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Mediation Matters

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Mandated Mediation: An Effective Dispute-Resolution Tool

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Mandated mediation is authorized by federal statute. As such, 28 U.S.C. § 652(a) provides, "Any district court that *elects to require* the use of alternative dispute resolution in certain cases *may do so only with respect to mediation*."[1] Despite such authorization, mandated mediation is a controversial concept. The idea that mediation can be mandated by a court's rules or a court's order is anathema to many.

Why it is controversial is a mystery. After all, judges order litigating parties and their lawyers around all the time, requiring them to do a multitude of different things. So why are they bashful about ordering parties into mediation?

The controversy centers around the expressed ideal that mediation is an "entirely voluntary" process and cannot be mandated. This ideal is held by many people everywhere, with doctrinaire fervor. One problem with the ideal is this: Mediations are in fact mandated in many court systems — and are highly successful. Studies[2] have shown that mandated mediation produces settlement agreements; produces happy results for the parties; preserves a party's right to self-determination on whether to settle; minimizes litigation expenses and delays; assists the progression of litigation, even when it fails to produce agreement (*e.g.*, by narrowing the issues to be tried); and creates a culture where entirely voluntary mediations will regularly occur.

Mandated Mediation: A Remedy for Heavy Caseloads

"I don't feel comfortable ordering people to mediate" or "mediation should not be mandated" seem to be nearly ubiquitous sentiments among judges. But judicial opposition to mandated mediation tends to last only as long as caseloads remain manageable. Once caseloads become heavy and overwhelming, judges look for solutions — and mandated mediation is one that is commonly adopted. In fact, mandated mediation to address heavy caseloads is precisely the reason that today's mediation profession even exists in the U.S.[3]

In the 1970s, Chief Judge Irving Kaufman of the U.S. First Circuit Court of Appeals was facing burgeoning caseloads that resulted in long delays. To address the problem, he began an experiment in which cases were randomly assigned to a mandatory settlement conference with a settlement judge. That experiment proved successful in achieving settlements and reducing caseloads, so it became a permanent part of the court's regular processes. Its continued success resulted in nearly all other U.S. courts of appeals adopting a similar mandatory mediation process. What happened in the U.S. First Circuit Court of Appeals is often viewed as the beginning of today's mediation profession.[4]

1 28 U.S.C. § 652 became law in 1998 as part of the Alternative Dispute Resolution Act of 1998 (emphasis added), *available at* transportation.gov/civil-rights/pl-105-315-28-usc-651-alternative-dispute-resolution-act-1998 (unless otherwise specified, all links in this article were last visited on Aug. 10, 2021).

2 Examples of such studies include the following: (1) The Interim Report of the ADR Working Group for the Civil Justice Council for England and Wales, dated October 2017, *available at* judiciary.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf; (2) Jerry Goldman, "An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration," Federal Judicial Center (Jan. 1, 1977), *available at* fjc.gov/content/evaluation-civil-appeals-management-plan-experiment-judicial-administration-0; (3) Dorcas Quek Anderson, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program," 11 *Cardozo J. of Conflict Resolution* (Jan. 1, 2010), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=2843509; and (4) "Evaluation of Early Mediation Pilot Programs," Judicial Council of California, Administrative Office of the Courts, Office of the General Counsel (Feb. 27, 2004), *available at* courts.ca.gov/documents/empprept.pdf.

3 This information is from Edward R. Becker, "Forward to Appellate Mediation in the Third Circuit," 47 *Vill. L. Rev.* 1055 (2002).

4 *Id.*

Mediation Is Underutilized when Entirely Voluntary

Studies show that mediation programs are often underutilized when they rely entirely on voluntary entry by the parties. That is true even when heavy caseloads are causing delays and even when mediation is offered at low or no cost. That's also true in many countries — not just the U.S.

Small-claims courts are an example.[5] Many small-claims courts offer mediation services at no cost, with volunteer mediators standing by in court to provide on-the-spot mediation. Such mediation services, when not mandated, are underutilized, even when mediators are standing by in court to mediate disputes immediately and at no charge. Why don't the small-claims judges simply order some of the parties into a no-cost mediation to remedy the underutilization? The answer is unknown, but they don't — and won't. This is a shame!

Studies also show that underutilization is also true in other courts with entirely voluntary mediation programs. Post-trial interviews show that parties who did not participate in a voluntary mediation have no recollection of being advised by their attorneys or by the court about mediation services.[6] This is also a shame!

Benefits of Mandated Mediation

A study of mandated mediation in England and Wales[7] lists the following benefits:

1. Mediation "is capable of conferring huge benefits on disputants and on the civil justice system";
2. The "voluntary" use of mediation is disappointingly slow and small — so requiring mediation, even temporarily, can "really can change the culture";
3. Experienced mediators "feel strongly" that "mediation will be effective" in settling a "majority of cases" and "will shorten or help to focus" the cases that do not settle;
4. "If you let the parties" argue about whether to mediate or not, "they will do so" — and they will argue, generally, "for tactical/positional reasons";
5. In mandated mediation, the parties are only obligated "to attend and participate in good faith"; they have no obligation to settle;
6. Experience shows that parties who attend mediation under compulsion and "unwillingly" often "engage in the process and settle their disputes" — and that settlement rates did not drop; and
7. Sometimes parties are "quietly relieved" when compelled to use mediation, because of a sense that proposing mediation "might lead an opponent to suspect weaknesses in their case."

Ideals Yield to Developing a Mediation Culture

A study in 2010 by a mediation professional who holds strongly to the entirely voluntary ideal concludes that mandated mediation can create a mediation culture.[8] The study evaluated data on the effectiveness of mandated mediation in developing a mediation culture and finds that when attorneys with no experience are compelled to mediate, they become accustomed to mediation, like what it has to offer and start mediating voluntarily. So, the professional adjusts her entirely voluntary position to this: Mediation can be mandated for a limited period of time to develop a mediation culture — but when a voluntary mediation culture is established, the mediation mandates must cease.

Such study is an example of the tension between the need for mandating mediation to overcome underutilization and the desire for an entirely voluntary process. The result is that a lot of creative energy is expended to bridge and relieve that tension.

For example, a New York state court in 2018 was experiencing severe caseload problems. To help solve that problem, the court introduced mandatory mediation. In a creative effort to minimize its "mandated" nature, the court established the following procedures: (1) the first 90 minutes of every mandated mediation will be performed *pro bono* by the mediator; then (2) if the parties wish to continue with the mediation, they may do so — but they will be paying for the mediator's services from then on.[9]

Another example of creativity is in British Columbia, Canada.[10] Here is how that mediation program works: (1) A party to a lawsuit may initiate mediation by serving a "notice to mediate" on the other parties in the lawsuit; and (2) mediation must then occur, unless one of the parties declines and fits one of these narrow exemptions: (i) mediation already occurred; (ii) the parties agree in writing that mediation shall not occur; or (iii) the court finds that a mediation would be "materially impracticable or unfair."

A case in the Supreme Court of Canada under the British Columbia system found that (1) applications for exemptions "are rare," (2) "settlement rates in all forms of mediation, including mandatory mediation, are high," and (3) a mediation effort can be valuable, even when the parties are unable to reach a settlement, including narrowing and refining issues, planning next court steps and shortened trial times. A study of this British Columbia system by a group in England reaches these conclusions:

- The system "has led to the growth of informally agreed mediation as a norm," with the formal procedure "only being invoked rarely," and
- "This is exactly the kind of outcome" that we "would welcome and would see as beneficial for civil justice" in England.[11]

Put another way, the result of a creative and mandated mediation system is the development of a voluntary mediation culture, which is a highly desirable result for everyone.

Mediation Culture: Decades to Develop Without Mandating

Mediation cultures have developed in many communities without being mandated. However, such cultural develop-

5 *See, e.g.*, Dr. Roselle L. Wissler, "The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Please Courts," 33 *Willamette Law Review* 565 (1997).

6 *See, e.g.*, Donna Shestowsky, "When Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs," 22 *Harvard Negotiation Law Review* 189 (2017).

7 Interim Report, dated October 2017, *supra* n.2.

8 Quek, *supra* n.2.

9 *See* Alan D. Scheinkman, "Tacking the Backlog: New Initiatives in the Second Department," Supreme Court of State of New York, Appellate Division, Second Judicial Department.

10 "Oral Reasons for Judgment," *Matsqui First Nation v. Canada (Attorney General)*, 2015 BCSC 1409; Interim Report, dated October 2017, *supra* n.2.

11 *Id.*

ments can take decades, which is true everywhere. Here is how a mediator describes the development of a voluntary mediation culture in his community without mediation mandates.[12]

In our community, mediation began developing in personal-injury cases back in the mid-1990s. Local courts were backlogged, so plaintiffs and the defendants/insurance companies started mediating their disputes as a way to move cases along. Plaintiffs' attorneys found that they could get favorable settlements without the costs and risks of trial, and insurance companies found that they could get favorable settlements without the risks of runaway juries and the costs of a trial. As a result, they began mediating every personal-injury case and settled the vast majority of them.

Then, as personal-injury attorneys, both plaintiff and defendant, handled other types of civil lawsuits, they began mediating those as well. Over time, the litigation culture evolved into this: Nearly every civil case will be mediated voluntarily before it goes to trial. In fact, if you talk with local litigators today about their cases and case strategies, the first thing they will mention is mediation (*i.e.*, getting mediations scheduled and the results of mediation efforts) before they ever talk about the possibility of trial. But all that culture development occurred slowly — an evolutionary process over decades of time.

How Entirely Voluntary Processes Fail

Nebraska has a farm mediation law, which requires a creditor, before filing suit on a farm debt, to give notice to the debtor of a mediation opportunity. Such a law is common among farm states, but with variations in one critical respect: Some laws mandate that a mediation actually occur before a lawsuit can be filed, while other laws require only that a notice be given of the entirely voluntary process. Failure is the common result of farm mediation laws requiring only a notice of mediation opportunity. Here's an example of such a failure.

The author is representing a farm debtor, and we received one of those entirely voluntary mediation notices from the farmer's bank. The mediation notice states (italics added for emphasis):

> By providing you with this notice, [the Bank] *is merely complying* with the notice requirements under the Nebraska Farm Mediation Act. *[The Bank] does not, in any way, acquiesce to participation in the mediation process with you.*

Studies show that farm mediation laws are highly successful in producing settlements — when mediations actually occur.[13] However, under the entirely voluntary law for Nebraska, the Bank felt free to essentially say, "Here's notice of your mediation rights ... but we won't mediate with you." The moral of the foregoing is this: A mediation culture can develop without the assistance of mandated mediation, but that can take decades to accomplish, if it ever happens.

Benefits from "Failed" Mediations

One argument against mandated mediations is that they produce settlements at lower rates than entirely voluntary mediations. Whether that is accurate or not, the argument misses a significant point: Mediation provides benefits to the litigation process, even when a settlement does not result.

A 2017 study[14] found that nonsettlement benefits of mediation include narrowed issues for trial, a better understanding of those issues by the parties, and greater efficiencies in the pre-trial process. Such benefits are commonly realized whether the mediation is mandated or entirely voluntary.

One example[15] of this aspect is a bankruptcy dispute where the parties mediated their dispute over a creditor's claim — twice. The two mediations produced no settlement, the dispute went to trial on some, but not all, issues, and the bankruptcy judge ruled on the merits. As to the issues that remained, the judge mandated a third mediation. The parties complied and reached a settlement, in the third mediation, of all disputes between them. For these disputing parties, mandated mediation worked, even after two prior failures.

A Benefit from Mediation (Whether Mandated or Voluntary)

Mediation inserts a third-party neutral between disputing parties to help them negotiate effectively, which helps. Here's an example of how that happens.[16] Studies have shown that anger and similar emotions often exist between disputing parties, and that such emotions prevent the parties from accurately seeing the opponent's true position and interests. A mediator can help the parties, one study says,[17] by prompting them to correctly identify their emotions and thereby moderate the negative effects of such emotions. This moderating effect can occur in all types of mediation, whether mandated or entirely voluntary.

Conclusion

Despite its controversial nature, mandated mediation is an effective dispute-resolution tool. Judges are often reluctant to mandate mediation, but their resistance diminishes when heavy caseload pressures intervene. Although controversial, mandated mediations are effective in producing settlements and other benefits in the litigation process. They are also effective in developing an entirely voluntary mediation culture. To put it more bluntly, mandated mediations work. abi

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12 *See* "How Mediation Developed: A Local Example" (Parts I & II), mediatbankry.com (July 28 and Aug. 4, 2016).
13 *See, e.g.*, Cheryl L. Cooper, "The Role of Mediation in Farm Credit Disputes," *Tulsa Law Review*, Vol. 29, Issue 1 (Fall 1993).
14 Interim Report, dated October 2017, *supra* n.2.
15 *See* "Mediation: Persisting Despite Early Failures (*Kellogg v. Progressive*)," mediatbankry.com (Jan. 19, 2021).
16 *See* "A Study of Anger and Its Effects: Implications for Mediation?" mediatbankry.com (Dec. 1, 2020).
17 *Id.*