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# JUDICIAL REVIEW OF MEDIATED SETTLEMENT AGREEMENTS: IMPROVING MEDIATION WITH CONSENT

Jacqueline M. Nolan-Haley\*

## I. INTRODUCTION

Ask any law student who has taken a mediation or ADR course to describe mediation and its benefits. They most likely would inform you that mediation is a voluntary process based on party self-determination.<sup>1</sup> Mutually satisfactory solutions are possible, individual interests and personal needs are met, and adversarial encounters are avoided. They might also add that studies report a high degree of party satisfaction with the mediation process<sup>2</sup> and compliance with mediated agreements.<sup>3</sup>

A review of U.S mediation litigation over the past 14 years shows a less rosy picture. Varying shades of buyer's remorse dot the landscape as parties seek to avoid enforcement of their mediated agreements. In looking at the claims of these parties, I am reminded of some words from T. S. Elliot's poem, *The Love Song of J. Alfred Prufrock* – "That is not it at all. That is not what I meant, at all."<sup>4</sup> Seeking to disentangle themselves from promises made or allegedly made in mediation, disappointed parties claim problems in contract formation, mistake, fraud, duress, coercion and undue influence. While some parties seem more sympathetic than others (compare the exhausted, excluded from mediation, 65 year old Mrs. Olam<sup>5</sup> to the sophisticated Winklevoss twins in the *Facebook* litigation who were accompanied at mediation by a team of six lawyers, a valuation

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\*Professor of Law, Director of ADR & Conflict Resolution Program, Fordham University School of Law. My thanks to Marc Arkin, Jim Coben, Marianna Hernandez Crespo, Jennifer Reynolds, Alison Shea and Nancy Welsh for helpful insights and comments on this essay. Thanks also to my excellent research assistants Megan Reinhardt and Ashley Dumoff.

<sup>1</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I(A) (2005) available at <http://www.mediate.com/pdf/ModelStandardsOfConductForMediatorsfinal05.pdf>. Standard I(A) provides in part: "A mediator shall conduct a mediation based on the principle of party self-determination."

<sup>2</sup> Christopher Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885 (1998); see also Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLIN J. PUBL. L. & POL'Y 376 (1997).

<sup>3</sup> See, e.g., Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981) (compliance with mediation was higher than with adjudication); Craig A. McEwen & Richard Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11 (1984) [hereinafter McEwen & Maiman, *Achieving Compliance Through Consent*].

<sup>4</sup> T.S. Elliot, *The Love Song of J. Alfred Prufrock*, POETS.ORG, available at <http://www.poets.org/viewmedia.php/prmMID/20220> (last visited Mar. 7, 2013).

<sup>5</sup> *Olam v. Cong. Mortg. Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (court-sponsored voluntary mediation; the sixty-five year old plaintiff suffered from high blood pressure, headaches and abdominal distress. She argued that while she was in pain, weak and dizzy, she was pressured into an agreement by her attorney, the mediator and the defendants and their counsel. After fifteen hours of mediation, an agreement was reached at 1:00 A.M. Despite all these circumstances, the court found that the agreement did not result from undue influence.).

expert and their father, a former accounting professor),<sup>6</sup> courts are generally not persuaded by human sympathies and show considerable deference to mediated agreements.<sup>7</sup> These agreements represent settlement, and public policy favors settlement.

How should we account for the on-going level of buyer's remorse in some mediations? Because I am concerned in this essay with court-related mediation, I wonder whether it is because so much mediation now takes place in the shadow of the courts with all its judicial trappings. Does the court environment make parties feel somewhat coerced into participating in, or reaching an agreement in mediation? Does it make their "contractual undertaking" to mediate seem less than voluntary, thus depriving them of any particular moral commitment to keep their promises? Is it because parties may not have given informed consent to participate? Or, is it that many mediators are adept at persuading parties to move in specific directions, possibly to places where the parties did not want to go?<sup>8</sup> Is it because in some contexts, the practice of mediation is becoming very much like the practice of traditional arbitration<sup>9</sup> or like a judicial settlement conference?<sup>10</sup> The hypothesis I am working with is a "yes" to all these questions.

## II. JUDICIAL REVIEW OF MEDIATED AGREEMENTS

Mediation was originally proposed as an alternative to the court adjudication of disputes. Oddly enough, adjudication of disputes about mediation is an on-going judicial activity. Research on mediation litigation conducted by Professors James Coben and Peter Thompson of the period 1999 through 2003 shows that the highest number of litigated mediation cases involve challenges to enforceability of mediated agreements.<sup>11</sup> Their follow-up studies through 2007 also show that parties, not always pleased with their agreements, sought to avoid enforceability.<sup>12</sup>

Parties still continue to challenge their mediated agreements for a number of reasons including contract defenses such as problems in contract formation,<sup>13</sup> fraud,<sup>14</sup>

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<sup>6</sup> Facebook Inc. v. Pac. Nw. Software, Inc., 640 F.3d 1034 (9th Cir. 2011) (court-ordered mediation; claim that mediated agreement resulted from fraud).

<sup>7</sup> See Julia Rabich, Sarah Stoner & Nancy Welsh, *Judicial Review of Arbitration Awards and Mediation Agreements: Tips for Sustaining Deference*, 67-APR. DISP. RESOL. J. 48 (Feb.-Apr. 2012) (suggesting that courts are beginning to be more demanding in reviewing awards and agreements); SARAH COLE ET AL., *MEDIATION LAW, POLICY & PRACTICE* 247 (2012).

<sup>8</sup> James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, at 52 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1769167](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1769167) (last visited Mar. 7, 2013).

<sup>9</sup> See Jacqueline Nolan-Haley, *Mediation: The "New Arbitration"*, 17 HARV. NEGOT. L. REV. 61 (2012) [hereinafter *Mediation: The "New Arbitration"*].

<sup>10</sup> See Joseph P. McMahon, Jr., *Moving Mediation Back Towards Its Historic Roots-Suggested Changes*, 37 THE COLORADO LAW. 6, 23 (June 2008).

<sup>11</sup> James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 47 (2006).

<sup>12</sup> James R. Coben & Peter N. Thompson, *Mediation Litigation Trends: 1999-2007*, 1 WORLD ARB. & MEDIATION REV. 395, 403 (2007).

<sup>13</sup> See, e.g., McDonald v. Fox, No. 13-11-00479-CV, 2012 WL 5591795 (Tex. Ct. App. Nov. 15, 2012); Nanni v. Dinno Corp., 978 A.2d 531 (Conn. App. Ct. 2009).

<sup>14</sup> E.g., Facebook, Inc. v. Pac. Nw. Software, Inc., 640 F.3d 1034 (9th Cir. 2011).

coercion<sup>15</sup> and mistake.<sup>16</sup> It is not clear from some of the reported cases whether they arose in the context of court-connected mediation or were private undertakings. However, given the pervasiveness of mediation in U.S. courts,<sup>17</sup> we know that many of these enforceability cases have resulted from court-connected programs.

### A. *The Road to Judicial Review*

At the risk of offering a somewhat bleak narrative, I describe in this section the road to judicial review for a party who seeks to avoid enforcement of a mediated agreement.

As an almost regular part of the litigation process,<sup>18</sup> disputing parties find themselves involved in mediation. Though the rubrics of court-connected mediation programs vary, the end result is the same – through a number of different process design schemes, judges nudge, refer, or deliberately order parties to go to mediation, sometimes with an added requirement that they participate in good faith.<sup>19</sup> When this happens, it is not clear whether explicit fiduciary duties are imposed on any institution or person, whether it is the judge who referred the case to mediation, the court that sponsors the mediation program or the mediator who facilitates the process. In response to concerns that parties might have about being forced into what is a “voluntary” process, the standard response is to differentiate between coercion to attend mediation, which is permissible, and coercion within the process of mediation, which is unacceptable.<sup>20</sup>

Once engaged in the mediation process, the parties work with a mediator whose ethical responsibilities are described in the Model Standards of Conduct for Mediators<sup>21</sup> or in similar standards. Unless the parties have agreed otherwise, the mediator has extensive powers. Professor Peter Thompson has colorfully described a mediator’s work — “[t]he mediator is free, within extremely broad limitations, ‘to work her magic’ on the participants, establish the rules of the process, and then to use these rules to trash, bash, or hash out a settlement.”<sup>22</sup> The mediator’s ethical responsibility for fairness is limited to

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<sup>15</sup> *E.g.*, *Eswarappa v. SHED Inc.*, 685 F. Supp. 2d 229 (D. Mass. 2010).

<sup>16</sup> *E.g.*, *Dupont v. Dupont*, No. 2006-CA-002191-MR, 2008 WL 4951777 (Ky. Ct. App. Nov. 21, 2008); *Kott v. Kott*, No. 03-06-00398-CV, 2008 WL 536656 (Tex. Ct. App. Feb. 29, 2008).

<sup>17</sup> *See, e.g.*, *In Resolving Disputes, Mediation Most Favored ADR Option in District Courts*, 38 THE THIRD BRANCH 6, 6 (July 2006); *see generally* COLE ET AL., *supra* note 7, at ch. 9.

<sup>18</sup> Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation-Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 513 (2004) [hereinafter Thompson, *Enforcing Rights*]; Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 OHIO STATE J. ON DISP. RESOL. 363, 366, 417 (2011) [hereinafter Thompson, *Good Faith Mediation*]; COLE ET AL., *supra* note 7, at 434.

<sup>19</sup> *See* Thompson, *Good Faith Mediation*, *supra* note 18.

<sup>20</sup> This explanation, which was offered in the first edition of GOLDBERG ET AL.’S DISPUTE RESOLUTION, was criticized by Professor Sally Merry in Sally Engle Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057 (1987) (reviewing STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (1985)).

<sup>21</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I(A) (2005).

<sup>22</sup> Thompson, *Enforcing Rights*, *supra* note 18, at 514 (citing John Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L. J. 1, 7 (1997)).

procedural fairness.<sup>23</sup> The question of justice or a fair outcome is bracketed in the Model Standards.

After participating in mediation, and unhappy with either the process or their agreement, some parties return to court seeking to avoid enforcement of the mediated agreement. Their narratives vary—“this is not what I meant; my lawyer forced me to agree to this; the mediator made me do it; I had a terrible headache and felt pressure to cooperate.” Courts imagine that, in these returning cases seeking judicial review, the parties’ agreements resulted in the first instance from a voluntary, private ordering. They typically apply traditional contract law analysis and uphold mediated agreements.<sup>24</sup> In doing so, they often refer to the public policy favoring settlement.<sup>25</sup>

From an efficiency perspective, one could argue that the mediation process works very well.<sup>26</sup> If parties reach an agreement, then it is almost a sure thing that the courts will enforce that agreement. Judicial efficiency, predictability and the public policy in favor of settlement, all highly prized American values, are honored. So why should we care?

### B. *The Crux of the Problem*

The reality is that mediation, a voluntary process, operates in a thinly voluntary regime in the United States. Parties are referred to mediation as part of a national disputing culture that permits compulsory mediation. Since the enactment of the Alternative Dispute Resolution Act of 1998,<sup>27</sup> which empowered federal courts to establish dispute resolution programs, party consent is not required for participation in mediation.<sup>28</sup> State courts differ on the merits of compulsory mediation but in both state and federal courts, sanctions can be imposed for parties’ failure to participate in mediation or for their failure to participate in good faith.<sup>29</sup>

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<sup>23</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard VI(A) (2005). Standard VI(A) provides: A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence...procedural fairness...and mutual respect among all the participants.

<sup>24</sup> COLE ET AL., *supra* note 7, at 247. It should be noted that enforcement of mediated agreements is complicated by confidentiality concerns. See Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33 (2001).

<sup>25</sup> Rabich et al., *supra* note 7.

<sup>26</sup> *Accord*, COLE ET AL., *supra* note 7, at 247.

<sup>27</sup> Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (2006).

<sup>28</sup> 28 U.S.C. § 652(a) (2006) provides in relevant part: “...Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, ...arbitration.... Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration.” Early support for mandatory mediation was found in SOC’Y OF PROF’L IN DISPUTE RESOLUTION, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS (1991) (stating that “Mandating participation in non-binding dispute resolution processes often is appropriate.”).

<sup>29</sup> It is not surprising then that there is considerable litigation over sanctions for failure to participate in mediation and for failure to participate in good faith. See Coben & Thompson, *supra* note 11; Thompson, *Good Faith Mediation*, *supra* note 18. See also Edward Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079 (1993).

The “mediation phenomena” in U.S. courts did not just happen. U.S. courts have long been involved in promoting mediation and other ADR processes as a way of encouraging settlement,<sup>30</sup> often citing judicial economy and convenience as reasons for doing so.<sup>31</sup> Scholars have demonstrated that caseload pressures incline judges toward encouraging settlement.<sup>32</sup> So it becomes apparent that courts are not just bystanders in the “mediation phenomena,” and this is one of the reasons that their deferential standard of review in mediation enforceability cases is so problematic.

Consider what happens with judicial review of mediated agreements under the current regime. Aggrieved parties return to the court system that sent them to mediation in the first place, (the same court system that promoted wide-scale use of mediation) and they request judicial review of their mediated agreements which they believe are tainted with some legal impediment, frequently related to the voluntariness of their consent. The court acts as if the mediation process that resulted in the agreement was a voluntary undertaking. So it applies traditional principles of contract law, principles that scholars have observed apply poorly in the context of mediation.<sup>33</sup> More often than not, the court will show considerable deference to their mediated agreements. The parties are *stuck* and that is the crux of the problem.

### III. GOING FORWARD

#### A. *Proposals for Reform Within the Current System of Mandatory Mediation*

Several thoughtful scholars have recognized the problems in mandatory, court-connected mediation programs and suggested reform measures.<sup>34</sup> Professor Nancy Welsh has suggested several modifications to contract law,<sup>35</sup> including a cooling off period that

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<sup>30</sup> See e.g., Barbara McAdoo, *All Rise, the Court is in Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377 (2007) (in the view of judges “ADR offers assistance in getting cases settled and off their dockets”). See also Sander, *infra* note 47.

<sup>31</sup> COLE ET AL., *supra* note 7, at 435, 439.

<sup>32</sup> John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L. J. 522, 560-562 (2012).

<sup>33</sup> See Thompson, *Enforcing Rights*, *supra* note 18, at 563 (explaining that the traditional contract defenses of duress, misrepresentation, undue influence and mistake were developed within the framework of adversarial negotiations). See also Robert P. Burns, *The Enforceability of Mediated Agreements: An Essay on Legitimation and Process Integrity*, 2 OHIO ST. J. ON DISP. RESOL. 93 (1986) (in applying contract law principles to mediated agreements, courts should take into consideration the context of mediation); Coben & Thompson, *supra* note 11.

<sup>34</sup> See, e.g., James J. Alfani & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 206 (2001) (issues related to the enforcement of mediated agreements need to be decided with reference to mediation’s unique attributes); Deason, *supra* note 24, at 77 (arguing that a writing is important to sustain the consensual nature of mediation).

<sup>35</sup> Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. U. L. REV. 187, 209-10 (2013). Borrowing from Professor Welsh’s research in the ERISA area, if courts insist on retaining the current deferential standard of review, it may be possible to have them consider as an additional factor, the voluntariness of the parties’ consent to mediation. Professor Welsh has demonstrated how in the ERISA context, the Supreme Court has acknowledged the existence of structural bias and made it a relevant and important factor to be considered as part of deferential judicial review.

would permit rescission immediately after mediation.<sup>36</sup> She and Professor Barbara McAdoo have argued that in mandatory court mediation programs, there should be procedures for parties to opt-out of the process.<sup>37</sup> Professor Peter Thompson has suggested truth-telling and disclosure requirements in court-connected mediation,<sup>38</sup> and Professor John Lande has offered dispute system design proposals that would improve court mediation programs.<sup>39</sup>

### B. *The Real Problem—Compulsory Mediation*

It is time to consider that mandatory mediation in the United States, sanctioned under the ADR Act of 1998, has outlived its usefulness.<sup>40</sup> Compulsory mediation was once a helpful pedagogical tool to inform parties about mediation. It engaged otherwise reluctant clients and lawyers so that they could experience the benefits of mediation. But, we now have a pervasive mediation regime in state and federal courts. There are multiple models of mediation practice. Law schools and business schools teach mediation on a regular basis and there is a substantial literature to assist them. Many lawyers and clients are now knowledgeable about mediation.<sup>41</sup> In fact, some lawyers are so familiar with the process that they have become skilled in mediation tricks—spinning the mediator,<sup>42</sup> using mediation for discovery purposes,<sup>43</sup> lying<sup>44</sup> and transforming mediation into a legal

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<sup>36</sup> Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1 (2001).

<sup>37</sup> Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES 1, 18 (Donna Stienstra & Susan M. Yates eds., 2004).

<sup>38</sup> Thompson, *Enforcing Rights*, *supra* note 18, at 571; Thompson, *Good Faith Mediation*, *supra* note 18, at 424 (noting the need clear procedures for opt-out).

<sup>39</sup> See, e.g., John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002).

<sup>40</sup> Several scholars have expressed concern with mandatory mediation. See e.g., Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 142 (2004) (courts should end their reliance on mandatory mediation; the court's authority to mandate mediation should sunset within two to three years after a court-connected mediation program has been introduced); Richard C. Reuben, *Tort Reform Renews Debate Over Mandatory Mediation*, 13 DISP. RESOL. MAG. 13, 13 (2007); Carol I. Azumi & Homer C. LaRue, *Prohibiting "Good Faith" Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J. DISP. RESOL. 67 (mandatory court-connected mediation may create process dissonance); 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 (2005); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L. Q. 47 (1996).

<sup>41</sup> Thompson, *Good Faith Mediation*, *supra* note 18, at 423.

<sup>42</sup> See, e.g., John T. Blankenship, *The Vitality of the Opening Statement in Mediation: A Jumping Off Point to Consider*, 9 APPALACHIAN J. L. 165, 178 (2010) (proposing that when parties are placed in different rooms, it may be easier to spin the mediator).

<sup>43</sup> Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 267 (reporting reaction of an attorney in a mandatory court mediation program that "...mediation is a perfect opportunity for the fishing expedition...").

<sup>44</sup> Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481 (2009); Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119 (2007).

process that fits more with their adversarial inclinations.<sup>45</sup> Corporations are active mediation users and in recent years have preferred it to arbitration.<sup>46</sup> In short, through the use of compulsory mediation, we have made substantial progress in educating potential users about the value of mediation.<sup>47</sup>

My suggestion that compulsory mediation has outlived its usefulness is not to suggest abandoning court-connected mediation programs. Rather, improving the quality of justice in these programs should be the goal.

One way to achieve this goal is to simply abolish compulsory mediation and require that parties give informed consent to mediate.<sup>48</sup> The ADR Act of 1998 could be amended to exclude mediation as one of the processes that does not require consent.<sup>49</sup> Other options include economic incentives such as those used by some countries in the European Union<sup>50</sup> following issuance of the Mediation Directive.<sup>51</sup> Another option would be enhanced educational programs. Continued efforts by the courts to educate the public on what to expect from the mediation process is important to assist parties in their decision-making about mediation. Taking advantage of available technology, courts could provide parties with informational videos portraying different approaches to mediation.<sup>52</sup> Then, a party's decision to participate or not participate in mediation would at least be based on an informed understanding of the mediation process.

The option I propose for consideration in this essay is adopting the English view that mediation is a consensual process but that courts may use robust encouragement to engage parties in mediation. If parties unreasonably refuse their consent to mediation, then costs can be imposed. This represents a departure from the usual English rule that the losing party pays costs. In this regard, it is worth noting that in England, there are far

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<sup>45</sup> See Nolan-Haley, *Mediation: The "New Arbitration,"* *supra* note 9; Jacqueline M. Nolan-Haley, *Lawyers, Clients and Mediation*, 73 NOTRE DAME L. REV. 1369, 1380-81 (1998).

<sup>46</sup> Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, SOCIAL SCIENCE RESEARCH NETWORK, available at <http://ssrn.com/abstract=2221471> (reporting on the results of a survey of corporate counsel in Fortune 1,000 companies conducted in 2011, text accompanying note 26).

<sup>47</sup> See Frank E.A. Sander, *Another View of Mandatory Mediation*, 13 DISP. RESOL. MAG. 16, 16 (2007) (referring to compulsory mediation "as a kind of temporary expedient, a la affirmative action.").

<sup>48</sup> See Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 776 (1999).

<sup>49</sup> 28 U.S.C. § 652(a) (2006).

<sup>50</sup> For example, in Bulgaria, if parties are successful in resolving disputes in mediation, they are entitled to a refund of 50% of the court filing fees and in Romania parties are entitled to 100% refund of court fees if they settle a dispute in mediation. See EUR. PARL. DOC. (COM P7\_TA(2011)0361, Par. 6) *Resolution of September 13, 2011 on the Implementation of the Directive on Mediation in the Member States, Its Impact on Mediation and its Take-Up by the Courts*, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0361+0+DOC+XML+V0//EN> (last visited Mar. 7, 2013). For more detailed discussion of implementation of the EU Directive, see Jacqueline M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?*, 37 N. C. J. INT'L L. & COM. REG. 981 (2012).

<sup>51</sup> 2008 O.J. (L 136/3) Parliament and Council Directive 2008/53/EC, European Mediation Directive, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF> (last visited Mar. 7, 2013).

<sup>52</sup> For example, the Virginia Judicial System offers videos depicting the facilitative style of mediation. See Virginia's Judicial System, <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/home.html> (last visited Mar. 7, 2013).

fewer cases of parties challenging the enforceability of their mediated agreements,<sup>53</sup> suggesting perhaps that party consent enhances compliance with mediation agreements.<sup>54</sup>

#### IV. MEDIATION IN ENGLAND

After an extensive study of its civil justice system, which was plagued by delay and general malaise,<sup>55</sup> England reformed its Civil Procedure Rules (CPR) effective 1999.<sup>56</sup> As a result of the reforms, courts were empowered to encourage litigants to use appropriate ADR processes to settle their disputes and to punish those who failed to do so.<sup>57</sup>

For several years, the English courts struggled with questions about their power to establish a compulsory mediation regime. The cases went in differing directions with some courts imposing costs on parties who unreasonably refused consent to mediate.<sup>58</sup> Finally, in 2004, the Court of Appeal rejected a compulsory mediation regime in *Halsey v. Milton Keynes General NHS Trust and Steel v. Joy*.<sup>59</sup> Party consent would now be necessary for parties to participate in mediation. To do otherwise and require unwilling parties to mediate, would, in the court's view, violate a litigant's fundamental rights to have access to the courts and violate Article 6 of the European Convention on Human Rights. The court observed that its role was to encourage, not compel parties to engage in ADR. Encouragement, however, could be "robust," and parties who unreasonably refused to give consent to mediation could be assessed costs.<sup>60</sup>

This represented a significant departure from the traditional English rule that the unsuccessful party pays the costs of the successful party.<sup>61</sup> The *Halsey* court offered a non-exhaustive list of six factors which could be considered in determining the

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<sup>53</sup> See *Crystal Decisions (UK) Ltd. v. Vedatech Corp.*, [2008] EWHC (Civ) 848 (mediation agreement challenged on the grounds of duress and fraud); *Brown v. Rice & Patel & ADR Group*, [2007] EWHC (Ch) 625 (issue of whether a settlement was reached during mediation).

<sup>54</sup> Cf. McEwen & Maiman, *Achieving Compliance Through Consent*, *supra* note 3.

<sup>55</sup> See Loukas A. Mistelis, *ADR in England and Wales*, 12 AM REV. INT'L ARB. 167 (2001) (discussing England's civil justice reform efforts in the 1990s).

<sup>56</sup> Lord Woolf, *Access to Justice-Final Report*, THE NATIONAL ARCHIVES (1996) available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/contents.htm> (last visited Mar. 7, 2013). This report formed the foundation of Uniform Civil Procedure Rules for England. For a more detailed discussion of England's reform efforts, see Jacqueline M. Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247, 1256-59 (2009) [hereinafter *Mediation Exceptionality*].

<sup>57</sup> References to the term "ADR" in England, are usually understood as being a reference to some form of mediation. *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576, [5].

<sup>58</sup> See, e.g., *Dunnett v. Railtrack PLC*, [2002] EWCA (Civ) 302; *Royal Bank of Can. Trust Corp. Ltd. v. Sec'y of State for Defence*, [2002] EWHC (Ch) 1841; *Hurst v. Leeming*, [2001] EWHC (Ch) 1051.

<sup>59</sup> See generally [2004] EWCA (Civ) 576 (Eng.).

<sup>60</sup> Costs generally include reasonable litigation expenses, court fees, legal fees, expert witness fees etc. See Herbert M. Kritzer, *The English Rule*, 78-NOV A.B.A. J. 54 (1992). An extensive study of costs in England conducted by Lord Rupert Jackson was published in 2009. See Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (Dec. 21, 2009) available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

<sup>61</sup> The CPR 44.3 provides that the unsuccessful party will be ordered to pay the costs of the successful party. Under the American Rule, each party to the litigation bears their own costs. See Kathryn E. Spier, *Pretrial Bargaining and the Design of Fee-shifting Rules*, 25 RAND J. OF ECON. 197 (Vol. 2, Summer 1994).

reasonableness of a party's refusal to consent: (a) nature of the dispute; (b) merits of the case; (c) extent to which other settlement methods have been attempted; (d) whether ADR costs would have been disproportionately high; (e) whether delay in using ADR would have been prejudicial; and (f) whether ADR had a reasonable prospect of success.<sup>62</sup>

Mediation litigation in England focuses more on parties who unreasonably refused consent to mediate than on those who seek judicial review of mediated agreements. Thus, the most active role of the courts in mediation is reviewing parties' unreasonable refusals to consent to participate in mediation. A review of the mediation consent cases shows that courts do not have a deferential attitude toward England's robust policy of encouraging mediation. They seem to have little problem in finding that refusals to consent to mediation were not unreasonable.<sup>63</sup>

I am not suggesting that we simply import the English rule on a wholesale basis into our mediation jurisprudence. Given the real threat of meaningful cost sanctions, it cannot be said that mediation is a purely consensual process in England. But, the requirement of party consent must matter in some respects considering the paucity of cases challenging the enforceability of mediated agreements in England. Thus, the English rule might be worth adopting as a pilot project in the United States.<sup>64</sup> As a settlement tool, it has more teeth than some of the settlement mechanisms we currently have such as Federal Rule of Civil Procedure 68.<sup>65</sup> Robust encouragement such as cost sanctions (which would include attorney fees) could provide meaningful incentives for parties to mediate.

What could we expect to happen under a consensual mediation regime? There are multiple possible responses to this empirical question. We could end up trading merits litigation for mediation litigation. More cases would be tried, more legal norms would be established and some ADR critics might be pleased at this development.<sup>66</sup> Another result might be increased litigation generally, by retaining current levels of mediation litigation

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<sup>62</sup> See Halsey, [2004] EWCA (Civ) 576, [16] (Eng.).

<sup>63</sup> See, e.g., *ADS Aerospace Ltd v. EMS Global Tracking* [2012] EWHC 2904 (TCC) (Halsey principles applied and court did not sanction a successful defendant for refusing to mediate); *Swain Mason and Mills & Reeve* [2012] EWCA (Civ) 498 (unsuccessful party failed to show that successful party acted unreasonably in refusing mediation); *Jeffrey Jones v. Sec. of State for Energy and Climate Change & Coal Prods. Ltd.*, [2012] EWHC 3647 (QB) (finding that there was little or no prospect of important issues being settled by mediation; highly unlikely that the mediation would have been successful); *Corby Grp. Litig. & Corby Dist. Council*, [2009] EWHC 2109 (TCC) (refusal to mediate was reasonable); *S & ORS and Chapman & ANR*, [2008] EWCA (Civ) 800 (defendant's refusal to mediate was reasonable.); *Whapples v. Birmingham E. & N. Primary Care Trust*, [2008] EWCA (Civ) 465 (not unreasonable to fail to participate in mediation before litigation); *Reynolds v. Stone Rowe Brewer*, [2008] EWHC 497 (QB) (mediation had little chance of success). See also cases discussed in *Mediation Exceptionality*, *supra* note 56, at 1262.

<sup>64</sup> I would exclude from this proposal situations where there is a potential for fee shifting. For example, attorneys' fees provisions are frequently available in civil rights, environmental protection and consumer protection statutes. See generally Henry Cohen, *Awards of Attorneys' Fees by Federal Courts and Federal Agencies*, CRS Report for Congress (June 2008), <http://www.fas.org/sgp/crs/misc/94-970.pdf>.

<sup>65</sup> See Edward F. Sherman & Christopher M. Fairman, *Interplay Between Mediation and Offer of Judgment Rule Sanctions*, 26 OHIO ST. J. ON DISP. RESOL. 327 (2011) (discussing weaknesses of Rule 68); Jan Horowitz, *Rule 68: The Settlement Promotion Tool that has not Promoted Settlement*, 87 DENV. U. L. REV. 485 (2010).

<sup>66</sup> See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

and adding to it, litigation over the reasonableness of refusing consent. Alternatively, a consensual mediation regime might simply substitute the current enforceability and good faith litigation with litigation about a party's reasonableness in refusing consent to mediate. In this case, the basis for judicial review would change but it might be a change for the better. Focusing on the reasonableness of a person's behavior fosters respect for individual choice and honors self-determination, values that are close to the heart of authentic mediation.

Based on England's experience, a consensual mediation regime would most likely come with a price. Court mediation programs could become under-utilized<sup>67</sup> and decreased usage might result in other settings. Recently, commercial mediation practice in England has been described in paradoxical terms. Despite the high number of successful mediations, there is low usage.<sup>68</sup> But, a potential reduction in mediation usage in the U.S. should not be cause for great concern. There are several other ADR processes, some of which are compulsory, which can be used to encourage settlement.<sup>69</sup> Let them do their job so mediation can return to its proper place in the courts as a voluntary process.

## V. CONCLUSION

Mediation has drifted, untethered from its original understanding<sup>70</sup> as a voluntary process based on party self-determination. With this drift has come some party dissatisfaction as evidenced in continuing challenges to the enforceability of mediated agreements. A return to voluntariness would help to anchor mediation on a foundation based on justice principles (procedural and substantive) rather than on raw power to compel participation.

Mediation should operate in a voluntary system that honors party self-determination. When courts engage in judicial review of mediated agreements and apply traditional contract law analysis, the agreements that are reviewed should derive from a voluntary mediation regime where parties have given informed consent to participate in the process and to the outcome that is reached.

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<sup>67</sup> When English judges lost their power to compel mediation after *Halsey*, there was an opt-out rate of 80% from a pre-existing quasi-compulsory pilot court mediation program. See HAZEL GENN ET AL., TWISTING ARMS: COURT REFERRED AND COURT LINKED MEDIATION UNDER JUDICIAL PRESSURE 19 (2007) available at [http://www.ucl.ac.uk/laws/judicial-institute/docs/Twisting\\_arms\\_mediation\\_report\\_Genn\\_et\\_al\\_1.pdf](http://www.ucl.ac.uk/laws/judicial-institute/docs/Twisting_arms_mediation_report_Genn_et_al_1.pdf).

<sup>68</sup> Giuseppe de Polo & Mary B. Trevor, *Is Mediation Moving Out of the Shadows and Into the U.K. Practice Mainstream?*, 30 ALTERNATIVES TO HIGH COST LITIG. 9 (2012). The authors report that despite settlement rates of 90% in commercial mediations, only 8,000 commercial and civil cases are mediated annually.

<sup>69</sup> See, e.g., FED. R. CIV. P. 16(f) (giving judges the power to compel parties to attend mandatory settlement conferences). The ADR Act of 1998 allows courts to require parties to use the Early Neutral Evaluation (ENE) process. See 28 U.S.C. §652(a) (2006).

<sup>70</sup> Matthew Caton, *Civil Costs: Adrift and Untethered from Common Law*, 27 ME. B. J. 206 (2012) (the author makes the same point about costs).