

Participation Standards in Mandatory Mediation Statutes: “You Can Lead A Horse to Water. . . .”

“Discourage litigation. Persuade your neighbors to compromise whenever they can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time.”

-Abraham Lincoln, July 1, 1850.*

A Proverb:

Samuel Johnson, to Boswell, who had just remarked that he was afraid his father would force him to be a lawyer:

“Sir,” retorted Johnson, “you need not be afraid of his forcing you to be a laborious practising lawyer; that is not in his power.” Then Johnson repeated this proverb, “A man may lead a horse to the water, but four and twenty canna gar him drink.”

-Boswell, *Life of Johnson*, July 14, 1763.**

I. INTRODUCTION

In the last two decades there has been much criticism about the state of the litigation process in the United States.¹ One recent article, indicating

* EUGENE C. GERHART, QUOTE IT! MEMORABLE LEGAL QUOTATIONS 429-30 (1987).

** THE MACMILLAN BOOK OF PROVERBS, MAXIMS, AND FAMOUS PHRASES 1179-80 (Burton Stevenson ed., 1948).

¹ See, e.g., Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 MISS. C. L. REV. 211, 211 (1994) (stating that the caseload of the federal courts is at a level that undermines the courts' ability to administer justice); Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendment to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts Be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721, 721 (1993) (stating that the federal civil justice system is in serious, critical condition because it is too expensive and takes too long); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 9 (1986) (citing numerous empirical studies to support his argument that litigation is a “miserable, disruptive, painful experience” to both plaintiffs and defendants); Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 274 (1982) (stating that any improvements in the civil legal system are lost due to the time lapse, expense, and emotional stress of the litigation process). *But see* Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 738-39 (1994) (stating that claims by politicians that the legal system is running amok are unsubstantiated); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984) (praising civil litigation as a method of using state power to bring a “recalcitrant reality closer to our chosen ideals”).

that the federal court system is in a state of crisis, describes the system's future as "nightmarish."² The article predicts that by 2020 over one million cases will be filed annually, compared to the 281,740 filed in 1994.³ The "nightmare" of this increased litigation is the huge cost in terms of time and money imposed on an already overburdened and inefficient court system. In an effort to deal with this problem, states have increasingly turned to alternative dispute resolution (ADR).⁴ The purpose of ADR is to establish attractive and effective dispute resolution forums for aggrieved citizens while at the same time relieving backed-up court dockets.⁵

The term ADR encompasses many dispute resolution techniques. Mediation, arbitration, and summary jury trials are some of the more familiar examples. Of these ADR techniques, mediation contrasts most sharply with litigation because it is a voluntary process. Essentially, mediation is a multi-party negotiation conducted with the assistance of a third-party neutral, who has no power to impose a settlement on the disputing parties.⁶ An important part of any mediation is this third-party neutral or mediator. The mediator's role is to encourage disputing parties "to find a mutually agreeable settlement by helping the parties sharpen the issues, reduce misunderstandings, establish priorities, vent emotions, find points of agreement, and ultimately negotiate an agreement."⁷ However, mediation also allows the disputants to retain control of the process because the mediator lacks the authority to impose an award. Thus, mediation can fail if one or both of the parties refuse to settle.

To increase the use of this cost-saving ADR technique, many states have passed statutes that enable courts to order disputing parties to participate in a mediation hearing.⁸ Mandatory mediation may seem to be

² Randall Samborn, *Judges Foresee Federal Courts Caseload Crush*, NAT'L L.J., Jan. 9, 1995 at 25.

³ *Id.*

⁴ See OKLA. STAT. ANN. tit. 12, § 1801 (West 1993) (in the title of this state's dispute resolution act the stated goal of the statute is to "help alleviate the backlog of cases which burden the judicial system in this state").

⁵ Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 238 (1981).

⁶ STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 103 (2d ed. 1992).

⁷ McEwen & Maiman, *supra* note 5, at 238.

⁸ IOWA CODE ANN. § 654A.6 (West 1994) (repealed 1995) (requiring a creditor desiring to enforce a debt against agricultural property to file a request for mediation); FLA. STAT. ANN. § 44.102 (West 1995); ME. REV. STAT. ANN. tit. 19, § 214.4 (West 1994) (prior to a contested hearing under this Domestic Relations Act, the court shall refer the parties to mediation); MINN. STAT. ANN. § 583.26 (West 1995) (repealed 1995) (allows a

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something of an oxymoron because mediation is fundamentally a voluntary process. However, mandatory mediation is still a voluntary process despite the fact that the parties are not participating voluntarily. The right to decline settlement preserves the fundamental fairness and voluntariness of mediation.⁹ As long as a settlement is entered into voluntarily by the parties, the process is mediation.

However, a serious problem with the implementation of mandatory mediation statutes remains. Often these statutes do not define the level of party participation necessary to satisfy the statute. The result of this lack of guidance is that most parties are forced to determine for themselves what level of participation constitutes compliance. Some states have attempted to more clearly define the necessary standard for participation, yet still characterize participation in amorphous terms such as “good faith.”¹⁰ However, this attempt at establishing a standard level of proper participation can create dangers of its own. One danger of an amorphous participation standard is that it may spawn satellite litigation over compliance which could undermine the effectiveness of the mediation process.¹¹ Additionally, enforcing an unclear participation standard may require the neutral third party to testify about what transpired during the mediation, which can destroy the elements of neutrality and confidentiality so vital to the process.

This Note discusses the attempts to define satisfactory participation in mediation and the consequences of such definitions. First, this Note will describe the advantages that mandatory mediation can provide to both the parties involved in a dispute and to the legal system. Second, it will examine two cases that illustrate the problems and issues that are created by an unclear participation standard. Third, this Note will discuss the limitations and enforcement consequences of the “good faith” and “meaningful participation” standards. Finally, it will suggest the use and describe the benefits of a more objective standard.

farm debtor to request court-supervised mediation, which obligates both the debtor and creditor to attend); CAL. FAM. CODE § 3170 (West 1994) (requires that potential litigants mediate child custody and visitation disputes before the issue is set for trial).

⁹ GOLDBERG ET AL., *supra* note 6, at 265.

¹⁰ KAN. STAT. ANN. § 72-5430(c)(4) (1993).

¹¹ See, e.g., Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079, 2093 (1993); see also NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* § 5.2 (1989).

II. ADVANTAGES OF MANDATORY MEDIATION

The idea of mandatory mediation has met with some criticism. It has been argued that mandatory mediation may be an exercise in futility if one of the parties enters the mediation determined not to settle.¹² Since this party's attitude will most likely drive the dispute to litigation anyway, little can be gained from forcing both parties through a process designed for settlement.¹³ Another argument against mandatory mediation statutes is that a mandatory process simply creates another legal obstacle for the parties to overcome on their way to litigation.¹⁴ Additionally, it has been asserted that unsuccessful mediation followed by litigation merely adds to the costs of the litigation process by forcing parties to double their efforts in settling a case.¹⁵

Mediation's dependence on the cooperative efforts of the parties seems to call into question the utility of mandating the process. Because the parties control the process, mediation may fail if one party simply refuses to settle. However, several advantages of mandatory mediation do exist.

The first advantage of mandatory mediation is that it may in fact accelerate the settlement process. Our present litigation system places the greatest impetus for settlement at the end of the dispute process. That is why many disputes settle on the proverbial "court house steps" or during the "eleventh hour." Mandatory mediation shifts the settlement impetus by requiring parties to think about compromise at earlier stages in the dispute process.¹⁶ The imminence of mediation, much like the imminence of trial, can serve as a "settlement event" that induces parties and attorneys to focus on the case and to enter into serious negotiations.¹⁷ Once the parties are in mediation, the trained mediator adds structure to the settlement process and can facilitate frank discussions that can lead to settlement.¹⁸ Discussions in

¹² Lucy V. Katz, *Enforcing an ADR Clause—Are Good Intentions All You Have?*, 26 AM. BUS. L.J., 575, 583 (1988).

¹³ *Id.*

¹⁴ Susan C. Kuhn, Comment, *Mandatory Mediation: California Civil Code Section 4607*, 33 EMORY L.J. 733, 758 (1984).

¹⁵ Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 19 (1995).

¹⁶ Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 673 (1986).

¹⁷ CPR INSTITUTE FOR DISPUTE RESOLUTION, CPR MODEL ADR PROCEDURES AND PRACTICES: MEDIATION I-5 (1994).

¹⁸ Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1091 (1990) (discussing the mediator's ability "to spur settlement by overcoming difficulties such as a lack of effective

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the presence of a mediator tend to reduce misunderstandings, and antagonism frequently subsides. Even when parties fail to reach a settlement, the enhanced mutual understanding resulting from the mediation process greatly improves the prospects for a later agreement.¹⁹

Second, mandatory mediation requires parties, initially hostile to the process of mediation, to participate and possibly settle their dispute via mediation. Experience shows that parties often benefit from mediation despite the fact that their participation in the mediation is a result of a court order.²⁰ An experiment conducted in 1980-81 studied the effect of mediation in the coal industry.²¹ The participants had never used mediation but had always utilized the more adjudicatory arbitration process. The results showed that mediation was successful in resolving eighty-nine percent of the grievances.²² Moreover, all groups of mediation participants preferred mediation to arbitration. The results showed that seventy-seven percent of the grievants whose disputes were mediated were satisfied with the process, as compared to forty-five percent of the grievants using arbitration.²³ This data suggests that increasing the use of mediation will decrease costs as more parties have the opportunity to settle out of court.

Reported rates of settlement achieved in mediation vary greatly.²⁴ Published estimates for settlement in the various forms (mandatory and non-mandatory) of mediation range between twenty percent and eighty percent with a median of sixty percent.²⁵ Even using the most conservative of these estimates, if two of every ten cases bound for trial settle via mandatory mediation substantial savings in time and money would accrue to the court

communication, different assessments of information, different attitudes toward risk, or constituency pressures”).

¹⁹ CPR INSTITUTE FOR DISPUTE RESOLUTION, CPR MODEL ADR PROCEDURES AND PRACTICES: MEDIATION I-22 (1994).

²⁰ Craig A. McEwen & Thomas W. Milburn, *Explaining a Paradox of Mediation*, 9 NEGOTIATION J. 23, 23 (1993) (“[R]eluctant parties often use mediation effectively and evaluate their mediation experiences positively.”).

²¹ Stephen B. Goldberg & Jeanne M. Brett, *Disputants' Perspectives on the Differences Between Mediation and Arbitration*, 6 NEGOTIATION J. 249 (1990).

²² *Id.* at 250-51.

²³ *Id.*

²⁴ Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 394, 394-99 (Kenneth Kressel et al. eds., 1989).

²⁵ *Id.* at 397.

system and the parties.²⁶ Court-ordered mediation provides the parties an opportunity to settle while, in turn, providing the legal system an opportunity to reduce the number of cases going to trial.²⁷

Further, court-ordered mediation is an effective means of obtaining binding, out-of-court settlements. In 1985, McLean County, Virginia, established a court-ordered divorce mediation program and reported success in reaching custody and visitation agreements.²⁸ In the first year of the program, approximately sixty percent of the client couples were able to effectively mediate the living arrangements for their children without using the adversarial process.²⁹ Interviews with the attorneys who participated in the program revealed positive results. Despite several suggestions to eliminate the mandate and make participation voluntary, these attorneys reported that the mandatory process saved time and money for clients who would otherwise have gone to trial and that the process generally reduced trauma for the entire family.³⁰

A third advantage of mandatory mediation is that mandating the process overcomes the sign of weakness that is often associated with mediation. A lingering perception in the legal community is that to suggest mediation to an adversary is a sign of a weak case or a weak party; that "[r]eal men don't mediate."³¹ Many lawyers view the suggestion of compromise as an admission of weakness and because of this view will delay the dispute resolution process with the hope that the onus of suggesting settlement will fall on the opposing party.³² However, when a statute mandates participation in mediation, it may be accomplishing what the parties secretly want, but will not express.

²⁶ Lawrence J. Brennan, *Introduction: Alternative Dispute Resolution - Litigation Solutions for the 90's and Beyond*, PRACTICING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES, Apr. 21, 1993, at 1. This commentator reports on the use of ADR in the Nassau County, New York court system. Costs estimated at nearly \$10,225 in fixed discovery and trial costs per case as well as 100-200 hours of attorney time for discovery, conferences, trial preparation, research and trial for each lawsuit may be avoided when an ADR technique is utilized.

²⁷ Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 50.

²⁸ Lynette C. Hale & James A. Knecht, *Enriching Divorced Families Through Grass Roots Development of Community-Wide Court-Referral Mediation Services*, 24 CONCILIATION CTS. REV. 6, 15 (1986).

²⁹ *Id.* at 13.

³⁰ *Id.* at 14.

³¹ Edward A. Dauer, *Impediments to ADR*, 18 COLO. LAW. 839, 839 (1989).

³² Edwards, *supra* note 16, at 670.

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Additionally, rates of voluntary usage are low because parties or their lawyers are more accustomed to the litigation process.³³ Mandatory mediation increases the exposure and hence the familiarity with the process. Parties that are more familiar with mediation are more likely to take advantage of its cost-savings and efficiency even when the process is not a result of a court order.

The advantages of mandatory mediation are extensive, and powerful arguments can be made for continuing the use of mediation through statutes mandating the process. However, there is a problem with the enforcement of these statutes. The problem lies in defining the level of participation that constitutes compliance with the statute. When contemplating this dilemma one is reminded of the old adage: "You can lead a horse to water, but you can't make it drink." Many state legislatures have "led the horse to water" by ordering parties to submit to mediation, but have not been able to "make it drink" because settlement cannot be imposed on these disputing parties. The problem becomes how to objectively define a satisfactory level of participation while at the "trough." This is the central challenge associated with participation standards in mandatory mediation statutes.

III. THE PROBLEM ASSOCIATED WITH PARTICIPATION STANDARDS IN MANDATORY MEDIATION STATUTES

Mediation is a cooperative process and in order for it to be successful, the process requires satisfactory participation by the parties. However, most parties in a mediation do not know what constitutes satisfactory participation. This problem surrounding participation standards derives from mediation becoming mandatory in state dispute-resolution statutes. Before mandatory mediation, participation in the process was voluntary. If party *A* predetermined that the dispute was to be litigated, then party *A* simply did not participate in the mediation process. However, with the advent of mandatory mediation statutes, party *A* is now compelled to participate and must determine what minimum level of participation is necessary to constitute compliance with the statute. This often results in a discretionary decision by the parties and inconsistent results from the process.

Unfortunately, legislatures often fail to help explain what is required by the parties in order to have satisfactorily participated in the mediation process. The result is a participation standard that is unclear and difficult to enforce. For example, an Iowa statute concerning farmer-creditor disputes required the creditor to file a mediation request and to obtain a mediation

³³ GOLDBERG ET AL., *supra* note 6, at 264.

release before proceeding with the forfeiture process.³⁴ Beyond filing a mediation request, and presumably attending a mediation hearing, the requirements of participation for the parties are ambiguous. This ambiguity is the central issue in the following case.

In *Graham v. Baker*,³⁵ the creditors' attorney filed the requisite mediation request and attended the hearing. At the session, the creditors' attorney refused to cooperate with the mediator and denied the opposing party any chance to put forward a proposal for resolving the dispute.³⁶ The creditors' attorney became increasingly more "agitated" and "belligerent," accused his opponent of bad faith, and finally demanded that the opposing party either sell the land within thirty days or forfeit the property.³⁷ In the words of Justice Snell, "It was clear that [creditors' attorney] was hostile to the [opposing party], the mediator, and the mediation process."³⁸

The creditors' attorney then demanded from the mediator that his client be given a mediation release. Quite understandably, given the attorney's behavior, the mediator refused, granting instead an extra thirty days to attempt mediation.³⁹ The creditor went to district court and was granted a writ of mandamus to force the mediation service to issue the mediation release.⁴⁰ The opposing party appealed, and the Iowa Supreme Court granted certiorari to resolve the issue of whether the creditors' attorney had participated in the mediation to the satisfaction of the statute.

The Iowa Supreme Court held that the creditors' attorney had attended the mediation hearing as required and had satisfactorily participated, despite the fact that he stated that his position was not negotiable.⁴¹ Supporting this holding, the court reasoned that the mediation service did not have the power to compel either party to negotiate, rather the mediation "merely attempts to set up conditions in which the parties might find a solution to their problems"⁴² Despite the cajoling and inappropriate behavior, the Iowa Supreme Court found that the mere presence of the creditors' attorney satisfied the minimal participation required by the statute.⁴³

It is obvious that the creditors' attorney turned this mediation into a wasted process. Such behavior, if condoned, simply reduces the mediation

³⁴ IOWA CODE ANN. § 654A.6.1 (West 1994) (repealed 1995).

³⁵ 447 N.W.2d 397 (Iowa 1989).

³⁶ 447 N.W.2d at 398.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 398.

⁴¹ 447 N.W.2d at 401.

⁴² *Id.*

⁴³ *Id.*

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process to an obstacle of inefficiency on the way to a forfeiture proceeding. One wonders whether such a decision by the Iowa Supreme Court simply encourages unruly behavior and undermines the objectives of the mediation process as a whole. The actions by the creditors' attorney seem to demonstrate the need for a more strict participation standard in mandatory mediation.

A participation standard can be made more strict by requiring both parties to submit an opening offer, consider their opponent's offer, and then propose a counteroffer. A standard can be even more strict still by imposing trial and attorney costs on a party that does not better its counteroffer.⁴⁴ Yet, a more strict participation standard is not necessarily the proper response to behavior like that of the creditors' attorney in *Graham*. Obviously, *Graham* was a party who was not going to settle voluntarily and sought to resolve this case at trial. In mediation, parties always have the right to decline settlement and risk litigation; this is the essence of a voluntary process. A more strict participation standard would have controlled the behavior of the creditors' attorney, but would not have saved the parties any time or money.

Another case that focused on the issue of adequate participation in a court-ordered dispute resolution process was *Gilling v. Eastern Airlines, Inc.*⁴⁵ The plaintiffs alleged that during a stopover they were wrongfully ejected from their flight over an on-board incident involving knives.⁴⁶ The case was referred to compulsory court-annexed arbitration as required by the local court rules.⁴⁷ The attorney for the airline immediately took an uncooperative stance during the hearing. The arbitrator stated he was "flabbergasted" that defendant's attorney arrived at the hearing with no witnesses.⁴⁸ Further demonstration of this attorney's contempt for the court-ordered process was her response to the arbitrator's question about damages: "We don't care what you do, we won't pay it anyway."⁴⁹ Within

⁴⁴ See WASH. REV. CODE ANN. § 7.06.060 (West 1994) (costs and reasonable attorney's fees may be assessed against a party appealing from the award who fails to improve his position on the trial de novo).

⁴⁵ 680 F. Supp. 169 (D.N.J. 1988). The ADR technique in this case was court-annexed arbitration, a mandatory, non-binding form of adjudication where the issue of party participation is similar to mandatory mediation by analogy.

⁴⁶ *Id.* at 170. Plaintiffs sought damages for breach of contract, negligence, false imprisonment, battery, assault, slander, invasion of privacy, infliction of emotional distress, and conversion. *Id.*

⁴⁷ U.S. Dist. Ct., D.N.J. R. 47C.1 (requiring compulsory arbitration for any civil action where the relief sought consists only of money damages not in excess of \$100,000).

⁴⁸ *Gilling*, 680 F. Supp. at 170.

⁴⁹ *Id.*

the thirty days allotted by the local rules, the airline moved for a trial de novo.⁵⁰ The plaintiffs opposed the motion, contending that defendant's failure to participate meaningfully in the arbitration deprived the airline of its right to demand a trial de novo.⁵¹ The *Gilling* court imposed sanctions on defendant's attorney stating that her participation rendered the proceeding a "sham" because "she merely went through the motions."⁵²

At first glance, the *Graham* and *Gilling* cases seem to demonstrate the need for a more strict participation standard. One could argue that with an exacting standard and the ability to impose sanctions for noncompliance, a court could ensure genuine participation from the parties. However, the "teeth" of a strict participation standard and threat of sanction may result in undermining one of the stated objectives of mandatory mediation—promoting efficiency.⁵³

It is inefficient for parties to be forced to participate in a costly, time-consuming process that is futile. However, sanctioning a party, or that party's attorney, simply because he or she was not polite is also inefficient. In *Gilling*, the defense attorney's conduct caused the court-ordered ADR process to be a waste of time and money for the plaintiffs. But, if the defense attorney in the *Gilling* case had thoughtfully listened to the plaintiffs' proposals and then presented completely unreasonable, but pleasantly delivered counterproposals, it is doubtful that the court would have imposed sanctions. Yet, such a "polite" proceeding would still be a "sham" because there is still no ability for the parties to reach a voluntary, mutually agreed upon resolution.

In the *Graham* and *Gilling* cases, it was clear from the beginning that one party had resolved itself against voluntary settlement. Once a party demonstrates that the possibility of voluntary settlement is eliminated, it is more efficient to let the case go to trial. In both the *Graham* and *Gilling* cases, it was not efficient to continue a voluntary, non-binding process once settlement had been foreclosed. When this point in the mediation process is reached, the proper response is to simply let the parties litigate.

Mandatory mediation is not meant to be a complete substitute for litigation. The purpose of this mandatory mediation, and all of ADR, is to provide an effective forum for parties to settle their disputes while saving time and money for themselves and the overburdened legal system. Even if the parties satisfactorily participate, it may be appropriate for them to

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Gilling*, 680 F. Supp. at 170. In describing the behavior of the defendant's attorney, Justice Sarokin stated, "Rather than reducing the cost and promoting efficiency in the system, such an attitude increases the costs and reduces the efficiency." *Id.*

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discontinue mediation and go on to litigate. The proper response to cases like *Graham* and *Gilling* is not a more strict participation standard and increased sanctions for noncompliance. Rather, the legislatures of states with mandatory mediation statutes need to clearly define the standard of necessary participation and include this standard in their mandatory mediation statutes.

IV. PARTICIPATION STANDARDS IN MANDATORY MEDIATION STATUTES

As stated previously, most mandatory mediation statutes fail to provide any guidance for the required level of participation by the parties. A few states have attempted to define the necessary level of participation by quantifying it in terms of “good faith,” but courts have had difficulty enforcing this standard. Additionally, commentators suggest that parties must “meaningfully participate” in order to comply with a mandatory mediation statute, but courts have had equal difficulty enforcing this standard. The following text is a discussion of these possible standards and the consequences that may arise from their use.

A. *Good Faith Standard*

Legislatures have consistently failed to adequately specify the necessary level of participation in their mandatory mediation statutes. The development of a clearly defined and workable participation standard is certainly easier said than done. Some states have attempted to alleviate this problem by including language in the statute that compels participants to make a “good faith effort” at resolving the dispute.⁵⁴ This attempt to clarify the definition of participation is an acknowledgment that mediation, as a non-binding process, will be a futile exercise unless the parties are willing to present their best arguments and listen to counterarguments with an open mind.⁵⁵

Even with these attempts at clarity, the questions as to what constitutes compliance remain because defining a participation standard in terms of good faith is inherently ambiguous.⁵⁶ The ambiguity of this legal concept

⁵⁴ See, e.g., KAN. STAT. ANN. § 72-5430(c)(4) (West 1992) (this section makes it a “prohibited practice” for parties in a teacher contract dispute to willfully refuse to participate in good faith in a court-ordered mediation session); ME. REV. STAT. ANN. tit. 19, § 214.4 (West 1994); MINN. STAT. ANN. § 583.27.1 (West 1988 & Supp. 1995) (repealed 1995).

⁵⁵ Sherman, *supra* note 11, at 2089.

⁵⁶ *Id.* at 2093.

has been recognized by courts. "‘Good faith’ is an intangible and abstract quality with no technical meaning or statutory definition An individual’s personal good faith is a concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone."⁵⁷ In its farmer-lender mediation act, the Minnesota state legislature attempted to explain what good faith is by defining what good faith is not.⁵⁸ The statute listed six actions by a party that constitute not participating in good faith including "behavior which evidences lack of good faith by the party."⁵⁹ This circuitous definition of good faith identifies the problem in dealing with this vague concept. The main criticism of the good faith standard is that it seems to require a subjective evaluation of a party’s motives rather than a party’s conduct.⁶⁰ This subjectivity would force the courts to make exhaustive investigations into the bargaining during the mediation process, and thereby, severely undermine the objectives of economy and efficiency.⁶¹ Thus, such overregulation adds to, instead of subtracting from, an already heavy burden on the courts.

B. Meaningful Participation Standard

Another suggested participation standard requires meaningful participation from the parties during the mediation.⁶² Although no current mandatory mediation statutes employ a meaningful participation standard, the Florida rules for court-appointed mediators instruct a mediator to end a mediation session if one or more of the parties is unwilling to participate in a "meaningful manner."⁶³ Attempting to determine what constitutes

⁵⁷ Doyle v. Gordon, 158 N.Y.S.2d 248, 259-60 (N.Y. App. Div. 1954).

⁵⁸ MINN. STAT. ANN. § 583.27.1 (West 1988 & Supp. 1995) (repealed 1995).

⁵⁹ MINN. STAT. ANN. § 583.27.1 (West 1988 & Supp. 1995) (repealed 1995). The entire list was as follows: (1) a 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 which evidences lack of good faith by the party. *Id.*

⁶⁰ Sherman, *supra* note 11, at 2093.

⁶¹ *Id.*

⁶² Note, *supra* note 18, at 1096.

⁶³ FLA. STAT. ANN. § 10.050(b) (West 1995).

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“meaningful” participation is almost as difficult and subjective an exercise as determining what constitutes “good faith.” Just as there is a risk of satellite litigation due to the subjectivity of the good faith standard, the subjectivity inherent in the meaningful participation standard also carries that risk.

Some have attempted to reduce this subjectivity by more clearly defining meaningful participation. One commentator suggests that meaningful participation obligates the parties to consider, and reconsider, the positions and interests of both sides, and to think about ways to resolve the dispute.⁶⁴ This definition does slightly reduce the subjectivity of this standard; however, it creates new problems. Enforcement of this standard would require the courts to make inquiries into the specific actions of the parties to determine if consideration and reconsideration were granted. In New Jersey, where the *Gilling* case was tried, federal court rules require the parties who participate in court-ordered arbitration to do so in a meaningful manner.⁶⁵ Clearly, the defense attorney in this case did not participate in a “meaningful manner” and was deserving of a sanction. However, not all cases will be this blatant.

As a participation standard becomes more defined by requiring or prohibiting certain actions by the parties, it cuts deeply into litigant autonomy that the legal system seeks to protect. The higher the level of participation required, the greater the danger of forcing a party to present its case in a manner not of its choosing.⁶⁶ A proper participation standard should encourage the parties to actively participate in the voluntary process of mediation and preserve the parties’ right to refuse settlement and go to trial. A proper participation standard for mandatory mediation would require only such participation as is needed to prevent frustration of the process.⁶⁷ The participation standard in a mandatory mediation statute should encourage, but not require, interactive participation between the parties.

C. Consequences

There are consequences that result from a participation standard in a mandatory mediation statute that is either unclear or over-defined. Either

⁶⁴ 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.Q. 1059, 1114 (1991).

⁶⁵ U.S. Dist. Ct., D.N.J. R. 47E.3: “In the event that a party fails to participate in the arbitration process in a meaningful manner, the arbitrator shall make that determination and shall support it with specific written findings filed with the Clerk.”

⁶⁶ Sherman, *supra* note 11, at 2094.

⁶⁷ *Id.* at 2112.

way, the participation necessary to comply with the statute is ill-defined, resulting in losses of economy and efficiency for all parties. Further consequences that result from an ill-defined participation standard are satellite litigation and loss of mediator confidentiality.

A basic principle in ADR is that as the requirements and sanctions for non-compliance are increased, there is increased legal coercion to participate in the ADR procedure. This coercion encourages satellite litigation of the mediation hearings in the form of motions and hearings challenging the other party's failure to mediate.⁶⁸ The *Graham* and *Gilling* cases are examples of the additional litigation created by an ill-defined participation standard. Additionally, one could easily anticipate a number of lawsuits initiated to determine if a party complied with an over-defined participation standard such as the one used in the Minnesota farmer-lender mediation act.⁶⁹ A participation standard that creates additional litigation wastes the time and money of the parties and adds to an already overburdened legal system instead of relieving these burdens as the mediation process is designed to do.⁷⁰

A second consequence resulting from an ill-defined participation standard in mandatory mediation hearings is a loss of confidentiality. The assurance of confidentiality fosters the open discussion necessary to successful mediation.⁷¹ Mediators encourage the parties to reveal deep-seated feelings on sensitive issues in an attempt to uncover the underlying causes of conflict. Equipped with such information, a mediator is then able to identify hidden interests and settlement alternatives that would not otherwise have been considered. Often the parties are assured that the feelings, trade secrets, or issues that are revealed in the course of the mediation will be protected by the privilege of confidentiality. However, attempts to enforce these ill-defined participation standards may require mediators to testify as to what transpired in the proceedings. Some commentators suggest that increased testimony about the mediation process would change this perceived confidentiality of the process and thus discourage participation.⁷²

The Ninth Circuit acknowledged the importance of confidentiality in *NLRB v. Joseph Macaluso, Inc.*⁷³ In this case, the defendant sought the testimony of a federal mediator concerning the agreements of the parties

⁶⁸ ROGERS & MCEWEN, *supra* note 11, § 5.2.

⁶⁹ See *supra* notes 58-59 and accompanying text.

⁷⁰ Sherman, *supra* note 11, at 2099.

⁷¹ GOLDBERG ET AL., *supra* note 6, at 181.

⁷² Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 42 (1986).

⁷³ 618 F.2d 51 (9th Cir. 1980).

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during the mediation of a labor dispute.⁷⁴ In revoking the subpoena of the mediator, the Ninth Circuit held that the public interest in maintaining the perceived and actual impartiality of federal mediators outweighed the benefits of the mediator's testimony.⁷⁵ The integrity of the mediator and of the mediation process as a whole requires that the privilege of confidentiality surrounding the neutral party be maintained. This decision confirmed the belief that confidentiality is critical if mediators are to maintain the appearance of neutrality essential to successful mediation.⁷⁶

V. A PROPOSED OBJECTIVE STANDARD

A proper participation standard for mandatory mediation statutes must first provide a clear and enforceable definition of the participation necessary to constitute compliance with the mandatory mediation statute. Both the "good faith" and "meaningful participation" standards fail because they are not clearly defined. Good faith as a legal concept is inherently ambiguous and meaningful participation is only slightly less murky. Additionally, both of these standards require a subjective evaluation by the court or the neutral party, which is counterproductive to the mediation process because it produces satellite litigation and potential breach of mediator confidentiality.

This Note suggests the adoption of a proposed objective standard as the proper means to measure satisfactory participation in mandatory mediation. An objective standard would increase clarity by defining compliance in objective terms. Clearly defining the participation standard also decreases the risk of litigation over compliance.

This proposed objective participation standard can be satisfied with the fulfillment of two objective elements. The first element is to require the parties, or a party representative, to attend the mediation hearing. Requiring attendance will encourage the party to become more involved with the mediation, which, in itself, makes settlement more likely.⁷⁷ Attending parties can better react to new information and spot opportunities for solutions to problems. Attendance of the disputing parties builds the cooperation and momentum that can lead to quicker and more satisfying agreements.⁷⁸ Along with attending, the party or representative must at least have the authority to make proposals and, more importantly, to settle the dispute. Without this requirement of party attendance and settlement authority, mandatory mediation will lack the necessary credibility as a

⁷⁴ 618 F.2d at 53.

⁷⁵ *Id.* at 54.

⁷⁶ *Id.* at 53.

⁷⁷ Riskin, *supra* note 64, at 1100.

⁷⁸ *Id.* at 1101.

legitimate dispute resolution technique. The requirement of attendance with the necessary authority and discretion to settle is critical to the objectives of mediation.⁷⁹

This requirement of attendance with settlement authority does, however, ignore the costs associated with attendance. This issue was examined in *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*⁸⁰ In that case, the defendant, a Philadelphia corporation, was forced to send a representative with settlement authority to a settlement conference in Wisconsin. Such a requirement imposes many costs on the principal including the lawyer's hourly bills, travel expenses of both the lawyer and the principal, and the principal's time away from work. However, in *Heileman Brewing*, the Seventh Circuit Court of Appeals allowed the attendance requirement in the interest of "preserving the efficiency, and more importantly the integrity, of the judicial process."⁸¹ Similarly, a mandatory mediation statute that did not require the attendance of the parties would lack the integrity that is critical to its effectiveness.

The second element for satisfactory participation would compel each party to submit a letter to the opponent and the neutral third party, outlining the party's position on each issue in dispute.⁸² By requiring parties to meet a threshold of minimal preparation, each side can better evaluate the viability of their position and the position of their opponent.⁸³ This minimal preparation provides valuable information to all parties and can create momentum for a mediated settlement.

Behavioral theorists Roger Fisher and William Ury describe the importance of preparation to any negotiation⁸⁴ in their popular book, *Getting To Yes*. Fisher and Ury define preparation in terms of a B.A.T.N.A., or "best alternative to a negotiated agreement." Developing a B.A.T.N.A. helps a party meet two objectives: protecting against making an agreement that should be rejected and helping make the most of a party's

⁷⁹ Sherman, *supra* note 11, at 2112.

⁸⁰ 871 F.2d 648 (7th Cir. 1989). This case did not involve pre-trial mediation but rather a court-ordered settlement conference. The costs of attendance, however, are similar by analogy.

⁸¹ *Id.* at 652.

⁸² Kathleen A. Devine, Note, *Alternative Dispute Resolution: Policies, Participation, and Proposals*, 11 REV. LITIG. 83, 109 (1991). See also Sherman, *supra* note 11, at 2094 (suggesting requiring parties to submit a "position paper" in advance of the mediation similar to pretrial orders issued under the authority of the Rule 16 pretrial conference rule).

⁸³ Devine, *supra* note 82, at 109.

⁸⁴ Techniques in negotiation are analogous to mediation techniques because mediation is a multi-party negotiation with the assistance of a third party neutral. See GOLDBERG ET AL., *supra* note 6.

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assets so the ultimate resolution will satisfy the needs of that party.⁸⁵ In submitting a position paper both parties are required to outline their respective positions before the mediation. This essentially creates a B.A.T.N.A. for each party. The parties and the mediators can then use the B.A.T.N.A.s to identify common issues and move toward resolution.

The importance of preparation cannot be underestimated. Critics may argue that requiring the parties to produce a position paper is part of the costly, time-consuming and futile process of mandatory mediation. But, even without a mediated settlement, the position papers allow the parties to sharpen the issues in preparation for litigation. A Los Angeles study noted that attorneys who participated in the mediation process spent less time arguing over inconsequential details when they returned to court to argue cases that were not successfully mediated.⁸⁶ The position paper requires the parties to do work they would have to do anyway to prepare for litigation and forces the parties to begin to think about settlement.

This new participation standard increases clarity by defining compliance according to the objective conduct of the parties. This conduct requires that all parties submit a position paper and that each party be represented at the mediation by a person with the authority to make a settlement. This avoids the dangers associated with enforcing vague concepts like "good faith." Further, this objective standard eliminates party discretion in determining what constitutes satisfactory participation while maintaining party discretion in accepting or rejecting settlement. A clear and workable standard will also decrease the risk of costly satellite litigation over compliance and consequently decrease the potential for breach of mediator confidentiality.

Once satisfactory participation is defined, proper sanctions for noncompliance must be considered. Appropriate sanctions are difficult for courts because of the inherent tension in requiring parties to participate in mediation. Courts must strike a delicate balance between encouraging the parties to actively participate in the voluntary process of mediation and preserving the parties' rights to refuse settlement and go to trial. Although parties may be required to participate in mandatory mediation, a court cannot order parties to settle.⁸⁷ Courts in the past have been reluctant to impose sanctions for noncompliance with a mandated mediation statute due

⁸⁵ ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 99 (2d ed. 1991).

⁸⁶ Kuhn, *supra* note 14, at 759.

⁸⁷ See *Semiconductors, Inc. v. Golasa*, 525 So.2d 519, 519 (Fla. Dist. Ct. App. 1988) (holding that although parties can be compelled to participate in mediation, they cannot be sanctioned for failing to settle. To hold otherwise would turn mediation into a "forced settlement proceeding . . .").

to vaguely worded participation standards or statutory silence on what the penalty should be.⁸⁸ Additionally, even when courts have determined that sanctions for egregious behavior are warranted, they have lessened the penalty due to an ill-defined participation standard.⁸⁹ This suggests that when the participation standard is ambiguous the level of sanction will be low. Conversely, when a participation standard is clearly defined an appropriate sanction can be more substantial.

Sanctions for failure to satisfactorily participate in a mandatory mediation hearing are designed to maintain fairness in the process. If one party attends a mandatory mediation hearing without the basic preparation necessary to properly participate in the hearing, it is unfair to the opposing party that is properly prepared because that party's time and efforts have gone to waste. One court emphasized this concept of promoting fairness when it sanctioned a plaintiff's attorney who was found to be "substantially unprepared" to participate in a scheduling conference.⁹⁰ This court reasoned that "one of the primary purposes of the scheduling conference is to explore the possibilities of settlement early in the litigation . . ." and required plaintiff's attorney to pay the costs, including attorney's fees, that were incurred by the defendant in preparation for the scheduling conference.⁹¹ Magistrate Collins noted that it would be "patently unfair to have the

⁸⁸ See *Schulz v. Nienhuis*, 448 N.W.2d 655, 657 (Wis. 1989) (declining to dismiss the lawsuit because it would be too harsh a penalty when the statute does not define what it means to "participate in mediation").

⁸⁹ See *Gilling v. Eastern Airlines, Inc.*, 680 F. Supp. 169, 172 (D.N.J. 1988) ("[T]he court has determined to impose this more limited sanction, although denial of the trial de novo would have been warranted, because of the lack of clear guidelines as to what participation is 'meaningful.'").

⁹⁰ *Flaherty v. Dayton Electric Manufacturing Company*, 109 F.R.D. 617, 618 (D. Mass. 1986). This case was a product liability action involving a bench grinder manufactured by the defendant. At the conference, plaintiff's attorney was unable to identify the extent of the injury to his client or even which fingers were injured. Additionally, plaintiff's attorney could not state the client's amount of lost wages and medical bills or even identify the defendant's workers' compensation carrier. *Id.*

⁹¹ *Id.* The court's power to sanction is derived from FED. R. CIV. P. 16(f) which provides: "If a party or a party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's representative fails to participate in good faith In lieu of or in addition to any other sanctions, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the non-compliance was substantially justified or that other circumstances make an award of expenses unjust." *Id.*

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defendant incur costs and attorney's fees to prepare for and attend a conference at which little could be accomplished"⁹²

Because participation under this proposed objective standard has been reduced to the fulfillment of objective elements, sanctions would be warranted only when a party failed to attend a scheduled mediation session, failed to attend with settlement authority, or failed to submit a position paper. For example, a party who failed to attend the mediation, provided no reasonable excuse, and then requested a trial de novo would fail to comply with the mediation statute. Under these circumstances, a harsh penalty may be warranted, such as precluding a party from demanding a trial de novo. If the purpose of the program is to save litigants time and money then these goals are seriously undermined if a party is permitted to refuse to attend an ADR session and then demand a trial de novo.⁹³

Less egregious behavior such as failure to attend with settlement authority or failure to submit a position paper can be sanctioned with a lesser penalty, such as assignment of travel and legal costs, or simply by postponing a party's ability to proceed to litigation until that party complies with the mediation statute's participation requirements. Although mediation is a voluntary process, a mandatory mediation statute must somehow provide incentive for unwilling parties to participate properly. A minimally defined participation standard and appropriate sanctions are necessary for mandatory mediation to maintain legitimacy and efficiency.

VI. CONCLUSION

Mandatory mediation is an appropriate ADR technique to help meet the needs of an overburdened judicial system. Yet, in order for mandatory mediation to be effective and avoid the pitfalls illustrated in the *Graham* and *Gilling* cases a clear and workable participation standard must be implemented. Legislatures must move past the vague "good faith" and "meaningful participation" standards and establish a more objective participation standard. This proposed objective standard would have two simple elements. The first is to require the parties to attend the mediation hearing, and those who attend must have settlement authority. The second element requires both parties to submit a position paper outlining their position in the dispute. Defining the standard of participation as the

⁹² *Flaherty*, 109 F.R.D. at 619.

⁹³ *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712, 715 (E.D. Pa. 1983). *But see* *Lyons v. Wickhorst*, 727 P.2d 1019, 1023 (Cal. 1986) ("An immediate and unconditional dismissal entered at the first suggestion of non-cooperation is too drastic a remedy in light of the fact that arbitration was not intended to supplant traditional trial proceedings, but to expedite the resolution of small civil claims.").

fulfillment of two objective elements increases clarity and decreases the need for subjective evaluations by the court or the neutral party and thus decreases the likelihood of satellite litigation and loss of mediator confidentiality. As the potential for satellite litigation decreases, the likelihood of mediator testimony and subsequent loss of confidentiality also decreases.

This new objective standard is clearly yet minimally defined, and therefore increases its enforceability by the courts. This new standard will not necessarily increase settlement rates because the parties still maintain the right to refuse resolution. When the participation standard is clearly defined and not unreasonable, the risk of litigation over compliance is decreased.⁹⁴ The institution and use of this objective standard will heighten the efficiency of mandatory mediation statutes and enable disputing parties and the legal system to reap the benefits of this dispute resolution technique.

Mandatory mediation is not a panacea for the ills of our judicial system, and this resolution technique may not be appropriate for every dispute. There will always be parties, or more likely their attorneys, who cannot or will not reach a voluntary settlement. These parties will proceed to litigation. The purpose of mandatory mediation and other ADR techniques is not to push parties to settlement. Rather, the purpose of mandatory mediation is to provide parties an opportunity to settle in an alternative forum that is less costly and more efficient. Mandatory mediation is not *the* alternative to litigation but it is *an* alternative.

Mandatory mediation is a valuable asset in our adjudicatory process. A standard of participation, like the proposed objective standard, provides a basis for meaningful consideration of the dispute without mandating specific forms of presentation or interaction with the other party.⁹⁵ This objective participation standard will increase the effectiveness of mandatory mediation and will allow this process to continue to aid our litigation system.

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⁹⁴ GOLDBERG ET AL., *supra* note 6, at 268.

⁹⁵ Sherman, *supra* note 11, at 2094-95.