

MANDATORY MEDIATION: AN OXYMORON? EXAMINING THE FEASIBILITY OF IMPLEMENTING A COURT-MANDATED MEDIATION PROGRAM

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I. INTRODUCTION

The introduction of the “multi-door courthouse” concept at the Pound Conference is said to have ushered in a modern era of dispute resolution within the United States.¹ This watershed event in the history of Alternative Dispute Resolution (“ADR”) spawned greater involvement by the courts in ADR. Court-annexed ADR programs were set up throughout the U.S. and legislation was enacted to encourage the use of ADR.² In 1983, Rule 16 of the Federal Rules of Civil Procedure was amended to exhort courts to consider the “possibility of settlement” or “the use of extrajudicial procedures to resolve the dispute” at pre-trial conferences.³ The Civil Justice Reform Act of 1990 also required every federal district court to consider court-sponsored ADR.⁴ In addition, the ADR Act of 1998 gave district courts the mandate to establish ADR programs and listed mediation as an appropriate

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¹ Frank E. A. Sander, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Varieties of Dispute Processing (April 7-9, 1976), 70 F.R.D. 79, 111-16 (1976); Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the Federal Courts: Panacea or Pandemic?*, 81 ST. JOHN’S L. REV. 77, 81 (2007).

² From 1984 to 1994, the number of states which formally incorporated ADR methods grew to 27 states and the District of Columbia. See Judith Filner, *Dispute Resolution Options in State Courts: NIDR Survey Reveals Significant Growth*, NIDR NEWS, Mar.-Apr. 1995, at 1.

³ See 1983 amendments to FED. R. CIV. P. §16(c)(7) and Advisory Committee Notes.

⁴ 28 U.S.C. §§ 471-482 (2006).

ADR process.⁵ The courts' increasing association with mediation programs begs the question of whether the courts should *compel* disputing parties to attempt mediation, especially in jurisdictions where mediation is not widely utilized. This paper will examine the current debate in the United States concerning court-mandated mediation and briefly evaluate other jurisdictions' approaches to this issue, as well as make recommendations concerning the most appropriate way to administer a mandatory mediation program.

II. KEY DEFINITIONS

ADR typically refers to any mode of dispute resolution that does not utilize the court system, such as arbitration, neutral evaluation and mediation. However, the terms ADR and mediation will be used almost interchangeably in this paper because of the huge emphasis in many courts on mediation. Mediation, in turn, will refer to a process of facilitated negotiation, in which a neutral third party, the mediator, assists the disputing parties in understanding their underlying concerns or needs, and in negotiating a possible settlement of their dispute.⁶

Mandatory or court-mandated mediation has been used in multiple ways in the relevant literature. This is especially true as mediation has become increasingly used as an adjunct to civil proceedings and as many different permutations of mediation programs have emerged in various states. Professor Frank Sander has formulated a useful way of navigating the different usages of the term court-mandated mediation. He distinguishes between *cate-*

⁵ 28 U.S.C. §§ 651–658 (2006). The Act lists mediation as an appropriate ADR process at § 651(a).

⁶ See JAMES J. ALFINI, SHARON B. PRESS, JEAN R. STERNLIGHT & JOSEPH B. STULBERG, *MEDIATION THEORY AND PRACTICE* 1 (2d ed. LexisNexis, 2006) (defining mediation as “a process in which a neutral intervener assists two or more negotiating parties to identify matters of concern, develop a better understanding of their situation and develop mutually acceptable proposals to resolve these concerns”); see Kimberly Kovach, *Mediation*, in *HANDBOOK OF DISPUTE RESOLUTION* 304 (Michael L. Moffitt & Robert C. Bordone eds., Jossey-Bass 2005) (stating that “[m]ediation is commonly defined as a process in which a third party neutral assists disputing parties in reaching a mutually agreeable resolution, and that mediators normally aim to promote information exchange, promote understanding among the parties and encourage exploration of creative solutions.”). See Leonard L. Riskin, *Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 *HARV. NEGOT. L. REV.* 7, 18 (1996); see also BERNARD MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER’S GUIDE* 226 (2000) (stating that mediation is a form of facilitation where the focus is on helping the parties resolve an identified conflict).

gorical and discretionary referral to ADR.⁷ The former approach applies when statutes provide that *certain classes of disputes must undergo ADR*,⁸ whereas the latter approach refers to judges who are given the authority to refer any case they deem appropriate to any of a listed number of ADR options.⁹ This paper will examine the utility of court-mandated mediation from both perspectives.

III. THE NECESSITY OF COURT-MANDATED MEDIATION

As the title of this paper suggests, mandatory mediation appears to be a glaring contradiction. Formality is eschewed within mediation because this mode of dispute resolution emphasizes self-determination, collaboration and creative ways of resolving a dispute as well as addressing each party's underlying concerns.¹⁰ Any attempts to impose a formal and involuntary process on a party may potentially undermine the *raison d'être* of mediation. In view of this danger, there must be *compelling* reasons to introduce mandatory mediation.

A. Empirical Studies on the Benefits of Mediation

The issue of whether to introduce mandatory mediation presupposes that mediation yields benefits that are both verifiable and well-accepted. However, some writers opine that these benefits are over-stated and have not been subject to rigorous empirical

⁷ Frank E. A. Sander, H. William Allen & Debra Hensler, *Judicial (Mis)use of ADR? A Debate*, 27 U. TOL. L. REV. 885, 886 (1996); Frank E. A. Sander, *Another View of Mandatory Mediation*, DISP. RESOL. MAG., Winter 2007, at 16.

⁸ Examples include California statute, CAL. FAM. CODE § 3170(a) (Deering 2009) ("If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation."), and the since-repealed Maine statute, ME. REV. STAT. ANN. tit. 19, § 752(4) (repealed 1995) ("[P]rior to a contested hearing under this section when there are minor children of the parties, the court shall refer the parties to mediation . . .").

⁹ Examples include Florida statute, FLA. STAT. ANN. § 61.183(1) (LexisNexis 2010) ("In any proceeding in which the issues of parental responsibility, primary residence, access to, visitation with, or support of a child are contested, the court may refer the parties to mediation . . ."), and Texas statute, TEX. FAM. CODE ANN. § 153.0071(c) (Vernon 2009) ("On written agreement of the parties, or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation.").

¹⁰ See Lon L. Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971); see also James Coben & Peter Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

scrutiny.¹¹ Some studies have also revealed that the parties who attempted mediation did not necessarily view the mediation process more favorably than the litigation process.¹² Furthermore, other studies have found that mediated agreements did not increase the level of compliance or reduce subsequent disputing.¹³

Notwithstanding the need for further advanced research to be conducted, recent studies have adequately established the general benefits of mediation. Parties endorse mediation because of the opportunities to participate in the process, to tell their side of the story and to contribute in determining the outcome of the dispute.¹⁴ Attorneys have found that mediation has improved communication between the parties and the attorneys.¹⁵ Furthermore, a majority of the studies show that mediated cases have a higher rate of settlement than cases that did not undergo mediation.¹⁶ A number of studies also show a greater compliance rate for judgments resulting from mediation rather than from judgments arrived through the litigation process.¹⁷ The available research

¹¹ Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 914–29 (1991); Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986) (suggesting through a study that there are no savings in costs).

¹² Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 695 (2002) (notes that parties and attorneys appeared to assess mediation somewhat more positively than the litigation process in some studies, but gave similar ratings in others). Wissler refers to Stevens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settling: Court-ordered Civil Case Mediation*, 19 JUST. SYS. J. 311, 324 (1997).

¹³ *Id.* at 695. Wissler observes that in a community mediation context, there was no correlation between measures of short-term mediation success (*i.e.*, settlement and immediate satisfaction with the agreement) and long-term success (*i.e.*, satisfaction with the agreement after about six months' compliance, and the parties' relationship). *See also* Dean G. Pruitt, *Process and Outcome in Community Mediation*, 11 NEGOT. J. 365, 372–73 (1995).

¹⁴ Wissler, *supra* note 12, at 690.

¹⁵ *Id.* at 692.

¹⁶ *Id.* at 694; Craig A. McEwen, *Toward a Program-Based ADR Research Agenda*, 15 NEGOT. J. 325, 331–33 (1999).

¹⁷ Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981); Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11 (1984); Neil Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. OF SOC. ISSUES 127 (1985); Craig A. McEwen & Richard J. Maiman, *The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance*, 20 LAW & SOC'Y REV. 439 (1986); Neil Vidmar, *Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance*, 21 LAW & SOC'Y REV. 155 (1987). There are, admittedly, conflicting empirical studies on compliance rates. However, while Wissler, *supra* note 12, calls for more thorough research to follow mediated cases some time after the mediation session, she had in an earlier article acknowledged McEwen and Maiman's studies showing increased rates of compli-

indubitably establishes the utility and benefits of mediation. The residual gaps in empirical studies concern relatively peripheral aspects of mediation, such as whether mediation produces more creative solutions.¹⁸ It is therefore submitted that the general benefits of mediation are not in doubt.

B. Mandated Mediation: A Temporary Expedient

Despite its documented advantages, mediation may well be under-utilized in certain jurisdictions. Parties and their attorneys are still accustomed to treating litigation as the default mode of dispute resolution; initiating mediation may also be perceived as a sign of weakness.¹⁹ In many jurisdictions, the rates of *voluntary* usage of mediation have been low. For instance, in England's Central London County Court system in which mediation occurred only with the parties' consent, only 160 mediations took place out of the 4,500 cases in which mediation was offered.²⁰ In contrast, after England introduced the Civil Procedure Rules, which empowered the courts to encourage the use of ADR (with cost sanctions), the number of commercial disputes referred for mediation increased by 141 percent.²¹ Hence, the full benefits of mediation are not reaped when parties are left to participate in it voluntarily.

Where the parties' reticence towards mediation is due to unfamiliarity with or ignorance of the process, court-mandated mediation may be instrumental in helping them overcome their prejudices or lack of understanding. Studies show that parties who have entered mediation reluctantly still benefited from the process even though their participation was not voluntary.²² It has been

ance. See Roselle L. Wissler, *Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323, 325 (1995).

¹⁸ Wissler, *supra* note 12, at 693.

¹⁹ SOC'Y OF PROF. IN DISP. RESOL., MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS (1991).

²⁰ The Lord Chancellor Dep't, *Alternative Dispute Resolution: A Discussion Paper*, Annex B (Nov. 1999), available at <http://www.dca.gov.uk/consult/civ-just/adr/annexbfr.htm>.

²¹ THE LORD CHANCELLOR DEP'T, EMERGING FINDINGS: AN EARLY EVALUATION OF CIVIL JUSTICE REFORMS, para. 4.12 (Mar. 2001), available at <http://www.dca.gov.uk/civil/emerge/emerge.htm>.

²² Jessica Pearson & Nancy Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 COLUM. J. L. & SOC. PROBS. 451 (1985); James A. Wall & Lawrence F. Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge is Not a Bump on a Log*, 6 AM. J. TRIAL ADVOC. 27 (1982); Craig McEwen & Thomas Milburn, *Explaining a Paradox of Mediation*, 9 NEGOT. J. 23 (1993).

observed that parties probably get “swept along by [mediation’s] power and forget how they got there initially.”²³ The need to increase awareness and the usage of mediation services is probably the most compelling reason for introducing mandatory mediation. It may not be ideal to implement what appears to be an uneasy contradiction in terms. However, as Professor Sander has noted, mandatory mediation is needed as a *temporary expedient* because individuals do not use mediation voluntarily and therefore should be given the opportunity to experience the benefits of mediation.²⁴ One critic has opined, in this respect, that mandatory mediation might have been appropriate in the United States as a remedial measure to get the ADR ball rolling in the 1970s and 1980s, and that court compulsion is no longer needed since the ADR movement in the United States is more mature.²⁵ It is thus submitted that court-mandated mediation should only be a short-term measure utilized in jurisdictions where mediation is relatively less well-developed, and that this expedient should be lifted as soon as the society’s awareness of mediation has reached a satisfactory level.

IV. WHETHER MANDATORY MEDIATION IS AN OXYMORON

Although mandatory mediation may be beneficial, considerable criticism has been leveled against the movement towards compulsory mediation. The principal objection is that mandatory mediation impinges upon the parties’ self-determination and voluntariness, thus undermining the very essence of mediation. Mediation, according to the U.S. Model Standards of Conduct for Mediators, is a process that emphasizes *voluntary* decision-making and focuses on self-determination as a controlling principle.²⁶ Coercion into the mediation process therefore seems inconsistent with, and even antithetical to, the fundamental tenets of the consensual mediation process.

²³ See Sander, *Another View of Mandatory Mediation*, *supra* note 7.

²⁴ Sander, Allen & Hensler, *Judicial (Mis)use of ADR? A Debate*, *supra* note 7, at 886. In Sander, *Another View of Mandatory Mediation*, Professor Sander repeats the point that compulsory mediation is a kind of temporary expedient a la affirmative action.

²⁵ Richard C. Reuben, *Tort Reform Renews Debate over Mandatory Mediation*, *DISP. RESOL. MAG.*, Winter 2007, at 13, 15.

²⁶ U.S. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), *cited in* Jacqueline Nolan-Haley, *Consent in Mediation*, *DISP. RESOL. MAG.*, Winter 2008, at 4, 5.

A. Coercion “into” vs. Coercion “within” Mediation

The apparent paradox of mandatory mediation has sparked diverse opinions on whether coercion *into* mediation may realistically be distinguished from coercion *within* mediation.²⁷ Some writers adamantly contend that coercion into the mediation process invariably leads to coercion to settle within the mediation process, which leads to unfair outcomes.²⁸ In this regard, a mediation study has shown that disputants are most satisfied with the mediation process when it is non-coercive and attentive to parties' interests.²⁹ Critics of mandatory mediation are of the opinion that there cannot possibly be a neat demarcation or even a semantic difference between coercion *into* and *within* mediation. One writer has opined that from a broad perspective, the mediation process cannot exist separate from the preceding sequence of stages leading to the mediation, and that “the expectation of an imposed settlement will inevitably alter the meaning of the [mediation] event for all the actors.”³⁰ The English courts seemed to have adopted this view in the seminal case of *Halsey v. Milton Keynes General NHS Trust*, when the Court decided that “to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to courts.”³¹

Other observers, including Professor Frank Sander, however, share the opinion that mandatory mediation is not an oxymoron because there can be a clear distinction between coercion within

²⁷ These terms are referred to also as front-end consent or entry-level consent, which is required for participation in the mediation process, and back-end or outcome consent that is required for an authentic agreement. *Id.* at 5.

²⁸ Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 565 (1997); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1581 (1991); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 22–30, 41; Susan Myers et. al., *Divorce Mediation in The States: Institutionalization, Use and Assessment*, 12 STATE CT. J. 17, 23 (Fall 1988).

²⁹ Guthrie C. & J. Levin, *A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 892–93 (1998).

³⁰ Sally Engle Merry, Book Review, 100 HARV. L. REV. 2057, 2066 (1987) (reviewing STEPHEN B. GOLDBERG, ET AL., *DISPUTE RESOLUTION* (1985)); see Timothy Hedeon, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but Some are More Voluntary than Others*, 26 JUST. SYS. J. 273, 278 (2005).

³¹ *Halsey v. Milton Keynes Gen. Hosp.*, [2004] EWCA (Civ) 576 (Eng.). The court ruled that this would infringe their right of access to courts under article 6 of the European Convention on Human Rights.

the mediation process and coercion into mediation.³² An individual may be told to attempt the process of mediation, but that is not tantamount to forcing him to settle in the mediation. As two writers put it, the coercion in mandatory mediation only “relates to requiring that parties *try to reach an agreement* to resolve their dispute.”³³ Furthermore, the individual is not being denied access to court because mandatory mediation is not being ordered *in lieu of* going to court. Instead, the parties’ access to court is only delayed; the parties have the liberty to pursue litigation once again if mediation fails.³⁴

The above debate is partially resolved by empirical studies showing no major difference between the rates of settlement in mandatory mediation and voluntary mediations.³⁵ If the critics’ hypothesis were true, mandatory mediation could possibly have yielded higher settlement rates than voluntary mediation as the parties who participate in a mandated mediation process would feel compelled to arrive at a settlement. On the contrary, certain other studies indicate that not only did mandatory mediation fail to increase settlement rates, but resulted in lower rates of settlements than cases in which the parties voluntarily participated in mediation.³⁶

Nonetheless, the empirical research may arguably be equivocal and fail to show a clear correlation or nexus between mandatory mediation and the likelihood of coercion within mediation. The lower settlement rates for mandatory mediation in the above studies could well be attributable to other factors and need not necessarily demonstrate that mandatory mediation does not readily lead to coercion to settle. It is equally possible that lower

³² Sander, Allen & Hensler, *supra* note 7, at 886; George Nicolau, *Community Mediation: Progress and Problems*, in MASSACHUSETTS ASSOCIATION OF MEDIATION PROGRAMS (1986).

³³ Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 948 (1997).

³⁴ David S. Winston, *Participation Standards in Mandatory Mediation Statutes: “You Can Lead a Horse to Water. . .”*, 11 OHIO ST. J. ON DISP. RESOL. 187, 190–92 (1996); Campbell C. Hutchinson, *The Case for Mandatory Mediation*, 42 LOY. L. REV. 85, 91 (1996).

³⁵ Wissler, *supra* note 12, at 697. Wissler states that a slight majority of studies reported no difference in settlement rates between mandatory and voluntary referral, and two studies found a higher rate of settlement with voluntary referral. One such study is in Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOT. J. 259, 261–62 (1996). None of the studies found a higher settlement rate under mandatory referral, which suggests that compulsory mediation does not compel settlement. See also DAVID SPENCER & MICHAEL BROGAN, *MEDIATION LAW AND PRACTICE* 271 (2006), where it was observed that there was no difference in success or user satisfaction rates between compulsory and non-compulsory mediation in the Australian state of Victoria.

³⁶ Wissler, *supra* note 28, at 581.

settlement rates are the result of the negative ramifications of mandatory mediation associated with undue pressure. For instance, there could be the lack of frank communication because parties perceive the mediator as having an effect on the adjudicated outcome and consequently act strategically within the mediation.

In one study of New York state mediation centers, mediation program staff revealed that disputants often agreed to participate in mediation because they wished to impress the judge and they thought that their case would not be damaged if they told the judge that they made an effort to mediate; it was found that court referrals to mediation led to a lower likelihood of settlement compared to referrals from other agencies and lower settlement rates for mandatory vis-à-vis voluntary mediation established that the litigants and certain attorneys gave negative ratings regarding their satisfaction with the process in mandatory mediation.³⁷ Empirical studies may therefore be less than conclusive in this debate. Evidently, settlement rates alone cannot be an indicator of whether coercion exists, and other factors such as the parties' level of satisfaction and response to the entire mandatory mediation process have to be considered to reach an accurate and holistic conclusion. Furthermore, there may be limited utility in comparing settlement rates between mandatory and voluntary mediation, since it is highly plausible that parties who voluntarily enter into mediation are more amenable to reach a settlement to begin with; any comparison with the purpose of finding a correlation between mandatory mediation and the likelihood of settlement may thus be meaningless. In short, more nuanced research is probably required to specifically establish the link between mandatory mediation and coercion (or lack thereof).

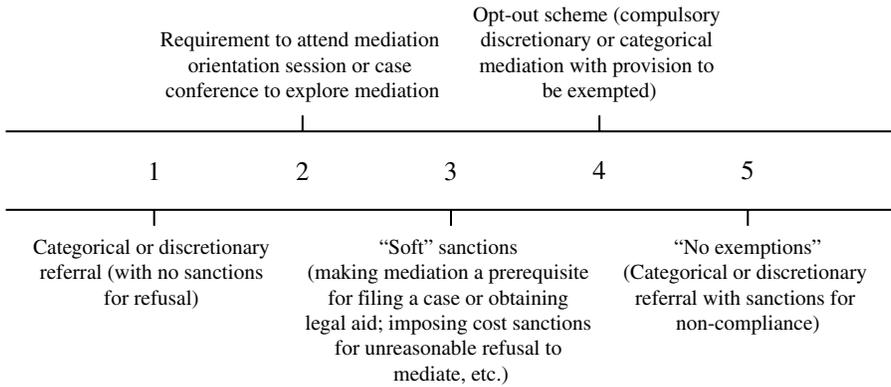
In the light of the equivocal and provisional results of empirical studies, it is submitted that the above concerns concerning the level of coercion within the mediation process may not be totally unwarranted. Since mediation is often closely linked to the entire court process, parties could easily associate coercion from the judge with a reduction in the level of autonomy that they may exer-

³⁷ See Timothy Hedeem, *The Influence of Referral Source Coerciveness on Mediation Participation and Outcomes*, cited in Hedeem, *supra* note 30, at 278–79; Sally Engle Merry, *Myth and Practice in the Mediation Process*, in *MEDIATION AND CRIMINAL JUSTICE: VICTIM, OFFENDERS AND COMMUNITY* 244 (M. Wright & B. Galaway eds., 1989); see also Wissler, *supra* note 28, at 584–85, 604. Wissler, *supra* note 12, at 697 (noting that the lower settlement rates in mandatory mediation could be due to differences in the timing of mediation rather than the mode of referral).

cise within the mediation process. In short, there could be a very faint distinction between coercion to *enter* mediation and coercion *within* mediation.

B. The Continuum of Mandatoriness

The resolution of the above issue ultimately hinges on the degree of mandatoriness of any mediation program. A program that has a high degree of compulsion is more likely to blur the distinction between coercion to enter into mediation and coercion within mediation. As pointed out above, mandatory mediation may take the form of either discretionary or categorical referral of cases for mediation. For both categories, there can be differing levels of compulsion being imposed on the parties. This “continuum of mandatoriness” is diagrammatically summarized below.³⁸ A brief explanation follows.



THE CONTINUUM OF “MANDATORINESS” IN MEDIATION

1. Categorical or Discretionary Referral with No Sanctions

A prime illustration of this kind of referral is the U.K. Automatic Referral to Mediation pilot scheme in Central London County Court, which took place from 2004 to 2005. Although cases were automatically being referred by the courts for media-

³⁸ This continuum is adapted and modified from Tania Sourdin, Making People Mediate, Mandatory Mediations in Court-Connected Programmes in DAVID SPENCER & TOM ALTOBELLI, DISPUTE RESOLUTION IN AUSTRALIA: CASES, COMMENTARY AND MATERIALS 148 (2005).

tion, the disputing parties had the option to express their objections.

2. Requirement to Attend Mediation Orientation Session or Case Conference

This approach is employed in Queensland, Australia, where the court may require parties appear before the court prior to assessing whether mediation is appropriate (Section 97 of the District Court Act 1967).³⁹ Similarly, in the U.S. state of Virginia, parties are required to attend mediation orientation sessions before they are allowed to decide whether they wish to attempt mediation.⁴⁰

3. Soft Sanctions

The United Kingdom offers the best example of this approach. The courts encourage parties to attempt ADR, and take into account the party's conduct—including any unreasonable refusal of ADR or uncooperativeness during the ADR process—in determining the proper order of costs. Another approach in the U.K. Family Law Act is to require parties seeking legal aid to first attend a meeting to determine whether mediation is appropriate.⁴¹ In a similar vein, the 1991 New South Wales Supreme Court Policy and Planning Sub-Committee recommended that certain classes of cases be prohibited from being commenced in court unless the parties provided certification that pre-filing mediation had been attempted.⁴²

³⁹ Section 97 of the District Court Act of 1967 provides:

(1) The District Court may require the parties or their representatives to attend before it to enable the court to decide whether the parties' dispute should be referred to an ADR process. . . . (3) The Court may, by order ("referring order"), refer the dispute for mediation or case appraisal. (4) Without limiting the court's discretion, the court may take the following matters into account when deciding whether to refer a dispute to case appraisal—(a) whether the costs of litigating the dispute to the end are likely to be disproportionate to the benefit gained; (b) the likelihood of an appraisal producing a compromise or an abandonment of a claim or defence; (c) other circumstances [that] justify an appraisal.

District Court of Queensland Act, 1967, c. 7, § 97, available at http://www.austlii.edu.au/au/legis/qld/consol_act/dcoqa1967308/s97.html.

⁴⁰ Geetha Ravindra, *Reflections on Institutionalizing Mediation*, 14 DISP. RESOL. MAG. 28, 29 (2008).

⁴¹ Family Law Act, 1996, c. 27, § 29 (Eng.) available at http://www.opsi.gov.uk/acts/acts1996/Ukpga_19960027_en_1.

⁴² DAVID SPENCER & TOM ALTABELLI, DISPUTE RESOLUTION IN AUSTRALIA: CASES, COMMENTARIES AND MATERIALS 149 (Law Book Co. 2005).

4. Opt-out scheme

The mandatory mediation program in Ontario, Canada refers all civil cases, except family cases, to mediation, but provides the parties the option of seeking exemption by way of motion.

5. No exemptions

Some Australian states, such as the courts in South Australia, Victoria and New South Wales, are empowered by legislation to refer parties to mediation with or without their consent.⁴³

This continuum demonstrates how the extent of coercion into mediation can vary drastically across different programs. It is this paper's assertion that *mandatory mediation only becomes an oxymoron at level five of the mandatoriness continuum, i.e., when cases are referred for mediation without any provision for exemption and are accompanied by sanctions for non-compliance*. It is submitted that mediation is not necessarily a contradiction in terms in all other types of mandatory mediation programs.

C. Mandatory Mediation Need Not Be an Oxymoron

It is this paper's assertion that mediation is likely to lose its voluntary nature and become a cause for concern *only when accompanied by the following three factors*:

1. Arbitrary Referral of Cases for Mediation

In a discretionary referral regime, a judge can easily fail to actively exercise his discretion and consequently refer all cases for mediation as a blanket rule. The disputing parties will then feel that they are being coerced because their cases are arbitrarily being sent for mediation regardless of the cases' specific circumstances. Discretionary referral is meant to be a customized and fairer form of mandatory mediation, in comparison to categorical referral of entire classes of cases.⁴⁴ Hence, if judges are not well-trained to

⁴³ Supreme Court General Civil Procedure Rules, 2005, § 50.07 (Austl.), available at http://www.austlii.edu.au/au/legis/vic/consol_reg/sccpr2005433/s50.07.html; Supreme Court Amendment (Referral of Proceedings) Act, 2000, c. 36, § 110K (Austl.), available at http://www.austlii.edu.au/au/legis/nsw/num_act/scaopa2000n36488.pdf; Supreme Court Act, 1935, c. 4, § 65(1) (Austl.), available at http://www.austlii.edu.au/au/legis/sa/consol_act/sca1935183/s65.html; District Court of Queensland Act, 1967, c. 7, § 97, available at http://www.austlii.edu.au/au/legis/qld/consol_act/dcoqa1967308/s97.html.

⁴⁴ Sander, *Another View of Mandatory Mediation*, *supra* note 7.

exercise their discretion, discretionary referral may effectively be tantamount to automatic referral. Coercion to enter into mediation will then readily lead to parties sensing that they are being coerced within the mediation process.

Categorical referral presents a slightly thornier situation, since classes of cases are arbitrarily referred for mediation regardless of the characteristics of each case. Since this regime, while simple to administer, is synonymous with arbitrariness, it is frequently accompanied by provisions for parties to opt-out of the mandatory mediation program.⁴⁵ Category 5 of the continuum has therefore been highlighted as potentially causing coercion within the mediation process. It is thus submitted that categorical referral very readily leads to coercion unless parties are allowed to request an exemption from mediation.

2. Excessive Sanctions for Non-Compliance

Disproportionate sanctions for failure to participate in mediation may also result in coercion and undermine the nature of mediation as a voluntary process. It is indeed ironic if punitive sanctions have to be imposed in order to compel a party to participate in a voluntary process. A strict regime of sanctions may cause the parties to enter the mediation process with an acute consciousness and fear of court sanctions, resulting in less than candid and autonomous participation in the mediation process.

3. Excessive Scrutiny of Parties' Participation in Mediation

Further, if the courts, in determining whether the parties have complied with the order to mediate, examine their conduct within the mediation session, the parties may feel that their communications in mediation are under rigorous scrutiny by the courts, and that there is no genuine voluntariness in the entire process.

In sum, it is submitted that mandatory mediation (falling under categories 1 to 4 of the continuum) does not necessarily contradict or undermine the nature of mediation as a voluntary and consensual process, provided certain conditions are present. Mandatory mediation, as a merely temporary expedient, should remain as an informal process that parties feel comfortable with. This will not be possible if there are excessive sanctions, if there is arbitrary referral of cases for mediation without any provision for exemptions, or if the parties do not have the assurance that the

⁴⁵ See, e.g., Ontario's mandatory mediation program, *infra* Part VI.A.

court will not scrutinize their conduct within the mediation process. Only in such circumstances will mandatory mediation truly be an oxymoron because it affects the parties' conduct within the mediation process. It is this paper's assertion, as will be demonstrated below, that the *distinction between coercion into and within the mediation, albeit a fine one, can be maintained if accompanied by appropriate standards of compliance and sanctions*. I turn now to examine the issues of setting appropriate standards of compliance and sanctions.

D. The Required Level of Participation in Mediation

Winston described the peculiar problem in mandatory mediation—that the horse may be led to the water (i.e. ordered to participate in mediation) but cannot be forced to drink.⁴⁶ To ensure that mandatory mediation is truly effective, many states have required parties to participate in mediation in good faith. However, commentators have questioned whether there should be *any* prescribed level of participation. The debate concerning this issue again stems from the differing views on the nature of mediation. Some writers have asserted that confidentiality of mediation is jeopardized once the court begins to make complex evaluations concerning what transpired during the mediation process.⁴⁷ The courts' attempts to enforce participation standards may entail requiring mediators to testify about the proceedings.⁴⁸ Parties' perceptions of the reduction in confidentiality could discourage them from participating freely and openly.⁴⁹ Professor Edward Sherman also opposes a good faith standard, arguing that it deprives parties of their "litigant autonomy and the legitimate right to hold out and

⁴⁶ Winston, *supra* note 34, at 193.

⁴⁷ Iur. Ulrich Boettger, *Efficiency Versus Party Empowerment – Against a Good-Faith Requirement in Mandatory Mediation*, 23 *REV. LITIG.* 1, 34 (2004).

⁴⁸ Note that under sections 4 and 6 of the Uniform Mediation Act of 2002, mediation communications are privileged. The mediator may not be called to testify save certain exceptions, when the society's interest is deemed to outweigh the interest in confidential mediation communications (e.g., when communication is used to plan a crime or used in regard to a complaint of professional misconduct). There is no provision for the waiver of mediation confidentiality in order to evaluate whether the parties to the mediation participated in good faith. See *UNIF. MEDIATION ACT*, §§ 4–6 (2002).

⁴⁹ Winston, *supra* note 34, at 200; Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 *OHIO ST. J. ON DISP. RESOL.* 37, 42 (1986).

have those issues determined in a trial.”⁵⁰ These commentators essentially share the view that a strict line should be drawn between the court’s referral of mediation and the court’s interference with the mediation process itself.

There is a very plausible danger that the courts, while trying to zealously promote mediation, may interfere excessively with the mediation process. Mandatory mediation will then fail to fulfill its intended purpose. Be that as it may, it is still necessary to enforce the court’s order to participate in mediation and to motivate the horse to drink the water. The current efforts in this regard suffer from lack of clarity in defining the level of participation. Good faith, though undoubtedly a salutary standard, is intrinsically vague and amenable to vastly differing interpretations.⁵¹ Unfortunately, this standard has been used in the Federal Rules of Civil Procedure⁵² as well as a number of statutes in U.S. states.⁵³ Notably, there has hardly been any legislative definition of what “good faith” entails.⁵⁴ One statute in Minnesota has listed six types of action that *do not* constitute good faith.⁵⁵ One writer, Kimberlee Kovach, has attempted to stipulate six specific elements of good faith, including possession of knowledge of the case and readiness to take into account the interests of the other party.⁵⁶ However,

⁵⁰ Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079, 2093 (1993).

⁵¹ *Id.*

⁵² FED. R. CIV. P. 16(f)(1)(B).

⁵³ See, e.g., KAN. STAT. ANN. § 72-5430(c)(4) (2009); ME. REV. STAT. ANN. tit. 19, § 214(4) (repealed 1995); MINN. STAT. ANN. § 583.27(1) (West 2009).

⁵⁴ Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1096–97 (1990); Alexandria Zylstra, *The Road From Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIM. L. 69, 70 (2001); John Lande, *Using Dispute System Design Methods To Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 80 (2002).

⁵⁵ See MINN. STAT. ANN. § 583.27(1) (West 2009). The list of factors includes: (1) failure on a regular or continuing basis to attend and participate in mediation sessions without cause; (2) failure to provide full information regarding the financial obligations of the parties and other creditors; (3) failure of the creditor to designate a representative to participate in the mediation with authority to make binding commitments within one business day to fully settle, compromise, or otherwise mediate the matter; (4) lack of a written statement of debt restructuring alternatives and a statement of reasons why alternatives are unacceptable to one of the parties; (5) failure of a creditor to release funds from the sale of farm products to the debtor for necessary living and farm operating expenses; or (6) other similar behavior that evidences lack of good faith by the party. See *id.*

⁵⁶ Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935, 963–964 (2001). The factors listed include: (1) have knowledge of the

these elements have not been incorporated into any jurisprudence or legislation. While Kovach has made a laudable attempt to elaborate on good faith, her definition does not resolve the difficulty in determining whether the parties have sufficient knowledge or demonstrated awareness of other parties' interests. More importantly, it would still entail the courts evaluating conduct within the mediation process and jeopardizing the informal and confidential nature of mediation. Hence, the lack of clear definitions of good faith underscores how nebulous a concept it is. Lack of clarity easily results in satellite litigation and greater uncertainty as well as lack of confidence in the confidentiality of the mediation process.⁵⁷

The above difficulties seem to suggest that it is a futile exercise to stipulate any type of required participation in mediation. However, it is submitted that the *solution lies in developing standards that are as clear and objective as possible, and involve the least amount of interference by the court in the mediation process.*

There is a palpable tension between the courts' desire to exert control over the parties' conduct in mediation and the need for parties to exercise the fullest level of autonomy within the mediation. It has been astutely highlighted by Sherman that "the higher the level of participation required, the greater the coercion by forcing a party to present its case in a manner not of its choosing."⁵⁸ In other words, excessive control by the courts should be avoided since it will compromise the parties' right of self-determination. While it may be argued that lenient standards would not penalize parties who are blatantly uncooperative during the mediation, it is equally, if not more, important that the parties should be free to conduct themselves as they see fit during the mediation. This overarching priority in mediation cannot be jeopardized by well-intentioned desires to compel co-operation in a process that is ultimately grounded in voluntariness and party autonomy. Fur-

case in terms of facts and solutions; (2) be ready to take into account the interests of the other side; (3) have all necessary decision-makers in person at the table; (4) engage in a frank and open discussion so that the other side is able to understand their own positions better; (5) not lie in response to direct questions; (6) not mislead the other side; and (7) demonstrate a broad willingness to listen and communicate about their own positions in detail, and explain why offers are accepted or not. *Id.*

⁵⁷ Winston, *supra* note 34, at 200. See Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy and Confidentiality*, 76 *IND. L.J.* 591, 628 (2001) ("An objective standard of what constitutes bad-faith participation in ADR should identify minimal aspects of good-faith participation or, as a corollary, specify prohibited conduct . . . to provide notice of minimal aspects of good-faith participation.").

⁵⁸ Sherman, *supra* note 50, at 2094.

thermore, any party's lack of co-operation may be easily dealt with by the mediator who should be astute enough to end the mediation if it proves unfruitful.⁵⁹ Hence, effective mandatory mediation should be accompanied by a deliberate choice by the courts or legislature not to impose overreaching participation standards excessively on the parties. This approach will invariably involve stipulating minimal standards of compliance.

Several commentators have proposed the following objective and clear standards that will fulfill the above suggestion. This author concurs with these standards and makes additional recommendations to arrive at the following standards:

- (i) The parties and/or the parties' representatives have to be present at the mediation; it is suggested that the individual parties must attend the mediation. It has been asserted, in this regard, that the party, when present at the mediation, will have sufficient information to both make a decision and actively participate in the mediation.⁶⁰ It is further recommended that party representatives specifically include attorneys or insurance representatives, when insurance companies are involved;
- (ii) The parties and/or the parties' representatives should have the necessary authority to make proposals and settle the dispute;⁶¹ this is a basic requirement for the parties or their representatives to be the primary decision makers who need not consult other parties who are not present at the mediation session. It should not entail the more complicated determination of whether a party has authority to settle at a certain monetary amount; in such cases, parties may not be at ease in revealing at the beginning of the mediation whether they have such authority; and
- (iii) Each party should exchange position papers setting up the facts and arguments in their respective cases.⁶² These papers

⁵⁹ Winston, *supra* note 34, at 199. Winston argues that when it was clear from the beginning that one party had resolved itself against voluntary settlement, it was more efficient to let the case go to trial. The solution was not to impose stricter participation standards or increased sanctions.

⁶⁰ Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v Joseph Oat Corp.*, 69 WASH. U. L.R. 1059 (1991); Sherman, *supra* note 50, at 2104.

⁶¹ Nonetheless, it is submitted that it should be verifiable in most cases whether the parties or their representatives are the primary decision makers and need not consult other parties who are not present. This requirement may not necessarily be easy to determine prospectively since certain parties may not wish to reveal at the beginning of the mediation session that they have authority to settle only up to a certain monetary or other amount.

⁶² Winston, *supra* note 34, at 201-02; Sherman, *supra* note 50, also proposes mandatory client attendance and authority to settle.

should clearly set out the parties' legal positions on the issues in dispute.

The above standards offer the optimal solution to ensure that mandatory mediation is feasible. They ensure that the court only evaluates the parties' conduct *before* the mediation occurs; the court's interference with the substantive mediation process is avoided. They are also clear standards which can be easily enforced and determined based on the facts of each case.

E. Appropriate Sanctions for Non-Compliance

The above minimal standards have to be enforced via appropriate sanctions. Many states, such as Indiana and North Carolina, prescribe sanctions in the form of mediation costs and/or attorney's fees.⁶³ The courts have used monetary sanctions when one party failed to send a representative and when a party's representative had no authority to settle. Typical measures of monetary sanctions include the opposing party's wasted expenses and attorney fees in preparing and attending the mediation.⁶⁴ In one unconventional case, the court ruled that the appropriate penalty was the amount of money that the defaulting party attempted to save by not sending a representative instead of the expenses incurred by the other party.⁶⁵ Monetary sanctions are beneficial in compensating the other party as well as exercising a punitive function to deter future breaches of the court's order to participate in mediation. The courts in other states are given broader power to impose harsher penalties. In Alabama and Maine, for instance, the court may use a wide array of sanctions, including dismissing an entire action or rendering judgment against the defaulting party. Rule 16 of the Federal Rules of Civil Procedure also ostensibly incorporates punishments authorized under Rule 37(b)(2)(C), including the sanction of dismissal or default judgment.⁶⁶ The current sanctions thus

⁶³ IND. R. ALTERNATIVE DISP. RESOL. 2.11 & 2.7(E)(3) (2009); N.C. GEN. STAT. § 7A-38.1 (2010).

⁶⁴ See, e.g., *Dvorak v. Shibata*, 123 F.R.D. 608, 610 (D. Neb. 1988) (awarding the plaintiff expenses incurred in traveling to the settlement conference, including mileage, lodging, lost wages and out-of-pocket costs as well as attorney's fees incurred in relation to the conference).

⁶⁵ *Universal Coop., Inc. v. Tribal Coop. Mktg. Dev. Fed'n of India, Ltd.*, 45 F.3d 1194, 1196 (8th Cir. 1995).

⁶⁶ Charles A. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599, 614–15 (1989). Judge Richey argues that this rule empowers the judge to impose punishments for the purpose of active case management.

range from monetary penalties to the extreme measure of dismissing a case.

There is an issue as to the proportionality of sanctions imposed for non-compliance with minimal standards. In several cases, the courts have refrained from ordering harsh sanctions because of courts' unease with the patent ambiguity in the participation standard.⁶⁷ It has thus been argued that harsher penalties may be warranted when there are clearer and more objective guidelines.⁶⁸ However, this argument does not necessarily hold water. Sanctions must be proportionate to the gravity of the breach of the participation standard. A failure to produce a position paper, for instance, must surely be treated less harshly than a failure to attend the mediation session. In addition, a delicate balance must be struck between the need to provide an incentive for parties to comply with the court order, and the equally crucial necessity of ensuring that sanctions are not draconian to the extent that they overshadow the informal and voluntary nature of mediation. While case dismissal certainly provides an incentive for compliance, it is an undeniably harsh penalty and should be thoroughly justified based on the gravity of the breach of the court's order. Dismissal should, at most, be a sanction used only for blatant and callous breaches of the court's order, such as willful non-appearance at the mediation session. It is therefore submitted that the *sanctions should be limited to predominantly monetary sanctions*. Providing the court with unlimited power to impose harsher penalties may lead to draconian results that will undermine the purpose of mandatory mediation, which is to encourage parties to overcome their prejudices about mediation and experience the benefits of the process. Hanging a Sword of Damocles over the parties, in the form of ominous and draconian penalties, is likely to distract the parties from the beneficial nature of mediation. One has to be careful not to create a chilling effect on mandatory mediation in an over-zealous bid to enforce court orders.⁶⁹

⁶⁷ *Schulz v. Nienhuis*, 448 N.W.2d 655, 657 (Wis. 1989). The court did not dismiss the lawsuit because it deemed it too harsh a penalty when the statute does not define what it means to participate in mediation.

⁶⁸ Winston, *supra* note 34, at 204.

⁶⁹ Michael D. Young, *Mediation Gone Wild, How Three Minutes Put an ADR Party Behind Bars*, 25 ALTERNATIVES TO THE HIGH COST OF LITIGATION 97 (2007). The author describes how a defaulting party was incarcerated by a Florida court, and questions whether this would create a chilling effect for future mediations and inhibit parties from being as open and honest as is sometimes necessary to reach a settlement.

To conclude, mandatory mediation need not undermine the voluntary nature of mediation where the standards of compliance are as clear and objective as possible, involve the least amount of interference by the courts in the mediation process, and when the accompanying sanctions are not draconian and disproportionate to the act of non-compliance. The courts should resist the temptation to exert excessive control over the mediation process, and should limit their interference primarily to referral of cases for mediation.

V. THE “CASE AGAINST MANDATORY MEDIATION:” OTHER OBJECTIONS

While this paper focuses principally on whether mandatory mediation impinges on the parties’ autonomy, there are also the following objections to compulsory mediation, which should be taken into account when designing any mandatory mediation program:

A. It Hampers the Parties’ Access to Justice

Critics have highlighted that parties who are forced to mediate are being deprived of their day in court⁷⁰ and made to incur additional litigation costs against their will.⁷¹ Along this line, the U.K. courts have decided that compelling a party to mediate against his will may unduly restrict an individual’s right of access to court which is guaranteed under Article 6 of the European Convention of Human Rights.⁷² Also, Professor Sander has noted that making the parties pay for court-annexed ADR may run counter to the fundamental idea of creating a justice system that provides litigants with a range of dispute resolution options. He raises the pertinent question of whether it is fair to compel parties to use alternative processes and also to pay for these processes.⁷³

It is submitted that mandatory mediation does not deny access to justice, but merely defers it. In this respect, Hong Kong in its

⁷⁰ Holly A. Streeter Schaefer, *A Look at Court Mandated Civil Mediation*, 49 *DRAKE L. REV.* 367, 388 (2001); Editorial, *Mandatory ADR: Can We Talk?* 78 *JUDICATURE* 272 (1995); Wissler, *supra* note 28, at 571–72.

⁷¹ Streeter Schaefer, *supra* note 70, at 388.

⁷² *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] *EWCA (Civ)* 576 (Eng.).

⁷³ Frank E. A. Sander, *Paying for ADR*, 78 *A.B.A. J.* 105 (1992)

report on Civil Reform stated that only an order that the parties resort to ADR in lieu of having their case decided in court may run afoul of Article 35 of the Hong Kong Basic Law, which guarantees the right of access to the courts.⁷⁴ A more significant issue with regard to this objection is ensuring that such access to justice is not unduly deferred (through, for instance, draconian sanctions), as well as ensuring that the quality of mandatory mediation is monitored closely so as not to unfairly compel parties to incur additional costs for mediation.

B. It Leads to General Inefficiency

There is also the concern that the mandatory mediation program leads to satellite litigation concerning issues such as whether the parties complied with the obligation to mediate and the appropriate sanctions to be imposed for non-compliance. Such litigation ultimately increases the costs for litigants and results in general inefficiency within the court system. In this regard, it has been noted that court time may be used in deciding on an issue which has been initially designed to save court time.⁷⁵ This objection, as in the case of the issue of voluntariness, has implications on how participation standards and sanctions for non-compliance should be designed.

C. There is Unfairness in Administering the Mandatory Mediation Program

This objection relates principally to the difficulty in arriving at fair and clear criterion concerning issues such as when the obligation to mediate has been fulfilled or when one can opt out of mandatory mediation. As stated above, an amorphous standard of good faith or satisfactory participation results in great difficulties in

⁷⁴ HONG KONG WORKING PARTY ON CIVIL JUSTICE REFORM, INTERIM REPORT AND CONSULTATION PAPER, para. 638 (2001), available at http://www.civiljustice.gov.hk/eng/archives_ir_view.html.

⁷⁵ Richard Ingleby, *Court Sponsored Mediation: The Case Against Mandatory Participation*, 56 MOD. L. REV. 441, 449 (1993); SARAH RUDOLPH COLE, CRAIG A. MCEWAN & NANCY HARDIN ROGERS, *MEDIATION LAW: POLICY AND PRACTICE* 59 (1989).

enforcing the parties' obligations. Inconsistent results and a general lack of clarity may ensue as a result.⁷⁶

VI. DESIGNING THE COURT-MANDATED MEDIATION PROGRAM

In the light of the above submissions—notably, the faint distinction between coercion into mediation and coercion within mediation—a court-mandated mediation program has to be designed with utmost care and sensitivity to address all the objections leveled against mandatory mediation. This section focuses on how the principles in the preceding sections may be translated in practical terms into workable court-mandated mediation programs. One particularly intriguing issue that arises is how to strike a balance between the need for the courts to freely direct cases to mediation and the equally significant need for the parties to request for exemption due to exceptional circumstances. Four programs will be examined in this regard: mandatory mediation in Ontario; the U.K. Automatic Referral Mediation program in the Central County London Court; the U.K. approach towards court referrals for mediation; and Florida's court-mandated mediation program.

A. Mandatory Mediation in Ontario

Ontario has one of the most extensive categorical referral schemes. In 1999, Ontario introduced mandatory mediation for civil, non-family actions, with a provision for the parties to opt-out of filing a motion. The parties in all these cases have to undergo mediation within ninety days after the filing of the first defense. The parties in standard cases may consent to an extension of sixty days, but all other extensions have to be obtained through formal court orders.

It is noteworthy that this scheme was hailed as a resounding success just twenty-three months after its inception.⁷⁷ The parties and lawyers expressed overall satisfaction with the mandatory me-

⁷⁶ Winston, *supra*, note 34, at 193. *See also*, Section IV (Whether Mandatory Mediation is an Oxymoron), *supra*.

⁷⁷ *See* ROBERT G. HANN & CARL BAAR, EVALUATION OF THE ONTARIO MANDATORY MEDIATION PROGRAM (RULE 24.1): FINAL REPORT – THE FIRST 23 MONTHS 80 (2001), available at http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/eval_man_med_final.pdf.

diation process.⁷⁸ The success is primarily attributable to one factor: the latitude given to the parties to obtain extension of time to mediate. Exemption from the scheme does not seem to be easily obtained; the parties have to file a motion before a case management master or judge, and no particular criteria for exemption are stipulated in the related legislation. However, the parties frequently made use of their right to obtain extensions of time. Close to 50 percent of all the cases in Ontario were mediated between 91 and 150 days after the filing of the first defense.⁷⁹ Evidently, Ontario's program, while achieving the overarching goal of increasing the number of mediations, "tempered" the mandatory effect of the scheme by giving parties the option to either opt out for cause or to obtain more time to undergo mediation. These are certainly essential features for any categorical referral scheme to be well-received by litigants and attorneys.

B. The U.K. Automatic Referral Mediation Program in the Central County London Court⁸⁰

In contrast to the Ontario program, the U.K. Automatic Referral Program is illustrative of how a court-mandated mediation program may fail to reach its goal when the level of mandatoriness is set at too low a level. The pilot project, introduced between 2004 and 2005, involved the random allocation of cases to mediation after a defense had been filed. Although there was automatic referral of cases for mediation, the parties were given almost unrestricted liberty to object to the referral. Each party was required to reply to the court's referral, and could raise objections in this reply. Where one or more parties objected, a District Judge would review the case and convene a case conference to persuade the parties to attempt mediation. The ease of opting out of the mandatory mediation scheme resulted in a high rate of objections and the parties and attorneys often did not take the program seriously. Further, the convening of case conferences, which were not

⁷⁸ *Id.* at 97. Eighty percent of the lawyers in Ottawa and fifty-nine percent of the lawyers in Toronto expressed satisfaction with the overall mandatory mediation experience, while eighty-two percent and sixty-five percent of the litigants in the respective states expressed satisfaction.

⁷⁹ *Id.* at 46.

⁸⁰ See generally DAME HAZEL GENN, ET AL., *TWISTING ARMS: COURT REFERRED AND COURT LINKED MEDIATION UNDER JUDICIAL PRESSURE* (2007), available at <http://www.justice.gov.uk/publications/docs/Twisting-arms-mediation-report-Genn-et-al.pdf>.

always successful, caused delay in the case proceedings.⁸¹ In short, the failure to impose clear limits on the parties' right to opt out led to the scheme being effectively rendered a voluntary, rather than a mandatory, mediation program.

The above two illustrations cumulatively underscore the importance of setting clear criteria concerning the opt-out provisions, as well as ensuring a sufficiently high threshold for the parties to obtain an exemption from mediation. While both the Ontario and the U.K. schemes do not set out any guidelines, there are instructive examples of opt-out standards from several U.S. states. Colorado, for instance, stipulates that compelling reasons should be shown in the motion, which has to be filed five days after court referral for mediation. The relevant statute also elaborates that these reasons include "that the costs of mediation would be higher than the requested relief and previous attempts to resolve the issues were not successful."⁸²

In summary, it is crucial that any mandatory mediation scheme set out succinctly the circumstances when mediation will not be made mandatory. It is also prudent to ensure that exemption is not too easily obtained. Simple measures, such as requiring the party to apply for the exemption as well as requiring the establishment of compelling reasons or good cause for exemption, should be incorporated into any mandatory mediation program. These principles will help address objections relating to the unfairness in the administration of mandatory mediation programs.

C. The U.K. Approach to Court Referral for Mediation

While the above case studies are instructive in highlighting the importance of providing for clear opt-out provisions, the U.K. experience with "mandatory" mediation shows how crucial it is for the mandatory nature of mediation to be clearly delineated. In the United Kingdom, mediation is theoretically a process that is entered into voluntarily.⁸³ However, the court should encourage the use of mediation or ADR for suitable cases under the U.K. Civil

⁸¹ *Id.* at ii, 72–73.

⁸² COLO. REV. STAT. ANN. § 13-22-311 (West 2009).

⁸³ The U.K. courts have ruled that compelling a party to mediate against his will may unduly restrict an individual's right of access to court which is guaranteed under Article 6 of the European Convention of Human Rights. *Halsey v. Milton Keynes*, [2004] EWCA (Civ) 576 (Eng.).

Procedure Rules.⁸⁴ The court may take into account the party's conduct (including unreasonable refusal of ADR or uncooperativeness during the ADR process) in determining the proper costs order. Several English cases have imposed cost sanctions because a party unreasonably refused to consent to participate in mediation.⁸⁵ Some of the non-exhaustive guidelines the court has stipulated to determine the reasonableness of a refusal include the nature of the dispute, the merits of the case, the extent to which other settlement methods have been attempted, whether costs of ADR would be disproportionately high, whether any delay in setting up and attending the ADR would have been prejudicial, and whether the mediation had a reasonable prospect of success.⁸⁶ Hong Kong has recently followed this approach by amending its High Court Rules to allow courts to make similar cost sanctions, taking into account the parties' conduct with respect to ADR.⁸⁷

There are principally two difficulties with the U.K. approach:

(i) The threat of costs sanctions effectively turns the courts' encouragement to mediate into a mandate to mediation. The courts' exhortation to attempt mediation is not a toothless one because of the possible costs ramifications. It has been noted that it is not inevitable that costs consequences will follow from a refusal to mediate since there have been cases in which the court held that the refusal to pay heed to the courts' encouragement was reasonable.⁸⁸ Nonetheless, it is still least risky and probably less costly for a party to heed the court's encouragement to mediate instead of arguing that it was not unreasonable to refuse to participate in mediation. Despite the ostensibly consensual basis for participation in mediation, the U.K. approach, for all practical purposes, veers very close to a mandatory mediation scheme.

⁸⁴ CIV. PROC R. 1.4(e) (Eng.) ("Active case management includes: . . . (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.").

⁸⁵ Halsey, [2004] EWCA (Civ) 576 (Eng.); Hurst v. Leeming, [2002] EWHC (Ch) 1051 (Eng.); Dunnett v. Railtrack, [2002] EWCA (Civ) 303 (Eng.); Hickman v. Blake Laphorn, [2006] EWHC 12 (QB) (Eng.).

⁸⁶ Halsey, [2004] EWCA (Civ) 576 (Eng.). Judge Lightman, in *Hurst's case* [2003] 1 Lloyd's Rep 379, 381, considered the "critical factor" in that case to be whether "objectively viewed" a mediation had any real prospect of success.

⁸⁷ See the newly introduced Order 1A, Rule 4 of Hong Kong Rules of the High Court (Amendment) Rules, available at http://www.civiljustice.gov.hk/gaz_sub_leg/rhc.html (follow "Order 1A" hyperlink).

⁸⁸ Nolan-Haley, *supra* note 26, at 6, citing the cases of Hickman v. Blake Laphorn [2006] EWHC 12 (QB) (Eng.), and Chaudry v. Yap [2004] EWHC 3880 (Ch) (Eng.).

(ii) It is difficult to accurately assess whether a party has *unreasonably* refused mediation.

The United Kingdom, apart from having to evaluate whether a party was uncooperative during the mediation (synonymous with the “good faith” requirement in the United States), faces the additional hurdle of making difficult findings of fact concerning, *inter alia*, the nature of the dispute, the merits of the case, or whether mediation has a reasonable prospect of success. It is not easy, for instance, to determine whether a party had a high chance of succeeding. One writer has highlighted how it is not always reasonable to expect a defendant to agree to mediation as there are circumstances when mediation presents a “no-win option” for him, and that not all cases are suitable for mediation.⁸⁹ The myriad of circumstances to be taken into account makes this determination an unenviable task. In fact, it is probably more daunting a decision than determining whether a party has participated in mediation in good faith. Satellite litigation concerning costs orders is likely to increase because of the difficulty in making such a determination. The court may also face difficulties in making factual findings concerning the parties’ conduct without infringing confidentiality within mediation.

It is fairly evident that the U.K. approach, in seeking to avoid overt coercion of the parties, has spawned a host of other problems associated with determining whether a party has acted unreasonably in ignoring the courts’ exhortation to mediate. By contrast, the approach in many U.S. states avoids the tenuous question of unreasonable refusal by simply ordering the parties to attempt mediation. One U.S. state’s approach will be examined next.

D. Florida

Florida is leading the way among U.S. states with its comprehensive court-connected ADR program.⁹⁰ It has been estimated

⁸⁹ Mark Friston et al., *Cost Cutting*, 156 *NEW L. J.* 737 (2006). The authors explain that any defendant who agrees to go to mediation is likely to be confronted with a claimant who assumes that the only real question at the mediation is “how much?” Some defendants may reasonably take the view that the claimant’s case is wholly without merit. Others may realize that once the principle of liability is conceded, it is going to be difficult for them to avoid paying substantial sums. In those circumstances mediation is a no-win option for the defendant, and it is unreasonable to expect him to agree to it.

⁹⁰ See Bruce A. Blitman, *Mediation in Florida: The Newly Emerging Case Law*, *FLA. B. J.*, Oct. 1996, at 44; J. Sue Richardson, *Review of Florida Legislation; Comment: Mediation: The*

that more than 100,000 cases are diverted from court process to mediation each year.⁹¹ In 1987, as ADR was growing in popularity, trial judges were given the authority to refer any civil cases to mediation or arbitration “if the judge determines the action to be of such a nature that mediation could be of benefit to the litigants or the court.”⁹² Under the Florida Rules of Civil Procedure, the first mediation session must take place within sixty days of the court referral. Parties are able to request that mediation be dispensed with by filing a motion within fifteen days of referral. The grounds for such a motion to be granted include:

- (i) the issue to be considered has been previously mediated between the same parties pursuant to Florida law;
- (ii) the issue presents a question of law only; or
- (iii) any other good cause is shown.

Florida’s director of court ADR services has noted that mandatory mediation orders are heavily litigated in Florida despite the obligation for parties to pay the mediators’ fees.⁹³ Further, the number of applications for exclusion from mandatory mediation has been relatively low.⁹⁴ The success of this discretionary referral regime is principally attributable to a few factors:

Florida Legislature Grants Judicial Immunity to Court-Appointed Mediators, 17 FLA. ST. U. L. REV. 623 (1990) (“Florida is leading the way in the establishment of alternative dispute resolution procedures.”); Dorothy J. Della Noce et al., *Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection*, 3 PEPP. DISP. RESOL. L.J. 11, 11 (2002) (“Over the past twenty-five years, the state of Florida has been recognized across the United States as a leader in the development of court-connected alternative dispute resolution programs.”); Paul Dayton Johnson, Jr., *Confidentiality in Mediation: What can Florida Glean From the Uniform Mediation Act?*, 30 FLA. ST. U. L. REV. 487, 501–02 (2003); Robert B. Moberly, *Ethical Standards For Court-Appointed Mediators and Florida’s Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 702, 726 (1994) (“Florida has perhaps the most comprehensive system of statewide and state-controlled court mediation in the country.”); Fran L. Tetunic, *Florida Mediation Case Law: Two Decades of Maturation*, 28 NOVA L. REV. 87, 88 (2003).

⁹¹ Sharon Press, *Florida’s Court-Connected State Mediation Program*, in COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS 57 (Ed Bergman & John Bickerman eds., 1998).

⁹² FLA. R. CIV. P. 1.710(b). See also *Florida’s Court-Connected ADR History*, in FLORIDA MEDIATION & ARBITRATION PROGRAMS, A COMPENDIUM 94 (Earnestine Reshard ed., 19th ed. 2005-2006), available at http://www.flcourts.org/gen_public/adr/bin/2006%20Compendium.pdf.

⁹³ Sharon Press, *Institutionalization: Savior or Saboteur of Mediation*, 24 FLA. ST. U. L. REV. 903, 907–08 (1997). Ms. Press has since confirmed that the volume of litigation on mandatory mediation remains low. Interview with Sharon Press, Director, Dispute Resolution Institute, Hamline University School of Law (Feb. 2009) (on file with the author).

⁹⁴ According to Ms. Sharon Press, motions for exclusions under Florida Rules on Civil Procedure rule 1.720 are rarely filed. *Id.*

(i) *The parties have the freedom to choose their mediators.*

One noteworthy feature of Florida's court-annexed mediation programs is the liberty given to the parties to mutually agree on a mediator. Since 1990, the parties were given the option to choose any court-certified mediator or any other mediator whom they deemed to be sufficiently qualified.⁹⁵ Private mediators invariably acquire different reputations based on their different styles of mediation or their respective niche areas. While the parties' autonomy over the mode of dispute resolution has been impinged upon, the parties are given considerable self-determination and flexibility concerning the way they would like mediation to be conducted. This is a prudent move to soften the blow of the mandatory mediation regime.

(ii) *Dissatisfied parties have recourse to a mediator grievance system.*

In 1992, Florida became the first U.S. state to introduce a mediator grievance mechanism.⁹⁶ The Florida Rules for Certified and Court-Appointed Mediators introduced a code of conduct for all mediators, which is enforceable through the right of litigants to file grievance complaints.⁹⁷ Although this grievance system is not totally free from criticism, it is likely to be instrumental in tempering the "coercive" element of the mandatory mediation program by giving the parties the avenue to express their objections.⁹⁸ Further, once mediation is made mandatory for litigants, it is incumbent on the courts to ensure that the quality of mediation is monitored closely. This meets the concern that mandatory mediation leads to parties being compelled to incur unnecessary costs. It is notable that the number of grievances filed compared to the large number of mediations has not been particularly high in Florida, which seems indicative that the level of dissatisfaction with the mandatory mediation scheme is not great.⁹⁹

⁹⁵ FLA. R. CIV. P. 1.720; Press, *supra* note 93, at 911.

⁹⁶ Press, *supra* note 91, at 60. See also FLORIDA MEDIATION & ARBITRATION PROGRAMS: A COMPENDIUM, *supra* note 92, at 12

⁹⁷ The formal and systematic procedure, set out in Rule 10.810 of the Rules involves referring a complaint to a complaint committee for it to make a facial sufficiency determination, and thereafter to send a report to the mediator for his or her response. A hearing panel may deal with the complaint where it is not resolved at the complaint committee level. See FLA. R. CERTIFIED & CT. APPOINTED MEDIATORS 10.810

⁹⁸ See Press, *supra*, note 93, at 913 (explaining that the original grievance system was refined in 1995 to provide for more front-end investigation and confidentiality protection, as well as opportunities for grievances to be addressed without a formal hearing).

⁹⁹ According to statistics supplied by Ms. Sharon Press, as of December 2008, only 115 complaints have been filed since the grievance procedure came into place in 1992. Interview with

(iii) *Clear requirements on the obligation to mediate.*

Finally, Florida has also introduced relatively clear criteria on when the obligation to mediate is fulfilled.¹⁰⁰ The main requirement is for parties to appear at the mediation session, and appearance is met when the following persons are physically present:

- the party or its representative having full authority to settle without further consultation;
- the party's counsel of record, if any; or
- a representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle.

Unlike the amorphous "good faith" standard, these tangible requirements result in greater certainty for the parties, and could also in some way attenuate the mandatory nature of the discretionary referral of cases.¹⁰¹ They also address the concern that mandatory mediation results in unfairness because of difficulty in enforcing participation standards.

In summary, Florida's experience offers an apt illustration of how a court-mandated mediation program can be comprehensively institutionalized. This state's programs ensure that the parties are given flexibility and autonomy over many aspects of the mediation process. Hence, while the choice to mediate may be imposed on the parties, it is more than compensated for by the parties' freedom of choice over other aspects. Further, clarity in the requirements for opting out of the mandatory mediation program and for fulfillment of the obligation to mediate are likely to have played a part in minimizing the level of dissatisfaction over the mandatory process.¹⁰²

Sharon Press, *supra* note 93. See also FLORIDA MEDIATION & ARBITRATION PROGRAMS, A COMPENDIUM, *supra* note 92, at 12.

¹⁰⁰ FLA. R. CIV. P. 1.720.

¹⁰¹ A caveat is that some circuits within Florida have introduced the additional requirement of "good faith." See Press, *supra* note 91, at 58.

¹⁰² While Florida has comprehensive provisions concerning mandatory mediation, it is notable that mandatory mediation is not used as a "temporary expedient", as Florida's programs have been in place since the 1980s. In this regard, Ms. Sharon Press commented that courts might need to mandate mediation for fewer cases given that Florida had mandatory mediation for a considerable duration of time. James Alfini, et al., *What Happens When Mediation is Institutionalized? To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 308, 318 (1994).

E. Brief Recommendations

It is evident, from a brief survey of all the above programs, that the task of designing a temporary expedient—a court-mandated mediation scheme—is an extremely delicate and challenging one. On one hand, the program has to be clear and unequivocal in setting out the mandatory nature of mediation. On the other hand, the program should not be excessively mandatory such that it effectively impinges upon the parties' autonomy within the mediation session. It is suggested that the following learning points can be distilled from an analysis of the above programs:

(i) Every program, regardless of whether it entails discretionary or mandatory referral of cases for mediation, should permit the parties to opt out of the scheme based on exceptional circumstances. Both the Ontario and Florida mandatory mediation schemes have such provisions for categorical referral and discretionary referral respectively. The "opt out" provision functions as a safety valve to reduce the level of arbitrariness and consequently, the degree of coercion, within the program.

(ii) *The criteria for opting out should not be couched in vague terms or be set at too lenient a standard.* The British automatic referral scheme is a prime illustration of the latter, while the Florida legislative provisions are instructive on how specific and clear guidelines can be created.

(iii) *The mandatory nature of the mediation program should be tempered by other ways of increasing the parties' autonomy.* This can take the form of giving the parties the choice of their mediator or providing them an avenue to lodge complaints over any mediator misconduct.

(iv) The court should also ensure that the *quality of mediation is closely monitored.* This can be done through introducing a mediator grievance system, as in Florida's case, or through other means such as enacting clear ethical guidelines for court-connection mediation.

(v) *The required participation standards should be simple and specific* so as to prevent unnecessary litigation and uncertainty.

(vi) *The sanctions to be imposed for non-compliance should not be draconian to the extent it overshadows the informal and voluntary nature of mediation.*

The table below summarizes these recommendations and links them to the objections against mandatory mediation:

Recommendation	Objection addressed
Permit the parties to opt out of the scheme based on exceptional circumstances	Lack of voluntariness within mediation.
The criteria for opting out should not be couched in vague terms or be set at too lenient a standard	Unfairness in administering mandatory mediation program.
The mandatory nature of the mediation program should be tempered by other ways of increasing the parties' autonomy (Selection of mediators; mediator grievance system)	Lack of voluntariness within mediation.
The quality of mediation should be closely monitored.	Hampering parties' access to justice.
The required participation standards should be simple and specific.	General inefficiency and incurring of additional costs.
The sanctions to be imposed for non-compliance should not be draconian to the extent they overshadow the informal and voluntary nature of mediation.	Lack of voluntariness within mediation.
	Hampering parties' access to justice.

VII. CONCLUSION

This paper began by posing the question of whether mandatory mediation is an oxymoron. Some commentators have answered this question with a resounding “no.” This paper has sought to demonstrate that there is no absolute or simplistic answer. Mandatory mediation need not necessarily be an oxymoron when used with circumspection. There may well be an acute danger that mandatory mediation could undermine the essence of mediation when accompanied by excessive coercion by the judge without exercise of his or her discretion, unduly strict sanctions for non-compliance or participation requirements that are amorphous and entail scrutiny of the parties' conduct within mediation.

It must be recognized that mandatory mediation, as a temporary expedient, has to be carefully implemented in any jurisdiction with the penultimate aim of increasing the awareness of mediation in a society. The “mandatory” aspect of this scheme has to be delicately handled so that mediation does not become enmeshed in excessive technicalities or rigid requirements that are in contradistinction with the fluid nature of mediation. As a temporary measure, mandatory mediation ultimately has to be complemented by education and other steps to increase the general awareness of mediation in the society.

