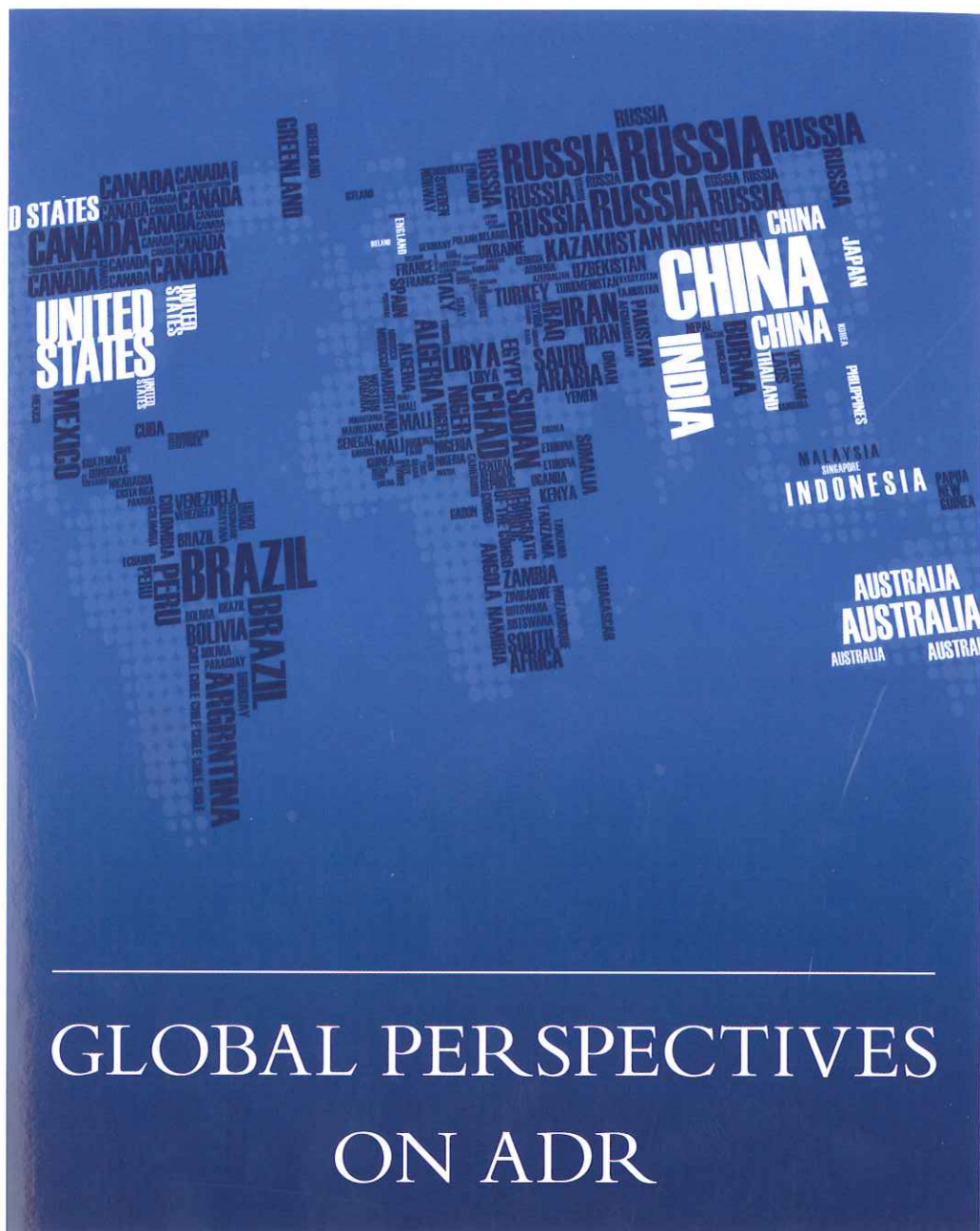




GLOBAL PERSPECTIVES ON ADR

Carlos Esplugues and Silvia Barona (eds.)



intersentia

UNITED STATES: MEDIATION

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'The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.'

Supreme Court Justice Sandra Day O'Connor

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1. INTRODUCTION TO MEDIATION IN THE UNITED STATES

Mediation is a procedure for resolving disputes. The procedure can take on many different forms and incorporate different philosophies, but in its purest sense, it is a process by which a neutral intervener assists two or more parties to a dispute in reaching a resolution. Three essential features of mediation are: first, the mediator has no stake or interest in the outcome of the dispute; second, the mediator has no authority to compel or dictate a binding resolution on the parties; and third, only the parties can reach an agreement as to the terms of a settlement.¹

Mediation has been used as a tool for resolving many different kinds of conflicts from labour and collective bargaining disputes, disputes among neighbours and families such as divorce actions and custody claims, disputes with governmental agencies, and nearly all other types of disputes imaginable. Mediation can be used as an alternative to litigation as well as a device utilised by disputants and courts as supplementary to litigation.

As our laws and commerce have grown more complex, so too have mediation and other systems employed for resolving disputes. Through the years, mediation in the United States has matured from an amorphous and unstructured infancy to the sophisticated, skilled and rule-oriented practice that is common today.

2. HISTORICAL EVOLUTION OF MEDIATION IN THE UNITED STATES

2.1. MEDIATION AND THE RISE OF COMMERCE AND INDUSTRY IN THE UNITED STATES

Mediation in America from colonial times through the end of the nineteenth century was informal, unstructured, and primitive by today's standards. As trade and communities developed with the advent of the industrial revolution, so did an increase in disputes among citizens and the need for developing alternative systems, outside of the courts, for disposing of these disputes. These concerns figured most prominently in the area of labour relations and collective bargaining.

¹ J. ALFINI *et al.*, *Mediation Theory and Practice*, Lexis Publishing, New York NY 2001.

2.1.1. *President Theodore Roosevelt mediates the United Mine Workers Strike of 1902*

In May of 1902, 147,000 coal miners in the anthracite coal region of Pennsylvania went on strike in search of increased wages and recognition of the United Mine Workers as their union bargaining representative.² The labour demonstrations became violent during the summer months and the impact of the work stoppage was feared to be catastrophic for the country.³ The perilous situation was described by author Edmund Morris as follows:

'Here was the nation's biggest union challenging its most powerful industrial combination – a cartel of anthracite railroad operators and absentee "barons" in total control of an exclusive resource. Already it amounted to the greatest labor stoppage in history. A visiting British economist predicted that if the current standoff lasted until cold weather came, there would be "such social consequences as the world has never seen."⁴

With the economic and social consequences potentially far-reaching, the President of the United States, Theodore Roosevelt, was at first reluctant to interject the weight of his office in a private labour dispute;⁵ such a move would have been unprecedented. But by October, as the public interest became more threatened by the potential of a winter fuel famine, Roosevelt arranged for a meeting among the parties wherein he would serve as mediator in an attempt to bring about an agreement to end the labour strike.⁶ Although the initial meeting mediated by Roosevelt did not result in an agreement, the strike was later resolved, with the assistance of Secretary of War Elihu Root and banker J.P. Morgan, with the parties' agreement to the appointment of a Coal Strike Commission.⁷

The mediation of the coal miners' strike by President Roosevelt was a watershed event for mediation in the United States. This mediation was primitive by today's standards; the President had a powerful interest in the outcome of the dispute and had applied pressure through threats of a military takeover of the coal mines.⁸ But Roosevelt's mediation of the labour dispute was notable in that it was 'a very big and entirely new thing [...] the definite entry of a powerful government upon a novel sphere of operation.'⁹

² E. MORRIS, *Theodore Rex*, Random House, Inc., New York NY 2001.

³ *Ibid.*

⁴ *Ibid.*, p. 131. The quote of the 'British economist' was attributed to Stuart Uttley in *Literary Digest*, 8.02.1902.

⁵ E. MORRIS, *supra* n. 2.

⁶ J.T. BARRETT, *A History of Alternative Dispute Resolution*, 1st ed., Jossey-Bass, San Francisco CA 2004.

⁷ E. MORRIS, *supra* n. 2.

⁸ J.T. BARRETT, *supra* n. 6.

⁹ E. MORRIS, *supra* n. 2, p. 169, quoting *The Times* of London.

2.1.2. *Establishment of the US Department of Labor in 1913*

The Department of Labor was established as a cabinet-level department by act of Congress and signed into law by President Taft in 1913. The mediation of labour disputes by the executive branch espoused by President Roosevelt in 1902 was now codified in federal law as Congress prescribed the role of the Secretary of Labor to include 'the power to act as mediator and to appoint commissioners of conciliation in labour disputes whenever in his judgment the interests of industrial peace may require it to be done.'¹⁰ In its first year, the Department of Labor mediated 33 labour disputes.¹¹

With a spike in labour disputes brought on by the increased labour demands of World War I, the Department of Labor's budget was expanded in 1917 to create the United States Conciliation Service (USCS), dedicated specifically to the mediation and conciliation of labour disputes.¹² By 1919, the annual caseload of the USCS increased to 1,789. Since few individuals had experience with mediation, the USCS mediators spent much of their time educating and coaching parties regarding the nature of the mediation process.¹³ The USCS, by the end of World War I, had played a major role in the proliferation of mediation and in the resolution of labour disputes.¹⁴

2.1.3. *Railway Labor Act of 1926 and the creation of the National Mediation Board*

The Railway Labor Act (RLA) was passed into law in 1926 to prevent railroad shut-downs and to promote peace between the railroads and its labourers.¹⁵ The prominent features of the RLA survive today, including protections for unions and employees and use of mediation to resolve disputes relating to pay, work rules and working conditions.¹⁶ The RLA established the National Mediation Board (NMB) for the purpose of mediating disputes between the railroad industry and labour. According to the NMB:

'As provided for in the RLA, the National Mediation Board (NMB) is responsible for providing mediation services to help the parties reach a settlement should the parties fail to reach an agreement during direct negotiations. If the parties are unable to

¹⁰ Public Law 426-62, Section 8, approved 4 March 1913.

¹¹ J.T. BARRETT, *supra* n. 6.

¹² J.T. BARRETT, *supra* n. 6.

¹³ USCS Director John Steelman said that "The primary work of our mediator was educating the parties on how to negotiate and use mediation. The parties did not know what they were doing or how to do it." J.T. BARRETT, *supra* n. 6.

¹⁴ J.T. BARRETT, *supra* n. 6. Following the War, the USCS caseload steadily declined to no more than 560 total cases through 1932. The caseload increased with the New Deal legislation and the Second World War. *Ibid.*

¹⁵ The Act was subsequently amended to expand coverage to airlines and airline employees: 45 U.S.C. 151 ff.

¹⁶ J.T. BARRETT, *supra* n. 6.

reach a voluntary agreement to establish or modify a collective bargaining agreement, either party may apply for the mediation services of the NMB. Once mediation is invoked, the NMB conducts mediation meetings until an agreement is reached or until the NMB concludes no agreement can be reached despite its best mediatory efforts. If the NMB reaches this conclusion, it urges both sides to resolve their dispute through binding arbitration. Upon rejection of the proffer of arbitration by either party, the NMB releases the parties into a 30 day cooling off period. During the cooling off period, neither side can alter the status quo. At the end of 30 days, the parties either reach an agreement or engage in self-help. In some situations, the parties may be required to participate in a Presidential Emergency Board (PEB) and defer any self-help action until 30 days after the PEB makes its recommendation.’

The NMB’s use of mediation has played a critical role in maintaining an uninterrupted flow of commerce by preventing airline and railroad work stoppages. The Board has an impressive record ensuring that bargaining disputes rarely escalate into disruptions of passenger service and commerce. According to the NMB, 97% of all mediations in the history of the NMB have been successfully resolved without interruptions to public service. Since 1980, the success rate has been nearly 99%.¹⁷

2.2. MEDIATION IN THE 1930S AND THE RISE OF LABOUR

The elevation of Franklin Delano Roosevelt to the Presidency in 1933 resulted in substantial pro-labour legislative achievements that are characteristic of Roosevelt’s ‘New Deal’. The New Deal legislation and increase in labour demands from World War II ushered in an era of growth for labour unions, with corresponding growth in the use of mediation in the context of collective bargaining.¹⁸

2.2.1. *Creation of the National Labor Relations Board*

Following the end of World War I and into the 1920s, hostilities between labour and employers ran high and labour strikes became widespread.¹⁹ During this period, employers sought to quell labour strikes by seeking injunctive relief through the courts.²⁰ In August 1933, President Roosevelt created the National Labor Board (NLB) to mediate labour disputes and achieve compliance with

¹⁷ <www.nmb.gov/mediation/mrna.html>.

¹⁸ J.T. BARRETT, *supra* n. 6.

¹⁹ A. BAUMANN, ‘Play Ball: What Can Be Done To Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On’ (2012) 32 *Journal of the National Association of the Administrative Law Judiciary* 251.

²⁰ <www.nlrb.gov/who-we-are/our-history/pre-wagner-act-labor-relations>.

existing labour laws. Although the NLB lacked power to enforce labour laws, by June 1934, the NLB mediated the settlement of 1,019 labour strikes and settled or averted over 2,000 other types of labour disputes.²¹

In July 1935, the Roosevelt Administration and Congress took a major step forward toward the advancement of mediation in labour disputes with the passage of the National Labor Relations Act.²² The Act, also known as the Wagner Act,²³ created the National Labor Relations Board (NLRB), an independent agency endowed with the power to enforce the rights of labour employees and to force employers to engage in collective bargaining with their union.²⁴

The NLRB exists to investigate claims of labour law violations and to 'resolve cases by settlement rather than litigation whenever possible'.²⁵ The NLRB also has the power to adjudicate disputes and to enforce its orders in the federal courts when necessary.²⁶ Today, the NLRB mediates disputes between employers and labour unions. From 2000 to 2010, the NLRB has mediated labour settlements of nearly \$430,000,000 to the benefit of tens of thousands of American workers.²⁷

2.2.2. *Creation of the Federal Mediation and Conciliation Service*

With the enactment of the Taft-Hartley Act in 1947, Congress created the Federal Mediation and Conciliation Service (FMCS) as an independent agency of the United States government.²⁸ The agency assists with mediating private non-airline and non-railroad labour disputes across the United States.²⁹ The FMCS articulates its mission as follows:

²¹ *Ibid.*

²² <www.nlr.gov/who-we-are/our-history/1935-passage-wagner-act>.

²³ Senator Robert F. Wagner of New York was the chief sponsor and proponent of the law. Senator Wagner had previously served as Chairman of the NLB. <www.nlr.gov/who-we-are/our-history/1935-passage-wagner-act>.

²⁴ A. BAUMANN, *supra* n. 19, p. 251. The role of the NLRB was expanded with the passage of the Taft-Hartley Act which put both employers and workers under the jurisdiction of the NLRB. *Ibid.*

²⁵ <www.nlr.gov/what-we-do>.

²⁶ *Ibid.*

²⁷ <www.nlr.gov/75th/settlements.html>.

²⁸ <www.fmcs.gov/internet/itemDetail.asp?categoryID=21&itemID=15810>. The FMCS was a reincarnation of the U.S. Conciliation Service which previously operated as an arm of the Department of Labor. J.T. BARRETT, *supra* n. 6.

²⁹ Mediation of collective bargaining agreements in the railroad and airline industries fall exclusively within the jurisdiction of the National Mediation Board. Negotiation disputes in the non-rail and non-airline private sector are handled by the Federal Mediation and Conciliation Service in accordance with the Taft-Hartley Act. Collective bargaining representation of federal government employees is administered by the Federal Labor Relations Authority pursuant to the Civil Service Reform Act of 1978, Title VII. Collective bargaining representation of state, county and municipal government employees varies and

‘The primary responsibility of the Federal Mediation and Conciliation Service (FMCS) is to promote sound and stable labor relations through mediation and conflict resolution services. We mediate collective bargaining negotiations, provide other forms of alternative dispute resolution services outside of the collective bargaining context, provide training courses to improve the workplace relationship, and refer arbitrators for settlement of contract application disputes. FMCS mediators are widely dispersed throughout the country.’³⁰

‘Dispute mediation – and other conflict resolution services – are the tools and techniques used by FMCS to promote collective bargaining, strengthen labour-management relations, and enhance organisational effectiveness.’³¹ While labour dispute mediation continues to be the primary service offered by the FMCS today, the agency has broadened its services to include conflict prevention and other alternative dispute resolution systems.³²

Throughout its long history, the FMCS has mediated a wide range of notable private and public sector conflicts. In the early 1970s, the FMCS was called upon by Congress and the Native American Hopi and Navajo tribes to mediate a land dispute between the tribes.³³ In 2002, the FMCS, at the request of President George W. Bush, successfully mediated a labour dispute that closed all West Coast shipping ports for ten days and put approximately \$300 billion worth of economic activity at risk.³⁴ In 2004, the FMCS mediated an end to the 141-day strike by the United Food and Commercial Workers against Southern California supermarket chains. The strike was the longest in the grocery industry’s history and affected approximately 70,000 workers.³⁵ In 2008, the FMCS facilitated an agreement between the Boeing Company and the International Association of Machinists and Aerospace Workers (IAMAW) to end a 52-day labour strike of 27,000 employees.³⁶ In 2011, the FMCS was involved in mediating negotiations of a new collective bargaining agreement between the National Football League and its Players’ Association.³⁷ The FMCS has made significant contributions to the field of mediation by helping to resolve these disputes as well as many others, and it continues to make important contributions today.

depends on whether there is a state or local law which permits collective bargaining. <www.nmb.gov/mediation/faq-meditation.html>.

³⁰ <www.fmcs.gov/>.

³¹ <www.fmcs.gov/internet/categoryList.asp?categoryID=12>.

³² A. STRIMLING, ‘The Federal Mediation and Conciliation Service: A Partner in International Conflict Prevention’ (2002) 2 *Pepperdine Dispute Resolution Law Journal* 417.

³³ *Ibid.*, p. 417. The success of this mediation by the FMCS led to the agency’s continued involvement in Native American communities.

³⁴ <www.fmcs.gov/internet_text_only/printerPage.asp?categoryID=93&itemID=16811>.

³⁵ <www.fmcs.gov/internet_text_only/printerPage.asp?categoryID=93&itemID=16811>.

³⁶ <www.fmcs.gov/internet_text_only/printerPage.asp?categoryID=21&itemID=15810>.

³⁷ <www.washingtonpost.com/wp-dyn/content/article/2011/02/17/AR2011021707365.html>.

2.3. THE COMMUNITY JUSTICE MOVEMENT

The judiciary in the United States has a long history of struggles in effectively handling minor civil and criminal cases among families, acquaintances and neighbours.³⁸ These cases typically involve small financial disputes and minor instances of assault, harassment and theft.³⁹ The courts are especially ill-equipped to deal with these types of cases because traditional criminal penalties such as fines and incarceration provide little hope of resolving these matters – and often cause them to escalate – and it is often difficult to distinguish the truth of the matter, leading to frustration of law enforcement, lawyers and judges.⁴⁰ The concerns among the parties to a dispute are refashioned as ‘legal issues’ by the traditional justice system, leaving those with fundamentally personal and emotional conflicts alienated from addressing the issues directly and resolving them constructively.⁴¹ The cases would add to an already backlogged and overloaded court docket and the cases were of little to no significance to the community. Though the courts were widely viewed as ineffective in dispensing justice in these types of cases, there were not assessable alternatives until the advent to community mediation programs in the late 1960s.⁴²

There were a number of public and private experimental community mediation programs that were birthed in urban centers in the late 1960s and early 1970s, often making use of volunteer citizens as mediators.⁴³ There were wide differences among these programs, but the general nature of the approach and philosophy has been described as follows:

‘Bring all the neighbors into a room. Have them meet with one another in the presence of a community resident trained in conducting problem-solving dialogues. Try, through that discussion, to have the parties discuss their concerns, communicate their aspirations to one another, and work out arrangements acceptable to each [...] The process – mediation – requires people to listen to one another, accord respect to and concern for each other’s viewpoint, place fault-finding in perspective, and engage in problem solving discussions that enable participants to resolve their immediate concerns and stabilize future interactions. Doing all those things is neither easy nor straightforward; it takes time, commitment and skill from the parties, their representatives, and the mediator. The benefits though are obvious and tangible: it empowers persons and families to interact constructively as neighbors; it enables

³⁸ D. MCGILLIS, *Community Mediation Programs: Developments and Challenges*, National Institute of Justice, July 1997.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ J. ALFINI, *supra* n. 1.

⁴² D. MCGILLIS, *supra* n. 38.

⁴³ *Ibid.* Notable programs that became models for the development of future programs included those in San Francisco, Philadelphia, Rochester (NY), New York City, and Columbus, Ohio.

persons to regain command of discussing the things that matter most to them; and it requires each individual to be accountable for her conduct.⁴⁴

Many of the private community-based programs would be 'referred' cases by judges as a means of reducing backlogged court dockets and in hopes of achieving more durable and meaningful resolutions.⁴⁵ Numerous studies on these community-based programs revealed that these mediations yielded a high rate of settlement and a high degree of party satisfaction with the process and the outcome.⁴⁶

Increased public funding from the federal, state and local governments in addition to private financial support from non-profit organisations,⁴⁷ bar associations and industry groups,⁴⁸ led to further proliferation of community-based mediation programs in the 1970s and 1980s.⁴⁹ In 1977, the US Department of Justice initiated three experimental 'Neighborhood Justice Centers' in Atlanta, Los Angeles and Kansas City. Though each program was designed differently, each achieved a great deal of success and has become permanent fixtures in their communities. Not only have these programs flourished and survive to today, but they have spawned hundreds of similar court-sponsored and private, community-based mediation programs across the United States.⁵⁰

2.4. MODERN MEDIATION IN THE UNITED STATES

2.4.1. *Pound Conference of 1976*

The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, known as the Pound Conference,⁵¹ was a defining event in the mediation movement in the United States in that it birthed a re-imagination of mediation's role in the judicial process. The Pound Conference

⁴⁴ J. ALFINI, *supra* n. 1, pp. 9–10.

⁴⁵ D. HENSLER, 'Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Our Legal System' (2003) 108 *Pennsylvania State Law Review*, 165.

⁴⁶ J. ALFINI, *supra* n. 1.

⁴⁷ The Ford Foundation and William and Flora Hewlett Foundation were prominent private organisations that played a significant financial and leadership role in the development of community mediation. J. ALFINI, *supra* n. 1.

⁴⁸ The American Arbitration Association and Institute for Mediation and Conflict Resolution provided leadership in encouraging community mediation programs. D. MCGILLIS, *supra* n. 38.

⁴⁹ D. MCGILLIS, *supra* n. 38.

⁵⁰ J. ALFINI, *supra* n. 1.

⁵¹ The namesake of the Pound Conference was Harvard Law School Professor Roscoe Pound, a celebrated advocate of 'court reform and improvements in the administration of justice in the first half of the twentieth century'. J.T. BARRETT, *supra* n. 6.

was organised by Chief Justice Warren Burger to address the inefficiencies and sources of disenfranchisement with the American court system.⁵²

Professor Frank E.A. Sander spoke at the conference, advocating for the concept of the 'multi-door courthouse' which offered multiple avenues toward conflict resolution.⁵³ Sander argued that improved case management efficiency and more impactful social outcomes could be achieved by diverting certain cases, particularly divorce cases and disputes among relatives and neighbours,⁵⁴ from the judicial caseload to mediation programs.⁵⁵ Sander argued that these types of cases were well-suited for mediation because of its 'capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship [...] that will redirect their attitudes and dispositions toward one another',⁵⁶ its emphasis on the parties' responsibilities and decision making, and its potential to reinforce a sense of community.⁵⁷

The Pound Conference generated momentum for and stimulated court-connected mediation programs in the United States. Legislation and the adoption of local rules promoting mediation and ADR were spawned from the ideas advanced by Professor Sander at the Pound Conference.⁵⁸

2.4.2. *Civil Justice Reform Act of 1990*

Propelled by the success of the community justice movement and in the wake of Pound Conference, Congress took a major step toward the institutionalisation of alternative dispute resolution, including mediation, in the United States federal courts with the passage of the Civil Justice Reform Act (CJRA) in 1990.⁵⁹ The CJRA required each United States district court to implement a 'civil justice expense and delay reduction plan' the purpose of which is to 'facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy and inexpensive resolutions of civil disputes'.⁶⁰ By 1996, mediation had become the most prominent form of ADR in the federal courts; only six years after the institution of the CJRA's pilot

⁵² J.T. BARRETT, *supra* n. 6.

⁵³ J.T. BARRETT, *supra* n. 6. See 70 F.R.D. 79 for the addresses delivered at this three-day conference in 1976.

⁵⁴ F. SANDER at 70 F.R.D. 79.

⁵⁵ D. DELLA NOCE, 'Mediation Theory and Policy: The Legacy of the Pound Conference' (2002) 17 *Ohio State Journal of Dispute Resolution* 545.

⁵⁶ F. SANDER at 70 F.R.D. 79, 115, quoting L.L. FULLER, 'Mediation – Its Forms and Functions' (1971) 44 *South California Law Review* 305, 325.

⁵⁷ D. DELLA NOCE, *supra* n. 55, p. 545.

⁵⁸ *Ibid.*

⁵⁹ 28 U.S.C. §471 (1990).

⁶⁰ *Ibid.*

programs, over half of the federal district courts had developed mediation programs.⁶¹

The Dispute Resolution Act of 1998 expanded on the CJRA by requiring that each federal district court specifically consider mediation as a form of court-mandated dispute resolution.⁶² The expansion of mediation in the federal courts attributable to the CJRA played a pivotal role in the settlement of many federal court cases, including the antitrust lawsuit brought by the Justice Department against software giant Microsoft.⁶³

2.4.3. *Administrative Dispute Resolution Act of 1990*

The Administrative Dispute Resolution Act (ADRA) was enacted by Congress in response to the growth of alternative dispute resolution procedures and the need for greater efficiency in dispute resolution with federal agencies. The law mandated each federal agency to adopt policies to address the use of alternative means of dispute resolution and case management and required a senior official to be designated within each agency to be responsible for implementation of the agency's ADR policies. The ADRA was enacted originally with a five-year sunset provision, but the law was reenacted in 2006 without a sunset.⁶⁴

In response to the ADRA, mediation has become a widely used method for dispute resolution by federal agencies. Mediation figures prominently in the dispute resolution procedures by many federal agencies including the military, the Department of Energy, Equal Employment Opportunity Commission, and the Internal Revenue Service (IRS).⁶⁵

⁶¹ R. BIRKE and L.E. TEITZ, 'U.S. Mediation in 2001: The Path that Brought America to Uniform Laws and Mediation in Cyberspace' (2002) 50 *American Journal of Comparative Law* 181.

⁶² 28 U.S.C. §651 (1998). The Findings and Declaration of Policy included strong promotion for use of mediation in the court by providing as follows: 'Congress finds that – (1) Alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the Court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements; (2) Certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials and voluntary arbitration, may have the potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and (3) The continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local dispute resolution programs.' *Ibid.* See Findings and Declaration of Policy.

⁶³ J.T. BARRETT, *supra* n. 6.

⁶⁴ 5 U.S.C. §571 (1990).

⁶⁵ R. BIRKE and L.E. TEITZ, *supra* n. 61, p. 181.

3. GOVERNING LAW AND RULES RELATING TO MEDIATION IN THE UNITED STATES

There is broad diversity among jurisdictions – state to state, district to district, county to county – in legal cultures, law and rules which are responsible for a wide range of mediation practices. With the proliferation of mediation, these inconsistencies among the various jurisdictions have led to complexities, particularly with regard to the parties' expectations relating to the issues of privilege and confidentiality of communications during mediation.⁶⁶ Efforts to address these concerns have been undertaken in recent years by state legislatures and through the promulgation of the Uniform Mediation Act.

3.1. MEDIATION IN THE FEDERAL COURTS

Endorsement of the use of alternative dispute resolution methods, including mediation, is codified in the Federal Rules of Civil Procedure. Federal Rule 16 governs the procedure for Pretrial Conferences and sets forth a framework for judicial management of cases in advance of trial. Federal Rule 16 authorises the court to order conferences for the purpose of 'facilitating settlement' and to 'consider and take appropriate action' on matters such as 'settling the case and using special procedures to assist in resolving the dispute' and 'facilitating in other ways the just, speedy, and inexpensive disposition of the action'.⁶⁷ The Notes of the Advisory Committee on Rules pertaining to the 1993 Amendments to Federal Rule 16 states that:

[Federal Rule of Civil Procedure 16] is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, *mediation*, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits.⁶⁸

While district courts employ many different types of ADR procedures,⁶⁹ mediation has emerged as the most consistently preferred way to resolve cases.

⁶⁶ <[www.uniformlaws.org/ActSummary.aspx?title=Mediation Act](http://www.uniformlaws.org/ActSummary.aspx?title=Mediation%20Act)>.

⁶⁷ Federal Rule of Civil Procedure 16.

⁶⁸ Notes of the Advisory Committee on Rules – 1993 Amendments, Federal Rule of Civil Procedure 16. Emphasis added.

⁶⁹ Most of the federal district courts have promulgated local rules governing the use of mediation. The Southern District of Florida requires, with few narrowly defined exceptions, that every civil case undergo mediation no less than 60 days before the scheduled trial date (S.D. Fla. Local Rule 16.2D). The local rules require that within seven days following the mediation, the mediator is required to file a Mediation Report with the Court, advising of the status of settlement negotiations (S.D. Fla. Local Rule 16.2F(1)). Most district courts, however,

According to a study conducted by the Federal Judicial Center in 49 district courts in a twelve month period from 2010 to 2011, of the 28,267 cases that went through an ADR process, 17,833 of those cases employed mediation.⁷⁰ 'If you have a civil case in the District of South Carolina, you will encounter mediation, and before the litigation is concluded, you likely will have discussed mediation, with your client, with opposing counsel and with the court,' explained Danny Mullis, the ADR Program Director for the District of South Carolina.⁷¹

3.2. MEDIATION IN THE STATE COURTS

Though the governing laws, rules and practices regarding court-annexed mediation, and ADR generally, vary widely from state to state, every state has enacted some form of court-sanctioned mediation or ADR procedure.⁷² The proliferation of these court-sanctioned programs began in the 1970s in the wake of the community justice movement and the Pound Conference and the growth has accelerated to the present.

Court-annexed mediation practices broadly differ among states, and among the local courts within each state. Some mediation programs are mandatory for litigants while some are not; some courts will cover the cost of mediation services while others require the litigants to pay for the services of a mediator.⁷³

3.3. CONFIDENTIALITY OF COMMUNICATIONS AND THE UNIFORM MEDIATION ACT

Confidentiality of communications in mediation is essential to creating an atmosphere of trust and candour, and thus is essential to the very nature of the

do not have mandatory mediation programs, placing the Southern District of Florida squarely in the minority. In the Eastern District of Pennsylvania, a judge may order mediation on a case by case basis, or will refer the parties to mediation with the consent of all parties to the litigation. D. STIENSTRA, 'Federal Judicial Center, ADR in the Federal District Courts: An Initial Report', 16 November 2011 (Appendix 5).

⁷⁰ D. STIENSTRA, 'Federal Judicial Center, ADR in the Federal District Courts: An Initial Report', 16 November 2011.

⁷¹ <www.uscourts.gov/news/TheThirdBranch/06-07-01/In_Resolving_Disputes_Mediation_Most_Favored_ADR_Option_in_District_Courts.aspx> The Third Branch, July 2006. The District of South Carolina has codified a unique practice by Local Rule 16.03, which requires that counsel for each party file an Alternative Dispute Resolution Statement and Certification, whereby counsel certifies that he/she has discussed the availability of ADR mechanisms with the client and has discussed the advisability and timing of ADR with opposing counsel (District of S.C. Local Rule 16.03).

⁷² To see an extensive and evolving database of ADR programs from State to State, see the website of the National Centre for State Courts at <www.ncsconline.org/WC/Publications/ADR/default.htm>.

⁷³ E. WARD, 'Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: A Panacea or a Pandemic?' (2007) 81 *Saint John's Law Review* 77.

process. Each state has different statutes and rules regarding the treatment of confidentiality issues in mediations. Currently, legal rules on mediation can be found in more than 2,500 state and federal statutes; more than 250 of these deal with issues of confidentiality and privileges alone.⁷⁴ The lack of uniformity leads to unpredictability as to whether communications made during mediation will be confidential. This is especially true in mediations across multiple jurisdictions because it may be unclear which state's law applies.

Most states have a common law evidentiary exclusion for offers of settlement. Such statements are excludable from evidence on the basis that they are not probative of the issues to be determined by the finder of fact. However, the practical value of this common law rule in the settling of mediation is eroded in that it does not exclude admissions of fact and all other statements made during mediation.⁷⁵

Federal Rule of Evidence 408 is another possible source of protection to parties for communications made during mediation. The Rule states as follows:

'Rule 408. Compromise Offers and Negotiations

- (a) Prohibited Uses. Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
 - (1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and
 - (2) conduct or a statement made during compromise negotiations about the claim – except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
- (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.'

Federal Rule of Evidence 408 confers broader protection on communications than the common-law rule by expanding protection to include evidence of 'conduct' and 'statements made during compromise negotiations'. The Rule makes no mention of mediation specifically but presumably, would be encompassed by the Rule. However, the confidentiality protections afforded by the Rule are limited in scope. Section (b) enumerates various purposes for which such statements would be admissible as evidence. Further, and perhaps most significantly, the Rule speaks only to evidentiary concerns and makes no limitations on the discoverability of any statements or conduct during mediation.

⁷⁴ <[www.uniformlaws.org/Narrative.aspx?title=Why States Should Adopt UMA](http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UMA)>.

⁷⁵ 'Protecting Confidentiality in Mediation' (1984) 98 *Harvard Law Review* 441, citing FRE 408 advisory committee note.

Confidentiality concerns can often be addressed by contract, wherein the parties and mediator agree to maintain the confidentiality of all communications. This has become a widespread and common practice. However, the confidentiality protections afforded by contracts are only binding on the contracting parties; these contracts cannot preclude an outsider from seeking to discover or admit as evidence a statement or conduct in a mediation.⁷⁶

In an effort to promote greater uniformity in the practice of mediation across the United States, the Uniform Mediation Act (UMA) was drafted cooperatively by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association's Section of Dispute Resolution.⁷⁷ According to the NCCUSL, '[t]he Uniform Mediation Act will further the goals of alternative dispute resolution by promoting candor of the parties by fostering prompt, economical, and amicable resolution of disputes, by retaining decision-making authority with the parties, and by promoting predictability with regard to the process and the level of confidentiality that can be expected by participants.'⁷⁸ The NCCUSL summarises the UMA as follows:

'The UMA's prime concern is keeping mediation communications confidential. Parties engaged in mediation, as well as non-party participants, must be able to speak with full candor for a mediation to be successful and for a settlement to be voluntary. For this reason, the central rule of the UMA is that a mediation communication is confidential, and if privileged, is not subject to discovery or admission into evidence in a formal proceeding [see Sec. 5(a)]. In proceedings following a mediation, a party may refuse to disclose, and prevent any other person from disclosing, a mediation communication. Mediators and non-party participants may refuse to disclose their own statements made during mediation, and may prevent others from disclosing them, as well. Thus, for a person's own mediation communication to be disclosed in a subsequent hearing, that person must agree and so must the parties to the mediation. Waiver of these privileges must be in a record or made orally during a proceeding to be effective. There is no waiver by conduct.

As is the case with all general rules, there are exceptions. First, it should be noted that the privilege extends only to mediation communications, and not the underlying facts of the dispute. Evidence that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its use in a mediation. A party that discloses a mediation communication and thereby prejudices another person in a proceeding is precluded from asserting the privilege to the extent necessary for the prejudiced person to respond. A person who intentionally uses a mediation to plan or attempt to commit a crime, or to conceal an ongoing crime, cannot assert the privilege.

⁷⁶ 'Protecting Confidentiality in Mediation' (1984) 98 *Harvard Law Review* 441.

⁷⁷ The Act was promulgated by the National Conference of Commissioners on Uniform State Laws in 2001 and amended in 2003. <[www.uniformlaws.org/ActSummary.aspx?title=Mediation Act](http://www.uniformlaws.org/ActSummary.aspx?title=Mediation%20Act)>.

⁷⁸ <[www.uniformlaws.org/ActSummary.aspx?title=Mediation Act](http://www.uniformlaws.org/ActSummary.aspx?title=Mediation%20Act)>.

Also, there is no assertable privilege against disclosure of a communication made during a mediation session that is open to the public, that contains a threat to inflict bodily injury, that is sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding where a child or adult protective agency is a party, that would prove or disprove a claim of professional misconduct filed against a mediator, or against a party, party representative, or non-party participant based on conduct during a mediation. If a court, administrative agency, or arbitration panel finds that the need for the information outweighs the interest in confidentiality in a felony proceeding, or a proceeding to prove a claim of defense to reform or avoid liability on a contract arising out of the mediation, there is no privilege.

The Uniform Mediation Act is meant to have broad application, while at the same time preserving party autonomy. While a mediation proceeding subject to the Act can result from an agreement of the parties, or be required by statute, a government entity, or as part of an arbitration, the Act allows parties to opt out of the confidentiality and privilege rules described above. Also, the Act does not prescribe qualifications or other professional standards for mediators, allowing parties (and potentially states) to make that determination. The Act generally prohibits a mediator, other than a judicial officer, from submitting a report, assessment, evaluation, finding, or other communication to a court agency, or other authority that may make a ruling on the dispute that is the subject of the mediation. The mediator may report the bare facts that a mediation is ongoing or has concluded, who participated, and, mediation communications evidencing abuse, neglect, or abandonment, or, other non-privileged mediation matters. The Act also contains model provisions calling for a mediator to disclose conflicts of interest before accepting a mediation (or as soon as practicable after discovery). His or her qualifications as a mediator must be disclosed to any requesting party to the dispute.⁷⁹

The UMA has been approved by the American Bar Association and endorsed by industry stakeholders such as the American Arbitration Association, the Judicial Arbitration and Mediation Service, CPR Institute for Dispute Resolution and the National Arbitration Forum.⁷⁹ As of 2012, the UMA has been enacted into law in ten states, namely Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington, in addition to the District of Columbia.⁸⁰ Other states have adopted similar mediation laws in the spirit of the UMA, including Virginia, Delaware, Florida, Montana, Nevada, Oregon and Wyoming.⁸¹

⁷⁹ <[www.uniformlaws.org/ActSummary.aspx?title=Mediation Act](http://www.uniformlaws.org/ActSummary.aspx?title=Mediation%20Act)>.

⁸⁰ <[www.uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation Act](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation%20Act)>.

⁸¹ <<http://cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/239/Legislation-Where-the-Uniform-Mediation-Act-Stands-in-the-States-Web.aspx>>.

4. PRACTICAL CONSIDERATIONS REGARDING MEDIATION

The decision whether to undertake mediation is deceptively complex. No one should agree to mediation unless they are truly ready to settle. In a civil case, that means the defendant has to be willing to pay and the plaintiff has to be willing to accept payment.

Sometimes, a defendant will seek mediation in order to get a preview of the plaintiff's case. The plaintiff can ferret out an insincere request for mediation by conditioning mediation on the making of a substantial settlement offer.

Choosing a mediator is also a subtle issue. There is little point in engaging in long debate over who should be the mediator, as the mediator is not an adjudicator. Rather, someone who is a good communicator and well regarded by both sides is adequate. It may be preferable from the plaintiff's perspective to let the defendant choose the mediator, as then the mediation cannot be seen to have 'failed' because of the plaintiff's fault in choosing the mediator. As a safeguard against the possibility of the defendant choosing someone close to the defence side, the plaintiff might ask the defence to produce a list of three to five potential mediators from which the plaintiff would choose one.

As discussed above, mediations begin with the execution of a confidentiality agreement. This bars introduction of what occurs in the mediation in court. A mediator will also often add that he will not disclose to the other side anything discussed *ex parte* unless specifically instructed that he may do so. As a practical matter, this is rarely followed. A party is wise to confine their remarks to a mediator to those which they do not mind having their opponent hear.

From the defence perspective, mediation is an opportunity to put pressure on the plaintiff to settle. The defence may request the plaintiff's presence at the mediation, and may use the mediation as an opportunity to speak directly to the plaintiff. The defendant may ask the mediator to speak directly to the plaintiff if settlement discussions are not successful. Plaintiff's counsel must be cognisant of these possibilities and might decline to bring the client to the mediation. The plaintiff may also set a time limit on the mediation so as not to permit the process to wear down the plaintiff or the plaintiff's counsel.

In all mediations, the goal is to get both sides to say 'yes'. How to do so can be highly complicated. Competent counsel should be adroit in the art of settlement negotiation. Everyone has their own style and the parties must be diplomatic and understanding of differences among counsel in this regard. Often, one side or the other wishes to enter into bracketed negotiations where each side progressively gives a little and there are many offers back and forth. On other occasions, counsel may 'lay down a marker' of a specific sum that they will not pay more or will not accept less, depending upon their side in the proceeding. Such ultimata can make negotiations more difficult. The best approach is for

each side to seek to sublimate their ego and desire to be seen as 'victor' and, instead, try to help the other get to 'yes'.

As a last resort, the mediator may suggest a settlement figure and request that both sides confidentially advise whether they will say yes to that number. Unless both sides say yes, the mediator will send both sides home without a resolution. This process has the advantage of permitting one side to say yes without the other side knowing they said yes, unless the other side says yes as well. That preserves the agreeing side's bargaining position in the event that the other side says no as the declining side will not be told of the agreeing side's agreement.

Other details of settlement agreements must not be overlooked in the process. The parties must discuss how long it will take for payment to be made, whether confidentiality is to be a condition of settlement, and whether non-economic considerations, such as remedial measures, are part of the bargain for resolution. We have found that it is best to discuss these matters early, rather than leaving them to the last part of settlement negotiations, after a fixed sum has been agreed.

5. FUTURE OF MEDIATION IN THE UNITED STATES

Mediation and alternative dispute resolution has become a big business in the United States. Private firms specialising in mediation services have become a prominent fixture in the legal landscape. These firms employ former judges and skilled practitioners to service the diverse dispute resolution needs of parties in litigation and those seeking to avoid the litigation process altogether. As long as alternatives to traditional court processes are sought, the marketplace for mediation businesses will be strong and continue to grow.

Mediation is not merely an alternative to litigation, but has become a prominent tool for resolving disputes within the context of litigation. With the proliferation of mediation in American courts, the success and future of mediation is intrinsically tied to litigation – the more complex and diverse litigation becomes, the more useful mediation can be in assisting the parties to narrow their issues and reach resolution to their disputes.

As a form of 'private justice', mediation and other ADR systems will continue to be utilised, but will never be a replacement for the indispensable American jury trial. Constitutional underpinnings ensuring the right to a trial by jury combined with American legal and cultural traditions ensure that mediation and other forms of ADR will always be just an alternative. Although disputes will often conclude without the assistance of a jury, it is through the prism of the prospect of trial by a jury that will always define the way by which legal disputes are analysed and resolved.