

# Introduction—The Impact of Mediation: 25 Years After the Pound Conference

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In every movement, there is a defining event that shapes and frames what is to come. For the alternative dispute resolution movement, that event was the Pound Conference<sup>1</sup>, held in April 1976, in which more than 200 judges, scholars, and leaders of the bar gathered to examine concerns about the efficiency and fairness of the court systems and dissatisfaction with the administration of justice. At that conference, then Chief Justice Warren Burger called for the exploration of informal dispute resolution processes.<sup>2</sup> Professor Frank E.A. Sander encouraged those assembled to issue periodic “impact statements” to assess accomplishments and challenges in efforts to use dispute resolution processes to address public concerns with the administration of justice.<sup>3</sup> The purpose of this Symposium, held twenty-five years after the Pound Conference, is to take stock of the impact of that conference on the field of mediation and the impact of mediation on the administration of justice.

In the first article of the Symposium, Professor Joseph B. Stulberg addresses questions about the theoretical foundations of mediation and how the theory of mediation affects mediation practice. His article raises and suggests ways to think about a number of questions, both questions that have been answered since the time of the Pound Conference and questions that remain unanswered. He suggests that these unanswered questions—issues of inconsistency between rule of law and individual autonomy, the relationship between negotiation and litigation of disputes, the profile of mediators, and the pedagogy of mediation teaching and training—constitute an agenda for the next decade of work in the field of mediation.

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<sup>1</sup> Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), in 70 F.R.D. 79 (1976).

<sup>2</sup> Warren E. Burger, Agenda for 2000 A.D.—The Need for Systematic Anticipation, Keynote Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), in 70 F.R.D. 83, 93–95 (1976).

<sup>3</sup> Frank E.A. Sander, Varieties of Dispute Processing, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), in 70 F.R.D. 111, 133–34 (1976).

Dorothy J. Della Noce in her article addresses the effects of the Pound Conference on mediation theory and policy. In particular, she notes how the Conference's focus on popular dissatisfaction with the cost, delay, and inaccessibility of adjudication in the courts encouraged a prioritization of one particular goal of mediation—that of case management efficiency—over other social goals of mediation. She discusses how the focus on case management efficiency framed the research conducted about mediation and affected the practice of mediation, including mediation behavior and the definition of success within the mediation process. Dr. Della Noce then traces how critiques of this model of mediation have led to a reemergence of calls for development of a theoretical base for mediation and a recognition of the fundamental social values that can be served by the mediation process. She notes that the challenge for the future is to determine how the theoretical underpinnings of mediation will be used to shape—and reshape—programs of court-connected mediation and to evaluate the effectiveness of such programs.

Dean Lisa A. Kloppenberg's article addresses a number of policy issues concerning mediation in the context of a court-annexed environmental mediation pilot program conducted by the federal district court in Oregon. That article addresses the appropriateness of using mediation for resolution of public policy issues and raises the issue of whether such mediation would best occur within the court system or separate from the courts. Dean Kloppenberg raises questions about the most appropriate strategies to be used in resolving environmental public policy disputes, providing concrete examples from the Oregon pilot project of the effectiveness of strategies employed there and making suggestions for other steps that might be taken to improve the mediation of such disputes.

The fourth article of the Symposium addresses advances in legal education and mediation training since the time of the Pound Conference. Professor Lela Porter Love notes the expansion of dispute resolution courses and other initiatives in law schools throughout the country, as well as the variety of creative ways that mediation and dispute resolution skills are being taught to law students and to practicing lawyers and dispute resolution practitioners. However, in addition to these positive aspects of mediation teaching and training, she sees potential threats to the process of mediation. She expresses concern that a focus on mediation advocacy might turn mediation into just another adversarial process and undermine the potential for understanding and creative problem solving that mediation offers. She also notes that recent world events make it more difficult to advocate reconciliation and collaboration. She ends her article with a call for additional research and improvement of mediation teaching and training to achieve the promise that mediation offers.

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The next three Symposium articles address the use of court-annexed mediation in the federal and the state courts. Robert W. Rack, Jr. provides his thoughts on federal court-annexed mediation programs from his perspective as a chief circuit mediator. He contrasts the high level of use of staff mediation programs in the federal circuit courts as compared to the federal district courts, in which that model of providing mediation services is uncommon. He then addresses some of the challenges of and methods for assuring quality in staff mediation programs, particularly with respect to mediator qualifications, training, supervision, and evaluation. He concludes his article by suggesting that the staff mediation model for mediation programs may allow courts to better control the availability, quality, and style of mediation provided to the public.

Douglas A. Van Epps discusses the impact of mediation on the state courts, from his perspective as director of a state court dispute resolution office. Mr. Van Epps suggests in his article that mediation has not actually achieved the gains in management of court dockets that was envisioned at the time of the Pound Conference, but that mediation has had significant effects in creating a new judicial culture of problem solving. Among the effects of mediation on the court environment discussed by the article are improvements in access to justice, user satisfaction, citizen involvement in dispute resolution, and the demystification of litigation. The article then suggests that mediation in the future can have effects on recasting public expectations of the court system, on encouraging use of technology to resolve disputes, and a reexamination of the legal system's—and legal education's—focus on the adversarial process as the primary method of dispute resolution.

Roselle Wissler's article presents empirical research about the operation of court-annexed mediation programs. Her article describes original empirical research conducted of court-annexed mediation programs in nine Ohio courts of common pleas, focusing on the nature of the cases referred to mediation, the qualifications of the mediators, and the conduct of the mediation sessions. She then describes the finding from that research dealing with party and attorney assessment of the mediation process, the outcomes of mediation, and the impact of mediation on the time and costs involved in dispute resolution. She discusses the relationship between several characteristics of the mediated cases and the likelihood of settlement and party and attorney assessment of the mediation process. Her article concludes by identifying several issues for future research.

The final article in the Symposium, by Professor Frank E. A. Sander, contains some reflections and observation on changes in mediation since the time of the Pound Conference. Professor Sander, an important player in the Pound Conference, offers his insights about how to achieve basic change in

the system of dispute resolution, so that alternative methods of dispute resolution are routinely explored and litigation becomes a dispute resolution method of last resort. His article also calls for more basic research on the cost-effectiveness of mediation, the implications of satisfaction with mediation, the effects of mediation training and of co-mediation, the implications of mandatory mediation, and the importance of mediation confidentiality. Professor Sander concludes his article by discussing the collateral benefits of mediation for the legal profession and the administration of justice.

Collectively, through these articles and their presentations made at the symposium, this distinguished group of dispute resolution scholars and practitioners have provided a "Pound Conference impact statement." They have also provided us with a glimpse of the future of mediation and have sketched out issues to address and challenges to overcome during the next stage in the development of dispute resolutions processes.