confrontation and has raised expectations to the point of hampering its performance.

Grievance mediation will never *replace* grievance arbitration as a dispute-resolution procedure. No matter how positive the relationship between the parties and no matter how sophisticated their problem solving, there will always be issues to which an arbitrator's skill and thoughtful decision-making must be brought. However, to the extent that the parties to a labor-management relationship have a genuine interest in minimizing the number of "unresolvable" issues between them and in seeking to solve their problems on a daily basis at all levels of the company, then grievance mediation can be a useful approach. And to the extent the parties are successful, with the help of a mediator, at resolving their differences during the life of their agreement, these successes should carry over into the negotiation process and perhaps reduce the potential for conflict in the form of a strike.

Grievance mediation is a direct challenge to a traditional labor relations environment which has come to consider strikes and lockouts as normal tools of the trade—an environment, in short, that has not renewed itself since the fifties. I'm willing to give it a try, and I'm sure I'll like it.

IV. A UNION ADVOCATE'S VIEW

GORDON A. GREGORY*

Grievance or rights mediation as an alternative method of labor-management dispute resolution is not a new or unique technique. It has been available since the inception of collective bargaining and, indeed, has been used variously by action of the parties or the initiative of various prominent arbitrators.

In his address to the 30th Annual Meeting of the Academy, held in Toronto, Arbitrator Arnold M. Zack, in discussing "Some New Alternatives to the Conventional Grievance Procedure," suggested both a form of "med-arb" and the "controversial device" of grievance mediation. Why grievance mediation is or should be "controversial" will be considered in a moment.[1]

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*Gregory, Van Lopik, Moore & Jeakle, Detroit, Mich.

[1]Zack, *Suggested New Approaches to Grievance Arbitration,* Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1978), 112.

Arbitrator Zack noted a technique utilized by his mentor in the 1960s as follows:

> "The late Saul Wallen, who taught me all I ever learned in this field, utilized this device in a number of situations. With one set of clients in Bristol, Rhode Island, he designated a young Harvard Law School graduate student, Joel Bell (now, less than 10 years later, vice president of Petro-Canada), to serve as a mediator, receiving brief, informal presentations of the parties' facts and arguments and providing oral 'nonbinding recommendations' for the resolution of those disputes. Although the arrangement permitted either party to appeal a case to Saul as arbitrator de novo and without precedent or prejudice, *not one of the more than 100 cases so handled was ever appealed.*"[2] (Emphasis added.)

Similarly, Arbitrator David L. Cole pioneered in grievance mediation at Inland Steel and elsewhere.[3]

Given the early success rates of mediation prior to arbitration and the contemporary outstanding results of Professor Goldberg's experiments in the bituminous coal mining industry (a final resolution rate of 89 percent), it is difficult to understand why the technique has fallen into disuse or disfavor. In short, why is grievance mediation as an aid to rather than in lieu of arbitration a "controversial device"?[4]

I must admit early skepticism of the notion that grievance mediation can perform a viable role in the traditional grievance arbitration process. Albeit it has been my privilege to represent unions exclusively since 1955, and both private- and public-sector unions since 1965, I confess to an initial lack of understanding and/or experience with grievance mediation in lieu of arbitration or prior to arbitration. This is not altogether surprising in that my clients do not usually involve advocates in the lower steps of the grievance procedure. While this may not be a blessing for my honorable profession, it comports with my personal philosophy as a union lawyer and unionist that the parties themselves should resolve all disputes. In concept, grievance mediation is consonant with that goal.

I am reminded of the Michigan state legislator who rose to

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[2] *Ibid.*

[3] Simkin, Mediation and the Dynamics of Collective Bargaining (Washington: BNA Books, 1971), 294.

[4] Goldberg and Brett, *Grievance Mediation: An Alternative to Arbitration,* Proceedings of the 35th Annual Meeting, Industrial Relations Research Association (Madison, Wis.: IRRA, 1983), 256.

address his colleagues and said, "Before I give you the benefit of my remarks, I'd like to know what we're talking about."

Mediation Experience

My personal interest in grievance mediation stems from the common complaints of heavy users of arbitration that the system has become too slow, too expensive, too formal, and there is often a dearth of readily available arbitrators who are qualified and acceptable. That interest has been sustained and heightened by external factors beyond the control of the parties in the collective bargaining relationship. Foreign competition and a receding economy have introduced an era of concession bargaining and union-management willingness to explore partnership rather than adversarial roles. Edward L. Cushman, a friend, a distinguished professor, and a member of this Academy, noted recently that "Union-management relations can be classified in three states: (1) Conflict, (2) Mutual Accommodations and (3) Cooperation."[5] He observed that the cooperation stage is the exception, albeit, by necessity arising from external forces, the parties must reach that goal for the common good. Professor Cushman concludes his point with the noteworthy comment, "Like marital relations, success in labor relations is not found in seeking victory over the other party."[6] While we may disagree with the analogy for marital reasons, I submit that grievance mediation holds the promise of fulfilling Ed's profundity.

For better or worse, as time and my peers will determine, my interest in mediation prior to arbitration began in the fall of 1978 when Dr. Mollie H. Bowers, a current and effective advocate of the technique, invited me to serve on a panel entitled "Grievance Mediation in the Private and Public Sectors" at the 6th annual meeting of the Society for Professionals in Dispute Resolution (SPIDR) in Detroit.[7] This invitation sparked a review of the literature and a survey of federal and state mediators in Michigan. To my surprise, I learned that grievance mediation, as both a terminal and intermediate step in the grievance proce-

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[5]Cushman, *Cooperation or Catastrophe: The Challenge to Management and Labor,* Wayne State University (1981), 9.

[6]*Ibid.*

[7]Gregory and Rooney, *Grievance Mediation: Observations on the Michigan Situation,* Proceedings of the 6th Annual Meeting, Society of Professionals in Dispute Resolution (1978).

dure, enjoyed limited but successful use in both the private and public sectors in Michigan.

In 1980 I was privileged to deliver a paper to the spring meeting of the Industrial Relations Research Association (IRRA), entitled "Grievance Mediation: A Trend in the Cost-Conscious Eighties."[8] Thus the dilettante's emergence from believer to convert regarding rights mediation as an aid or alternative to traditional arbitration.

My subsequent evolution from convert to disciple was the result of fortuitous circumstances. First came the kind invitation to participate on this panel. This caused me to review the recent works of Professor Goldberg and Dr. Bowers and conclude that there was sufficient evidence to support the view that advisory grievance mediation prior to arbitration is a viable solution to current problems with traditional rights arbitration.[9]

Second, an actual field experience demonstrated to me the efficacy of grievance mediation in one of the areas described by William E. Simkin as "when a backlog of accumulated unresolved grievances is added to other issues at the time of negotiation or renegotiation of the labor agreement."[10] The cases, which actually arose during the term of the agreement, involved a small international union in the service industry with bargaining units, limited in size, throughout the United States. The employer was a large international corporation engaged in providing security service on a contract basis for multiplant and multiemployer facilities engaged in nuclear activity.

The union had filed some 95 requests for arbitration panels with the Federal Mediation and Conciliation Service (FMCS); the employer refused to arbitrate multiple grievances. The Office of Arbitration Services *sua sponte* requested the parties to meet with FMCS mediators in Pittsburgh and Detroit. The aegis of the FMCS effectively provoked the "mutual consent" of the parties—a "trigger mechanism" that Professor Goldberg's research identified as one means to invoke the mediation process.[11] I presented the union's position as a partici-

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[8]Gregory and Rooney, *Grievance Mediation: A Trend in the Cost-Conscious Eighties,* 31 Lab. L. J. 502 (1980).

[9]Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration,* 77 Nw. U. L. Rev. 270 (1982), and Bowers, *Grievance Mediation: Settle Now, Don't Pay Later,* 3 Fed. Ser. L. Rel. Rev. No. 2, 25 (1981).

[10]Simkin, *supra* note 3, at 289.

[11]Goldberg and Brett, *supra* note 4, at 258.

pant/observer in two full-day sessions conducted in Detroit. The mediator assigned conducted the sessions according to the traditional techniques of contract mediation, including joint and separate meetings with the parties and the encouragement of "off-the-record" conferences between counsel for the parties.

The grievances presented were a mixed bag of discipline and contract interpretation cases, some with related contract/law questions; many were simply "complaints" *dehors* the contract. Initial sessions were marked by the employer's insistence upon an "all-or-nothing" or "package deal." Union representatives were equally adamant that mediation take place case-by-case on the merits of each case. It was made clear that the union would not engage in tradeoffs with respect to discharge and discipline cases. The individual grievants were not present, albeit their subsequent approval was solicited and obtained with respect to their case settlements. Since some cases arguably constituted Section 8(a)(3) violations, the union was understandably concerned with the National Labor Relations Board's (NLRB) deferral policy and/or breach of the duty of fair representation suits.[12] While I did not tabulate precise data on the experience, my impression is that the union withdrew as many cases as the employer granted on the union's terms. Approximately half of the Detroit cases were compromise settlements, and only six cases were advanced to arbitration. All of the cases in the Pittsburgh office were settled. The experience I have described was unique and significant to me for several reasons. Site management and local union representatives were inexperienced and unsophisticated in lower-step grievance resolution. The parties' relationship was subject to the external factors of some labor relations control by the principal site contractor and various rules and regulations of a federal government licensing agency. Those rules and regulations clearly affected terms and conditions of employment. Yet the employer claimed supremacy of law, while the principal contractor/licensee denied any responsibility as a co-employer or otherwise. Thus, in all candor, it was nearly impossible for middle management and local union representatives to resolve most matters in the lower steps of the grievance procedure.

Equally, the parties' relationship had been marked by the all

[12] *Vaca* v. *Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967).

too common practice that top-level representatives and/or counsel did not enter the grievance procedure until *after* arbitration had been requested, and usually *after* an arbitrator had been selected. There was no contract provision for prearbitration consideration, and the parties had not developed the practice, used in some industries, of a third and one-half step, or "shake-out" meeting. Both parties were represented by the ultimate decision-maker, and each had full authority to enter into binding agreements. The mediator did not issue advisory opinions, but simply provided the atmosphere and opportunity to settle. As noted by Professor Goldberg, "[The] conclusion we draw is that how parties get to mediation is less important than attitude once there. . . . [Is there] a serious and good faith effort to settle?"[13]

A collateral salutary effect of the described mediation should be noted. Each party gained new insight with respect to the other's position, arguments, and evidence to be presented in those cases that were advanced to arbitration. The mediation effectively served as a form of prearbitration discovery, and a strong possibility exists that some of the remaining cases will be settled prior to arbitration because of such discovery.

Grievance Mediation for Public Employees: Michigan Observations

I was specifically requested to comment briefly on the role of grievance mediation for public-sector employees in Michigan.

In 1965, Michigan adopted a Public Employment Relations Act, tailored after the National Labor Relations Act.[14] This was followed in 1969 by enactment of a compulsory interest arbitration statute for public-safety employees.[15] That Act, No. 312, was amended in 1972 to provide for last offers of settlement on economic issues on an issue-by-issue basis. The interest arbitration act requires mediation as a condition precedent to its use. Of some interest to the instant topic—a police bargaining unit attempted to submit a grievance dispute to the mediation and arbitration procedures of Act 312. (Among other considerations, the costs of such arbitrations are split, with each party

[13]Goldberg and Brett, *supra* note 4, at 258.
[14]M.C.L.A. § 423.201 *et seq.*
[15]M.C.L.A. § 423.231 *et seq.*

and the state paying one-third.) Unfortunately, the ingenuity of the police union was not rewarded. The Michigan Supreme Court ruled that Act 312 did not encompass rights disputes. Later the statute was amended to exclude ". . . a dispute concerning the interpretation or application of an existing agreement (a 'grievance' dispute). . . ."[16]

Michigan's general public-employee bargaining law, however, recognizes and encourages the use of mediation to resolve grievance or rights disputes. Section 7(1) of the Act (commonly referred to as PERA) is entitled "Mediation of Grievances" and provides:

> "Upon the request of the collective bargaining representative defined in section 11 or, if a representative has not been designated or selected, upon the request of a majority of any given group of public employees evidenced by a petition signed by the majority and delivered to the commission, or upon request of any public employer of the employees, *the commission forthwith shall mediate the grievances* set forth in the petition or notice, and for the purpose of mediating the grievances, the commission shall exercise the powers and authority conferred upon the commission by sections 10 and 11 of Act No. 178 of the Public Acts of 1939, as amended, being sections 423.10 and 423.11 of the Michigan Compiled Laws."[17] (Emphasis added.)

Sections 10 and 11 of Michigan's private-sector labor mediation act, incorporated by reference, provide rudimentary guidelines and authority for the state mediator in the role of grievance mediator. Section 10, for example, provides in relevant part:

> "(a) . . . arrange for, hold, adjourn, or reconvene a conference or conferences between the disputants, any of their representatives, or both.
>
> "(b) . . . invite the disputants, their representatives, or both, to attend the conference and submit, either orally or in writing, the grievances of, and differences between, the disputants.
>
> "(c) . . . discuss the grievances and differences with the disputants or their representatives . . . .
>
> "(d) . . . assist in negotiating and drafting agreements for the adjustment or settlement of the grievances and differences and for the termination or avoidance . . . of the existing or threatened labor dispute."[18]

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[16]*See Local 1516, AFSCME* v. *St. Clair County Sheriff,* 407 Mich. 1 (1979).
[17]M.C.L.A. § 423.207.
[18]M.C.L.A. § 423.10.

Section 11 provides in relevant part for the conduct of hearings and subpoena powers.[19]

While the above provisions are reflective of a private-sector labor mediation act adopted in 1939, before the widespread use of binding arbitration as the terminal step of the grievance procedure, it is significant that substantive Section 7(1) of PERA, adopted in 1965, merely incorporated the procedural provisions of the earlier statute. Moreover, PERA prohibits strikes by *all* public employees, and some antagonists of public-employee bargaining still suggest that a governmental entity cannot accede decision-making to a third party such as an arbitrator. Thus, despite the lack of recorded legislative intent, it appears that Michigan favors grievance mediation for public-employee rights disputes irrespective of formal arbitration—a fact that has escaped many in Michigan public-sector labor relations. Perhaps, as one of our state senators from Pine Stump put it: "This state is atypical. We've got some real queer ducks and I think that's reflected in this Senate, with all due respect." But one of his colleagues sagely observed: "I don't think people appreciate how difficult it is to be a pawn of labor."

In 1978, my interest in grievance mediation—and more importantly, my need for material for the SPIDR presentation—prompted our firm's labor economic analyst and me to conduct a survey of federal and state mediators in Michigan.[20] While the questionnaire was carefully drawn in accordance with conventional methodology, we did not presume to suggest that it adhere to scientific principles of statistical research. That survey, however, did permit us to make "general observations" which, interestingly, come rather close to the empirical results of Professor Goldberg's coal industry experiments.[21] While the Michigan survey has not been updated, I am advised that it reflects current trends in that the composition of state mediators has not changed and the level of grievance mediation is approximately the same. Our results are summarized in Tables 1 and 2.

I am fully aware that the antagonists of grievance mediation argue that the procedure will increase the time and cost of dispute resolution and that the internal grievance procedure settle-

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[19]M.C.L.A. § 423.11.
[20]Gregory and Rooney, *supra* note 7.
[21]Goldberg and Brett, *supra* note 4.

TABLE 1

Grievance Mediation Experience in Michigan (1978)

(in percent)

	State Mediators (293 cases)		Federal Mediators (24 cases)
	Private	Public	Private
Grievance mediation successful in avoiding arbitration[a]	83	84	99
Type of grievance mediation			
Disciplinary actions	53	22	58
Contract interpretation	67	88	42
Grievance mediation provided:			
By contract	71	42	52
On an ad hoc basis or other, e.g., where it was not provided by contract but was agreed to by all parties	29	58	48

[a]Goldberg experienced a final resolution rate of 89 percent in his bituminous coal mining industry experiment.

TABLE 2

Mediators' Attitudes Toward Grievance Mediation

(in percent)

	State Mediators	Federal Mediators
Favored grievance mediation	96	80
Encouraged use of grievance mediation	80	20

Note: 20 percent were indifferent.

ment rate will be reduced, thereby increasing both delay and cost. These negative considerations notwithstanding, I respectfully submit that there is sufficient need, supported by empirical results, to justify a meaningful experiment with public-sector rights mediation—particularly in Michigan.

Several reasons support my advocacy of this position. Michigan provides statutory favor and support for public-employee

grievance mediation. It appears that the number of grievance arbitrations is increasing, with the concomitant problem of delay, expense, formalism, and frustration. Most bargaining units are small and not able to afford arbitration with the trappings of counsel, records, and briefs. Many grievances are intertwined with considerations of civil service rules, administrative codes, and ordinance and charter provisions. Public-sector representatives, both employer and union, have not yet developed the expertise and sophistication of their private-sector counterparts in the investigation and settlement of rights disputes. Such representatives often lack the inclination and/or authority to make final decisions; frequently, final approval by elected officials and union executive boards or memberships is required. And finally, public-sector participants—at least in Michigan—are probably more cost-conscious than their private-sector colleagues.

I believe that a Michigan experiment can be accomplished through the use of state mediators (assuming that budget and staffing permit) if they are willing to modify traditional contract mediation techniques and to issue advisory opinions. An alternative source of grievance mediators is the Michigan Employment Relations Commission's (MERC) not fully utilized panels of both grievance and interest arbitrators. Beyond that, it would be expected that the parties would make ad hoc selections. Aspiring arbitrators would receive training and experience and develop contacts leading to acceptability as a final decision-maker. The grievance mediation process should be informal, off-the-record, and without traditional advocates; the grievant should be present, and the mediator's advisory opinion should be oral. Preferably, the mediation should be triggered by mutual consent albeit the Michigan statute currently permits ex parte application.

Skeptics of grievance mediation hasten to point out that mediated/negotiated settlements may not enjoy deferral by administrative agencies, such as the NLRB, and/or that such settlements may increase the chance of breach of the duty of fair representation suits.[22] In my opinion, both concerns are insufficient in Michigan to cause the parties to reject the clear advantages that grievance mediation provides. First, in mixed contract/law

[22] *Vaca* v. *Sipes, supra* note 12; *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955); *T. & T. Indus.*, 235 NLRB 517, 98 LRRM 1112 (1978).

questions, the Michigan courts have rejected the "deferral doctrine."[23] Second, since the courts and the NLRB still recognize broad discretion in the collective bargaining representative to settle and adjust grievances, it is not anticipated that mediated settlements should expose either the union or the employer to liabilities not already inherent in the grievance procedure. Assuming that the mediated settlement is free of improper motives or fraud, arbitrary conduct, or gross negligence, such settlement would be well within the "wide range of reasonableness allowed a statutory bargaining representative in serving the unit it represents . . . ."[24] Professor Goldberg has concluded that "this fact of contract administration life [informal settlements] is not affected by mediation, which simply constitutes another step in the process of grievance resolution. In summary, there is little risk that the mediation process will be used to deprive employees of contractual rights which they might obtain through arbitration."[25] I agree.

I suspect that my Michigan colleagues—arbitrators and advocates alike—will not be so readily proselytized as I to experiment with public-sector grievance mediation as a prearbitration step.[26] I do not seek to end the halcyon days of traditional labor arbitration or interfere with the welfare of arbitrators and advocates. Indeed, I would settle for the euphemisms "advisory arbitration," "med-arb," or perhaps "attitude adjustment" if opposition is mitigated and the result is a better, but not exclusive, way to settle disputes. I note that both state and federal courts in Michigan provide for the mediation of certain civil cases by court rules, with successful results.[27] There is sufficient empirical evidence to demonstrate that grievance mediation works effectively.

I foresee grievance mediation in Michigan, if structured and used properly, as resolving in excess of 70 percent of the public-employee disputes submitted at one-third the cost and delay of formal arbitration. Other benefits will accrue whether or not a particular case is advanced to arbitration. Anticipating the in-

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[23]*See Detroit Fire Fighters* v. *City of Detroit,* 408 Mich. 663, 105 LRRM 3386 (1980).
[24]*See Ford Motor Co.* v. *Huffman,* 345 U.S. 230, 31 LRRM 2548 (1953).
[25]Goldberg, *supra* note 9, at 314.
[26]It is noted that the NAA Code of Professional Responsibility contains a section entitled "Mediation by an Arbitrator." 64 LA 1322 (1975).
[27]*See* Rule No. 32, U.S. District Court, E.D. Mich., and Rule No. 403, Wayne County, Mich., Circuit Court.

tervention of a third-party neutral, the parties will investigate the grievance thoroughly, collect evidence, examine precedents, and involve representatives with decision-making authority. The parties should develop and improve settlement skills that will serve them in the lower grievance steps. Although Michigan has adequate prearbitration discovery devices in the form of a freedom of information act, an employee right-to-know act, the PERA duty to bargain, and traditional demands to produce, as noted earlier, a collateral effect of grievance mediation is to supply each party with a greater understanding of the other's position and arguments.[28] The salutary effect of such discovery would result in part from the absence of formal rules of evidence and advocates, although it is understood that offers of compromise and settlement would not be used in a subsequent arbitration. I submit that postmediation/prearbitration settlements would be stimulated and that, in any event, there would be more effective and expeditious presentation of the ultimate arbitration case.

Conclusion

Grievance mediation in the public sector is not expected to be a panacea for all the problems that attend grievance processing and arbitration. The evidence is compelling, however, that it holds the promise of its proponents to produce voluntary informal settlements and to reduce the delay and cost associated with conventional arbitration. Grievance mediation is urged as an option, not as a substitute for arbitration—as an alternative and an aid to arbitration. Given these objectives, the procedure should not be controversial and perceived as a threat to the institution of grievance arbitration.

As Mollie Bowers noted, "The 'bottom line' on grievance mediation is, you will not know until you try to settle now without paying later."[29] And finally, as a Michigan legislator declared in public session, "There comes a time to put principle aside and do what's right."

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[28]Freedom of Information Act, M.C.L.A. §15.231 *et seq.;* Employee Right-to-Know Act, M.C.L.A. §423.501 *et seq.;* PERA, M.C.L.A. §423.301 *et seq.*

[29]Bowers, *supra* note 9, at 35.