CONF. R. 8 (mediation). For more on the required qualifications of mediators, see *infra* notes 187-90.

27. Little, *supra* note 3, at 2.

28. See *id.* at 3 (suggesting the 90% figure); Rothman, *supra* note 23, at 14 (suggesting a 95-97% rate of settlement).

29. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 673 (1986) (suggesting that ADR makes parties think about settlement sooner); Rothman, *supra* note 23, at 14 (noting that mediation allows early determination of those cases that are most likely to go to trial).

30. Edwards, *supra* note 29, at 670. “[T]oo many lawyers view the suggestion of compromise as an admission of weakness and therefore delay the initiation of negotiations with the hope that the onus of suggesting settlement will fall on opposing counsel.” *Id.*

31. Little, *supra* note 3, at 4. Little suggests that traditional settlement discussions occur over the telephone. Due to the impersonal and inconstant nature of such communications, a fragmented settlement process results. Little refers to this process as “serial communication.” *Id.*

32. *Id.*; see also Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1091 (1990) (discussing the mediator’s ability “to spur settlement by overcoming difficulties such as a lack of effective communication, different assessments of information, different attitudes toward risk, or constituency pressures”).

33. See Robert A. Phillips, *Mediated Settlement Conferences in North Carolina Superior*

opportunity to bring emotions into the settlement process.<sup>34</sup> Mediation also promises self-determination, allowing parties to speak for themselves and to make their own decisions.<sup>35</sup> In addition, mediation has great potential for producing a resolution acceptable to both parties—a win-win situation—as opposed to winner-take-all scenario.<sup>36</sup> As a result of these advantages, studies indicate that mediation is “more accommodative and conducive to compromise,” improves relationships among participants, and results in better compliance rates.<sup>37</sup>

## II. NORTH CAROLINA GENERAL STATUTES SECTION 7A-38

Recognizing the advantages of mediation, the Dispute Resolution Committee of the North Carolina Bar Association (N.C.B.A.) established a mediation subcommittee for the purpose of presenting ideas for a court-affiliated program to be adopted by the General Assembly. This subcommittee consisted of attorneys, judges, mediators, court administrators, and law professors. After establishing several basic assumptions,<sup>38</sup> the subcommittee set out to draft proposed legislation. Because

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*Court, in* MEDIATED SETTLEMENT CONFERENCES (Mediation, Inc. 1992) (giving a complete list of the advantages of mediation to the courts, attorneys, and parties).

34. Grillo, *supra* note 7, at 1572 n.117; see also Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982) (“[W]hatever a party deems relevant is relevant.”). Grillo criticizes the fact that certain emotions such as anger are usually not welcome, especially in divorce proceedings. Grillo, *supra* note 7, at 1572. Divorce proceedings, however, will not be mediated under § 7A-38. See *infra* notes 74-75 and accompanying text (discussing the jurisdiction of superior courts).

35. Grillo, *supra* note 7, at 1581. Grillo voices concern that any inability of the parties to choose their own mediator or the time of mediation will actually serve to deprive parties of self-determination. *Id.* The mediation process that Grillo critiques is different from the one existing under § 7A-38 in that it does not allow attorneys to participate in the mediation process, does not allow the choosing of mediators, and allows mediators to make recommendations to the court. *Id.* at 1554. In North Carolina, the parties may choose their own mediator and “the party’s counsel of record” is required to attend the mediated settlement conference. N.C. MEDIATED SETT. CONF. R. 2(a); R. 4(a)(2).

36. Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S6 (1989); see also Carrie Menkel-Meadow, *Symposium: Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1, 7 (1991) (discussing mediation as a means by which parties may reach the most efficient outcome in the Pareto-optimal sense).

37. Pearson, *supra* note 6, at 431-33; see also Cletus C. Hess, Comment, *To Disclose or Not to Disclose: The Relationship Between Confidentiality in Mediation and the Model Rules of Professional Conduct*, 95 DICK. L. REV. 601, 603 (1991) (noting that mediation has higher compliance rates and preserves relationships); Note, *supra* note 32, at 1091-92 (observing that consensual ADR enhances party relations, allows for creative solutions, and results in better compliance than adjudication).

38. The four basic assumptions were: (1) “structured settlement negotiations involving attorneys and their clients, conducted well in advance of trial, will provide a kind of certainty about trial preparation that will produce savings and satisfactions to all,” (2) someone other

Florida had a similar program already in operation, the subcommittee carefully studied Florida's program before finalizing its draft and receiving the approval of the Board of Governors of the N.C.B.A.<sup>39</sup>

The final proposal was sent to State Senator Alexander P. Sands, III, who chose to present and sponsor it before the Senate Judiciary II Committee.<sup>40</sup> Although Senator Sands presented the N.C.B.A. bill, he also offered a committee substitute at the actual committee hearing.<sup>41</sup> After approving the substitute, the Senate Judiciary II Committee made three amendments to it before issuing a favorable report to the full senate.<sup>42</sup> Senate Bill 791, as substituted and amended, passed all three of its senate readings without a single dissenting vote and was then sent to the State House.<sup>43</sup> The bill was then given a favorable report by the House Judiciary III Committee.<sup>44</sup> As in the senate, the bill passed the house without any dissension.<sup>45</sup> Senate Bill 791, as substituted and amended, was then codified as section 7A-38.

The North Carolina Supreme Court adopted the North Carolina Rules of Mediated Settlement Conferences to implement the act.<sup>46</sup>

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than the parties is needed to serve as a facilitator of discussion, (3) the cost of facilitation should "be borne by the parties rather than the state," and (4) "that everyone who has authority to settle the case should participate in the settlement process, but that progress toward settlement cannot be mandated." Little, *supra* note 3, at 7-8.

39. Telephone Interview with Robert A. Phillips, Member of the North Carolina Bar's Subcommittee on Mediation (Oct. 26, 1992) [hereinafter Phillips Interview]. As part of its study, the mediation subcommittee visited Florida for first-hand exposure to the program.

40. S. 791, N.C. Gen. Assembly, Sess. 1991. The N.C.B.A. approached Senator Sands with its proposal because he was chair of the Senate Judiciary II Committee.

41. This substitute contained several new subsections regarding the rules of mediated settlement conferences, case selection, attendance of parties, selection of mediator, sanctions, mediator standards, and mediator immunity. See N.C. GEN. STAT. § 7A-38 (d)-(j) (1992). This proposal appears to have had the support of the mediation subcommittee, as two of its most influential members, J. Anderson Little and Judge James M. Long, spoke in support of the substitute before the Senate Judiciary II Committee. See Senate Judiciary II Comm., Minutes (April 30, 1991).

42. Senate Judiciary II Comm., Minutes (April 30, 1991). These amendments required the Director of the Administrative Office of the Courts to pick the pilot jurisdictions, required a report on the program to be filed by May 1, 1995, and prohibited the use of any state funds to establish, conduct, or evaluate the program. *Id.*

43. Search of North Carolina General Assembly Computer Files, History of Senate Bill S. 791 (Oct. 23, 1992) [hereinafter Search].

44. House Judiciary III Comm., Minutes (May 30, 1991). J. Anderson Little and Judge James M. Long spoke in support of the bill. *Id.*

45. Search, *supra* note 43. A minor technical change was later made as a result of House Bill 929, but this had no substantive impact upon the bill. See H.R. 929, N.C. Gen. Assembly, Sess. 1991.

46. "Rules of mediated settlement conferences. The Supreme Court may adopt rules to implement this section." N.C. GEN. STAT. § 7A-38 (d); see N.C. RULES OF MEDIATED SETT. CONF.

Shortly after adoption of these rules, the first pilot program began operation in Stokes and Surry Counties (Judicial District 17B).<sup>47</sup> By July 1, 1992, the pilot program had commenced in all eight of the pilot districts. Under Rule 10, the Senior Resident Superior Court judge has authority to publish local rules.<sup>48</sup> As of April 1, 1993, six of the eight pilot districts had adopted local rules.<sup>49</sup>

#### A. *Mediators Are Neutral Persons*

Under the definitions of section 7A-38, a mediator is defined as "a neutral person who acts to encourage and facilitate a resolution of a pending civil action . . . [and who] does not render a judgment as to the merit of the action."<sup>50</sup> Neutrality of the mediator is crucial to effective mediation. Unless all parties have confidence in the mediator, it is difficult, if not impossible, to have effective settlement negotiations. If a party believes the mediator to be biased, even if she is not, it could thwart full disclosure to the same extent as when actual bias exists.<sup>51</sup> Therefore, a mediator must maintain an air of neutrality at all times, even if the resulting settlement is not always "neutral."<sup>52</sup>

Because mediators have traditionally been neutral parties, the statute offers nothing new in this regard. But Rule 8's requirement that mediators be members of the North Carolina State Bar<sup>53</sup> raises the question of whether a mediator is acting in a representative capacity. If the mediator is representing the parties, then he must abide by established ethical codes that were created to foster the adversarial process.<sup>54</sup> Such a requirement would be at odds with a program of court-ordered mediated settlement conferences. For example, the North Carolina Rules of Professional Conduct require that:

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47. Operation of the program began on December 1, 1991. Judge James M. Long, an influential member of the mediation subcommittee, is the senior resident superior court judge in this district.

48. N.C. MEDIATED SETT. CONF. R. 10.

49. The six districts were 12, 13, 17B, 18, 21, and 30B. Districts 6A and 15B have yet to adopt any local rules and simply follow the rules established by the North Carolina Supreme Court.

50. N.C. GEN. STAT. § 7A-38(b)(3) (1992).

51. Christopher Honeyman, *Patterns of Bias in Mediation*, 1985 J. DISP. RESOL. 141, 142. Honeyman notes that bias is not always of a personal nature and may arise from the mediator selection process or the very nature of mediation. *Id.*

52. *Id.* at 149. One valuable means of maintaining neutrality is for the mediator to disclose any known personal conflicts prior to mediation. See *infra* note 179 and accompanying text.

53. N.C. MEDIATED SETT. CONF. R. 8.

54. Sandra E. Purnell, Comment, *The Attorney as Mediator—Inherent Conflict of Interest?*, 32 UCLA L. REV. 986, 992 (1985).



A lawyer shall not represent a client if the representation of that client will be or is likely to be directly adverse to another client, unless: (1) The lawyer reasonably believes the representation will not adversely affect the interest of the other client; and (2) Each client consents after full disclosure which shall include explanations of the implications of the common representation and the advantages and risks involved.<sup>55</sup>

Because this rule requires the consent of both parties, a mediator seen as representing the parties may not perform her role when one party withholds consent. In essence, defining an attorney-mediator's role in a representational capacity will require all mediation to be voluntary.

To avoid such a conflict, it is necessary to have a clear understanding of when an individual is acting in a representative capacity. Currently, the North Carolina State Bar has not adopted any applicable definitions, although it has published several ethical opinions relevant to mediation. It appears from these opinions that attorney-mediators are involved in the practice of law.<sup>56</sup> It is unclear, however, whether attorney-mediators are acting in a representational capacity. Commentators have suggested that mediation be distinguished from client representation. At least one has found support for this conclusion in existing federal case law,<sup>57</sup> while another has called for states to change their code and rule definitions of "the practice of law" to distinguish between advo-

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55. N.C. RULES OF PROFESSIONAL CONDUCT Rule 5.1(A) (1993).

56. See N.C. STATE BAR, THE GREEN BOOK CPR 316 (Proposed Feb. 5, 1982) [hereinafter GREEN BOOK]. The inquiry involves several attorneys who wish to create a "Marital Mediation Center." The opinion forbids the creation of such a center, because attorney-mediators are engaged in the practice of law and in so doing are prohibited from practicing under a trade name. *Id.* Although the overall opinion of CPR 316 has been overturned (the center could now be opened under a trade name), the concept that mediators are practicing law would seem unchanged. Telephone Interview with Frank C. Laney, Mediation Coordinator for the North Carolina Bar Association (April 2, 1993). Other opinions suggest that an attorney-mediator must disclose his limited role to the clients, see GREEN BOOK, *supra* at CPR 286 (Proposed Jan. 14, 1981) (concerning mediated divorce settlements), may draft any agreement reached between the parties, see *id.* at CPR 298 (Proposed Oct. 14, 1981) (concerning property settlement between husband and wife where attorney desires to represent both parties), and is prevented from later representing either of the parties in subsequent proceedings, see *id.* at CPR 323 (Proposed July 14, 1982) (attorney became a de facto mediator by requesting, as a friend, that the husband, return home to his wife and, as a result, was prevented from representing the wife in the divorce proceedings).

57. Purnell, *supra* note 54, at 1001-02. Purnell approves of the test announced in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950). Under this test, the practice of law involves two elements: (1) that the client reasonably believe the attorney to be representing him, or (2) the attorney offers confidential legal advice to a client. Purnell, *supra* note 54, at 1001-02. Thus, a mediator can avoid a representational position by informing the party that she is acting as a mediator, not an attorney, and by offering any legal advice to both parties, rather than a single one. *Id.* at 1003-07.

cacy and non-advocacy roles.<sup>58</sup> Because there is no strong authority in North Carolina case law defining "the practice of law," one should not rely upon the courts to draw such a distinction.

For the full potential of mediation to be realized, the practice of attorney-mediators should not be considered one of representation.<sup>59</sup> Only then can the neutrality of attorney-mediators be adequately protected in an adversarial system. One way to place attorney-mediators in a non-representative capacity is the creation of ethical codes specifically for mediators, something the North Carolina Bar Association is likely to recommend in the near future.<sup>60</sup> If such an ethical code is to be adopted, other important considerations that should be taken into account include the duties and expectations of the mediator, as well as the goals of the mediation process itself.<sup>61</sup>

### B. Selection of Cases for Mediation

With a few limited exceptions,<sup>62</sup> the senior resident superior court

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58. Glen Sato, *The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance—A Proposal for Some Ethical Considerations*, 34 UCLA L. REV. 507, 521 (1986). The commentator suggests that the following definition be adopted by each state: "[A] lawyer practices law when she aids others through the use of legal knowledge in problem solving." *Id.* Sato's discussion suggests that such a definition would draw a distinction between "the attorney's advocate and non-advocate activities" and allow attorney-mediators to take "a multidimensional approach to problem solving." *Id.* at 521-23.

59. See *supra* notes 57-58 and accompanying text.

60. Telephone Interview with Frank C. Laney, Mediation Coordinator for the North Carolina Bar Association (Nov. 16, 1992) [hereinafter Laney Interview]. In creating a separate set of ethical guidelines, it is assumed that mediators would not be obligated to obey other guidelines as well. Otherwise, existing conflicts of interest would not be avoided.

Some ethical guidance is given during mediator training. Under rules established by the Supreme Court of North Carolina, all certified training programs must include education on the standards of conduct for mediators. N.C. MEDIATED SETT. CONF. R. 9(a)(3).

Florida has already drafted an ethical code for mediators. It is expected that North Carolina will look at this code carefully in considering the creation of its own code. Telephone Interview with J. Anderson Little, Chair of the Dispute Resolution Committee of the North Carolina Bar Association (April 6, 1993).

61. Sato, *supra* note 58, at 530. Some suggest that the mediator role should be defined as that of a facilitator, rather than an advocate, and that the various goals of mediation should be carefully defined to include maximization of benefit (have all possible alternatives been discussed?), long term viability of the agreement (will the agreement be self-enforceable over the long term?), and fairness (is the agreement reasonably fair to the parties and to third parties "directly affected by the agreement"?). *Id.* at 530-32. Another commentator has suggested that the duties of fairness and maximization of total benefit are sufficient in and of themselves, thereby eliminating the need for defining the role of the mediator. Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 354-59 (1984).

62. Habeas corpus proceedings and other actions for extraordinary writs are excluded from mediation. N.C. MEDIATED SETT. CONF. R. 1(a). "[O]ther extraordinary writs' would probably include writs of mandamus, assistance, attachment, capias, and others." John R.

judge may send any civil action properly before the court, in whole or in part, to mediated settlement conference.<sup>63</sup> Under the North Carolina Constitution, "[e]xcept as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State."<sup>64</sup> The General Assembly has defined this jurisdiction to include civil actions in which the amount in controversy exceeds ten thousand dollars,<sup>65</sup> probate of wills,<sup>66</sup> administration of estates,<sup>67</sup> special proceedings,<sup>68</sup> actions in *quo warranto*,<sup>69</sup> condemnation actions,<sup>70</sup> corporate receiverships,<sup>71</sup> and review of most administrative agency decisions.<sup>72</sup> In addition, superior courts have jurisdiction over cases seeking injunctive relief, declaratory relief, or enforcement of constitutional rights.<sup>73</sup> Superior courts do not, however, have jurisdiction over "proceedings for annulment, divorce, equitable distribution of property, alimony, child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof."<sup>74</sup> Jurisdiction over these cases lies in the district court.<sup>75</sup>

Given the wide range of cases within the jurisdiction of the superior court, one might expect mediation to be especially useful in certain kinds of cases, but not in others. Actual experience, however, has proven otherwise. In Stokes and Surry Counties (Judicial District 17B), Judge James M. Long originally picked cases for mediation that he felt had a good chance of settling. He now refers all cases for mediation because he has decided that there is no accurate way to determine the probability that a case will settle.<sup>76</sup> Others have also found that the flexibility and

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Van Winkle, *Mediation: An Analysis of Indiana's Court-Annexed Mediation Rule*, 25 IND. L. REV. 957, 964 (1992).

63. N.C. GEN. STAT. § 7A-38(e) (1992).

64. N.C. CONST. art. IV, § 12, cl. 3.

65. N.C. GEN. STAT. § 7A-243 (1992). "Where no monetary relief is sought, but the relief sought would establish, enforce, or avoid an obligation, right or title, the value of the obligation, right, or title is in controversy." *Id.*

66. *Id.* § 7A-241.

67. *Id.*

68. *Id.* § 7A-246 (limited exceptions do exist).

69. *Id.* § 7A-247.

70. *Id.* § 7A-248.

71. *Id.* § 7A-249.

72. *Id.* § 7A-250.

73. *Id.* § 7A-245.

74. *Id.* § 7A-244.

75. *Id.* Under § 7A-494, child custody and visitation may be subject to court-ordered mediation. See *supra* note 13 and accompanying text.

76. Telephone Interview with Judge James M. Long, Senior Resident Superior Court

adaptability of mediation make it suitable for "any kind of dispute," even those involving more than two parties.<sup>77</sup> One probable exception to the general suitability of mediation is in the area of public disputes concerning "constitutional issues, issues surrounding existing government regulation, and issues of great public concern."<sup>78</sup> The issues involved in these cases are typically of concern to much of the general public, not simply to the parties. In these circumstances, litigation might be the only way to ensure that the concerns of all interested parties are best met.<sup>79</sup> The critical difference is that these parties are seeking an exposition of the law, rather than a resolution of a dispute.<sup>80</sup>

### C. *Mandatory Attendance by Parties*

Traditionally, mediation has been considered a voluntary process. Parties forced into mediation could simply refuse to participate, making mandatory mediation ineffective. The idea of mandatory mediation appeared to be a contradiction in terms, given the self-determinative nature of mediation.<sup>81</sup> Under section 7A-38(f), however, attendance is mandatory for mediated settlement conferences: "[The] law is [not] mandating agreement, but it is requiring a process, however extensive or minimal it may turn out to be in a particular instance."<sup>82</sup> The underlying premise is that voluntary mediation simply fails to attract participants, so mediation must be mandated.<sup>83</sup> Once forced to mediate, however, a clear majority of participants "are satisfied with the process and glad they were ordered to participate."<sup>84</sup> In addition, research has shown no dif-

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Judge, District 17B (Oct. 14, 1992) [hereinafter Judge Long Interview]. This realization came after several cases that Judge Long thought destined for trial were, in fact, settled. *Id.*

77. Feinberg, *supra* note 36, at S9.

78. Edwards, *supra* note 29, at 671; see also Steven Lubet, *Some Early Observations on an Experiment with Mandatory Mediation*, 4 OHIO ST. J. ON DISP. RESOL. 235, 243-44 (1989) (making essentially the same argument, but distinguishing the cases based on the principles involved).

79. In mediation, the parties settle based on what is most advantageous to them, not what is most advantageous to society as a whole. In addition, mediated settlements may be kept confidential, preventing the public from learning of the outcome.

80. See James A. Gardner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint*, 71 N.C. L. REV. 805, 827-30 (1993) (discussing the distinction between resolution and exposition).

81. George Ferrick, *Three Crucial Questions*, MEDIATION Q., Fall 1986, at 61, 64.

82. *Id.* at 65.

83. Pearson, *supra* note 6, at 427-29 (attributing the lack of voluntary participation to a "wait and see" attitude among attorneys, lack of public education about mediation, and the possibility that community mediation centers keep individuals already aware of mediation out of the courts).

84. Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 505 (1991). A study of parents required to mediate found 75% to 80% to be satisfied with the process. *Id.*;

ference in the chance of settlement between cases of voluntary mediation and cases of mandatory mediation.<sup>85</sup>

In an effort to encourage mediation, at least one commentator has proposed the requirement of a good faith effort by the parties to negotiate.<sup>86</sup> A potential problem with such a standard is a danger that the mediator will become involved in the dispute. Once a party has charged the other with a breach of this standard, the mediator is the only disinterested party available for testimony. Thus, a mediator will be forced to determine whether one side was participating in good faith. This jeopardizes the neutrality of the mediator. To protect the role of the mediator as a neutral party, the courts should avoid all situations which might force the mediator to choose one party over the other. Furthermore, the creation of a good faith standard would simply create more litigation and frustrate one of the primary purposes of mediation.<sup>87</sup>

#### D. Sanctions

In order to insure participation in mediated settlement conferences, the General Assembly authorized the imposition of sanctions for the failure of a party or attorney to attend the conference.<sup>88</sup> The resident or presiding judge has the discretion to impose any lawful sanction he considers appropriate.<sup>89</sup> For purposes of illustration, the North Carolina General Assembly and Supreme Court have declared sanctions to include "the payment of attorneys' fees, mediator fees, and expenses incurred in attending the conference, contempt, or any other sanction authorized by G[eneral] S[tatutes] 1A-1, Rule 37(b)."<sup>90</sup>

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see also Pearson, *supra* note 6, at 429 (reporting that 60%-70% of participants supported a court-ordered mediation program).

85. Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 252 (1981).

86. James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This The End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 63 (1991). Alfini concedes that any good faith standard would necessarily be subjective. *Id.* Given the existence of similar norms in other contexts, though, such a standard could be workable, despite its subjectivity. *Id.*

87. Judge Long Interview, *supra* note 76. In drafting the initial legislation, a good faith requirement was considered by the North Carolina Bar Association, but not included for this very reason. *Id.* The North Carolina Supreme Court also considered such a standard of participation, but felt that no standard was necessary since professional mediators are trained to encourage participation. *Id.* Under North Carolina law, insurance companies are under a good faith obligation in settlement negotiations. *Id.* This obligation does not change in mediated settlement conferences. *Id.*

88. N.C. GEN. STAT. § 7A-38(h). N.C. MEDIATED SETT. CONF. R. 5 expands the application of sanctions to any individual required to attend the conference.

89. N.C. GEN. STAT. § 7A-38(h); N.C. MEDIATED SETT. CONF. R. 5.

90. N.C. GEN. STAT. § 7A-38(h); see also N.C. MEDIATED SETT. CONF. R. 5 (using al-

*E. Selection of Mediators*

After being ordered to attend mediation, the parties are given the name of a tentative mediator selected by the court.<sup>91</sup> If the parties fail to agree upon their own mediator, then the tentative mediator will be appointed by the senior resident superior court judge.<sup>92</sup> To stipulate their own mediator, the parties must do so within fourteen days of being ordered to participate in a mediated settlement conference.<sup>93</sup> If the parties agree, they may stipulate a mediator who does not meet the certification requirements, provided the mediator is otherwise qualified by training or experience in the opinion of the senior resident superior court judge.<sup>94</sup> In Florida, where a similar mediation system has been in place since 1987, most disputants select their own mediators.<sup>95</sup> This has led some mediators to complain that only a handful of mediators do a majority of the work.<sup>96</sup> The less popular mediators see this as unfair in light of the investment of time and money necessary to become certified.<sup>97</sup> This situation, however, does not seem substantially different than the freedom of a party to hire the attorney of her choice.<sup>98</sup>

In appointing mediators, the senior resident superior court judge is limited to those mediators certified under Rule 8.<sup>99</sup> To make mediation available in all cases, only those mediators who agree to mediate indigent cases without pay may be appointed by the court.<sup>100</sup> In an attempt to give all certified mediators an equal chance, several of the local courts have employed a method of rotating appointments.<sup>101</sup> Use of such a system avoids the potential problem of attorneys seeking to have the court

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most identical language). Under N.C. GEN. STAT. § 1A-1 (1991), another possible sanction is the rendering of a default judgment.

91. N.C. MEDIATED SETT. CONF. R. 1(b)(3).

92. N.C. GEN. STAT. § 7A-38(g).

93. N.C. MEDIATED SETT. CONF. R. 2(a).

94. N.C. MEDIATED SETT. CONF. R. 2(a)(2).

95. Alfini, *supra* note 86, at 58.

96. *Id.*

97. *Id.*

98. This point is made under the assumption that the popular mediators are being hired based on superior competence. If, however, the popular mediators are being chosen because they are more accommodating to the attorneys, a serious problem exists. The danger here is that the popular mediators might ignore the needs of one or both of the parties in an attempt to reach a quick settlement, especially in contingency cases where the plaintiff's attorney desires to avoid the additional costs of going to trial. An assumption of this explanation, is that the attorneys, rather than their clients, usually choose the mediators.

99. N.C. MEDIATED SETT. CONF. R. 8.

100. N.C. MEDIATED SETT. CONF. R. 2(b).

101. See N.C. DIST. 13 MEDIATED SETT. CONF. R. M-4 ("Appointments shall be in succession from a rotating list unless the judge finds that another mediator has special qualifications to mediate a particular dispute, in which case an exception to the succession rule may be

appoint popular mediators to avoid paying the higher fees usually charged by party-chosen mediators.<sup>102</sup> In addition, rotation of appointments allows as many mediators as possible to experience the pilot program. The disadvantage to such a system is that it could enable bad mediators to continue to mediate, thereby decreasing the effectiveness of the program and preventing some individuals from reaching agreements.

As a procedural safeguard, parties have the ability to petition the court for the disqualification of mediators upon a showing of "good cause."<sup>103</sup> This remedy is important because bad mediators do exist and these mediators may create an impasse between the parties. Allowing parties to disqualify the mediator and have a replacement appointed increases the possibility for a positive mediation experience.

### F. Mediator Immunity

Under section 7A-38(j), mediators are extended the same immunity from criminal and civil penalties as that given "a judge of the General Court of Justice."<sup>104</sup> In North Carolina, judicial immunity is an absolute immunity and exists "even when the judge is accused of acting maliciously and corruptly."<sup>105</sup> This immunity covers only those actions performed while fulfilling judicial duties.<sup>106</sup> As a result, a mediator can expect immunity only in performing those duties necessary to the mediated settlement conference.<sup>107</sup> Such immunity is not for the protection of mediators, "but for the benefit of the public, whose interest it is that the [mediators] should be at liberty to exercise their functions with independence and without fear of consequences."<sup>108</sup> "[I]f not so protected, our judicial and prosecutorial officers, even though honest and conscientious, would labor under the threat of civil suit and judicial proceedings would

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made."); N.C. DIST. 17B MEDIATED SETT. CONF. R. 4 (same); N.C. DIST. 18 MEDIATED SETT. CONF. R. 4 (same); N.C. DIST. 30B MEDIATED SETT. CONF. R. 4 (same).

102. Van Winkle, *supra* note 62, at 972. The potential for such abuse exists in those districts where the senior resident superior court judge chooses to make his own appointments rather than use a rotating system.

103. N.C. MEDIATED SETT. CONF. R. 2(c).

104. N.C. GEN. STAT. § 7A-38(j).

105. *Foust v. Hughes*, 21 N.C. App. 268, 270, 204 S.E.2d 230, 231-32 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)), *cert. denied*, 285 N.C. 589, 205 S.E.2d 722 (1974). For a differing view of potential liability of mediators, see Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. ON DISP. RESOL. 47, 53 (1986) (stating that the scope of judicial immunity in settlement discussions is unclear).

106. *Foust*, 21 N.C. App. at 270, 204 S.E.2d at 231.

107. Presumably, this immunity would be available for any actions taken in preparation for the mediated settlement conference.

108. *Foust*, 21 N.C. App. at 270, 204 S.E.2d at 232 (quoting *Pierson*, 386 U.S. at 554).

be seriously hindered."<sup>109</sup>

Commentators have argued over the prudence of granting judicial immunity to mediators. One commentator has argued that mediators should have qualified immunity, rather than absolute, allowing for liability based upon fiduciary obligations of fairness and trust.<sup>110</sup> As the parties' attorneys are required to be present at the mediated settlement conference,<sup>111</sup> it would seem that they are in a better position than the mediator to protect their clients from unfair settlements. Perhaps the best recourse for parties is through malpractice suits against their attorneys, rather than against mediators. Given the availability of alternatives for redress, judicial immunity helps insure that mediators work to the best of their ability and without fear of liability.<sup>112</sup>

### G. Costs

When the parties choose their own mediator, compensation will be whatever is agreed upon by the parties and mediator.<sup>113</sup> If the mediator is court-appointed, the court will set the compensation rate.<sup>114</sup> The current court-appointed rate is one hundred dollars per hour, in addition to a one hundred dollar base fee.<sup>115</sup> All costs are to be equally shared: one share by plaintiffs, one share by defendants, and one share by any third-

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109. *Mazzucco v. Board of Medical Examiners*, 31 N.C. App. 47, 50, 228 S.E.2d 529, 532, *disc. rev. denied*, 291 N.C. 323, 230 S.E.2d 676 (1976).

110. Arthur A. Chaykin, *Mediator Liability: A New Role For Fiduciary Duties?*, 53 U. CIN. L. REV. 731, 762 (1984). Professor Chaykin sees three possible theories for mediator liability: tort, contract, and breach of fiduciary duty. Given the variety of styles used by mediators, there is little agreement as to what a reasonably competent mediator should do. *Id.* at 736. As a result, it would be difficult to pursue liability under a tort theory, except for clearly outrageous behavior. *Id.* Mediator contracts tend to be rather vague, so they provide little upon which to base liability. *Id.* at 737. Based on the confidential nature of mediation, Professor Chaykin suggests that breach of fiduciary duty provides the most likely chance for recovery. As a fiduciary, a mediator could not act opportunistically and would be under a duty to act fairly with respect to both parties. *Id.* at 742-49. In the event that a breach of fiduciary duty occurred, the agreement could be rewritten and/or the mediator could be liable for those damages suffered as a result of his breach. *Id.* at 758-60.

111. N.C. GEN. STAT. § 7A-38(f).

112. See *supra* notes 108-109 and accompanying text. In addition, this possibility for redress may prevent possible constitutional challenges under N.C. CONST. art. I, § 18 (guaranteeing that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law. . ."). See J. Sue Richardson, *Mediation: The Florida Legislature Grants Judicial Immunity to Court-Appointed Mediators*, 17 FL. ST. U. L. REV. 623, 643-46 (1990) (discussing possible state constitutional challenges to judicial immunity for mediators).

113. N.C. MEDIATED SETT. CONF. R. 7(a).

114. N.C. MEDIATED SETT. CONF. R. 7(b).

115. *Report of Mediator* (N.C. Admin. Office of the Courts, Form AOC-CV-813).



party defendant.<sup>116</sup> This arrangement is subject to change by order of the court or agreement of the parties.<sup>117</sup> In addition, any indigent party may avoid payment by having the court appoint a mediator.<sup>118</sup> Payment is due upon completion of the conference.<sup>119</sup> Under local rules, failure of a party to make timely payment of a mediator's fee will result in "contempt of court and may result in the imposition of any and all lawful sanctions."<sup>120</sup>

### H. Confidentiality

The guarantee of confidentiality in mediation is crucial if mediation is to meet its high expectations. For mediation to be effective, the parties must feel completely free to tell their sides of the story without worrying that such statements will later be used against them.<sup>121</sup> Any fear that the mediator may subsequently testify against the parties could ruin the perception of the mediator as neutral.<sup>122</sup> Furthermore, "[m]aking conduct and statements made during mediation inadmissible reduces th[e] risk" of parties engaging in unprincipled discovery.<sup>123</sup> Finally, as some individuals may desire to keep certain information from the general public, the confidential nature of mediation may encourage them to participate in the process.<sup>124</sup>

To protect the confidentiality of mediated settlement conferences, the General Assembly made all conduct and communications made in such conferences subject to Rule 408 of the North Carolina Rules of Evidence,<sup>125</sup> which provides:

Evidence of 1) furnishing or offering or promising to furnish, or

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116. N.C. GEN. STAT. § 7A-38(k); N.C. MEDIATED SETT. CONF. R. 7(d).

117. N.C. GEN. STAT. § 7A-38(k); N.C. MEDIATED SETT. CONF. R. 7(d).

118. See *supra* note 100 and accompanying text. Determination of indigent parties will be made after completion of the conference or, if the parties do not settle, trial. In deciding whether a party is indigent, the judge may consider "the outcome of the action and whether a judgment was rendered in the movant's favor." N.C. MEDIATED SETT. CONF. R. 7(c).

119. N.C. MEDIATED SETT. CONF. R. 7(d).

120. N.C. DIST. 13 MEDIATED SETT. CONF. R. M-11(E); see also N.C. DIST. 17B MEDIATED SETT. CONF. R. 11(E); N.C. DIST. 18 MEDIATED SETT. CONF. R. 11(E); N.C. DIST. 21 MEDIATED SETT. CONF. R. 11(E); N.C. DIST. 30B MEDIATED SETT. CONF. R. 11(E).

121. Feinberg, *supra* note 36, at S28-S29.

122. Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1, 2 (1988). For a discussion of the importance of a neutral mediator, see *supra* notes 50-52 and accompanying text.

123. Frank C. Laney, *What is Mediation?*, in EFFECTIVE ADVOCACY IN MEDIATED SETTLEMENT CONFERENCES, July 10, 1992, App. II, at 46 (North Carolina Bar Foundation Continuing Legal Education, Raleigh, N.C.).

124. Prigoff, *supra* note 122, at 2.

125. N.C. GEN. STAT. § 7A-38(f) (1992).

2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim that was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible.<sup>126</sup>

Under Rule 408, evidence is not excluded when "offered for another purpose, such as proving bias or prejudice of witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."<sup>127</sup>

By itself, Rule 408 does not guarantee that all statements made in mediated settlement conferences will remain confidential. In situations where the conduct or statement is offered for reasons other than to prove liability or amount, it may be admissible.<sup>128</sup> Where evidence can be discovered outside the mediation conference, the mere fact that it was learned in mediation will not make it inadmissible.<sup>129</sup> In addition, Rule 408 does not protect parties from discovery of the mediation proceedings, nor does it prevent parties from revealing statements made in the proceedings to others.<sup>130</sup> In sum, Rule 408 does not provide parties with complete protection from the revelation of conduct or statements made during mediation.

Although other rules of evidence may provide limited protection from disclosure,<sup>131</sup> North Carolina law does not guarantee confidentiality. For confidentiality to be assured, more stringent confidentiality statutes must be adopted. Several other states have enacted such provisions. For example, in Minnesota, "[a] person cannot be examined as to any communication or document, including worknotes, made or used in the course of or because of mediation."<sup>132</sup> In Texas, any communications

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126. N.C. R. EVID. 408. North Carolina's Rule 408 is almost identical to Federal Rule 408 and to that of most states. The North Carolina version adds the phrase "evidence of" to the second sentence.

127. *Id.*

128. For example, the rule would not exclude evidence offered to prove the existence of an agreement or the terms therein. See *Carter v. Foster*, 103 N.C. App. 110, 116, 404 S.E.2d 484, 488-89 (1991).

129. N.C. R. EVID. 408.

130. Kent L. Brown, Comment, *Confidentiality in Mediation: Status and Implications*, 2 J. DISP. RESOL. 307, 314 (1991). Courts are split on whether Rule 408 precludes discovery of settlement discussions. See *Feinberg*, *supra* note 36, at S34-S35. North Carolina has yet to decide the matter.

131. See N.C. R. EVID. 403 (requiring courts to balance the probative value of evidence with the harm likely to result from its admission); N.C. R. EVID. 501 (allowing courts to create new privileges under the appropriate circumstances).

132. MINN. STAT. § 595.02, subd. 1(k) (1988).

made in the course of any ADR proceeding are confidential, protected from disclosure, and unavailable as evidence against a participant.<sup>133</sup> Under North Carolina's pilot program for child custody mediation, neither the mediator nor the parties are competent witnesses as to communications made during the mediation session.<sup>134</sup> The enactment of a statute similar to any of these would prevent disclosure of mediation statements in subsequent litigation.

Absent such legislation, any individual involved in a mediated settlement conference would be wise to consider a pre-mediation agreement on confidentiality. These agreements prohibit the parties and mediator from disclosing anything that occurred in the mediated settlement conference. It is unclear whether such agreements would be enforced in North Carolina.<sup>135</sup> Elsewhere, courts have both upheld and overturned confidentiality agreements on public policy grounds, although the trend appears to be in favor of such agreements.<sup>136</sup> Assuming courts do enforce confidentiality contracts, then any breach could result in liability. Of course, it may be difficult to prove damages, especially those of a consequential nature.<sup>137</sup> One advantage of contracts, however, is that they may be written to require confidentiality in circumstances other than the presentation of evidence.

No matter how the issue of confidentiality is resolved, another problem arises with common law or statutory duties of disclosure. For example, does the mediator have a duty to disclose to the proper authorities that one of the parties to mediation has revealed himself to be a child abuser? What if a party reveals to the mediator that she intends to commit a crime? Such situations create the duty of disclosure when revealed in non-court-ordered mediation settings,<sup>138</sup> but will a duty also arise in

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133. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a) (West Supp. 1993).

134. N.C. GEN. STAT. § 50-13.1(f) (1991). An exception is made for communications made in furtherance of a crime or fraud. *Id.*

135. In the context of community mediation centers, at least one North Carolina superior court judge has upheld a confidentiality agreement. Mike Wendt, Presentation to Volunteer Mediator Training Session for the Dispute Settlement Center of Durham (July 31, 1992). As the mediators for such centers are volunteers rather than paid professionals, this decision may have turned on public policy considerations. In other words, a desire to encourage volunteer participation at community mediation centers may have led the court to protect mediators from testifying at trial. Courts might be more reluctant to protect confidentiality in cases that lack this or a similar policy consideration.

136. See Brown, *supra* note 130, at 318-22.

137. John R. Murphy III, Comment, *In the Wake of Tarasoff: Mediation and the Duty to Disclose*, 35 CATH. U. L. REV. 209, 224-225 (1985).

138. Community mediation volunteers are bound by North Carolina law to report suspected child abuse or reasonable cause to believe a disabled adult is in need of protection from abuse. Reid, *supra* note 10, at 27. Typically, one would expect such revelations to be made in domestic relations cases. Such cases are outside the jurisdiction of the superior court and,

mediated settlement conferences? Under the cloak of judicial immunity, mediators will be protected from any civil liability if they choose not to reveal such information.<sup>139</sup> Judicial immunity will not protect mediators from criminal prosecution, however. At least one state attorney general has issued an opinion that such revelations would remain confidential if presented in the course of mediation.<sup>140</sup> In Texas, conflicts between confidentiality requirements and a duty to disclose are to be heard in camera to determine the proper course of action.<sup>141</sup> A similar law in North Carolina would encourage full disclosure by the parties and, as a result, make agreeable settlement terms easier to achieve.

### III. RIGHT TO A JURY TRIAL

The North Carolina Constitution states: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable."<sup>142</sup> In accord with this provision, section 7A-38(p) states that nothing in the statute or rules "shall restrict the right to jury trial."<sup>143</sup> This final portion of the statute is significant because it makes clear the intent of the General Assembly to avoid constitutional challenges to mediated settlement conferences. Although individuals might challenge the current mediation as an infringement to their right to jury trial, any finding of such an infringement would only invalidate the mediation, not the statute. In other words, the statute should survive any constitutional challenge based on the right to trial by jury.

If a challenge were made to the existing process, it would be unlikely to prevail. Employing various methods of analysis, courts have typically upheld ADR methods as long as they do not compel settlement.<sup>144</sup> Under the three basic methods of analysis,<sup>145</sup> it appears likely that sec-

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thus, are not subject to court-ordered mediation. See *supra* notes 74-75 and accompanying text. Although unlikely, the possibility still exists that such a revelation could be made in mediation. Given the gravity of the possible results, this issue should not be dismissed lightly.

139. See *supra* notes 104-109 and accompanying text. In situations where mediators do not have judicial immunity, this could create real problems. See, e.g., Chaykin, *supra* note 105, at 73-76 (1976) (discussing possible liability in light of *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334 (1976)); Murphy, *supra* note 137, at 213-18 (same).

140. See Murphy, *supra* note 137, at 220 (discussing the situation as it exists in New York).

141. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(d) (West Supp. 1993).

142. N.C. CONST. art. I, § 25.

143. N.C. GEN. STAT. § 7A-38(p).

144. Nancy A. Welsh, *Court-Ordered ADR: What Are The Limits?*, 12 HAMLINE J. PUB. L. & POL'Y 35, 37-43 (1991) (reviewing federal cases that have involved constitutional challenges to ADR).

145. *Id.* at 38.

tion 7A-38 would be upheld. First, under the "ultimate access" standard, ADR methods will be upheld so long as a jury will ultimately determine the issues of fact if settlement proves unsuccessful.<sup>146</sup> Because the parties to a mediated settlement conference can demand a jury trial if settlement does not occur, this standard is met. A second approach, the "onerous condition" standard, is a balancing test that weighs the limitations upon jury trial and the benefits of ADR.<sup>147</sup> Mediated settlement conferences cause no delay in trial proceedings and, therefore, are not an "onerous condition" to jury trial.<sup>148</sup> Finally, the "basic procedural innovation" standard is one by which the courts analyze the potential impact of ADR upon the jury's decision.<sup>149</sup> If the ADR method is such that it affects the outcome of the jury's decision, then it is considered a "basic procedural innovation" which effectively deprives the parties to a jury trial.<sup>150</sup> Given the inadmissibility of conduct or statements made in mediation, there is little chance that they would have any impact upon the jury's decision.<sup>151</sup>

#### IV. NORTH CAROLINA SUPREME COURT AND LOCAL RULES

In addition to the statute, anyone involved in mediation must be familiar with the North Carolina Supreme Court rules governing mediated settlement conferences in superior court civil actions. If a district has adopted local rules, individuals should be familiar with these as well.<sup>152</sup> Some of these rules have been discussed above in conjunction with the statute;<sup>153</sup> others will be discussed in the following section.

##### A. Order for Mediated Settlement Conference

Under Rule 1, the authority of the senior resident superior court

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146. *Id.*; see, e.g., *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266, 268 (6th Cir. 1985).

147. Welsh, *supra* note 144 at 39. For cases using this approach, see *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 577 (E.D. Pa. 1979) (benefits of arbitration outweigh the cost of the party's preparation for it); *Parker v. Children's Hosp. of Philadelphia*, 483 Pa. 106, 120-21, 394 A.2d 932, 939 (1978) (same).

148. See *infra* notes 166-67 and accompanying text.

149. Welsh, *supra* note 144, at 42. See, e.g., *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 45-46 (E.D. Ky. 1988) (stating that the summary jury trial was not "outcome-determinative" and did not represent a basic procedural innovation); *Kimrough v. Holiday Inn*, 478 F. Supp. 566, 574 (E.D. Pa. 1979) (holding that non-binding arbitration has no effect on the outcome of a case and is not a basic procedural innovation).

150. Welsh, *supra* note 144, at 42.

151. See *supra* notes 125-30 and accompanying text.

152. Districts are authorized to make local rules. N.C. MEDIATED SETT. CONF. R. 10; see also *supra* note 49 (listing the districts that have adopted local rules).

153. See *supra* notes 62, 88-103, 113-120 and accompanying text (discussing other state and local rules).

judge in a pilot district is made explicit. Through a written order, the judge may require the presence of parties at mediated settlement conferences. Any case properly before the court may be sent to mediation, "except habeas corpus proceedings or others actions for extraordinary writs."<sup>154</sup> The written order will contain, among other things, a deadline for completion of mediation and the name of a tentatively appointed mediator.<sup>155</sup> A judge's decision to send a case to mediation may be challenged by motion to dispense with or to defer the mediated settlement conference.<sup>156</sup> The movant must show good cause for dispensing with or deferring mediation.<sup>157</sup> It is not yet clear what is considered to be good cause, but it appears to be a difficult burden to meet.<sup>158</sup> Additionally, in cases not sent to mediation, any or all of the parties may petition the senior resident judge to order mediation.<sup>159</sup> This ability to petition the court for an order to mediate is important because it allows a single party to initiate mediation.<sup>160</sup>

### B. *The Mediated Conference*

"The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice to all attorneys and unrepresented parties of the time and location of the conference."<sup>161</sup> Except for good cause, mediation is not to begin "earlier than 120 days after the filing of the last required pleading and no later than 60 days after the court's order."<sup>162</sup> Again it is unclear what constitutes good cause.<sup>163</sup> Once mediation has begun, the mediator is free to recess

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154. N.C. MEDIATED SETT. CONF. R. 1(a); *see also supra* note 62 (discussing what might constitute an extraordinary writ).

155. N.C. MEDIATED SETT. CONF. R. 1(b); *see also* Order for Mediated Settlement Conference, March, 1992 (N.C. Super. Ct. Order AOC-CV-810).

156. N.C. MEDIATED SETT. CONF. R. 1(c).

157. *Id.*

158. In District 17B, Judge James M. Long denied all motions to dispense with mediation in the first ten months of the pilot program. Judge Long Interview, *supra* note 76. In addition, of the first 1939 cases sent to mediated settlement conferences, only 104 were removed. *Mediated Settlement Conference: Status Report* (Admin. Office of the Courts), Feb. 28, 1993.

159. N.C. MEDIATED SETT. CONF. R. 1(d). Nonmoving parties are given ten days to file objections to such a motion. *Id.*

160. It is difficult to determine what a party must show in order to have such a motion granted. Currently, districts are forced to deny many such motions on grounds that one half of all cases must be kept from mediation to serve as a control group for the Institute of Government study. *See infra* note 250 and accompanying text. This practice has led many attorneys to complain that they are being unfairly denied access to mediation. *See* Phillips Interview, *supra* note 39.

161. N.C. MEDIATED SETT. CONF. R. 3(a).

162. N.C. MEDIATED SETT. CONF. R. 3(b).

163. Some local court rules have done away with the good cause standard and left media-

at any time and may set times for the resumption of the conference.<sup>164</sup> The mediated settlement conference must be completed within thirty days of its commencement.<sup>165</sup>

Section 7A-38 provides that a conference must not delay "other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge."<sup>166</sup> Without this important provision, the mediated settlement conference could be subject to constitutional challenges. The North Carolina Constitution guarantees that "justice shall be administered without favor, denial, or delay."<sup>167</sup>

### C. Duties of Parties, Representatives, and Attorneys

Under Rule 4, a party's representative must have authority to settle the case.<sup>168</sup> If an individual has no authority to settle, mediation becomes useless as an alternative to settlement. Thus, it is only logical that the supreme court and General Assembly should require such authority.<sup>169</sup>

Upon settlement of a case, the parties and their counsel must sign a written agreement stipulating the terms of settlement.<sup>170</sup> Under local rules, this agreement must be made immediately upon reaching settlement.<sup>171</sup> No such urgency exists under the state rule.<sup>172</sup> In addition, "[A] consent judgment or one or more voluntary dismissals shall be filed

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tion schedule changes within the discretion of the senior resident judge. See N.C. DIST. 13 MEDIATED SETT. CONF. R. M-7(B); N.C. DIST. 17B MEDIATED SETT. CONF. R. 7(B); N.C. DIST. 18 MEDIATED SETT. CONF. R. 7(B); N.C. DIST. 21 MEDIATED SETT. CONF. R. 7(B); N.C. DIST. 30B MEDIATED SETT. CONF. R. 7(B).

164. N.C. MEDIATED SETT. CONF. R. 3(c).

165. N.C. MEDIATED SETT. CONF. R. 3(b).

166. N.C. MEDIATED SETT. CONF. R. 3(d).

167. N.C. CONST. art. I, § 18. If mediation were to delay trial proceedings, it might be found unconstitutional. Mandatory ADR has been struck down in several states precisely on this ground. See Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 547-549 (1989).

168. N.C. MEDIATED SETT. CONF. R. 4(a). Government representatives must have authority to negotiate and recommend settlement. *Id.*

169. See N.C. GEN. STAT. § 7A-38(f) (also requiring that parties have the authority to settle).

170. N.C. MEDIATED SETT. CONF. R. 4(b).

171. See N.C. DIST. 13 MEDIATED SETT. CONF. R. M-8(B); N.C. DIST. 17B MEDIATED SETT. CONF. R. 8(B); N.C. DIST. 18 MEDIATED SETT. CONF. R. 8(B); N.C. DIST. 21 MEDIATED SETT. CONF. R. 8(B); N.C. DIST. 30B MEDIATED SETT. CONF. R. 8(B).

172. Attorneys and their clients would be wise to have everyone involved sign the agreement as soon as possible in order to create a binding agreement and prevent the possibility of future disputes concerning what was agreed upon.

with the court by such persons as the parties shall designate.”<sup>173</sup> If parties opt for voluntary dismissal, the dismissal will be without prejudice provided the same claim has not been dismissed previously.<sup>174</sup> After dismissal, a claim based on the same action may be brought within one year, unless all the parties have stipulated to a shorter period.<sup>175</sup> If the parties agree to terms that exceed the stipulation of voluntary dismissal, any additional agreements are likely to be enforced under general contract law.<sup>176</sup>

#### D. Authority and Duty of Mediators

Under Rule 6, the mediator is placed in complete control of the mediated settlement conference.<sup>177</sup> If she desires, a mediator may choose to meet separately with a party or the party’s counsel during the conference.<sup>178</sup> Regardless of whether all of the parties are present, the mediator has a duty to maintain her neutrality and inform all parties of any possible bias, prejudice, or partiality.<sup>179</sup> The mediator also has the duty “to timely determine when mediation is not viable, that an impasse exists, or that mediation should end.”<sup>180</sup> Prior to commencing the mediated settlement conference, a mediator must disclose to the parties certain information concerning mediation and related matters.<sup>181</sup> Once the confer-

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173. N.C. MEDIATED SETT. CONF. R. 4(b). A consent judgment is a contract between the parties entered with the approval and sanction of the court. *See Layton v. Layton*, 263 N.C. 453, 456, 139 S.E.2d 732, 735 (1965). As such, consent judgments may be enforced by the court to the same extent as a judgment resulting from a jury verdict. *Henderson v. Henderson*, 307 N.C. 401, 408, 289 S.E.2d 345, 350 (1983).

174. N.C. R. Civ. P. 41.

175. *Id.*

176. *See Robert P. Burns, The Enforceability of Mediated Agreements: An Essay on Legitimation and Process Integrity*, 2 OHIO ST. J. ON DISP. RESOL. 93, 94-100 (1986) (discussing the enforceability of mediated agreements under contract law).

177. N.C. MEDIATED SETT. CONF. R. 6(a).

178. Such individual meetings are often referred to as caucuses. They provide the mediator with a valuable opportunity to discuss matters that may not be appropriate in the presence of all parties. Some mediators will reveal the content of caucuses to all parties, while others will not. *See infra* note 230 and accompanying text.

179. N.C. MEDIATED SETT. CONF. R. 6(d); *see also supra* notes 50-52 and accompanying text (discussing the importance of neutrality).

180. N.C. MEDIATED SETT. CONF. R. 6(e).

181. The mediator is specifically charged with informing the parties of the following:

- 1) The process of mediation.
- 2) The differences between mediation and other forms of conflict resolution.
- 3) The costs of the mediated settlement conference.
- 4) The facts that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement.
- 5) The circumstances under which the mediator may meet alone with either of the parties or with any other person.



ence has ended, the mediator must file a report with the court giving the outcome, if any, of the mediated settlement conference.<sup>182</sup>

### *E. Mediator Certification and Decertification*

Rule 8 authorizes the Administrative Office of the Courts to certify all mediators.<sup>183</sup> As of November 13, 1992 there were 116 certified mediators in North Carolina.<sup>184</sup> To become certified, an individual must: (1) "[b]e a member in good standing of the North Carolina State Bar and have at least five years of experience as a judge, practicing attorney, law professor, or mediator, or equivalent experience,"<sup>185</sup> (2) "[h]ave completed a minimum of 40 hours" in a certified training program;<sup>186</sup> (3) have observed two mediated settlement conferences;<sup>187</sup> (4) "[d]emonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina,"<sup>188</sup> (5) "[b]e of good moral character and adhere to any ethical standards." adopted by the North Carolina Supreme Court;<sup>189</sup> and (6) "[p]ay all administrative fees."<sup>190</sup>

Interestingly, only individuals who are members of the North Carolina State Bar with at least five years experience may become

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6) Whether and under what conditions communications with the mediator will be held in confidence during the conference.

7) The inadmissibility of conduct and statements as provided by Rule 408 of the Evidence Code.

8) The duties and responsibilities of the mediator and the parties.

9) The fact that any agreement reached will be reached by mutual consent of the parties.

N.C. MEDIATED SETT. CONF. R. 6(b).

182. N.C. MEDIATED SETT. CONF. R. 6(f). This duty to report refers strictly to the agreement, not to any conduct or statements of the conference. As part of this duty, the mediator may be requested to submit statistical data to the Administrative Office of the Courts. *Id.* Interestingly, there is no mention of what might happen in the event one of these duties is breached. Decertification might be one possible result. See *infra* notes 197-98 and accompanying text (discussing decertification).

183. N.C. MEDIATED SETT. CONF. R. 8.

184. ADMINISTRATIVE OFFICE OF THE COURTS, LIST OF CERTIFIED MEDIATORS (1992) (available on request from the Administrative Office of the Courts). In addition, well over two hundred people have completed a certified training course. J. Anderson Little, Speaking to the Executive Committee of the Dispute Resolution Committee of the North Carolina Bar Association (Oct. 24, 1992).

185. N.C. MEDIATED SETT. CONF. R. 8(b).

186. *Id.* 8(a).

187. *Id.* 8(c).

188. *Id.* 8(d). This familiarity is established through testing. See *Id.* 9(a)(7) (requiring such tests as part of all certified training programs).

189. *Id.* 8(e).

190. *Id.* 8(g).

mediators.<sup>191</sup> Allowing attorneys to become mediators makes a great deal of sense because attorneys often engage in settlement negotiations<sup>192</sup> and may possess useful mediation skills learned during the legal training process.<sup>193</sup> Additionally, a working knowledge of the law is helpful in understanding the position of each party.<sup>194</sup>

One question, however, is whether the role of mediator should be exclusively reserved for members of the bar. If mediation is the facilitation of settlement between disputing parties, is this not "a skill that stands completely separate and apart from other professional training and abilities?"<sup>195</sup> If so, then any individual with strong interpersonal skills could serve as a mediator. After all, the community mediation centers have relied upon such individuals for years. In limiting mediators to members of the bar, the supreme court has simply protected the legal profession from additional competition and possibly excluded many excellent mediators from the process, especially those with expertise in the subject matter of the dispute.<sup>196</sup>

A mediator may lose his certification if the Director of the Administrative Office of the Courts decides that the mediator no longer meets statutory qualifications or has failed to observe "faithfully" either the state or local rules.<sup>197</sup> Currently, no set guidelines for decertification exist.<sup>198</sup> The informal nature of mediation, however, makes the creation of guidelines necessary. If mediators are uncertain about the possible results of their action, this will reflect in their actions and possibly harm their ability to bring about settlement.

#### F. Certification of Training Programs

To become certified, a training program must offer a minimum of forty hours of instruction.<sup>199</sup> This instruction must include: (1) conflict

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191. *Id.* 8(b).

192. Sato, *supra* note 58, at 514-15.

193. *Id.*

194. *Id.* at 515.

195. Lubet, *supra* note 78, at 247. *But see* Riskin, *supra* note 34, at 43 (arguing that the use of lawyers as mediators makes it more likely that mediation will become an accepted alternative to adjudication).

196. The parties may agree to a mediator who does not meet the requirements of Rule 8. N.C. MEDIATED SETT. CONF. R. 2(a). Of course, the lack of certification will hamper non-certified mediators in their efforts to solicit employment. In addition, in order to stipulate to a non-certified mediator, both parties and the senior resident superior court judge must agree to the mediator's ability. *Id.* This requirement of unanimity makes it even more difficult for non-certified mediators to be chosen.

197. N.C. MEDIATED SETT. CONF. R. 8.

198. Laney Interview, *supra* note 60.

199. N.C. MEDIATED SETT. CONF. R. 9(a). At least one of the training courses has been

resolution and mediation theory, (2) mediation process and techniques, (3) standards of conduct, (4) education on the statutes, rules, and practice of mediated settlement conferences, (5) demonstrations, (6) simulations in which students may participate and be evaluated, and (7) the administration of an examination testing student knowledge of the statutes, rules, and practice of mediation.<sup>200</sup> The focus of such training programs is typically role playing, which enables the student to become comfortable with her ability to mediate.<sup>201</sup> Currently, there are two certified training programs, administered in North Carolina by the American Arbitration Association (Charlotte, N.C.—regional office) and Dispute Management, Inc. (Orlando, Fla.). By approval of the Director of the Administrator Office of the Courts, individuals may become certified if they were trained prior to the promulgation of the state rules or attended other mediation programs that later achieved certification.<sup>202</sup>

## V. THE MEDIATION PROCESS

### A. Preparation

Although an understanding of the statutes and rules governing mediation is essential, individuals representing a party to mediation should also have some knowledge of what to expect in the actual mediated settlement conference. Before attending the conference, a significant amount of preparation is necessary. First, attorneys should inform their clients about mediation, making sure to compare the benefits and drawbacks of mediation and litigation and to answer any questions the client might have.<sup>203</sup> Lawyers should emphasize to their clients that they are under no obligation to accept a settlement and, by all means, should not agree to anything unacceptable.<sup>204</sup> In addition, attorneys should inform their clients that mediation will only work if everyone is candid and truthful throughout the conference.<sup>205</sup> Of course, an attorney and her

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approved for 37.5 hours of CLE credit, including two hours of ethics. AMERICAN ARBITRATION ASSOCIATION, SUPERIOR COURT MEDIATION SKILLS TRAINING COURSE BROCHURE (1992) (available from the American Arbitration Association regional office in Charlotte, NC).

200. *Id.*

201. AMERICAN ARBITRATION ASSOCIATION, OUTLINE FOR NORTH CAROLINA SUPERIOR COURT MEDIATION TRAINING PROGRAM (1992) (available from the American Arbitration Association regional office in Charlotte, N.C.) (stating that 20 of the 40 hours are spent in simulated mediation sessions).

202. N.C. MEDIATED SETT. CONF. R. 9(b).

203. Frank C. Laney, *Preparing for Mediation*, in MEDIATED SETTLEMENT CONFERENCES 1, 1 (Mediation, Inc. 1992). If the attorney is not already informed about mediation, she will obviously want to prepare herself before discussing it with her client.

204. *Id.*

205. *Id.* at 2.

client may, for strategic reasons, decide not to participate actively in the mediated settlement conference. Such a strategy would not violate any statute or rules because, apart from insurance companies, a good faith participation requirement is not currently imposed upon the parties.

After informing the client about the particulars of mediation, an attorney should prepare the actual case. Because the mediated settlement conference may not delay any other proceedings,<sup>206</sup> an attorney should continue preparing for possible trial. This does not require additional work because mediation and trial preparation are very similar. Both require an attorney to clarify her understanding of the facts and, if necessary, engage in discovery. In addition, the attorney will be determining and researching the relevant legal issues, and be preparing to discuss them.

Once this preparation is complete, a review of the case and its facts with the client would be helpful.<sup>207</sup> The presentation of new information at the mediated settlement conference may catch an opponent "off guard" and require him to rethink his position. Because such a situation may prevent settlement from being reached, parties should provide their opponents with any information that they intend to reveal at the mediated settlement conference.<sup>208</sup> In addition, attorneys for each side should furnish the mediator with a statement of the facts, issues, and any information helpful for an understanding of their position.<sup>209</sup> This material should be provided as far in advance as possible in order to allow the mediator an adequate opportunity to fully understand the controversy.

Prior to the mediated settlement conference, both the attorney and her client will want to develop a negotiating strategy. One approach that can be of great benefit is to determine the Best Alternative to a Negotiated Agreement (BATNA).<sup>210</sup> In other words, the attorney and the cli-

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206. N.C. MEDIATED SETT. CONF. R. 3(d); *see also supra* notes 166-67 and accompanying text (discussing statutory and constitutional prohibitions of delay).

207. If there are any facts that an attorney and her client have decided not to reveal in the mediated settlement conference, the attorney may want to remind her client of this at a time closer to the actual mediated settlement conference. It is stressed again, however, that candor and truthfulness are crucial to successful mediation.

208. It is important to remember that settlement is a voluntary process and the mediator will be making no decision. There is no real benefit to saving information for the mediated settlement conference. *See* Larry A. Kimel, *Preparing a Case for Mediation*, in *MEDIATED SETTLEMENT CONFERENCES* 4, 4 (Mediation, Inc. 1992).

209. Charles Guittard, *Preparing for Mediation and Negotiation (Part I)*, *PRAC. LAW.*, Sept. 1991, at 77, 80-81. Some "mediators will ask for confidential position papers from both sides in advance of mediation." *Id.* at 81.

210. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 97-106 (Bruce Patton ed., 2d ed. 1991).

ent should realistically consider the options available if mediation fails.<sup>211</sup> Typically, one's BATNA will be the anticipated result at trial, although other alternatives should be considered as well. If the BATNA is less appealing than a proposed offer, the attorney may want to suggest that her client accept the offer. Conversely, if the BATNA is better than the offer, the attorney may want to advise her client to reject the offer. In determining one's BATNA, important considerations include any additional costs of rejecting settlement,<sup>212</sup> the client's desire to see the case settled,<sup>213</sup> and the outcome of similar cases that have gone to trial.<sup>214</sup> It is also useful to determine the BATNA of the adverse party in order to develop an idea of their bargaining position.<sup>215</sup> Finally, an attorney and her client should discuss an initial offer of settlement and the high or low position to be taken at conference.<sup>216</sup>

### B. *The Mediated Settlement Conference*

Mediated settlement conferences will vary in as many ways as there are mediators. It is useful, however, to get a general idea of what occurs in such conferences. Typically, the mediator will begin the session with a short introduction that will include defining mediation, comparing it with other forms of dispute resolution, and describing the mediation process.<sup>217</sup> The mediator should discuss the confidentiality of the conference, the role of the mediator as a neutral facilitator, and the fact that any resolution must be made by mutual agreement of the parties.<sup>218</sup>

Next, the mediator will allow each side to give an informal presentation of the controversy as he sees it. Although the attorney is not prohibited from making the presentation, some mediators may request that the client do this. Allowing the client to make the presentation is often useful because it involves him in the settlement process and may satisfy a

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211. Fisher and Ury suggest following a three stage operation to determine one's BATNA: (1) listing all possible options if settlement fails, (2) "improving some of the more promising ideas and converting them into practical alternatives," and (3) selecting the option that seems best. See *id.* at 103.

212. The costs of further discovery, expert witnesses, and taking the case to trial may be more than the difference between a proposed offer and the BATNA.

213. The client may not be interested in settlement, but only in judicial vindication of his position.

214. If there appears to be only a slight chance of receiving a larger award at trial, this may not be a realistic BATNA.

215. FISHER & URY, *supra* note 210, at 105.

216. See Kimel, *supra* note 208, at 7.

217. This information must be discussed by the mediator. N.C. MEDIATED SETT. CONF. R. 6(b).

218. This information is also required. *Id.*

desire to tell the story personally.<sup>219</sup> During these presentations, the mediator may ask questions of the presenter in an effort to understand his position and point out possible weaknesses.<sup>220</sup> The mediator may also repeat what the parties have said in order to clarify the situation or to emphasize points made by a party. Parties should strive to tell their stories as effectively and persuasively as possible.

After both sides have completed their presentations, the mediator begins his task of facilitating settlement. It is useful to begin this process by asking each party what she feels is a fair settlement. In revealing possible settlement terms early, all parties and the mediator will have an idea of where the process stands and what must be accomplished to reach an agreement. If only minor differences prevent agreement, the mediator may be able to work these out quickly. More than likely, however, substantial differences will exist between the initial offers.<sup>221</sup> At this point, it becomes necessary for the mediator to define the issues and their importance to each party. Once this is done, the mediator can begin to explore other options of settlement. Because seemingly minor issues might be of great importance to a party, all issues should be explored equally. For example, the value of an apology is often overlooked. For the plaintiff, it may be extremely important that the defendant apologize for his actions. Such an action may be of little cost to the defendant, but of great value to the plaintiff.<sup>222</sup>

Mediators will vary greatly in their approaches to facilitating settlement. One commentator has suggested three broad classifications of mediator style: (1) "trashing," in which the mediator attempts to "tear apart" the cases of each party so they recognize the weaknesses in their case and move toward their adversary's position, (2) "bashing," in which the mediator chips away at the parties' settlement offers until a middle

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219. [I]f you speak for your client he will not be involved, and you will be frustrating one of the main goals of mediation, which is to make the client take responsibility for the problem, and for finding the solution. If you, as the attorney, take possession of the problem the client may feel shut out of the process and therefore less inclined to help the move toward resolution by making concessions or discussing mutually advantageous options that may appear later.

Guy Price, *A Beginner's Guide to Mediation Procedure*, ADVOC., March, 1989, at 7.

220. Rothman, *supra* note 23, at 13. To avoid seeming biased, the mediator will often point out weaknesses through the use of rhetorical questions. *Id.*

221. For the purpose of this discussion, an offer refers to any position taken by a party. It is quite possible that a party believes no wrong has occurred and, thus, no settlement should be made at all. This situation will not necessarily prevent the process from continuing because parties may change their minds as the discussion continues.

222. See Robert A. Phillips, *Presenting Your Case in Mediation*, in *MEDIATED SETTLEMENT CONFERENCES 2,2* (Mediation, Inc., 1992); see also Riskin, *supra* note 34, at 45-46 (discussing the value of an apology).

figure of settlement is reached, rather than working toward a resolution of the issues, and (3) "hashing it out," in which the mediator takes on the role of a facilitator whose goal is to get the parties to communicate with one another over issues that are important to them.<sup>223</sup> While the goal of the "trashers" and "bashers" is simply to reach settlement, the "hashers" also are concerned with less tangible interests such as the relationship between parties.<sup>224</sup>

"The mediator's strength is not for overpowering others, but for empowering others."<sup>225</sup> The goal of mediation is to place the "substantive outcome of the dispute within the control and determination of the parties themselves; it frees them from relying on or being subjected to the opinions and standards of outside 'higher authorities,' legal or otherwise."<sup>226</sup> To empower the parties, the mediator may help invent possible solutions, but should allow the parties to decide which solution is best for them.<sup>227</sup> The ability of the parties to help determine the outcome of their disputes is one of mediation's major advantages over other forms of dispute resolution. If the goal of mediation is merely to expedite the settlement process, however, other reforms might better achieve this goal. For example, binding arbitration would provide a rapid resolution to disputes, while also providing the finality that mediation, absent settlement, lacks. Procedures that mandate speedy trials would also serve these ends. Thus, empowerment should be recognized as a goal of mediation.<sup>228</sup> Assuming it is, all mediators should use a method similar to that of the "hashers." All mediators are not "hashers," however, and anyone intending to participate in a mediated settlement conference should be prepared for any one of the three styles.

Regardless of the mediation style, some mediators prefer to use caucuses in their settlement efforts. Caucuses involve separating a party, with or without his attorney, from the conference so that he and the mediator may hold private discussions. A mediator might find that caucuses provide an opportunity for candor or, perhaps, a chance for the

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223. Alfani, *supra* note 86, at 66-73. Other commentators have classified mediator styles by focusing on the difference between bargaining for an agreement and helping the parties to understand one another's position (therapeutic mediation). See Susan S. Silbey & Salley E. Merry, *Mediator Settlement Strategies*, LAW AND POL'Y, Jan. 1986, at 9, 19-20.

224. Alfani, *supra* note 86, at 66-73.

225. Ferrick, *supra* note 81, at 62.

226. Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 267 (1989).

227. *Id.* at 278-80.

228. Many commentators feel that empowerment is one of the major strengths of mediation. See, e.g., *id.* at 267-68; Ferrick, *supra* note 81, at 62. But see Bush, *supra* note 226, at 259-260 (noting that some people view efficiency as the main purpose of mediation).

party to feel more at ease. Of the mediators who employ caucusing, many feel that it serves as a valuable tool for obtaining settlement.<sup>229</sup> At the beginning of the mediated settlement conference, the confidentiality of statements made in caucus must be clarified<sup>230</sup> because some mediators feel that these discussions should be disclosed to opposing parties.

Eventually, the mediation session will reach a point where the parties either reach an agreement or acknowledge an impasse. In the event a consensus is reached, the parties should have an agreement drawn up and signed as soon as possible.<sup>231</sup> If impasse is reached, the mediator may choose either to recess or to end the mediated settlement conference. Once a mediated settlement conference is terminated, parties are still free to negotiate among themselves and are encouraged to do so.<sup>232</sup> The typical mediated settlement conference lasts half a day.<sup>233</sup>

## VI. CRITICISMS AND PROBLEMS OF MEDIATED SETTLEMENT CONFERENCES

In drafting the legislation for mediated settlement conferences in North Carolina, the mediation subcommittee of the North Carolina Bar Association expended a great amount of time and effort. As a result, attorneys, parties, and the courts have encountered few problems thus far.<sup>234</sup> However, problems of a general nature may exist with ADR and mediation.

One general complaint is that courts should concern themselves with justice, rather than with the relationship between parties. In ordering cases to ADR, courts may rob the public of vital information.<sup>235</sup> Arguably, if a great deal of cases are sent to ADR, the number of cases going through the traditional adversary system will result in too few ex-

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229. In fact, some "trashers" may separate the parties after presentation of their cases and never bring them back together. See Alfani, *supra* note 86, at 67.

230. See N.C. MEDIATED SETT. CONF. R. 6(b)(6) (requiring the confidentiality of caucuses to be discussed by the mediator).

231. See *supra* notes 170-76 and accompanying text.

232. The mediated settlement conference tends to set the parameters for settlement and, as a result, may clear the way for settlement after the conference has been terminated. In at least one district, the vast majority of cases that left mediation unsettled are being settled prior to trial. Judge Long Interview, *supra* note 76.

233. See James M. Long, *Mediated Settlement Conferences in North Carolina*, in EFFECTIVE ADVOCACY IN MEDIATED SETTLEMENT CONFERENCES VII-4 (North Carolina Bar Foundation Continuing Legal Education, July 10, 1992).

234. Judge Long Interview, *supra* note 76.

235. Menkel-Meadow, *supra* note 36, at 25.



positions of the law.<sup>236</sup> In addition, if confidentiality guarantees exist, the public is prevented from learning of the settlement terms. Thus, it is argued that courts may one day lose their legitimacy because of their willingness to experiment with ADR. Mediation seems unlikely to create such a situation, however, because there is no binding nature to mediation as there is with arbitration. Given the voluntary nature of mediation, parties may take their cases to trial by choosing not to settle. As a result, where the main issue is a question of law, rather than damages or liability, the parties are less likely to settle because there is no middle ground between them. In addition, mediation expedites the settlement process and allows for early identification of cases that will go all the way to trial.<sup>237</sup> This early identification allows more resources to be expended on trial cases and, therefore, increases the quality with which they are tried.

Others argue that mediation coerces disputants to settle, rather than adjudicate.<sup>238</sup> In the extreme, if one party is right, why should she have to give anything at all to the other party? Obviously, she should not. Again, it is important to remember the voluntary nature of mediation. In addition, the parties are free to have the advice of counsel.<sup>239</sup> If one party is clearly right, he should feel confident that his attorney will recommend going to trial. The same safeguards exist for cases that are not so clear-cut. Of course, it may be less expensive for a party to settle early, rather than win at trial later, but this is true of any case, and not just those sent to mediation.

Some commentators have voiced fears that mediation will magnify existing inequalities between the parties, rather than empowering them.<sup>240</sup> As parties to disputes do not always possess equal power and resources, these commentators argue that the procedural safeguards of adjudication are necessary to protect the disadvantaged.<sup>241</sup> North Carolina provides two safeguards to protect against such inequality. First, the mediator is in a position to take an active role to caution against over-

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236. *Id.*

237. Phillips Interview, *supra* note 39.

238. See, e.g., G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, JUDICATURE, June-July, 1991, at 34, 36.

239. In fact, ethical considerations may compel the presence of attorneys at mediation sessions. Particularly when the mediator is an attorney, unrepresented parties may look to the mediator for legal advice. Such a situation places the mediator in a position where he must "balance his commitment to settling the case against any obligations that may be owed the parties." Rothman, *supra* note 23, at 15.

240. See, e.g., Edwards, *supra* note 29, at 679; Grillo, *supra* note 7, at 1581.

241. Edwards, *supra* note 29, at 679.

bearing by one party.<sup>242</sup> Second, the attorney for a party should recognize such inequalities and be able to insulate her client from coercive presentations.<sup>243</sup> A good mediator and the presence of the parties' attorneys should protect the parties from any abuse of process.

The largest problem facing mediated settlement conferences is resistance to the program from practicing attorneys. "Some lawyers have an adversarial mind-set that winning or losing is their only reality. Others just don't know what mediation is and confuse it with arbitration. And, sadly, a few attorneys are afraid that a fast, easy solution, without a lot of discovery, will cut into their incomes."<sup>244</sup> Fortunately, all of these misconceptions can be overcome through education. As news of the pilot program begins to spread among practicing attorneys, more discussion of the program should occur. Hopefully, a greater interest in education and training will accompany this discussion. If law schools also notice the benefits of mediation, they may begin to offer more education on the subject to their students.<sup>245</sup>

## VII. EARLY RESULTS

In an effort to better understand the benefits and successes of mediation, the Institute of Government at the University of North Carolina at Chapel Hill is currently conducting a study.<sup>246</sup> This study will examine the effect of mediated settlement conferences on settlement rates, average disposition times, and court workloads.<sup>247</sup> In addition, the study will investigate the views of litigants and attorneys who participate in the program.<sup>248</sup>

For purposes of the study, "all eligible superior court cases will be candidates" for mediated settlement conferences.<sup>249</sup> To provide valid

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242. See N.C. MEDIATED SETT. CONF. R. 6(a); see also Ferrick, *supra* note 81, at 66 (discussing the mediator's active role).

243. See N.C. MEDIATED SETT. CONF. R. 4; see also Note, *supra* note 32, at 1100 (discussing the mediator's role in equalizing power relations).

244. Kenneth A. Ehrman, *A Mediator's Story*, CAL. LAW., Nov. 1987, at 18, 20.

245. Because some students may want to practice ADR, perhaps "mediation training can do for law students what mediation can do for disputants; help them to decide for themselves what they want to do with their lives." Riskin, *supra* note 34, at 60.

246. Telephone Interview with Stevens H. Clarke, N.C. Institute of Government (Sept. 9, 1992). This study is a statutory requirement. N.C. GEN. STAT. § 7A-38(m). No state funds are to be expended on the study, so the North Carolina Bar Association is soliciting the necessary funds. Laney Presentation, *supra* note 14.

247. Stevens H. Clarke, Proposal for Evaluation of Mediated Settlement Conference Project 2 (July 13, 1992, revised Aug. 11, 1992) (available from the author).

248. *Id.* at 3.

249. *Id.* at 6. For a discussion of the superior court's jurisdiction, see *supra* notes 64-75 and accompanying text.

comparisons, a control group will be created by randomly choosing fifty percent of the cases to be ineligible for participation in the conferences.<sup>250</sup> Few mediation studies have incorporated such a control group,<sup>251</sup> so the North Carolina study should provide the state and nation with valuable information on court-ordered mediation. This information will enable legislators to make educated choices about the future use of mediation. In addition, control groups will be used only in a limited number of counties and only for a six-month period.<sup>252</sup>

Unfortunately, the Institute of Government study will not be completed before October 31, 1994.<sup>253</sup> Therefore, it is necessary to rely on limited statistics in evaluating the early success of the program. According to statistics from the Administrative Office of the Courts, fifty-seven percent of the cases sent to mediation have been settled.<sup>254</sup> In many of the pilot districts, the first cases sent to mediation were the oldest ones in the jurisdiction and less likely to settle than the average sample.<sup>255</sup> As a result, a higher rate of settlement may be experienced in the future.<sup>256</sup>

Most statistics have only tracked results through the mediated settlement conference and have not followed settlement rates subsequent to mediation. In at least one district where such statistics are kept, the introduction of mediated settlement conferences was followed by an increase in the overall settlement rate from eighty-five to ninety percent.<sup>257</sup> Although only a small increase is seen in the number of cases that settle, this translates to a one-third decrease in the number of cases that currently go to trial. If these figures are supported over the long run, medi-

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250. *Id.* The other 50% of cases will be sent to mediated settlement conferences. *Id.* at 5-6. Although the decision to create a control group has resulted in complaints that it denies individuals the possibility of early settlement, it seems a small price to pay for the information that will be received. Phillips Interview, *supra* note 39.

251. See, e.g., Pearson, *supra* note 6, at 425-26 (giving an overview of previous studies on mediation); see also Joseph P. Tomain & Jo Anne Lutz, *A Model for Court-Annexed Mediation*, 5 OHIO ST. J. ON DISP. RESOL. 1, 15 (1989) (stating that the lack of a control group makes any results speculative).

252. Clarke, *supra* note 247, at 4-7.

253. *Id.* at 7.

254. ADMINISTRATIVE OFFICE OF THE COURTS, MEDIATED SETTLEMENT CONFERENCE, STATUS REPORT (Feb. 28, 1993). Of 1939 cases ordered to mediation, 502 cases were still awaiting conference and 104 were removed from mediation. *Id.* Of the remaining 1282 cases, 737 (roughly 57%) had settled either prior to the mediated settlement conference or in the conference itself. *Id.* Similar results were reported from District 13, where 17.7% of cases sent to mediation were settled prior to conference and 35.8% were settled in conference. Telephone Interview with Steve Foster, District 13 Trial Court Administrator (Nov. 13, 1992) [hereinafter Foster Interview].

255. Foster Interview, *supra* note 254.

256. *Id.*

257. Judge Long Interview, *supra* note 76.

ated settlement conferences could serve to alleviate overcrowded court dockets and to expedite the adjudication process for those cases that do go to trial. In addition, another major benefit of mediation is a decrease in the time between filing a case and its final disposition.<sup>258</sup> As a result, parties may avoid many of the expenses associated with trial preparation.

Reaction to the mediated settlement conference program has been overwhelmingly positive. Judges view the program as having great potential for benefiting the judicial system as a whole.<sup>259</sup> Attorneys participating in the program have found it to be a highly satisfying experience.<sup>260</sup> The high interest of attorneys in mediation is also evidenced by the fact that over three hundred attorneys have signed up for the dispute resolution section of the North Carolina Bar Association, a section that has yet to be created officially.<sup>261</sup> Of the attorney complaints about mediation, most concern the circumstances of a particular conference, rather than the process of mediation.<sup>262</sup>

Very little information is available on the client impressions of mediated settlement conferences in North Carolina. If the experiences of the clients in North Carolina is similar to those of disputants elsewhere, then it is likely that the parties are highly satisfied with the mediation process. For instance, an evaluation of Maine's mediation program showed that compared to disputants who took their cases to trial, individuals who participated in mediation better understood what was occurring with their cases and felt less intimidated.<sup>263</sup> Overall, the disputants who mediated were more satisfied with the outcome of their cases than the disputants who litigated their claims.<sup>264</sup> Better compliance with settlement agreements appears to be a product of this satisfaction. For example, disputants in the Maine study who settled through mediation were almost twice as likely to pay the full amount they owed than were their litigating counterparts.<sup>265</sup>

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258. *Id.*

259. See, e.g., Letter from Giles R. Clark, District 13 Senior Resident Superior Court Judge, to Jay Mebane, author (Sept. 29, 1992) (on file with the *North Carolina Law Review*); Letter from J. Marlene Hyatt, District 30B Senior Resident Superior Court Judge, to Jay Mebane, author (Sept. 24, 1992) (on file with the *North Carolina Law Review*).

260. Long, *supra* note 233, at VII-4 (noting that the only attorney disapproval came from one individual who had failed to settle and found the process to be a waste of money).

261. J. Anderson Little, Speaking to the Executive Committee of the Dispute Resolution Committee of the North Carolina Bar Association (Oct. 23, 1992).

262. Phillips Interview, *supra* note 39.

263. McEwen & Maiman, *supra* note 85, at 256.

264. *Id.* at 256-57; see also Pearson, *supra* note 6, at 431-33 (discussing satisfaction evaluations of various mediation studies).

265. McEwen & Maiman, *supra* note 85, at 263.

## VIII. CONCLUSION

If mediated settlement conferences continue to enjoy the success and acceptance that they have experienced to date, it appears likely that the system will be expanded upon completion of the pilot program. In the meantime, the existence of a pilot program offers an excellent opportunity to implement some necessary changes. First, more protective confidentiality rules must be adopted to encourage greater candor on the part of participants. Second, ethical guidelines should be established so that mediators better understand their positions and the obligations that this position brings. Third, strict guidelines should be created for the decertification of mediators. Fourth, it should be clearly established that the role of a mediator is to facilitate the parties in their own efforts at settlement, not to force settlement upon the parties. In other words, the mediator should take more of a "hashing it out" approach to mediation, rather than a "trashing" or "bashing" approach. Finally, mediator certification should be opened to the public at large, rather than limited to members of the North Carolina State Bar.

Through implementation of these or similar reforms, mediated settlement conferences will become more effective, while continuing to provide the same advantages as presently available: substantial reductions in the number of cases that go to trial, reductions in the average time of disposition, monetary savings, high levels of participant satisfaction, and greater compliance rates. In offering such advantages, mediated settlement conferences may one day replace the practice of settling cases on the courthouse steps and, in so doing, allow disputants a greater voice in the determination of their disputes.

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