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Veronique Bardach

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A PROPOSAL FOR THE ENTERTAINMENT INDUSTRY: THE USE OF MEDIATION AS AN ALTERNATIVE TO MORE COMMON FORMS OF DISPUTE RESOLUTION

*Véronique Bardach**

I. INTRODUCTION

When Shakespeare proclaimed “let’s kill all the lawyers”¹ he may have been speaking with foresight, expressing the same frustration that many of his contemporaries in the entertainment industry feel today. The frustration arises because artists, whether performers, writers or others, struggle with conflicting positions. On the one hand, they value the skills of an entertainment lawyer who can protect their rights, while on the other hand, they resent the costs and complexities associated with the profession and the legal system. This Article proposes mediation as an alternative to present forms of dispute resolution in the entertainment industry, suggesting that such a step would help relieve some of this frustration.

This Article begins by identifying the two forms of dispute resolution most commonly used in the entertainment industry today, litigation and arbitration. The Article then goes on to describe the criticisms and concerns associated with these approaches and how they add to, rather than lessen, the frustration regarding the legal profession. Next, this Article introduces the proposal which advocates the use of mediation as an alternative to litigation and arbitration. It explains what mediation is and how it could operate in the entertainment industry. It also discusses mediation’s particular applicability to the entertainment world and how it can help artists and performers protect their rights while not incurring the costs and aggravations associated with litigation and arbitration. The Article concludes with a brief examination of future hurdles to the implementation of the proposal.

* Véronique Bardach, Esq. is an associate with the law firm of Rogers & Wells in Los Angeles, California, which has recently acquired the entertainment law firm of Boccara-Orengo-Van Cauwelaert in Paris, France. She received her J.D. from Georgetown University Law Center, Washington, D.C. in 1992.

1. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2.

II. PRESENT STATE OF AFFAIRS

A. *Litigation*

In the entertainment industry, litigation is uncommon and is generally reserved for the test cases. A good example of such a case is the suit initiated by Art Buchwald against Paramount Pictures in order to shed some light on a puzzling industry custom.² Companies such as Paramount have a long tradition of distorting the definition of words such as "net" and "gross" in order to reduce the reported size of a project's profit.³ This practice reduces the share that goes to those with profit participation contracts.⁴ While this custom had been accepted in the industry, Buchwald sought the court's intervention to determine whether this practice had evolved beyond acceptable accounting tactics into the realm of unconscionable practices.⁵

The entertainment industry is not immune to the litigation difficulties encountered by other industries.⁶ Litigation is often criticized because of the length of time required to go to trial. In California, parties may have to wait as long as five years before they are granted a court date on a civil matter.⁷ In New York City, the waiting period for a civil case is approximately eight months for claims under \$25,000,⁸ and well over a year for claims over \$25,000 which must be filed with the Supreme Court of New York City.⁹ In addition, parties and their attorneys spend hours prior to going to court either devising or overcoming dilatory procedural or legal

2. *Buchwald v. Paramount Pictures, Corp.*, 13 U.S.P.Q.2d (BNA) 1497 (1990).

3. John Lippman, *Buchwald Case to Focus on Studios' Profit*, L.A. TIMES, June 22, 1990, at D3.

4. *Id.*

5. Georgia D. Gavric, *Profit Participation Contracts, A Glossary of Terms*, L.A. LAW., Apr. 1991, at 22.

6. Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S6 (1989) (citing NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION, REPORT OF THE AD HOC PANEL ON DISPUTE RESOLUTION AND PUBLIC POLICY (OCT. 1983), reprinted in ACUS, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 5-53 (1987)).

7. Another study indicated that the average period between the time of filing to the time of trial in a civil case in federal civil court is one and one-half years. Feinberg, *supra* note 6, at S10 n.10 (citing Sacks, *The Alternative Dispute Resolution Movement: Wave of the Future or Flash in the Pan?*, 26 ALBERTA L. REV. 233, 233 (1988)).

8. Telephone Interview with the Calendar Clerk, Civil Division, New York City Court (Apr. 14, 1992).

9. Telephone Interview with the Calendar Clerk, Civil Division, Supreme Court of the City of New York (Apr. 14, 1992).

tactics.¹⁰ Moreover, many disputes in the entertainment industry arise during the life of the project. In order to litigate a dispute, parties must interrupt a project until a judgment is rendered, a process which could take years. The time factor alone renders litigation an economically infeasible option for many in the entertainment industry.

Another concern with litigation is that it is exceedingly expensive. Attorneys' fees alone can be crippling. A New York law firm can charge anywhere from \$110 per hour for a young associate to \$375 per hour for a partner.¹¹ In Los Angeles, the fees charged range from \$108 per hour for a young associate to \$338 per hour for a senior partner.¹² In addition to attorneys' fees, a party has to pay court fees and other related court expenses, as well as wage remuneration and travel expenses for witnesses, fees for expert witnesses if needed, and expenses associated with the client's inability to continue working during the period of the trial. Certainly, the typical struggling artist cannot afford these costs.

Finally, litigation is a highly inflexible mechanism which does not easily adapt to the needs of the entertainment industry. Judges rarely consider industry practices, and outcomes are controlled by prior case law.¹³ Moreover, the relief granted is limited to a confined body of predefined legal remedies.

B. Arbitration Proceedings in Collective Bargaining Agreements

Currently, the most common form of dispute resolution between employers and employees in the entertainment industry is arbitration.¹⁴ There are two reasons for this phenomenon. First, the litigation process is too costly and time consuming to be useful in resolving the day-to-day contract disputes typical in the entertainment industry. Second, and more importantly, most artists and performers are members of one of the many guilds or unions and almost all union contracts include an arbitration

10. Feinberg, *supra* note 6, at S6.

11. LAWYER'S ALMANAC 332 (Prentice Hall Law & Business 1993).

12. *Id.*

13. Barry B. Langberg, *Entertainment Industry Customs on Trial*, L.A. LAW., Apr. 1989, at 19.

14. THOMAS D. SELZ ET AL., 2 ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 21.17 (McGraw-Hill, 2d ed. 1992).

clause.¹⁵ Arbitration is a process in which a grievance is submitted both in writing and orally to one or more professionals for review and decision. The decision of an arbitrator is final and binding. An appeal is allowed only in the rare instance where there is proof of fraud.¹⁶

Some of the collective bargaining agreements *require* that certain disputes under the contract be resolved through final and binding arbitration.¹⁷ Other agreements also include pre-arbitration grievance procedures. These latter procedures are most like mediation.

1. Arbitration Clauses and Hearings

A party to a union contract faced with a grievance must follow several steps before determining whether to file for arbitration. First, she must turn to the arbitration clause in the contract to determine whether the matter in dispute is arbitrable, and if so, whether she must undertake certain grievance procedures prior to initiating arbitration.¹⁸ Second, she must determine whether the party with whom she has a grievance is bound by the contract.¹⁹ Third, she must decide who is entitled to demand arbitration.²⁰ In some instances only the union or only the employee may

15. The Writers Guild of America ("WGA"), which represents motion picture writers, has an arbitration clause in its contract. The clause's application to a particular dispute depends upon subsequent clauses. The Screen Actors Guild ("SAG"), which represents motion picture and television performers, also includes an arbitration clause in its contract. The Directors Guild of America ("DGA") represents directors as well as unit production managers, assistant directors, and technical coordinators in the motion picture industry. The arbitration clause under the DGA agreements is rather narrow and applies only to a limited number of disputes. DGA contracts, however, require that parties take any arbitrable issue through a grievance mechanism before it can go to arbitration. Both WGA and SAG have similar preliminary grievance mechanism requirements. The American Federation of Television and Radio Artists ("AFTRA"), which represents taped film producers, has an arbitration clause which is a complete defense to any judicial action regarding a dispute arising under the union contract. AFTRA contracts do not provide for grievance procedures prior to arbitration. Similarly, the American Federation of Musicians ("AF of M"), which represents musicians, includes an arbitration clause in their agreements which makes any dispute subject to original arbitration, with no preliminary grievance procedures. SELZ et al., *supra* note 14, §§ 21.16-17.

16. LINDA R. SINGER, *SETTLING DISPUTES* 28 (1990).

17. A 1979 survey estimated that 96% of the collective bargaining agreements provided for final and binding arbitration. Stephen B. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270, 271 (1982) (citing 2 Collective Bargaining Negot. and Cont. (BNA) No. 875, at 51:5 (Feb. 9, 1979)).

18. SELZ et al., *supra* note 14, § 21.18.

19. *Id.*

20. *Id.* § 21.19.

demand arbitration while in others it must be a collective effort by the employee and the union.²¹ Fourth, she must make a written demand for arbitration which resembles a formal pleading.²² In the event her contract or arbitration clause does not specify the location or time of the arbitration hearing, she must contact the opposing party and reach a mutual agreement as to where and when the hearing will take place. Also, if the arbitration clause does not specify who the arbitrators will be, then the parties must find mutually agreeable arbitrators.²³ If one or more of the arbitrators are popular, scheduling a time when they are all free to hear the case may be the greatest challenge.

Prior to the start of the proceedings, each party submits a brief establishing in detail the nature of the dispute and any relevant law, although adherence to legal precedent is not required.²⁴ The arbitration proceeding is generally recorded, and parties may subpoena witnesses.²⁵ Once the hearing begins, each party is given an opportunity to make an opening statement.²⁶ The parties may offer any evidence they choose, including personal testimony and affidavits of witnesses.²⁷ The arbitrator is not bound by rules of evidence and may require that one party or both produce evidence in order to clarify the case.²⁸ After each party makes closing arguments, the arbitrators make their decision. A decision is not usually accompanied by an opinion although it must be in writing.²⁹

Arbitrators are free to choose the award they feel is best suited to resolve the conflict; however, if the dispute concerns a union contract, then the award may not exceed those awards prescribed by the rules of the guild.³⁰ If it is a union contract, parties need not worry about noncompliance with the award since the unions can wield significant pressure to ensure adherence. The guild has disciplinary rules it may use against employees and members of the union who do not abide by the decisions.³¹

21. *Id.*

22. SELZ et al., *supra* note 14, § 21.19.

23. *Id.*

24. *Id.* § 21.21.

25. *Id.*

26. SELZ et al., *supra* note 14, § 21.21.

27. *Id.*

28. *Id.* § 21.17.

29. *Id.* § 21.22.

30. SELZ et al., *supra* note 14, § 21.22.

31. *Id.*

For example, the union has the authority to withhold the services of employee members if the employer refuses to honor the award.³²

2. Advantages and Disadvantages of Arbitration

Although arbitration continues to be a welcome alternative for someone faced with the exorbitant costs and time required for litigation, it has recently been the subject of much criticism. Originally, arbitration was expected to provide a quick, inexpensive and informal method of resolving disputes. Examination of a typical arbitration proceeding, however, reveals that "it is frequently none of those,"³³ and that the shortcomings may inhere in the process itself.³⁴

First, arbitration has become increasingly expensive. The cost of arbitration generally includes arbitrator's fees, travel expenses, attorneys' fees, wage payments for any witnesses, rental of a hearing room, payment to an organization for furnishing the arbitrators, a filing fee,³⁵ and stenographic transcription costs should the parties want to have a record of the hearing.³⁶ A 1984 study reported that the cost of grievance arbitration was approximately \$5,000 per case.³⁷ Currently, the daily fee for a single arbitrator is roughly \$600.³⁸

In addition to excessive costs, arbitration has also become time consuming. The average duration of an arbitration hearing is four to five

32. *Id.*

33. Goldberg, *supra* note 17, at 270.

34. *Id.* at 275.

35. In 1986, the American Arbitration Association charged a filing fee that ranged from \$200 to \$1,800, plus ¼% of the amount of the claim in excess of \$160,000, for claims up to \$5 million. Richard L. Feller, *Let Me Count The Ways—Dispute Resolution in the Entertainment Industry*, ENT. & SPORTS LAW., Fall 1985, at 1, 15.

36. W.J. Usery, Jr., *Some Attempts to Reduce Arbitration Costs and Delays*, MONTHLY LAB. REV., Nov. 1972, at 3.

37. Panel Address *Fair Representation Problem, Alternatives to Arbitration at NYU Conference*, Daily Lab. Rep. (BNA) No. 117, at A-14 (June 18, 1984).

38. The American Arbitration Association, for example, charges an initial administration fee which is a percentage of the claim, but in no case less than \$300. In most cases, this fee covers the cost of the first day of the hearing. If the hearing goes beyond one day, then the arbitrator receives compensation in the range of \$600 per day. The fee and daily compensation varies depending upon where the arbitration takes place. Interview with Kelly Gregory, Case Administrator for the Washington, D.C. office of the American Arbitration Association (Apr. 7, 1992); interview with Maria D'Alessandro, Tribunal Administrator for the Los Angeles office of the American Arbitration Association (Apr. 7, 1992).

months.³⁹ Part of the reason for the extensive length is that arbitration involves several prescribed stages, sometimes resembling a formal trial. There are numerous formal procedures that parties must follow both prior to and during the arbitration proceedings.⁴⁰ In fact, many of these procedures require the assistance of an attorney. Parties submit briefs, make formal presentations of evidence, introduce witnesses, and make opening and closing arguments. As one commentator reported, the formalization of arbitration proceedings has left employees dissatisfied, frustrated, and confused even when they prevail.⁴¹ Part of the frustration stems from the fact that all too often the intricate legal questions that dominate the hearings appear, to the employee, far removed from the real issues in dispute.⁴²

For all the reasons mentioned above, arbitration has fallen into disfavor as an alternative to litigation. Therefore, another form of alternative dispute resolution which conforms to arbitration's original purpose is greatly needed.

III. A PROPOSAL: THE INCLUSION OF A MEDIATION CLAUSE IN ALL ENTERTAINMENT INDUSTRY CONTRACTS

Artists and performers spend half of their time entering into "deals,"⁴³ which in the entertainment industry are the equivalent of oral contracts. Unfortunately, all too often these deals are never put into writing and, when they are, they often suffer from a lack of precision.⁴⁴ Consequently, the artist spends the other half of his time arguing over the terms of the deal or contract. If the parties cannot resolve their differences amicably, the

39. AM. JUR. 2D, *New Topic Service, Alternative Dispute Resolution*, § 7 (1985).

40. See *supra* part II.B.1.

41. Usery, *supra* note 36, at 3.

42. *Id.*

43. One author recently noted that the entertainment industry is besieged with deals, "deals to sign a hot new star, deals to sign the new up-and-coming producer and deals to produce motion pictures," concluding that in many instances the contracts that result are based on different persons' recollection of what was agreed upon. Kirk A. Pasich, *Beware the 'Creeping Contract,'* NAT'L L.J., Mar. 2, 1992, at 25.

44. Sandra Bodovitz explains how contracts in the entertainment industry are created. She states that it is not uncommon for megadeals to begin and end over croissants, cappuccinos and a handshake, leaving it up to the attorneys to hammer out the details. She notes that while attorneys are still "hammering" out the details the parties are already well into the project. In many instances, the project is finished before the contract is ever signed. Sandra Bodovitz, *Unsigned Contracts the Norm for Big Film Deals*, L.A. DAILY J., Sept. 16, 1991, California Law Business, at 5.

artist or performer may wish to litigate. As was suggested earlier, however, the cost of hiring a lawyer and litigating, as well as the interminable waiting period before a party can obtain a court date, make this a nonviable solution for most artists.⁴⁵ Alternatively, the artists may opt for arbitration, particularly if the contract is a union contract. But this approach, which is time consuming and frustrating, is often no better. More commonly, the artist either resigns himself to accept the other parties' interpretation of the contract, or walks away from the whole thing in search of a bigger, better deal.

The solution to this problem is relatively simple. Artists, whether or not they are members of a union, should request the inclusion of a mediation clause in every deal or contract. Such a clause will insure that the parties will come before a mediator any time they disagree over a term of the deal or contract. In addition, a mediation clause will thwart a party's reflexive desire to immediately threaten arbitration or litigation.

A. Mediation and How it Works

The mediation process is relatively uncomplicated, especially for those familiar with it. The parties usually meet at the mediator's office. Since it is an informal setting, parties will sit around a table or desk, with the mediator either in between or across from them. The session begins with the mediator briefly describing the process and what the parties can expect during the session.⁴⁶ Then, the caucus is described to the parties. The caucus, a meeting between the mediator and one of the parties, is one of the most important tools of the mediator. The mediator uses it to gather information which may be critical to resolving the dispute, but which the party may not feel comfortable divulging in front of the other party.

Once the introductions have been made, the mediator will ask each party (the complainant first) to describe the dispute, the facts surrounding the dispute, and that party's terms for settlement. Once this is done, the mediator may continue the joint session and allow discussions to proceed

45. Alma Robinson, *Dispute Resolution for the Arts Community*, 11 COLUM.-VLA J.L. & ARTS 333, 333 (1987). The author notes that a majority of artists cannot afford to pursue their claims in litigation even though their income is larger than the Bay Area Lawyers for the Arts' pro bono standard. *Id.*

46. Included in the mediator's opening statement is important information regarding the confidentiality of what is said during the session and the fact that nothing is recorded except the final agreement. See LINDA R. SINGER & MICHAEL K. LEWIS, *MEDIATION TRAINING MANUAL CENTER FOR DISPUTE SETTLEMENT* (1987).

in a controlled yet unrestricted manner or she may immediately break for a caucus. During these preceding discussions, the mediator will attempt to (1) build trust, (2) open the communication channels, (3) translate information, (4) note considerations, (5) address realities, and (7) suggest options.⁴⁷ This process may take a couple of hours or a couple of sessions spread out over weeks before the parties reach an agreement. During these sessions, a mediator must remain neutral and attentive to the requests and concerns of each party no matter how small or immaterial, while allowing the parties to vent their frustrations.

If the parties agree, the mediator must ensure that the agreement solves all the issues involved in the dispute and prevents similar disputes in the future.⁴⁸ The agreement should be in writing and each party should approve the language during the individual caucus. Once the language is agreed upon, the parties should come together in a joint meeting where the mediator reads the agreement and it is signed by each side.⁴⁹

The process described above can change significantly depending upon the nature of the dispute, the mediator's predispositions and the wishes of the parties. Generally, however, this is an accurate description of the process as it is observed in most mediations.

B. The Mediation Clause

Under the proposed method, parties to an entertainment contract, whether artist, performer, manager, agent or other, would request that a contract include a mediation clause. The following is a sample mediation clause:

All disputes arising out of this agreement shall be submitted to mediation in accordance with the requests of the parties as set out in this mediation clause and/or the rules of [a mediation organization] [a government agency] [a union] [lawyer/neutral third party]. If mediation is not successful in resolving the entire dispute, any outstanding issues shall be submitted to [arbitration][litigation][an agreed to third party who will make a final and binding decision] [other].

Parties must begin the mediation process as soon as negotiations appear futile and in no event later than two weeks

47. *Id.* at 5-6.

48. *Id.* at 23.

49. *Id.* at 24.

from the inception of the dispute. If one party obstructs the mediation process, the other party may (1) choose an alternative means of dispute resolution including litigation or (2) void the contract and all its terms.

The parties agree to adhere to all the mediation rules established by the organization unless they mutually agree to change one or more rule(s).

The location for the mediation proceeding will be [Los Angeles][San Francisco].⁵⁰

Unlike most mediation clauses, this one gives the parties a broad range of choices. Parties may choose to establish their own mediation service by selecting a lawyer or professional mediator they are both comfortable with and a set of basic rules to guide the mediation. Alternatively, they may use the services of organizations such as California Lawyers for the Arts, Arts Arbitration and Mediation Services or the Center for Dispute Resolution.⁵¹ Another possibility is for the parties to engage a government agency to mediate their disputes such as Federal Mediation and Conciliation Services.⁵² While unions are not presently equipped to provide mediation services, some grievance mechanism and applicable rules could be adopted. The exemplary clause above also allows parties to consider and choose the form of dispute resolution they will use to address any issues not resolved through mediation.

There are a number of benefits that result from the inclusion of such a clause at the time the parties agree on the contract instead of waiting until a dispute arises to suggest mediation. First, it avoids having the party that suggests mediation at the time the dispute arises from appearing weak to the other side. Although mediation has many advantages, there is a popular perception that suggesting an alternative means of dispute resolution implies fear of the potential outcome of litigation. Having the clause in place

50. An adaptation from sample clauses included in ARTS ARBITRATION AND MEDIATION SERVICES, A PROGRAM OF CALIFORNIA LAWYERS FOR THE ARTS, INFORMATION PAMPHLET (1993) (available from California Lawyers for the Arts, 1549 11th Street, Suite 200, Santa Monica, California 90401).

51. Other services available in California include: The Los Angeles County Bar Association Dispute Resolution Services, Inc.; Judicial Arbitration & Mediation Services, Inc.; Kenneth A. Ehrman Dispute Resolution Services in Monterey, California; Alternative Dispute Resolution Associates in Palo Alto, California. See generally FAULKNER & GRAY'S ARBITRATION AND MEDIATION DIRECTORY (1992) (for services in other states).

52. Allen D. Schwartz, *A Primer on Alternative Dispute Resolution*, CBA RECORD (Chicago Bar Association), Nov. 1988, at 19. See also William A. Newman, *Use of Non-Adjudicative Third Party Dispute Resolution Methods by Dispute Resolution Agencies of the United States Government*, 17 OHIO N.U. L. REV. 121, 121 n.3 (1990).

before the dispute arises can avoid this problem. Second, including the clause at the time the contract is being negotiated may deter a party from thinking he can bully the other (who may not be able to afford litigation or arbitration costs) into accepting different terms than those originally agreed upon. Third, having the clause in place will ensure parties a quick resolution to their dispute. Time will not be wasted selecting a mediation service with which both parties feel comfortable. Fourth, when a dispute arises, the presence of a mediation clause forces parties to enter into a positive sequence of events such as telephone contact, settlement conference and mediation. This focuses attention on resolving the grievance rather than on taking adversarial positions. Finally, for those artists who persist in entering into undocumented deals, the inclusion of a requirement that any future disputes be referred to mediation can serve to give unwritten agreements a semblance of structure and legitimacy.

C. History of Mediation

Mediation evolved over many centuries, finding its origins in religious institutions.⁵³ In Western Europe, for example, the Catholic Church served as mediator between family members and landowners.⁵⁴ Rabbis and Jewish rabbinical courts have always played a vital role in mediating disputes among members of the Jewish faith.⁵⁵ In fact, orthodox Jews may be barred from using other means of dispute resolution by the religious mediating "court." Mediation has also played an important role in Asian cultures. In China, for example, mediation has long been the standard method of resolving disputes between members of a community. Today, in the People's Republic of China, People's Conciliation Committees work as mediators to resolve disputes.⁵⁶

In the United States, mediation was first used in the labor management disputes of the 1920's.⁵⁷ Today, mediation is used to resolve family,⁵⁸

53. AM. JUR. 2D, *New Topics Service, Alternative Dispute Resolution*, § 1 (1985). See also CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 19 (4th ed. 1989).

54. MOORE, *supra* note 53, at 19.

55. *Id.*

56. Ruth B. Ginsberg, *American Bar Association Visits the People's Republic of China*, 64 A.B.A. J. 1516, 1521 (1978). See generally MOORE, *supra* note 53, at 19-20 (discussing the historical development of mediation).

57. MOORE, *supra* note 53, at 21.

58. See Robert E. Emery & Melissa M. Wyer, *Divorce Mediation*, 42 AM. PSYCHOLOGIST 472 (1987). See also Lincoln Clark & Jane Orbeton, *Mandatory Mediation of Divorce: Maine's Experience*, 69 JUDICATURE 310 (1986).

community,⁵⁹ environmental,⁶⁰ contract and commercial,⁶¹ and employer-employee disputes,⁶² as well as some criminal matters.⁶³ The applications are endless since currently there are no laws limiting its use.⁶⁴

D. Advantages and Disadvantages to Mediation

The widespread appeal of mediation leads one to question why it has not gained much support within the entertainment industry. There are three explanations for this phenomenon. First, alternative forms of dispute resolution ("ADR") have generally received little, if any, attention in the arts industry. It is only recently that members of the entertainment industry, affected by budgetary and time constraints, have begun to consider other avenues of dispute settlement aside from arbitration and litigation. Second, most attorneys know very little about mediation because only a handful of law schools offer mediation courses. Moreover, as one commentator explained, mediation is counter-intuitive to attorneys who have been trained in the adversarial process.⁶⁵ Finally, mediation has not generated much support within the art world because of the legitimate concerns and criticisms leveled by attorneys who have participated in mediation.

Mediation can provide a medium within which an artist can actively participate to protect his rights without having to go bankrupt in the process. Mediation is inexpensive, quick and flexible enough to adapt to the eccentricities of the entertainment world. Therefore, it is the perfect vehicle for dealing with contract disputes.

Mediation has been termed a "cooperative process" through which two parties or a group of parties design an acceptable resolution to their dispute

59. See DANIEL MCGILLIS, *COMMUNITY DISPUTE RESOLUTION PROGRAMS AND PUBLIC POLICY* 32 (1986).

60. See David Schoenbrod, *Limits and Dangers of Environmental Mediation: A Review Essay*, 58 N.Y.U. L. REV. 1453 (1983).

61. See JAMES F. HENRY & JETHRO K. LEIBERMAN, *THE MANAGER'S GUIDE TO RESOLVING LEGAL DISPUTES* 59-60 (1985).

62. See Mary P. Rowe & Michael Baker, *Are You Hearing Enough Employee Concerns?*, HARV. BUS. REV., May-June 1984, at 127.

63. See Richard Danzig, *Toward the Creation of a Complementary Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973).

64. See Feinberg, *supra* note 6, at S9.

65. Glen Sato, *The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance—A Proposal for Some Ethical Considerations*, 34 UCLA L. REV. 507, 507 (1986).

with the assistance of a neutral third party, called a mediator.⁶⁶ The mediator is critical to an effective mediation. By developing a relationship of trust with the parties, the mediator is able to create a format which allows for the free exchange of information. Through the flow of information, the parties and/or mediator can find a solution to the dispute which benefits both sides.⁶⁷ Since mediation is not limited by preexisting legal theories or remedies, any resolution to the dispute is acceptable so long as the parties agree to it.

Mediation proceedings are informal. Rules of evidence do not apply, so the parties do not submit evidence or call upon witnesses to testify. However, parties may exchange information if they feel it helps clarify their case. The mediator does not make findings of fact nor does she have any power to make agreements or rulings. There are no binding rules or procedures except for a form the mediator has the parties sign stating that all disclosures shall remain confidential.⁶⁸ The process is entirely voluntary, the theory being that an agreement voluntarily approved by both parties has a better chance of lasting.⁶⁹

However, some attorneys feel that while mediation is appropriate in some cases, it is wholly inappropriate in others. For example, in cases which may have complicated facts or a gross imbalance between the two parties, mediation may not be a suitable option. There is no doubt that a party to such a case may be better served using a system with rules and procedures to safeguard her interests. Thus, some parties may want to reconsider including a mediation clause in their contracts. However, it should be noted that any party is free to walk away from the proceedings any time she feels it is no longer in her interest to continue the session.⁷⁰

Another criticism is that, in some instances, the client is incompetent or too hostile for the process to function. However, in those cases, a party may always hire someone else to mediate for her. A final concern is that since a party is not under oath, she may disclose too little in the mediation or misrepresent the facts. The best solution for this problem would be to insure that the mediation agreement (provided by the mediator before the

66. Feinberg, *supra* note 6, at S7.

67. SINGER, *supra* note 16, at 20-21.

68. Barbara A. Phillips & Anthony C. Piazza, *Using Mediation to Resolve Disputes*, CAL. LAW., Oct. 1983, at 11.

69. Although the decision to enter into an agreement is voluntary, once the agreement is signed it is as binding as any other contract.

70. This is assuming that the parties have at least attempted mediation. It would be a violation of the terms of the contract for a party to refuse to mediate if the parties agreed that mediation would be the first and/or only means of dispute resolution.

session begins) or rules provide for full disclosure. An agreement of this nature could include the following clause: "Each party will fully and honestly disclose all relevant information, documentation and other information as requested by the mediator and all information requested by the other party, if the mediator determines that the disclosure is relevant to the mediation."⁷¹ Similarly, if the parties come to an agreement at the conclusion of the session, a clause stating that the agreement is based upon the premise that both parties made full and accurate disclosure of all pertinent information should be included.⁷²

Despite these criticisms of mediation, the arts industry's lack of interest in it is lamentable because mediation is particularly suited for the entertainment industry. The sooner attorneys and artists begin to incorporate mediation clauses in their contracts, the sooner they will reap the benefits.

E. Why Mediation is Particularly Applicable to the Entertainment Industry

The unique characteristics of the entertainment industry and its members are a reason why mediation may be a better means of dispute resolution than either litigation or arbitration. First, few parties enter into traditional contracts and therefore, it is difficult to apply traditional rules of contract law to resolve such disputes.⁷³ Second, artists have eccentric personalities, unusual designs and unheard of requests. Thus, a rigid body of law, as we have in place today in the United States, is not necessarily equipped to deal with artists' concerns. Third, over the years the industry has developed its own set of rules or customs which serve to guide parties

71. James Melamed, *Attorneys and Mediation: From Threat to Opportunity*, MEDIATION Q., Spring 1989, at 13, 19.

72. *Id.* at 19-20.

73. The case between actress Valerie Harper and Lorimar Telepictures Corporation represents a good example of the clash between customary practices in the entertainment industry and contract law. Langberg, *supra* note 13, at 19. Barry Langberg explains:

The entertainment industry is a business of tradition, custom and handshake deals involving millions of dollars. Legal "technicalities" are often disregarded, based on the need to "get the project going." . . . However, to everyone's surprise, when entertainment industry disputes reach the courtroom, the parties learn that the laws that apply to the rest of the population apply equally to the entertainment industry. Custom and usage is not always admissible and judges instruct juries based on well-established case law.

Id. (citations omitted).

within the industry. Unfortunately for the industry, such customary practices have not been incorporated into the law of the United States and are therefore not considered by courts faced with an entertainment contract case. One issue which continues to arise in entertainment industry litigation is whether or not a deal memo or short form agreement, which carries the weight of a full-fledged contract for industry purposes, meets the requisite elements to be considered a binding contract between the parties by a court of law.⁷⁴ Another issue is oral contracts, which in the industry are considered valid, but which may be invalid under contract law because they violate the statute of frauds (which requires contracts to be in writing).⁷⁵

Mediation, on the other hand, is flexible enough to adapt to both the eccentricities of the parties and any customary industry practices that are mutually relied upon. As one commentator explains, "mediation can proceed along any path and according to any format depending upon the circumstances of the case and the predilections of the mediator."⁷⁶ Not only are the parties free to adopt any procedures and change them at any time during the proceedings so long as they mutually agree, but in contrast to arbitration, they are not bound by any rules of evidence, rules governing formation of a record, or rules limiting or regulating communications between parties. Moreover, since the parties are free to choose whomever they wish as mediator, they may control the extent of that person's knowledge of industry practices, and her predispositions and operating procedure.

A second advantage to the use of mediation in the entertainment industry is its cost-effectiveness. Most artists find their legal rights severely compromised by the cost of legal assistance. Therefore, mediation may be the only viable option, short of doing nothing, for a struggling artist or performer. Although the cost of mediation varies depending upon where the parties elect to go, a mediator usually costs \$100 an hour.⁷⁷ Most cases are settled in a series of three to five-hour sessions, bringing the total

74. *See id.* at 22-23. Another common issue deals with conflicts of interests. In the entertainment world, an agency can represent more than one actor, producer or director without questioning whether there might be a conflict of interest. In a court of law, however, an agency will have to explain how it is that it can represent an artist and his producer and not have any conflict of interest. *Id.*

75. *Id.* at 22.

76. B.C. Hart, *Alternative Dispute Resolution: Negotiation, Mediation and Mini-trial*, 37 FED'N INS. & CORP. COUNS. Q. 113, 119 (1987).

77. Kenneth Cloke, *Attorneys Should Use Mediation More for Resolving Legal Disputes*, L.A. DAILY J., May 17, 1988, at 4.

cost to \$1,000 dollars, or \$500 per party.⁷⁸ A promising program established by California Lawyers for the Arts, called "Arts Arbitration and Mediation Services," charges a sliding scale fee of up to \$45 per party for a mediation session.⁷⁹ In addition, since most parties may prefer to represent themselves in the mediation, attorneys' fees may be avoided altogether.

Another advantage of mediation is that it may be initiated almost immediately upon the discovery of a conflict,⁸⁰ and certainly before the dispute gets out of control.⁸¹ In addition, the entire process is relatively short. Most disputes average three four-hour sessions, over a two-week period. One commentator stated that it took him only three months to settle a ten-year-old antitrust dispute between competitors in the telephone paging business and only ten days to resolve a dispute between a shipper and supplier.⁸² Mary Brake, Program Coordinator of Arts Arbitration and Mediation Services in San Francisco, California, estimated that the average duration of a mediation proceeding was three to four weeks, during which time parties met three times for approximately three hours each time.⁸³

In addition, mediation is especially suited to the settlement of entertainment industry disputes because often these disputes occur while the parties are working on a project, well before the expiration date of the contract. Thus, the parties anticipate working together after the dispute is resolved. Such a working relationship may be thwarted, or at the very least severely damaged, as a result of either arbitration or litigation, since both are inherently adversarial processes. Mediation, on the other hand, allows parties to come to their own resolution, thus ensuring that each party is

78. *Id.*

79. ARTS ARBITRATION AND MEDIATION SERVICES, A PROGRAM OF CALIFORNIA LAWYERS FOR THE ARTS, FEE SCHEDULE (1992) (available from California Lawyers for the Arts, 1549 11th Street, Suite 200, Santa Monica, California 90401).

80. However, the time that may lapse between the initial disagreement and the inception of a mediation proceeding will depend upon how detailed a mediation clause the parties include in their contract.

81. One commentator explained that "[o]ften a case will take on a life of its own, and considerable expense will be incurred before the parties engage in serious settlement negotiations. . . . Mediation imposes a deadline early in the case. It requires the parties to sit down at an established time and focus on settlement." Michael S. Gillie, *Voluntary Mediation: Tool to Assess Risk and Speed Settlements*, 4 CORP. COUNS. Q. 148, 153 (1991).

82. Feinberg, *supra* note 6, at S10. In the same article the author cites a report by *American Jurisprudence* which estimates that the average arbitration takes four to five months, while litigation may take several years. *Id.* at n.10.

83. Interview with Mary Brake, Program Coordinator of Arts Arbitration and Mediation Services in San Francisco, California (a branch of California Lawyers for the Arts) (Mar. 4, 1992).

satisfied with the outcome and does not feel they were taken advantage of. This should help preserve business relations between the parties. In addition, since both parties enter into the agreement voluntarily, it is less likely that a party will have future costs associated with noncompliance. Furthermore, the nonadversarial and cooperative nature of mediation can help parties build trust, thus lessening the chance of future disputes.⁸⁴

A further advantage of mediation which is not available in other forms of dispute resolution is that it allows both parties the opportunity to vent their frustrations during the proceedings. Unlike arbitration and litigation, which are adversarial, mediation is a cooperative process. Thus, mediators ensure that each party is given ample opportunity to discuss their concerns and voice their frustrations, enabling parties to move on to the substantive issues.⁸⁵

Another less obvious advantage to mediation in the entertainment industry is that it provides a private and confidential environment in which to resolve disputes. Many actors and other artists may choose not to litigate because they do not want to subject their public persona and private life to widespread scrutiny. Mediation proceedings are conducted behind closed doors where anything said to the mediator is held in strict confidence. Moreover, unless the parties request otherwise, no records of the mediation proceedings are kept and only the final agreement is recorded. In addition, at the inception of the mediation, parties are asked to sign a form stating that anything said during the mediation will remain confidential. Courts have generally concluded that mediators do not have to testify in subsequent litigation, although much rests upon the importance of the evidence and the court's ability to procure the evidence by other means.⁸⁶

By allowing parties to discuss their concerns in an informal setting, the mediation process enables disputants to evaluate, perhaps for the first time, the legitimacy of their position. As one commentator explained, "mediation

84. One commentator described the mediation process in the following manner:

[T]he mediator [is] a catalyst, one who prompts action by others through identification of issues, clarification of facts, reason, and persuasion. In doing so, mediators will help educate each party . . . not merely for the resolution of the present dispute, but for the resolution and even prevention of future disputes.

HENRY & LEIBERMAN, *supra* note 61, at 60.

85. Robinson, *supra* note 45, at 334. Robinson, Executive Director of California Lawyers for the Arts, noted two primary reasons why her organization felt mediation was a better form of alternative dispute resolution for the arts than arbitration. One, it gives the parties the responsibility of solving their own disputes and two, it enables parties to establish new forms of communication which can help avoid disputes in the future. *Id.*

86. SINGER, *supra* note 16, at 172.

enables the disputants to test the reasonableness of their respective positions and perceptions."⁸⁷ This is particularly important since litigation and arbitration proceedings tend to distort perceptions and impair objectivity by both counsel and parties because of their adversarial nature. A party who may have been certain that he would win in court may be forced to reconsider the strength of his case under mediation.⁸⁸

Finally, mediation has had a very high success rate. It has been reported that 90% of clients who contact the Arts Arbitration and Media Service of California Lawyers for the Arts in San Francisco actually enter into mediation proceedings, with 78% of these arriving at an agreement.⁸⁹ The Los Angeles branch of the Arts Arbitration and Mediation Service reported that 75% of its mediation proceedings ended with an agreement.⁹⁰ Although these are the only statistics available in the arts industry since California Lawyers for the Arts is presently the only group in the United States that has a mediation service exclusively for the arts industry, studies have reported that mediation in other fields has resulted in settlements about 90% of the time.⁹¹ For example, California State Mediation and Conciliation Service settled 88% of all grievances under collective bargaining contracts submitted to it for mediation.⁹²

IV. HURDLES TO THE IMPLEMENTATION OF THE PROPOSAL

There are several hurdles that have to be overcome before mediation is considered by the entertainment world as a viable alternative to litigation or arbitration. The first hurdle to conquer is the lack of education in the field of ADR in general, and mediation in particular. Interestingly, lawyers

87. Phillips & Piazza, *supra* note 68, at 11.

88. One article states that attorneys participating in the mediation process felt that many of their clients would not have accepted a reasonable settlement if they had not attended mediation sessions and had their "day in court" so to speak. Mediation enabled their clients to evaluate for themselves the true value of their claim. Gillie, *supra* note 81, at 153.

89. Interview with Mary Brake, *supra* note 83.

90. Interview with Nancy Locke, Program Coordinator of Arts Arbitration and Mediation Services in Los Angeles, California (a branch of California Lawyers for the Arts) (Mar. 23 & Apr. 16, 1992). Locke indicated that many of the statistics quoted regarding the success rate of mediation are misleading because so much depends upon at what point you decide the process has started. Further, she explained that in her case, if she were to include those parties who had to be convinced that mediation was an appropriate means of settling their dispute rather than starting with those parties who were already committed to mediation, the rate of success would go down to 63%. *Id.*

91. Phillips & Piazza, *supra* note 68, at 11.

92. Goldberg, *supra* note 17, at 290.

are the biggest offenders, since few law schools provide classes in ADR. Furthermore, the bulk of law school training is in the adversarial system. Thus, as one commentator explained, "lawyers . . . tend not to recognize mediation as a viable means of reaching a solution; and worse, they see the kinds of unique solutions that mediation can produce as threatening to the best interests of their clients."⁹³ The solution to this problem is two-fold. First, law schools must be encouraged to offer courses in ADR, as well as promote nonadversarial skills such as negotiation. Second, judges, bar associations and other organizations should be encouraged to promote ADR as an option to more formal procedures, and to offer training sessions or lectures on the subject.

A second hurdle is the general preference by unions to continue using arbitration as *the* alternative form of dispute resolution. Unions tend to want to preserve the status quo. However, union members who would benefit from the adoption of mediation procedures need to convince union leaders to study the advantages of mediation. Not only should unions consider changing the present system because of all the criticism associated with arbitration, but also because of the system's inability to adapt to the ever increasing number of requests being filed. Professor Stephen Goldberg has stated that there is a general trend among unions to accede to employee wishes so that even grievances of doubtful or no merit are allowed to go to arbitration.⁹⁴ The result is an overloaded system with scheduling problems and long waiting lists for arbitrators who are in demand. In addition, every hearing that needs to be continued requires the calendar concurrence of two lawyers and the arbitrators, as well as the parties.⁹⁵ Assuming Professor Goldberg's portrayal accurately describes the present state of affairs, then it is certainly in the unions' best interest to implement mediation proceedings. Furthermore, for some guilds, the development of a mediation mechanism would only require a restructuring of what they presently call pre-arbitration grievance procedures. With the support and backing of the guilds in the entertainment world, it is only a question of time before the rest of the industry follows. In addition, the unions will

93. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 45 (1982).

94. Goldberg, *supra* note 17, at 278.

95. Another disconcerting trend in guild arbitration proceedings is that as union contracts become longer and more complicated (WGA boasted of having 368 pages of fine print in its basic agreement in 1985), the arbitrator must spend a greater portion of the parties' time reviewing the contract than he did just one year ago. Since more time is spent arguing over the language and clauses of the contract, less time is available during the arbitration hearing to focus on substantive issues. Edgar A. Jones, Jr., *The Interplay of Collective Bargaining Agreements and Personal Service Contracts*, 11 LOY. L.A. ENT. L.J. 11, 21 (1991).

lend legitimacy to the proposal as well as a proven set of workable rules and procedures.

The final hurdle is the uncertainty many lawyers and other professionals have regarding the confidentiality of communications made during mediation proceedings. The protection of such communications from disclosure, especially in subsequent litigation, is of particular concern. Although both the federal government and state legislatures have recently passed statutes recognizing the need to assure confidentiality, mediators still do not enjoy the same protection afforded attorneys through the attorney-client privilege, which protects all communications between an attorney and her client.

Nevertheless, there are procedures that may be undertaken to ensure that the parties to a mediation proceeding get the best possible protection. First, the mediator should have the parties sign an agreement stating that no party will divulge information from the mediation session, nor will they attempt to subpoena the mediator.⁹⁶ Second, Federal Rule of Evidence 408 may provide additional protection. Under this rule, statements made during settlement negotiations are not admissible in subsequent litigation.⁹⁷ However, it is important to note that there are serious limitations to the breadth of this rule.⁹⁸ Finally, Federal Rule of Evidence 403, which states that courts must balance the probative value of the evidence sought to be admitted against the harm likely to result from its admission, may also be used to protect communications made during a mediation session.⁹⁹ Advocates of the confidentiality of mediation proceedings would argue that the probative value of the evidence sought to be introduced, when balanced, is less than the harm likely to result to the public policy concern of promoting the nonjudicial resolution of disputes by safeguarding the confidentiality of settlement negotiations.¹⁰⁰

V. CONCLUSION

Although the hurdles discussed above may seem imposing, they are not insurmountable. Furthermore, the rewards to the lawyer who recommends mediation to her client may be greater than she could ever

96. SINGER, *supra* note 16, at 172-73.

97. Feinberg, *supra* note 6, at S35 (citing FED. R. EVID. 408).

98. For example, the rule "bars the admission of evidence only when it is offered to prove the validity or amount of the disputed claim." *Id.* at S34.

99. *Id.* at S35.

100. *Id.* at S35-S36.

anticipate. Paul Sugarman, an attorney in San Francisco, put it this way: "It doesn't cost that much to explore ADR possibilities If it works, you're a hero."¹⁰¹ On the other hand, the cost of not exploring the possibilities may be great. A client, resentful towards his attorney for suggesting that the dispute go to litigation without discussing alternative forms of dispute resolution, may be angry enough to sue his lawyer.¹⁰² It has been suggested that during these difficult economic times a lawyer who fails to offer an alternative to litigation to his client, such as mediation, may be exposing himself to a lawsuit by the client for the client's financial losses.¹⁰³

Therefore, in order to ensure that artists' and performers' rights are adequately protected, parties to union and non-union contracts should include a mediation clause in all their agreements. Mediation will provide a fast, inexpensive and informal procedure by which artists or performers can resolve their contract disputes. It will also provide a venue where parties can vent their frustrations and thus mend damaged relationships that would otherwise contribute to future disputes. Finally, even if mediation fails to produce an agreement, the process enables parties to rehearse their arguments, ultimately making them better prepared for more formal proceedings.

101. Sandra Bodovitz, *Clients Push Use of ADR To Cut Costs*, L.A. DAILY J., Jan. 28, 1991, California Law Business, at 16, 17.

102. Robert F. Cochran, Jr., *Suing Lawyers Who Sue*, CAL. LAW., Apr. 1991, at 120. The California State Bar Association has considered a proposal to include a rule in the California Rules of Professional Conduct which would read as follows: "A member shall advise a client, where appropriate, of the availability of alternatives to litigation in resolving disputes, taking into consideration expenses of litigation, time delays in proceeding to trial, the client's time in pursuing litigation, and the advantages and disadvantages of such alternatives." Lee R. Petillon, *Must Clients Be Informed About ADR?*, L.A. DAILY J., Oct. 17, 1991, State Bar Bulletin, at 1. The issue is not whether the Bar Association will adopt such a rule, but when will it adopt such a rule.

103. Cochran, *supra* note 102, at 120.

