

“The Ancient Chinese Secret”: A Comparative Analysis of Chinese & American Domestic Relations Mediation

I. INTRODUCTION

One day Ye Chengmei, of Henan Province China, was beaten by her husband, Pan Chenggong. Ye's brother sought to teach his brother-in-law a lesson by bringing a group of men armed with sticks and spades to Pan's home. Pan heard the news and gathered up his friends to fight back. At this critical moment, Ye Bringyan, a mediator, hastened to the scene. The mediator persuaded the men to stop the fight and sit down to talk. Through the persuasion and education on applicable laws by the mediator, Pan admitted his wrong doings and apologized to his wife's family. The dispute was solved and the family was on good terms again.¹

This incident illustrates one of the many types of disputes in China settled through mediation.² As portrayed in the anecdotal incident, mediation is considered to be at the forefront of China's judicial system. The mediator prevented a fight and settled a domestic dispute. Consequently, the formal judicial system will likely not be involved in the incident between Ye Chengmei and her husband because adjudication of Chinese civil disputes is regarded as a last resort.³ This philosophy is colorfully reflected in the ancient Chinese proverb “[t]o enter a court of law is to enter a tiger's mouth.”⁴ This sentiment holds true for both

1. *Mediators Help Ensure Social Stability*, The Xinhua General Overseas News Service, Oct. 31, 1989, Item No. 1031142 (Made available through the Xinhua News Agency, and available on Lexis) [hereinafter Xinhua News].

2. There are a variety of textual and statutory definitions for mediation. Roughly speaking, mediation is a process where the participants, along with a neutral person or persons, isolate the dispute, clarify the issues, consider alternatives, and reach a mutual agreement. Unlike litigation or arbitration, a third party does not resolve the dispute for the parties. The parties, with the assistance of a mediator reach their own agreement while resolving the dispute. See J. FOLBERG & A. TAYLOR, *MEDIATION, A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 7 (1984).

3. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201, 1201 (1966).

4. Comment, “*Far From the Tiger's Mouth*”: Present Practice and Future Prospects for the Settlement of Foreign Commercial Disputes in the People's Republic of China, 3 J. LAW & COM. 115 (1983).

Chinese international and domestic affairs. The importance of mediation in China is confirmed by its extensive use. In 1989, China had more than one million mediation committees and over six million mediators.⁵ This Note focuses on the potential use for Chinese mediation or conciliation practices in American family law.⁶

The introductory scenario illustrates the typical role of a Chinese mediator. In Ye Chengmei's case, the mediator prevented a fight, established communication, and educated the parties using related laws. Other functions of a mediator may be to define issues; decide questions of fact; make recommendations for settlement; and place political, economic, social, and moral pressures on the parties.⁷

Mediation has recently gained attention as an alternative dispute resolution (ADR) technique in the United States.⁸ ADR techniques have developed to provide viable informal options for settling disputes. There are many types of ADR techniques, such as pretrial arbitration, summary jury trials, mini-hearings, and labor arbitration. The increased interest in mediation may be a result of the growing concern regarding the effectiveness of the United States' legal system or simply a response to the continual increase in litigation. The United States' judicial system has become overburdened. Non-traditional methods are needed to relieve an over-crowded system.⁹

Mediation is of particular interest in the area of family law in the United States.¹⁰ Family disputes, especially disputes involving children, may best be resolved through a consensual rather than an adversarial

5. Xinhua News, *supra* note 1.

6. For information on the use of mediation in China to settle foreign trade and economic disputes, see "*Far From the Tiger's Mouth*", *supra* note 4, at 115; see also ERIC LEE, COMMERCIAL DISPUTES SETTLEMENT IN CHINA 9-20 (1985).

7. Cohen, *supra* note 3, at 1201.

8. There are now several professional associations that have been formed, including the Society of Professionals in Dispute Resolution, the National Institute of Dispute Resolution, and The Federal Mediation and Conciliation Service. There are also newsletters and journals, including Harvard Journal of Negotiation, Mediation Quarterly, and The Missouri Journal of Dispute Resolution. Prisons, Law schools, and other institutions have joined in the movement. See generally D. MCGILLIS & J. MULLEN, NEIGHBORHOOD JUSTICE CENTERS, AN ANALYSIS OF POTENTIAL MODELS 14-15 (1977). Former U.S. Supreme Court Chief Justice Warren E. Burger is in favor of alternative dispute resolutions, see Burger, *Isn't There a Better Way?* 68 A.B.A. J. 274 (1982).

9. Burger, *supra* note 8, at 274.

10. See, e.g., WINKS, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615, 651 (1981).

process.¹¹ Instead of giving third parties the decision making power, mediation places the power in the hands of the parties. Thus, it increases family autonomy and the benefits of a privately produced result.¹² Mediation has been favored for "its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception . . . that will redirect their attitudes and dispositions toward one another."¹³

The Chinese people have used mediation as a form of ADR for thousands of years, and mediation appears well suited to their society.¹⁴ It is one tradition that has continued in spite of many different Chinese political and economic systems. The present mediation system is a result of both traditional Chinese culture and the influence of the Communist Party. An understanding of the Chinese mediation system may benefit the American legal system as the interest in mediation grows. Although the Chinese mediation system may be impossible to implement fully in the United States, the underlying theories may be useful to American family law mediation.

II. THE ROLE OF CONFUCIAN PHILOSOPHY IN CHINESE MEDIATION

Confucianism, which dominated Chinese philosophy for millennia, is thought to be the source of Chinese mediation.¹⁵ Although traditional Chinese beliefs formed from various philosophies of social behavior and law, the significance of Confucianism must be extracted from the other traditional Chinese school of philosophy.¹⁶ Admittedly, it is not clear to what extent a society's philosophical beliefs will influence its practice. However, the long reign of Confucianism has made it the dominant Chinese philosophy.¹⁷ Clearly Confucianism emerged as the dominant philosophy and influenced the leaders and the people of China for many years.¹⁸

11. Note, *Agreements to Arbitrate Post-Divorce Custody Disputes*, 18 *Colum. J. L. & Soc. Probs.* 419, 439-445 (1985); *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 *HARV. L. REV.* 1086, 1088 (1990) [hereinafter *Mandatory Mediation*].

12. *Agreements to Arbitrate Post-Divorce Custody Disputes*, *supra* note 11, at 440.

13. Fuller, *Mediation - Its Forms and Functions*, 44 *S. CAL. L. REV.* 305, 325 (1971).

14. See generally Cohen, *supra* note 3.

15. *Id.* at 1206.

16. Funk, *Traditional Chinese Jurisprudence: Justifying Li and Fa*, 17 *S.U.L. REV.* 1, 2 (1990).

17. Cohen, *supra* note 3, at 1206-1209.

18. *Id.*

Confucianism stresses that social conflicts interfere with the natural order of life. Harmonious living is the goal of a Confucian society. In the Confucian view:

A lawsuit symbolized disruption of the natural harmony that was thought to exist in human affairs. Law was backed by coercion, and therefore tainted in the eyes of Confucianists. Their view was that the optimum resolution of most disputes was to be achieved not by the exercise of sovereign force but by moral persuasion. Moreover litigation led to litigiousness and to shameless concern for one's own interest to the detriment of the interests of society.¹⁹

A. The Concept of Li

This harmonious attitude centers on the dichotomy between the concepts of *li* and *fa*.²⁰ The single word definitions of *li* and *fa* do not capture the essence of the concepts. *Li* translates as propriety, and *fa* translates as law.²¹ However, these concepts are much more complex than indicated by the single word translations.

Ethical rules of conduct regarding basic relationships are found in the *li*.²² *Li* is more closely related to morality rather than to punishment by physical force.²³ The function of *li* is to promote a natural harmony of ethical behavior. For example, a man who lives his life by a moral force was thought to ". . . naturally . . . [accept] his social role. He [would] submit to *li* without hesitancy. Furthermore, the moral force which the noble man manifests in his behavior and in his attitudes acts as a radiating force, as it were, bringing others into its field of radiation."²⁴ In a purely *li* society, systems of law would be unnecessary because people would conduct themselves properly because of their devotion to a moral life.

Although the traditional *li* concept is not as strong in today's China, it is still prevalent, especially concerning individual rights or interests. In a society where *li* rules, individual interests extend up to a certain point. When conflicts of individual interest arise, they are

19. *Id.* at 1207.

20. SCHWARTZ, ON ATTITUDES TOWARD LAW IN CHINA, GOVERNMENT UNDER LAW AND THE INDIVIDUAL 28 (1957).

21. *Id.*

22. *Id.* at 30.

23. *Id.*

24. *Id.*

easily resolved because individuals are willing to yield personal rights to maintain societal harmony. "Both sides will be ready to make concessions, to yield (*jang*), and the necessity for litigation will be avoided."²⁵ To invoke one's individual rights is in complete contradiction to the spirit of *li*.²⁶ The favored position is one in which the individual yields or compromises in favor of society.²⁷ It was "... taught that it was better [for the individual] to 'suffer a little' and smooth the matter over rather than make a fuss over it and create further dissension."²⁸ This yielding trait underlies the modern Chinese view of litigation.²⁹ The Chinese have traditionally associated courts with the enforcement of state rules and not with the settlement of private disputes.³⁰ Thus, the court's primary function is to enforce *duties* of citizens, not rights of citizens.³¹

B. *The Concept of Fa*

Not all Chinese philosophers emphasized *li*, as did Confucianists. For example, the Legalist emphasized *fa*, rather than *li*, for guiding behavior.³² *Fa* functions as a model for human behavior. *Fa* establishes a method of behavior, and functions as a rule or law. These functional legal rules are enforced by sanctions.³³ *Fa* maintains order in society through fear of punishment. This concept contrasts sharply with *li* which maintains order by valuing the volitional pursuit of a state of natural harmony.

As time passed, Confucian followers realized that *li* could not prevail in all human situations.³⁴ Therefore, *fa* began to reinforce *li*.

25. SCHWARTZ, *supra* note 20, at 31.

26. *Id.* at 32.

27. Cohen, *supra* note 3, at 1207.

28. *Id.*

29. A Chinese proverb also provides insightful background on the Chinese view of litigation. "It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit." *Id.* at 1201.

30. R. FOLSOM & J. MINAN, *LAW IN THE PEOPLE'S REPUBLIC OF CHINA* 86 (1989).

31. *Id.*

32. Schwartz, *supra* note 20, at 34; H. CREEL, *SHEN PU-HAI* 147-48 (1974); The short-lived Ch'in dynasty during the third century B.C. ruled by a legalist philosophy. The dynasty employed a harsh penal system and heavy reliance on brute force. Schwartz, *supra* note 20, at 35.

33. Funk, *supra* note 16, at 7.

34. Schwartz, *supra* note 20, at 33.

New standards of *li* were reflected in successive dynastic penal codes.³⁵ Thus, over time, the two concepts were interwoven. The resulting combination of *li* and *fa* was viewed as a whole system.³⁶ Under the Ch'in dynasty, the people only followed the concept of *fa*. In this society, an individual conducted himself in a particular way because of the threat of punishment, not because of some sense of moral obligation. Therefore, to instill morality within the people, both *fa* and *li* were needed.³⁷

The intertwined concepts of *li* and *fa* produced the unique Chinese view of dispute resolution. Although China continues to undergo many other cultural changes, the Confucian virtue of compromise remains.³⁸ Understanding the importance of Confucian philosophy is essential to appreciate the Chinese aversion to litigation.³⁹

III. MAO ZEDONG'S⁴⁰ INFLUENCE ON MEDIATION

During the twentieth century, China was in a constant state of unrest.⁴¹ When the People's Republic of China was established in 1949, the laws of the Nationalist government were abrogated.⁴² Mao criticized

35. Funk, *supra* note 16, at 7.

36. SCHWARTZ, *supra* note 20, at 33.

37. *Id.*

38. Schwartz suggests that, ". . . the main effect of Confucianism has been to inhibit the growth of an all-inclusive legal system and of an elaborate system of legal interpretation. [Additionally] [i]t has inhibited the emergence of a class of lawyers and has in general, kept alive the unfavorable attitude toward the whole realm of *fa*. *Id.* at 37. For a brief introductory on Confucianism, see, e.g., CHAN, CHINESE PHILOSOPHY, IN 2 ENCYCLOPEDIA OF PHILOSOPHY 87-96 (1967). For more on Confucian history see, e.g., LOWE, THE TRADITIONAL CHINESE LEGAL THOUGHT 27-34 (1984).

39. Currently Chinese still avoid litigation and disfavor the judicial system. However, as China continues to develop the bias toward lawyers seems to be lifting.

40. Mao Zedong was the leader of the Chinese Communist Party, and the Red Army, that seized control of the most populous country in the world. In 1949, he announced the birth of the People's Republic of China. He was the leader of the Chinese Communist Party for forty years. His inspiring leadership contributed greatly to the development of China; however, during the Great Proletarian Cultural Revolution, he was responsible for nearly destroying the Party. There were constant struggles among the leaders and the country went through troubled times. It was not until after Chairman Mao's death in 1976, that these problems were somewhat resolved. C. DIETRICH, PEOPLE'S CHINA 3-49 (1986).

41. Starting with the fall of the Ch'ing dynasty in 1911, China was devastated by internal chaos, topped with the conflict between the Nationalists and Communists and the battles fought by both of those groups against the Japanese. Utter, *Tribute: Dispute Resolution in China*, 62 WASH. L. REV. 383, 387 (1987).

42. LEE, *supra* note 6, at 4.

the legal system for being a tool of suppression over the lower classes, used to continue class struggle.⁴³ Mao believed the old system was unnecessary because the people could judge and decide disputes arising in ordinary life.⁴⁴ The entire judicial system suffered greatly during the cultural revolution which began in 1966 and ended in 1976.⁴⁵

The beginning of the revolution was marked by the closing of all law schools. Attorneys, judges and legal scholars were sent to rural farms to work. The purpose of these actions was to reeducate those in the legal profession regarding the new Communist Party. These actions resulted in the collapse of the judicial and legal systems. "China was virtually in a state of lawlessness."⁴⁶

Changes in dispute resolution proceedings were accompanied by political changes. Although Confucian thought is still prevalent in Chinese society, its emphasis in dispute resolution has diminished.⁴⁷ Today's dispute resolution methods have been heavily influenced by Communist ideology and perspectives. Instead of focusing on compromise and yielding, mediation began to function as a means of educating the masses on Party ideology.⁴⁸ This shift in emphasis was due largely to Mao's leadership. During the 1950's, the Chinese people followed Mao's teaching that "'disputes among the people' (as distinguished from those involving enemies of the people) ought to be resolved, whenever possible, by democratic methods, methods of discussion, of criticism, of persuasion and education, not by coercive, oppressive methods."⁴⁹

Mao's plan was to mobilize the masses to gain support for the Party.⁵⁰ He planned to transform the thought of individuals through mobilization. He believed and taught that "[t]he thought and consciousness of men and their social classes must be changed by 'resolving their contradictions' through the use of tools of struggle, especially 'criticism and self-criticism' and 'thought reform.'"⁵¹ This mobilization

43. *Id.*

44. FOLSOM & MINAN, *supra* note 30, at 11-12.

45. *Id.*

46. Jenkin Chan Shiu-Fan, *The Role of Lawyers in the Chinese Legal System*, 13 H.K.L.J. 157, 158 (1983).

47. Confucian thought is illustrated by the trial of the Gang of Four (1980-81), who were viewed "not simply as criminals, but as victims of incorrect thinking who deserved to be given human dignity." FOLSOM & MINAN, *supra* note 30, at 6.

48. Cohen, *supra* note 3, at 1201.

49. *Id.*

50. Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284, 1303-05 (1967).

51. *Id.* at 1305.

of people was accomplished by a mass line.⁵² The mass line is a term given to a variety of techniques used to gain support for the Communist Party. The purpose of the mass line was solidarity, with the goal of achieving the people's desires.⁵³ The party stayed intimately involved with the masses, using propaganda, discussion, persuasion, and exhortation to gain further support.⁵⁴ Cadres, who are members of the Communist Party or people employed by the government, would consult with the masses about their problems and then work out appropriate courses of action.

During the mass line era, mediation was used extensively. Legislation was passed that required mediation in civil cases.⁵⁵ Mediation was thought to be a defense against injury to the masses. Reconciling the disputes among the people promoted unity and Party policies.⁵⁶ The principle of compromise still existed in mediation, but education on the Party's policies and goals became mediation's most important function.

Another important function in Mao's mediation was to bring the disputing parties to a "correct attitude." A correct attitude required the development of "positive factors."⁵⁷ The mediators stressed the importance of positive factors, such as an individual's job status. Individuals were to concentrate on these positive factors to educate themselves. The disputing party thought to be the wrongdoer was educated on the importance of a positive factor. After the party realized the positive factor, the problem was solved.⁵⁸ One method of educating the wrongdoer was applying pressure on him through his work unit, neighbors, and family. It was hoped that the pressure would eliminate the dispute.

It is interesting to note that China's government credits the Communist Party with the origin of mediation.⁵⁹ One reason for this may be that the government wants the Party to be associated with the success of the mediation system. The Party maintains that pre-revolution mediation was operated by the wealthy and influential classes to manipulate

52. For further information on Mao's mass line, see MAO TSETUNG, SELECTED WORKS OF MAO TSE-TUNG 226 (1965).

53. Lubman, *supra* note 50, at 1304-08.

54. *Id.*

55. *Id.* at 1306.

56. *Id.* at 1306-07.

57. *Id.* at 1308.

58. Lubman, *supra* note 50, at 1308.

59. Cohen, *supra* note 3, at 1205.

and evade the law, and to oppress the masses.⁶⁰ Even though the Communist Party and Mao contributed greatly to the current mediation system, the formative period of mediation is attributable to Confucian scholars.

IV. THE ROLE OF MEDIATION IN MODERN CHINA

Mediation has been the traditional Chinese method for resolving disputes for thousands of years. Mediation is successful because of its unique history, Chinese culture, and effectiveness. Although altered to some degree, mediation is still the most popular method of dispute resolution.⁶¹

Conflict is inevitable in all human relations, thus, the obvious role of mediation is to resolve these disputes. Mediation is a mandatory preliminary step for all civil cases in China.⁶² However, if *any* type of dispute can be mediated, then mediation should be the first step in resolving that dispute. Currently, mediation serves the people by resolving disputes. It also serves the government by providing a method of continuous education regarding Communist Party policies.

Not only does mediation provide an effective alternative to over-crowded courts, it is also an acceptable and respectable mode of dispute settlement because most disputes are resolved in an amicable manner. Ideally, parties have resolved their dispute and no longer bear grudges. One reason why mediation is viewed more favorably than litigation is because it encourages the people to work together as a collective.⁶³ This factor, along with the historical bias against litigation, gives mediation a key role in Chinese law. In addition, practical reasons support mediation.⁶⁴ The most obvious is its cost-effectiveness in settling disputes in the world's most populous country.⁶⁵ Furthermore, China is a country where lawyers are scarce, and disfavored as "litigation tricksters."⁶⁶

Mediation also serves the country by educating the masses on the Party's policies, values and principles.⁶⁷ Additionally, it helps mobilize

60. *Id.*

61. Yu Zhan J, Lecture at the East China Institute of Politics and Law (June 2, 1990) [hereinafter Lecture by Yu].

62. *Id.*

63. *Id.*

64. See FOLSOM & MINAN, *supra* note 30, at 86, for a list of practical reasons.

65. China's official census of 1982 reported a population of 1,008,175,288, making China the home of approximately one out of every four people in the world. *Id.* at 17.

66. V. Li, *LAW WITHOUT LAWYERS* 87-89 (1978).

67. Lubman, *supra* note 50, at 1339.

the masses by increasing their commitment toward Party policies and goals.⁶⁸ However, problems emerge when the function of settling disputes collides with the function of educating the masses. The main problem is that mediation may serve to suppress rather than settle disputes between individuals. Although the Party wants to educate the masses, it is concerned with settling disputes because too many social conflicts interfere with the building of a powerful, socialist China.⁶⁹

Chinese village committees contain about twenty people. One of the committees' roles is mediation. The village committees are organized by place of residence and employment.⁷⁰ These committees meet with the community to discuss current events and ideas. If a dispute arises, a mediator is aware of it because of his connection with the community.

Mediators apply social pressure to criticize and educate the wrong-doer. During the mediation process, the disputing parties are pressured by their neighbors, families, and work units to settle the dispute. This pressure makes it difficult to imagine a dispute continuing beyond mediation. If the dispute continues, then it may be litigated. Mediation brings about self-criticism and social cohesion. In today's China, it also promotes the Communist ideology regarding the individual's role in modern Chinese society.⁷¹ Furthermore, it educates people in the spirit of the law.⁷²

Mao was succeeded by Deng Xiaoping. As the present leader of China, Deng, places much emphasis on the promulgation of new laws and codes.⁷³ This re-establishment of a legal system is based on the plan of "Four Modernizations": (1) agriculture, (2) industry, (3) national defense, and (4) science and technology.⁷⁴ However, despite these reforms, the traditional legal system still cannot handle the number of cases that arise.⁷⁵ Thus, mediation is still the predominant method of settling disputes.⁷⁶

V. THE STATUTORY MEDIATION SCHEME

Although mediation has been used in China for thousands of years, the first regulations establishing a mediation system were drafted in

68. *Id.*

69. *Id.*

70. Utter, *supra* note 41, at 391.

71. FOLSOM & MINAN, *supra* note 30, at 13.

72. Lecture by Yu, *supra* note 61.

73. FOLSOM & MINAN, *supra* note 30, at 13.

74. A. KANE, CHINA BRIEFING, 1989 141 (1989).

75. UTTER, *supra* note 41, at 390.

76. FOLSOM & MINAN, *supra* note 30, at 85.

1954.⁷⁷ It took approximately ten studies and many years for these rules to be passed. The importance placed on these rules is illustrated by the fact that they were passed during the cultural revolution.⁷⁸ Another important aspect of the mediation rules was that they were the sole rules applicable to the entire nation.⁷⁹ These early regulations were recently repealed and replaced by new regulations enacted in June of 1989.⁸⁰

China's 1982 Constitution⁸¹ provides for the establishment of neighborhood and municipal people's mediation committee.⁸² A second body of mediation law can be found in Article 14 of China's Law of Civil Procedure enacted in 1982 that states:

Under conditions prescribed by law . . . [the] people's mediation committee conduct mediation work through the methods of persuasion and education. The parties concerned should follow the agreement reached in mediation; those who do not want the mediation or for those whom mediation has failed may initiate legal proceedings in the people's courts.⁸³

This rule clearly reflects the preference of mediation as a form of dispute resolution. Although mediation appears to be a tradition, it is certainly not merely a custom. During the last century, regulations and rules have been enacted, making mediation an official dispute resolution method.

Similarly, a preference for mediation can be seen in China's Marriage Law. The present marriage law was enacted on September 10, 1980, making mediation a compulsory first step in any dissolution case.⁸⁴ The traditional concept of *li* underlies this first-step requirement

77. Cohen, *Drafting People's Mediation Rules for China's Cities*, 29 HARV. J. ASIA STUDIES 295, 302 (1969).

78. *Id.* at 300.

79. *Id.* at 298.

80. The new regulations consist of 17 articles. Article 1 states the regulations were ". . . formulated with a view to strengthening the establishment of people's mediation committees, settling promptly any civil disputes, promoting solidarity among the people, safeguarding social security and facilitating socialist modernization and construction." HSIN CHANG, *SELECTED FOREIGN-RELATED LAWS AND REGULATIONS OF THE PRC* 651-54 (1989).

81. In the last forty years, China has had five constitutions: 1949; 1954; 1975; 1978; 1982. Each constitution indicates a change in economic or political conditions.

82. P.R.C. CONST. art. 111.

83. *Civil Procedure Law of the People's Republic of China Provisional* art. 14 (1982).

84. *Marriage Law of the People's Republic of China* ch. IV art. 25 (1980) [hereinafter

for divorce mediation. *Li* has always advocated that a husband and wife should compromise and work together toward a harmonious way of life within the family.

Mediation is especially necessary in divorce proceedings because it promotes Communist morality and opposes the bourgeois idea of loving the new and detesting the old.⁸⁵ Mediation also opposes rash decisions in marriage. Couples that seek divorces are counseled not to insist on their legal rights, but to fulfill their duty to stay married.⁸⁶ However, if mediation fails and alienation of affection is present, then under the 1980 Marriage Law a divorce "should" be granted. This is a notable change from the 1950 Marriage Law that provided a court "may" grant a divorce if mediation failed.⁸⁷

Although divorces are more readily available in today's China, the divorce rate is still lower than Western countries.⁸⁸ One reason for the lower Chinese divorce rate is that divorce is still condemned by public opinion.⁸⁹ Another reason is the success rate of mediation that often results in reconciliation of the husband and wife.⁹⁰

Mediation committees that work with family disputes are usually neighborhood committees made up of housewives and retired workers.⁹¹ The mediator investigates the couple's relationship to determine if they have truly lost affection for one another. There are no explicit grounds for divorce in China.⁹² It is not uncommon for the mediator to persuade the couple through moral pressure and public shaming.⁹³ It is important

Marriage Law]. Article 25, chapter IV states:

When one party insists on divorce, the organizations concerned may try to effect a reconciliation, or the party may appeal directly to the people's court for divorce. In dealing with a divorce case, the people's court should try to bring about a reconciliation between the parties. In cases of complete alienation of mutual affection, and when mediation has failed, a divorce should be granted.

85. FOLSOM & MINAN, *supra* note 30, at 388.

86. See e.g. Palmer, *The People's Republic of China: Some General Observations on Family Law*, 25 J. FAM. L. 41, 44 (1986-87).

87. *Marriage Law*, *supra* note 82, at ch. IV, art. 25.

88. FOLSOM & MINAN, *supra* note 30, at 377.

89. Naftulin, *The Legal Status of Women in the PRC*, 68 WOMEN LAW J. 74, 75 (1982).

90. Beijing Rev., Feb. 4, 1985, at 18.

91. Lecture by Yu, *supra* note 61.

92. Naftulin, *supra* note 89, at 75.

93. Hareven, *Divorce, Chinese Style: The Cases That Come Before Shanghai's Family Court Offer Intimate Glimpses of a Changing Society*, THE ATLANTIC MONTHLY, Apr., 1987.

to remember that pressure not only comes from the mediators, but also from work units.

Although benefits of mediating family disputes are apparent, some drawbacks do exist. One drawback is the coercive pressure applied on the individual. This pressure can become overwhelming. The pressure may be too much for an individual to resist when most everyone he contacts emphasizes the need to settle his family dispute. This pressure also raises questions about what makes mediation successful. It may be that mediation really does not solve a dispute, but merely temporarily suppresses the problem.⁹⁴

VI. THE ROLE OF FAMILY MEDIATION IN THE UNITED STATES

Recall the case of Ye Chengmei, discussed at the beginning of this Note.⁹⁵ If this family domestic dispute had occurred in the United States a different result would most likely have transpired. If a husband beat his wife in the United States, the wife would likely seek recourse through the legal system. Although the provisions vary, most jurisdictions provide remedies for the victim of spousal abuse. Most statutes provide for civil protective orders and make spousal abuse a separate criminal offense.⁹⁶

A civil protective order is granted to stop future threats or abuse by one spouse against another. The order may be issued against the abuser to refrain from contacting the victim, to move from a shared home, or to enter counseling.⁹⁷ The drawback in obtaining a protective order is that several days may pass before a hearing.⁹⁸ However, abusive situations are recognized as an emergency in most jurisdictions; therefore, a temporary restraining order may issue at an ex parte hearing.⁹⁹

Many years ago spousal abuse was not perceived as a criminal offense. Within the last decade, however, all states have enacted legislation making spousal abuse a criminal offense.¹⁰⁰ Accordingly, an abused spouse can seek some type of immediate relief. However, without further action, such as a divorce proceeding, the problem may not be resolved. If mediation were available, the family dispute might be

94. See *supra* text accompanying notes 70-71.

95. See *supra* text accompanying note 1.

96. Lerman, *Protection of Battered Women: A Survey of State Legislation*, 6 WOMEN'S RIGHTS L. REP. 271, 276-84 (1980).

97. *Id.* at 272.

98. *Id.* at 273.

99. *Id.*

100. Lerman, *supra* note 96, at 272.

resolved more efficiently, as in Ye Chengmei's case, where the dispute was settled through mediation and a family reunited.

In the last few years, adjudication has become more complex, time-consuming, and expensive.¹⁰¹ These increased costs have produced great dissatisfaction with and within our legal system. The need for ADR has been recognized. As former U.S. Supreme Court Chief Justice Warren E. Burger stated: "We must now use the inventiveness, the ingenuity, and the resourcefulness that have long characterized the American business and legal community to shape new tools We need to consider moving some cases from the adversary system to administrative processes, . . . or to mediation"¹⁰²

Mediation and other forms of ADR encompass many areas, but mediation has become most popular in divorce and family proceedings.¹⁰³ The first divorce statistics available in the United States are from 1867.¹⁰⁴ In 1867, divorces totalled 9,937, or approximately .03 divorces per every 1,000 people.¹⁰⁵ Divorces increased to approximately 500,000 in 1967, or a rate of 4.2 divorces per every 1,000 people.¹⁰⁶ By 1981, there were approximately 5.3 divorces for every 1,000 people.¹⁰⁷ In 1987, the last year in which complete national figures are available,¹⁰⁸ the divorce rate of 4.8 for every 1,000 people was its lowest since 1975.¹⁰⁹ However, commentators are predicting a slow rise in the divorce rate during the next two decades.¹¹⁰

The high divorce rate, together with family law cases, has added to already over-crowded court dockets. However, the over-crowded system is not the only problem. There is increasing evidence that the traditional adversarial system is not the best method to resolve spousal and parental disputes.¹¹¹ Problems with using the adversarial system as

101. *Mandatory Mediation*, *supra* note 11, at 1086.

102. Burger, *supra* note 8, at 276.

103. *Agreements to Arbitrate Post-Divorce Custody Disputes*, *supra* note 11, at 439-442.

104. C. VETTER, *CHILD CUSTODY: A NEW DIRECTION* 9 (1982); Rigby, *Alternative Dispute Resolutions*, 44 LA. L. REV. 1725 (1984).

105. *Id.*

106. *Id.*

107. *Id.*; Wolff, *Family Conciliation: Draft Rules for the Settlement of Family Disputes*, 21 J. FAM. L. 213, 214 (1982).

108. Figures are available for Indiana in 1989: there were 47,603 divorce or legal separations filed. The courts handled 46,783 divorces or legal separations. Gannett News, Sept. 21, 1990, at 1.

109. San Francisco Chron., May 31, 1990, at A6.

110. Rigby, *supra* note 104, at 1725; C. VETTER, *supra* note 104, at 11.

111. Rigby, *supra* note 104, at 1725; Bahr, *Mediation is the Answer*, 3 FAM. ADVOC. 32 (1981); Mumma, *Mediating Disputes*, 42 PUBL. WELFARE, 22, 25 (1984).

a method for solving family disputes include: (1) encouraging "cat and dog fights" that are inapposite to the children involved; (2) failing to address unsettled feelings about the marriage and divorce that often predated the conflicts; (3) failing to encourage cooperation, communication, and the problem-solving techniques of the parties; and (4) increasing costs and delays.¹¹² Moreover, in a traditional adversarial divorce, one party is thought to win, and the other lose. In contrast, parties who use divorce mediation are concerned with values such as honor, respect, dignity, security and love that often are lost in the traditional divorce.¹¹³

It appears that the United States is beginning to realize the benefits of the ancient technique of resolving disputes that the Chinese people have used for thousands of years. Although China's heritage is diverse from the United States's background, the extensive use and age of the Chinese mediation system demands the attention of other countries developing mediation systems. The Confucian goal of harmony is at the polar opposite of the American focus on autonomy and individual liberty.¹¹⁴ Although these two countries' goals for mediation may differ in purpose and direction, both share interests in positive use of mediation.

VII. THE HISTORY OF MEDIATION IN THE UNITED STATES

Informal mediation has a long history in the United States.¹¹⁵ Mediation was first formally used in the United States in labor disputes.¹¹⁶ In 1947, the Federal Mediation and Conciliation Service was established to handle conflicts between labor and management.¹¹⁷ The rationale for this mediation panel was to prevent strikes or lockouts and to improve the safety, welfare and wealth of Americans.¹¹⁸

Mediation has grown tremendously and now is used in several areas. One of the most useful areas for mediation is in family law.¹¹⁹ The increased use of mediation indicates a belief among courts and

112. Rigby, *supra* note 104, at 1727; Wolff, *supra* note 106, at 222-23.

113. J. FOLBERG & A. TAYLOR, *supra* note 2, at 7-10.

114. See May, *Adversarialism in America*, CENTER MAG. 47, 48 (Jan.-Feb. 1981).

115. See generally J. AUERBACH, *JUSTICE WITHOUT LAW: RESOLVING DISPUTES WITHOUT LAWYERS* (1983) (Describes the history of dispute resolution techniques used by the Puritans, Quakers, and other religious sects. Also gives description of applicable dispute procedures for Jewish and ethnic groups).

116. C. MOORE, *THE MEDIATION PROCESS* 21 (1986).

117. *Id.*

118. *Id.*

119. See *supra* text accompanying notes 86-93.

legislatures that some disputes may call for a more consensual process than the traditional adversarial system provides.

VIII. MANDATORY MEDIATION IN THE UNITED STATES

As explained earlier, mediation in China is mandatory.¹²⁰ On the other hand, the mediation process in the United States varies among the jurisdictions that use it. It is employed in both private¹²¹ and court annexed¹²² methods of dispute resolution. Private mediation is always voluntary.¹²³ However, court annexed mediation can be either voluntary or mandatory.¹²⁴ The most popular cases for mandatory mediation are in child custody and other civil disputes.¹²⁵ Studies reflect a belief that most parties involved in mandatory mediation experience greater satisfaction than those involved in adjudication.¹²⁶ Furthermore, mandatory mediation cases tend to settle at the same rate as voluntary mediation cases. This suggests that a mandatory mediation requirement does not interfere adversely with the effectiveness of the mediation.¹²⁷

In most cases mediation is mandatory in China. Historically, the Chinese mediation system has been accepted without debate. Even after the Communists came into power, the mandatory nature of the system did not change. The Chinese constitutional provision providing for the mediation of disputes has not been challenged. Perhaps the mandatory characteristic of mediation and its acceptance by the people of China are the reasons their mediation system works so well.

In contrast, mandatory mediation has not found favor in the United States. The Constitution of the United States does not prohibit ADR; however, the courts' power to mandate ADR is unclear.¹²⁸ A number

120. *Id.*

121. Private or voluntary mediation occurs when the parties mutually agree to mediate. *Mandatory Mediation*, *supra* note 11, at 1087.

122. Court annexed mediation takes place when mediation is judicially mandated. *Id.*

123. *Id.*; See, e.g. OKLA. STATE. ANN. title 12, ch. 37 app., rule 7(E) (West Supp. 1991) (authorizes a case to be mediated when stipulated and judicially approved).

124. *Mandatory Mediation*, *supra* note 11, at 1087.; See, e.g. CAL. CIV. PROC. CODE § 1141.11 (West Supp. 1991) (provides mandatory ADR for civil cases involving amounts in disputes under \$50,000).

125. See, e.g., CAL. CIV. PROC. CODE § 4607(a) (West Supp. 1987) (requires mandatory mediation for child custody disputes before adversary procedures).

126. *Mandatory Mediation*, *supra* note 11, at 1088; see McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 256-57 (1981).

127. *Mandatory Mediation*, *supra* note 11, at 1091 n. 37.

128. *Id.* at 1089.; See generally Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487 (1989).

of courts claim such power rests in a trial court's authority to control its docket and in rule 16(c) of the Federal Rules of Civil Procedure.¹²⁹ Those opposed to mandatory mediation have two arguments. First, mandatory mediation represents a distinct deviation from previously accepted legal doctrine.¹³⁰ Second, mediation does not work for everyone and can place undue pressure on those with unequal bargaining power.

A. Mandatory Mediation - a Significant Departure from Traditional Doctrines

The legal system has traditionally decided divorces, child custody, and other family law disputes. Legislatures, which are thought to be the best representatives of the people, make laws. Courts then decide cases based on those laws. Traditionally, these court procedures have been adversarial in nature. The traditional goal of a divorce action was the termination of the couple's marriage. However, mandatory mediation suggests that the adversarial approach is not the best method to handle certain types of family disputes.¹³¹ However, some contend that mediation, as a method for settling such disputes, is a deviation from the traditional system and should not be followed.

Mandatory mediation is perceived as a less harsh method for settling family disputes than adjudication. Social workers and other professionals are thought to be better equipped to handle some types of family disputes. However, under mandatory mediation, social workers in custody disputes are accused of functioning as decisionmakers, removing guardians ad litem and substituting for judges as the final arbiters of child custody.¹³² The role of social workers in the mediation system is completely different from their traditional function in the legal system as counselors or investigators.¹³³

129. *Mandatory Mediation*, *supra* note 11, at 1089.; See, e.g., *McKay v. Ashland Oil*, 120 F.R.D. 43, 47-48 (E.D. Ky. 1988) (This court held that the district court's inherent power and the Federal Rules of Civil Procedure (FRCP) provide authorization for a local mandatory summary jury trial rule. Summary jury trial is another form of ADR, where third parties have no decision making authority and can resolve the dispute only through mutual agreement of the parties). FRCP 16(c) states: "The participants at any conference under this rule may consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . ." FED. R. Civ. P. 16(c) (West Supp. 1990).

130. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making*, 101 HARV. L. REV. 727, 728 (1988).

131. See *supra* text accompanying note 94.

132. Fineman, *supra* note 130, at 741.

133. *Id.* at 740.

According to M. Fineman, a Professor of Law and Director of the Family Policy Program in Wisconsin, family disputes once solved by the adversarial process, are now being treated as emotional crises through mandatory mediation.¹³⁴ Attorneys are viewed as incapable of handling the crises because of their insensitivity and adversarial background. Consequently, the traditional adversarial role of the attorney in family disputes is substantially altered. Resistance by attorneys to the implementation of mediation may be attributable to the reduction of their role in family disputes.

B. Mandatory Mediation Inapplicable to All Cases

The second major argument against mandatory mediation is that mediation is not for everyone. Parties bringing an action have certain expectations, and these should be considered. Some parties may not need mediation. Other parties may need mediation, but have no incentive to mediate in good faith. The latter problem could be resolved if some type of sanction were applied to parties who did not make an effort to mediate. However, some couples have already determined they want to end their marriage and requiring mediation merely adds another layer to the judicial process. These types of parties are expecting the court to render a judgment and to end the dispute.

Requiring mediation for everyone undoubtedly subjects some parties to mediation who really do not need mediation, particularly in divorce proceedings. Arguably, where no dispute over the proceeding exists, a couple should not be forced to mediate. Mandatory mediation for all divorces is thought by some to prolong the procedure and increase the costs to both the parties and society. However, Chinese mediation is required in all divorce actions and as a result, China's divorce rate is much lower than that of the United States.¹³⁵ Moreover, if mediation is not mandatory for all parties, it may be impossible to determine which cases should be mediated and which should not. Undoubtedly, some cases well-suited for mediation may slip through the system.

Another danger inherent in mandatory mediation is its application to disputes between individuals with unequal bargaining power.¹³⁶ A knowledgeable party could dominate the entire process. Since the mediator should remain a neutral third party, individuals who are not aware of their legal position will not be directed by the procedure to

134. *Id.*

135. See *supra* p. 12.

136. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29, 34-35 (1982).

develop a consciousness of their rights.¹³⁷ The idea of parties being aware of their individual rights is foreign to the Chinese system. In China, mediation works to bring the parties together through the concept of *li*. The goal is to restore harmony. Because of the different schools of thought, unequal bargaining power may not be a concern for the Chinese, but is a primary concern in the United States.

The extreme position is that much inequality exists between the average man and woman in terms of bargaining and that mediation is never appropriate in any domestic situation.¹³⁸ This idea is based on the assumption that women are generally taught to be passive, deferential, and nurturing toward others. Thus, they are unable to bargain for what they need.¹³⁹ However, this position becomes outdated as more women enter professional careers and become heads of families. Women are developing bargaining skills and independence.¹⁴⁰ In general, women today are as skilled in negotiations as men.

Despite the arguments against mandatory mediation, several states have recognized its advantages and have implemented court annexed programs for mediation.¹⁴¹ Perhaps the mandatory nature of mediation is essential to the Chinese system. As the United States continues to develop mediation processes, the mandatory requirement of the Chinese system should not be overlooked. Mandatory mediation seems to benefit most parties, and also prevents lack of use of the process. Courts are often reluctant to order mediation because they are unclear of their power to do so. However, if mediation were mandated by statute, both problems would be solved.

IX. MEDIATOR QUALIFICATIONS

To aid the United States in establishing an effective mediation system, an understanding of the Chinese mediator selection process is helpful. Chinese mediators consist mainly of women and retired workers.¹⁴² There are usually three to eleven mediators per committee, and they are selected every two years in each village, municipality,

137. *Id.* at 35.

138. Rowe, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855, 862 (1985).

139. *Id.* at 862.

140. *Id.*

141. See Jenkins, *Divorce California Style*, STUDENT LAWYER 30 (Jan. 1981); CAL. Crv. CODE § 4607 (West Supp. 1990); MICH. COMP. LAWS ANN. § 522.513 (West Supp. 1991).

142. Lecture by Yu, *supra* note 61.

and neighborhood.¹⁴³ There is no dispute over who acts as a mediator in China. The selection of Chinese mediators has been made for thousands of years without debate.

This is not the case in the United States. The recent popularity of mediation in the United States has raised many issues. Among these issues is who is qualified to be a mediator. The mediator's role is unique in the United States' legal system.

A mediator's objective is always to facilitate communication between the parties and achievement of a mutually acceptable settlement.¹⁴⁴ Although the mediator is neutral, he need not be entirely passive during the mediation process.¹⁴⁵ The mediator may assist the parties in spotting the issues that need to be resolved.¹⁴⁶ Usually the mediator meets with each party separately to determine who can compromise. While the mediator meets with the parties, he cannot show favoritism to one party.¹⁴⁷

The process should be controlled by the parties, as opposed to the mediator.¹⁴⁸ The parties determine what compromises are needed to reach agreement. However, the mediator's role is to facilitate compromise. A vital skill the mediator must possess is the ability to listen carefully not only to what is said, but also to what is not said. Although the parties control the mediation process, it is the mediator who motivates the parties to reach agreement.

There has been much disagreement over who should serve as mediators. Some commentators believe a new field of certified public mediators should be established.¹⁴⁹ Others think that social workers or psychologists are best able to fulfill the requirements of mediator. Still others believe lawyers should mediate. Interestingly, retired workers and housewives have not been suggested as mediators. This is a further reflection on the differences between the mediation system of China and the United States.

A mediator's success should not depend on his background or training. As long as he possesses the necessary skills and obtains ad-

143. *Id.*

144. R. COULSON, PROFESSIONAL MEDIATION OF CIVIL DISPUTES 17 (1984).

145. McKay, *Ethical Considerations in Alternative Dispute Resolution*, 45 Arb. J. 15, 22 (1990) [hereinafter *Ethical*].

146. *Id.*

147. *Id.*

148. R. COULSON, *supra* note 144, at 18-23.

149. If the process is mandatory the quality control of mediation becomes increasingly important because the free market will no longer be controlling the process. See *Mandatory Mediation*, *supra* note 11, 1101 n. 106.

ditional training in mediation, he should be qualified to mediate. Skills required are the ability to communicate and the ability to identify issues. The most critical skill is the ability to remain neutral in the eyes of the parties. The mediators must be able to remain open minded and allow the parties to settle the dispute. A variety of requirements should be imposed on those entering the profession to ensure quality mediation.¹⁵⁰ After being trained, the mediator should receive a license and follow a code of ethics.¹⁵¹

If a lawyer is a mediator, a few complications exist. One problem is that some lawyers are unable to remain neutral because of their adversarial training.¹⁵² Unlike China, American law schools have traditionally trained students to represent their clients with zealous advocacy. It is difficult for some lawyers to be neutral and restrain their commitment to the adversarial process. However, American law schools are beginning to offer training in ADR methods.¹⁵³ As law students are exposed to ADR methods, this problem may fade.

Another dilemma for the lawyer/mediator is the considerable ethical issues involved. Since divorce mediation may involve the representation of two clients, difficulties arise as to the lawyer's role.¹⁵⁴ Conflict-of-interest problems normally arise when a lawyer represents more than one client in the same matter.

The American Bar Association has created model rules that allow lawyers to act as intermediaries between clients if the lawyer complies with certain restrictions.¹⁵⁵ This common representation approach is

150. *Id.*

151. *Ethical*, *supra* note 145, at 22.

152. *Id.*

153. Comment, *Model Rule 2.2 and Divorce Mediation: Ethics Guideline or Ethics Gap?*, 65 WASH. U.L.Q. 223, 225 (1985) [hereinafter *Model Rule 2.2 Comment*]. See also MODEL RULES OF PROFESSIONAL CONDUCT RULE 2.2 (1983).

154. *Model Rule 2.2 Comment*, *supra* note 153, at 225.

155. Model Rule 2.2 provides:

- (a) A lawyer may act as intermediary between clients if:
- (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;
- (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the client's best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interest of any of the clients if the

manifestly difficult. Many ethics committees and bar associations have suggested that lawyers provide non-representational divorce mediation to alleviate some ethical dilemmas lawyers face.¹⁵⁶

These problems involving the selection of the mediator are non-existent in the Chinese mediation system. Traditionally, the Chinese mediators have been selected without debate. The Chinese mediators seem to be at an advantage because they are accepted by most everyone. The United States is still struggling to decide who should mediate and what limitations should be placed on the mediator.

X. APPLICATION OF PRESSURE ON THE DISPUTING PARTIES

A common role of Chinese mediators is to pressure the disputing parties to resolve their dispute.¹⁵⁷ This pressure is applied in many ways. One method is to encourage the parties to engage in self-criticism, to examine their behavior, and to resume a happy life.¹⁵⁸ A second method is to have the families, neighbors, and work units of the parties suggest a settlement. Another method may be for the mediator to stress values to the disputants regarding commitment to the Party and to collective efforts to attain them.¹⁵⁹ These types of pressures to resolve the dispute may, in reality, result in a suppression rather than a resolution of the dispute.¹⁶⁰

The possibility of suppression of the dispute occurs when the mediator's application of values emphasizing national unity and collective living suffocate the underlying dispute.¹⁶¹ For example, "[a]

contemplated resolution is unsuccessful; and

- (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
 - (b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.
 - (c) A lawyer shall withdraw as intermediary if any of the clients so request, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

156. *Model Rule 2.2 Comment*, *supra* note 153, at 228.

157. See *supra* text accompanying note 70.

158. Lecture by Yu, *supra* note 61.

159. Lubman, *supra* note 41, at 1346-47.

160. *Id.*

161. *Id.*

bourgeois creditor is told that he cannot expect a cadre to pay rent because all economic classes must unite to assist the national economic effort."¹⁶² The original conflict may still exist, though the dispute has ended.

Application of pressure runs contrary to the traditional legal notions in the United States. Some American courts have held that judges do not have the power to coerce settlement.¹⁶³ The same concept should apply to mediators. When mediators pressure parties to settle their dispute, they undermine the consensual nature of mediation and run the risk of suppression rather than resolution of the dispute.

An American mediation system should implement safeguards to prevent coerced settlement. Mediators should be required to caution parties that no pressure should be applied during the mediation and that they may report any such pressure to the proper authorities.¹⁶⁴ In addition, the mediators' code of ethics should forbid settlement pressure.¹⁶⁵ Mediators should never make decisions for the parties. One way to ensure that no pressure is applied by mediators would be to submit mediators to malpractice sanctions.¹⁶⁶

Although the above suggestions may help reduce the likelihood of forced settlement, the confidentiality of mediation creates a problem of enforcing the safeguards. The preservation and importance of confidentiality is widely accepted.¹⁶⁷ The ability to assure confidential disclosure that is necessary to reaching a settlement may decide the success of the mediation. However, mediators should be subjected to some type of review, especially when disclosure is crucial to prevent forced settlement.¹⁶⁸ The courts should protect the disputants' confidentiality; however, an open proceeding should be available when the risk of coercion is present.¹⁶⁹

XI. CONCLUSION

The Chinese mediation system is deeply-rooted in Confucian philosophy, and has grown over the years to become an integral part of

162. *Id.* at 1347.

163. *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985).

164. *Mandatory Mediation*, *supra* note 11, at 1098.

165. *Id.*

166. *Id.*

167. See Freedman & Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. DISPUTE RESOL. 37 (1986); *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441 (1984); N. ROGERS & C. McEWEN, *MEDIATION: LAW, POLICY, PRACTICE* 96-100 (1989).

168. *Mandatory Mediation*, *supra* note 11, at 1100.

169. *Id.*

Chinese society. The mediation system was reinforced by Mao's leadership which added education as a function of mediation. While the system works very well for China, it is possible that some disputes are merely suppressed rather than resolved. However, mandatory mediation has been quite effective in Chinese society for centuries.

As interest in mediation grows in the United States, much can be learned by considering the scope and effectiveness of the Chinese mediation system. The American legal system is often counter-productive and wasteful. An increasing number of couples facing divorce and legal separation seek a fair and amicable settlement that will allow them to restructure their family. When children are involved, couples especially need to communicate and continue to cooperate in the raising of their children. Mediation offers a more productive forum for settlement that will enhance communication between the parties. Perhaps mandatory mediation as used by the Chinese should be implemented in the United States.

The United States' mediators should be carefully trained and prohibited from applying pressure on individuals to settle disputes. The application of pressure on the disputing parties may be the most significant difference between the two countries' mediation systems. The United States' traditional legal doctrine prohibits applying pressure on parties to settle disputes, unlike the Chinese system, where pressure is viewed positively.

Although there are inherent dangers involved with mediation, it is a promising system for dispute resolution. Many details and standards remain to be established. The mediation process from ancient and modern China has provided a foundation upon which the United States can build its own system to meet the needs and values of its citizens.

*Judy Winn**

* J.D. Candidate, 1992, Indiana University School of Law—Indianapolis.