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Charting a Middle Course for Court-Connected Mediation

John Lande

CHARTING A MIDDLE COURSE FOR COURT-CONNECTED MEDIATION

John Lande[*]

I. INTRODUCTION

Court-connected mediation programs[1] have produced important benefits for parties, practitioners, courts, and society generally. These programs have helped lawyers settle tough cases and generally manage their workload while their clients retain the power to litigate if they cannot reach an acceptable agreement. Courts have created and enforced rules to protect the integrity of process so that parties' time and money in mediation are well spent.

Considering the proliferation of court-connected mediation programs and rules governing mediation, it is not surprising that courts have adjudicated a wide range of disputes over these rules. Professors James Coben and Peter Thompson constructed a database of all 1,223 state and federal court decisions on Westlaw for 1999 through 2003 that discussed mediation issues.[2] The issues include confidentiality, enforcement of mediated agreements, conduct of participants, duty to mediate, fees and costs, and sanctions, among others.[3] James Coben recently updated the database and found that in 2013-2017, the number of cases more than tripled – up to 4,319 cases.[4]

Coben and Thompson note that the large volume of litigation is "ironic" considering that a goal of mediation has been to provide an alternative to the legal system.[5] I coined the term "liti-mediation" referring to practice cultures where it is taken for granted that mediation is the normal way to end litigation.[6] Courts that require parties to mediate are especially likely to promote this practice culture.

This article describes two theoretical approaches regarding the goals and procedures of court-connected mediation: a purely voluntary approach and a liti-mediation approach. It suggests that court planners and administrators use an intermediate approach to gain the benefit of both approaches while reducing the problems with each one.

Of course, it is appropriate for courts to enforce their rules, parties' agreements to mediate, and agreements reached in mediation. However, some courts have effectively taken

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[1] Some courts order parties to participate in mediation while other courts encourage them to do so but do not require it. The term "court-connected mediation" includes both approaches. This article generally refers to both approaches, though some discussion refers only to mandatory mediation.

[2] James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 51–52 (2006).

[3] *See id.* at 57-123.

[4] James R. Coben, *Evaluating the Singapore Convention Through a U.S.-Centric Litigation Lens: Lessons Learned from Nearly Two Decades of Mediation Disputes in American Federal and State Courts*, 20 CARDOZO J. CONFLICT RESOL. 1063, 1072 (2019).

[5] Coben & Thompson, *supra* note 2, at 47.

[6] John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 841 (1997).

over the mediation process, over-regulating it by imposing problematic requirements. Some courts' micro-managing of mediation is a manifestation of an extreme version of a "liti-mediation" perspective.[7] The extreme version is illustrated by the following statement from a recent California case. "[T]he mediation ordered by the probate court, like the trial in *Smith*, was an essential part of the probate proceedings."[8] This truly is ironic considering that mediation is supposed to be a voluntary process and not just another tool for courts to manage litigation.[9]

Although some courts overreach their appropriate role in court-connected mediation, presumably this is not true of most courts. Even so, this article describes potential room for improvement in court-connected mediation as some courts do not fulfill their obligations to manage the programs by providing suitable education of parties and other stakeholders,[10] schedule mediations at optimal times in cases,[11] or consistently enforce confidentiality rules.[12]

Part II reviews the development of mandatory mediation in the US and how it increases the risk of coercion in mediation. Part III summarizes voluntary and liti-mediation perspectives of court-connected mediation. Part IV analyzes court-connected mediation features, and it suggests policies and procedures to gain the benefits of both the voluntary and liti-mediation perspectives. Part IV.A notes that by operating mediation programs, especially mandatory mediation programs, courts assume responsibility for managing them properly and setting the highest priority of serving the parties' interests. Part IV.B discusses education of the parties and other stakeholders needed for these programs to function effectively. As described in Part IV.C., the effectiveness of mediation depends, in part, on the timing of mediation because parties need to be ready to mediate. Part IV.D cites data showing that courts do not consistently enforce confidentiality protections and recommends that courts do so. Part IV.E describes the regulation of parties' behavior in mediation and recommends that courts limit their regulation to a few objective requirements. The conclusion, Part V, argues that courts should use dispute system design methods to gain the benefits of both the voluntary and liti-mediation approaches to mediation.

II. BRIEF HISTORY AND DESCRIPTION OF COURT-CONNECTED MEDIATION IN THE US[13]

In the dawn of the modern ADR era in the US,[14] most lawyers and judges were not familiar with mediation of legal cases because it was so rare. Courts started ordering parties

[7] *See infra* Part IV.E.

[8] Breslin v. Breslin, 62 Cal.App.5th 801, 806 (Cal. Ct. App. 2021), *reh'g denied* (Jul 14, 2021). The *Breslin* court referred to *Smith v. Szeyller,* 31 Cal.App.5th 450 (2019), in which a potential beneficiary who did not participate in a trial challenged a trust distribution following the trial.

[9] Frank E. A. Sander, *The Future of ADR - The Earl F. Nelson Memorial Lecture*, 2000 J. DISP. RESOL. 3, 7–8 (2000).

[10] *See infra* Part IV.B.

[11] *See infra* Part IV.C.

[12] *See infra* Part IV.D.

[13] Portions of this part are adapted from John Lande, *Courts Should Make Mediations Good Samaritans Not Frankensteins* (Univ. of Mo. School of L. Legal Stud. Rsch. Paper No. 2021-09, 2021), https://ssrn.com/abstract=3843331.

to mediate to overcome unfamiliarity with the process. In 2000, Professor Frank Sander explained the rationale this way:

> There are some hot arguments in the literature with some people saying, "Mediation means voluntarily agreeing to a result. How can you force somebody to voluntarily agree to a result?" I think that confuses coercion into mediation with coercion in mediation. If you have coercion in mediation, it is not mediation. But to say "You have to try this process because in our judgment" – the legislature's or judge's judgment – "this may be a good case for attempted settlement," that seems to me all right. We have evidence that many people who resisted settlement and then went into mediation did settle the case or, even if they didn't, found the process to be productive for simplifying the trial later. So we have evidence that the process is very powerful, that it works for people who use it, but for some of the reasons I mentioned earlier, people don't seem to be using the process sufficiently voluntarily. So my view about mandatory mediation is about the same as for affirmative action – that is, it's not the right permanent answer, but it is a useful temporary expedient to make up for inadequate past practices.[15]

Court mandates certainly increased use of mediation and satisfied many stakeholders. Lawyers and judges became familiar with mediation, and many learned to love it.[16] Courts generally are overloaded and under-funded.[17] Mandatory mediation provides a mechanism to help relieve the courts' burdens by regularly outsourcing a substantial part of their dockets. Mediation helps lawyers better serve clients by exploring the possibility of settlement and avoiding unnecessary trials. Mandatory mediation provides a regular flow of business to private mediators.

Although mandated mediation shouldn't necessarily pressure parties to settle or accept agreements they wouldn't voluntarily make, too often that's the result. Judges, lawyers, and mediators often expect parties to settle in mediation in one day if possible.[18] It can be hard for parties to resist this pressure, including from their own lawyers. The problem

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[14] Professor Jeffrey Stempel suggests that the 1976 Pound Conference is an appropriate point to mark the beginning of the modern ADR movement. *See* Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 310–11 (1996).

[15] Sander, *supra* note 9, at 7–8.

[16] Julie Macfarlane, *Culture Change - A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 253-59 (2002) (describing five general types of lawyers based on their attitudes about mediation, including "true believers.").

[17] John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213, 216–21 (2006).

[18] John Lande, *Planning for Good Quality Decision-Making in Mediation Using Two-Stage Mediation*, INDISPUTABLY (May 9, 2019), http://indisputably.org/2019/05/planning-for-good-quality-decision-making-in-mediation-using-petsm/.

is exacerbated by the common high-pressure positional negotiation process relying on extreme, disingenuous claims about expected court results.[19]

Court-ordered mediation provides lawyers with additional adversarial weapons in their litigation arsenals. Professor Julie Macfarlane interviewed lawyers about mandatory mediation and found a range of attitudes including those of lawyers who viewed it as an opportunity to gain partisan advantage. She quoted one lawyer describing how he takes advantage of mandatory mediation:

> The worst, negative aspect of it is, if . . . I act for the Big Bad Wolf against Little Red Riding Hood and I don't want this dispute resolved, I want to tie it up as long as I possibly can, and mandatory mediation is custom made. I can waste more time, I can string it along, I can make sure this thing never gets resolved because as you've already figured out, I know the language. I know how to make it look like I'm heading in that direction. I make it look like I can make all the right noises in the world, like this is the most wonderful thing to be involved in when I have no intention of ever resolving this. I have the intention of making this the most expensive, longest process but is it going to feel good. It's going to feel so nice, we're going to be here and we're going to talk the talk but we're not going to walk the walk. You can tie anybody up and keep them farther away from getting their dispute resolved through mandatory mediation process or a mediation process than anything else.[20]

Professor Nancy Welsh documented some courts' "rush to closure" to move cases out of court.[21] She reviewed court cases in which settlement conference judges exerted great pressure on parties to settle, and she found that appellate courts reviewing these issues "generally have refused to find pressure or coercion by judicial officers in settlement conferences, unless the judicial officers make outright threats or impose sanctions for parties' or attorneys' failure to cooperate by settling."[22] Considering that judges have a lot more coercive power than mediators, courts are even less likely to be sympathetic to claims about coercion in mediation.

Nancy Welsh published her article 20 years ago, but this pattern still takes place today – including in mediation. For example, in 2020, in *Pohlman v. Pohlman*, the trial court enforced a mediated agreement despite the wife's claim that she had been the victim of domestic violence and the fact that the mediator did not comply with the statute requiring screening for domestic violence.[23] The Michigan Court of Appeals upheld the enforcement of the mediated agreement she signed at 7:30 pm after more than six hours of mediation.[24] The

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[19] John Lande, *BATNAs and the Emotional Pains from "Positional Negotiation"*, INDISPUTABLY (July 8, 2020), http://indisputably.org/2020/07/batnas-and-the-emotional-pains-from-positional-negotiation/.-from-positional-negotiation/.

[20] Macfarlane, *supra* note 16, at 267.

[21] Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 59, 59–78 (2001).

[22] *Id.* at 74.

[23] Pohlman v. Pohlman, No. 344121, 2020 WL 504775, at *6 (Mich. Ct. App. Jan. 30, 2020).

[24] *Id.*, at *1.

Court ruled, "Plaintiff's allegations that she was not allowed to leave, and was pressured to sign the settlement terms agreement by her attorney and the mediator, do not demonstrate the coercion necessary to set aside an agreement based upon duress."[25] The appellate court decided that the trial court did not need to hold an evidentiary hearing because the wife's affidavit was sufficient evidence.[26]

Of course, many court-connected mediations are extremely beneficial for parties and courts. Unfortunately, some courts are so focused on the rush to closure that they are indifferent to the harm that some mediations cause to parties.

III. TWO CONTRASTING PERSPECTIVES OF COURT-CONNECTED MEDIATION

This part summarizes two theoretical perspectives about court-connected mediation programs. Although it oversimplifies these perspectives, it reflects real differences between them.

From a "liti-mediation" perspective, courts regulate mediation as a normal part of the litigation process. Court-connected mediation – especially *court-ordered* mediation – helps relieve some courts' caseload burdens by referring part of their dockets to mediation. It is grounded in a concern that without a court order, parties and lawyers would not mediate some cases that are appropriate for mediation. In that situation, some parties lose valuable opportunities to mediate, and parties and courts spend their limited resources on cases that would appropriately be resolved in mediation. Courts want to ensure that parties and attorneys comply with their orders and cooperate with the courts' case management systems. From this perspective, courts must regulate mediation and rigorously enforce rules to ensure the integrity of mediation.

The other perspective focuses on the voluntary nature of mediation and emphasizes the distinction from the litigation process. Parties have a constitutional right to trial[27] but no constitutional rights to mediation. Courts have the authority to order parties to mediate, but courts are not obligated to order mediation and parties have no right to compel courts to do so. Litigation is designed to produce binding adjudications of facts and law. Mediation is designed to help parties to communicate, negotiate, and settle cases, and any settlement must be a voluntary decision of the parties.

In a pure version of this "voluntary process" perspective, courts may promote mediation but should not order parties to mediate. As noted above, in 2000, Frank Sander argued that mandatory mediation was appropriate as a "temporary expedient" to introduce people to mediation.[28] Since then, parties have used mediation in virtually every area of the law, and lawyers regularly mediate their cases. Indeed, many parties and lawyers mediate

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[25] *Id.,* at *5

[26] *Id.*, at *6. The Michigan Supreme Court remanded the case to the trial court with instructions to hold a hearing to make factual findings whether the agreement was obtained under duress and whether the agreement was obtained without the domestic violence screening required under state law. Pohlman v. Pohlman, 957 N.W.2d 338 (2021). Although the Supreme Court corrected the errors, this case illustrates the willingness of many courts not to take seriously claims of coercion.

[27] U.S. CONST. amend. VII; MO. CONST. art. 1, § 22(a) (Missouri constitutional provision guaranteeing right to trial).

[28] Sander, *supra* note 9, at 7–8.

voluntarily without being required to do so. Professor Dwight Golann recently conducted a survey of lawyers with cases in the Massachusetts Superior Court in Boston, where a state law prohibits judges from requiring or pressuring litigants to mediate.[29] He found that lawyers carefully considered whether to use mediation and they often used mediation voluntarily when they believed it to be appropriate. For example, in cases eligible for mediation, mediations were conducted in 65% of tort cases, 24% of contract cases, and 41% of complex business cases.[30] From this perspective, mandating mediation is no longer needed.

Another version of this voluntary process perspective accepts the legitimacy (or at least the reality) of court-ordered mediation but places a premium on protecting parties' rights to make their own decisions free from inappropriate pressure. From this perspective, a liti-mediation approach puts too much pressure on parties and risks undermining the integrity of mediation.

Table 1 catalogues some differences between these theoretical perspectives. This table is for illustration and is not intended to suggest that specific individuals or courts have all of the views expressed in the respective perspectives. In real life, most people and courts have views reflecting a combination of these perspectives.

[29] Dwight Golann, *If You Build It, Will They Come? An Empirical Study of the Voluntary Use of Mediation and its Implications*, 22 CARDOZO J. OF CONFLICT RESOL. 181, 182 (2021).

[30] *Id.* at 184–85.

Table 1. Theoretical Perspectives About Court-Connected Mediation

Issue	Perspective	
	Voluntary Mediation	**Liti-Mediation**
Attendance	Parties should mediate only if all parties choose to do so	Courts should order parties to mediate in all appropriate cases
Opportunity to opt out	Parties should not be ordered to mediate and, if ordered to mediate, should be able to opt out easily and cheaply	Parties generally should be required to mediate unless they can demonstrate good cause not to mediate
Length of participation	Parties should be required to attend mediation only for a limited, defined amount of time	Parties should be required to participate as long as necessary to mediate seriously
Right to leave	Parties should have the right to leave mediation at any time	Parties should be permitted to leave mediation only when the mediator declares an impasse
Confidentiality	Courts must strictly enforce confidentiality protections and exclude evidence of protected mediation communications	Courts generally should enforce confidentiality protections (if the issue comes to their attention)
"Good faith" participation	Courts should not require good faith participation but should enforce only objectively-defined orders, such as orders to attend mediation	Courts should require parties to participate in good faith and sanction parties who act in bad faith
Duty to negotiate	Parties should not be required to make any offers	Parties may be required to make reasonable settlement offers
Settlement authority	Parties decide what is reasonable settlement authority	Parties must bring what the courts determine to be sufficient settlement authority

IV. A MIDDLE COURSE FOR COURT-CONNECTED MEDIATION

I recommend an approach to designing and operating court-connected mediation starting from the voluntary perspective and also accommodating important interests reflected in a liti-mediation perspective. I believe that this would be in courts' enlightened self-interest.

My recommended approach is intended to make mediation attractive so that parties would willingly choose to use it. Even when courts order parties to mediate, courts can operate programs that make parties want to take advantage of it. The more that parties and lawyers believe that mediation satisfies their interests, the more that they will use it without

compulsion and the less that courts are likely to need to adjudicate disputes about mandated mediation.

Court rules and orders are not the only "tools" in courts' "toolboxes."[31] For example, using dispute system design methods,[32] courts can collaborate with other stakeholders to make mediation more desirable by developing policies to promote important mediation goals, sponsoring continuing education programs, encouraging practitioners' peer consultation groups, producing and disseminating educational materials, or requiring parties to attend educational sessions, among many other options.[33]

The following suggestions are informed by the National Standards for Court-Connected Mediation Programs[34] (hereinafter "Standards"). The Standards were developed by the Center for Dispute Settlement and Institute for Judicial Administration under the direction of Margaret Shaw, Linda R. Singer, and Edna A. Povich, working with a stellar advisory board.[35]

A. Exercising Responsibility to Design Mediation to Satisfy Parties' Interests

Courts have an obligation to design and operate their mediation programs to work properly, especially when courts order parties to mediate.[36] In designing court-ordered mediation programs, courts should set the parties' interests as the top priority. Standard 5.1 states, "Mandatory attendance at an initial mediation session may be appropriate, but only when a mandate is more likely to serve the interests of parties."[37]

Unfortunately, many lawyers and parties are reluctant to suggest mediation because they fear appearing weak, therefore causing the other side to try to take advantage of their

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[31] John Lande, *The Dispute Resolution Movement Needs Good Theories of Change*, 2020 J. DISP. RESOL. 121, 125-26 (2020) (identifying numerous strategies to achieve goals of the dispute resolution movement).

[32] *See, e.g.*, LISA BLOMGREN AMSLER ET AL., DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT (2020).

[33] *See* Lande, *supra* note 31.

[34] CTR. FOR DISP. SETTLEMENT AND INST. FOR JUD. ADMIN., NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1999), https://s3.amazonaws.com/aboutrsi/59a73d992959b07fda0d6060/NationalStandardsADR.pdf [hereinafter NAT'L STANDARDS].

[35] *Id.*

[36] The Standards state:

> The degree of a court's responsibility for mediators or mediation programs depends on whether a mediator or program is employed or operated by the court, receives referrals from the court, or is chosen by the parties themselves.
>
> a. The court is fully responsible for mediators it employs and programs it operates.
>
> b. The court has the same responsibility for monitoring the quality of mediators and/or mediation programs outside the court to which it refers cases as it has for its own programs.")

Id. § 2.1. Standard 2.2 states that courts should specify their goals for mediation programs. The commentary lists ten possible goals. Presumably, most courts have multiple goals for mediation programs but differ in their priorities. *Id.* § 2.2.

[37] *Id.* § 5.1.

perceived weakness.[38] By mandating mediation, courts can help parties avoid this dilemma by having the court take responsibility for initiating mediation. If courts routinely and easily permit parties to opt out of mediation[39] and leave at any time, the mandate can serve as a "nudge"[40] that makes mediation the default but enables parties to voluntarily choose whether to mediate and for how long.

According to the Cole et al. mediation treatise, "Some [courts] require the parties to attend one or two mediation sessions before they can choose to terminate the mediation. ... More and more court rules and decisions vest the authority to declare an impasse with the mediator and not with the parties. This authority, of course, can be used by mediators to pressure settlement."[41] For example, in *In re Daley*, after an insurance representative left a mediation without the mediator's permission, the court upheld an order requiring the representative to be deposed about whether he was justified in leaving the mediation.[42] Forcing the representative to justify leaving the mediation was inherently coercive.

Parties must be free to leave at any time, regardless of whether mediators declare impasse or not. Mediation is not voluntary if parties are required to stay in mediation when they want to leave. Clearly, if parties want to leave mediation, they believe it is in their interest to do so, and courts should honor parties' decisions about this.

Standard 5.3 states, "Any system of mandatory referral to mediation should be evaluated on a periodic basis, through surveys of parties and through other mechanisms, in order to correct deficiencies in the particular implementation mechanism selected and to determine whether the mandate is more likely to serve the interests of parties, the justice system and the public than would voluntary referral."[43] Even well-functioning programs would benefit by periodically reviewing their policies to make sure that they are functioning optimally.[44]

It is important for program administrators to learn what is working well so that courts can continue the helpful practices. It is especially important to identify and fix any problems. There are many ways to evaluate mediation programs. Typically, this involves systematic efforts such as using surveys, interviews, and focus groups to assess the operation and effects of the programs. In addition, program administrators might ask participants in

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[38] JOHN LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY 6–9 (2d ed. 2015).

[39] The Standards state:

> Courts should institute appropriate provisions to permit parties to opt out of mediation.

NAT'L STANDARDS, *supra* note 34, § 11.1. The commentary states, "any mandatory referral system should include liberal opt-out provisions."

[40] *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

[41] SARAH COLE ET AL., MEDIATION: LAW, POLICY AND PRACTICE § 9:10 (2020) (footnotes omitted).

[42] *See generally* In re Daley, 29 S.W.3d 915, 918–19 (Tex. Ct. App. 2000).

[43] NAT'L STANDARDS, *supra* note 34, § 5.3; *see also id.* § 16.1 (stating, "Courts should ensure that the mediation programs to which they refer cases are monitored adequately on an ongoing basis, and evaluated on a periodic basis and that sufficient resources are earmarked for these purposes."); *see also id*. § 16.3 (stating, "Courts should ensure that program evaluation is widely distributed and linked to decision-making about the program's policies and procedures.").

[44] *See* AMSLER ET AL., *supra* note 32, at 74–89 (describing the importance of evaluating dispute system designs to promote accountability).

continuing education programs about their positive and negative experiences with mediation. For example, in a recent educational program, I asked about problems they experience with mediation. Many mediators and lawyers expressed frustration about parties' and lawyers' lack of preparation, unrealistic expectations, and emotional reactions.[45]

Program administrators also should pay attention to behaviors that signal problems with their programs. For example, if parties regularly attend mediation only long enough to comply with orders to mediate, this is an indicator of problems in the program design. Professor Julie Macfarlane documented a practice of "twenty-minute mediations" in which parties sometimes attended mediation only long enough to satisfy (or evade) mediation requirements.[46] Similarly, one mediator described what he called "Starbucks mediations" in which he would meet people at a Starbucks, they would buy him a cup of coffee, and he would "check the box" on a court form indicating that they had attended a mediation.[47]

B. Educating Parties and Other Stakeholders

For court-connected mediation programs to work properly, parties and all other stakeholders must have realistic expectations about the process. Experts widely agree on the importance of preparation for mediation.[48] For example, one empirical study found:

> Parties who had more preparation for mediation, compared to parties with less preparation, thought that the mediation process was more fair; that they had more chance to tell their views and more input into the outcome; and that the mediator was more impartial, understood their views better, and treated them with more respect. Notably, parties who had more preparation felt less pressured to settle than did parties who had less preparation. In addition, parties who received more preparation for mediation were more likely to settle and were more likely to think the settlement was fair.[49]

Standard 3.1 states

> Courts, in collaboration with the bar and professional organizations, are responsible for providing information to the public, the bar, judges and court personnel regarding the mediation process; the availability of programs; the differences between mediation, adjudication and other

[45] John Lande, *How You Can Solve Tough Problems in Mediation*, 21 MICH. DISP. RESOL. J. (NO. 2 FALL) 11, 11–15 (2021).

[46] Macfarlane, *supra* note 16, at 268.

[47] Int'l Inst. of Conflict Prevention & Resol., Consequences of Not Participating in Court-Ordered Mediation: What is Fair? (June 17, 2021).

[48] *See* Roselle L. Wissler, *Representation in Mediation: What We Know From Empirical Research*, 37 FORDHAM URB. L.J. 419, 431 n.61 (2010) (collecting sources indicating importance of preparation for mediation).

[49] *Id.* at 433 (footnotes omitted).

> dispute resolution processes; the possibility of savings in cost and time; and the consequences of participation.[50]
>
> Courts should provide clear information about issues such as the following:
>
> - whether parties are required to attend mediation;
> - whether they can opt out of mediation and, if so, the procedures for doing so;
> - how long they are required to stay in mediation;
> - whether they can decide when they want to leave mediation;
> - what are their rights to communicate confidentially;
> - whether they have a duty to mediate in "good faith" – and, if so, what that specifically requires;
> - whether they have a duty to make offers; and
> - how much settlement authority, if any, they are required to bring.

Providing this education is not easy. Professor Donna Shestowsky's study of litigants in three states found that most litigants did not know what ADR programs their courts offered, including litigants represented by lawyers.[51] Professor Timothy Hedeen and his colleagues surveyed mediators who said that parties often were poorly prepared to mediate.[52]

Educating parties is complicated by the fact that there are multiple aspects of the mediation process. Understanding how mediation works can be particularly difficult for parties who have little or no litigation or mediation experience, and limited education, English language ability, or other relevant capabilities. Many features of mediation are expressed in legal terminology, which can increase the difficulties. People may not pay much attention if the educational material is presented as standard legalistic boilerplate that people routinely ignore. The process may become so routinized that professionals who regularly deal with mediation may not pay careful attention or educate clients properly.

To effectively educate parties, the educational materials need to be easily understandable by all parties. Program administrators should consider ways to effectively educate parties. For example, having parties watch a video of a judge convincingly deliver a message in addition to providing written materials may be more effective than having them simply read a document. Program administrators should consider if there are insights from advertising that could increase the effectiveness of communications to parties and other stakeholders.

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[50] NAT'L STANDARDS, *supra* note 34, § 3.1. § 3.2 provides detailed lists of information that should be provided to judges, court personnel, the bar, and mediation users. *Id.* § 3.2

[51] Donna Shestowsky, *When Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L.REV. 189, 211–13 (2017) (study of litigants in California, Oregon, and Utah).

[52] Timothy Hedeen et al., *Setting the Table for Mediation Success: Supporting Disputants to Arrive Prepared*, 2021 J. DISP. RESOL. 65, 72–75 (2021).

The following language is an example of a simple, clear statement that courts and professionals could use or adapt reflecting the policies of particular programs:

> This court has ordered the parties in this case to mediate and try to reach an agreement that they all find acceptable. Mediation is a valuable opportunity for parties to communicate, negotiate, and settle cases. Although parties can request to opt out of mediating, sometimes they are surprised that they reach good agreements in mediation. Parties can save monetary and emotional costs of litigation by mediating at the earliest appropriate time in a case. If parties are not ready to settle at the outset, early mediation can lay the groundwork for a satisfactory settlement later in the case.
>
> Mediators do not represent any party. If mediators offer opinions or suggestions, parties are free to disregard the opinions and suggestions. Parties have the right to leave mediation without settling (or making offers), and they may continue to litigate. It is up to parties to decide if they want to settle or continue to litigate, possibly going to trial.
>
> The mediator will work as hard as possible to help the parties make good decisions by considering the benefits and risks of settling their cases as well as the benefits and risks of going to trial. Parties usually find mediation to be very helpful, and this court asks all parties to work hard to find a mutually agreeable resolution of your case if reasonably possible.[53]

Such explanations presumably would be only part of parties' preparation for mediation. The American Bar Association Section of Dispute Resolution developed pamphlets to help parties and lawyers prepare for mediation including a general guide as well as specialized versions for family and complex civil cases.[54]

Courts can develop educational programs to address problems in their court-connected mediation programs, such as poor preparation for mediation, unrealistic expectations, and strong emotional reactions by the participants. Professors Michaela Keet, Heather Heavin, and I wrote a nuts-and-bolts guide about litigation interest and risk assessment that addresses these concerns.[55] It provides a practical framework and checklists for lawyers and mediators to help parties make decisions based on realistic assessments of the expected court outcome and the tangible and intangible costs of continuing to litigate.[56] It

[53] John Lande, Proposal for Standard Explanation in Mediation (Univ. of Mo. School of L. Legal Stud. Rsch. Paper No. 2021-10, available at SSRN: https://ssrn.com/abstract=3853071. For an example of a statute prescribing information to be provided to parties, *see* Cal. Evid. Code 1129.

[54] *Section of Dispute Resolution: Resources*, AM. BAR ASSN., https://www.americanbar.org/groups/dispute_resolution/resources/.

[55] MICHAELA KEET ET AL., LITIGATION INTEREST AND RISK ASSESSMENT: HELP YOUR CLIENTS MAKE GOOD LITIGATION DECISIONS (2020).

[56] *Id.* at 65–81.

suggests helping parties value intangible interests related to their emotional reactions, which can be intrinsically satisfying for parties and also help reduce their monetary expectations.[57]

C. Setting Timing of Mediation to Fit Parties' Needs

The timing of mediation can make a big difference in how well the parties can take advantage of it. If mediators convene the process before parties and lawyers have had a chance to do some basic investigation and assessment of their cases, they will not feel ready to make decisions in mediation. On the other hand, some lawyers and courts prefer to schedule mediations only after the parties have completed discovery, which can lose potential benefits of the process because of excessive investment of time and money in litigation.[58]

Although parties need to do some investigation and assessment before they convene in mediation, they generally should be ready to mediate before completing all the preparation that would be needed for trial. If parties wait until they are ready for trial, they may lose opportunities to resolve their disputes and save the tangible and intangible costs of continuing to litigate. Waiting too long to mediate can reduce the likelihood of a productive process and settlement. Parties may fall prey to the sunk-cost bias[59] and be reluctant to settle, feeling that settling would be a waste of all the time and money they invested. Moreover, prolonged litigation can intensify adversarial relationships, making it more difficult to communicate and reach agreement.[60]

Standard 4.4 states, "While the timing of a referral to mediation may vary depending upon the type of case involved and the needs of the particular case, referral should be made at the earliest possible time that the parties are able to make an informed choice about their participation in mediation."[61]

Courts, lawyers, and parties should collaborate to set the best time to mediate in each case. Courts often set a deadline for parties to mediate, which should allow enough time for parties to prepare but not so much time that they procrastinate. Standard 4.5 states, "Courts should provide the opportunity on a continuing basis for both the parties and the court to determine the timing of a referral to mediation." Standard 4.6 states, "If a referral to mediation is mandated, parties should have input on the question of when the case should be referred to mediation, but the court itself should determine timing."[62]

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[57] *Id.* at 29–46.

[58] Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 904–06 (1998).

[59] KEET ET AL., *supra* note 55, at 8.

[60] John Lande, *Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better*, 16 CARDOZO J. CONFLICT RESOL. 63, 91–94 (2014). As an example of an effort to set the timing of mediation at an appropriate time, the Mediation and Assessment Program of the U.S. District Court for the Western District of Missouri conducted focus groups of lawyers and mediators, who discussed. Based on input from the focus groups, the Court revised its rule generally requiring mediations to take place no later than 75 calendar days after the Rule 26 meeting. U.S. D. FOR THE W.D. OF MO., MEDIATION AND ASSESSMENT PROGRAM, MAP GENERAL ORDER V.B., https://www.mow.uscourts.gov/sites/mow/files/MAP_GO.pdf (last visited Nov. 10, 2021).

[61] NAT'L STANDARDS, *supra* note 34, § 4.4.

[62] *Id.* § 4.6.

Courts can encourage planning for the possibility of two-session mediations.[63] The first session would be scheduled to take place soon after the parties have done basic fact-finding and legal research. They should conduct some basic investigation but not all the discovery they would need to go to trial. If the parties settle at the first session, a second session would not be needed. If people need more information, mediators could use the first session to help them identify what they would need to be ready. For example, they could plan "homework" before the second session to (1) complete specifically-needed discovery, (2) obtain expert opinions, narrowly-focused arbitration awards, or court rulings on critical legal issues, and/or (3) consult with important individuals or entities relevant to the dispute. If the parties participate in a second mediation session, it is likely to be a lot more productive, efficient, and consensual than typical one-session mediations.[64]

D. Consistently Enforcing Confidentiality Protections

Almost all experts agree that it is important for mediation communications to be confidential, with specified exceptions.[65] Many parties would not engage in candid discussions in mediation without assurances that their communications would not be revealed to the other parties or the court. Confidentiality protections are included in virtually all statutes, court rules, and ethical rules governing mediation. Mediators routinely provide written confidentiality assurances to parties at the outset of mediation. Standard 8.1.e expresses these principles.[66]

The Standards provide detailed guidance for courts to protect confidentiality. Standard 9.1 states, "Courts should have clear written policies relating to the confidentiality of both written and oral communications in mediation consistent with the laws of the jurisdiction."[67] Standard 9.2 states, "Courts should ensure that their policies relating to confidentiality in mediation are communicated to and understood by mediators to whom they refer cases."[68] Standard 9.3 states, "Courts should develop clear written policies concerning

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[63] *See* Lande, *supra* note 18.

[64] *Id.*

[65] *See, e.g.*, Model Standards of Conduct for Mediators, Standard 5 (2005), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf (last visited Nov. 10, 2021) (adopted by the American Arbitration Association, American Bar Association, and Association for Conflict Resolution).

[66] The Standards state:

> In the absence of a statute to the contrary, the mediator should treat information revealed in a mediation as confidential, except for the following:
>
> (1) Information that is statutorily mandated to be reported.
>
> (2) Information that, in the judgment of the mediator, reveals a danger of serious physical harm either to a party or to a third person.
>
> (3) Information that the mediator informs the parties will not be protected.
>
> The mediator should inform the parties at the initial meeting of any limitations on confidentiality.

NAT'L STANDARDS., *supra* note 34, § 8.1(e).

[67] *Id.* § 9.1.

[68] *Id.* § 9.2.

the way in which confidentiality protections and limitations are communicated to parties they refer to mediation."[69] Standard 12.1 strictly limits information from mediation that should be provided to courts.[70] Standard 3.2.a(7) states that "Courts should provide the following information . . . [t]o judges, court personnel and the bar: . . . applicable laws and rules concerning mediation."[71]

Unfortunately, many courts do not enforce mediation confidentiality rules. In the database of court decisions discussing mediation issues, Coben and Thompson found that courts routinely ignored confidentiality rules. They found a

> large volume of opinions in which courts considered detailed evidence of what transpired in mediations without a confidentiality issue being raised – either by the parties, or sua sponte by the court. Indeed, uncontested mediation disclosures occurred in thirty percent of all decisions in the database, cutting across jurisdiction, level of court, underlying subject matter, and litigated mediation issues. Included are forty-five opinions in which mediators offered testimony, sixty-five opinions where others offered evidence about mediators' statements or actions, and 266 opinions where parties or lawyers offered evidence of their own mediation communications and conduct – all without objection or comment. In sum, the walls of the mediation room are remarkably transparent.[72]

They reported that the "substance of uncontested mediator evidence was extremely wide-ranging," including evidence about:

- attendance and authority;
- quality of parties' participation;
- quality of class action bargaining;
- party admissions and impeachment;
- party conduct and mental state;
- what issues were or were not discussed;
- mediator's factual assertions;
- mediator's valuation of the case;
- mediator's proposals;

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[69] *Id.* § 9.3.

[70] The Standards state:

> During a mediation the judge or other trier of fact should be informed only of the following:
>
> a. the failure of a party to comply with the order to attend mediation;
>
> b. any request by the parties for additional time to complete the mediation;
>
> c. if all parties agree, any procedural action by the court that would facilitate the mediation; and
>
> d. the mediator's assessment that the case is inappropriate for mediation.

Id. § 12.1.

[71] NAT'L STANDARDS, *supra* note 34, § 3.2.(a)(7).

[72] Coben & Thompson, *supra* note 2, at 58–59 (emphasis added).

- mediator's understanding of settlement terms;
- parties' understanding of settlement terms; and
- coercion and duress allegations.[73]

In addition:

> Parties and their lawyers offered evidence of their own communications and actions in mediation even more frequently than those of the mediator. The database contains 359 opinions that include evidence of oral mediation communications other than mediator evidence. In seventy-four percent of these cases (266), the evidence came in without objection or judicial review. As with mediator evidence, parties and their lawyers shared their recollection of what was said and done in mediation on a wide range of topics . . ..[74]

The following are just two cases illustrating how some courts rely on mediation communications without considering whether the communications should be admitted in evidence. *Griffin v. Wallace* involved a mediation of a probate case.[75] Without considering whether mediation communications should be admissible, the appellate court recounted the bargaining history in mediation, including the initial demand and exchange of counteroffers.[76] In *Gentry v. Wilson*, the appellate court noted that a physician member of malpractice mediation panel advised participants that there may have been negligence, again without considering the admissibility of this evidence.[77]

Courts' frequent failure to enforce the law regarding mediation confidentiality is extremely problematic. In effect, parties may disclose sensitive information in mediation based on false assurances of confidentiality. Although courts actually may ultimately protect confidentiality in later litigation, parties cannot be confident that the courts will do so.

This pattern is especially troubling in court-ordered mediations. Here, parties are obligated to mediate and then the courts may use their mediation communications against them despite providing assurances of confidentiality. Unlike evidence covered by virtually all other evidentiary rules, in cases where courts order parties to mediate, courts require parties to engage in presumptively confidential communications and create potential evidence that could later harm their interests in court.

It is a scandal when courts fail to protect parties' confidentiality rights, especially when the courts do not even consider whether mediation communications should be admitted in evidence.

All stakeholder groups in court-connected mediation programs should have serious conversations with judges in those courts to develop clear understandings about the applicable confidentiality rules and the procedures for enforcing the rules. If appropriate, courts should

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[73] *Id.* at 59–61 (footnotes omitted).

[74] *Id.* at 62. Coben's analysis of cases in 2013-2017 does not include detailed analysis of confidentiality provided in Coben and Thompson's analysis of cases in 1999-2003. It seems likely that many courts continue to admit such evidence without considering whether it is admissible. *See id.*; Coben, *supra* note 4.

[75] Griffin et al. v. Wallace, 581 S.E.2d 375, 376 (Ga. Ct. App. 2003).

[76] *Id.*

[77] Gentry et al. v. Wilson et al., 328 N.W.2d 439 (Wis. Ct. App. 2001).

revise their rules to provide accurate expectations about confidentiality that conform to actual practice in their jurisdictions. The rules should provide that protected mediation communications specified in the rules "shall not" be admitted in evidence or be the basis of court decisions except in clearly specified situations.

Whenever any evidence of mediation communications is offered in court that arguably should be excluded, any party or the court on its own motion should raise the issue of admissibility. Courts should admit evidence of such communications only after consideration of whether it is admissible.

E. Clear and Limited Regulation of Parties' Conduct in Mediation

Courts vary about what parties are required to do in mediation, generally without specifying the requirements in advance. According to the Cole et al. mediation treatise,

> [M]any jurisdictions impose and enforce an obligation to mediate in good faith, and allow evidence of bargaining history when considering claims for sanctions. Numerous court rules and statutes specifically mandate that parties participate in good faith in court-ordered mediation processes. ... While courts may enforce a duty of good faith in mediation, there is not an agreed upon definition of what is meant by good faith in mediation.[78]

In re Acceptance Insurance Co.[79] illustrates a court extensively investigating a bad-faith claim. The parties did not settle in mediation, and the parties tried the case resulting in a judgment for the plaintiff. After the trial, the plaintiff filed a motion seeking $250,000 in sanctions against the defendant's insurer for failing to mediate in good faith. At the hearing on the motion, the trial court permitted detailed cross-examination of the insurance adjustor who attended the mediation. The adjustor was asked about her knowledge of the case, preparation for the mediation, communications with her supervisor by telephone during the mediation, and authorization to settle the case to the full policy limit.[80] The trial court continued the hearing and ordered the personal appearance of a senior vice president for the insurer.[81] Although the appellate court issued a writ preventing the trial court from holding further hearings or imposing sanctions,[82] this case illustrates how intrusive courts can be in making detailed inquiries about negotiations in mediation.

The American Bar Association Section of Dispute Resolution adopted a Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated

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[78] COLE ET AL., *supra* note 41, § 9:16. *See generally* John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002).

[79] *In re* Acceptance Ins. Co., 33 S.W.3d 443 (Tex. Ct. App. 2000).

[80] *Id.* at 447.

[81] *Id.* at 446–47.

[82] *Id.* at 454–55.

Mediation Programs.[83] The resolution states, "Sanctions should be imposed only for violations of rules specifying objectively-determinable conduct."[84] It elaborates:

> In a narrow class of situations, court sanctions can appropriately promote productive behavior in mediation. Sanctions are appropriate for violation of rules specifying objectively-determinable conduct. Such rule-proscribed conduct would include but is not limited to: failure of a party, attorney, or insurance representative to attend a court-mandated mediation for a limited and specified period or to provide written memoranda prior to the mediations. These rules should not be labeled as good faith requirements, however, because of the widespread confusion about the meaning of that term. Rules and statutes that permit courts to sanction a wide range of subjective behavior create a grave risk of undermining core values of mediation and creating unintended problems. Such subjective behaviors include but are not limited to: a failure to engage sufficiently in substantive bargaining; failure to have a representative present at the court-mandated mediation with sufficient settlement authority; or failure to make a reasonable offer. Giving courts such broad authority to sanction types of subjective behaviors does not provide participants with clear understandings about what behavior is sanctionable, may cause participants to refrain from legitimate behavior in mediation, may create uncertainties about what communications would be confidential, and can actually stimulate inappropriate conduct by participants and mediators. Ambiguity arising out of subjective "bad faith" conduct is likely to spawn extensive satellite litigation, thus defeating three primary purposes of the court-mandated mediation programs – to reduce docket congestion, to aid effective judicial administration, and to promote productive negotiation.[85]

The ABA resolution is consistent with Standard 11.2, which states, "Courts should provide parties who are required to participate in mediation with full and accurate information

[83] AM. BAR ASS'N SECTION OF DISP. RESOL., RESOLUTION ON GOOD FAITH REQUIREMENTS FOR MEDIATORS AND MEDIATION ADVOCATES IN COURT-MANDATED MEDIATION PROGRAMS, (Aug. 7, 2004), http://indisputably.org/wp-content/uploads/ABA-SDR-policy-of-good-faith-in-court-mandated-mediation.pdf.
[84] *Id.* at 2.
[85] *Id.*

about the process to which they are being referred, including the fact that they are not required to make offers and concessions or to settle."[86]

The ABA resolution represents a middle course for court-ordered mediation. Under this approach, parties can be required to attend a mediation for a limited and specified period of time and to provide written memoranda, but courts cannot regulate parties' conduct in mediation.

V. CONCLUSION[87]

There is merit in both the voluntary and liti-mediation perspectives about court-connected mediation. The fundamental principle of mediation is that parties make decisions about their cases voluntarily, without inappropriate pressure. Mandatory mediation programs provide valuable benefits for parties, courts, and society.

Most mediators, mediation program administrators, and courts are conscientious about providing appropriate, high-quality mediation services. Unfortunately, with some frequency, there have been reports of problematic behaviors by mediators, lawyers, and parties.[88] The challenge is how to maximize the former and minimize the latter.

There is no perfect approach for designing court-connected mediation programs, however. Purely voluntary programs do not realize the full potential benefits if reluctant parties fail to mediate when they could reach good agreements in mediation. Mandatory mediation programs reflecting a liti-mediation perspective can undermine the fundamental principle of parties' voluntary decision-making in mediation.

This article sketches an approach to combine the benefits and reduce the risks of both perspectives. Courts have more than two options. They do not have to choose between enforcing mandatory mediation rules or leaving mediation decisions completely up to parties and their lawyers.

Courts vary and should design mediation policies based on their circumstances. For example, federal courts in large cities with large populations of experienced lawyers and

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[86] The section commentary in the Standards state:

> Inadequate information may lead parties to believe that they must settle in mediation. At a minimum, care should be taken to inform them at the outset that the mediator has no authority to impose a solution, and that no adverse consequences will be imposed as a result of their failure to settle. Informing parties that the mediator has no authority to impose a solution may be particularly important if a retired judge is serving as the mediator, because of the likelihood, given a retired judge's status, that parties may assume otherwise. When mediation involves unrepresented or unsophisticated parties, who may be more susceptible, courts should provide even fuller information. . . .
>
> In some jurisdictions, mandated referrals explicitly provide or are interpreted to provide that parties must participate in the process "in good faith." . . . Although there is no doubt that successful mediation involves good faith, requirements to participate in good faith are vague, counterproductive, and cannot be enforced without the mediator's testimony. They may also pressure parties to make offers of settlement that might not be made in the absence of such provisions.

NAT'L STANDARDS, *supra* note 34, § 11.2.

[87] Portions of this section are adapted from Lande, *supra* note 13.

[88] *See generally* Lande, *supra* note 78.

mediators handling cases of sophisticated parties are very different from family courts in rural and suburban areas with limited pools of mediators and where many parties are self-represented and have no prior mediation experience.

The "try it, you'll like it" rationale that Frank Sander articulated[89] no longer is necessary or justified in many courts. Probably most lawyers who have been in practice for a while know what mediation is, and many have experience with it. Mediation now is a big business with high-powered mediators in large organizations like JAMS,[90] not the small start-up industry that it was several decades ago.

In some contexts, judges, lawyers, and mediators have gotten hooked on the convenience (to them) of mandatory mediation. In particular, some judges and lawyers have become dependent on mediation to terminate cases. In turn, many mediators feel pressured to have produce high settlement rates so that they can get repeat business. As a result, parties may be at risk of excessive and inappropriate pressure to settle.

The Massachusetts experience demonstrates that many lawyers voluntarily recommend mediation to their clients without court orders.[91] Eliminating court mandates would avoid many of the problems that Coben and Thompson documented,[92] and reduce the risk of coercion that Nancy Welsh described.[93] If courts do not require parties to mediate, this would eliminate litigation about non-compliance.

In some courts, mandatory mediation policies may be the best option. When courts require parties to mediate, the courts should take special care to minimize risks of coercion. In general, there should be reasonable opt-out procedures and/or the option of attending for only a limited period of time. The rules and practice culture should clearly and credibly communicate to parties that they are not required to reach agreement and can leave at any time.

For courts operating mandatory mediation programs, this article outlines some policies that should motivate parties and lawyers to gain the benefits of mediation while protecting parties' rights to make their own decisions. This middle course would be imperfect as it presumably would produce some problems of the other two perspectives. But, if carefully designed and implemented, it is likely to produce the best process and outcomes overall.

The key is for courts to use dispute system design techniques that engage all the stakeholder groups to develop policies that advance the interests of all stakeholders in mediation, with a priority on satisfying parties' interests. Using dispute system design methods to periodically evaluate program policies and make any needed changes requires some resources, particularly leaders' time. This is a good investment as it fulfills courts' obligations to effectively manage their mediation programs and is likely to help accomplish the courts' goals.

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[89] *See* Sander, *supra* note 15.

[90] *See* JAMS, https://www.jamsadr.com/ (last visited Dec. 26, 2021).

[91] *See* Golann, *supra* notes 29–30.

[92] *See* NAT'L STANDARDS, *supra* notes 68–69.

[93] *See* Welsh, *supra* notes 21–22.