

# SAN JOAQUIN AGRICULTURAL LAW REVIEW

---

VOLUME 25

2015-2016

NUMBER 1

---

## THE MANDATORY MEDIATION AND CONCILIATION ACT: A PARTISAN REMEDY DISGUISED AS A RESOURCE FOR NEUTRAL DISPUTE RESOLUTION

### I. INTRODUCTION

One of the most recognized figures of the ancient world, found within the pages of a book read by more people than any other, is a man known simply as Moses.<sup>1</sup> Many recall the marvelous stories of his parting of the Red Sea while leading the Israelites out of Egyptian bondage, his receiving of the Ten Commandments, the burning bush, or the story of the brazen serpent.<sup>2</sup> He performed many roles on behalf of the ancient people of Israel. Among those included prophet, law giver, and navigator. However, many people overlook entirely his invaluable role as a mediator. In fact, it was his actions as a mediator that saved his people from imminent destruction by the Lord.<sup>3</sup>

In the ninth chapter of Deuteronomy, the Bible describes the dismay the Lord conveyed towards the Israelites.<sup>4</sup> It elaborates on the sins of the people and their continual lack of obedience.<sup>5</sup> Such disdainful conduct nearly caused the Lord to destroy the people had it not been for Moses.<sup>6</sup> Verses 25 through 26 read as follows;

---

<sup>1</sup> See Jennifer Polland, *The 10 Most Read Books In The World*, BUSINESS INSIDER (Dec. 27, 2012, 11:17 AM); see also *Exodus* 2:10.

<sup>2</sup> See *Exodus* 14:21; see also *Exodus* 20:3-17; see also *Numbers* 21:9.

<sup>3</sup> See generally *Deuteronomy* 9.

<sup>4</sup> *Deuteronomy* 9:6-16.

<sup>5</sup> *Id.*

<sup>6</sup> *Deuteronomy* 9:25.

Thus I [Moses] fell down before the Lord forty days and forty nights, as I fell down at the first; because the Lord had said he would destroy you.

I prayed therefore unto the Lord, and said, O Lord God, destroy not thy people and thine inheritance, which thou hast redeemed through thy greatness, which thou hast brought forth out of Egypt with a mighty hand.<sup>7</sup>

After such lengthy and heartfelt pleadings, and what could certainly be considered a compromise between Moses and the Lord, Moses concluded: “. . . the Lord hearkened unto me at that time also, and the Lord would not destroy thee.”<sup>8</sup>

It can be confidently stated that throughout human existence there have been disputes, and a common method of resolving those disputes has been mediation practices not unlike those utilized by Moses.<sup>9</sup> Various alternative dispute resolution methods have been adopted and implemented across the legal field. In fact, it has become so widespread and successful that many pieces of legislation requiring alternative dispute resolution have been passed by the United States Congress and many states, including California.<sup>10</sup>

The Mandatory Mediation and Conciliation Act (“MMCA”) was passed by the California legislature and signed into law by Governor Gray Davis in 2002 as an effort to assist the negotiations of collective bargaining agreements between farmers and farmworker labor unions.<sup>11</sup> Its language lends one to believe that it was intended to be an effective and positive resource for both the farmer and laborer.<sup>12</sup> However, many of its requisites appear to neglect the most basic and essential characteristics of mediation.

This Article will address how the MMCA undermines the effectiveness and true purpose of the dispute resolution method of mediation, and provide a recommendation on how it should be amended to ensure a more amicable approach. Part II will provide a history of mediation, and discuss its modern practices. Specifically, it will explain the types of mediation used today and their essential characteristics. Part III will delve into the history of the MMCA and its effects on agriculture, and it will lay out the rules and functions of the act. Part IV of this Article will analyze how many of the MMCA requirements

---

<sup>7</sup> *Deuteronomy* 9:25-26.

<sup>8</sup> *Deuteronomy* 10:10.

<sup>9</sup> *See infra* Part II.

<sup>10</sup> *See* CAL. LAB. CODE § 1164.

<sup>11</sup> Thomas Casa, *Mandatory Mediation and Conciliation in California*, 15 SAN JOAQUIN AGRIC. L. REV. 117, 117 (2006).

<sup>12</sup> *See* CAL. LAB. CODE § 1164(a).

violate the foundations of mediation that ensure its success, specifically the elements of informed consent, voluntariness, collaboration, control by the parties, and self-responsibility and satisfaction. This will show that the legislature's approach to mediation is infected with partiality and treads over proven methods of mediation. Part V will make the recommendation to amend the statute by reducing governmental power and returning it to the parties, thus ensuring both sides view mediation as it was intended – an amicable, impartial approach to resolving disputes. Part VI will conclude that failure to amend the MMCA as recommended in Part V will continue to aggravate the current friction between farmer and laborer, thus prolonging the desired goal of the MMCA, which is to assist laborers in achieving collective bargaining agreements with the agriculture industry.

## II. THE HISTORY AND PRACTICE OF MEDIATION

### A. *Disputations Have Always Existed*

Controversy stemming from disagreement, followed by the lack of effective dispute resolution, has led to the downfall of dynasties and the destruction of civilizations. The Biblical Prophet Isaiah noted that “God has made my mouth like a sharp sword.”<sup>13</sup> Too often, it’s “not that which goeth into the mouth defileth a man, but that which cometh out of the mouth, this defileth a man.”<sup>14</sup> An old Yoruba saying from Nigeria states that “the tongue and teeth often come in conflict. To quarrel and get reconciled is a mark of responsibility.”<sup>15</sup>

Since the beginning of time, there have always been those who seek an unfair advantage over others and exploit advantages to dominate their counterpart. Dictators and monarchs, robber barons, and even business executives have all benefitted from a system that permits them to disregard the good of others.<sup>16</sup>

Thankfully, there have always been individuals who have placed the needs of others above their own and appealed to the higher ideals of fairness, greater good, common interests and a sense of community.

---

<sup>13</sup> *Isaiah* 49:2.

<sup>14</sup> *Matthew* 15:11.

<sup>15</sup> ISAAC O. ALBERT ET AL., *INFORMAL CHANNELS FOR CONFLICT RESOLUTION IN IBADAN NIGERIA* 9 (1995), available at <http://books.openedition.org/ifra/717>.

<sup>16</sup> JEROME T. BARRETT & JOSEPH P. BARRETT, *A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF POLITICAL, SOCIAL AND CULTURAL MOVEMENT* xiii (1st ed. 2004).

These individuals have laid aside their power and personal interests in an attempt to work out differences and seek the greater good.<sup>17</sup>

From the Kalahari Bushmen, who emphasize group harmony over discord, to the ancient Athenians, who appointed all men during their sixtieth year as arbitrators, and on to the win-win negotiators of today, there is a long history of those who have attempted to resolve disputes peacefully and to the benefit of all.<sup>18</sup>

*B. Alternative Dispute Resolution Precursors: A History of Mediation, Negotiation, and Arbitration Throughout the World*

Alternative dispute resolution is a refreshing alternative that refrains from using power, force, judicial precedent or even violence in achieving the resolution of conflict. It can be used in just about any conflict, large or small, with just about any number of disputants. It is just as effective between two individuals as it can be between two corporations or even two countries. "In its purest form, it seeks to go beyond the cloud of the present difficulties and resolve matters in a way that does not just stop the fighting but allows the participants to build a better relationship for the future."<sup>19</sup>

For centuries, rudimentary forms of conflict resolution have been utilized by nearly every nation across the globe. Mediation techniques such as rephrasing and restating have turned contentious choruses into refrains of peaceable communication. While sharp tongues and defiling statements have hastened conflict, the fundamental principles of dispute resolution have been used effectively for centuries to deescalate contentious communication.

One imaginative story from prehistoric times provides the fundamental roots to alternative dispute resolution. As the story goes, two long-haired and fur-clad men cast devious stares in the others direction. Backed by legions of club-in-hand warrior followers, the two men meet in the middle of the battlefield to determine which of the tribes will hunt near the village and which will forge the river during the icy cold winter ahead. One man crouches to the ground and picks up a stone, smooth on one side, rough on the other. He tosses the "deciding stone" into the air while both tribes wait breathlessly for it to reveal their fate.<sup>20</sup> Since the beginning of time, man has dissolved differences by imploring

---

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at xiv.

<sup>20</sup> *Id.* at 1.

all manner of dispute resolution techniques; some have been as easy as flipping a coin while others necessitate more progressive practices.

In order to gain insight and understanding to our current Alternative Dispute Resolution system, we must first look to its roots. Experts on dispute resolution such as William Ury and others have written numerous times about an indigenous people known as the Bushmen of Kalahari. These hunter-gatherers have established a rather urbane approach to settling disputes that altogether avoids violence and promotes peace.

The Bushmen have their fair share of disputes but are quick to find someone who can facilitate resolution and reinstate amity. When two individuals are feuding, they swiftly introduce others to the conflict in hopes that these neutral parties will assist the disputants in reaching a resolution. If required, the small-scale intervention then goes tribal and becomes a matter in which everyone will participate. Ury finds that when serious problems arise, everyone in the tribe sits down and they talk. Each person is provided a chance to speak, and the talks may last for two or three days. It will continue until the dispute is talked out.<sup>21</sup>

For hundreds of years the Polynesian culture has developed a distinctive yet effective family-oriented approach to resolving conflict. When clashes arise, the disputants meet in council with an esteemed leader or family member who in turn conducts the informal session and acts as a mediator. The leader opens the discussion with prayer, and in order to avoid direct conflict or harsh feelings, requires the parties address the leader directly rather than each other. The well-respected leader does his or her best to bring the parties together through sound reasoning and by using his or her perceived cultural or religious authority.<sup>22</sup>

Countries such as China have a well-established dispute resolution history founded in Confucian ethics dating back centuries. Confucius instructed that the natural harmony of things should not be disrupted and that litigious or antagonistic measures were at odds with the expected

---

<sup>21</sup> See Conflict Research Consortium Staff, *Conflict Research Consortium ARTICLE SUMMARY: "Conflict Resolution among the Bushmen: Lessons in Dispute Systems Design"* by William Ury, OPTIC, <http://www.colorado.edu/conflict/peace/example/ury7503.htm>. (last visited Apr. 5, 2016).

<sup>22</sup> See generally William Bloom, *Ho'oponopono – Clarifying the Forgiveness Prayer*, WILLIAM BLOOM (Jul. 2, 2014), <http://www.williambloom.com/blog/hooponopono---clarifying-the-forgiveness-prayer-193.htm>.

harmony that should exist. The value Chinese society has placed on reconciliation and mediation is so high that for nearly 2,000 years every government administration has appointed a mediation post to resolve interagency conflict.<sup>23</sup> One author wrote, “Chinese mediation aims not only to respond to a conflict when it breaks out, but also to prevent it from happening. It is total quality management of conflict . . . [It] is a continuous process of being vigilant against any potential threats to harmony, even after the harmony has been built.”<sup>24</sup>

The Greek roots of dispute resolution are evident in the “Judgment of Paris.” The tale commences at the wedding of Peleus and Thetis.<sup>25</sup> All of the gods were invited to the wedding except Eris, goddess of discord.<sup>26</sup> When she came to the wedding festival, she was refused admittance.<sup>27</sup> In her wrath she tossed a golden apple amongst the goddesses which contained the inscription “To the Fairest.”<sup>28</sup> Goddesses Aphrodite, Hera, and Athena all took hold of the apple, declaring they were “the fairest.”<sup>29</sup> The god Zeus was requested to mediate the dispute and determine whom of the three was truly the fairest.<sup>30</sup> Zeus delegated his role as mediator to the shepherd prince Paris of Troy.<sup>31</sup> Each of the goddesses offered Paris gifts in an attempt to be the one selected.<sup>32</sup> Paris was persuaded to select Aphrodite based on her promise to accord him Helene for his wife.<sup>33</sup> Helene was soon abducted leading to the Trojan War and the fall of the city.<sup>34</sup>

Mediation has been used as a method of dispute resolution in a variety of different cultures across the globe for thousands of years. Romans

---

<sup>23</sup> Linda Mealey-Lohmann, *Using Mediation to Resolve Disputes – Differences Between China and the United States*, CHINAINSIGHT (May 28, 2010, 1:00 PM), <http://www.chinainsight.info/culture/chinese/526-using-mediation-to-resolve-%20disputes--differences-%20%20%20%20%20%20%20%20%20between-china-and-the-united-states-.html>.

<sup>24</sup> WENSHAN JIA, CHINESE CONFLICT MANAGEMENT AND RESOLUTION 289 (Guo-Ming Chen et al. eds., 1st ed. 2002).

<sup>25</sup> Aaron J. Atsma, *Judgement of Paris*, THEOI GREEK MYTHOLOGY, <http://www.theoi.com/Olympios/JudgementParis.html> (last visited Apr. 4, 2016).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

affectionately referred to their mediators by various names such as internuncios, me-dium, intercessor, philanthropus, interpolator, conciliator, interlocutor, and interpres.<sup>35</sup> These practices, as imagined, have continued to evolve and be refined over the centuries. In fact, there are various styles of mediation today which often lead parties to wonder if what they're participating in is in fact mediation.<sup>36</sup>

### *C. Modern Mediation Practices*

During a period of about twenty years, between 1960 and 1980, mediation was largely conducted in what is known as Facilitative Mediation.<sup>37</sup> In this type of mediation the mediator “. . . structures a process to assist the parties in reaching a mutually agreeable resolution.”<sup>38</sup> However, the mediator will never provide recommendations, opinions, or predictions on what a court may decide in that particular case.<sup>39</sup> This method may best be explained as “[t]he mediator is in charge of the process, while the parties are in charge of the outcome.”<sup>40</sup> This type of mediation is often used in family and contract disputes.

Another modern method of mediation is known as Evaluative Mediation, where the mediator assists the parties in resolving their dispute by identifying weaknesses of each of the party's case.<sup>41</sup> This approach was born out of court-mandated mediation.<sup>42</sup> The mediator will also provide his or her opinion as to what the judge or jury would likely rule in this case.<sup>43</sup> This type of mediation is often used in personal injury cases where the mediator will meet with the parties and their attorney in separate rooms.<sup>44</sup> This is often called “shuttle diplomacy.”<sup>45</sup> The mediator's purpose is largely to assist the parties in “. . . evaluating

---

<sup>35</sup> Tim Dingle, *Mediation*, THE L SET, <http://www.thelset.com/courses-2/> (last visited Apr. 5, 2016).

<sup>36</sup> See Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, MEDIATE.COM, <http://www.mediate.com/articles/zumeta.cfm> (last visited Feb. 29, 2016).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

their legal position and the costs vs. the benefits of pursuing a legal resolution rather than settling in mediation.”<sup>46</sup>

Transformative Mediation is a third approach that is still in its infancy.<sup>47</sup> It, like Facilitative Mediation, attempts to empower the parties in resolving their own disputes.<sup>48</sup> However, it goes one step further in allowing the parties to not only come to their own outcome, but to also structure the process while the mediator “. . . follows their lead.”<sup>49</sup>

It’s important to note that among these three variations of mediation, one thing remains the same: the power to settle rests solely upon the parties. Mr. Jim Melamed, CEO of Mediate.com and nationally recognized mediator, in his article entitled *What is Mediation?* identifies eight essential elements of mediation.<sup>50</sup> He labels these elements as the “key qualities of the mediation process,” which are necessary regardless of the method used.<sup>51</sup> Without these qualities the tool of mediation loses its effectiveness, and, for all intents and purposes, ceases to be mediation.<sup>52</sup>

First among these qualities is informed consent by both parties.<sup>53</sup> Melamed stated that this is central to mediation, and that as long as both parties consent to participate “. . . virtually any mediation process is possible and appropriate.”<sup>54</sup>

Second, mediation must be voluntary.<sup>55</sup> This allows for any party, at any time, for any reason, or for no reason at all, to leave and end the mediation process.<sup>56</sup>

Third, mediation must be collaborative.<sup>57</sup> Melamed argues that because within the mediation process no party can impose anything on the other party, everyone is committed to working together to come to an agreement.<sup>58</sup>

---

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See Jim Melamed, *What is Mediation?*, MEDIATE.COM, <http://www.mediate.com/articles/what.cfm> (last visited Feb. 29, 2016).

<sup>51</sup> *Id.*

<sup>52</sup> See *id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

Fourth, mediation must be controlled by the parties.<sup>59</sup> It is contended that each participant must have “complete decision-making power.”<sup>60</sup> This includes the power to veto any and every provision in a mediation agreement.<sup>61</sup> A participant cannot be forced to do or agree to anything.<sup>62</sup>

Fifth, mediation must be confidential.<sup>63</sup> This is often ensured by statute, contract, or rules of evidence.<sup>64</sup> This ensures that the participants will be open during negotiations to increase the likelihood of settlement.

Sixth, the participants of the mediation must be informed.<sup>65</sup> As explained by Melamed, this is different than the first element, informed consent. The idea of mediations being informed is that the parties are entitled to have counsel present during mediation.<sup>66</sup> They’re permitted to have access to and rely upon expert advice; however, they cannot be obligated to do so.<sup>67</sup>

Seventh, it is necessary for the mediation to be impartial, neutral, balanced, and safe.<sup>68</sup> Melamed explains this as requiring the mediators to be equal and balanced in assisting the participants.<sup>69</sup> The mediator should never favor one party over the other, and is “. . . ethically obligated to acknowledge any substantive bias on issues in discussion.”<sup>70</sup> The mediator’s sole role is to ensure agreements are reached voluntarily.<sup>71</sup>

Finally, mediation must be self-responsible and satisfying.<sup>72</sup> This is the idea that because the parties have volitionally participated in resolving their own dispute each party will experience the feeling of satisfaction with the outcome.<sup>73</sup> It seems this element is often overlooked or forgotten during the drafting of mediation statutes by partisan legislators.

---

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

## III. MANDATORY MEDIATION AND CONCILIATION ACT

A. *Rocky Start*

The Mandatory Mediation and Conciliation Act (“MMCA”) was originally conceived by State Senator John Burton as Senate Bill 1736 which required binding arbitration, rather than mediation, where there was a refusal to negotiate or where negotiations halted to an impasse.<sup>74</sup> However, despite the bill being passed by both the California Senate and Assembly in 2002, Governor Gray Davis refused to sign it into law due to his impending election and the friction it was causing between farm labor unions and the agriculture industry.<sup>75</sup> Negotiations continued until alternative bills, Senate Bill 1156 and Assembly Bill 2596, were signed into law by the Governor in late 2002, thus enacting the MMCA.<sup>76</sup>

The enactment of the MMCA was the legislature’s “. . . attempt at providing the California farm worker with the ability to organize in labor unions and achieve collective bargaining agreements with the agricultural industry.”<sup>77</sup>

Since its inception, the MMCA has been a topic of debate, and following its enactment it has been the subject of multiple law suits contesting its constitutionality. The first law suit came shortly following its enactment and was brought by the farm industry through the Western Growers and the California Farm Bureau.<sup>78</sup> It was argued that the MMCA permitted the government to dictate the contract terms between private parties, thus violating their Constitutional freedom to contract.<sup>79</sup> It was also argued, and understandably so, that it only targeted the farmer, which they argued was a violation of the Equal Protection Clause.<sup>80</sup> Finally, it was argued that forcing contract terms constituted a taking under the Constitution.<sup>81</sup>

Recently, another suit was brought by a local farmer once again contesting the MMCA on constitutional grounds. On August 19, 2015,

---

<sup>74</sup> Thomas Casa, *Mandatory Mediation and Conciliation in California*, 15 SAN JOAQUIN AGRIC. L. REV. 117, 118 (2006).

<sup>75</sup> *Id.* at 118-19.

<sup>76</sup> *Id.* at 119.

<sup>77</sup> *Id.* at 117.

<sup>78</sup> *Id.* at 119.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

the California Fifth District Court of Appeal handed down a ruling deeming the MMCA unconstitutional.<sup>82</sup> In *Gerawan Farming, Inc. v. Agricultural Labor Relations Board*, Gerawan Farming, Inc. (“Gerawan”) and the United Farm Workers of America (“UFW”) never entered into a collective bargaining agreement.<sup>83</sup> After a series of delayed negotiations spanning nearly twenty years, UFW requested mediation under the MMCA.<sup>84</sup> Following an agreement obtained with the help of a mediator, Gerawan appealed the agreement on the grounds that UFW, due to twenty years of non-negotiations, forfeited its status as bargaining representative, and also on the grounds that the MMCA “. . . violates equal protection principles and constitutes an improper delegation of legislative authority.”<sup>85</sup> Ultimately, the Court of Appeal concurred with Gerawan’s constitutional arguments.<sup>86</sup> The Court reasoned that section 1164 of the statute sets out agricultural employers as a class, but the law fails to treat the employers similarly because each employer will be subjected to a different legislative act – a unique collective bargaining agreement.<sup>87</sup> The Court determined that such unequal treatment was a violation equal protection.<sup>88</sup>

Despite what appeared to be a victory for farmers in *Gerawan v. ALRB*, on August 19, 2015 the California Supreme Court granted certiorari.<sup>89</sup> So, as they say, the verdict is still out.

### *B. How it Works*

The MMCA consists of sections 1164 and 1164.11 of the California Labor Code which lays out the general procedures and requirements for mandatory mediation. It clearly states that either party, farmer or labor union, has the right to initiate these proceedings by filing a request with the Agricultural Labor Relations Board (“the Board”).<sup>90</sup> Following such request, the Board orders mandatory mediation and requests a list of

---

<sup>82</sup> *Gerawan Farming, Inc. v. Agricultural Labor Relations Board*, 236 Cal.App.4th 1024 (2015).

<sup>83</sup> *Id.* at 1035.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1035-36.

<sup>86</sup> *Id.* at 1036.

<sup>87</sup> *Id.* at 1068-69

<sup>88</sup> *Id.*

<sup>89</sup> *Gerawan Farming, Inc. v. Agricultural Labor Relations Board*, 236 Cal.App.4th 1024 (2015), *cert. granted*, 343 P.3d 301 (Cal. Aug. 19, 2015)(No. S227243).

<sup>90</sup> CAL. LAB. CODE § 1164(a).

mediators from the California State Mediation and Conciliation Service for the parties to select from.<sup>91</sup> In the event that a participant refuses to select a mediator, the other party is then empowered to select the mediator.<sup>92</sup> Once mediation proceedings commence they have thirty days before the mediator may declare the mediation efforts “exhausted.”<sup>93</sup> Once that declaration has been pronounced, the mediator will then submit a report to the Board that “. . . resolves all the issues between the parties and establishes the final terms of a collective bargaining agreement. . . .”<sup>94</sup>

However, there are certain criteria that must be met before mandatory mediation can commence. California Labor Code section 1164.11 lists these requirements.<sup>95</sup> First, the parties must fail to reach an agreement after at least one year of negotiating.<sup>96</sup> Second, it must be shown that the employer, or farmer, has committed an unfair labor practice.<sup>97</sup> And, finally, there has never been a prior binding agreement between the two parties, or, in other words, there has never been a prior collective bargaining agreement between the parties.<sup>98</sup>

#### IV. MEDIATION AND MMCA STARKLY JUXTAPOSED

Understanding the essential elements of mediation in connection with the nuances of the MMCA forces one to pose the question, are the methods mandated by the legislature compatible with what mediation experts have deemed key qualities of mediation? The express language of the statute provides strong evidence that the MMCA fails the test as a legitimate, viable, and neutral way to resolve disputes amongst farmers and labor unions.

---

<sup>91</sup> CAL. LAB. CODE § 1164(b).

<sup>92</sup> *Id.*

<sup>93</sup> CAL. LAB. CODE § 1164(c).

<sup>94</sup> CAL. LAB. CODE § 1164(d).

<sup>95</sup> CAL. LAB. CODE § 1164.11.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

### A. *Informed Consent*

The first element the MMCA fails is the most fundamental – informed consent.<sup>99</sup> It is a necessity that both parties must consent to participate in mediation.<sup>100</sup> The MMCA gracefully presents an illusory idea that mutual consent is required before mediation will be permitted. It enticingly states that “[a]n agricultural employer or a labor organization . . . may file with the board . . .” requesting mandatory mediation.<sup>101</sup> However, as the reader of the statute continues, it becomes clear that if one party can prove to meet the prerequisites, the Board will force both of the parties to participate in the mediation.<sup>102</sup> The fact that one party’s application for mediation can compel the other party to participate is a direct and obvious violation of the requirement that both parties enter into mediation under informed consent. Essentially, the phrase “mandatory mediation” is an oxymoron, and it has no place in the mediation arena.

### B. *Voluntary*

Similar to informed consent, voluntariness mandates that either party can, for any reason, stop the mediation.<sup>103</sup> However, contrary to this common practice and similar to its disregard of informed consent, the MMCA enables the Board to declare mandatory mediation on both parties.<sup>104</sup> Each is mandated to participate until an agreement is either reached by the parties themselves, or until the mediator declares the mediation efforts exhausted and then unilaterally imposes an “agreement” on the parties.<sup>105</sup> It is impossible to identify any voluntariness for either party under such proceedings.

### C. *Collaborative*

The idea of mediation consisting of participants working collaboratively is centered on the idea that no party can impose anything on the other, and, because of that fact, both sides will seek to work

---

<sup>99</sup> See Melamed, *supra* note 50.

<sup>100</sup> *Id.*

<sup>101</sup> See CAL. LAB. CODE § 1164(a).

<sup>102</sup> CAL. LAB. CODE § 1164(b).

<sup>103</sup> Melamed, *supra* note 50.

<sup>104</sup> CAL. LAB. CODE § 1164(b).

<sup>105</sup> CAL. LAB. CODE § 1164(c).

together to find a resolution.<sup>106</sup> The MMCA tramples on this ideal. First, one party has the power to force the other into mediation.<sup>107</sup> Further yet, one of the prerequisites to initiating mediation under the MMCA mandates that there be a showing that the farmer has committed unfair labor practices.<sup>108</sup> So, even if an agricultural employer wished to initiate the mediation, it would first be required to admit to the Board that it had committed unfair labor practices.<sup>109</sup> It is hard to imagine a farmer that would desire to utilize such a service, let alone operate collaboratively under such forceful and unequitable conditions.

#### *D. Controlled by the Parties*

The element of control states that the participants hold and maintain complete decision making power.<sup>110</sup> The MMCA sidesteps this in two obvious ways. First, under section 1164(b), it states that in the event one party refuses to select a mediator the other party is granted sole power to select the mediator.<sup>111</sup> Second, under section 1164(c) and 1164(d), the mediator is given conclusive authority to not only declare the mediation process “exhausted” after thirty days, but can then proceed to file a report with the Board which, in effect, becomes the collective bargaining agreement between the parties.<sup>112</sup> Most mediators, and especially mediation participants, would find the idea of a mediator forcing an agreement upon participants as absurd and transcendent of a mediator’s role. This would all but eliminate the entire purpose of mediation and cause one to wonder why the dispute was not presented directly to a judge.

#### *E. Self-Responsible and Satisfying*

This element can arguably be the most important. The practice of mediation is largely successful because of the fact that each participant walks away satisfied with the outcome.<sup>113</sup> The legislature, either by accident or political blinders, seemed to neglect this foundational

---

<sup>106</sup> Melamed, *supra* note 50.

<sup>107</sup> CAL. LAB. CODE § 1164(b).

<sup>108</sup> CAL. LAB. CODE § 1164.11.

<sup>109</sup> *See id.*

<sup>110</sup> Melamed, *supra* note 50.

<sup>111</sup> CAL. LAB. CODE § 1164(b).

<sup>112</sup> CAL. LAB. CODE § 1164(c); CAL. LAB. CODE § 1164(d).

<sup>113</sup> *See* Melamed, *supra* note 50.

principle. There are various examples found within the body of the statute that makes the principle of mutual satisfaction impractical when performed under the micromanagement of the MMCA. As already stated, a mediator, though at the objection of one or both parties, has the power to conclude proceedings and force an agreement upon the parties.<sup>114</sup> It may be argued that the participants are given thirty days to effectuate an agreement on their own accord, and are thus given the experience of satisfaction that comes from self-government.<sup>115</sup> But what about the fact that the employer is forced into the mediation because it is presumed to have committed unfair labor practices?<sup>116</sup> That coupled with the idea that the employer can then be forced into a collective bargaining agreement, can't help but leave at least one party wanting. This lack of satisfaction is perhaps best articulated through the extensive litigation pursued by the agricultural employers.<sup>117</sup>

The MMCA unapologetically tramples under foot five of the eight essential elements of mediation.<sup>118</sup> It does so to such an extent that it is inconceivable to think the legislature had any other purpose behind the statute than to compel collective bargaining agreements between the participants.

## V. RECOMMENDATIONS

The method of amelioration is simple, amend the labor code to better comply with established principles of mediation. The idea of mediation is to create an environment where disputants are empowered and encouraged to resolve their own problems.<sup>119</sup> It is well recognized in our society, and very much a part of the American DNA, that individuals, when forced to act, will often resist. Forced resolutions are contrary to the purpose of mediation.<sup>120</sup> The legislature, in order to reduce the number of law suits against the State and to increase the likelihood of agreements, should reduce the power of the Board to mandate mediation, and reduce the authority given the mediator to resolve the dispute according to his or her own volition. Creating a program that undertakes the role of facilitator rather than dictator will better serve both farmer and farmhand.

---

<sup>114</sup> CAL. LAB. CODE § 1164(c); CAL. LAB. CODE § 1164(d).

<sup>115</sup> See CAL. LAB. CODE § 1164(c).

<sup>116</sup> See CAL. LAB. CODE § 1164.11.

<sup>117</sup> See *supra* Part III.A.

<sup>118</sup> See *supra* Part IV.

<sup>119</sup> See Melamed, *supra* note 50.

<sup>120</sup> See *id.*

## VI. CONCLUSION

In order to better bridge the gap between employer and farm worker, the MMCA must be amended to reduce the government's power, giving it back to the participants to resolve their own disputes. The MMCA substantially operates outside the boundaries of proper mediation practice and standards.<sup>121</sup> The very name of the act, The Mandatory Mediation and Conciliation Act, is an oxymoron.<sup>122</sup> The government has failed to recognize the role of a mediator which has been established throughout the history of the world.<sup>123</sup> It has chosen to vigorously pursue its partisan agenda, all the while abandoning principles that have made mediation such an effective tool for peace and progress.

AARON N. CASTLETON<sup>124</sup>

---

<sup>121</sup> *See supra* Part IV.

<sup>122</sup> *See supra* Part IV.

<sup>123</sup> *See supra* Part II.

<sup>124</sup> Aaron Castleton is an attorney in Merced, California, where he practices in the areas of business law, wills, trusts, personal injury, and civil litigation. He is also the Director of Family Court Services at Merced Superior Court where he oversees all mediations conducted within the Family Court. Aaron received his law degree from University of La Verne College of Law, and his LL.M. degree in Alternative Dispute Resolution from the Straus Institute at Pepperdine University School of Law. He would like to thank his brother, Jeff Castleton, for assisting him in developing early drafts of this article and for his unceasing pursuit of excellence in the law. Aaron would also like to thank the San Joaquin Agricultural Law Review for their dedication to illuminating the essential legal issues of our community. Lastly, Aaron would like to thank his wonderful wife Melissa and their three children for their unyielding faith, support, and love.