

Introduction

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How should one embark upon the task of drafting a uniform or model act on mediation? One way would be by listing all the key issues with which such a statute must deal (e.g., confidentiality of mediation proceedings, liability of mediators, enforcement of agreements to mediate as well as of agreements arrived at in mediation, etc.) and then arguing them out one by one and carefully drafting the requisite provisions. Of course this would involve some reference to existing statutes and the secondary literature, but this research effort would be primarily a policy-based one.

Another approach would draw upon the available empirical data and pattern the statute closely upon those data. For example, if the goal of such a statute is to facilitate the wide use of mediation, then we would take careful account of recent research suggesting that actually requiring lawyers to participate in mediation rather than subjecting them to continuing legal education courses better accomplishes the objective of widespread use.¹

This symposium represents a blend of these two approaches. Before delving into the substantive issues, it is appropriate to take special note of Jim Brudney's splendid essay on how a mediation statute fits with the uniform state law experience. Those of us who have not worked before in that world have a lot to learn, as, for example, the difference between a model act and a uniform act. Not surprisingly, the National Conference of Commissioners on Uniform State Laws appears to give higher priority to uniform acts. Some of us who are academics are more drawn to a model act because it seems to respond better to the present diversity of practice and even conceptualization of the mediation process.² But Jim Brudney tells us we may be able to have the best of both worlds by opting for a uniform act covering some of the basic issues (such as privilege) and then adding in an array of optional provisions on such unsettled and controversial topics as the qualification of mediators. Pointing out that surprisingly only about one-fourth of the uniform acts have been adopted by more than forty states, he

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¹ See generally Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831 (1998).

² Cf., e.g., NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1992).

urges us to make our case forcefully and to bring to bear the myriads of interest groups so as to give this effort a maximal chance of success.

Let me then turn to the substantive issues. I have already referred to the Rogers and McEwen article on how law can be used to increase the use of mediation. First they strongly argue for facilitation by the judicial system of early settlement efforts. They then draw upon empirical research to show that this goal is most likely achieved by a regime of mandatory mediation sessions, with appropriate opt-outs and with required attendance by both principals and attorneys.

Much to their credit, Professors Rogers and McEwen recognize that some types of provisions arguably belong in any model or uniform mediation statute even though there is no persuasive evidence that this will enhance use of the process. Some of the examples they cite are qualification provisions (which will perhaps increase the cost and hence limit use), provisions dealing with the enforcement of agreements to mediate and of agreements arrived at in mediation, and duties by attorneys to apprise clients of ADR options. All these provisions (except possibly the last one³) seem important parts of a comprehensive mediation statute.

Two of the other papers add some qualifications to the recommendation for mandatory mediation. The paper by McEwen and Williams on access to justice examines a number of threshold barriers (such as the high costs of mediation including the possible participation of attorneys) and concludes that there must be a mixture of public funding, pro bono services by paid mediators and use of volunteers to assure adequate access. Interestingly they also point out that mandatory mediation may even restrict access to court where parties don't have the time or money to pursue both processes. While the just cited recommended alternatives may take care of the lack of money to pay mediators, they can't cover the extra time needed. So the authors conclude that there should be an exception to a regime of mandatory mediation if parties do not have time to pursue both processes. One is left to wonder about the workability of such a proposal, and, more fundamentally, whether such a procedure wouldn't conflict with the legislature's apparent judgment that certain types of cases are better resolved by mediation and hence must be brought there first.

Levin and Guthrie in their paper on party satisfaction point to the overwhelming empirical evidence of party satisfaction with the mediation process, even in cases where the matter was not resolved. They conclude

³ Some states (e.g., Hawaii and Colorado) have inserted such a provision in the Model Rules of Professional Conduct for attorneys.

that such satisfaction can be assured and enhanced if the courts and mediators provide realistic expectations at the outset, and if the parties can choose the mediator—a goal not met in many mandatory mediation programs.

The most challenging paper in this fine set of papers is Josh Stulberg's essay on mediation fairness—a perennial hard nut. He rightly begins by pointing out that mediation fairness should not be determined by simply comparing the result to the likely court outcome. After all, a prime advantage of mediation is that it can provide more flexible and more optimal outcomes than a court could.

One must of course distinguish between process fairness and outcome fairness. Concerning the latter, Professor Stulberg concludes that mediation must not put the parties in a much worse position than they were in at the start of the mediation. That seems to this writer a dubious test. If the parties freely choose a solution that makes at least one of them worse off, but has the plus of ending the conflict and presumably providing other benefits for the assenting party, why should that be objectionable? Indeed, given the subjective nature of outcome fairness, is it possible to come up with any generally acceptable formula? Isn't the main goal one of process fairness (i.e., that the agreement was reached freely and knowingly)? Certainly Stulberg's recommendation that there should be an absolute right to counsel in all mediation cases would go far towards fulfilling that objective, but whether this goal is feasible in all types of mediation when society hasn't even reached that point in most civil litigation remains an open question. Still, our understanding of the complex parameters of process and outcome fairness is surely enriched by Stulberg's provocative discussion.

So much for some of the topics that *should* be covered. There is disagreement among some of the writers about topics that should not be covered. Thus Professor Stulberg says mediators should not be allowed to give their own evaluation; McEwen and Williams, and this writer, disagree. Quite aside from the advisability of such a ban,⁴ there is a serious question whether this kind of standard of practice belongs in a uniform or model law.

As the discerning reader will note, there is ample and stimulating grist here for the drafter's mill. Let us hope that the process that will now begin will be a productive one.

⁴ See generally, e.g., Jeffrey Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997).

