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TORT REFORM RENEWS DEBATE OVER MANDATORY MEDIATION

BY RICHARD C. REUBEN

DESPITE THE RISE OF THE Democrats during the mid-term elections, tort reform can be expected to continue to be an important topic at both the state and federal levels. This is significant for dispute resolution, because a number of the reform measures being discussed include mandatory mediation requirements for many, if not most, civil cases.

I see this possibility as both salutary and troubling. It is salutary in that it acknowledges the important place ADR has come to have in our system of justice. Just think about it: 25 years ago, few legislators had even heard of mediation, or if they had, they might have thought it was some kind of California fad, nothing to be taken seriously. Now often conservative legislators are including mediation in measures intended to fix what they perceive to be wrong with the civil justice system. This is good. More importantly, mediation is bringing to disputants the capacity to have their legal problems solved in ways that produce potentially better outcomes and are more satisfying for participants.

These legislative measures are troubling, however, because they often include mediation not as an option for disputants to consider, but as a mandatory requirement or condition for proceeding to trial. To me this approach is less desirable and has the capacity to threaten the integrity and utility of mediation as a truly alternative dispute resolution process.

Arguments for mandatory mediation

Mandatory mediation has been a part of the dispute resolution landscape for many years. Under it, parties who file claims with the courts are required (either by legislative command or court rule) to use mediation to attempt to resolve the dispute before they will be permitted to proceed to trial. Without question, mandatory mediation has contributed mightily to the institutionalization of ADR in the United States today, and a number of arguments have been advanced to justify it.

1. Mandatory mediation is efficient because it reduces judicial caseloads. It has long been argued that the civil courts are overburdened, and that many of the cases that are filed in courts are not worth judicial resolution either because they are essentially private matters that provide little guidance to others, or because these disputes are better addressed in other processes that can bring more flexibility in decision-making than rule-bound courts. Mandatory mediation helps courts by diverting these cases to alternative forums while still preserving the right of the parties to return to the judicial forum if they are dissatisfied with the results of mediation.

2. Mandatory mediation encourages lawyers to use mediation. The central idea of this argument can be summed up by the punch line of a fast-food commercial of the 1970s: "Try it, you'll like it." Indeed, there is some empirical research to suggest that experience with mediation is the best predictor of the willingness of lawyers to recommend mediation to their clients.[1] In this sense, mandatory mediation serves an educational, even remedial, purpose, and has been particularly important in the institutionalization of ADR because the private bar has historically been much more reluctant than the bench to use alternative, nonjudicial processes to resolve legal disputes.

3. Mandatory mediation provides shelter for lawyers with unreasonable clients. One of the biggest contributions of the ADR movement during the last 30 years has been to help disputants get over the idea that to settle is a sign of weakness. This notion is particularly challenging when dealing with clients, who rightly expect their attorneys to represent them zealously. Many clients confuse zealousness with contentiousness, however, and a mandatory mediation program gives their lawyers a reason to get their clients into the room without giving the appearance of weakness and undermining their clients' confidence in them.

4. Mandatory mediation brings the parties into the legal negotiation process. Negotiation has long been the backbone of legal dispute resolution, but this is negotiation that often has been between the attorneys, with clients ultimately approving or disapproving the results of the negotiation. Mandatory mediation furthers procedural justice values by bringing parties into the actual negotiation of legal disputes by permitting the clients to tell their stories (or hear their attorneys tell them), and by providing an environment for the consideration of the parties' interests that is at least theoretically even-handed and dignified.

All of these are significant reasons to support mandatory mediation. There are, however, a number of arguments against mandatory mediation, which I divide into two categories: the standard arguments, and my additional concerns.

Standard arguments

1. Mandatory mediation interferes with trial access rights and denies due process. Courts have generally not been receptive to these arguments, on the theory that these important rights are only delayed, not denied.[2]

2. Mandatory mediation contradicts the consensual nature of the process. For many, part of the strength of the mediation process, and a crucial element of its enforcement power, is the desire of people to be there to begin with, to resolve their problems according to what best suits their interests, needs and concerns rather than according to the dictates of law or the likelihood that a given position will prevail. Party self-determination is the prime directive

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in mediation, and in this view, forcing people to be in a dispute resolution process that they don't want to be in is simply antithetical to the concept of self-determination.

3. Mandatory mediation allows for the exploitation of power imbalances. While trainings routinely include instruction on techniques to promote participation and self-determination by low-power parties, critics may reasonably raise questions about their effectiveness.[3] We can say more confidently that unless power imbalances are skillfully handled, mediation can make them worse, with mediators actually, and perhaps unwittingly, reinforcing power imbalances. The classic example is the mediation of divorce cases involving domestic abuse or violence, in which the higher-power spouse sometimes can dictate the terms of the divorce in an environment that can be not only intimidating, but dangerous or even life-threatening. Under this argument, public courts should not be putting people in this position.

4. Mandatory mediation improperly pushes cases outside the public realm. There has been much discussion about the "vanishing trial" in recent years, a notion based on Marc Galanter's highly publicized recent research indicating that trial rates are only about 1.6 percent of all filed claims.[4] While this finding is probably good news for those of us in dispute resolution, we need to remember that this decrease in trials comes at a price. That price includes the diminished application of public law norms to past conduct and the loss of precedent to guide future behavior, as well as the limitation of opportunities for citizens to participate in the administration of justice. In my view, it's important that we route away from trial only the cases that are more appropriately resolved by other methods of dispute resolution, not just "cases."

Additional concerns

Several states have already taken significant steps in requiring the mediation of certain cases as a condition for proceeding to trial. In my view, that experience has not always been good. Here are some additional concerns.

1. Mandatory mediation undermines direct negotiation between the parties and their representatives. With mandatory mediation, parties have little incentive to engage in serious negotiation prior to the mediation. This situation is unfortunate because as salutary as the mediation process is as a vehicle for settling disputes, it still has to be viewed as a second-best alternative to the parties working things out themselves. That is real self-determination.

Mandatory mediation undermines this kind of self-determination at two levels. First, it preempts systemic efforts to teach people the skills they need to resolve disputes themselves. For example, many schools have enacted peer mediation programs to teach students how to serve as mediators in disputes among their peers. These programs are all to the good, but where are the programs that will provide training in the fundamentals of conflict and the basics of negotiation, training that would enable students to address disputes constructively themselves?

Similarly, mandatory mediation can also encourage weak lawyering because lawyers know that mediators can save them from having to press the more difficult issues themselves, either with opposing counsel or, worse yet, with their own clients (potentially raising questions about the lawyer's commitment to the client's cause).

2. Mandatory mediation creates collateral problems, such as the need for good-faith participation requirements and all the problems they create. When mediation is mandatory, attorneys who don't want to be there have an incentive to use the process for strategic advantage in litigation rather than for true settlement. This opportunity can lead to the cynical use of mediation as a fishing expedition for discovery. It can also lead attorneys to see mediation as a procedural formality, which, like fishing expeditions, inspire both cynicism and resentment toward the mediation process and undermine its legitimacy.

Good-faith requirements are intended to reach this problem, but they also raise problems of their own, not the least of which is how to define good faith. It is said that in Florida, the informal rule is that you have to be in the room for 15 minutes to satisfy the obligation. Is this really good faith? As a result, we see things like the one-hour divorce mediation. We have to ask ourselves, is this really mediation?

3. Mandatory mediation can shift practice away from being a broader, interest-based alternative, and toward a narrower, more evaluative and more directive style of mediation.

Narrower, more evaluative mediation may be what some parties in fact want, and certainly has its place in the field. But it is a far cry from the effort by the movement's pioneers to establish a truly alternative process—one that allows parties to use disputes to satisfy deeper interests, needs and concerns. It was this goal that gave the mediation movement its force and moral authority. It would be a shame to see mediation co-opted in this way.

4. Finally, mandatory mediation undermines the democratic character of governmental dispute resolution. In my view, when the government is involved in a dispute resolution process, that process ought to reaffirm and foster democratic values rather than undermine them. Mandatory mediation may be efficient, but especially when it operates without effective quality control, it can undermine the fundamental, transcendent democratic value of personal autonomy and potentially other democratic values.

Professor Frank Sander offers one response to these concerns about mandatory mediation, saying that one can be compelled into mediation but cannot be compelled to settle in mediation.[5] This may be true, but a failed mediation can leave a lot of sensitive information on the table that can be harmful to the parties in subsequent litigation. Let us remember that part of the mediator's job is to encourage hesitant parties to reveal this type of information. Moreover, some jurisdictions have at least informal reporting requirements that compel the mediator to tell the judge when parties are dragging their heels.

Such consequences do not inspire public confidence and trust in the mediation process, or in the courts and the rule of law more generally.

In my view, the benefits of mandatory mediation are not worth these costs, especially since voluntary programs can be constructed with sufficient incentives to ensure their use and to achieve the efficiency, educational and other benefits I have discussed. Mandatory mediation may have been appropriate, even necessary, as a remedial measure to get the ADR ball rolling when ADR was first introduced in the 1970s and 1980s. But the process is more mature now and capable of standing on its own two feet, without the crutch of court compulsion. In my view, the mediation community should resist the mandatory mediation tide and push the legislative embrace of mediation toward an incentive-based voluntary model rather than continuing with an involuntary model.

This of course raises the question of what to do if the mandatory tide can't be turned. Being pragmatic, I think we should continue to take advantage of the momentum by being more purposive about it and thinking through the design questions sooner rather than later. During the drafting process we should let legislators know the cons as well as the pros of mandatory mediation, and encourage them to consider the following questions:

1. What is the real goal of mandatory mediation? If it's merely efficiency, then a one-hour divorce mediation makes sense. But is that what the dispute resolution community would want? Clarification of this question would provide crucial guidance for program designers charged with implementing the programs enacted by the legislatures.

2. How will mandatory mediation programs be funded, and will the mediators be paid? All too often these programs rely on volunteer mediators, who work for free for the experience, prestige or proximity to the court. This staffing model hardly inspires confidence in the system, and can distort the process. The use of mandatory mediation should not be just another justification for cutting judicial budgets. Program design, implementation and evaluation all have to be paid for, and the legislature should be prepared to do so if it going to compel people into mediation.

3. Should there be categorical exceptions for some cases, and if so, which cases?

4. Should parties be able to opt out? Most mandatory mediation programs have at least some basis under which parties may be relieved of the obligation to mediate, although standards vary widely. The concerns I have raised should counsel in favor of a more permissive standard.

5. What standards, if any, should there be for such participation? Nearly half of the states now have good faith requirements, although there is considerable variety in their structure.[6]

6. What minimum qualifications should there be for court-sponsored mediators, and what kind of training should they receive?

7. Should parties be given some autonomy over critical issues, such as who the mediator will be, the style the mediator will use, and whether caucuses will be permitted?

8. At what level should mediators and programs be accountable? For mediators, one possibility is to establish a government structure, like Florida's, to consider ethical complaints against mediators. But Florida's system is costly and is viewed by some as ultimately toothless.[7] Is licensing more appropriate? For programs, given the important rights at stake in mediation and the dynamics of judicial self-interest in the efficiency of such programs, traditional principles of checks and balances counsel in favor of legislative or executive oversight of court-ordered mediation programs, in addition to internal oversight by the court.

9. What remedies should be available for misrepresentation, coercion and other defects in the mediation process? Professor Nancy Welsh has suggested a "cooling off" period.[8] Are there other possibilities?

10. How will mandatory mediation programs be evaluated to assure they are meeting their objectives, and are not creating incidental problems? Even the best of programs can fail to meet critical objectives and may produce unintended consequences. Regular and public program monitoring and evaluation are essential to assure the effectiveness and legitimacy of mandatory mediation programs.

The forthcoming legislative consideration of mandatory mediation (as a part of the larger issue of tort reform) is important, and presents an opportunity for those who care about dispute resolution to educate legislators about it. We should take advantage of that opportunity, lest the opportunity take advantage of us.

ENDNOTES

[1] See Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 845 (1998).

[2] See Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 641 n.42 (1997).

[3] The complicated, contentious and long-unresolved debate over whether mediators should strive to ensure "fair" results in mediation is but one example of the field's inchoate response to this issue.

[4] See Marc Galanter, *The Vanishing Trial: An Examination of Trial and Related Matters in State and Federal Courts*, 1 J. EMPIRICAL LEG. STUD. 459 (2004); Symposium, *ADR and the Vanishing Trial*, DISP. RESOL. MAG., Summer 2004.

[5] See Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3, 7-8.

[6] For a discussion, see John Lande, *Using Dispute Systems Design Methods to Promote Good Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002). In 2004, the ABA Section of Dispute Resolution adopted a policy on good-faith requirements that can be found on the section_s web site at www.abanet.org/dispute/webpolicy.html#9.

[7] See Bruce A. Blitman, *Florida's Ethics Advisory Committee Breaks New Ground*, DISP. RESOL. MAG., Spring 2001, at 10.

[8] See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEG. L. REV. 1 (2001).