Mediation in Public Policy
by Rodney A. Max

I. Decision Making in the 21st Century

This article introduces the concept and develops the discussion of utilizing mediation in the area of public policy decision-making. It recognizes and honors the constitutional organization and implementation of checks and balances of the multiple branches of government. At the same time it recognizes and respects the new pace and complexities by which 21st Century events evolve, public actions and reactions transpire, and effective and efficient community or public sector direction requires facilitation. Therefore mediation in public policy is herein suggested not as a substitute, but as a complement to the existing structure governing.

In earlier centuries current events transpired and governmental branches used their checks and balance framework to deliberate and react "in due course" fashion.[1] Now such events not only transpire (compare response to WWII to response to 9/11), but the community reaction and governmental deliberation require not only expedited but efficient responses. (In our American system of governing, the Legislative Branch makes the laws and reviews Executive actions/orders, while the Executive Branch executes the laws passed by Congress and implements the orders/actions it may make. The Judicial Branch interprets the laws and actions of both of the other branches; and at the federal level the Judicial Branch is created by the appointment of the Executive Branch and approval/consent of the Legislative Branch.)[2]

While public deliberation, debate, and decision making need to remain open and subject to rules and procedures within the Legislative and Executive Branches of government, the use of mediation can assist them as it has within the Judicial Branch at both the federal and state (and

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[1] Michael Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*., 83 Geo. L.J. 217 (1994).
[2] *Id.*

local) levels in facilitating more efficient and effective resolution.[3] Bipartisan debates are a part of our representative democracy, but when they create gridlock and inaction to necessary progress (regardless of their place on the political spectrum), we all lose.[4] Concepts of mutuality of interests get lost in the public "monologue", while debate negates the necessary "dialogue" toward consensus building.[5] It is now said "we do not listen to one another, but we react to one another"; we don't "build bridges of mutuality", we "build positions of exclusivity".[6]

II. Judicial Branch Leadership in Mediation

Enter the "process of mediation" built around concepts self-determination[7], facilitation, mutuality, and interest based considerations.[8] Interestingly, despite the adversarial nature of our common law justice system, the Judicial Branch has taken the lead in formulating rules and procedures for mediation to enable that judicial process to serve better the parties, their counsel, and the courts.[9]

Courts are constitutionally established to handle conflicts, whether private or public, through a process of trial and appeal.[10] Lawsuits are filed in state and federal courts whereby judges and juries award judgments, and appellate courts review for affirmation or reversal of said

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[3] Stephen T. Bullock, Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana, 57 La. L. Rev. 885 (1997).
[4] Michael J. Teter, *Congressional Gridlock's Threat To Separation Of Powers*, Wis. L. Rev. 1097 (2013).
[5] Nathan Witkin, *Interest Group Mediation: A Mechanism for Controlling and Improving Congressional Lobbying Practices*, 23 Ohio St. J. on Disp. Resol. 373 (2008).
[6] Jonathan R. Cohen, *"Open-Minded Listening*", 5 Charlotte L. Rev. 139 (2014).
[7] Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 Harv. Negotiation L. Rev. 1,3 (2001).
[8] *Alternative Dispute Resolution Handbook*, available at: https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/alternative-dispute-resolution/handbook.pdf
[9] Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 Harv. Negotiation L. Rev. 29, 37 (2003).
[10] *The Appeal Process*. Retrieved from: http://judiciallearningcenter.org/the-appeal-process/

decisions.[11] This has been and continues to be the heart of our judicial system.

However in the mid-1980's court dockets were becoming critically back-logged and judicial inefficiencies set in[12]. Numerous state and federal courts began to explore, create, and implement 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, however, 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 achieve agreement.[16] In certain circumstances said agreements are subject to approval of courts and/or other authorities.[17] Thus, their constitutional 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 federal[19]. In addition private sector associations began to implement mediation rules and procedures to effectuate and encourage early dispute

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[11] *Id.*

[12] Elena Nosyreva, *Alternative Dispute Resolution in the United States and Russia: A Comparative Evaluation*, (2001) *available at* http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1057&context=annlsurvey.

[13] Michael McManus & Brianna Silverstein, *Brief History of Alternative Dispute Resolution in the United States* (2011) *available at* http://cadmusjournal.org/node/98

[14] Geoff Sharp, *Should Mediators Wear Robes?* Retrieved from: http://www.mediate.com/articles/SharpGbl20120604.cfm

[15] *What Happens When Mediation Fails?* Retrieved from: http://www.dtmlegal.com/news/what-happens-when-mediation-fails/

[16] *Id*

[17] Michael Carbone, *Enforcing Agreements Made at Mediation*, retrieved from: http://www.mediate.com/articles/carbone5.cfm

[18] Bernard S. Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*, 182, 184 (2004).

[19] Howard S. Bellman & Susan L. Podziba, *Best Of ABA Section, Dispute Resolution Public Policy Mediation: Best Practices*, (2016).

resolutions within consumer and commercial settings.[20] Industry standards evolved to contractually implement mediation and private sector organizations began to enlist corporations, law firms and individuals to join their ranks in the promotion of mediation programs for private dispute resolution.[21] Said programs further expanded to the international arena. [22]

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. [23] As a result, private parties are increasingly utilizing mediation to resolve judicial differences. [24]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.[25] Said mediated agreements with public bodies are simply and expressly made subject to the approval of the overriding bodies, boards, commissions, or councils.[26]

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.[27] 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 in resolving it.[28]

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[20] Lydia Nussbaum, *Mediation as Regulation: Expanding State Governance over Private Disputes*, Utah L. Rev. 361, 370 (2016).
[21] *Id.*
[22] Thomas Stipanowich, *The International Evolution Of Mediation: A Call For Dialogue And Deliberation*, 46 VUWLR 1191, 1192 (2015).
[23]Susan Oberman *, Confidentiality in Mediation: An Application of the Right to Privacy*, 27 Ohio St. J. on Disp. Resol. 539 (2012).
[24] Lydia Nussbaum, *Mediation as Regulation: Expanding State Governance over Private Disputes*, Utah L. Rev. 361, 370 (2016).
[25] Robert Zeinemann, *The Characterization of Public Sector Mediation*, (2001) *available at* http://environs.law.ucdavis.edu/volumes/24/2/articles/zeinemann.pdf
[26] *Id.*
[27] Franchising: Realities and Remedies § 5.03A (Dec. 15, 2016)
[28] Shawn P. Davisson*, Privatization and Self-Determination in the Circuits: Utilizing the Private Sector Within the Evolving Framework of Federal Appellate Mediation*, 21 Ohio St. J. on Disp. Resol. 953, 965 (2006).

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 make it up. In the judicial system the courts do not give up their authority to make decisions.[29] In fact, having given the parties the opportunity to resolve their differences, the courts still have the 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 of achieving their own resolution in whole or in part through the mediation process.[30] Those component parts include:

1. Self-Determination is a critical component of mediation.[31] The parties/participants are in control of their decision making.[32] They elect to resolve or not.[33] The role of the mediator is not one of decision-maker.[34] The mediator's role is that of facilitator and custodian of the process with the goal of initiating and maintaining the dialogue.[35] Any decision-making of the parties collectively is controlled by the process of mutuality (discussed below). If agreement is achieved the parties are resolved. If agreement is not achieved the mediation is "adjourned without

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[29] Geoff Sharp, *Should Mediators Wear Robes?* Retrieved from: http://www.mediate.com/articles/SharpGbl20120604.cfm

[30] All You Need To Know About Mediation But Didn't Know To Ask-A Parachute for Parties in Litigation! Retrieved from: http://www.mediate.com/articles/fisher2.cfm

[31] Tim Hedeen, *Ensuring Self-Determination through Mediation Readiness: Ethical Considerations retrieved from http://www.mediate.com/articles/hedeenT1.cfm*

[32] *Id*

[33] *Id*

[34] Joel Kurtzberg, *Freeing the Parties From the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant* ***Mediation***, 1997 J. Disp. Resol. 53, 85

[35] *Id*

resolution" or "impassed".[36] While the parties to the mediation can resolve 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.[37] Where said authority exists, the agreement of the parties is subject to the final approval of the stated authority.[38]

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 them among or between themselves. Thereafter, such resolution or other agreed framework would be presented to the appropriate executive or legislative body to inquire, understand, approve or disapprove that on which the parties have agreed. The parties' initial differences would have been given the opportunity to resolve within the mediation process, and this 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. (As in the judicial branch, failure to reach agreement simply leaves it to the judge, jury or appellate court to resolve issues unresolved by the mediation mediation process.)

2. Mutuality is the corresponding component that converts self-determination from unilateral

[36] *Mediation vs. Arbitration vs. Litigation: What's the Difference? Retrieved from:* http://adr.findlaw.com/mediation/mediation-vs-arbitration-vs-litigation-whats-the-difference.html

[37] Geoff Sharp, *Should Mediators Wear Robes?,* retrieved from http://www.mediate.com/articles/SharpGbl20120604.cfm

[38] Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 Harv. Negotiation L. Rev. 1 (2001).

decision-making to bi- or multi-lateral decision-making when agreement can be reached.[39] Resolution only binds when it is final; and it is only final when both sides finally agree. Nothing is agreed until everything is agreed by all participants/parties.[40] 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.[41]

3. The "interests" of the parties in mediation are as important a component as are their rights.[42] Where positions may be difficult to reconcile, interests may be more fluid.[43] 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.[44] Thus, distinctive negotiation positions of differing sides, may find commonality when exploring the mutuality of their interests.[45] For example, the right to assert a class action may yield to the interest of achieving meaningful individual relief for the named plaintiff; and the right to assert a defense of statute of limitations may yield to the interest of achieving confidential finality.

[39] *Settlement Agreements For Employment Termination Cases*, available at http://leehornberger.com/UserFiles/File/PLIT1003_Ford_Horn.pdf

[40] Joshua N. Weiss, *Sequencing Strategies and Tactics,* retrieved from http://www.beyondintractability.org/essay/issue-segmentation

[41] Dale Eillerman, *Agree to Disagree - The Use of Compromise in Conflict Management,* retrieved from http://www.mediate.com/articles/eilermanD7.cfm

[42] Peter Thompson*, Enforcing Rights Generated In Court-Connected **Mediation**-Tension Between The Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 Ohio St. J. on Disp. Resol. 509, 556 (2004)

[43] Heidi Burgess*, How to Find a Transformative Mediator*, retrieved from: http://www.colorado.edu/conflict/transform/tmall.htm

[44] *Id* at 556

[45] *Id* at 556

4. "Confidentiality" is a hallmark component of the mediation process.[46] 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.[47] Once impassed or adjourned, parties are relieved of obligation of confidentiality.[48] However, so long as the mediation process is "in play" communications are protected. [49]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.[50] Said confidentiality is not to be confused by or become an impediment to public airing of issues within a public forum.[51] 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 the one hand, if an agreement is achieved, the agreement will bind that which will be publicly discussed. [52]On the other hand, a failure to reach an agreement simply ends the confidentiality of subsequent discussions without infringing on that which was previously communicated during and within the mediation process.[53]

5. The "scope of the agreement" is the opportunity to achieve a resolution on those component parts by which the parties intend to be bound. [54]If it is expressed that "nothing is agreed until

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[46] Jay Zitter, *Construction and Application of State Mediation Privilege*, 32 A.L.R.6th 285

[47] Ellen Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 Ohio St. J. on Disp. Resol. 239 (2002).

[48] Karin Hobbs, *Mediation Confidentiality and Enforceable Settlements: Deal or No Deal?* http://www.mediate.com/articles/hobbsk1.cfm

[49] *Id* at 245

[50] *Id* at 245

[51] Susan Oberman, *Confidentiality in Mediation: An Application of the Right to Privacy*, 27 Ohio St. J. on Disp. Resol. 539, 564 (2013).

[52] Ellen Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 Ohio St. J. on Disp. Resol. 239, 304 (2002).

[53] *Id* at 304-305

[54] Michael Tsur, *The Art of Writing A Mediation Agreement* available at http://www.mediate.com/articles/tsur.cfm

everything is agreed" then agreement of only "some" component parts will not become binding until "all" component parts are resolved.[55] This is not to suggest that it can not be otherwise partially binding - if that is the clear understanding.[56]

6. Neutral facilitation is the role of the mediator who is neither the judge nor the arbitrator.[57] However, 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 same.[58] Where explicitly or implicitly the participants are asking for the mediator's input, it may be skillfully conveyed.[59] However, imposing an evaluative approach may be as harmful to the component of self-determination as ignoring it when said determination could use such evaluation.[60]

IV. Implementation of Mediation in Public Policy

"In order to form a more perfect Union" our Constitution proceeds to set forth a system of checks and balances to assure that the representative government is "of, for, and by the people".[61] It sets up a general mechanism of governing.[62] It does not limit the mechanisms by which those institutions may govern.[63] Accordingly, each institution has the prerogative of establishing within its internal rule-making authority, the means of achieving the missions and goals of its

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[55] http://aim-mediation.co.za/page/mediation/
[56] http://flcourts.org/resources-and-services/alternative-dispute-resolution/mediation.stml
[57] Paula Young, *Teaching the Ethical Values Governing Mediator Impartiality Using Short Lectures, Buzz Group Discussions, Video Clips, a Defining Features Matrix, Games, and an Exercise Based on Grievances Filed Against Florida Mediators*, 11 Pepp. Disp. Resol. L.J. 309, 333 (2011).
[58] *Id* at 335
[59] *Id* at 357
[60] *Id* at 358
[61] USCS Const.
[62] *Id*
[63] *Id*

respective jurisdictions.[64] Those internal rules are not pre-ordained or limited by exclusive rule making precedents. They are open to whatever breadth and scope the members of said branch decide to implement.[65] So while rules have been historically created to meet the needs of the governing body, said rules may change or be modified to meet the demands of changing times.[66]

Historically, the Executive Branch has consisted of varying cabinet positions to meet the issues of the times[67]; the Congress (both Senate and House of Representatives) has consisted of varying committees to address matters of governing;[68] and appellate circuits within the federal judiciary have increased in number to meet the needs of judicial caseloads.[69] Thus, the governing branches have found within their constitutional powers and internal rule-making authorities the means to adopt to the changing needs of society. As the Judicial Branch has evolved to find and implement the use of mediation (as discussed above in Section II, supra), so too may the Executive and Legislative Branches now consider the use of mediation in their structures of governing to better accomplish the resolution of issues that confront them. Mediation within these branches affords the opportunity of facilitative dialogue to better understand, evaluate and consider the merits of issues presented. This does not eliminate the hearings, debates, or other public forums that have historically been used to achieve decision-making within these branches.

[64] Michael Blaise, *A SEPARATION OF POWERS DEFENSE OF FEDERAL RULEMAKING POWER*, 66 N.Y.U. Ann. Surv. Am. L. 593, 594 (2011).
[65] Susan Israel, *Checks and Balances and the Three Branches of Government*, available at http://nationalparalegal.edu/ChecksAndBalances.aspx?AspxAutoDetectCookieSupport=1
[66] *Id*
[67] Phaedra Trethan, *Executive Branch of Government*, available at http://usgovinfo.about.com/od/thepresidentandcabinet/a/execbranch.htm
[68] *The House Explained*, available at http://www.house.gov/content/learn/
[69] *Caseload Increases Stress Need for New Federal Judgeships*, available at http://www.uscourts.gov/news/2013/09/10/caseload-increases-stress-need-new-federal-judgeships

Mediation does provide a forum for balanced, facilitated consideration and debate of the merits of public issues.[70]

Implementing such mediation calls upon its traditional components 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 determination of a compromised resolution (or the alternative of impasse for lack of compromise).[71] The confidential setting has to 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 necessary to accomplish "mutuality" of the issue's solution.[72] 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; giving them an opportunity to be part of the solution; and facilitating the ingredient for reasonable compromise will make for a more meaningful, legitimate and respected resolution while providing a balanced forum for the opportunity to either build "consensus" or at the very least "understanding" of the issue(s) at hand.

[70] *What are the Advantages of Mediation?*, available at http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/mediation_advantages.html
[71] U.S. Const. art. I & II
[72] Dale Eilerman, *Agree to Disagree - The Use of Compromise in Conflict Management,* available at: http://www.mediate.com/articles/eilermanD7.cfm

At the legislative level mediation would be instituted within a committee or subcommittee assigned to the issue.[73] Following a public presentation of the issue, those for and against may ask or be asked by the majority and/or minority leadership to proceed to mediation to identify a compromise resolution and thereafter return to the committee/subcommittee for public questioning, clarifications, and approval or disapproval of that which was agreed or attempted to be agreed.[74]

At the executive level mediation would be instituted upon an executive officer (from President, Governor, Mayor, cabinet member, or other authoritative staff) being asked or otherwise requesting the appropriate representatives to proceed to a mediation forum and emerge with a resolution and/or an articulation of the merits of both sides of an issue.[75] Thereafter, the resolution or merits would be openly discussed and debated for public consideration and executive approval or disapproval.[76] The authority to initiate such executive mediation would require the approval of the most senior position within that office (unless otherwise delegated).[77]

Pursuant to either legislative or executive authorization, the process of mediation gives those debating the issue the opportunity to preliminarily and confidentially better understand the issues

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[73] *EASING GRIDLOCK IN THE UNITED STATES CONGRESS THROUGH MEDIATION: LETTING OUR CITIES AND STATES TEACH US LESSONS ON GETTING ALONG*, available at http://www.americanbar.org/content/dam/aba/events/dispute_resolution/lawschool/boskey_essay_contest/2013/easing_gridlock_in_the_united_states_congress_through_mediation_letting_our_cities_and_states_teach_us_lessons_on_getting_along.authcheckdam.pdf
[74] *Id* at 2
[75] *Id*
[76] *Id*
[77] *Administrative Dispute Resolution Act of 1996 Section 3,* available at https://www.adr.gov/pdf/adra.pdf

and attempt to find a resolution to the problems subject to the ultimate approval (or rejection) by the appropriate constitutional officer.[78]

Each branch would have at their disposal individuals who have been identified or recognized as accepted and qualified neutrals for that branch, similar to the way the judicial branch has been able to identify and recognize accepted and qualified neutrals.[79] 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.[80] The scope would define and thereby limit the issues to be presented and it may also define the expectations of the body authorizing the mediation.[81] The time period would place reasonable and appropriate limits on the mediation so as to enable the mediation to meet the needs of the authoritative body.[82] The confidentiality would be prescribed by the authorizing body within each branch to insure that during the mediation process there is freedom of expression without the threat of disclosure thereafter.[83] 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.[84]

The means of 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.[85] Said rules and procedures can be supplemented to include mediation as an alternative means of dispute

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[78] *Id* at 11
[79] *Administrative Dispute Resolution Act of 1996 §573,* available at https://www.adr.gov/pdf/adra.pdf
[80] *Id* at §574.
[81] *Id* at §575 (a)(2).
[82] *Id* at §579.
[83] *Id* at §574.
[84] *Id* at §574.
[85] U.S. Const. art. I & II.

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.[86] This individual 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.[87]

V. Conclusion

This article "opens the door" to an alternative method of dispute resolution within the legislative and executive branches of government from federal to state and to local. 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 stops from defining how each branch would so implement the mediation process. This is because each body at each level may have their own needs, concerns, and internal rule-making authorities that may alter the or otherwise modify such implementation. That 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.

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[86] *Id* at § 573(a).
[87] *Id* at § 573(a).