

# A LOOK AT COURT MANDATED CIVIL MEDIATION

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## I. INTRODUCTION

*A dispute is a problem to be solved together,  
not a combat to be won.*<sup>1</sup>

Litigation is risky, arbitrary, and costly.<sup>2</sup> It is also an all or nothing resolution to a conflict that can disrupt business and family relationships.<sup>3</sup> There are other ways to settle disputes between parties without using litigation and its adversarial nature.<sup>4</sup>

Alternative dispute resolution (ADR) has existed for hundreds of years and has continued to evolve into the methods that are used today.<sup>5</sup> ADR is fast becoming an important and inexpensive alternative dispute method for the resolution of conflicts.<sup>6</sup> With ADR being heavily used by courts, clients, and even the federal government, there are mixed views as to whether it is working and should be mandatory.<sup>7</sup> Some believe the decision to use or not to use mediation should be left to the parties.<sup>8</sup> Others feel mandatory mediation functions to clear court dockets and helps parties settle their disputes amicably.<sup>9</sup>

Does mandatory mediation go too far? Does it encroach the rights of people who deserve their day in court? A discussion and critique of the evolution of mediation will provide the answers to these questions. Further, a full discussion of mediation's evolution necessarily includes a review of its current position in the United States judicial system. This Note discusses the history of mediation, the states' use of statutory mandatory mediation, and the successes and failures of mandatory mediation.

Part II of this Note briefly discusses the background of mediation, its history, other types of ADR, and how courts first began to use mandatory mediation. Part III discusses the 1998 federal statute that mandates mediation for federal courts. Part IV reviews and analyzes numerous statutes enacted by states across the union. Although the statutes discussed in Part IV do not include every

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1. Author unknown. See Campbell C. Hutchinson, *The Case for Mandatory Mediation*, 42 LOY. L. REV. 85, 85 (1996).

2. JOHN W. COOLEY, *MEDIATION ADVOCACY* 5 (1996).

3. *Id.* at 7.

4. *Id.* at 1.

5. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* 3 (1985).

6. Joe Robertson, *Mediation Still not Popular Among Some Lawyers*, TULSA WORLD, Aug. 30, 1998, at A-1.

7. *Id.*; see also 28 U.S.C. § 651 (1994 & Supp. IV 1998) (authorizing federal district courts to use ADR in civil actions).

8. Robertson, *supra* note 6, at A-1.

9. *Id.*

state, many states have enacted some form of a mandatory mediation statute.<sup>10</sup> Part IV also examines the areas of law in which courts most frequently mandate mediation and the penalties for those who refuse to enter mandatory mediation sessions or fail to mediate in good faith. Part V looks at how mandatory mediation works and does not work in the court system. This Part discusses cases that have challenged mandatory mediation statutes and the reasoning behind the challenges. Part VI concludes with a summary of mandatory mediation.

## II. BACKGROUND OF MEDIATION

### A. *Alternative Dispute Resolution History*

ADR methods began to gain popularity in the late 1960s.<sup>11</sup> These methods were used for many years before being questioned or critiqued.<sup>12</sup> Now, questions are being raised as to the probable success of ADR methods, especially in the area of court-mandated mediation.<sup>13</sup>

In the 1960s, mediation and other dispute methods offered a solution to problems such as overcrowded court systems and delays in lawsuits tried before a judge.<sup>14</sup> During this time, organizations across the country formed committees to find ways of using alternate dispute methods.<sup>15</sup> The committees were formed: "(1) to relieve court congestion as well as undue cost and delay; (2) to enhance community involvement in the dispute resolution process; (3) to facilitate access to justice; [and] (4) to provide more 'effective' dispute resolution."<sup>16</sup>

Mediation and other dispute resolution methods have become a popular method of resolving disputes and have seen a substantial increase in use by courts in the past ten years.<sup>17</sup> Mediation and litigation are not the only ways of resolving disputes. Many other forms of dispute resolution exist. The least formal methods for resolving disputes are negotiation, conciliation, facilitation, and mediation.<sup>18</sup> Other informal methods include mediation-arbitration, arbitration, court-annexed arbitration or mediation hybrids, and court

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10. See *infra* note 61.

11. GOLDBERG, *supra* note 5, at 3.

12. *Id.*

13. *Id.*

14. *Id.* at 4.

15. *Id.* at 5.

16. *Id.* The organizations formed included the Center for Public Resources in New York and the Special Committee on Dispute Resolution—previously a Special Committee on Minor Disputes—established by the American Bar Association and the Institute of Civil Justice. *Id.*

17. COOLEY, *supra* note 2, at 1.

18. *Id.* at 3.

adjudication.<sup>19</sup> There are hybrids of every dispute resolution method, including hi-low arbitration, mini-trial, and summary jury trial.<sup>20</sup> Mediation is the focus of this Note, although it is only one alternative method for resolving a dispute outside of litigating in a courtroom. A brief description of other ADR methods follows.

Arbitration is a process in which the parties present the dispute to a selected decision-maker or a panel of decision-makers, usually with expertise in the subject of litigation.<sup>21</sup> The parties are able to determine the rules and procedures that will govern the arbitration.<sup>22</sup> Arbitration can be binding, non-binding, or advisory with very limited grounds for appeal.<sup>23</sup> This form of dispute resolution is useful in cases "requiring fast, private decisions and specialized decision-makers."<sup>24</sup>

Another increasingly popular dispute resolution method is a summary jury trial. Usually this process takes place in one day with the parties presenting a case summary to a jury.<sup>25</sup> The jury issues an advisory opinion, which the parties may use in further settlement negotiations.<sup>26</sup>

Mini-trials are similar to summary jury trials but are generally more expensive.<sup>27</sup> A mini-trial is a hearing that occurs after completion of most of the discovery process, but the decision is non-binding on the parties.<sup>28</sup> This process allows the parties to see how a jury or panel of experts will react to the evidence and witnesses presented.<sup>29</sup>

Mediation, on the other hand, consists of a mediator or co-mediators that meet with the parties to help them resolve their dispute.<sup>30</sup> The mediator is a neutral party that typically meets with the parties during an opening session and then separates the parties for private meetings or caucuses.<sup>31</sup> Mediations may take anywhere from three hours to several days and may extend over weeks or even months before the parties come to an agreement.<sup>32</sup>

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19. *Id.*
  20. *Id.*
  21. MARK D. BENNETT & MICHELE S.G. HERMANN, *THE ART OF MEDIATION* 8 (1996).
  22. *Id.*
  23. *Id.*
  24. *Id.*
  25. *Id.* at 9.
  26. *Id.*
  27. COOLEY, *supra* note 2, at 167.
  28. *Id.* at 169.
  29. *Id.*
  30. PETER LOVENHEIM, *HOW TO MEDIATE YOUR DISPUTE* 1.28 (1996).
  31. *Id.*
  32. *Id.* at 1.27.

Mediations can be voluntary or mandatory.<sup>33</sup> In voluntary mediation, the parties agree to hire a mediator to help them resolve their dispute.<sup>34</sup> With mandatory mediation, a court order or contract forces the parties into a mediation session.<sup>35</sup> Although the parties have to enter mediation, they do not have to agree to accept the agreement or the mediator's award and can still proceed to the courtroom to resolve the dispute.<sup>36</sup> Mediation, as well as the other above-mentioned dispute resolution methods, are not the only methods of resolving a dispute, but they are the methods being used more frequently to resolve disputes before entering a courtroom.<sup>37</sup>

### B. How Courts Became Involved in Mandating Mediation

Courts first started mandating settlement conferences before trial as a way to bring the parties together to settle the case before litigating the dispute.<sup>38</sup> The judge presiding over the case would order a settlement conference and require those with settlement authority to attend.<sup>39</sup> These settlement conferences, mandated by the court, occurred only a few days before trial.<sup>40</sup>

In *G. Heileman Brewing Co. v. Joseph Oat Corp.*,<sup>41</sup> the Court of Appeals for the Seventh Circuit ordered parties to appear before the judge in a pretrial settlement conference.<sup>42</sup> The court ordered the parties to send a representative with settlement authority to the conference, but only counsel for the Joseph Oat Corporation attended the meeting.<sup>43</sup> The district court held that the Joseph Oat Corporation violated the pretrial settlement conference order because a principal from the corporation with settlement authority did not attend the meeting.<sup>44</sup> On appeal, the Seventh Circuit affirmed the district court's ruling, holding that the district court did have the authority to order the parties to attend a pretrial settlement conference and the Joseph Oat Corporation violated the order by not

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33. *Id.* at 1.22.

34. *Id.*

35. *Id.*

36. *Id.*

37. *See generally id.* at 1.2 (discussing that mediation as a means of resolving disputes has grown rapidly in the United States in recent years). Today nearly 400 tax-supported community mediation centers exist, and there is an increased number of mediation organizations, programs, and private dispute companies, which allow mediation as an option to resolve disputes. *Id.*

38. Elliot G. Hicks, *Too Much of a Good Thing?*, 12 W. VA. L. REV. 4, 4 (1998).

39. *Id.*

40. *Id.*

41. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989).

42. *Id.* at 650.

43. *Id.*

44. *Id.*

sending a representative with the ability to settle.<sup>45</sup> The court made it clear that it has the power to mandate settlement conferences before trial and to force representatives with settlement authority to attend the conference.<sup>46</sup>

The increase in court mandated mediation has much to do with clearing cases from court dockets and bringing a faster resolution to disputes.<sup>47</sup> South Carolina first became involved with court sanctioned mediation in 1986 when a federal district court judge started a mediation program.<sup>48</sup> The program got its formal start across the state in 1996.<sup>49</sup> The program consists of a week of court mandated mediations intended to clear the court's docket.<sup>50</sup> Considering it takes the state court almost nine years to render a verdict in most cases, the mediation program also allows parties to settle their disputes in less time.<sup>51</sup>

Court mandated ADR received a jump-start from the federal government in 1998 when Congress enacted a statute ordering federal courts to start ADR programs.<sup>52</sup> Even the Clinton administration encouraged mediation and other forms of ADR.<sup>53</sup> The emergence of court mandated mediation raises questions concerning both the programs and their effects on the United States court system.

### III. FEDERAL STATUTE 28 U.S.C. § 651<sup>54</sup>

To deal with "court-annexed arbitration," Congress enacted 28 U.S.C. § 651, also called the Alternative Dispute Resolution Act of 1998, in October of 1998, and authorized federal district courts to implement ADR programs.<sup>55</sup> The statute allows existing programs to continue as long as the ADR programs are effective and meet the purpose of the statute.<sup>56</sup> The ADR programs are used in

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45. *Id.* at 652-53.

46. *Id.*

47. Chris Stirewalt, *Mediators Help Many Find Middle Ground*, CHARLESTON DAILY MAIL, June 1, 1999, at 1C.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Christine Lepera & Jeannie Costello, *The Use of Mediation in the New Millennium*, N.Y. L.J., May 6, 1999, at 3, 3.

53. *Id.* President Clinton signed the Year 2000 Information and Readiness Disclosure Act (IRDA), which expressly advocates the use of mediation and other ADR methods for settlement of Y2K disputes. *Id.*; see also Year 2000 Information and Readiness Disclosure Act, 15 U.S.C. § 6601(a)(8) (1994 & Supp. V 1999) (advocating parties use mediation rather than litigation in resolving Y2K computer errors).

54. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 (1994 & Supp. IV 1999).

55. *Id.* § 651(b).

56. *Id.* § 651(c).



all civil actions,<sup>57</sup> and the statute specifically includes bankruptcy proceedings.<sup>58</sup> This law allows the district courts significant flexibility and discretion, "including the ability to determine the extent of the court's ADR program, what types are used, [and] what disputes are covered."<sup>59</sup> Further, this law sets no implementation deadline and instead prescribes immediate execution.<sup>60</sup>

#### IV. STATE STATUTES MANDATING MEDIATION

Numerous states jumped on the bandwagon, enacting some form of a mandatory mediation statute, giving courts the power to order parties to settle disputes in mediation rather than the courtroom.<sup>61</sup> Various individual state

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57. *Id.* § 651(b).

58. *Id.*

59. Eileen Barkas Hoffman, *The Impact of the ADR Act of 1998*, TRIAL, June 1, 1999, at 30, 31.

60. *Id.*

61. In Alabama, mediation is mandatory for all parties when the parties agree, upon motion by either party, and when the court orders the dispute into mediation. ALA. CODE § 6-6-20(b) (Supp. 2000). In Alaska, mediation may be ordered by the court if both parties agree to it for resolving a divorce. ALASKA STAT. § 25.24.140 (Michie 1998). Alaska's courts may also order mediation to resolve disputes under unfair trade practices and consumer protection. *Id.* § 45.50.536. In Arkansas, a farmer may request mandatory mediation of farm indebtedness. ARK. CODE ANN. § 2-7-303 (Michie 1996). In California, an insurer for earthquake damage is subject to an order for mandatory mediation. CAL. INS. CODE § 10089.75 (West Supp. 2000). In Colorado, the court may order mediation in any domestic case with the exception of domestic abuse cases. COLO. REV. STAT. ANN. § 13-22-311 (West 2000). The court may also order mandatory mediation to resolve parenting time disputes in Colorado. *Id.* § 14-10-129.5. Connecticut allows the court to order mediation in discriminatory practice complaints under Connecticut's Human Rights Act. CONN. GEN. STAT. ANN. § 46a-83 (West 1995 & Supp. 2000). Florida's courts may order parties into mandatory mediation for any civil action. FLA. STAT. ANN. § 44.102 (West 1998 & Supp. 2001). Florida also allows the court to order mediation in worker's compensation claims. *Id.* § 440.45. Mediation conferences are also mandatory in Florida for consumer and manufacturer disputes arising from the sale of recreational vehicles. *Id.* § 681.1097. Hawaii mandates mediation in cases of divorce but exempts battered spouses from such proceedings. HAW. REV. STAT. § 580-41.5 (1993 & Supp. 1999). Iowa allows the court to determine whether the parties in a domestic relations dispute will enter mediation to resolve their issues. IOWA CODE § 598.7A (2001). Iowa also allows the court to force farm creditors into mediation to resolve farmer-creditor disputes. *Id.* § 654A.6. Kansas courts may order mediation in any contested issue of child visitation or custody. KAN. STAT. ANN. § 23-602(a) (1995). The court may order parties to mediate disputes in a custody or visitation proceeding in Louisiana. LA. REV. STAT. ANN. § 9:332 (West 2000). Maine allows the state courts to order mediation in any domestic relations dispute. ME. REV. STAT. ANN. tit. 19-A, § 251 (West 1998). Maine also allows courts to mandate the parties enter into mediation to resolve visitation rights of grandparents. *Id.* tit. 19-A, § 1804. Maine grants courts the power to force parties in medical malpractice cases to use mandatory mediation panels. *Id.* tit. 24, § 2851. Montana provides for mandatory mediation in all workers' compensation disputes. MONT. CODE ANN. § 39-71-2408 (1999). District courts in Montana may also order mediation in any family law dispute. *Id.* § 40-4-301. Nevada requires mandatory mediation programs involving custody and visitation disputes. NEV. REV. STAT. §§ 3.475-.500 (1999). New Hampshire provides for actions

statutes are examined, recognizing the differences and similarities in provisions from state to state.

A. *A Closer Look at Specific State Mandatory Mediation Statutes*

1. *Indiana's Mediation Rule*

A closer look at Indiana's ADR court rules reveals that a court may order mediation without the consent of the parties in the lawsuit.<sup>62</sup> Indiana's court-annexed mediation rule also allows the judge to terminate the mediation process for good cause at any time and return the case to the court's docket.<sup>63</sup> Indiana's mediation rule also provides for the parties to object to the court-annexed mediation within fifteen days of the mandate to mediate the dispute.<sup>64</sup>

Further, the parties must participate in the court-ordered mediation in good faith.<sup>65</sup> If a party does not participate in good faith in the mediation proceedings, and this lack of effort will likely result in an unreasonable settlement, the mediator, as well as the court, can terminate the mediation.<sup>66</sup> The parties may also end mediation after attending two complete mediation sessions.<sup>67</sup> Sanctions for failing to comply with the mandated mediation or failing to mediate in good faith are relatively mild.<sup>68</sup> The harshest punishment is the assessment of

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transferred from the district court to be submitted to ADR before entering the Superior Court of New Hampshire. N.H. SUP. CT. R. 170. New Mexico states that disputes involving performance on a public works project must be submitted to mediation before seeking relief in a state court. N.M. STAT. ANN. § 13-4C-4 (Michie 1997). North Carolina provides for mandatory mediation in farm nuisance disputes. N.C. GEN. STAT. § 7A-38.3 (1999). North Carolina also mandates mediation in domestic disputes and in all civil superior court lawsuits. *Id.* §§ 7A-38.1, -38.4. North Dakota provides for court-ordered mediation in which custody, visitation, or support of children is in dispute, but a court may not order mediation in cases involving domestic violence. N.D. CENT. CODE § 14-09.1-01 to -02 (1997). North Dakota also specifically allows for mandatory mediation in disputes involving custody or visitation for grandparents. *Id.* § 14-09-05.1. Oregon mandates mediation in disputes involving child custody or parenting time. OR. REV. STAT. § 107.179 (1999). Pennsylvania allows state courts to establish mediation programs and order parties to attend mediation sessions in established programs. 23 PA. CONS. STAT. ANN. § 3901 (West Supp. 2000). South Carolina grants state courts the power to mandate mediation in family law disputes. S.C. CODE ANN. § 20-7-420(39) (Law. Co-op. 1985 & Supp. 1999). Texas provides for ADR methods to be mandatory and binding in parent-child disputes. TEX. FAM. CODE ANN. § 153.0071 (Vernon 1996 & Supp. 2001). The State of Washington enables the courts to mandate mediation in healthcare claims. WASH. REV. CODE ANN. § 7.70.100 (West Supp. 2001).

62. John R. Van Winkle, *Mediation: An Analysis of Indiana's Court-Annexed Mediation Rule*, 25 IND. L. REV. 957, 964 (1992).

63. *Id.*

64. *Id.* at 966.

65. *Id.*

66. *Id.* at 967.

67. *Id.*

68. *Id.* at 977-78.



mediation costs and attorney fees.<sup>69</sup> From this, one can see the ADR rule in Indiana provides an opportunity to parties who will not likely benefit from mediation to settle their dispute in court. This rule does not punish the parties for settling their dispute in court rather than by mediation.

## 2. *Nevada's Court Mandated Mediation Program*

Nevada hopped on the court-mandated mediation bandwagon to help unload the Nevada Supreme Court's backlog of cases.<sup>70</sup> The large number of backlogged cases is the result of allowing parties to appeal trial court decisions directly to the Nevada Supreme Court.<sup>71</sup> In Nevada, mediation is available to help settle cases already decided by a district court.<sup>72</sup> Such mediation sessions employ experienced settlement judges to help reduce the court's overcrowded docket and allow the parties a faster resolution of the dispute.<sup>73</sup>

## 3. *North Carolina's Program for Mandated Mediation in Civil Lawsuits*

North Carolina's mandatory mediation rule allows for parties in all civil actions in superior court to settle their disputes outside of the courtroom.<sup>74</sup> The rule requires all parties with settlement authority attend the mediation session.<sup>75</sup> Parties failing to comply with mediation rules are subject to sanctions.<sup>76</sup> The sanctions, which the party may appeal, include costs associated with the mediation session and attorney's fees.<sup>77</sup> Further, the parties are able to choose their own mediator within a certain prescribed time period.<sup>78</sup> If the parties fail to choose a mediator, the court will appoint one.<sup>79</sup> Similar to Indiana's mandated mediation rules, North Carolina's statute allows the parties to file a motion to stop mediation before the mediation occurs.<sup>80</sup> The court may grant the motion if good cause is shown.<sup>81</sup> This rule, again similar to Indiana's, gives parties the

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69. *Id.*

70. Lester H. Berkson, *Supreme Court Mandated Mediation—A Giant Step Forward*, NEV. LAW., Oct. 1998, at 22, 22.

71. *Id.*

72. *Id.*

73. *Id.*

74. N.C. GEN. STAT. § 7A-38.1 (1999).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*; see also IND. ALTERNATIVE DISPUTE RESOLUTION RULE 1.7 (allowing termination of ADR process under showing of good cause).

81. N.C. GEN. STAT. § 7A-38.1.

chance to end mediation before it even starts and to proceed to the courtroom for litigation of the dispute.<sup>82</sup>

#### 4. *Delaware's Mandatory Mediation Statute*

In Delaware, mediation is a voluntary process until a party falls under the statute mandating mediation.<sup>83</sup> The statute forces parties into mediation if before the litigation is filed the claims are for \$100,000 or more.<sup>84</sup> The statute requires parties to come to the mediation session prepared, which results in more costs associated with the mediation session.<sup>85</sup> Adding to the expense of mediation in Delaware, the statute allows witness testimony and cross-examination along with any exhibits the parties may want to use during the session.<sup>86</sup> Mediation under Delaware law is very different from that found in Indiana, Nevada, or North Carolina and costs much more than most mediation programs because of the mandated trial-like setting.<sup>87</sup>

#### 5. *Louisiana's Mediation Program*

Louisiana's court-ordered mediation program provides that all parties with authority to negotiate and enter binding agreements must attend the court-annexed mediation.<sup>88</sup> This statute is very broad and extremely short, stating that minimal meaningful participation in mediation must be completed within ninety days of notice of mediator appointment.<sup>89</sup>

#### 6. *Alabama's Mandatory Mediation Prior to Trial*

In Alabama, mediation is mandatory for all parties when the court orders mediation sessions, when all the parties agree to mediate their dispute, or upon motion by either party.<sup>90</sup> The court may impose any sanction appropriate under

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82. *Id.*; see also IND. ALTERNATIVE DISPUTE RESOLUTION RULE 1.7 (allowing termination of ADR process under showing of good cause); see also Van Winkle, *supra* note 62, at 967 (suggesting rules allow parties unwilling to use ADR to terminate the process).

83. Vanessa Mitchell, Note, *Mediation in Kentucky: Where Do We Go from Here?*, 87 KY. L.J. 463, 479 (1999); see also DEL. CODE ANN. tit. 6, § 7701 (1999).

84. Mitchell, *supra* note 83, at 479; see also DEL. CODE ANN. tit. 6, § 7702.

85. Mitchell, *supra* note 83, at 480; see also DEL. CODE ANN. tit. 6, § 7714.

86. Mitchell, *supra* note 83, at 480; see also DEL. CODE ANN. tit. 6, § 7714.

87. Mitchell, *supra* note 83, at 480; see also DEL. CODE ANN. tit. 6, § 7714; IND. ALTERNATIVE DISPUTE RESOLUTION RULE 1.4; N.C. GEN. STAT. § 7A-38.1 (1999); NEV. R. APP. P. 16.

88. LA. REV. STAT. ANN. § 9:4108 (West Supp. 2000).

89. *Id.* The act applies to all civil cases but includes a limited exception for the Parish of Orleans and the City of New Orleans through August 31, 1999. *Id.*

90. ALA. CODE § 6-6-20(b) (Supp. 2000).

Rule 37 of the Alabama Rules of Civil Procedure<sup>91</sup> if a party fails to mediate as required under the statute.<sup>92</sup> The statute does not state that the parties must mediate in good faith, but defers to the court's discretion to determine if the parties failed to mediate as required under the statute.<sup>93</sup>

#### 7. *Montana's Appellate Alternative Dispute Resolution Program*

Montana mandates mediation in all civil appeals involving workers' compensation, money judgments, and domestic relations.<sup>94</sup> The statute limits the time in which mediation must take place.<sup>95</sup> The parties and the mediator have seventy-five days from the date an appeal is filed to complete the mediation process.<sup>96</sup> Further, the statute gives the parties the chance to select a mediator in a certain time period.<sup>97</sup> However, after the period passes, the court will select a mediator for the parties.<sup>98</sup> Again, this statute is broad in parts, offering the parties some choices, such as the selection of a mediator, yet specific in stating the cases subject to mandatory mediation.<sup>99</sup>

#### 8. *Maine's Mandatory Mediation Statute for Domestic Relations*

In Maine, courts have the authority to mandate mediation at any time on any issue arising in a domestic relations case.<sup>100</sup> This statute imposes severe sanctions on parties failing to appear for mediation and failing to mediate in good faith.<sup>101</sup> Possible sanctions include further mediation, dismissal of the action, default judgment, attorney's fees, or any other sanction the court deems appropriate.<sup>102</sup> The harshness of the sanctions leaves parties little room to enter the courtroom to settle a dispute, considering the court must decide whether good faith was involved in the mediation sessions each time an agreement is not reached in mediation.<sup>103</sup>

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91. ALA. R. CIV. P. 37(b) (allowing sanctions for failure to comply with orders from the court in which the action is pending).

92. ALA. CODE § 6-6-20.

93. *Id.*

94. MONT. R. APP. P. 54.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. ME. REV. STAT. ANN. tit. 19-A, § 251 (West 1998).

101. *Id.*

102. *Id.*

103. *See id.*

B. *Areas of Law in Which Mediation is Mandated  
Most Frequently*

1. *Family Law*

As the number of divorces grows in the United States, the number of statutes mandating mediation for custody disputes is on the rise.<sup>104</sup> The use of mandatory mediation in custody disputes allows for a less painful and traumatic experience for children when compared to litigation.<sup>105</sup> Mandatory mediation for custody disputes allows parents to cooperate and compromise to reach a resolution.<sup>106</sup>

Furthermore, with overcrowded dockets, courts rarely have the time necessary to fully and adequately assess the parties' disputes and then reach fair decisions in the children's best interests.<sup>107</sup> With mandatory mediation, courts send parties to a mediator, who then spends the quality time needed with the parties, allowing the parties to settle their disputes together.<sup>108</sup> Mandatory mediation in custody disputes also relieves much of the hostility and tension created in an adversarial setting.<sup>109</sup> Mediation is not a win-lose situation, as are many court proceedings.<sup>110</sup> Mediation allows the parties to settle the dispute in the best interests of their children, whom the parents, and not the courts, know best.<sup>111</sup>

In 1981, California enacted the first mandatory mediation law addressing custody disputes,<sup>112</sup> and it continues to amend its law as new studies reveal concerns with mandatory mediation in custody disputes.<sup>113</sup> California allows courts to waive mandatory mediation in cases involving spousal abuse.<sup>114</sup>

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104. Christy L. Hendricks, Note, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 32 U. LOUISVILLE J. FAM. L. 491, 493 (1994); see also Maggie Vincent, Note, *Mandatory Mediation of Custody Disputes: Criticism, Legislation, and Support*, 20 VT. L. REV. 255, 271 (1995).

105. Hendricks, *supra* note 104, at 492.

106. *Id.* at 494.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 495.

111. *Id.* at 494.

112. *Id.* at 496; see CAL. CIV. CODE § 4607(a) (West 1981) (repealed 1982).

113. Dane A. Gaschen, Note & Comment, *Mandatory Mediation: The Debate Over its Usefulness Continues*, 10 OHIO ST. J. ON DISP. RESOL. 469, 471 (1995).

114. *Id.* at 472; see CAL. FAM. CODE § 3170(a) (West Supp. 2000). Subsection (b) of section 3170 states that Family Court Services will handle domestic violence cases under a different set of rules and guidelines. CAL. FAM. CODE § 3170(b).

Many states followed California's lead; although some statutes allow courts to mandate mediation at their discretion or offer mediation as an option for the disputing parties, others provide that parties in custody disputes may request mediation at any time before final judgment.<sup>115</sup> In some cases, mandatory mediation for custody disputes may not be appropriate.<sup>116</sup> Many states with mandatory mediation statutes for custody disputes allow courts to waive the mediation in cases involving uneven bargaining power, domestic abuse, or upon a showing of good cause.<sup>117</sup>

Most statutes stipulate that before settling a custody dispute in a courtroom the parties must mediate the issue in good faith and attend one or two mediation sessions.<sup>118</sup> After attending at least one session—in some jurisdictions two sessions—the parties may then decide to discontinue mediation and enter the courtroom to settle their dispute over custody.<sup>119</sup> Some states allow the mediator to make a recommendation to the court if the parties do not reach an agreement in the mediation sessions.<sup>120</sup> Many courts will also sanction parties for failing to mediate in good faith or mediate at all, with some statutes allowing fairly steep penalties for violators of court-mandated mediation.<sup>121</sup>

One judge in Oklahoma requires parties involved in custody battles to mediate their dispute.<sup>122</sup> However, very few county courts in Oklahoma require mandatory mediation in custody disputes.<sup>123</sup> The courts that do mandate mediation do not allow yelling or screaming during a face-to-face negotiation with the mediator present to "serve as a mouthpiece for each party."<sup>124</sup> Further, the Oklahoma state court judges who mandate mediation, including Judge Shepard, do not require it in cases involving domestic abuse.<sup>125</sup> In Tulsa, judges encourage parties to mediate when the parents cannot agree on a parenting plan for their children.<sup>126</sup> The parties may be able to pass on mediation if they can convince the court that mediation would not be appropriate in their case.<sup>127</sup>

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115. Hendricks, *supra* note 104, at 496-98.

116. *Id.* at 498.

117. *Id.* at 499.

118. *Id.*

119. *Id.* at 499-500.

120. *Id.* at 501.

121. *Id.* at 504-05.

122. Kelly Kurt, *Judges Force Mediation in Custody Battles*, THE J. REC. (Oklahoma City), Feb. 15, 1999, at 3. In Wagoner County, Oklahoma, Judge Darrell Shepherd forces parties to mediate custody disputes because he believes children are too often left scarred by the divorce proceedings due to the tendency of parents to use the children as weapons. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. See Robertson, *supra* note 6, at A-1.

127. *Id.*

Texas courts mandate mediation in all divorce cases involving any area of dispute.<sup>128</sup> Individuals involved in mandatory mediation in Texas find it saves time, gives the parties control over the dispute, and allows for a kinder, gentler divorce than those received in adversarial settings.<sup>129</sup> Studies show that seventy to ninety percent of the parties involved in mandated mediation are satisfied with the outcome of their sessions and agreements.<sup>130</sup>

Mediation may not be appropriate in all situations, including divorces involving violence, alcoholism, or mental impairment.<sup>131</sup> Some state statutes prohibit mandatory mediation in certain divorce cases.<sup>132</sup> In many cases of divorce involving children, the grandparents are not remembered.<sup>133</sup> Since 1989, the American Bar Association and other groups have recommended mediation for grandparent visitation disputes.<sup>134</sup> Although few states mandate mediation in such cases, courts will uphold such agreements as a matter of contract if the parties file the mediation agreement with the court.<sup>135</sup>

## 2. Civil Cases

a. *Employment Disputes Mediated.* The increasing use of mediation to solve labor and employment disputes reflects the popularity of arbitration in this area.<sup>136</sup> This increase is due to fewer employees being part of a labor union along with fewer collective bargaining agreements.<sup>137</sup> Furthermore, mediation presents an easier and less expensive alternative to settle a dispute.<sup>138</sup>

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128. Carolyn Poirot, *A House Divided: Mediation May not Ease the Pain of Divorce, but for Increasing Numbers of Texas Couples, it Humanizes the Process*, FORT WORTH STAR-TELEGRAM, Mar. 2, 1999, at 1E.

129. *Id.*

130. Meg Lundstrom, *A Way to 'Take the War Out' of Divorce*, BUS. WK., Nov. 16, 1998, at 228, 228.

131. *Id.*

132. *Id.*; see, e.g., COLO. REV. STAT. ANN. § 13-22-311 (West 2000) (prohibiting courts from referring to mediation cases involving victims of abuse); LA. REV. STAT. ANN. § 9:363 (West 2000) (same); N.C. GEN. STAT. § 50-13.1(c) (1999) (allowing courts to waive mediation for good cause); N.D. CENT. CODE § 14-09.1-02 (1997) (prohibiting mandatory mediation in cases of abuse); TENN. CODE ANN. § 36-4-131 (Supp. 2000) (restricting court ordered mediation in cases of abuse).

133. See Christine Larson, *Holding Fast to Grandchildren: When Their Sons and Daughters Divorce, Grandparents are Adopting Tough Tactics to Preserve Family Ties*, WALL ST. J. ENCORE, June 7, 1999, at 8.

134. *Id.*

135. *Id.*

136. EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* 313 (1997).

137. *Id.*

138. *Id.*



In another related area of employment and labor disputes, Montana has enacted a statute mandating mediation of workers' compensation disputes.<sup>139</sup> The mandatory mediation session is non-binding and allows the mediator to issue a solution to the dispute before the parties file in workers' compensation court.<sup>140</sup> The purpose behind the statute is to allow for a quick and inexpensive resolution to a workers' compensation dispute.<sup>141</sup> Further, this statute requires the parties to present their claim fully to the mediator during the mediation sessions before filing in court.<sup>142</sup>

b. *Court-Annexed Mediation for Bankruptcy Disputes.* Due to court docket overcrowding and the expense of litigation, many courts have begun to use court-annexed mediation.<sup>143</sup> Many areas of bankruptcy are mediated, including: single creditor claims, liquidation of multiple creditor claims, and reorganization plans.<sup>144</sup> In 1986, the Bankruptcy Court for the Southern District of California was the first to establish a bankruptcy mediation program.<sup>145</sup> Other district bankruptcy courts followed and began adopting pilot mediation programs.<sup>146</sup> The Southern District of California court refers cases to mediation,<sup>147</sup> while in Virginia, the court or the parties may request mediation for resolution of bankruptcy disputes.<sup>148</sup> In Florida, similar to Virginia, the court or the parties can recommend mediation to resolve the dispute.<sup>149</sup> Not only have states enacted mandatory mediation statutes, but the Bankruptcy Code itself encourages mandatory mediation to promote just, speedy, and inexpensive resolution.<sup>150</sup> Furthermore, in 1990, Congress enacted the Judicial Improvements Act that allows federal district courts to refer cases for ADR, including mediation.<sup>151</sup>

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139. MONT. CODE ANN. § 39-71-2408 (1999).

140. *Id.*

141. *Id.* § 39-71-2406.

142. *Id.*

143. Steven R. Wirth & Joseph P. Mitchell, *A Uniform Structural Basis for Nationwide Authorization of Bankruptcy Court-Annexed Mediation*, 6 AM. BANKR. INST. L. REV. 213, 213-14 (1998).

144. *Id.* at 218.

145. *Id.* at 217.

146. *Id.*

147. *Id.* at 218; S.D. CAL. L.B.R. 7016-6(e) (2000).

148. Wirth & Mitchell, *supra* note 143, at 218; VA. CODE ANN. § 8.01-576.5 (Michie 1991).

149. Wirth & Mitchell, *supra* note 143, at 218-19; *see also* N.D. FLA. L.B.R. 7016-1 (2000); M.D. FLA. L.B.R. 9019-2(b) (2000); VA. CODE ANN. § 8.01-576.5 (Michie 2000).

150. Wirth & Mitchell, *supra* note 143, at 221; *see also* 11 U.S.C. § 105(d) (1994).

151. Wirth & Mitchell, *supra* note 143, at 220; *see also* 28 U.S.C. 473(a)(6)(B) (1994).

### 3. *Mandatory Mediation in Medical Malpractice Disputes*

Courts in Michigan have started mandating mediation in medical malpractice disputes to alleviate the problems arising in such disputes.<sup>152</sup> The mediation program in Michigan uses a mediation evaluation panel rather than one mediator.<sup>153</sup> The program gives each party fifteen minutes to testify and then the panel evaluates the claims.<sup>154</sup> The parties can either accept the evaluation or proceed to litigate in court.<sup>155</sup> The mediation occurs early in the process—many critics believe too early—which leads to insufficient discovery for use during mediation panel proceeding.<sup>156</sup>

#### C. *Penalties in Mandatory Mediation*

Along with mandating mediation, many state statutes grant courts the power to sanction parties for failing to attend mandatory mediation sessions and for failing to mediate in good faith.<sup>157</sup> In Utah, if a party fails to participate in mediation in good faith, the court can assess an amount in excess of the actual cost of mediation.<sup>158</sup> The Minnesota statute lists ways in which the parties may violate the mediation order by not participating in good faith during the mediation sessions.<sup>159</sup> For example, the Minnesota statute mandates mediation for farmer-lender disputes.<sup>160</sup> If the creditor fails to mediate in good faith, the court may suspend the creditor's remedies for a period of 180 days and require the creditor to pay attorney's fees and costs of the court-supervised mediation.<sup>161</sup> In Michigan, if the plaintiff rejects the mediation panel's evaluation, the plaintiff must fair ten percent better than the panel's decision or pay actual costs to the defendant.<sup>162</sup>

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152. Walter Orlando Simmons, *An Economic Analysis of Mandatory Mediation and the Disposition of Medical Malpractice Claims*, 6 J. LEGAL ECON. 41, 41 (1996).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 44.

157. See, e.g., MICH. COMP. LAWS § 423.9 (West 1995) (requiring parties in a labor dispute to mediate in good faith); MINN. STAT. ANN. § 583.27(a) (West 2000) ("The parties must engage in mediation in good faith."); UTAH CODE ANN. § 30-3-38 (1998 & Supp. 2000) ("If a parent fails to cooperate in good faith in mediation or services . . . a court may order . . . a temporary change in custody or visitation.").

158. UTAH CODE ANN. § 30-3-38.

159. MINN. STAT. ANN. § 583.27.

160. *Id.*

161. *Id.*

162. MICH. CT. R. § 2.403(0).

Many parties sanctioned for failing to mediate in good faith have challenged such penalties.<sup>163</sup> In *Great Lakes Gas Transmission, L.P. v. Markel*,<sup>164</sup> the plaintiffs rejected the mediation panel's evaluation and proceeded to court where the jury returned a verdict lower than the mediation panel's decision.<sup>165</sup> The lower court did not grant the defendant sanctions, but the appellate court reversed stating that the lower court erred in not sanctioning the plaintiff for failing to receive more than ten percent greater than the mediation panel's award.<sup>166</sup>

In *Armenta v. Goodridge*,<sup>167</sup> the court upheld the lower court's sanction against the defendants for their failure to attend a mediation session.<sup>168</sup> The defendants argued that the sanctions were dropped as a result of the settlement reached between the parties.<sup>169</sup> The Court of Appeals for the District of Columbia held the agreement was silent as to the sanctions and, therefore, the court could enforce the sanctions.<sup>170</sup>

## V. CRITIQUE OF MANDATED MEDIATION

### A. What Works with Mandatory Mediation

With all the problems in the United States legal system, including the expense, time, and disruptive nature of the process, mediation is fast becoming a way to resolve conflict with benefits to all involved.<sup>171</sup> Mandatory mediation is being used all over the country. In federal and state courts alike, mediation not only relieves pressure on the court's docket, but also may allow parties to settle their disputes without the combative nature of litigation, keeping business and personal relationships intact.<sup>172</sup>

Mandatory mediation allows parties that are reluctant to initiate settlement discussions—due to a feeling of weakness related to giving in or to a fear of not using litigation—the opportunity to have the court order the parties into

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163. See generally *Great Lakes Gas Transmission, L.P. v. Markel*, 573 N.W.2d 61 (Mich. Ct. App. 1997) (holding that the company was entitled to mediation sanctions against its owners); *Armenta v. Goodridge*, 682 A.2d 221 (D.C. 1996) (holding that defendants were required to pay sanctions in the form of attorneys' fees for their failure to appear at mediation).

164. *Great Lakes Gas Transmission, L.P. v. Markel*, 573 N.W.2d 61 (Mich. Ct. App. 1997).

165. *Id.* at 62.

166. *Id.* at 63-64.

167. *Armenta v. Goodridge*, 682 A.2d 221 (D.C. 1996).

168. *Id.* at 222.

169. *Id.*

170. *Id.*

171. Hutchinson, *supra* note 1, at 85.

172. *Id.* at 85, 88-89.

settlement discussions.<sup>173</sup> With many state mediation programs in their infancy, mandatory mediation is necessary to inform parties and lawyers about this type of alternative dispute resolution.<sup>174</sup> Judicially mandated mediation "will also result in the creation of a body of skilled neutrals who specialize in mediation, which, in itself, will enhance the process and encourage lawyers to use mediation on a voluntary basis."<sup>175</sup> Not only should practicing attorneys become familiar with mediation and other ADR processes, information on dispute resolution possibilities other than litigation could also be valuable for their clients.<sup>176</sup>

Because mandatory mediation is nonbinding in most situations, the benefits far outweigh the risks.<sup>177</sup> With nonbinding mandatory mediation, the parties are able to enter settlement discussions and still use the court system to resolve their dispute if the parties are not able to reach an agreement.<sup>178</sup> Mandatory mediation allows the parties to consider settlement earlier in the dispute process to potentially save both time and money.<sup>179</sup>

Mediation, even when mandated, gives both parties the chance to view themselves as winners, unlike the litigation process in which one party emerges from the courtroom as a loser.<sup>180</sup> "Parties in mediation, compared to those in adjudication, tend to be more satisfied with the process and to see it as more fair."<sup>181</sup> Mediation allows for compromises rather than victory or defeat.<sup>182</sup> Mandatory mediation used for settling divorce disputes, for example, allows the parties to decide themselves what is best for them and the children, rather than the court.<sup>183</sup> Mediation presents couples with an opportunity to focus on the

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173. *Id.* at 89.

174. *Id.* at 90.

175. *Id.*

176. Robert E. Nies, *ADR: Use It or Lose—Clients, That Is*, N.J. L.: THE WKLY. NEWSPAPER, July 5, 1999, at 8.

177. See David S. Winston, Note and Comment, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water. . ."*, 11 OHIO ST. J. ON DISP. RESOL. 187, 190-93 (1996); see also Hutchinson, *supra* note 1, at 89-91.

178. Winston, *supra* note 177, at 190-92; Hutchinson, *supra* note 1, at 91.

179. Winston, *supra* note 177, at 190-91; see *Mediation Is Helping Cut Court Costs*, DESERET NEWS (Salt Lake City), Dec. 11, 1998, at B12. Utah attorneys have discovered the state's mandatory mediation program allows cases to settle earlier, reducing the costs of litigation. *Mediation Is Helping Cut Court Costs*, *supra*, at B12.

180. Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1092 (1990) [hereinafter *Mandatory*].

181. Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 568 (1997).

182. Russ Wiles, *Mediation Gaining Ground in Small-Dollar Disputes*, ARIZ. REPUBLIC, June 20, 1998, at B5.

183. See Kelly Kurt, *Mediation Required in Oklahoma Divorce to Safeguard Children*, DALLAS MORNING NEWS, Feb. 18, 1999, at 23A.

needs of their children while resolving conflicts in a less adversarial process, thus leaving room for healing and a greater possibility of a kinder resolution.<sup>184</sup>

There is also a need for alternatives to litigation when entering a courtroom "simply is the wrong tool for the particular problem."<sup>185</sup> Mandatory mediation allows the parties to have a direct hand in the outcome of their dispute.<sup>186</sup> Mandatory mediation gives the parties the chance to discover creative solutions to their conflict that may not have been considered or available in litigation.<sup>187</sup> Further, mandatory mediation ensures that the necessary parties to the dispute will be present to discuss settlement possibilities.<sup>188</sup>

### B. Critics of Mandatory Mediation

Some critics believe that mandatory mediation takes the power of the legal system out of the parties' hands and puts the courts in control, just to reduce their overcrowded docket.<sup>189</sup> Many critics also feel that mandatory mediation does not give a person who was wronged a day in court—a fundamental component of the United States legal system.<sup>190</sup> Another critic states: "You can't avoid being sued, but you should have the right to answer before the jury, instead of having settlement virtually extorted from you by piling on extraordinary costs of litigation in the form of settlement conferences."<sup>191</sup> This Part looks at the critics' viewpoint of mandatory mediation and reasons behind the criticism.

Many "[c]ritics have raised the concern that coercion *into* the mediation process translates into coercion *in* the mediation process, creating undue settlement pressures that produce unfair outcomes."<sup>192</sup> Undue settlement pressure is most readily apparent when a weaker party enters into mediation with a dominant party and the weaker party becomes vulnerable to a forced settlement that may not be in his or her best interest.<sup>193</sup> Some states note the problems of dominant parties mediating against weaker opponents and have enacted statutes

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184. See *id.*

185. Nies, *supra* note 176, at 10.

186. Poirot, *supra* note 128, at 1E.

187. See *Mandatory*, *supra* note 180, at 1092.

188. See *id.* at 1093-94.

189. See *Hutchinson*, *supra* note 1, at 90-91.

190. *Id.*

191. Hicks, *supra* note 38, at 14.

192. Wissler, *supra* note 181, at 565 (emphasis in original).

193. *Id.*

to remedy the problems.<sup>194</sup> One example is a Louisiana statute allowing courts to waive mediation in cases involving domestic and family abuse.<sup>195</sup>

Other critics believe the statutes are not fixing the problem of dominating parties.<sup>196</sup> The power imbalance simply may not be obvious to the courts or the mediator.<sup>197</sup> Critics also believe that the parties, when ordered to participate in mandatory mediation, may not have sufficient information with which to make an appropriate settlement.<sup>198</sup> Some of the benefits of mediation are lost when the parties bring insufficient information to the mediation table.<sup>199</sup> Instead of the process working in the best interests of the parties, the process only works for the best interests of the court by reducing the backlog on its docket.<sup>200</sup>

In federal and state courts across the nation there is much discussion about the participation standards in mandatory mediation statutes.<sup>201</sup> Most mediation statutes do not state the minimum level of participation required for mandatory mediation.<sup>202</sup> Parties participating in mandatory mediation do not know the limits of participation, which results in a "discretionary decision by the parties and inconsistent results from the process."<sup>203</sup> Many statutes provide for a "good-faith" factor, but do not explain the level of participation required by the standard calls.<sup>204</sup>

In *Texas Parks and Wildlife Department v. Davis*,<sup>205</sup> the trial court sanctioned the Parks Department for failure to participate in mandated mediation in good faith.<sup>206</sup> The Texas Court of Appeals reversed, stating that the court may order parties to participate in mediation as mandated by state statutes, but cannot force the parties to mediate in good faith or to settle the dispute.<sup>207</sup> This case is

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194. See Vincent, *supra* note 104, at 271.

195. LA. REV. STAT. ANN. § 9:363 (West 2000); see also Vincent, *supra* note 104, at 272 n.128 (stating a party who demonstrates domestic abuse by the other spouse to the court's satisfaction will not be referred to mediation).

196. Wissler, *supra* note 181, at 574-75.

197. *Id.*

198. Hutchinson, *supra* note 1, at 92.

199. See *id.*

200. *Id.*

201. Winston, *supra* note 177, at 193-97.

202. *Id.* at 197.

203. *Id.*

204. *Id.*; see, e.g., COLO. REV. STAT. ANN. § 13-22-311 (West 2000); KAN. STAT. ANN. § 72-5430(c)(4) (1995); ME. REV. STAT. ANN. tit. 19-A, § 1804 (West 1998); MINN. STAT. ANN. § 583.27 (West 2000); MONT. CODE ANN. § 39-71-2411 (1999); OKLA. STAT. ANN. tit. 12, § 1824 (West Supp. 2001); UTAH CODE ANN. § 30-3-38 (1998 & Supp. 2000).

205. Tex. Parks & Wildlife Dep't v. Davis, 988 S.W.2d 370 (Tex. App. 1999).

206. *Id.* at 375.

207. *Id.*



one example of a mandatory mediation statute that fails to provide useful or meaningful participation standards for the parties or the courts.<sup>208</sup>

In *State v. Carter*,<sup>209</sup> the Indiana Court of Appeals reversed sanctions imposed by a lower court against the state for failing to mediate in good faith, as required by Indiana's mandatory mediation statute.<sup>210</sup> The court stated that the mandatory mediation rule requires the parties to mediate in good faith, but in this case, the court found the state did not act in bad faith.<sup>211</sup> Again, this case supports the critics' arguments that the participation standards in state mandatory mediation statutes generate confusion and inconsistent results. The courts must decide what the legislature meant by "good-faith" standards in the statutes and how to prevent further inconsistent results.<sup>212</sup>

The court of appeals in Indiana took the mandatory mediation participation standard a bit further by stating the parties are not compelled to reach a settlement agreement.<sup>213</sup> Courts can order parties to participate in mediation in good faith, but the courts cannot force the parties to accept a settlement offer or agreement.<sup>214</sup> Further, "[i]f sanctions are imposed in situations where no settlement is agreed upon, parties may refuse to participate in mediation."<sup>215</sup> This may lead to a breakdown in the justifications for mandating mediation.<sup>216</sup> The court also stated that the lower court failed to set forth any legal or factual basis in its finding of bad faith against the state.<sup>217</sup>

In Florida, the District Court of Appeals for the Fourth Circuit agreed with the Indiana Court of Appeals, finding the mandatory mediation statutes "do not require that parties actually settle cases."<sup>218</sup> The Florida District Court stated that the statutes do not even require a party make an offer at mediation, and thus, refusal to make an offer is not alone participating in bad faith.<sup>219</sup> The problems associated with participation standards in mandatory mediation statutes result in loss of time, money, and diminished efficiency for all parties, including courts

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208. See generally Winston, *supra* note 177, at 197-205 (discussing possible participation standards and proposing an objective participation standard in mandatory mediation).

209. *State v. Carter*, 658 N.E.2d 618 (Ind. Ct. App. 1995).

210. *Id.* at 624; see also IND. ALTERNATIVE DISPUTE RESOLUTION RULE 2.1.

211. *State v. Carter*, 658 N.E.2d at 621-22.

212. Winston, *supra* note 177, at 197-205.

213. *State v. Carter*, 658 N.E.2d at 623.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 622.

218. *Avril v. Civilmar*, 605 So. 2d 988, 989 (Fla. Dist. Ct. App. 1992); see also *State v. Carter*, 658 N.E.2d at 623.

219. *Avril v. Civilmar*, 605 So. 2d at 990.

and the appointed mediator, and possibly even the loss of mediator confidentiality.<sup>220</sup>

Studies show, however, the mediation process may have even less of an impact on the parties' efficiency and time involvement than originally believed.<sup>221</sup> Studies have found that there is no reduction in expenditures of the parties' time and costs attributable to mediation.<sup>222</sup> Even more importantly, studies also indicate mandatory mediation has "not reduced court delays, caseloads, or per-case costs."<sup>223</sup>

Other critics believe mandatory mediation takes the power of the judicial system away from the participants.<sup>224</sup> Mandatory mediation "goes too far and encroaches on the rights of people who are entitled to their day in court."<sup>225</sup> People have the right to use the court system to litigate their dispute, but they are being forced to increase their litigation expenses because of mandatory mediation.<sup>226</sup>

## VI. CONCLUSION

As mandatory mediation continues to become more popular and as more states enact statutes forcing parties into mediation to resolve their disputes, more litigation is likely to result due to the challenges of understanding the individual state statutes. As discussed above, very few of the statutes are clear in their participation standards, which leads to litigation and inconsistent decisions among the courts.<sup>227</sup>

Mediation is an effective way to resolve disputes between parties without the adversarial overtures of courtroom litigation, but may not be appropriate for all parties.<sup>228</sup> Although courts and states have tried to resolve some of the problems regarding power imbalances and domestic and family abuse, the statutes do not take care of all the problems associated with mandatory mediation.<sup>229</sup> Before mandatory mediation will provide the best solution for the parties involved in a conflict, all avenues need to be explored. As discussed in

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220. Winston, *supra* note 177, at 200. Loss of mediator confidentiality may result from unclear mediation statutes or from statutes that fail to define the mediator's confidentiality. *Id.*

221. Wissler, *supra* note 181, at 569.

222. *Id.*

223. *Id.* at 570.

224. *Id.* at 571-72.

225. Robertson, *supra* note 6, at A-1; *see also* Wissler, *supra* note 181, at 571-72.

226. Robertson, *supra* note 6, at A-1.

227. *See e.g.*, *Avril v. Civilmar*, 605 So. 2d 988, 989 (Fla. Dist. Ct. App. 1992); *State v. Carter*, 658 N.E.2d 618, 620 (Ind. Ct. App. 1995); *Tex. Parks & Wildlife Dep't v. Davis*, 988 S.W.2d 370, 375 (Tex. App. 1999).

228. Hicks, *supra* note 38, at 14.

229. *Id.*

this Note, many states have enacted mandatory mediation laws, but not all have listened to the critics and analyzed the studies in enacting such statutes.<sup>230</sup> The intent of this Note is to provide an overview of mandatory mediation, a discussion of individual state mandatory mediation statutes, and the opinions of critics who support and oppose mandatory mediation. Mediation is here to stay, but how and why the courts turn to mediation is still open to discussion.

*Holly A. Streeter-Schaefer*

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230. See *supra* Part IV.

