MEDIATION IN PUBLIC POLICY

RODNEY A. MAX

I. DECISION MAKING IN THE 21ST CENTURY

This article discusses the concept of utilizing mediation in the area of public policy decision-making. Constitutional organization and the implementation of checks and balances among the multiple branches of government remain the foundation of decision making. However, this article recognizes that effective and efficient community and public sector direction requires facilitation in order to properly respond to the new pace and complexities by which 21st Century events and resulting public actions and reactions transpire. Therefore, mediation in public policy is herein suggested not as a substitute, but as a complement to the existing structure of government.

In earlier centuries, events transpired and governmental branches used a checks and balance framework to deliberate and react in due course fashion.¹ Now such events not only transpire, but the community reaction and governmental deliberation require expedited and efficient responses. Under the United States governmental structure, the legislative branch creates law and reviews executive actions and orders while the executive branch executes the laws passed by Congress and implements its orders and actions. The judicial branch interprets the laws and actions of the legislative and executive branches. At the federal level, the judicial branch is created by the appointment of the executive branch and consent of the legislative branch.²

While public deliberation, debate, and decision making should remain open and subject to rules and procedures within the legislative and executive branches of government, the use of mediation can provide assistance—as it has within the judicial branch at both the federal and state levels—in facilitating more efficient and effective resolution.³ Bipartisan debates are a part of American representative democracy, but when such debates create gridlock and inaction to necessary progress, regardless of their place on the political spectrum, the system

² See id. at 322.
adversely impacts all of society. The concept of mutuality of interests gets lost in the public monologue, while debate negates the necessary dialogue toward consensus building. In fact, it has been proposed that individuals within modern society do not listen to one another and instead only react. This results in the construction of positions of exclusivity rather than bridges of mutuality.

II. THE JUDICIAL BRANCH’S LEADERSHIP IN MEDIATION

The process of mediation, built around concepts self-determination, facilitation, mutuality, and interest based considerations, provides a solution to this evident conflict. Interestingly, the Judicial Branch has taken the lead in formulating rules and procedures for mediation that enable the judicial process to better serve litigants, attorneys, and the courts, despite the adversarial nature of the common law justice system. Courts are constitutionally established to handle conflicts, whether private or public, through a process of trial and appeal. Lawsuits are filed in state and federal courts whereby judges and juries award judgments. Lastly, the appellate courts review for affirmation or reversal of said decisions. This has been and continues to be the heart of our judicial system. However, in the mid-1970s court dockets became critically back-logged and judicial inefficiencies set in. Numerous state and federal courts began to explore, create, and implement

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4 See generally Michael J. Teter, Congressional Gridlock’s Threat to Separation of Powers, 2013 WIS. L. REV. 1097 (discussing the ways in which congressional gridlock undermines the doctrine of separation of powers).


11 Id.

12 Elena Nosyreva, Alternative Dispute Resolution in the United States and Russia: A
mediation rules—not to replace the justice system but to assist it—
without prejudice to the established constitutional parameters.¹³

It must be understood that mediation has not interfered with the
authority of judges, juries and appellate courts.¹⁴  Mediation has, how-
ever, given those authorities the opportunity to act where parties are not
able to resolve the disputes between or among themselves.¹⁵  Public
trial, records, and judicial decision-making have all been preserved
while allowing parties to have the opportunity of self-determination if
they can agree.¹⁶  In certain circumstances, these agreements are sub-
ject to approval of courts and/or other authorities.¹⁷  Thus, their consti-
tutional duties and obligations (and other institutions) have not been
abridged.¹⁸  Historically, the proposition of creating and implementing
mediation rules and procedures was initiated (as with this article) by
attorneys within the organizational structure of bar associations and
courts, both state, and federal¹⁹  In addition, private sector associations
began to implement mediation rules and procedures to effectuate and
encourage early dispute resolutions within consumer and commercial
settings.²⁰  Industry standards evolved to contractually implement me-
diation and private sector organizations began to enlist corporations,
law firms, and individuals to join their ranks in the promotion of medi-
dation programs for private dispute resolution.²¹  These programs ex-
spaned further into the international arena.²²

Comparative Evaluation, 2 (2001), http://digitalcommons.law.ggu.edu/cgi/viewcon-
tent.cgi?article=1057&context=annlsurvey.

¹³  See Michael McManus & Brianna Silverstein, Brief History of Alternative Dispute Res-

¹⁴  See Mark Williams, What Happens When Mediation Fails?, DTM LEGAL (June 8,
Geoff Sharp, Should Mediators Wear Robes?, (June, 2012), http://www.mediate.com/arti-
cles/SharpGbl20120604.cfm.

¹⁵  Williams, supra note 14.

¹⁶  Id.

¹⁷  See Michael Carbone, Enforcing Agreements Made at Mediation (Dec. 2001),
http://www.mediate.com/articles/carbon5.cfm (discussing entry of judgments confirming
awards and court enforcement of agreements).

¹⁸  See id.

¹⁹  See Howard S. Bellman & Susan L. Podziba, Dispute Resolution Public Policy Medi-
ation: Best Practices, 33 A.B.A SEC. SOLO, SMALL FIRM & GEN. PRACTICE DIV. 3 (2016)
(discussing stakeholder participation in mediation as well as policy mediation “used by a
broad array of federal, state, and local governments.”).

²⁰  Lydia Nussbaum, Mediation as Regulation: Expanding State Governance over Private

²¹  Id.

²²  Thomas Stipanowich, The International Evolution Of Mediation: A Call For Dialogue
Today, every state court system has either formal or informal mediation rules, and every federal district court and appellate circuit court has some form of rules in place to encourage mediation at the earliest practical stage of litigation or decision-making. As a result, private parties are increasingly utilizing mediation to resolve judicial differences. Even public sector litigants are utilizing mediation while enabling their authoritative bodies to have the opportunity review, approve, or modify the result of their agreements. These mediated agreements with public bodies are made subject to the approval of the overriding bodies, boards, commissions, or councils. As a by-product, cases are being resolved more efficiently, more economically, and more expeditiously with greater levels of satisfaction of the parties over the decision-making process. This satisfaction is due in great part to the fact that the parties themselves have been involved in not only in defining the dispute but also in resolving it.

III. UNDERSTANDING THE BASIC COMPONENTS OF MEDIATION THAT MAKE IT RELEVANT TO PUBLIC POLICY ISSUES

To understand and appreciate the relevancy of mediation in public policy is to understand the basic components that comprise it. Just because parties use mediation does not mean courts give up their authority to make decisions regarding the case. Indeed, courts maintain jurisdiction over the case until it is dismissed by order of the court. However, prior to being confronted with the numerous factual and legal issues, courts allow the parties the opportunity to achieve their own resolution in whole or in part through the mediation process.

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24 Nussbaum, supra note 20, at 372.
25 Id. at 375, 379–80.
26 See id. at 380.
27 HAROLD BROWN ET AL., FRANCHISING: REALITIES AND REMEDIES § 5.03A (2016).
a. Self Determination

Self-Determination is a critical component of mediation. The parties and participants are in control of their decision making. They elect whether to resolve the controversy. The role of the mediator is not one of a decision-maker. The mediator’s role is that of facilitator and custodian of the process with the goal of initiating and maintaining the dialogue. Any decision-making of the parties collectively is controlled by the process of mutuality. If an agreement is achieved the parties are resolved. If the parties do not reach an agreement, the mediation is adjourned without resolution, commonly referred to as an impasse. While the parties to the mediation can resolve disputes between and among themselves, the constitutional or rule-making authority of any one office or officer is in no way abbreviated or undermined by utilizing the mediation process. Where the authority exists, the agreement of the parties is subject to the final approval of the stated authority.

For example, if there was an issue for legislative or executive decision making, the parties (constituents) to those issues would be given a forum to mediate. That process would enable the parties to explore all relevant issues and attempt to resolve the same amongst themselves. Thereafter, such resolution or other agreed framework would be presented to the appropriate executive or legislative body to inquire, understand, and approve or disapprove that on which the parties have agreed. The parties’ initial differences would have the opportunity to

33 Id.
34 Id.
36 Fisher, supra note 31.
39 Id.
be resolved within the mediation process, and would only be binding on them subject to approval of the higher authority. If the parties ultimately come to a mediated agreement and the ultimate authority disapproves, there is no agreement. If the parties cannot achieve a mediated agreement, the issue returns to the ultimate authority to follow its procedures of decision making. This is identical to the process in the judicial branch where failure to reach agreement simply leaves it to the judge, jury or appellate court to resolve issues unresolved by the mediation process.

b. Mutuality

Mutuality is the corresponding component that converts self-determination from unilateral decision-making to bi- or multi-lateral decision making when agreement can be reached. Resolution only binds when it is final, and it is only final when both sides finally agree; nothing is agreed to until everything is agreed upon by all participants/party. It is an appreciation of the concept of mutuality that makes the mediation process distinctive. Compromise for the sake of agreement becomes the new “art of persuasion,” and agreement that meets the “interests” of two or more conflicting sides is a principle worth achieving.

c. Interests

The “interests” of the parties in mediation are as important a component of the process as their rights. Where positions may be difficult to reconcile, interests may be more fluid. While understanding the “positions” of each side has its place in evaluating the chances of success or failure of achieving that “position,” considering each other’s “interests” attracts them toward common ground. Thus, distinctive negotiation positions of differing sides may find commonality when

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44 Id.


47 Thompson, supra note 45, at 556.
exploring the mutuality of their interests. For example, the right to achieve individual relief may yield to global finality of class action relief; or the right to assert a statute of limitations defense may yield to the interest of achieving confidential finality.

d. Confidentiality

Confidentiality is a hallmark component of the mediation process. As long as the mediation is in place and continues, that which is communicated as a part of mediation—whether at, leading up to, or following the mediation—is confidential and privileged. Once impasse is reached or the mediation is adjourned, the parties are relieved of the obligation of future confidentiality. However, so long as the mediation process is ongoing, communications are protected. Thus there is a “freedom of expression” within the mediation that breeds trust, candor, and reasonableness where said principles may not otherwise be achieved on the public record. The initial confidentiality rules are not to be confused by or become an impediment to public airing of issues within a public forum. Once the mediation is completed, views may be publicly asserted without reference to that which was stated or otherwise communicated within the context of the mediation. On one hand, if an agreement is achieved, the agreement can delineate what may be publicly discussed. Conversely, a failure to reach an agreement simply ends the confidentiality of subsequent discussions without infringing on that which was previously communicated during the mediation process.

e. Scope of the Agreement

The scope of the agreement highlights the points in dispute and provides the opportunity to achieve a resolution on those component

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48 Id.
52 See Deason, supra note 50, at 245.
53 Id.
55 Deason, supra note 50, at 303–4.
56 See id. at 304–5 (noting that “unless a confidentiality agreement has been incorporated into a court order, it is not binding on non-parties to the agreement.”).
parts which the parties have a mutual interest in resolving and intend to be bound by once resolution has been reached.\textsuperscript{57} If it is expressed that “nothing is agreed until everything is agreed,” then agreement of only some component parts will not become binding until all component parts are resolved.\textsuperscript{58} However, if it is within the parties’ clear understanding there may be a partial agreement.\textsuperscript{59}

f. The Mediator

The mediator is neither the judge nor the arbitrator. Instead the mediator has the role of a neutral facilitator.\textsuperscript{60} The paradigm from facilitation to evaluation is as much a matter of the parties’ prerogative as it is the skill of the mediator to sense the need for the same.\textsuperscript{61} Where explicitly or implicitly the participants are asking for the mediator’s input, it may be conveyed in certain circumstances.\textsuperscript{62} However, imposing an evaluative approach may be as harmful to the component of self-determination as ignoring it when the determination could use such evaluation.\textsuperscript{63}

IV. IMPLEMENTATION OF MEDIATION IN PUBLIC POLICY

“[I]n order to form a more perfect Union” our Constitution proceeds to set forth a system of checks and balances to assure that representative government is “of the people, by the people, for the people.”\textsuperscript{64} It merely sets up a general mechanism of governing.\textsuperscript{65} It does not limit the mechanisms by which those institutions may govern.\textsuperscript{66} Accordingly, each institution has the prerogative of establishing, within its internal rule-making authority, the means of achieving the missions and goals of its respective jurisdictions.\textsuperscript{67} Those internal rules are not pre-
ordained or limited by exclusive rule making precedents; rather, the 
breadth and scope of the federal government’s role is open to expan-
sion. So while rules have been historically created to meet the needs 
of the governing body, those rules may change or be modified to meet 
the demands of changing times.

Historically, the Executive Branch consisted of varying cabinet 
positions to meet the issues of the times. Indeed both houses of the 
United States Congress have varying committees to address matters of 
governing. Similarly, circuit courts within the federal judiciary have 
increased in number to meet the needs of judicial caseloads. Thus, 
the governing branches have found within their constitutional powers 
and internal rule-making authorities the means to adapt to the changing 
needs of society. Just as the Judicial Branch has evolved to find and 
implement the use of mediation, so too may and should the Executive 
and Legislative Branches consider the use of mediation in their struc-
tures of governing to better accomplish the resolution of issues that 
confront them. Mediation within these branches affords the oppor-
tunity of facilitative dialogue to better understand, evaluate and con-
sider the merits of issues presented. However, this does not eliminate 
the hearings, debates, or other public forums that have historically been 
used to achieve decision-making within these branches. Mediation 
provides a forum for balanced, facilitated consideration and debate of 
the merits of public issues.

Implementing such mediation calls upon its traditional compo-
nents as discussed in section III, supra. As governed by the internal 
rules of the respective legislative or executive branch, each side of an 
issue may be selected to have a place at the table and a voice in the


69 Id.


determination of a compromised resolution (or the alternative of impasse for lack of compromise). The confidential setting must be viewed as an “initial effort to understand” that which will ultimately be “aired” to promote the compromised resolution and/or the problem. The negotiating sides may therein engage both joint and separate dialogue over a limited period of time that is necessary to accomplish mutuality of the issue’s solution. Thereafter, the issue may be “aired” with a higher degree of commonality to achieve ultimate approval from the appropriate authority. Giving participants an opportunity to be heard and an opportunity to be part of the solution as well as facilitating the ingredients for reasonable compromise will make for a more meaningful, legitimate and respected resolution. Those actions will also provide a balanced forum to either build “consensus” or, at the very least, “understanding” of the issue(s) at hand.

At the legislative level, mediation would be instituted within a committee or subcommittee assigned to the issue. Following a public presentation of the issue those for and against may ask or be asked by the majority or minority leadership to proceed to mediation to identify a compromise resolution; thereafter, the parties would return to the committee or subcommittee for public questioning, clarifications, and approval or disapproval of that which was agreed upon or attempted to be agreed upon.

At the executive level, mediation would result from an executive officer—either President, Governor, Mayor, cabinet member, or other authoritative staff—being asked or otherwise requesting the appropriate representatives to proceed to a mediation forum. The appropriate representatives would then emerge with a resolution or an articulation of the merits of both sides of an issue. Thereafter, the resolution and/or merits would be openly discussed and debated for public consideration and executive approval. The authority to initiate such ex-

74 U.S. CONST. art. I–II.
77 See id. at 2–3 (discussing the benefits of mediation as a tool in reducing Congressional infighting).
78 Id. at 9–10.
79 Id.
Executive mediation would require the approval of the most senior position within that office unless that power is otherwise delegated.80

Pursuant to either legislative or executive authorization, the process of mediation gives those debating an issue the opportunity to preliminarily and confidentially gain understanding of the issues and attempt to find a resolution to the problems. These mediated resolutions would then be subject to the ultimate approval by the appropriate constitutional officer or body.81

Each branch would have at their disposal individuals who have been identified as accepted neutrals for that branch; this would be similar to the way the judicial branch has been able to identify and recognize accepted neutrals.82 Each branch would have the right and authority to create parameters and procedures for the scope, the time period, and the confidentiality of the mediation.83 The scope would define and limit the issues to be presented and it may also define the expectations of the body authorizing the mediation.84 The time period would place reasonable limits on the mediation so as to enable it to meet the needs of the authoritative body.85 Generally, the confidentiality would be prescribed by the authorizing body within each branch to ensure that during the mediation process there is freedom of expression without the threat of disclosure thereafter.86 That which will be disclosed will be defined as either that upon which agreement has been reached; or, alternatively, that upon which issues remains open and unresolved.87

Implementing mediation in the executive and legislative branches of federal, state, and local governing requires a review of the internal rules and procedures of each.88 These rules and procedures can be supplemented to include mediation as an alternative means of dispute resolution where so determined by those in authority. It would require selection of an individual who has the respect of all sides to the conflict for his/her ability to neutrally facilitate the mediation.89 This individual

81 Id.; Gonski, supra note 76, at 12.
83 See id. at §§3, 572, 574, 579.
84 Id. at §575(a)(2).
85 See e.g., id at §579.
86 Id. at §574.
87 Id.
should not have an interest in either side and be committed to the principle components of self-determination, mutuality, confidentiality and interest based party decision-making.90

V. CONCLUSION

This article “opens the door” to an alternative method of dispute resolution within the legislative and executive branches of local, state, and federal government. The precedent and success of the judicial branch at all such levels makes worthy the consideration and implementation of mediation within all other branches. This article purposefully does not define how each branch should implement the mediation process. This is because each body at each level of government may have their own needs, concerns, and internal rule-making authorities that may modify such implementation. Recommendations for implementation will be left to the writers of next article who choose to consider specific rule-making for a particular branch at a particular level of governing. For now the winds and currents of the times encourage all of us to consider the benefits of mediation afforded to the judiciary and thereby give strong consideration to other applications of mediation in public policy decision-making.

90 See id. (requiring that “[a] neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.”).