

COERCION AND SELF-DETERMINATION IN COURT- CONNECTED MEDIATION: ALL MEDIATIONS ARE VOLUNTARY, BUT SOME ARE MORE VOLUNTARY THAN OTHERS

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Mediation proponents often point to self-determination as the key to the broad applicability and acceptance of mediation in courts. While early mediation programs relied on voluntary participation, many courts now require litigants to try mediation before proceeding to court. Even in mandatory mediation, self-determination is essential: disputants are free to leave the process at any point, with or without settlement, and without coercion. While voluntary mediation may be highlighted in policy and theory, it is not always realized in practice. Research and appellate court filings demonstrate that many disputants experience substantial pressure: judges may pressure parties to enter mediation, mediators may pressure them to continue with mediation, and any number of actors and factors may pressure them to settle. Questions remain about the appropriate level of pressure, however: when does encouragement become coercion? Courts must ensure that court-connected mediation is delivered as promised—that self-determination is maintained throughout. This article reviews the philosophical and practical dimensions of this difficult goal, concluding with four recommendations to minimize coercion in mediation.

Society's reliance on courts to resolve differences has led the justice system to develop an array of innovative programs and partnerships. Courts around the country have embraced mediation as a useful alternative to adjudication for many cases. This institutionalization of mediation has been both well-received and well-critiqued (Menkel-Meadow, 1991; Hedeem, 2003; Press, 2003), and proponents hold the process to be a fitting complement to other judicial processes. Further, it meets a number of interests of court administrators:

Courts promote [mediation] in the belief that, overall, settlement saves time and money and produces better results than trial. Courts value mediation as a method of screening out cases that do not need much judicial attention so that they can focus their limited resources on cases that need more. Indeed, courts generally see settlement as an absolute necessity to process all their cases, and judges often look to mediation as a way to relieve caseload pressures (Lande, 2002:123-24).

Numerous studies have documented the positive effects of court-connected mediation initiatives, and many resource manuals set forth guidance on the design,

implementation, and evaluation of such programs (see Stienstra and Yates, 2004; Fowler et al., 2000; Plapinger and Stienstra, 1996; and Ostermeyer and Keilitz, 1997).

Across its many forms and contexts, mediation is “a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute” (American Arbitration Association et al., 2004). The process is distinguished from other forms of dispute resolution by its emphases on impartiality, confidentiality, and disputant self-determination. This article will focus on the last of these, self-determination, and the ways in which mediators, judges, or court administrators may compromise self-determination through coercion in court-connected mediation. In this treatment, specific court contexts (civil, criminal, family) are deemphasized in favor of lessons and observations applicable across court-connected mediation programs.

The article concludes with practical implications and recommendations for the operation of court-connected mediation programs. While it is recognized that power imbalances between the parties may certainly compromise a party’s self-determination, this article will focus on those elements within the control of mediators and mediation-program administrators.

SELF-DETERMINATION

The centrality of self-determination in the mediation community cannot be overstated. One need look no further than the recently revised *Model Standards of Conduct for Mediators*. The first reads:

Standard 1. Self-determination

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes (American Arbitration Association et al., 2004).

It should be noted that the December 2004 draft of the *Model Standards* includes this notation: “There is no priority significance attached to the sequence in which the standards appear” (American Arbitration Association et al., 2004). Nevertheless, the prominence of self-determination in these and many other mediation guidelines demonstrates the importance of voluntary participation and agreement in mediation.

While the above definition appears clear enough, a consensus definition remains elusive among actors in the court-connected mediation arena. Welsh (2001) notes that many speak of “self-determination” but that they understand the term quite differently. Such subjective understanding is reminiscent of Justice Potter Stewart’s 1964 commentary in *Jacobellis v. Ohio*, “I shall not attempt to define pornog-

raphy . . . but I know it when I see it.” Just as the public conception of pornography has changed over the past forty years, Welsh’s inquiry on self-determination suggests that its definition may have evolved over time:

Does it mean the same thing now in the context of court-connected mediation as it did when it inspired many people to become involved in the “contemporary mediation movement” that arose in the 1970s and early 1980s? Most importantly, if the meaning of this “fundamental” term is changing as mediation adapts to its home in the courthouse, does it matter? (Welsh, 2001:3.)

The experiences of judicial staff, mediators, researchers, and mediation participants—especially those involved in cases seeking to set aside mediation agreements based on compromised self-determination—demonstrate that it matters a great deal. (For analysis of a broad range of such cases, see Welsh, 2001, and Thompson, 2004.)

Many mediation proponents have claimed, and some researchers have concluded, that voluntary action in mediation is part of the “magic of mediation” that leads to better results than those from courts or other forums: higher satisfaction with process and outcomes, higher rates of settlement, and greater adherence to settlement terms. (For reviews of existing empirical research, see Shack, 2003, and Wissler, 2004.) A common argument in favor of voluntary participation comes from the early days of the mediation movement: agreements reached in mediation are said to be more durable and fitting than court decisions because the parties design them (Aaronson et al., 1977; Wahrhaftig, 1978). Put another way, “volition is the key to successful outcomes—volition validates those [mediated] outcomes; compulsion does not” (Nicolau, 1995).

While it is commonly held that mediators are expected to “honor, protect, and nurture parties’ self-determination . . . [and] to ‘empower’ the parties, ‘enable’ them to be ‘ultimate decision makers’ and ‘satisfy’ them” (Welsh, 2001:85), these expectations are not always realized in practice. The literature surrounding mediation identifies a number of ways in which a party’s volition or self-determination may be compromised; these may be grouped by the stage of mediation—pressure to enter and continue or to settle in mediation.

These distinctions have been recognized for some time—note the title of a 1991 report, *Mandated Participation and Settlement Coercion* (SPIDR, 1991)—but questions persist about the appropriate level of pressure involved at each stage of the process. Much of the academic literature and many programmatic guidelines concerning mediation employ the term “coercion” to represent the pressure perceived by disputants.

Coercion is a fitting term, with its Latin origins meaning *to surround, enclose, or confine* (Rosenbaum, 1986). Coercion is sometimes defined as *constrained volition*, wherein the recipient still retains the ability to make a choice but is given a limited set of unwanted options (Wertheimer, 1987). Its legal definition is tied closely to “duress,” meaning “threat of harm made to compel a person to do something against

his or her will or judgment; esp. a wrongful threat made by one person to compel a manifestation of seeming assent by another person to a transaction without real volition" (*Black's Law Dictionary*, 1999:520-21). In this discussion of coercion in and into court-annexed mediation, one must further consider two important issues drawn from the philosophical literature. First, Rhodes notes that "coercion" can be understood variously as "the act of coercing" or "an instance of being coerced" (2000:67): the former concerns mainly the actions and intentions of the coercer, while the latter concerns the experience of the coerced. Both conceptions are relevant here and the distinction between them points up the second issue: the element of threatened harm perceived by the coerced. It is not material to the definition of coercion whether the threat can be delivered, only whether the threat recipient (the coerced) thinks it to be possible: "Coerciveness is determined by the harm which the victim *believes* has been threatened, not by the seriousness of the actual harm threatened" (Hoekema, 1986:47, emphasis in original).

Matz observes that much dispute resolution literature portrays the mediator as "someone with the potential to do all kinds of bad things to parties—coercing them, manipulating them, and generally taking advantage of [them]" (1994:359). The following pages will discuss actions by which a mediator, judge, or court administrator may intentionally or unwittingly, explicitly or implicitly engage in actions eliciting perceived-threat-avoidance behavior.

COERCION INTO MEDIATION

While the discussion of voluntary participation is relevant to all areas of mediation practice, it takes on greater gravity in court-annexed mediation. Given the myriad documented benefits of mediation, it is not surprising that courts employ it extensively. Participation in mediation is mandated by rule or statute in some courts (Wissler, 2004; Streeter-Schaefer, 2001; Rack and Rogers, 1999). An Ohio resource manual for common-pleas courts identifies six benefits of mandatory mediation: high litigant and attorney satisfaction, high settlement rates, decreased costs for parties, increased use and the "spillover effect," increased court efficiency, and cost-effective program administration (Fowler et al., 2000). Among the benefits unlisted is addressing the long-recognized underutilization of mediation services (Rogers, 1991; Clarke, Valente, and Mace, 1992; Welsh, 2001).

In an attempt to increase the use of mediation in the 1980s and 1990s, some courts and other governmental institutions began to require disputants to participate in the process, reflecting "the view by legislatures or courts that benefits accrue to the courts, parties, and/or public when the use of dispute resolution procedures is not restricted to cases in which all parties agree to participate" (SPIDR, 1991:38). Only a few years into the enterprise of court-related dispute resolution, McGillis recognized a continuum of coercion levels in operation: "Very low coercion - Moderate coercion - Quite high coercion - Very high coercion - Outright referral to the program" (McGillis, 1986:43-45). A number of early studies supported the finding that increased coercion

leads to higher rates of attendance: the initial three Neighborhood Justice Centers employed low-to-moderate coercion and attained mediation sessions in 35 percent of cases, while five court-sponsored programs in Florida employed “quite high” coercion and attained sessions in 56 percent of their cases, and a Minnesota project sponsored by the prosecutor employed “very high” coercion and attained sessions in 90 percent of its cases (McGillis, 1986).

Focusing on coercion to enter mediation, researchers have found that court pressure may be exercised in a variety of ways. For illustration, Roehl and Cook (1989:45) have observed that judges or prosecutors may compel disputants *explicitly* or *implicitly*:

Explicit coercion may be used to persuade a reluctant disputant to agree to mediation by implying that prosecution will be initiated if mediation is not. Implicit coercion is evident in referrals by judges who agree to dismiss the court case if successful mediation takes place, and it appears in communications from prosecutors, police officers, and mediation program staff.

Even in states and court systems that have explicit guidelines to maintain the voluntary nature of mediation participation, such implicit coercion has been documented in both civil and criminal courts. A study conducted for the Department of Justice found that a number of programs “use very threatening letters to compel respondents to appear for mediation with the complainant. The typical closing line in the letter is, ‘Failure to appear may result in the filing of criminal charges based on the above complaint.’ Official stationery is used and the district attorney or a similar official signs the letter” (McGillis and Mullen, 1977:61). Indeed, for those disputants who might dismiss such a “recommendation” from a judge, it is not uncommon for court officials and mediation-center staff to caution reluctant disputants that failure to participate in mediation will be taken into account if the case returns to court; as is often observed about judicial suggestions, “People aren’t in the habit of saying ‘no’ to a judge.” In other words, “Even in programs which are not strictly mandatory, when court personnel encourage parties to mediate, the invitation is not lightly refused” (Nolan-Haley, 1996:63). While such pressures are present in civil cases, Brown (1994) has observed that they may be even greater in criminal matters and victim-offender mediation. Given that mediations are often conducted in courthouses, it should not be surprising to learn that many disputants may have difficulty distinguishing between mediation and adjudication (Merry, 1989; Hedeem and Coy, 2000).

Proponents of mandated participation contend that mediation remains a voluntary process so long as no coercion takes place during the session. Noting that the enticing carrot of mediation may be complemented by the punitive stick, Nicolau observes,

Some writers and analysts have suggested that a certain amount of coercion to accept the mediation process is inherent, particularly when matters are referred by courts, and that such coercion is acceptable as distinguished

from coercion in mediation, that is coercion to accept a particular settlement. Coercion to enter mediation is often labeled “encouragement” (1986).

More explicitly, Sander distinguishes between coercion in and coercion into mediation, “Is mandatory mediation an oxymoron?” I think not, because I believe there is a clear distinction between coercion into mediation and coercion in mediation” (in Sander, Allen, and Hensler, 1996). Sander also recognizes the polemics that attend this issue:

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 (Sander, 2000:7-8, emphasis in original).

The claim that entry into mediation is readily distinguished from the actions taken within the process is not universally accepted, however. Merry, for one, strongly refutes this argument based on a broader view of mediation’s place within larger dispute resolution processes, most of which involve substantial punitive power:

Once the importance of the linkage of stages in dispute processing becomes clear, the claim . . . that coercing people *into* mediation is not too serious if they are not coerced *in* mediation becomes more questionable. No process exists separately from its place in the unfolding sequence of stages, which gives it meaning and force. If parties are aware that a more coercive process will ensue if mediation fails, the dynamics of the mediation process will differ sharply from “pure mediation,” because the expectation of an imposed settlement will inevitably alter the meaning of the event for all the actors (Merry, 1987:2066, emphasis in original).

The “pure mediation” of which Merry writes is that in which disputants participate freely at all stages of the resolution process. Her choice of terms implies that mediation is pure only when it is free of compulsion.

Research on the issue of coercion into mediation has been conducted through New York’s statewide network of centers, which handles some 40,000 cases each year. Interviews with program staff echoed earlier research findings that “[d]isputing parties sometimes agree to mediation in the hope that it will impress the judge, or because they feel that this is a required part of the court process” (Merry, 1989:244). When asked about the potential harm faced by disputants referred from courts, staff members spoke directly to the issue of perceived harm:

I don't know that there are any consequences [for not participating], I think there are perceptions of consequences. . . . It's eventually going to end up back in front of the judge, so if you can say you made an effort, you won't be hurt. . . . I think a lot of people who perceive that type of pressure participate as a pre-emptive action (quoted in Hedeem, 2001).

While the New York programs do not mandate mediation for any cases, regression analysis found that referrals from courts led to higher rates of participation than those from law enforcement or other social services: court referrals were three times as likely to reach mediation as social and governmental services that did not include law enforcement or courts. Coincidentally, those same court referrals led to a lower likelihood of reaching agreement in mediation. (For detailed findings and methodology of this research, see Hedeem, 2001, or contact the author.)

Other observers waffle on this distinction. In one of the most prominent books on mediation, Moore equivocates on the issue of compulsory mediation: in one paragraph he writes, "*Voluntary* refers to freely chosen participation and freely made agreement. Parties are not forced to negotiate, mediate, or settle," and in the next, "Voluntary participation does not, however, mean that there may not be pressure to try mediation" (Moore, 1996:19, emphasis in original). Moore recognizes that the semantic distance between "not forced" and "pressure to try" is limited, and he offers support for this apparent contradiction shortly thereafter: "Attempting mediation does not, however, mean that the participants are forced to settle" (1996:20). This paradox is presented elsewhere:

Although there initially appears to be some contradiction between the voluntariness and self-determination that mediation is intended to foster and the coercion of a mandatory mediation requirement, mandatory proponents argue that there is no real inconsistency. Because no party can be forced to settle or otherwise alter his or her position in a mediation, the coercion only relates to requiring that parties try to reach an agreement to resolve their dispute (Bullock and Gallagher, 1997:948).

COERCION WITHIN MEDIATION

Coercion *toward* settlement has received the greatest attention in the mediation literature and caselaw, and perhaps appropriately so, as the resulting settlements usually bind the disputants to a course of action they may not have freely chosen. Mediation agreements in some contexts have the effect of a contract, thus narrowing the contracted parties' available options in the future. Before turning to settlement coercion, however, we must consider another form of coercion within mediation, which may occur between entry and exit: coercion *to continue* with mediation.

Coercion to Continue with Mediation. Mediators are sometimes described as controlling not the outcomes of mediation, but the *process* of mediation. Most court-

annexed mediation programs have established guidelines that any party may stop the mediation once in progress—see, e.g., Georgia’s ADR Rules, which stipulate that “mediation may be terminated by either the mediator or the parties at any time” (Georgia Rules, Appendix C, Chapter 1).

Given the pressures perceived by parties documented above, disputants may defer to the mediator to determine the appropriate time to quit. Some mediators, too, feel the decision to conclude mediation should reside exclusively with the mediator. Through interviews of circuit court mediators in Florida, Alfini (1991:72) observed that many mediators believe, “It’s my decision to either declare it an impasse and have everybody go home or to continue. It’s not their decision.” Commenting on this attitude, Moberly (1994:717) has observed, “This approach goes against traditional practice of mediation, in which parties have a right to withdraw rather than be forced to continue.”

Evidence drawn from recent caselaw and legal education events suggests that many mediators engage in coercion to keep disputants at the table. Such coercion may be exercised through acts of commission or of omission. Consider the appeal filed by a Texas plaintiff “who was on heart medicine, tried to set aside a mediation settlement agreement by claiming that despite chest pains and fatigue, he was told that he would have to continue in the mediation session until he was willing to reach agreement” (*Randle v. Mid Gulf, Inc.*, 1996, noted in Thompson, 2004:530). The pressure to remain in mediation and work toward agreement is clear here, but similar pressures may be applied through indirect means, too.

In a discussion of mediator manipulation, Coben (2004:9) relates the “stunning” response he received to a hypothetical posed to mediators “[a]t a continuing education event several years ago . . . , I was stunned by the high percentage of mediators who enthusiastically answered, ‘yes’ when asked if strongly encouraging parties to skip lunch (to keep the pressure on) was a good tactic” (parenthesis in original). It is not uncommon to read of all-night bargaining sessions in the labor arena, but it should be noted that negotiators in such sessions—whether assisted by mediators or not—are typically experienced in long- and late-hours meetings. Many disputants enter mediation with limited or no knowledge of the process, and appeals cases have demonstrated that they do not expect all-day marathon sessions. A 65-year-old plaintiff suffering from high blood pressure, headaches, and intestinal pains sought to rescind her mediated agreement at the end of a fifteen-hour session based on her compromised participation and on mediator “bullying” (*Olam v. Congress Mortgage Co.*, 1999). In a Florida appeal (*Vitakis-Valchine v. Valchine*, 2001) the plaintiff sought to negate a settlement reached after an eight-hour mediation, during which she claims the mediator “threatened to tell the judge that she caused the settlement failure” (Thompson, 2004:529).

While Coben (2004:9) expresses his dismay at such pressure, “Acquiescence through exhaustion—now that’s an ethically healthy approach to dispute resolution to make us all proud,” it is appropriate to consider that the guidelines that grant all parties the right to terminate mediation also send a cross-signal to mediators.

Consider that the Georgia ADR Rules cited above conclude, “Mediators will be sensitive to the need to terminate the mediation if an impasse has been reached. However, mediators must be courageous in declaring impasse only when there is no possibility of progress.”

Coercion to Settle in Mediation. Pressure to settle is the form of coercion most commonly examined in the existing literature and caselaw. Matz (1994:359) contemplates that a number of motivations may lead mediators to “push a hapless party into accepting an agreement.” Alongside a surfeit of guidelines prohibiting settlement coercion are a multitude of interests expecting—or even rewarding—such pressure: from Harrington’s (1984) documentation that many judges expected that referrals to mediation were effectively conclusions of cases to Sander’s (1995) observation that some mediators, for marketing purposes, are more interested in placing “another notch on their belts” to boost settlement rates than in facilitating a mediation outcome appropriate to the parties and their case. Further, research has found that many lawyers prefer mediators who get cases settled (McAdoo, 2002; McAdoo and Welsh, 1997); for those mediation clients intentionally seeking to reach agreement, a mediator’s settlement rate “is likely to be critically important” (Lande, 1997:852). But what of those parties for whom settlement is not the primary goal or those cases for which settlement may not be appropriate (Peterson, 2004)?

Lande (1997) observes that “an emphasis on settlement lends itself to [the mediator] being highly directive” (p. 852), and this is clear in a number of appeals cases related to mediator pressure. Given the highly contextual nature of mediation and the correspondingly broad range of contingent mediator behaviors, the field lacks a clear line delineating when a mediator has become too directive and has engaged in settlement coercion. While the cases cited in this section illustrate mediator behavior that may be held to be coercive, it should be noted that the appellant prevailed in only one of these; this suggests a party’s perception of coercion, of constrained self-determination, may not be the same as the judges on the appeals courts. For this author, that does not negate the appellants’ experiences of coercion in mediation.

In appealing the outcome of a Texas divorce mediation, a party attested that the mediator “yelled at her . . . , accused her of lying about seeking work, discouraged her from going to trial by telling her that [her husband] would fare better there” (*Durham v. Durham*, 2004). This behavior allegedly intimidated the party into signing the agreement. Other appellants have detailed similar patterns of mediators forecasting dire outcomes for their cases if unresolved in mediation and strongly pressuring them to settle. In another case the mediator told the plaintiff he would not “see a dime” unless he “agreed to the mediated settlement then and there,” leading to the plaintiff’s agreement to a settlement (*Chitkara v. New York Telephone Co.*, 2002). Only after the mediation did the plaintiff learn that the mediator’s estimation was factually incorrect. Going a step further, it is alleged that the mediator in another case went so far as to threaten plaintiffs with criminal prosecution (*FDIC v. White*, 1999, noted in Freed, 2004).

In one of the most comprehensive examinations of mediator coercion, Welsh (2001) details a case in which the parents of a man killed by police sued the officers involved (*Allen v. Leal*, 1998). The daylong mediation concluded with a settlement, but one which the plaintiffs reconsidered afterward and deemed unacceptable later on the day of the mediation. In a subsequent judicial settlement conference, the plaintiff's attorney described the mediator's actions:

"Your family is going to be destroyed in this case. You got zero"—and if he said it once, he must have said it 40 times—"you got zero chance of success on this and your family is just going to be destroyed"—and he really harped on that. [When the mediator returned with an offer that was \$10,000 less than the Allens' demand] [h]e said, "This is a take it or leave it. You got the 90 and that's it. And you better do this because you got zero chance of success and this will destroy your family" (transcript in Welsh, 2001:12).

The plaintiffs felt the mediator's actions inappropriately coercive and explained this to be the basis for their wishes to rescind the agreement. A local chapter president of a national attorney-mediator organization defended the actions of the mediator, arguing that "what some people might consider a little bullying is really just part of how mediation works" (Welsh, 2001:13). The federal district court reviewing the case (*Allen v. Leal*, at 947), responding to both the case and recent comments by a prominent local mediator, issued a statement that "coercion or 'bullying' clearly is not acceptable conduct for a mediator in order to secure a settlement." This echoes the commentary issued on *Vitakis-Valchine v. Vachine*, in which the court of appeals reasoned that "it would be unconscionable for a court to enforce a settlement agreement reached through coercion or any other improper tactics" (Freed, 2004:12). The Texas mediator's defense of bullying, alongside the above arguments against such coercion, demonstrates the wide range of understanding of self-determination among actors in court-annexed mediation. This wide range is evident in Nolan-Haley's (1999) presentation of four models of decision making in mediation, two of which may be seen in the *Vitakis-Valchine* and *Allen* cases: the first is the "*paternalistic* or 'dictated autonomy' model" and the second is the "*instrumentalist* or 'limited autonomy' model" (p. 815, emphasis in original). In the former the mediator's explicit appraisal of the case is meant to guide parties' decisions, while in the latter the mediator emphasizes risks in each party's case to encourage concessions toward settlement. Nolan-Haley's recommendations for "informed consent" in all cases will be addressed in the conclusion.

Many mediators are trained to facilitate negotiation through an interest-based process popularized by the text *Getting to Yes* (Fisher and Ury, 1981). Among its recommendations is that negotiators should know their "BATNA," or "best alternative to a negotiated agreement." Moffitt applies this concept to mediators, offering that "the process of helping parties assess their prospects outside of mediation" might be called, 'BATMA-checking' [!]" (1997:15). When a mediator assists a party in exploring or understanding their alternatives to agreement—not only the best but the full

range, including the worst—it is easy to envision how a party might feel such exploration is a form of pressure. Similarly, many proponents of mediation highlight the role of “reality-checking,” wherein parties gain a realistic sense of the strengths, weaknesses, and likely outcomes of their case. As a mediator asks questions or makes statements to encourage a disputant to appreciate these “realities” or undesirable alternatives, parties may feel badgered or coerced.

Badgering or coercing may be motivated by a mediator’s interest in her own marketing or accomplishment. Sander’s assessment that some mediators may press for settlement to enhance their own settlement rate has been confirmed in at least one case in Washington (*In re Patterson*, 1999). In that case plaintiff claimed that “the mediator told the parties that a lack of settlement would ruin the mediator’s record” (Thompson, 2004:558, n. 277). An Alaska attorney recently recounted a conversation with a prominent judge who bragged of his 100 percent settlement rate, upon which the attorney reflects, “It may be counter-intuitive, but the fact of the matter is that a high settlement rate is often a sign of a bad mediator, rather than of a good one” (Peterson, 2004:14). Settlement, he argues, is not desirable in all cases. Cases that should not settle include those involving fundamental rights or issues deserving a precedent (Peterson, 2004), or those for which “there is a need for public sanctioning of conduct [or] when repetitive violations of statutes or regulations need to be dealt with collectively and uniformly” (Center for Dispute Settlement et al., 1992:4.1). Further, both sources caution against mediation when either disputant is unable to negotiate effectively due to severe power imbalances or mental-health concerns. Many court-annexed mediation programs have screening procedures to direct these cases away from mediation (Coy and Hedeon, 1998).

Mediator as Tattletale?: Coercion Through Reports and Recommendations to the Court. The literature of court-connected mediation identifies another structural means through which mediators may coerce disputants: communication to the court following mediation. This communication may take the form of reports of parties’ behavior in mediation or recommendations for case outcomes to the judge. While some family courts have formalized the practice of mediators recommending custody placements and other arrangements unresolved in mediation, the prevalence of this practice is unknown but likely limited, due in large part to courts’ adoption of the 1992 *National Standards for Court-Connected Mediation*. Standard 9.4 recommends that “mediators should not make recommendations regarding the substance or recommended outcome of a case to the court” (Center for Dispute Settlement et al., 1992), while Standard 12 seeks to “insulate the mediator from the court” through communication of only procedural facts—party attendance at mediation, requests for more time, and mediator assessment *without elaboration* that a given case is inappropriate for mediation. It should be noted that many, if not most, states provide for mediation communication to the court or other authorities in instances of alleged or suspected child abuse or neglect; many have provisions related to abuse of vulnerable adults; and others have even broader exceptions for “threat of imminent harm to self or others.”

While confidentiality protections encourage candid settlement negotiations, they also largely preclude monitoring of mediators who may improperly coerce parties through threats of such reports. Recall, for example, the appeals case of *Vitakis-Valchine v. Valchine*, in which the mediator allegedly threatened to tell the judge that the plaintiff had prevented the case from reaching settlement. It is not clear that such a report would harm the disputants—note that Standard 11.5 reads, “There should be no adverse response by courts to non-settlement by the parties in mediation” (1992:11.5)—but in the context of a mediation session, would a party be expected to ignore the mediator’s threat based on a procedural guideline they have heard or read perhaps once?

Some courts have unwittingly introduced the possibility of mediator coercion through their solution to a different problem. It has long been recognized that some parties will participate in mediation with no intention of reaching agreement and, perhaps, with ulterior motives, such as fishing for compromising information about the other party’s case (see, e.g., Lande, 2002). To prevent such abuse of mediation, a number of courts instituted “good-faith” requirements; the National Standards cite Maine’s provision that “when ‘agreement through mediation is not reached on any issue, the court must determine that the parties made a good faith effort to mediate the issue before proceeding with a hearing” (Center for Dispute Settlement et al., 1992:12-2). These well-intentioned attempts to ensure appropriate conduct in mediation also brought about the potential for abuse:

A good-faith requirement gives mediators too much authority over participants to direct the outcome in mediation and creates the risk that some mediators would coerce participants by threatening to report alleged bad-faith conduct. Courts can predict abuse of that authority given the settlement-driven culture in court-connected mediation. The mere potential for courts to require mediators’ reports can corrupt the mediation process by instilling fear and doubt in the participants (Lande, 2002:106).

Party-as-Piñata: Does Desired Mediator Pressure Constitute Coercion?

Discussion at a recent conference of the American Bar Association brought to the surface a thorny issue for mediators and mediation clients: the question of desired pressure from the mediator. A conference participant relayed the experience of his associate, serving as counsel for an insurer: following a mediation that did not conclude in settlement, the adjuster complained to the attorney: “I had authority to offer more money, but the mediator didn’t beat it out of me” (comments at Hedeon, Alfini, and Lande, 2005). To this author, this conjures a new metaphor for mediator-client dynamics, that of “party-as-piñata.”

This dynamic is also reflected on a Web-based mediation resource, which lists fifteen methods for “crossing the last gap in negotiation” (*Mediate Today*, 2005). For the last of these methods—one “rarely chosen”—the authors describe a scenario in which parties have resolved most but not all of their differences, leading them to ask

the mediator to apply greater pressure. With “varying degrees of simulated anger,” the mediator expresses disappointment and disbelief at the disputants’ intractability, allowing them to “blame the mediator for ‘forcing’ the last concession (and rescuing them from their painted-in corners)” (*Mediate Today*, 2005).

While largely undocumented in the literature and unanticipated in the rules and regulations, the above anecdotes suggest that some parties seek, or even expect, mediators to apply pressure toward settlement. The most likely motivation is that such pressure grants greater latitude to the party: the party may tender an offer, or accept a settlement beyond its “bottom line” yet does not bear the full responsibility for doing so. Limited commentary on this dynamic has been offered, including Stulberg’s (1981) identification of scapegoat as one of a mediator’s roles, and Carnevale, Lim, and McLaughlin’s (1989) observation of mediators “press[ing] the parties hard to make compromise,” “express[ing] displeasure at the progress of negotiation” and “tak[ing] responsibility for concessions” (p. 216).

A related phenomenon occurs when attorneys seek out mediators to help provide “reality checks” to their clients. In some cases, these clients have maintained expectations of a case’s value or likelihood of success well beyond their attorney’s predictions; attorneys may mediate in the hope of the client accepting the neutral mediator’s more-moderate assessment. In others, the attorney follows the pattern described above, seeking the mediator to deliver the bad news so as to save face or not appear weak or unresolved in support of the client’s case. Lande (1997) observes that experienced attorneys may knowingly select mediators who employ more or less pressure, and that these “sophisticated buyers” may refer to the more directive mediators as “muscle mediators,’ . . . or mediators who will ‘knock some sense’ into the principals by ‘banging their heads together’ or ‘twisting their arms’” (p. 850). It remains unclear whether and how such pressure, when desired by the parties, constitutes a compromise of self-determination; this dynamic and its fit in court-connected mediation deserve further study.

IMPLICATIONS AND RECOMMENDATIONS

In their survey of mediation research, Guthrie and Levin summarize that disputants are most satisfied when the process is “*noncoercive*, unbiased, comprehensible, informative, attentive to party interests and private” (1998:892-93, emphasis added). The preceding discussion of self-determination and coercion demonstrates that mediators, referring court agents, and even court policies may effect coercion in court mediation. This arises, Thompson (2004:570) contends, because the prevailing philosophy of the courts (toward settlement) is in tension with the mediation’s commonly understood role of facilitating communication; his recommendation, with which this author thoroughly agrees, is that “courts should be up front and direct about the purpose of the process.”

To turn from description to prescription, and to build on suggestions born of the literature and of the author’s professional experience, I recommend that judges, court administrators, and mediators consider four changes to the present practice of court-

connected mediation. In the order in which these would influence a mediated case, they are that 1) referrals to mediation should be explicitly free of coercion; 2) mediation consent forms should be executed at the outset of mediation to affirm the disputants' informed consent (per Nolan-Haley, 1999) and understanding of a) the bounds of acceptable mediator pressure, b) their rights to terminate mediation at any time, and c) the court's policy that nonsettlement will not adversely affect either party's case; 3) Welsh's "cooling-off period" between the mediation session and the date any mediated settlements are finalized should be instituted; and 4) a blanket prohibition on substantive mediator reports and recommendations to the court should be enforced.

Just as Lande (2002) recommended that a consensus process among judges, court administrators, mediators, attorneys, and disputants could be used effectively to develop good-faith requirements in mediation, a similar group process would likely be required to clarify and effect some of the changes just outlined. How, for example, might referrals to mediation avoid the perception of being coercive? What are the acceptable bounds of mediator pressure? Procedural justice research suggests that these questions are best resolved at the local level with the participation of all affected parties.

* * *

In George Orwell's satirical *Animal Farm*, the ruling pigs replace the Seven Commandments of Animalism with but one: "All animals are equal, but some animals are more equal than others" (1946:123). Today, one might apply a paraphrased revision to the field of court-connected mediation: where once there was a tenet that disputants chose whether and how to participate in mediation, there is now, "All mediations are voluntary, but some are more voluntary than others."

If courts are to make full and appropriate use of mediation—and more important, if clients are to realize the full benefits of mediation—judges, mediators, and court administrators must work to ensure that self-determination is maintained throughout every case. The preceding pages have demonstrated that competing theories and evolving conceptions of mediation have occasionally led to a gulf between what is promised and what is practiced. Through consideration and adoption of practices like those recommended here, court-connected mediation can meet the interests and ethics of all parties involved in this innovative and valuable enterprise. **jsj**

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