

Only For A Season:
Mandatory Mediation As A Temporary Measure

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Alternative Dispute Resolution practices have now entered the mainstream, in spite of considerable opposition to their use. Indeed, ADR is mandatory in many of the American states. For example, Minnesota: when a claim in that state exceeds \$50,000, the judge can require the disputants to submit to mediation before allowing court proceedings to begin'. The process of institutionalizing ADR in Canada is also underway. For example, the Ontario Court began to phase in mandatory mediation for most civil litigation claims in January of this year.²

ADR practices include mediation, mini-trials, Early Neutral Evaluation, Summary Jury Trials, and arbitration.³ In this essay I will question in particular the wisdom of mandatory mediation. Mediation is the process most unlike adjudication, and arguably its integrity is preserved only if participation is voluntary. The body of the essay is divided into three approximately equal parts. First, I will provide relevant background information. Second, I will outline arguments in favour of mandatory mediation. Third, I will outline arguments against mandatory mediation. Finally, I will weigh the arguments and draw my conclusions.

1. Background issues

Certain background information is relevant to our consideration of the pros and cons of 1Lucy V. Katz, "Compulsory Alternative Dispute Resolution and Voluntarism: Two-

Headed Monster or Two Sides of the Coin?", Journal of Dispute Resolution (1993), footnote 57. 2"Let's mediate a deal", The Toronto Star, Jan. 2, 1999, pp. M9-10.

3For an introductory description of these processes see Justice George W. Adams and

Naomi L. Bussin, "Alternative Dispute Resolution and Canadian Courts: A Time For Change", Advocates' Quarterly 17 (May, 1995), pp. 136-141.

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mandatory mediation. First, it is certainly necessary at the present time to institutionalize ADR in Canada, but governments may do so without making ADR mandatory. Fleischmann and Bussin maintain this distinction between institutionalized and mandatory ADR:

"Institutionalization" encompasses programmes which are truly voluntary for the participants, yet are

found within institutional structures. . . . "Mandatory ADR" is more narrowly defined as methods such as arbitration which by court rule or statutes are required as a prerequisite to further relief in the judicial or regulatory system.⁴

The phrase "court-annexed mediation" must be carefully interpreted. It may refer to either of these approaches to ADR, institutionalized or mandatory.

Canadian governments must bring ADR programs into formal relationship with the courts. For example: lawyers may be required to inform their clients about alternative processes before initiating a lawsuit; information disclosed during mediation may be declared inadmissible in subsequent court proceedings; and public funding may be made available for ADR programs, as well as financial assistance for the people who utilize them. Regulatory considerations like these come under the definition of institutionalizing ADR. Governments may go so far as to make ADR mandatory but this measure need not accompany the others.

In the U.S.A. mediation is frequently court-ordered. According to Fleischmann and Bussin, "the main areas in which mediation is currently mandated by statute include labour and family disputes, medical malpractice claims, farms and mortgage foreclosures, agricultural producer/distributor bargaining, civil rights disputes, and consumer warranty cases."⁵ Mediation is more

4 Elana Fleischmann and Naomi Bussin, "The Institutionalization of Alternative Dispute Resolution: A Case Study of the Ontario Insurance Commission", Canadian Insurance Law Review 6 (1996), p. 267.

5Ibid., p. 270.

often mandatory in family disputes than in any other area, according to Lucy Katz.⁶ It is an open question whether Canada should follow the lead of the U.S.A. by making mediation mandatory in any or all of these areas.

Fleischmann and Bussin helpfully provide a detailed Canadian case study.⁷ They describe how mandatory mediation is employed by the Ontario Insurance Commission. At issue is whether parties who have been injured in an automobile accident are entitled to receive benefits, and the amount of the benefits to which they are entitled. Mediation is both compulsory and non-binding:

"Mediation is compulsory in that the *Insurance Act* prohibits the initiation of an arbitration or court proceeding before mediation has been attempted, and it is non-binding because the mediator cannot impose a decision upon the parties."⁸ In 1995, 70.1% of the cases were mediated within sixty days. Speed is very important because the injury may impact on the claimant's earning power; this is one of the reasons why ADR is preferable to the adjudication of these claims. ADR is also indicated because the courts are not equipped to handle the large volume of cases which resulted when no-fault insurance was introduced in Ontario in June, 1990.⁹ Costs are minimized by eliminating the need to travel: about half of the cases are mediated over the telephone. From 1990 through Dec. 31, 1995 the OIC mediated 21,613 cases. 54% of the cases were fully settled, and 24% of the cases were partially settled (i.e., the number of outstanding issues was reduced). The Dispute Resolution Group of the OIC provides three principal services: mediation, arbitration, and appeals. When

6Katz, p. 11.

7 Fleischmann and Bussin, pp. 278-291.

6Ibid., p. 279.

9Ibid., p. 272-73.

mediation fails to resolve some or all of the issues the claimant may opt for either arbitration or adjudication; the insurer, however, may only proceed through the court system. ADR practices, including mandatory mediation, seem to be the right approach in this specific instance. We will return to the OIC example repeatedly in subsequent discussion.

Two distinct rationales are concealed within the overall support for ADR programs. Came Menkel-Meadow labels these "quantitative-efficiency" claims and "qualitative-justice" claims. Qualitative-justice claims evolved in the U.S.A. in the 1960's, when the quality of justice delivered by the adversarial system was questioned. Concerns included the binary win-lose results of adjudication, the artificiality of defining disputes according to prescribed legal forms, and remedies which did not satisfy the underlying interests of the parties. Quantitative-efficiency claims arose later, during the mid-1970's to early 80's, when inefficiencies in the adversarial system became the

focus. At issue then was the "litigation explosion", the unmanageable workload of the courts, and the high costs of litigation (to major businesses, for example). 10 Proponents from these two camps joined forces to produce the ADR movement but the objectives they pursue are sometimes incompatible. According to Menkel-Meadow, "courts try to use various forms of ADR to reduce caseloads and increase court efficiency at the possible cost of realizing better justice." She notes that some of the earliest proponents of ADR have come to oppose it because, in its institutionalized forms, "it does not foster communitarian and self-determination goals. Instead, it is used to restrict access to the courts for some groups, just at the time when these less powerful groups have achieved some legal rights."12

10Carrie Menkel-Meadow, "Pursuing Settlement In An Adversary Culture: A Tale of

Innovation Co-opted or 'The Law of ADR', Florida State University Law Review 19(1991), pp.

6-11.

11 Ibid., p. 3.

The distinction between quantitative-efficiency claims and qualitative-justice claims increases in significance when we turn our attention from ADR in general to mandatory ADR in particular. Mandatory mediation ultimately serves quantitative-efficiency interests better than qualitative-justice interests.

Arguments in Favour of Mandatory Mediation

The main argument in favour of mandatory mediation is that it maximizes the use of a beneficial process. To state the same argument negatively, voluntary mediation is underutilized. Goldberg, Green, and Sander reported in 1986 that many of the neighborhood justice centers in the U.S.A. were starving for business.³ Michael Weinzierl relates a specific example of an underutilized ADR program. Voluntary ADR was actively promoted for libel disputes in the United States from 1987 through 1990. ADR offers at least one significant advantage over the litigation of libel disputes: ADR processes are conducted privately, whereas litigation is public and the allegedly libellous statements may be repeated in the media. Nonetheless most lawyers chose not to participate in the program. Project coordinators contacted attorneys involved in 128 libel disputes across the U.S.A.,¹⁴ and the parties agreed to ADR in only five of the 128 cases. As Weinzierl ruefully observes, "an overwhelming majority of the libel disputes that could have potentially been resolved were not even attempted".¹⁵

¹² Ibid., p. 11.

¹³ Stephen Goldberg, Eric Green and Frank Sander, "ADR Problems and Prospects: Looking To the Future", Judicature 69 (Feb.-Mar., 1986), p. 291.

¹⁴ Michael E. Weinzierl, "Wisconsin's Court-Ordered ADR Law: Potential for Resolving Libel Disputes", Journal of Dispute Resolution (1994), p. 200.

Voluntary ADR programs are underutilized for a variety of reasons. First, people automatically think of adjudication first. Goldberg, Green and Sanders observed:

Despite increasing publicity given to alternatives, we suspect that if a Gallup poll were taken today asking what an individual should do if he had a dispute with a neighbor which they could not resolve, most citizens would say "go to court" or "see your lawyer," rather than "visit your local neighborhood justice center." The emphasis given to courts and lawyers as the paradigm dispute resolvers in American society is simply too pervasive to be easily disturbed.⁶

Second, many lawyers do not advocate ADR. Lawyers could play a critical role in encouraging its use, but Menkel-Meadow states:

There is an unspoken resistance to alternative dispute resolution that derives in part from the tendency instilled by our adversarial training to distrust alternative forms of consciousness, such as a focus on solving the problem rather than winning the case.

Lawyers and judges. . . have been taught to argue, criticize, and persuade, rather than to listen, synthesize, and empathize.⁷

Lawyers have other reasons for preferring litigation to ADR. Goldberg, Green and Sander suggest the following: ADR is less familiar and less structured than adjudication; ADR gives lawyers less control and a diminished role; ADR requires fewer hours and therefore pays them less; and lawyers think that, if they suggest ADR, opposing counsel will take this as a sign of a weak case.⁸ Weinzierl suggests a fear

on the part of lawyers that ADR may result in a settlement lower than their

15Ibid., p. 208.

16 Goldberg, Green and Sander, p. 291.

17 Menkel-Meadow, pp. 34-35 and 36.

18Goldberg, Green, and Sander, pp. 29 1-92.

client's legal entitlement.'⁹

If people automatically think of adjudication first, and lawyers do not encourage them to consider ADR as an option, voluntary ADR programs will continue to be underutilized. In my opinion this is the strongest argument in favour of mandatory mediation. Richard Ingleby, however, considers the same data and reaches the opposite conclusion: "It should... trouble the advocates of mediation that the public has so far shown a limited demand for such services."²⁰

Related to this point is the argument that mandatory mediation may have educative value. According to some observers, people are unnecessarily belligerent and must be taught to resolve conflict non-adversarially. By requiring unwilling participants to give ADR a try we may change their perception of it. Fleischmann and Bussin offer some evidence to this effect. In the Ontario Insurance Commission program, they report, "cases ordered to mediation settle at a similar rate to those which are voluntarily mediated".²¹ ADR may thus have potential to transform society's approach to conflict resolution and reduce social discord. But this goal will not be achieved if we continue to give people the option of slaying their adversaries in court.

Mandatory ADR is also more cost-effective than voluntary ADR because administrative costs are spread over a larger number of cases.²² In this instance quantitative-efficiency interests conflict with qualitative-justice interests: i.e., increased caseloads improve efficiency but may jeopardize

19Weinzierl, p. 201.

20Richard Ingleby, "Court Sponsored Mediation: The Case Against Mandatory Participation", The Modern Law Review 56 (May, 1993), p. 443.

21Fleischmann and Bussin, p. 275.

22Ibid., p. 274.

the goal of better justice. Ingleby makes this point based on his observation of ADR in Australia. In that country there are two separate ADR programs. The Federal Court program is voluntary, handles a relatively small number of cases, and delivers quality justice. Ingleby found that the Registrars of this program "conducted a series of conferences for each case which was referred to them and had a close knowledge of all the relevant facts." In Family Court, on the other hand, ADR is mandatory, caseloads are greater, and efficiency is emphasized at the expense of justice:

The Registrars dealt with two or three conferences a day and considered themselves to be well-prepared if they had had a chance to read the file before the conference started. It was not unusual for two conferences to be conducted concurrently, if the first conference of the morning had not terminated by the time that the second one was due to start. Likewise in the Small Claims Tribunal, the referees were assigned cases shortly before the hearing and dealt with at least two or three per day. The third parties were more likely to act in an adjudicative manner when they were under pressure to dispose of the case.²³

In this instance, a quantitative-efficiency objective is achieved at the expense of a qualitative-justice objective.

Mandatory mediation is also advantageous for research purposes. In theory, ADR minimizes costs, reduces court backlogs, and preserves relationships; but it has been difficult to prove or disprove these results empirically.²⁴ If research subjects volunteer for mediation the sample is biased, as Goldberg, Green and Sander observe: "The obvious risk is that those disputants who were willing to mediate were particularly susceptible to a mediatory approach, and that if mediation were compulsory. . . its apparent advantages would disappear."²⁵ Likewise, if judges refer certain cases to mediation but not others, they may be referring only those cases which appear likely to settle. Sound research practice requires that we indiscriminately submit all cases to mediation and then evaluate outcomes.

²³ Ingleby, p. 448.

²⁴ Ibid., p. 442. Katz, for example, is skeptical about efficiency claims: "Studies show that ADR does not necessarily reduce caseloads. It may be a fairer, more just settlement

technique, but it generally replaces ordinary settlement negotiation more than it substitutes for trials" (p. 52).

Finally, we can set aside the objection that mandatory mediation may increase costs and delay. This concern is relevant to those cases in which mediation is unsuccessful. In such cases, mediation constitutes one more procedural layer: by making it mandatory we have forced the disputants to jump through yet another hoop in their quest for justice. In litigation the parties must begin all over again, repeating certain steps in that forum.²⁶ This issue, however, is more of a concern in arbitration and Summary Jury Trials than it is in mediation. There is no additional delay because mediation can be conducted while the parties are waiting for their first court date to arrive. Expenses are also minor

because mediation requires minimal advance preparation. In the case of the Ontario Insurance Commission, the claimant pays no fee for mediation. Fleischmann and Bussin state that the cost to the insurance industry per OIC mediation was only \$3 80.00.²⁷ The issue of increased costs and delay is very real for processes other than mediation, however, where more advance preparation is required and costs are much greater.

3. Arguments Against Mandatory Mediation

The fundamental argument against mandatory mediation is that mediation is, by definition, a voluntary process. Martin Shapiro²⁸ places mediators and judges on a continuum which may be represented graphically as follows:

[image not reproduced]

²⁵ Goldberg, Green and Sander, p. 294.

²⁶ Peter Bowal, "The New Ontario Judicial Alternative Dispute Resolution Model", Alberta Law Review 34 (1995), pp. 211-12.

²⁷ Fleischmann and Bussin, footnote 62 and pp. 290-91.

The great advantage of processes to the right side of the continuum is that they are norm-based; the great advantage of processes to the left side of the continuum is that they are voluntary. To the extent that we make mediation mandatory we strip it of the fundamental advantage it presents.

Voluntariness is multi-dimensional. According to Shapiro, it may consist of four discrete elements: disputants may choose the law according to which their dispute is to be settled; they may choose the neutral third party who will help to settle the dispute; they may participate in the dispute resolution process voluntarily; and they may voluntarily agree to the resolution.²⁹

The first of these elements, choosing the law, applies only to norm-based processes (i.e. adjudication and arbitration--not mediation). The other three elements may all be compromised to a greater or lesser degree in mandatory mediation. Least significant is the question of choosing one's own mediator. In mandatory mediation the dispute is typically assigned to a public official for mediation without the input of the disputants, but presumably this does them no harm. More significantly, the disputants' participation in the mediation process is involuntary. Fleischmann and Bussin describe the Ontario Insurance Commission's rules:

The parties to the mediation and their representatives are required to make themselves available for mediation within the time frames set out by the *Insurance Act*, to

²⁸ Martin Shapiro, Courts: A Comparative and Political Analysis (Chicago: The University of Chicago Press, 1981), pp. 2-5.

²⁹ Ibid., p. 6.

participate fully and in good faith in the mediation process, and to exchange all relevant documents. Failure to comply with the foregoing could result in a mediator reporting that the mediation did not take place, resulting in the parties having to reapply for mediation instead of being able to move forward to

the next step of arbitration or a court proceeding.³⁰

Legislation may provide for sanctions against parties who do not participate in good faith. For example, in Utah mediation is mandated for visitation disputes. "If a parent fails to cooperate during either the mediation process or in complying with an agreement, the court may order sanctions including a temporary change in custody or visitation".³¹

Voluntary agreement to the resolution is the final element identified by Shapiro. It is generally acknowledged that there must be no coercion to settle. But ordering people to negotiate "fully and in good faith" quickly degenerates into ordering them to settle. We cannot tidily extricate these two practices from one another: the rejection of a settlement offer is easily construed as a failure to make a bona fide attempt to reach agreement. Lucy Katz reports that in the U.S.A., "in some circumstances judges may indeed penalize parties for failure to settle":

In the Second Circuit, a refusal to settle resulted in sanctions in *Kline v. Wolf*. In that case, the court stated that rejection of settlement and insistence on trial can be grounds for an award of costs, expenses and attorney fees under 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying the proceedings when the claims for relief greater than the settlement are 'so lacking in merit that they have but a slender chance of success at trial.'³²

If such decisions are multiplied, parties may begin to settle out of fear that a court will find their position unreasonable and impose damages on them.

³⁰Fleischmann and Bussin, p. 280.

³¹Utah Courts' Visitation Mediation Program, <<http://courtlink.utcourts.gov/mediation/visitmed.htm>>.

³²Katz, p. 44.

Here we must again return to the conflict between quantitative-efficiency concerns and qualitative-justice concerns. Katz reports a Ninth Circuit Court of Appeals opinion:

The court held that a trial judge had the power to set a definite date by which the parties must settle, and then to impose costs under Rule 16 on a party which settles after that date, so long as the order's purpose was to control the docket by eliminating unnecessary trial schedules and jury selection.³³

Clearly the imposition of a date by which settlement must occur creates pressure on the parties to settle. In this instance the court justified the practice for the purpose of controlling the docket--a quantitative-efficiency objective.

Pressure to settle may originate with judges but then be passed along through other public servants. Andree Gagnon reports, "Massachusetts family service officers have indicated that there is pressure to settle cases, and that they tend to believe their job effectiveness is evaluated based on how many cases they settle".³⁴ In these circumstances, public servants will inevitably exert subtle pressures on disputants to induce settlement. For example, mediators may disqualify "irrelevant" considerations, dismiss obstacles to settlement, or advise the parties of the best "voluntary" settlement.³⁵ Ingleby found that pressure tactics were liberally employed in Australia:

The third parties promoted the benefits, and deprecated the alternatives to, settlement.

Settlement was portrayed as a way of keeping control. In litigation or arbitration, no-one knew what was going to happen. . . . The financial costs of litigation were constantly emphasized in the Family Court and the Federal Court. . . . Litigation was also said to be emotionally traumatic, and depicted as synonymous with cross-examination. 36

33Ibid., p. 42.

34Andree G. Gagnon, "Ending Mandatory Divorce Mediation for Battered Women", Harvard Women's Law Journal 15 (1992), p. 281.

35Ingleby, p. 448; Fleischmann and Bussin, p. 295.

36Ingleby, p. 446.

Another objection to mandatory mediation is that processes are not neutral: some aspect of mediation may serve the interests of one party over the other. In divorce mediation, for example, this situation exists when there is a history of domestic abuse. The abusive party benefits from a process which assumes the parties have equal bargaining power, which provides limited protection for the former partner, and which does not consider who is in the wrong.³⁷ Governments now commonly exempt people from mandatory mediation when domestic abuse has occurred. But conceivably there may be other situations in which mediation favours one party over another. Goldberg, Green and Sander mention an example:

If a consumer who has been victimized by a merchant sues in small claims court and then is referred to mediation, the case may be settled by having the vendor make some modest payment, without the consumer ever being apprised of his right to get treble damages under the applicable consumer protection act.³⁸

In this example, mediation favours the vendor because settlements are not based on legal norms. Other examples may be added. The fact that mediation is conducted privately may serve the interests of one party more than another.³⁹ Or the lack of procedural safeguards may fail to redress power imbalances between the disputants--e.g., when a private citizen has a dispute with the government, or with a multinational corporation. The point is that processes are not neutral: any distinctive feature of mediation may prove advantageous to a certain disputant in a certain set of circumstances. By imposing a process we may arbitrarily be assisting one of the parties against the other--while threatening to penalize the disadvantaged party if s/he does not participate in good faith.

37Gagnon, pp. 274-77.

38Goldberg, Green and Sander, p. 293.

39Menkel-Meadow, p. 28.

Some people object to mandatory ADR because it is conducted privately. Owen Fiss argues that the purpose of adjudication is not merely to settle conflicts, but to explicate and give force to public values. Whenever a dispute is settled privately a court is deprived of the opportunity to perform this function.⁴⁰

It is indeed vitally important that certain disputes be settled publicly. Menkel-Meadow credits Laura Nader with the following example: "We would never have learned about the defects of the Pinto if the first case had been resolved in a private summary jury trial".⁴² Retired Chief Justice Brian Dickson, however, argues in favour of court-annexed mediation on this very basis. When mediation is court-annexed, disputes are brought within the jurisdiction of a public institution; otherwise these disputes might remain entirely private.⁴²

Finally, some people argue that mandatory mediation produces a two-tier justice system. Sally Engle Merry observes that only wealthy disputants can afford arbitration or mini-trials; when S working poor disputants are shut out of court they end up in community mediation programs. In these programs, as Merry depicts them, mediators are volunteers who have minimal training, little time is given to the dispute, rules and procedures are imposed without the consent of the disputants, and vague, non-legal language may be employed in the ultimate agreement.⁴³ Goldberg, Green and

⁴⁰Owen M. Fiss, "Against Settlement", Yale Law Journal 93 (1984), p. 1085.

⁴¹Ibid.

⁴²Brian Dickson, "ADR, The Courts and The Judicial System: The Canadian Context", The Law Society Gazette 28 (1994), p. 236.

⁴³Sally Engle Merry, "Varieties of Mediation Performance: Replicating Differences in Access to Justice", in Access to Civil Justice, ed. Allan C. Hutchinson (Toronto: Carswell, 1990), pp. 261-69.

Sander believe that such concerns are a matter of perspective. They suggest that the issue turns on our definition of first-class justice: "If it is defined as a method of resolving disputes that includes legal representation, formal rules of procedure, and a resolution based upon law, then those alternatives that are mediatory in nature will inevitably be labelled second-class." If, on the other hand, we define first-class justice as "that dispute resolution process which most satisfies the participants", we arrive at a very different conclusion. Research "uniformly concludes that participants in the alternative processes are as satisfied or more satisfied with those processes than are participants in court adjudication".⁴⁴

Conclusion

Mandatory mediation is necessary for a season, but it would be a grave mistake to continue it permanently. It is indicated as a temporary measure because voluntary 4DR programs are likely to be underutilized. By requiring people to attempt mediation we can demonstrate to the Ciiradian public the benefits of non-adversarial approaches to conflict. Lawyers also begin to appreciate and encourage ADR as they become familiar with it.

When these developments have taken place, however, mandatory mediation will have served its purpose and should be discontinued. Mediation is, by definition, voluntary. When we require people to participate we compromise the integrity of the process. We inevitably create pressure to settle by imposing sanctions on people who (in our judgement) fail to participate "fully and in good faith". Furthermore, when controlling the docket becomes our top priority, and public servants begin to feel their job performance is being evaluated on the basis of settlement percentages, qualitative⁴⁴ Goldberg, Green and Sander, pp. 295-96.

justice objectives will be seriously compromised. I agree, therefore, with the observation of Goldberg, Green and Sander: "Ideally a disputant should be able to make a knowing choice between going to mediation and going to court".⁴⁵

In Ontario, mandatory mediation is already being phased in. This is a necessary measure, but only for a season. Let's not forget to phase it out again after it has achieved its purpose.

⁴⁵Ibid., p. 293.

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