

BROKEN PROMISES, BROKEN PROCESS: REPAIRING THE MANDATORY MEDIATION CONCILIATION PROCESS IN AGRICULTURAL LABOR DISPUTES

I. INTRODUCTION

California agricultural labor relations between farm owner and farm worker have a unique dynamic that is driven by a tumultuous and distrustful history.¹ This mutual relationship of skepticism was seeded in the fields of California, and at one point, rose to the office of the President of the United States.² The parties to the disputes are highly affluent and profitable agri-businesses versus influential and powerful unions with the poorest workers in the state, farm workers, wedged in the middle.³ Variables, such as the transient nature and high illiteracy rates among migrant farm workers and the year round harvesting that Califor-

¹ See generally SUSAN FERRIS & RICARDO SANDOVAL, *THE FIGHT IN THE FIELDS: CESAR CHAVEZ AND THE FARMWORKERS MOVEMENT* 159-221 (Paradigm Productions, Inc., 1st ed. 1997).

² *Id.* at 180-181. President Richard Nixon, in his 1972 re-election campaign, received his only major endorsement from the Teamsters. Former Teamsters' president, Jimmy Offa received a presidential pardon.

In the early 1970's, White House Counsel Charles Colson issued ... memos to the Labor and Justice Departments and the National Labor Relations Board: Any federal intervention in the struggle between the Teamsters and the UFW, he warned, should take the side of the Teamsters. Only of you can find some way to work against the Chavez union should you take any action,' he declared in a May 1971 federal memo ... A second Colson memo in 1972 reiterated those instructions: 'We will be criticized if this thing gets out of hand and there is violence, but we must stick to our position. The Teamsters union is now organizing in the area and will probably sign up most of the grape growers this coming spring and they will need our support against the UFW. *Id.*

³ Adam Weintraub, *Brown vetoes bill to ease farmworker unionization*, FRESNO BEE, June 28, 2011, <http://www.fresnobee.com/2011/06/28/2444871/calif-bill-would-ease-farmworker.html>.

nia's diverse climate yields, create an amorphous bond.⁴ All of these elements have contributed to static negotiations and the perpetuation of an ineffective collective bargaining process for nearly a half-century.⁵

To help stabilize labor relations, the California legislature has passed several laws designed to build a more peaceful, constructive, and effective environment for collective bargaining negotiations.⁶ The legislature codified the Agricultural Labor Relations Act ("ALRA") in 1975⁷ and the Mandatory Mediation Conciliation ("MMC") program in 2003.⁸ These two pieces of legislation helped farm workers achieve fair wages, and safe working conditions, while helping employers sustain profitability by limiting when farm workers are able to strike.⁹ While these measures are a step in the right direction, this Comment will show that collective bargaining within California's agricultural industry is still broken.

This Comment will address the weaknesses in the MMC and its ineffective hybrid of mediation and arbitration procedures the California legislature provided to the agricultural industry. Part II will discuss the birth of collective bargaining rights for labor workers in the United States, and the history of California agriculture labor relations. Part III will analyze the MMC, which was the California legislature's self-labeled promise to fix the agricultural collective bargaining process. Part IV will demonstrate that, on its face, the MMC is a broken and fruitless mediation procedure. Part V will present recommendations to help fulfill the California legislature's promises and create an effective mediation procedure.

II. CREATED UNEQUALLY – LABOR NEGOTIATIONS IN THE UNITED STATES

The concept of inequality in bargaining power between employers and labor workers has existed since the dawn of the United States.¹⁰ Labor employers relied on the fragmentation of the labor force to impose adhe-

⁴ See generally PHILIP L. MARTIN, PROMISES UNFULFILLED: UNIONS, IMMIGRATION, & THE FARM WORKERS, PROLOGUE: WHAT WENT WRONG? 1-6 (Cornell University Press, 1st ed. 2003).

⁵ *Id.*

⁶ See generally CAL. LAB. CODE § 1140-1160 (Deering 2004).

⁷ AGRICULTURAL LABOR RELATIONS BOARD <http://www.alrb.ca.gov/default.html> (last visited Nov. 12, 2011).

⁸ AGRICULTURAL LABOR RELATIONS BOARD-MANDATORY MEDIATION AND CONCILIATION http://www.alrb.ca.gov/content/statutesregulations/mandatorymediation/mandatorymediation_legislation.html (last visited Nov. 12, 2011).

⁹ See CAL. LAB. CODE §§ 1140.2, 1164

¹⁰ See ADAM SMITH, WEALTH OF NATIONS 41-54 (Digireads.com Publishing, 2009).

sion contracts onto workers and preserve the workers' impotence.¹¹ As workers attempted to rally together and negotiate higher wages, employers targeted and knocked down those who spoke up, obstructing their right to organize and stripped away their ability to enter into their own agreements.¹²

A. Congress' Remedy – The National Labor Relations Act

Congress fully recognized the significant imbalance of negotiating power between an employer and labor workers without a collective voice and introduced the National Labor Relations Act ("NLRA").¹³ Through the enactment of the NLRA, Congress began to counterbalance the power differential by giving labor workers the right to self-organize and a stronger position to collectively bargain.¹⁴ The act also imposed on employers the duty to negotiate in good faith and prohibited them from dominating or interfering with the formation of any labor organization.¹⁵ In the 1947 labor management amendment, the NLRA gave employers and employees the option to mediate disputes.¹⁶

The benefits the NLRA afforded to labor workers were revolutionary as it attempted to stabilize the industrial strife between employers and workers, gave laborers the full freedom of association, and the actual liberty to contract.¹⁷ However, agricultural labor workers received none of these rights.¹⁸ Members of Congress, who supported the act, needed votes from agricultural districts to pass the legislation;¹⁹ the political concession was the decision not to cast the NLRA's net of protection to cover agriculture.²⁰ This exclusion has been described as "a perverse holdover from the Jim Crow era."²¹ During this historical context, southern Democrats in Congress could not tolerate giving African-Americans an "equal footing in the workplace with whites."²² President Roosevelt's

¹¹ See 29 U.S.C. § 151 (1935).

¹² SMITH, *supra* note 10.

¹³ § 151

¹⁴ *Id.*

¹⁵ See *id.* § 158(a)(2).

¹⁶ 29 U.S.C. §§ 171–173 (1947).

¹⁷ 29 U.S.C. § 151 (1935).

¹⁸ Austin P. Morris, *Agricultural Labor and National Labor Legislation*, 54 CALIF. L. REV. 1939, 1951–56 (1966).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Editorial, *Farm Workers' Rights, 70 Years Overdue*, N.Y. TIMES, Apr. 6, 2009, <http://www.nytimes.com/2009/04/06/opinion/06mon1.html>.

²² *Id.* African Americans back then "made up most of the farm and domestic labor force."

compromise erased workers in those industries from the New Deal.²³ As a result, agricultural workers were sidelined from the labor movement.²⁴ The injustice spawned by the Dixiecrats has never been fully rectified.²⁵ “Poverty, brutal working conditions and legally sanctioned discrimination persist for new generations of laborers, who are now mostly Latino immigrants.”²⁶

B. California Agricultural Labor Relations and Rights – Violence in the Fields, Silence from the Legislature

California agricultural workers labored the fields for four decades without any of the rights and protections of the NLRA.²⁷ This lack of rights was compounded by the frequency in which farm workers were vulnerable to possible exploitation because California requires farm labor year round.²⁸ Farm worker’s tolerance began to wane and movements began to form, which evolved into the fight for farm workers’ civil rights.²⁹ One such movement was led by Caesar Chavez and the United Farm Workers union (“UFW”), which proved to be the catalyst that forever changed the quality and trajectory of agricultural labor relations in California.³⁰ In the 1960’s, Chavez led thousands of workers to march, boycott, and strike.³¹ The farm worker strikes were strategically initiated around peak harvest times.³² The boycotts hit vulnerable companies

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ NLRA was passed in 1935 and ALRA was passed in 1975. 29 U.S.C. §§ 151–169 (1935); CAL. LAB. CODE §§1140-1160 (Deering 2004).

²⁸ MARTIN, *supra* note 4, at 21.

Vegetables are harvested during the winter months in southern part of the state and navel oranges are harvested in the San Joaquin Valley between December and March. Harvesting moves to the coast in March and April as workers harvest lemons and oranges and in the Ventura area and vegetables in the Salinas areas. By May, farm workers are picking strawberries and vegetables and the harvesting continues through the summer. In June, workers move through the orchards of peaches, plums and nectarines. In July and August, vegetables are harvested in the coastal valleys and tree fruits, cantaloupes, melons, and tomatoes are harvested in the San Joaquin Valley. September is the month in which farm worker employment reaches its peak and raisins are harvested. Harvesting winds down in October as most migrant camps close and farm workers return to their homes.

²⁹ FERRIS & SANDOVAL, *supra* note 1, at 124-221.

³⁰ *See generally id.*

³¹ *See generally id.* at 125-158.

³² *Id.*

whose public image could not afford the negative publicity.³³ Both strategies affected employers' sales and profitability, which motivated them to sit down at the bargaining table with the intent to come to an agreement.³⁴ Chavez and the UFW successfully secured contracts with employers on behalf of farm workers, which included terms with higher wages and better working conditions.³⁵

In the early 1970's, disputes began to occur in California's fields when the Teamsters union intervened in UFW and grower negotiations.³⁶ The Teamsters capitalized when grape contract between growers and the UFW expired, and the Teamsters began entering into new contracts with the growers without the farm workers' knowledge.³⁷ Violence between the UFW and Teamsters frequently erupted in the fields as cars were turned over, windshields broken, and people were assaulted.³⁸ Picket lines turned into riots and the strikes of 1973 resulted in 3,500 farm worker arrests.³⁹ Employers acknowledged that the Teamsters' conduct throughout California and the bitter struggle between the UFW and Teamsters was "disorderly, occasionally bloody, and never the show-place of self-determination."⁴⁰

C. The Agriculture Labor Relations Act – Farm Workers Receive Limited Collective Bargaining Rights for the First Time

In direct response to the discord in the fields, the California legislature enacted the ALRA.⁴¹ The Act's preamble memorialized its purpose to "ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations."⁴² In 1975, forty years after the NLRA was put in place to safeguard the rights of labor workers, the ALRA finally provided agricultural workers the basic rights to self-organize without interference from employers and to collectively

³³ *Id.*

³⁴ *Id.* at 137.

³⁵ *Id.* at 138.

³⁶ *Harry Carian Sales v. ALRB*, 703 P.2d 27, 37 (Cal. 1985).

³⁷ *Id.* The Teamsters and growers agreed not to disclose the existence of the secret contracts and decided they would inform farm workers only after the contracts were signed, threatening that "if the workers didn't like it and did not want to pay Teamsters dues – they would be fired."

³⁸ FERRIS & SANDOVAL, *supra* note 1, at 170.

³⁹ *Id.*

⁴⁰ *Harry Carian Sales*, 703 P.2d at 37.

⁴¹ *Id.*

⁴² AGRICULTURAL LABOR RELATIONS BOARD <http://www.alrb.ca.gov/default.html> (last visited Nov. 12, 2011).

bargain for safe working conditions and better wages.⁴³ The ALRA also created a state agency, the Agriculture Labor Relations Board (“ALRB”), to hear and determine claims of unfair labor practices and supervise elections to certify unions.⁴⁴ Once certification occurs, the ALRA requires the employer to engage in good faith negotiations with the newly certified union.⁴⁵ “While the ALRA does not require the parties reach an agreement, both parties must make an honest, sincere effort to reach agreement on a contract.”⁴⁶

Even with ALRA in place, union and employers infrequently reached collective bargaining agreements.⁴⁷ Conflicts between farm owners and unions continued at the bargaining table.⁴⁸ In a number of cases, growers were found to have caused intentional delays⁴⁹ in the collective bargaining process by engaging in surface bargaining,⁵⁰ failing to seek good-

⁴³ CAL. LAB. CODE § 1140.2 (Deering 2004).

⁴⁴ *See id.* §§ 1141-1142.

⁴⁵ *See id.* § 1155.2.

. . . good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

⁴⁶ AGRICULTURE LABOR RELATIONS BOARD, A HANDBOOK ON CALIFORNIA AGRICULTURE LABOR LAW 22.

⁴⁷ CAL. LAB. CODE § 1164 (West, Westlaw through end of 2001-02 Reg. Sess. and 1st through 3rd Ex. Sess. and Nov. 5, 2002 election). “In nearly sixty percent of the cases in which a union wins an election, management never agrees to a contract.”

⁴⁸ *See Id.*

⁴⁹ *Mario Saikhon, Inc. v. United Farm Workers of America*, 13 ALRB No. 8 (1987) (McCarthy, Arb.). The employer delaying in responding to union bargaining proposals; refusing to provide information to unions, restricting union’s ability to communicate with employees in the bargaining unit; being uncompromising on major bargaining issues; and unilaterally making wage changes, to delay the collective bargaining process. The ALRB found the employer repeatedly delayed the collective bargaining process by belated responses to the union’s proposals, refusing to provide information, the employer’s “away-from-the-table” conduct supported the finding of bad faith, and that the union’s bargaining conduct could not serve as a defense to the farmer’s unlawful tactics. The ALRB further concluded that the employer was acting in conscious disregard of the union’s role as the exclusive bargaining representative of the employer’s agricultural employees. *Id.* at 11. And, the employer was engaging in conduct, which could not help but only frustrate the collective bargaining process. *Id.* at 6-7.

⁵⁰ *Paul W. Bertuccio v. United Farm Workers of Am.*, 10 ALRB No. 16 (1984) (Gomberg, Arb.). Employer engaged in surface bargaining by making predictably unacceptable proposals and engaging in dilatory tactics. *Id.* at 19.

faith resolutions,⁵¹ and not adhering to collective bargaining agreements once made.⁵² The California legislature acknowledged that the ALRA was not fulfilling its purpose⁵³ and a mediation procedure was needed to ensure a more effective collective bargaining process to help the parties reach an agreement.⁵⁴

III. THE 2003 AMENDMENT TO FIX THE ALRA: MANDATORY MEDIATION CONCILIATION

A. *The Legislative Intent – the Making of a Promise*

In 2002, the California legislature acknowledged that migrant farm workers were still unable to fight for labor rights, as all other labor industries in the nation have been able to do since the passage of the NLRA in 1935.⁵⁵ The legislature further recognized that the ALRA was not working as intended and some parts of the system were clearly broken.⁵⁶ Some members of the legislature contended in the early years of the ALRB's existence that it was successful in bringing the parties to the bargaining table.⁵⁷ However, the legislature claimed that "bad faith bargaining became the rule rather than the exception"⁵⁸ and "enforcement

⁵¹ *Tex-Cal Land Mgmt., Inc. vs. United Farm Workers of Am.*, 11 ALRB No. 28 (1985) (James-Massengale, Arb.). An employer was found guilty of refusing to bargain in good faith by refusing to bargain over acreage it was actually farming, subcontracting out of bargaining unit work to labor contractors and custom harvesters, refusing to bargain over a tree pruning rate and over the effects of its change in the start-up date of grape pruning, and its refusal to provide information to the union. *Id.* at 15. *Robert H. Hickman v. United Farm Workers of America*, 10 ALRB No. 2 (1985) (Resneck, Arb.). Employer's conduct in refusing to provide requested information, failing to submit economic proposals over a 19-month period, submitting only two non-economic proposals, and implementing unilateral changes constituted an unlawful refusal to bargain collectively in good faith. *Id.* at 23.

⁵² *Tex-Cal Land Mgmt., Inc.*, 11 ALRB No. 28. ALRB found an employer's refusal to sign the agreed-upon collective bargaining contract was in bad faith, where the employer knowingly misled the union about its intention to be bound by the contract, and subsequent to the refusal showed no willingness to explain or discuss its problems with the contract language. *Id.* at 15.

⁵³ *Hess Collection Winery v. Cal. Agr. Labor Relations Bd.*, 45 Cal.Rptr.3d 609, 620 (Cal. Ct. App. 2006).

⁵⁴ *Id.*

⁵⁵ CAL. LAB. CODE § 1164 (West, Westlaw through end of 2001-02 Reg. Sess. and 1st through 3rd Ex. Sess. and Nov. 5, 2002 election).

⁵⁶ *Id.*

⁵⁷ CAL. LAB. CODE § 1164 (LEXIS through 2002 legislation).

⁵⁸ *Id.*

against bad faith conduct was nearly non-existent.”⁵⁹ The legislature declared that,

a need exists for a mediation procedure in order to ensure a more effective collective bargaining process between agricultural employers and agricultural employees, and thereby more fully attain the purposes of the Agricultural Labor Relations Act, ameliorate the working conditions and economic standing of agricultural employees, create stability in the agricultural labor force, and promote California’s economic well-being by ensuring stability in its most vital industry.⁶⁰

In light of the legislature’s findings, Governor Gray Davis signed into law the first major amendment to the ALRA, which provided for binding mediation in selected circumstances where the parties are unable to reach a collective bargaining agreement.⁶¹ This process would become the Mandatory Mediation Conciliation (“MMC”).⁶² The intent behind the MMC was to help unions secure a first contract with employers to directly combat a new union’s inability to secure contracts.⁶³ Governor Davis reiterated this belief behind the MMC in a letter he wrote to the California Legislature where he noted that the purported benefits of the ALRA were not being realized as too many farm workers were being left “without a contract, without a remedy, and without hope.”⁶⁴

As with the ALRA, the MMC was specifically intended to address the inequality and injustice present in the agricultural collective bargaining process and create a more balanced negotiation environment.⁶⁵ The MMC’s unequivocal purpose was to help farm workers achieve the equal rights that had eluded them for nearly seventy years.⁶⁶ While signing the legislation that would put the MMC into effect, Governor Davis proclaimed:

[twenty-seven] years ago, California made a promise to the men and women who toil in California’s agricultural fields that they would have the right to fight for decent wages and working conditions, just as other workers have

⁵⁹ *Id.*

⁶⁰ CAL. LAB. CODE § 1164 (West, Westlaw through end of 2001-02 Reg. Sess. and 1st through 3rd Ex. Sess. and Nov. 5, 2002 election).

⁶¹ AGRICULTURAL LABOR RELATIONS BOARD-MANDATORY MEDIATION AND CONCILIATION http://www.alrb.ca.gov/content/statutesregulations/mandatorymediation/mandatorymediation_legislation.html (last visited Nov. 12, 2011).

⁶² See generally CAL. LAB. CODE §§ 1164-1164.13 (Deering 2004).

⁶³ See CAL. LAB. CODE § 1164 (Westlaw) through end of 2001-02 Reg. Sess. and 1st through 3rd Ex. Sess. and Nov. 5, 2002 election).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

had since the passage of the National Labor Relations Act in 1935. Today, with the signing of these two bills, California will fulfill that promise.⁶⁷

Finally, a system was in place that was intended to help both sides reach the results that they were seeking and at the same time address the inequality in the fields.

B. The MMC Process – The Breaking of a Promise

The MMC's purpose was to create a more constructive negotiation environment and effective collective bargaining process.⁶⁸ However, the MMC takes on a counter productive and adversarial tone from the onset, which is destructive for attempting conciliation.⁶⁹ The process begins once the ALRB issues an order directing the non-filing party to mediate.⁷⁰ The parties have seven days from the order directing them to mediation to select a mediator,⁷¹ identify what issues are in dispute, and identify contract language for those issues not in dispute.⁷² The adversarial tone is established as the mediator takes on the role of legal decision maker and "rules on the admission and exclusion of evidence, questions of procedure and exercises all powers relating to the conduct of the mediation."⁷³ Furthermore, the parties are prohibited from filing a request for mediation until the newly certified union and employer have failed at negotiations for 180 days.⁷⁴

The MMC's intent was to give farm workers the ability to negotiate their own contract terms and the liberty to contract through a mediation procedure.⁷⁵ However, the only layer of mediation is a thirty-day win-

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See CAL. LAB. CODE § 1164 (Deering 2004).

⁷⁰ *Id.* at § 1164(b).

⁷¹ See *id.*

The board shall request from the California State Mediation and Conciliation Service a list of nine mediators who have experience in labor mediation. The California State Mediation and Conciliation Service may include names chosen from its own mediators, or from a list of names supplied by the American Arbitration Association or the Federal Mediation Service. The parties shall select a mediator from the list within seven days of receipt of the list. If the parties cannot agree on a mediator, they shall strike names from the list until a mediator is chosen by process of elimination. If a party refuses to participate in selecting a mediator, the other party may choose a mediator from the list.

⁷² See *id.* § 1164(d).

⁷³ CAL. CODE REG. tit. 8, div. 2, § 20407(a)(2).

⁷⁴ CAL. LAB. CODE § 1164(a)(2) (Deering 2004).

⁷⁵ See CAL. LAB. CODE § 1164 (West, Westlaw through end of 2001-02 Reg. Sess. and 1st through 3rd Ex. Sess. and Nov. 5, 2002 election).

dow where the parties must come to a collective bargaining agreement.⁷⁶ If the union and employer are unable to agree to all terms, they go directly into arbitration before the same person who served as the mediator.⁷⁷ The mediator, in name only, has twenty-one calendar days to file a report that sets the terms of the collective bargaining agreement.⁷⁸ The report must cite evidence in the record that supports his or her findings and conclusions⁷⁹ and the record must be preserved by court reporter or stipulated record.⁸⁰ The parties can file a request that the ALRB review the mediator's report.⁸¹ If no request is filed within seven days, the terms in the report become the parties' collective bargaining agreement.⁸²

The MMC is not a mediation procedure that helps negotiations and collective bargaining, but an adversarial hybrid that perpetuates conflict. The MMC fuses the mediation and arbitration processes together and purges the central tenets of both.

C. The Hybrid Model: Speed and Economy at the Expense of Quality and Effectiveness

The California legislature's hybrid mediation/arbitration is not a solution; it is the root of the problem. The process harvests the limitations of both and reaps the benefits of neither.⁸³ Mediation's principal benefit is that it gives parties full control over the outcome of the dispute with the end game of reaching a mutual agreement.⁸⁴ If the parties are dissatisfied with the outcome, they have the power to walk away without being bound.⁸⁵ Arbitration's central benefit is that it gives parties, who are unable to reach a mutual agreement, finality because an impartial arbitrator renders a binding decision.⁸⁶ However, in arbitration, the parties are

⁷⁶ CAL. LAB. CODE § 1164(c) (Deering 2004). "The parties have thirty consecutive calendar days to resolve the mediation, which starts on the date of the first scheduled mediation session."

⁷⁷ *Id.*

⁷⁸ *See id.* § 1164(d).

⁷⁹ *Id.*

⁸⁰ *See Id.*

⁸¹ *See id.* § 1164.3 (a).

⁸² *See id.* § 1164.3 (a), (d). The ALRB's decision is subject to review by the appellate courts.

⁸³ Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals – A look at the ethical problems raised by this hybrid dispute resolution process and its Variants*, DISPUTE RESOLUTION JOURNAL, May-Oct. 2010, at 53.

⁸⁴ *See id.* at 54.

⁸⁵ *Id.* at 55.

⁸⁶ *Id.* at 54.

powerless over the outcome.⁸⁷ Under the hybrid model, when the mediation is unsuccessful, “the mediator becomes the arbitrator, holds an arbitration hearing and issues a binding award.”⁸⁸ This process is designed for speed and economy because it eliminates the need to start over with a new neutral adjudicator who is not fully briefed on the issues in dispute and the law that is implicated.⁸⁹ However, this drive for efficiency has its hazards that the California Rules of Court cautions against.⁹⁰ In the “quality of mediation process” section, the rules warn that combining mediation with another process should only be done with informed consent.⁹¹ The rule expressly requires the mediator to educate the parties about the differences of the two processes and the consequences of revealing information in one that can be relied on in the decision making for the second process.⁹² Lastly, the rule mandates that the mediator give the parties the option to select a different neutral⁹³ for the second process.⁹⁴

The entangling of mediation and arbitration disables parties from exercising the right of voluntariness and the power of self-determination.⁹⁵ Also, the crossbreeding of neutrals implicates ethical considerations cited in the California Rules of Court, Model Standards of Conduct for Mediators (“Mediator Model Standards”),⁹⁶ and the Code of Professional Responsibility for Arbitrators of Labor Management Disputes (“Arbitrator Code”), which cannot be ignored.⁹⁷

The MMC mandates that the same person serve both as the mediator and arbitrator.⁹⁸ A neutral thrusts him or herself into an ethical quandary when acting in the capacity of a crossbreed. The neutral must navigate

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ CAL. R. CT. 3.857(g) (2007).

⁹¹ *Id.*

⁹² *Id.*

⁹³ SUSAN PATTERSON & GRANT SEABOLT, *ESSENTIALS OF ALTERNATIVE DISPUTE RESOLUTION* 65 (Pearson Publication Company, 1997). Neutral is another term for mediator and is an impartial third party who assists the parties with the resolution of their dispute.

⁹⁴ CAL. R. CT. 3.857(g) (2007).

⁹⁵ See Fullerton, *supra* note 83, at 56.

⁹⁶ See generally MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005). (The Mediator Model Standards was approved by the American Bar Association (ABA) House of Delegates, adopted by the American Arbitration Association (AAA), and Association for Conflict Resolution (ACR). A special committee with representatives from the ABA, AAA, and ACR drafted the Mediator Model Standards.).

⁹⁷ See Fullerton, *supra* note 83, at 59.

⁹⁸ See CAL. LAB. CODE § 1164(c), (d) (Deering 2004).

through both the Model Mediator Standards and the Arbitrator Code because the MMC requires the parties to select a mediator from either the American Arbitration Association (“AAA”), the FMCS or the California State Mediation Conciliation Service (“CSMCS”).⁹⁹ The Model Mediator Standards apply to any neutral who serves on the AAA or FMCS, even if by referral.¹⁰⁰ The Arbitrator Code applies to any neutral who serves on the AAA, FMCS, or CSMCS, which covers all possible neutrals who could potentially serve on an MMC case.¹⁰¹ When acting as both the MMC mediator and arbitrator, the opportunity to coerce party agreement arises in violation the Mediator Model Standards for the mere fact that the same person will also act as the MMC arbitrator.¹⁰² After serving as an MMC mediator, the arbitrator’s appearance of impartiality is compromised because as the mediator he or she engages in ex-parte and off the record communication to explore union’s and employer’s interests and positions during the MMC’s thirty-day mediation phase, which violates the Arbitrator Code.¹⁰³ In a mediation session, the mediator attempts to build rapport and trust to draw out the parties’ interest and not have them focus on legal arguments or defenses, however, as an arbitrator this would create an appearance of bias and would never be allowed.¹⁰⁴ In a self-contained arbitration, ex-parte communication with a mediator will never be known to the arbitrator.¹⁰⁵ However, in the MMC the arbitrator is the mediator and the ex-parte communication can be potentially relied on knowingly or unknowingly by the arbitrator when rendering his decisions.¹⁰⁶

The same contours of arbitrator and mediator conduct are also established in the California Rules of Court,¹⁰⁷ which forbid a mediator from coercing the parties to reach an agreement and requires the mediator to conduct the “mediation in a manner that supports the principles of volun-

⁹⁹ See *id.* § 1164(b).

¹⁰⁰ See generally MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005).

¹⁰¹ See generally CODE OF PROF. RESP. FOR ARBS OF LAB. MGMT. DISPUTES (2007). (The Arbitrator Code was jointly prepared and adopted by the National Academy of Arbitrators (NAA), the American Arbitration Association and the FMCS. *Id.* The CSMCS are members of the NAA, <http://www.naarb.org/code.html>. The FMCS provides mediators to labor disputes under the NLRA. 29 U.S.C. § 171–172 (1978).).

¹⁰² MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I Paragraph A (2005).

¹⁰³ CODE OF PROF. RESP. FOR ARBS OF LAB. MGMT. DISPUTES 1(C)(3) (2007).

¹⁰⁴ Fullerton, *supra* note 83 at 61.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ CAL. R. CT. 3.853 (2007). “A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self determinations by the parties.”

tary participation and self determinations by the parties.”¹⁰⁸ A mediator’s ethical boundaries extend to not being able to infringe on the sphere of the parties’ involvement and participation in the mediation.¹⁰⁹ California Rules of Court and the Mediator Code mandate that a mediator “respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time”¹¹⁰ and “refrain from coercing any party to make a decision or continue to participate in the mediation.”¹¹¹ The parties’ knowledge that the MMC mediator can possibly impose a decision shifts their perspective of the neutral from collaborator to adjudicator in waiting, which directly affects their comfort in speaking about settlement terms.¹¹² The legislative history notes that opponents of the MMC were concerned with the ethical issues of the same person serving as both the mediator and arbitrator since the MMC’s conception.¹¹³

The MMC, as designed, creates a chasm between its intent and effect. The legislative intent was to help the collective bargaining process, improve relations between unions and growers, and jump-start stalled negotiations. The MMC’s effect is to force parties to enter into collective bargaining agreement or be subject to a mediator’s judgment.¹¹⁴ As a result of the hybrid shell of mediation, mediation’s core principles of confidentiality, self-determination and voluntariness are gutted from the process.¹¹⁵ Without these, the MMC fails on its face, and at its core, it is just a hollow political promise.

IV. TRUE MEDIATION - FULFILLING A PROMISE

To meet the legislature’s intent, the benefits of mediation must be realized. Three indispensable pillars of a true mediation procedure are confidentiality, voluntariness and self-determination, and prompt resolution.¹¹⁶

¹⁰⁸ CAL. R. CT. 3.853 (2007); MODELS AND STANDARDS OF CONDUCT FOR MEDIATORS, Standard I Paragraph A.

¹⁰⁹ *Id.*

¹¹⁰ CAL. R. CT. 3.853(2) (2007); MODELS AND STANDARDS OF CONDUCT FOR MEDIATORS (2005), Standard I Paragraph A.

¹¹¹ CAL. R. CT. 3.853(3) (2007); MODELS AND STANDARDS OF CONDUCT FOR MEDIATORS (2005), Standard I Paragraph B.

¹¹² Fullerton, *supra* note 83 at 61.

¹¹³ CAL. LAB. CODE § 1164 (LEXIS through 2002 legislation).

¹¹⁴ CAL. LAB. CODE § 1164(d) (Deering 2004).

¹¹⁵ *See generally id.* §§ 1164-1164.13.

¹¹⁶ CAL. EVID. CODE §§ 1115, 1119 (Deering 2004).

A. *Confidentiality is the Cornerstone of any Mediation or Negotiation*

Confidentiality is a foundational principle of mediation. The legislature has embraced the significance of confidentiality by codifying its importance in section 1119 of the California Evidence Code:

(a) No evidence of anything said or any admission made for the purpose of mediation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action . . . (b) No writing that is prepared for the mediation is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, . . . (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.¹¹⁷

Section 1121 of the California Evidence Code further expands the applicability of confidentiality and restricts a mediator from submitting any type of report of the mediation to a court or other adjudicative body.¹¹⁸

During the last ten years, the California Supreme Court has weighed in three separate times on the mediation confidentiality provisions' applicability.¹¹⁹ Each time the court reiterated and further clarified mediation confidentiality's far-reaching scope and unwavering intent.¹²⁰ In *Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.*, 25 P.3d 1117 (Cal. 2001) the California Supreme Court held the "purpose of confidentiality is to promote a candid and informal exchange regarding events in the past This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and adjudicatory processes."¹²¹ In *Rojas v. The Superior Court of Los Angeles County*, 93 P.3d 260 (Cal. 2004), the California high court overturned the Court of Appeal for the Second District's ruling, which had constructed an exception to mediation confidentiality and allowed plaintiffs in a subsequent proceeding to access documents that the trial court held to have been prepared for the sole purpose of mediation.¹²² In reversing, the Supreme Court ruled that

¹¹⁷ See *id.* § 1119.

¹¹⁸ See *id.* § 1121. "Other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118." *Id.*

¹¹⁹ See generally *Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc.*, 25 P.3d 1117 (Cal. 2001); *Rojas v. The Sur. Ct. of L.A. Cnty.*, 93 P.3d 260 (Cal. 2004); *Cassel v. Sur. Ct. of L.A. Cnty.*, 244 P.3d 1080 (Cal. 2011).

¹²⁰ See generally *id.*

¹²¹ *Foxgate*, 25 P.3d at 1126.

¹²² *Rojas v. The Sur. Ct. of L.A. Cnty.*, 93 P.3d 260, 269 (Cal. 2004).

the confidentiality of mediation communications is absolute as it applies to evidence prepared for the sole and limited purpose of mediation.¹²³

In 2011, the California Supreme Court reinforced its holdings in *Rojas* and *Foxgate*.¹²⁴ The court held the mediation confidentiality statutes prevent a client from using communication made within the context of the mediation with his attorney in a subsequent civil action.¹²⁵ In *Cassel v. The Superior Court of Los Angeles*, 244 P.3d 1080 (Cal. 2011), the client communicated to his attorneys that he would not take less than \$2 million as a settlement offer.¹²⁶ The client alleged that the attorneys harassed and coerced him to accept a \$1.25 million settlement, and that the attorneys lied about waiving their legal fees, which totaled \$188,000, if the client accepted the settlement offer.¹²⁷ The *Cassel* court found that all communications were protected under the mediation confidentiality statutes and could not be used in the client's legal malpractice claim against his attorney.¹²⁸ The court also held that, "in order to encourage the candor necessary to a successful mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding."¹²⁹ The California Supreme Court has repeatedly held and emphasized that the mediation confidentiality provisions are clear, absolute, and are to be strictly applied even in light of competing public policies.¹³⁰

The unqualified applicability of confidentiality and the court's lack of power to craft an exception were further expounded in *Porter v. Wyner*, 107 Cal.Rptr.3d 653 (Cal. Ct. App. 2010).¹³¹ The *Porter* court found that mediation confidentiality applied without exception, noting the California Supreme Court has repeatedly ruled that mediation confidentiality is clear and absolute and no judicial exceptions exist.¹³² Further, the decision noted that the doctrines of estoppel, judicial estoppel and implied waiver are not exceptions to mediation confidentiality.¹³³

Applying confidentiality to the entire MMC process would promote candor between employers and unions at the bargaining table. Agricultural labor relations have been filled with distrust on both sides. Making

¹²³ *Id.*

¹²⁴ *Cassel*, 244 P.3d at 1088.

¹²⁵ *Id.* at 1095.

¹²⁶ *Id.* at 1086.

¹²⁷ *Id.* at 1085.

¹²⁸ *Id.* at 1097.

¹²⁹ *Id.* at 1083.

¹³⁰ *Id.* at 1085.

¹³¹ *Porter v. Wyner*, 107 Cal.Rptr.3d 653 (Cal. Ct. App. 2010).

¹³² *Id.* at 667.

¹³³ *Id.* at 664-665.

the MMC process confidential would help insulate negotiations and make for a more effective collective bargaining process. *Cassel* noted that without the promise of confidentiality, parties may not feel inclined to admit facts that would be adverse to their positions if the mediation failed and litigation ensued.¹³⁴

The first and only time that the ALRB faced the issue of confidentiality in a MMC case was *Hess Collection Winery v. United Food and Commercial Workers Union*, 29 ALRB No. 6 (2003) (McKay, Arb.). The ALRB found that “the employer’s argument that the mandatory mediation and conciliation law violates sections 1119 and 1121 of the California Code of Evidence was without merit and provided no basis for the Board to grant the Employer’s petition for review.”¹³⁵ The basis of the ALRB’s decision was grounded in the Board’s understanding that these Evidence Code sections pertain solely to confidentiality in the mediation process.¹³⁶ The ALRB went on to declare that Sections 1164 thru 1164.14 of the California Labor Code created “a hybrid mediation/arbitration process and the portion of the process that is akin to arbitration is not governed by these evidence code sections.”¹³⁷ The ALRA limits the applicability of the confidentiality statutes to the MMC and specifies that “all communications taking place off the record shall be subject to the limitations on admissibility . . . and shall not be the basis for any findings and conclusions in the mediator’s report.”¹³⁸

The MMC’s confidentiality limitation is in direct conflict with Section 1119 of the California Evidence Code and *Cassel* and its progeny.¹³⁹ In any MMC session the entire subject matter is the collective bargaining agreement and the parties are likely to discuss a number of recurring issues that occur in labor disputes.¹⁴⁰ In order to properly negotiate and prepare for the MMC, the parties will have to review a large number of documents, proposed collective bargaining terms, previous settlement offers, and previous failed negotiations.¹⁴¹ All of these “communica-

¹³⁴ *Cassel*, 244 P.3d at 1086.

¹³⁵ *Hess Collect. Winery v. United Food and Commere’l Workers Union*, 29 ALRB No. 6, 7 (2003) (McKay, Arb.).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 8.

¹³⁹ See generally *Foxgate Homeowners’ Ass’n, Inc. v. Bramalea Cal., Inc.*, 25 P.3d 1117 (Cal. 2001); *Rojas v. Sur. Ct. of L.A. Cnty.*, 93 P.3d 260 (Cal. 2004); *Cassel v. Sur. Ct. of L.A. Cnty.*, 244 P.3d 1080 (Cal. 2011).

¹⁴⁰ CAL. LAB. CODE § 1164(e)(3)(4) (Deering 2004). Because of the similarity of issues in labor disputes, the mediator can look and other collective bargaining agreements, corresponding wages, benefits and terms and conditions.

¹⁴¹ CAL. LAB. CODE § 1164(e)(3)(4) (Deering 2004).

tions, negotiations, or settlement discussions by and between participants” as referenced in the Evidence Code are in the course of the mediation and are covered by the mediations confidentiality statutes.¹⁴² From a macro perspective, the entire purpose of the MMC is to negotiate collective bargaining terms and everything contained in this process is covered by the confidentiality statutes, particularly the thirty-day mediation window.¹⁴³ From a micro perspective, communication and discussions during the off the record or carved out process must include important and consequential information during the negotiation for any meaningful discussion to occur. Accordingly, the off the record communication will have to be relied on for a mediator to be able to make a competent report. Lastly, the MMC requires that the parties identify what issues are in dispute, and identify contract language for those issues not in dispute within seven days of initiating the mediation.¹⁴⁴ Because the mediation and arbitration are mixed, all of these filings are in preparation and utilized for both processes, which is in violation of *Cassel* and section 1119 of the California Evidence Code.¹⁴⁵

In *Hess*, the ALRB crafted an exception to the mediation confidentiality statutes when it limited the broad scope of confidentiality to only apply to the portion of the MMC akin to arbitration, contravening *Cassel* and *Porter*.¹⁴⁶ Further, the Evidence Code’s confidentiality provision “extends beyond utterances or writings in the course of a mediation and, thus, is not confined to communications that occur between mediation disputants during the mediation proceeding itself.”¹⁴⁷ So, the ALRB cannot contain mediation confidentiality’s applicability to a finite portion of the MMC. Rather, confidentiality applies in and outside of the mediation as long as the communication was used in the course off the mediation. Lastly, the MMC partially waives the mediation confidentiality statutes, which *Porter* says can only be waived expressly by the agreement of the union and employer.¹⁴⁸

In order for a mediation to be effective, unions and employers may need to reveal unfavorable information if it is relevant to resolving the

¹⁴² CAL. EVID. CODE § 1119 (Deering 2004).

¹⁴³ See generally *Cassel*, 244 P.3d 1080.

¹⁴⁴ CAL. LAB. CODE § 1164(a)(1), (b), (d) (Deering 2004).

¹⁴⁵ See discussion *supra* Part IV.A.

¹⁴⁶ *Id.*

¹⁴⁷ *Cassel*, 244 P.3d at 1084.

¹⁴⁸ See *Porter v. Wyner*, 107 Cal.Rptr.3d 653, 655 (Cal. Ct. App. 2010).

dispute.¹⁴⁹ “Without clearly defined limits on how information obtained during mediation can be used against them in the future, parties will not be forthcoming with relevant information, and the mediation process will break down.”¹⁵⁰ Confidentiality is the gateway to a successful mediation and must be a principle that encapsulates the entire mediation atmosphere. Once the parties are in the midst of a mediation session they must have the right of voluntariness and the power of self-determination to effectively engage in the collective bargaining process and reach a mutually acceptable agreement.

B. Voluntariness and Self-Determination Empowers Parties and Strengthens Relations

Voluntariness and self-determination are principles that act in tandem to allow parties the ability to make a conscious choice, exercise free will within the mediation process.¹⁵¹ Section 1115(a) of the California Evidence Code and the California Rules of Court codifies these principles and define mediation as “a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.”¹⁵² The California Rules of Court advisory committee comment emphasized that,

voluntary participation and self-determination are fundamental principles of mediation that apply both to mediations in which the parties voluntarily elect to mediate and to those in which the parties are required to go to mediation in a mandatory court mediation program or by court order. Although the court may order participants to attend mediation, a mediator may not mandate the extent of their participation in the mediation process or coerce any party to settle the case.¹⁵³

California courts have also recognized the importance of voluntariness and self-determination and found that mediation cannot function without it. In *Travelers Casualty and Surety Company v. Superior Court*, 24 Cal.Rptr.3d 751 (Cal.Ct.App. 2005) the court overturned a settlement agreement between the Roman Catholic Diocese of Orange and the alleged victims of child sexual abuse where the insurance company, Trav-

¹⁴⁹ See Laura A. Stoll, “We Decline to Address”: Resolving the Unanswered Questions Left By *Rojas v. Superior Court To Encourage Mediation And Prevent The Improper Shielding Of Evidence*, 53 UCLA L. REV. 1549.

¹⁵⁰ *Id.* at 1554.

¹⁵¹ *Id.*

¹⁵² CAL. EVID. CODE 1115(a) (Deering 2004); UNIF. MEDIATION ACT, § (2)(1) (2003); CAL. R. CT. 3.852(1) (2007).

¹⁵³ CAL. R. CT. 3.853 (2007) Advisory Committee Comment.

elers, was bound to pay.¹⁵⁴ The *Travelers* court found that the mediator made findings, evaluations, and pressed the parties into a settlement, which amounted to coercion.¹⁵⁵ The Court of Appeal held voluntariness and self-determination trump even the public policy favoring settlements and that mediator must always conduct a mediation proceeding in a way that is aligned with these principles.¹⁵⁶ The court held that self-determination includes the ultimate display of voluntariness – the ability to walk out of the mediation at any time.¹⁵⁷ The court limited how a mediator can engage with parties and defined the mediator's sole function as neutral person who facilitates communication between the parties and helps the parties reach a mutually acceptable agreement.¹⁵⁸ The *Travelers* court expressly prohibited a mediator from being an evaluator so they he or she not infringe on the parties' self-determination.¹⁵⁹

The Ninth Circuit Court of Appeals fully backed the benefits of voluntary mediation within the context of labor relations and collective bargaining.¹⁶⁰ In *National Labor Relations Board v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980), the court ruled that the NLRB can revoke the subpoena of a Federal Mediation & Conciliation Service ("FMCS") mediator capable of providing information crucial to resolution of factual dispute solely for purpose of preserving the mediator's effectiveness.¹⁶¹ The policy of stabilizing industrial relations between employers and employees and allowing for a voluntary mediation to keep this peace is clear.¹⁶² The court further held "since Congress made this declaration,

¹⁵⁴ *Travelers Cas. & Sur. Co. v. The Sur. Ct. of L.A. Cnty.*, 24 Cal.Rptr.3d 751, 754 (Cal. Ct. App. 2005).

¹⁵⁵ *See Id.*

¹⁵⁶ *Id.* at 758.

¹⁵⁷ *Id.* The court opined that a mediator could violate these principles by providing an opinion or evaluation, or "coercing any party to join or continue participating in a mediation proceeding."

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 55 (9th Cir. 1980).

¹⁶¹ *Id.*

¹⁶² *Id.* at 54-55.

This public interest was clearly stated by Congress when it created the FMCS: It is the policy of the United States that (a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees; (b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their em-

federal mediation has become a substantial contributor to industrial peace in the United States. Any activity that would significantly decrease the effectiveness of this mediation service could threaten the industrial stability of the nation.”¹⁶³

In an MMC case, employers and unions should have the right of voluntariness, as *Travelers* and the California Evidence Code mandate,¹⁶⁴ which will bring parties to the table who want to be there to reach an agreement. The MMC merges mediation and arbitration at the cost of voluntariness and self-determination in violation of section 1115 of the California Evidence Code, California Rules of Court, and *Travelers*. Farm owners and unions are unable to voluntarily leave the mediation because they are coerced to stay or be bound by the terms the mediator orders.¹⁶⁵ Farm owners and unions do not have power of self-determination, because if they do not agree to all terms, the MMC authorizes the mediator to impose a determination on them.¹⁶⁶ This exact concern occurred in *Hess* when the employer did not appear in the mediation.¹⁶⁷ The mediator’s report was solely based on the union’s filings and the collective bargaining agreement was formed without the employer’s input.¹⁶⁸ In the MMC’s framework even if both parties participate, a union or grower can feel pressured to accept a collective bargaining term in fear that the mediator may impose a term on them, which greatly inhibits the parties’ freedom to bargain and negotiate.¹⁶⁹ Access to early and prompt mediation can circumvent this process of intensifying the dispute and lead to a path more likely to result in resolution.¹⁷⁰

ployees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes . . . 29 U.S.C. s 171(a)(b).

¹⁶³ *Id.* at 55.

¹⁶⁴ See discussion *supra* Part IV.B.

¹⁶⁵ See CAL. LAB. CODE § 1164(c) (Deering 2004).

¹⁶⁶ See *id.* § 1160(c), (d).

¹⁶⁷ *Hess Collect. Winery v. United Food and Commerce'l Workers Union*, 29 ALRB No. 6 (2003) (McKay, Arb.).

¹⁶⁸ See *id.*

¹⁶⁹ Fullerton, *supra* note 83, at 56.

¹⁷⁰ See generally Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831-864 (1998).

C. Promptness Helps Resolve Disputes, Delays Help Dissolve Resolutions

Promptness is a key policy consideration that should be on the front end of a dispute to help avoid deadlock, resolve conflict amicably, and stimulate an economic incentive to settle disputes early.¹⁷¹ On the other hand, delaying mediation and not addressing the parties' interests can cause the parties to entangle themselves into their positions making resolution more improbable.¹⁷² Promptness is a simple and practical principle that even Chief Justice Warren Burger noted when speaking to the American Bar Association: "[t]he notion that ordinary people want black-robed judges, well-dressed lawyers and fine-paneled courtrooms as the setting to resolve their disputes isn't correct. People with problems, like people with pains, want relief and they want it as quickly and inexpensively as possible."¹⁷³ The California legislature codified the benefit of early resolution in section 1775 (d) of the Code of Civil Procedure:

Mediation and similar alternative processes can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred. Where appropriate, participants in disputes should be encouraged to utilize mediation and other alternatives to trial for resolving their differences in the early stages of a civil action.¹⁷⁴

The Ninth Circuit also recognized the importance of earlier settlement through mediation in the collective bargaining context and how it benefits labor relations as a whole.¹⁷⁵ The *Macaluso* court noted that the early mediation of disputes helps to prevent obstructing the flow of commerce, encourages friendly adjustments of industrial disputes, and removes sources of industrial strife and unrest.¹⁷⁶

In the MMC, the parties are sandwiched between a 180-day delay of disagreement and a thirty-day mediation window before they can file a request for mediation.¹⁷⁷ This six-month delay takes away the unions and growers ability to even entertain the benefits of early resolution that the Code of Civil Procedure promotes.¹⁷⁸ Lifting the 180-day delay would allow unions and growers to analyze other economic factors such as the

¹⁷¹ UNIF. MEDIATION ACT, Prefatory Note (2003).

¹⁷² See ROGER FISHER & WILLIAM URY, *GETTING TO YES* 20-21, 50 (Penguin Books, 3rd ed. 1981).

¹⁷³ Doug Marfice, *The Mischief of Court-Ordered Mediation*, 39 IDAHO L. REV. 57, 58 (2002).

¹⁷⁴ CAL. CODE CIV. PROC. § 1775(d) (Deering 2004).

¹⁷⁵ NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 55 (9th Cir. 1980).

¹⁷⁶ *Id.*

¹⁷⁷ See CAL. LABOR CODE § 1164(d) (Deering 2004).

¹⁷⁸ CAL. CODE CIV. PROC. § 1775(d) (Deering 2004).

cost/benefit to prosecute and defend a claim in an adversarial process versus the potential savings they could receive if they are able to resolve the dispute early. Early mediation would also allow the parties to create informed settlement options based on potential savings from not having to conduct depositions, cross-examine witnesses, perform direct examination, and draft submissions. Also, the 180-day statutory pause button prevents parties from immediately addressing the core issues of the dispute that brought them into the disagreement, which can reduce the clouding of issues as the *Macaluso* court found as benefits for collective bargaining labor disputes.¹⁷⁹ The intent of the MMC is to stabilize labor relations between employers and farm workers.¹⁸⁰ However, the MMC's delay prevents parties from using early mediation as a tool to alleviate strained relations.¹⁸¹ Early resolution is important to help resolve disputes in mediation and can help the parties build trust, especially in environments where parties have continued relations as unions and employers have in the agricultural industry.¹⁸² An unresolved dispute can create an unproductive and uncomfortable environment that effects relations and profitability.¹⁸³ The absence of the 180-day delay would allow the parties to use prompt mediation, which can minimize the restlessness and strife labor employees often experience when engaged in collective bargaining dispute that the *Macaluso* court highlighted.¹⁸⁴

Historically, the California legislature found that intentional delays occurred in the collective bargaining process.¹⁸⁵ Delay and the inability to reach an agreement were the principal reasons the MMC was created.¹⁸⁶ Employers can monetarily gain from delaying negotiations or new collective bargaining agreements.¹⁸⁷ Early mediation and resolution can shift the employer's unilateral economic benefit for delaying agreement to the parties' mutual benefit to settle their differences. Employers can save money for the costs associated with an adversarial process such as discovery, arbitration, and litigation that can cost more than the proposed terms in dispute.¹⁸⁸ Unions have the benefit of having the terms of the

¹⁷⁹ See *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 56 (9th Cir. 1980).

¹⁸⁰ See CAL. LAB. CODE § 1164 (West, Westlaw through end of 2001-02 Reg. Sess. and 1st through 3rd Ex. Sess. and Nov. 5, 2002 election).

¹⁸¹ CAL. LAB. CODE § 1164(a) (Deering 2004).

¹⁸² See FISHER & URY, *supra* note 172 at 19.

¹⁸³ *Id.*

¹⁸⁴ See *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 55 (9th Cir. 1980).

¹⁸⁵ CAL. LAB. CODE § 1164 (LEXIS through 2002 legislation).

¹⁸⁶ *Id.*

¹⁸⁷ See *William Dal Porto & Sons, Inc. v. ALRB* Cal.Rptr. 206, 209 (Cal. Ct. App. 1985).

¹⁸⁸ CAL. CODE CIV. PROC. § 1775(c), (d) (Deering 2004).

agreement implemented and agreed to earlier, which could result in additional pay or an immediate improvement to a sub par working condition. Both unions and employers are stakeholders in the success and profitability of the agriculture industry each with their own economic motivations. If motivated to resolve a dispute, mediation can serve as a bridge to help parties communicate, improve relations, and realize individual economic benefits. Unfortunately, the MMC erects a 180-day wall that blocks early resolution, serves as a barrier to improving relations, and renders the MMC's promise empty.

V. FULFILLING THE PROMISE, FIXING THE PROCESS

A. *Constructing an Effective Mediation Procedure with Integrity*

To fulfill the legislature's promise to stabilize labor relations and make a more effective collective bargaining process through a mediation procedure, the MMC must embrace the tenets that make mediation an effective dispute resolution tool. The entire MMC process must be protected with confidentiality so unions and farm owners are free to make concessions and admissions without fear they will be used against them in an adversarial process. Also, the mediator should not serve as the arbitrator, and voluntariness and self-determination must be honored so parties can freely bargain and create their own resolutions that bind them to their word. Lastly, the 180-day waiting period must be lifted to allow parties access to early and prompt mediation, so they can realize the economic motivations of reaching an agreement quickly.

Even with true mediation in place, the reality is it will not always result in a successful agreement. For that reason, mediation must be the beginning, not the end. To answer the high call of the California legislature and help make a more effective collective bargaining process,¹⁸⁹ a complete alternative dispute resolution ("ADR") process is needed. The ADR process must take into account the history between the parties, their continued relations, their mutual benefit in the success of the agricultural industry, the parties' need for a neutral third-party to facilitate a voluntary agreement, and their need for an impartial arbitrator to make a final decision when they are unable to agree. The process must be grounded in ethics and guided by fairness and the California Rules of Court should apply to the mediation. Consequently, the mediator must adhere to the Model Mediator Standards and the arbitrator must abide by the Arbitrator

¹⁸⁹ See discussion *supra* Part III.A.

Code.¹⁹⁰ The intertwining of mediation and arbitration must be unraveled where they should be available in two separate self-contained processes with a separate mediator and separate arbitrator. This will allow mediation and arbitration to work together as opposed to against each other. As a result, the benefits of both mediation and arbitration can be realized, which will also allow additional options such as using the mediation to narrow the issues so the arbitration can be efficient and more cost effective. Additionally, the process itself must be flexible and adjustments made if the parties agree to modify the process. Lastly, if the parties are unable to agree on a modification there must be default settings that trigger the next step to final resolution.

B. A Two-Tier ADR Process to Resolve Disputes and Maintain Relations

In a two-tier process, the parties can first put all their efforts in resolving the dispute in the mediation. Resolving the dispute in mediation takes account the parties' history, the interdependence of the relationship, future relations and allows them to freely bargain.¹⁹¹ If the parties reach an impasse, then they can then prepare for the adversarial process.

1. Zero Day Wait Period to Access Mediation – Party Agreement

With mutual agreement, the parties should have a zero day waiting period to request mediation and access the MMC. This will allow parties to a dispute, who are looking to resolve the dispute quickly, to utilize the MMC to help facilitate an agreement. The mediator must be bound by the Mediator Model Standards¹⁹² and the mediation must follow the California Rules of Court.¹⁹³

2. Thirty Day Wait Period to Access Mediation – One Party Initiates

After thirty calendar days, unions or growers should be able to file a request for mediation. The ALRB should initiate their case and give the parties seven calendar days to select a mediator from a list of five provided by the AAA, FCMS, or CSMCS. In the event the parties are able to agree on a mediator, that mediator will serve on the case. The parties are to notify the AAA, FCMS, or CSMCS of their agreement on or be-

¹⁹⁰ See discussion *supra* Part III.C.

¹⁹¹ See E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, *MEDIATION AND NEGOTIATION REACHING AGREEMENT IN LAW AND BUSINESS* 276-278 (Anderson Publishing Co., 1998).

¹⁹² See generally *MODELS AND STANDARDS OF CONDUCT FOR MEDIATORS* (2005).

¹⁹³ See generally CAL. R. CT. 3.852-3.854, 3.857 (2007).

fore the date the mediator rankings are due. If the parties are unable to agree, they are to each use a maximum of two strikes and rank the remaining in order of preference. Based on the parties' rankings, the most mutually agreeable mediator is invited to serve. If a party does not file a ranking, all names will be deemed acceptable and a mediator will be appointed.

Upon confirmation of the mediator's appointment, the mediator should require the parties to file pre-mediation briefs within seven calendar days of the parties being notified of the mediator's appointment confirmation. The mediation should occur no later than fourteen calendar days from the confirmation of the mediator's appointment. By party agreement, the parties are free to extend any deadline for as long or as short as they wish.

The mediator must be bound by the Mediator Model Standards¹⁹⁴ and the mediation must be governed by the California Rules of Court.¹⁹⁵ Any party must be able to voluntarily exit the mediation. The exiting party must file a notice of withdrawal in writing with the mediator and provide notice to all the parties in the mediation. Once this occurs or if the mediator declares an impasse in writing, the arbitration phase commences.

3. Mediation Impasse – Decision by an Impartial Arbitrator

The party who files the mediation is responsible for sending the letter of withdrawal or the mediator's letter declaring impasse within five days to the AAA, FCMS, or CSMCS. Once received, the AAA, FCMS, or CSMCS initiates the arbitration and provides the parties simultaneously with a list of five arbitrators (none of which can be the person who mediated the prior case). In the event the parties are able to agree on an arbitrator, the parties are to notify the AAA, FCMS, or CSMCS of the agreed upon arbitrator on or before the deadline for the rankings. If the parties are unable to agree, they are to each use a maximum of two strikes and rank the remaining in order of preference. Based on the parties' rankings, the most mutually agreeable arbitrator is invited to serve. If a party does not file a ranking, all names will be deemed acceptable and an arbitrator will be appointed.

Upon confirmation of the arbitrator's appointment (after disclosure process) that arbitrator must conduct a brief telephonic preliminary hearing within seven days of the confirmation. At the preliminary hearing, the arbitrator will set the deadlines of the arbitration and send it to the

¹⁹⁴ See generally MODELS AND STANDARDS OF CONDUCT FOR MEDIATORS (2005).

¹⁹⁵ See generally CAL. R. CT. 3.852-3.854, 3.857 (2007).

parties in writing no later than three calendar days from the preliminary hearing. The arbitrator will include the dates of filings for the documents specified in section 1160 (d) of the California Labor Code.¹⁹⁶

The arbitration hearing shall take place within forty-five calendar days of the arbitrator's confirmation of appointment. Within forty-eight hours of the hearing, the arbitrator will determine if written post briefs are necessary. Initial briefs will be due seven calendar days after the hearing date. Responses to the briefs are due seven calendar days after the initial briefs. If the arbitrator finds that no post hearing briefs are needed, the arbitrator will declare the hearings closed and have ten calendar days from the date the hearings are declared closed to render a decision. If post hearing briefs are requested, then the arbitrator shall declare the hearings closed on the due date of the response brief and have ten calendar days from that date to render a decision. The parties can file a request for the ALRB to review the decision pursuant to section 1164.3(a) of the California Labor Code.¹⁹⁷

VI. CONCLUSION

The MMC is a broken political promise and inept mediation/arbitration hybrid process that does not meet its legislative intent.¹⁹⁸ Initially, it appears to be a simple and efficient vehicle of resolution. However, once you examine its inner workings, the complexity of the ethical conundrum and its ineffectiveness as a dispute resolution mechanism become apparent. As crafted, the MMC violates the ethical mandates of the California Rules of Court, American Bar Association, Model Standards for Mediators, and the Arbitrator Code.¹⁹⁹ It contains none of the important policy considerations and benefits that the Uniform Mediation Act, and the California Labor Code, Evidence Code, and Code of Civil Procedure have codified.²⁰⁰ Lastly, the MMC does not honor the holdings in three California Supreme Court cases respecting mediation's most fundamental precepts.²⁰¹

¹⁹⁶ See CAL. LAB. CODE § 1164(d) (Deering 2004).

¹⁹⁷ CAL. LAB. CODE § 1164.3(a) (Deering 2004).

¹⁹⁸ See discussion *supra* Parts III.A-C.

¹⁹⁹ See CAL. R. CT. 3.852-3.854, 3.857 (2007); CODE OF PROF. RESP. FOR ARBS OF LAB. MGMT. DISPUTES (2007); MODELS AND STANDARDS OF CONDUCT FOR MEDIATORS (2005).

²⁰⁰ See CAL. LAB. CODE § 1160 (Deering 2004); CAL. EVID. CODE 1115(a) (Deering 2004); CAL. CODE CIV. PROC. § 1775(d) (Deering 2004). UNIF. MEDIATION ACT, § (2)(1) (2003).

²⁰¹ See *Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc.*, 25 P.3d 1117 (Cal. 2001); *Rojas v. Sur. Ct. of L.A. Cnty.*, 93 P.3d 260 (Cal. 2004); *Cassel v. Sur. Ct. of L.A. Cnty.*, 244 P.3d 1080 (Cal. 2011).

Through the NLRA, the nation's labor force has the option to use mediation and arbitration in its pure forms to assist in the collective bargaining process. Their arbitrators and are bound by ethical standards and mediators may not impose a decision on the parties.²⁰² Their labor mediation process is protected by confidentiality, against coercion, and is guided by self-determination, which has resulted in eighty five percent of their mediations ending in agreement.²⁰³ California's agricultural workers and employers should have the same options and ability to determine their own destiny. The MMC must be repaired from a static procedure that represents an unfulfilled political promise to a dynamic process that effectuates change in the industry and agreements between the parties.

JESSE MOLINA

²⁰² See CODE OF PROF. RESP. FOR ARBS OF LAB. MGMT. DISPUTES (2007); 29 U.S.C. § 171(b) (1947); FEDERAL MEDIATION & CONCILIATION SERVICE <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=141&itemID=15911> (last visited April 9, 2012).

²⁰³ See § 171(b) (1947); FEDERAL MEDIATION & CONCILIATION SERVICE <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=141&itemID=15911> (last visited April 9, 2012).