

Annual Advanced ALI-ABA Course of Study
Civil Practice and Litigation Techniques in Federal and State Courts

January 19-21, 2005
San Juan, Puerto Rico
March 2-4, 2005
Maui, Hawaii

Mediation Developments & Trends

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¹This is not an exhaustive table of contents. It only lists the major sections of the outline.

MEDIATION DEVELOPMENTS & TRENDS²

I. INTRODUCTION³

A. What the Manual for Complex Litigation (Fourth Edition) says about ADR:

A number of processes outside of the traditional litigation process have proved effective in helping parties reach settlement. The Federal Judicial Center's Guide to Judicial Management of Cases in ADR (2001) discusses such processes and how to use them. [Manual, §13.15].

B. What is mediation? One definition: Saeta v. Superior Court, 11 Cal. Rptr. 3d 610 (Ct. App. 2004):

Mediation takes many forms. Mediation has been defined in many different ways. In essence, mediation is a process where a 'neutral third party who has no authoritative decision-making power' intervenes in a dispute or negotiation 'to assist disputing parties in voluntarily reaching their own mutually acceptable' agreement.

²The author wishes to express his thanks to those who reviewed this outline in its original form: Alan Blakley of Thomas M. Cooley Law School, Robin Lawrence of the United States Department of Justice, Fred Russillo of the Administrative Office of the United States Courts, Donna Stienstra of the Federal Judicial Center, and Jonathan Hyman of Rutgers School of Law-Newark.

³An academic primer: "The term ADR is used here to connote 'appropriate dispute resolution,' suggesting a choice of methods to be used to fit the particular matter. In more common parlance, ADR is used to connote 'alternative dispute resolution' processes, where the process are seen as alternative to more conventional trial or litigation methods." Model Rule for the Lawyer as Third-Party Neutral, Preamble at 3 n.8 (2002).

There is an interesting interplay between mediation and the other principal ADR process, arbitration. For example, does a request to mediate constitute a waiver of a contractual right to arbitrate? See Stewart v. Covill and Basham Constr., 75 P. 3d 1276, 1278-79 (Mont. Sup. Ct. 2003) (no). Under the Federal Arbitration Act, 9 U.S.C. § 1 *et. seq.*, can mediation be a condition precedent to arbitration? See HIM Portland v. Devito Bldrs., Inc., 317 F. 3d 41, 43-44 (1st Cir. 2003) (yes); Kemiron Atlantic, Inc. v. Aguakem Internat'l, Inc., 290 F. 3d 1287, 1290-91 (11th Cir. 2002) (same). "Arbitration," as that term is used in the FAA, has itself been interpreted to encompass other ADR processes, including mediation. Fisher v. GE Medical Systems, 276 F. Supp. 2d 891, 893 (M.D. Tenn. 2003) (granting motion to compel mediation).

Mediation involves moving parties from focusing on their individual bargaining positions to inventing options that will meet the primary needs of all parties. The concept of *self-determination*, which gives parties control over the resolution of their own dispute, is of major importance to the mediation process. It is thought that self-determination enhances commitment to the settlement terms because parties make decisions themselves instead of having a resolution imposed upon them by an authoritative third party.’ * * *. The function of the mediator, therefore, is to facilitate the parties to voluntarily reach their own agreement. [11 Cal. Rptr. at 616 (citations omitted)].

C. What are the benefits of mediation? According to K.K. Kovach, Mediation in a Nutshell 34-40:

1. Time and cost savings
2. Confidentiality and privacy
3. Self-determination
4. Authorizing and acknowledging feelings and emotions
5. Opportunity for preserving relationships
6. Potential for creative solutions
7. Process flexibility and informality
8. Avoidance of legal precedent.

D. Results of one empirical study:

1. Under the Civil Justice Reform Act of 1990 (see below), six United States District Courts established ADR programs. The Rand Institute for Civil Justice evaluated these programs, which included mediation and neutral evaluation.

2. The “assessment” by the Institute, as set forth in An Evaluation of Mediation and Neutral Evaluation under the Civil Justice Reform Act (summary at xxxiv-xxxv):⁴

⁴For a critical response to the assessment, see the March, 1997 “Statement of Concerns Regarding the Ranc ADR Study,” issued by the CPR Institute for Dispute Resolution and available at http://www.cpadr.org/rand_397.htm.

For a “bibliographic summary” of studies of court mediation programs, go to the Center for Analysis of Alternative Dispute Resolution Programs at <http://www.caadr.org>.

Further empirical research may be warranted. See C. McEwen & R. Wissler, “Finding Out If It Is True: Comparing mediation and Negotiation through Research,” 2002 J. Disp. Resol., 131, 142 (“to address adequately important policy questions about the value and utility of