MANDATORY EARLY MEDIATION: A VISION FOR CIVIL LAWSUITS WORLDWIDE

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I. INTRODUCTION

Mediation has been shown to provide significant benefits to both litigants and court systems. Mediation surveys and statistics confirm that its use reduces costs, saves time, and increases satisfaction in the judicial system. Every year, there are 100 million or more civil lawsuits filed across the globe. Most court systems appear to be overworked and litigation costs are significant, even prohibitive. In many instances, lawsuits can take years before obtaining judicial disposition often resulting in justice delayed, or in other words, justice denied. Even in the most developed and mediation-friendly court systems, mediation is largely underused by disputants. Governments, court systems, and disputants should consider implementing early mandatory mediation with an easy opt-out for all civil cases.

This article will present evidence from around the world to help make the case to parties, practitioners, and legislative decisionmakers to adopt early mandatory mediation in their jurisdictions. Doing so will likely increase access to justice, reduce costs, save resources, reduce time to final adjudication, increase satisfaction of the legal system, and will otherwise promote more effective and efficient peacemaking. While each jurisdiction is unique and will require individual adaptation, this article presents basic characteristics to consider. This article does not attempt to address the myriad differences in the various legal systems of the world. Additional surveys and studies should be done to help determine the best way for each region, nation, jurisdiction, and court system to tailor and implement a mandatory early mediation program.

Legal systems with some type of mandatory mediation requirement, either court-annexed or otherwise, have seen great benefits. The world continues to evolve in ever complex ways, and the current court systems are failing to satisfy the dispute resolution needs of the people. If jurisdictions will adopt early mandatory mediation with the limited characteristics espoused in this article, the author believes the world will be closer to achieving increased efficiency, more process satisfaction, and increased access to justice.

II. CIVIL LAWSUITS

There are millions of civil litigation lawsuits filed every year throughout the world. In the United States of America, it is estimated that there are over 15 million civil lawsuits filed in the state courts alone each year.[1]

[1] *See Total Incoming Civil Cases in State Trial Courts, 2007–2016*, CT. STAT. PROJECT (2006), http://www.courtstatistics.org/NCSC-Analysis/Civil/~/media//F0CD3650C3984BE394C222FBEF9CD73F.ashx (including only information through 2016). It should be noted that from 2007 through 2011 there were approximately 18 million civil lawsuits filed in the various state courts and the number

There are an additional approximately 300,000 civil cases filed in the United States District Courts.[2] In California state court alone, there were more than 1.2 million civil lawsuit filed in 2017, which includes family law, juvenile law, and probate cases.[3] In China in 2015, there were approximately 10 million civil lawsuits filed.[4] In the United Kingdom in 2018, there were more than 2 million civil lawsuits filed.[5] In Italy in 2014, there were more than 4 million civil lawsuits filed.[6]

The number of new civil lawsuits filed each year throughout the world is likely more than 100 million.[7] This figure is astonishing for the sheer numbers involved, but it only tells part of the story. Cases can take years to reach final resolution, imposing significant financial and mental stress on the parties. Litigation is often cost prohibitive, leaving vast numbers of potential litigants without adequate access to justice. The current worldwide civil

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continued to decline but seems to have leveled out at 15 million cases. *Id.* When criminal cases are included in the numbers, the estimate jumps to approximately 40 million. *Top court filing statistics from around the country*, ONE LEGAL (Apr. 3, 2019), https://www.onelegal.com/blog/top-court-filing-statistics-from-around-the-country/.

[2] *See Table C—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary*, U.S. CTS.—STATISTICAL TABLES FOR THE FEDERAL JUDICIARY (Dec. 31, 2019), https://www.uscourts.gov/statistics/table/c/statistical-tables-federal-judiciary/2019/12/31.

[3] *See 2018 Court Statistics Report, Statewide Caseload Trends 2007–2008 Through 2016–2017*, JUD. COUNCIL CAL. i, xiv–xvi (2018), https://www.courts.ca.gov/documents/2018-Court-Statistics-Report.pdf. The 1.2 million civil case figure does include small claims filings, which consisted of 163,575 cases in 2017. *Id.* at xiv.

[4] *See Big data from the Supreme People's Court*, SUPREME PEOPLE'S CT. MONITOR (Mar. 20, 2016), https://supremepeoplescourtmonitor.com/tag/china-court-statistics-2015/.

[5] *See* Georgina Sturge, Number CBP 8372, HOUSE OF COMMONS LIBR. BRIEFING, COURT STATISTICS FOR ENGLAND AND WALES 7 (Dec. 16, 2019), available for download at http://researchbriefings.files.parliament.uk/documents/CBP-8372/CBP-8372.pdf.

[6] *See* Giovanni Matteucci, *Mandatory Mediation, The Italian Experience*, 16 REVISTA ELECTRONICA DE DIREITO PROCESSUAL 193 (2015). The chart shows civil proceedings per legal year and separates them into "registered," "defined," and "pending." *Id.* For purposes of the 4 million figure, only the "registered" and "defined" numbers were used, the "pending" cases would more than double the number.

[7] The 100 million civil lawsuit figure was estimated by extrapolating the 31 million civil lawsuits filed annually in the U.S., China, UK, and Italy, to the entire world. There are 193 member states in the United Nations and more than 31 million civil lawsuits are filed in just four of those member states, with the number being much larger if "pending" cases in Italy was factored in. *See* Matteucci, *supra* note 6. It is difficult to find accurate information about the number of civil lawsuits filed in many countries either because the information is not tracked, or the information is not made public/easily accessible. When considering countries with significant populations, economies, and established judicial systems, such as Russian, India, Australia, Ghana, South Africa, Nigeria, Egypt, Algeria, Brazil, Mexico, Canada, France, Germany, Singapore, Japan, Chile, South Korea, Argentina, Costa Rica, Ecuador, Greece, Hungary, Israel, Netherlands, New Zealand, Norway, Poland, Portugal, Ukraine, Switzerland, Turkey, United Arab Emirates, Uruguay, and others, it seems highly probable that the total number of civil lawsuits filed annually throughout the world exceeds 100 million.

litigation caseload requires tremendous allocation of resources for the court infrastructure and staffing needs. This is a small sampling of concerns that come from the reality of having 100 million or more new civil cases filed throughout the world each year; and imagine how many more cases there would be if access to justice was improved. Mediation should be playing a bigger role than it is to help address these and the host of other issues inherent in the world's current court systems.

Most cases in the United States end up being resolved prior to trial. In California during 2017, there were 186,786 civil trials (jury and bench trials), which included 96,099 small claims trials.[8] Of course, not all the 2017 civil trials held in California were from the approximately 1.2 million new civil case filings that year, but assuming the filing trend was relatively flat over the preceding two years, this equates to just over 15% of civil cases going to some kind of trial. When the small claims cases and trials are removed, the percentage drops to 8.7%. When looking at the subset of civil lawsuits in California that fall into the category of "Unlimited Civil" (those cases seeking more than $25,000), 78% are disposed of before trial with the remaining 22% after trial.[9]

What is missing from the statistics and analysis is an accurate breakdown of how many cases disposed of before trial are done by mutual settlement agreement among the parties, by some sort of summary proceedings (pleading challenge or summary judgment motion), by default (where the defendant failed to appear/respond or otherwise disappeared during the process), or by plaintiffs withdrawing their cases. Also missing from the California state court statistics are the number of civil cases that actually participate in some kind of ADR, such as mediation, to assist in the process of resolving and disposing of the case. Even with 78% of California Unlimited Civil cases being disposed of prior to trial, about 65% of those cases are disposed of within 12 months, 75% within 18 months, and 80% within 24 months.[10]

Given that so few civil cases in California go to trial, does that mean that ADR is not needed or is not beneficial? Interestingly, the California legislature and judicial branch passed statutes in 1999 requiring the Judicial Council of California to establish pilot programs in five of the California superior courts to assess the benefits of early mediation of civil cases, with three pilot programs using mandatory referrals to mediation and the other two assessing voluntary mediation programs.[11] The findings showed that early

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[8] *2018 Court Statistics Report*, *supra* note 3, at xvi.

[9] *Id.* at 65 (providing data from Fiscal Year 2016-2017).

[10] *Id.* at 64.

[11] CAL. CIV. PROC. CODE §§ 1730–1743, ch. 67, § 4, 1999; *see also* JUD. COUNCIL CAL., EVALUATION OF EARLY MEDIATION PILOT PROGRAMS 375–77 (2004),

mediation programs are "successful, resulting in substantial benefits to both litigants and the courts."[12] Among the benefits enumerated were "reductions in trial rates, case disposition time, and the courts' workload, increases in litigant satisfaction with the court's services, and decreases in litigant costs in cases that resolved at mediation in some or all of the participating courts."[13] Thus even though a solid majority of civil cases will be disposed of prior to trial, mediation, and, in particular, early mediation, is beneficial to both litigants and the courts.

III. COURT ANNEXED MEDIATION STATISTICS IN THE UNITED STATES

While the idea of "mandatory" mediation feels inherently wrong to some, especially those who view the mediation process as purely voluntary at all levels and at all steps along the way, there are some courts within the United States that have mandatory mediation programs in place. Some, like California, require mediation in certain types of cases, such as family law cases involving custody of minor children.[14] Others, like some of the federal district courts, have more robust mandatory ADR requirements for generally all types of civil litigation matters, with only a small number of exempted cases.[15] In looking at these court-annexed mandatory mediation programs, the numbers show that whether purely voluntary or part of a mandatory regime, mediation is wildly successful.

One report from 2018 (the "2018 Report"), looked at twelve court-annexed mediation systems across various jurisdictions within the United States.[16] Many of the court-annexed programs included in the study had mandatory mediation features. This article will look at three of those twelve systems, namely the United States District Court for the Central District of California, Colorado state courts, and the United States District Court for the Southern District of New York.

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https://www.courts.ca.gov/documents/empprept.pdf [hereinafter EVALUATION OF EARLY MEDIATION PILOT PROGRAMS].

[12] EVALUATION OF EARLY MEDIATION PILOT PROGRAMS, *supra* note 11, at xix.

[13] *Id.*

[14] Cal. Fam. Code § 3170 (2021).

[15] *See infra* note 18.

[16] Gary Shaffer, *Court Annexed Mediation by the Numbers*, N.Y. STATE BAR ASS'N (2018), https://nysba.org/NYSBA/Coursebooks/Spring%202018%20CLE%20Coursebooks/The%20Litigative%20DNA/III.F.%20Gary%20Shaffer%20-%20Court%20Annexed%20Mediation%20by%20the%20Numbers.pdf. Some of the statistics used below are more up to date than those used in Gary Shaffer's 2018 report since more recent information has become available. Where the more recent statistics are used, citations will be made to the source documents and not to Mr. Shaffer's 2018 report.

A. *United States District Court for the Central District of California*

One court the 2018 Report looked at was the United States District Court for the Central District of California. The study highlighted the applicable local rules that require "all civil cases to participate in one of three ADR processes; 1) a settlement conference before a magistrate or district judge, 2) an appearance before a neutral selected from the Court's Mediation Panel, or 3) a private dispute resolution proceeding."[17]

The local rule specifically says that participation in one of the three ADR methods is mandatory "[u]nless exempted by the trial judge."[18] The mandatory nature of ADR is so strong in the California Central District Court that General Order No. 11-10 presumptively refers all civil cases assigned to judges participating in the ADR program to either the mediation panel or private dispute resolution; only a select few enumerated case types are exempted from this requirement.[19] Even during the COVID-19 pandemic, where extraordinary social distancing measures were taken worldwide, the California Central District Court continued to require mediation pursuant to General Order 11-10, but authorized, at the discretion of the mediator, the ability to have the mediations conducted via video or telephone conference, rather than in-person.[20]

As of the time of this writing, the Central District's last published ADR report is for 2017.[21] The report shows that in 2017, a total of 2,918 cases were referred to one of the three ADR choices, with 1,525 cases referred to the Court Mediation Panel, 1,066 were referred to private mediation, and 327 were referred to a Magistrate Judge for a settlement conference.[22] In 2016, the total number of ADR-referred cases was 2,932, with 1,394 cases referred to the Court Mediation Panel, 1,114 referred to private mediation, and 424 referred to a Magistrate Judge.[23]

Of the 1,525 cases in 2017 referred to the Court Mediation Panel, mediations occurred in 731 of those cases.[24] Of the 731 mediated cases, 424

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[17] *Id.* at 4 (citing to C.D. Cal. R. 16-15.4).

[18] C.D. Cal. R. 16-15.1 (2014).

[19] Shaffer, *supra* note 16, at 4 (citing to General Order 11-10, §5, available at https://www.cacd.uscourts.gov/sites/default/files/general-orders/GO-11-10.pdf).

[20] The coronavirus announcement was published on the home page of the California Central District Court website, CENT. DIST. CAL., https://www.cacd.uscourts.gov (last visited Nov. 11, 2020).

[21] U.S. DIS. CT. CENT. DIST. CAL., 2017 ADR PROGRAM REPORT, https://www.cacd.uscourts.gov/sites/default/files/documents/ADR_Program_Report_2017.pdf.

[22] *Id.* at 1.

[23] *Id.*

[24] *Id.*

were settled or partially settled.[25] Another forty-one cases settled within sixty days after the mediation.[26] In 2017, the California Central District Court saw a 58% success rate with mandatory panel mediations the day the mediations occurred, with the success rate jumping to 63.7% within sixty days after mediation.[27] In 2016, there were 677 mediations actually conducted by the panel, with 342 cases settling or partially settling at the mediation.[28] Another forty-three settled within sixty days after the mediation, making for a success rate of 50.5% the day of mediation and jumping to 56.9% within sixty days of the mediation session.[29] Additionally, in 2016 there were 425 cases that settled before the mandatory mediation session that was referred to the Mediation Panel.[30] It is unknown what effect a looming mandatory mediation session may have had on the settlements for the 425 cases, but it seems reasonable to suppose that the requirement to mediate caused parties and attorneys to seriously consider settlement when they otherwise may not have considered it at that stage of the litigation. Of the 1,386 cases referred to the Mediation Panel in 2016, 1,145 settled either before the mandatory mediation session, at the mandatory mediation session, or within 60 days after the mandatory mediation session, for an impressive 82.6% settlement rate among that group of cases.[31]

Equally impressive to the settlement rate is the satisfaction rate of those participants who completed satisfaction surveys in 2016 and 2017. In 2017, 148 participants completed surveys that showed 84% were satisfied with the mediation outcome, with 51% being "very satisfied."[32] The survey responses in 2017 also showed that nearly 85% found the benefits of mediation to outweigh the costs.[33] A total of 95% felt the mediation procedures were "fair" or "very fair" and 96% rated their mediators as "excellent," "very good," or "satisfactory."[34] In 2016, 101 participants completed surveys showing an 89% satisfaction with the outcome.[35] Also, 89% felt the benefits of mediation outweighed the costs.[36] Ninety-five percent found the process either "very fair" or "fair."[37] And 96% found their mediators to be "excellent," "very good," or "satisfactory."[38]

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[25] *Id.*
[26] *Id.* at 2.
[27] *Id.* at 1–2.
[28] Shaffer, *supra* note 16, at 5.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] U.S. DIS. CT. CENT. DIST. CAL., 2017 ADR PROGRAM REPORT, *supra* note 21, at 2.
[33] *Id.*
[34] *Id.* at 3.
[35] Shaffer, *supra* note 16, at 6.
[36] *Id.*
[37] *Id.*
[38] *Id.*

B. *Colorado State Courts*

The 2018 Report also looked at court-annexed mediation in Colorado state courts.[39] Colorado enacted the Colorado Dispute Resolution Act in 1983.[40] Under the Colorado Dispute Resolution Act, the court can refer any case to mediation, except where one of the parties claims to be the victim of physical or psychological abuse by the other party and is unwilling to mediate the dispute.[41] Under this program, when a case is referred to mediation and the parties inform the court that they are pursuing the mediation in good faith, all pending hearings are continued.[42] When mediation is completed, the mediator is to supply the court with a written statement certifying that the parties have met the mediator.[43] It is important to note that the Colorado Dispute Resolution Act does not require parties referred to mediation to mediate in good faith or to participate in any way other than meeting with the mediator. These distinctions help ensure that the parties' constitutional rights are not violated by court-mandated mediation, and it generally alleviates concerns related to delays in access to justice.

In 2019, there were a total of "7,845 cases among Colorado's twenty-two judicial districts" that were referred to the Colorado Office of Dispute Resolution.[44] Of those cases, 98.7%, or 7,743 cases, were handled through mediation.[45] The other 1.3% of cases were handled with limited ADR services, including early neutral assessments.[46] Fiscal year 2019 saw a drop of 661 cases from fiscal year 2018, which the Office of Dispute Resolution believes occurred because of an increase in fees per party for the ADR services from $60 per party per hour to $75 per party per hour.[47] Of the 7,845 cases handled by the Office of Dispute Resolution, 4,127 were either completely or partially resolved, equating to a 52.6% success rate.[48]

In 2018, the statistics were similar. There were 8,506 cases referred to the Office of Dispute Resolution, with 98.5% of those cases being handled

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[39] *Id.* at 9–12.

[40] *Id.*; *see also* COLO. REV. ST. § 13-22-301 (1983).

[41] COLO. REV. ST. § 13-22-311(1) (1983).

[42] COLO. REV. ST. § 13-22-311(3) (1983).

[43] COLO. REV. ST. § 13-22-311(2) (1983).

[44] COLO. JUD. DEP'T, Colorado Judicial Branch Annual Statistical Report, Fiscal Year 2019 102 (2019), https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2019/FY2019AnnualReportFINAL.pdf.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 103. It is important to note that the report does not distinguish between cases resolved through mediation or through early neutral assessment. It is possible that the success rate of cases mediated is slightly higher or lower than the overall 52.6% reported.

through mediation, and the Office of Dispute Resolution completely or partially resolved 55.3% of all cases.[49] The success rates for 2016 and 2017 were also similar, coming in at 57.2% and 56.2% respectively, both involving over 8,000 cases each year.[50]

C. *United States District Court for the Southern District of New York*

Another court system analyzed in the 2018 Report was the United States District Court for the Southern District of New York.[51] Local Civil Rule 83.9, titled "Alternative Dispute Resolution (Southern District Only) [formerly Local Civil Rule 83.12]" makes clear that all civil cases, except habeas corpus, social security, and tax cases, are eligible for mediation and that the Board of Judges may direct specific categories of cases to automatically be submitted to the mediation program, and that for all other cases, the district judge or magistrate may order the case to mediation.[52] Currently, there is a standing administrative order that "requires all counseled employment discrimination cases, except cases brought under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, et seq., to be automatically referred to the Southern District of New York's Alternative Dispute Resolution program of mediation upon the filing of an Answer."[53] Additionally, pursuant to Local Rule 83.10, the Mediation Office automatically assigns a mediator to any case fourteen days after the defendant files an answer in any civil case "filed by a represented plaintiff against the City of New York ('City') and/or the New York City Police Department ('NYPD') or its employees alleging the use of excessive force, false arrest, or malicious prosecution by employees of the NYPD in violation of 42 U.S.C. § 1983."[54]

In 2017, a total of 1,209 cases were referred to the Southern District

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[49] COLO. JUD. DEP'T, Colorado Judicial Branch Annual Statistical Report, Fiscal Year 2018 102–03 (2018), https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2018/FY2018FINAL.pdf.

[50] COLO. JUD. DEP'T, Colorado Judicial Branch Annual Statistical Report, Fiscal Year 2016 91–92 (2016), https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2016/FY%202016%20Annual%20Statistical%20Report.pdf; COLO. JUD. DEP'T, Colorado Judicial Branch Annual Statistical Report, Fiscal Year 2017 89–90 (2017), https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2017/FY2017ANNUALREPORT.pdf.

[51] Shaffer, *supra* note 16, at 20–24.

[52] S.D.N.Y. CIV. R. 83.9(e).

[53] Second Amended Standing Administrative Order M10-468, *In re:* Counseled Employment Discrimination Cases Assigned to Mediation by Automatic Referral (2015), https://www.nysd.uscourts.gov/sites/default/files/pdf/2015-SecondAmendedStandingAdminOrder-Counseled-Employment.pdf.

[54] S.D.N.Y. CIV. R. 83.10.

of New York Mediation Program, either automatically or directly by judges.[55] In 2018 that number grew to 1,375 and in 2019 it went up to 1,800 cases.[56] In 2017, the settlement rate was 53%.[57] In 2018 the settlement rate improved to 60%, and when the Mediation Program Report was made in 2019, the settlement rate was 61%.[58] Settlement rates for ADA cases was an impressive 87% in 2017, 92% in 2018, and 94% in 2019.[59] The U.S.C. Section 1983 Plan cases had the lowest settlement rates of 39% in 2017, 38% in 2018, and 24% in 2019.[60] The automatically referred F.L.S.A. cases had settlement rates of 53% in 2017, 53% in 2018, and 57% in 2019.[61] The judge-referred F.L.S.A. cases had even higher settlement rates of 60% in 2017, 59% in 2018, and 69% in 2019;[62] however, the number of automatic F.L.S.A. referrals was significantly higher each year than the number of judge-referred F.L.S.A cases.[63]

The 2018 Report and the data obtained for the years after the report was first published show that court-annexed mediation programs are very successful, often resolving 50% to 60% of cases mediated, which typically does not factor in the cases that were referred to mediation but resolved prior to the mediation or those that were resolved shortly after mediation.[64] The 2018 Report surmised that:

> [p]erhaps counterintuitively, automatic/mandatory programs, where cases go directly to mediation by court rule and without input from the parties, often have high success rates. In other words, parties agreeing to mediate as a prerequisite for mediation does not necessarily correlate to program success. Making the parties walk

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[55] U.S. DIST. CT. S.D.N.Y., Mediation Program Report for 2017-2018 with Preliminary Information for 2019 as of January 21, 2020, 1 (2020), https://www.nysd.uscourts.gov/sites/default/files/pdf/Mediation/Mediation%20Program%20Annual%20Reports/Annual%20Report%202017.2018.2019.pdf.

[56] *Id.* at 1.

[57] *Id.* at 2.

[58] *Id.*

[59] *Id.* at 6.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 5 (showing 185 automatically referred F.L.S.A. cases in 2017 compared to 86 judge-referred F.L.S.A. cases; 220 automatically referred F.L.S.A. cases in 2018 compared to 112 judge-referred; and 392 automatically referred F.L.S.A. cases in 2019 compared to 96 judge-referred).

[64] Shaffer, *supra* note 16, at 32.

> through the door may be more important than waiting for them to say that they are ready.[65]

The 2018 Report further noted that "[r]easonable opt-out provisions seem to be standard in automatic programs, and certain classes of cases may be excluded. Any needed discovery can be completed before an actual mediation session is scheduled."[66] Perhaps more importantly from a practical standpoint, "[o]nce enacted, these [mandatory mediation] programs become part of the standard dispute resolution process, optimizing efficiency and more quickly resolving matters that otherwise might require more time and costs for judiciary, attorneys, and litigations."[67]

The 2018 Report concluded, based on the data, that court annexed-mediation programs work well; the procedural, administrative, and regulatory details have been mostly figured out by those jurisdictions that have adopted some form of mandatory mediation, and such programs can quickly and efficiently resolve large numbers of cases.[68] With statistical data showing such success, one wonders why more mandatory mediation programs have not been implemented.

IV. THE 2004 CALIFORNIA STUDY

As previously mentioned, California undertook a multi-year pilot program study to assess the benefits of early mediation on civil lawsuits.[69] This multi-year study resulted in a comprehensive 400-plus page report dated February 27, 2004.[70] Three of the pilot program counties used a mandatory mediation program, namely, San Diego County, Los Angeles County, and Fresno County.[71] The other two, Contra Costa County and Sonoma County, used voluntary mediation programs.[72] Generally, all unlimited civil litigation cases (those seeking over $25,000) were eligible for mediation under any of the programs.[73] For the voluntary programs, referrals were made by stipulation of the parties but encouraged by the court.[74] The mandatory programs used either a random assignment by a court administrator or by court order at the

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[65] *Id.*
[66] *Id.*
[67] *Id.* at 33.
[68] *Id.*
[69] EVALUATION OF EARLY MEDIATION PILOT PROGRAMS, *supra* note 11.
[70] *Id.*
[71] *Id.* at 5.
[72] *Id.*
[73] *Id.* Some of the programs also included limited civil lawsuits (those seeking less than $25,000) and each county had unique exemptions. For example, Fresno County placed a cap on the number of cases that could be mandatorily referred each month and Los Angeles County restricted the program to ten departments in the main courthouse.
[74] *Id.* at 6.

case management conference (the first hearing in the case)usually held between ninety and 150 days after filing a lawsuit.[75] With the mandatory pilot programs, the court paid for a certain number of hours of mediation at a rate set by the court with mediators selected from the court's panel.[76] If the mediation exceeded that time, presumably the parties paid the mediator at the mediator's normal hourly rate.[77]

The 2004 California study found that all the early mediation programs, both voluntary and mandatory, were successful. Both programs resulted in "substantial benefits to both litigants and the courts" by reducing "trial rates, case disposition time, and the court's workload," while at the same time increasing "litigant satisfaction with the court's services" and decreasing "litigant costs in cases that resolved at mediation."[78] The pilot programs saw settlement of 58% of the unlimited civil cases and 71% of the limited civil cases, which was "a direct result of early mediation," as opposed to mediation at a later stage in the proceeding.[79]

The study found that more cases went to mediation from the mandatory programs, but overall the settlement rate was lower than those from the voluntary programs, with the exception of San Diego County (mandatory mediation pilot program), which saw similar settlement rates to Contra Costa County (voluntary mediation pilot program).[80] In the Sonoma County voluntary program, the participants were required to pay for the mediation, and this county saw low numbers of smaller-value cases willing to participate in mediation, suggesting that financial incentives are needed to increase participation in small-value cases.[81]

The study found that in mandatory early mediation programs (San Diego and Los Angeles counties in particular), the pilot programs "reduced

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[75] *Id.* Even in the mandatory programs, parties could stipulate to mediation before the case management conference.

[76] *Id.* Courts paid for either three or four hours of mediation at a rate of $150 per hour.

[77] *See Mediation*, SUPERIOR CT. CAL. CNTY. SAN DIEGO, http://www.sdcourt.ca.gov/portal/page?_pageid=55,1555434&_dad=portal&_schema=PORTAL. This is what occurs, for example, in San Diego County as of the date of this paper, when parties select a mediator from the court's panel. To be on the court's panel, mediators agree to charge a specified amount for the first two hours of mediation and then the rate reverts to the mediator's normal hourly rate.

[78] EVALUATION OF EARLY MEDIATION PILOT PROGRAMS, *supra* note 11, at 29.

[79] *Id.*

[80] *Id.* at 29, 35. Contra Costa County had a 60% settlement rate as a direct result mediation, while San Diego County had a 58% settlement rate. It is noteworthy that Contra Costa's voluntary program only resulted in 1,157 unlimited civil cases being mediated, whereas San Diego's mandatory program had 3,676 unlimited civil cases that were mediated. San Diego and Contra Costa counties had by far the highest numbers of mediated cases among the five participating counties.

[81] *Id.* at 29.

the proportion of cases going to trial by a substantial 24 to 30 percent."[82] As a result, early mandatory mediation saved the courts considerable time (an estimated 521 trial days per year in San Diego and 670 trial days in Los Angeles) and money (estimated $1.6 million savings per year in San Diego and $2 million in Los Angeles).[83]

Interestingly, both mandatory and voluntary early mediation programs reduced the time required for case disposition overall, but actually increased the disposition times for cases that participated in early mediation but did not settle.[84] Given the overall reduction of disposition times and the high settlement rates achieved, the increase in disposition times for cases that did not settle at the early mediation stage still provided a net benefit to the court system as a whole. Also, there are certainly ways the courts can find to minimize the potential increase in disposition times for cases that do not settle. For example, instead of waiting until the case management conference (often 90–150 days after filing the lawsuit) to require mediation, each case could be automatically assigned a mediator when a lawsuit is filed, or it could be part of the court rules to require parties to have either mediated or selected a mediator prior to the case management conference. Some places, like Colorado, will postpone hearing dates if the parties request and indicate that they are doing so in relation to pursuing good faith mediation, but if case disposition times are a great concern, courts can forgo that practice.

An important finding from the 2004 California study is that early mediation, mandatory or voluntary, increased litigant satisfaction by as much as 10–15% from the attorneys' perspective.[85] This included increases in satisfaction with the litigation process and services provided by the court.[86] Attorneys were generally more satisfied when cases settled at mediation, but regardless of whether settlement occurred, satisfaction was still greater with those that participated in the early mediation compared with those that did not.[87]

The study also found that litigant costs were reduced by 61–68% in cases that settled at mediation, and attorney hours were reduced by 57–62%, resulting in an estimated savings in litigant costs in settled cases in Los Angeles of $1,769,040 and $24,784,254 in San Diego.[88] The court workload was also significantly reduced in San Diego (mandatory mediation), Los Angeles (mandatory mediation), Fresno (mandatory mediation), and Sonoma

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[82] *Id.*
[83] *Id.*
[84] *Id.* at 30.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 31. These cost estimates were based on figures from 2000 and 2001.

(voluntary mediation).[89] The reduction occurred in the form of fewer motions being filed and fewer pretrial hearings.[90] The number of motions reduced ranged from a reduction of 18–48%.[91] The pretrial hearing reduction ranged from 11–32%.[92] The reductions generated significant savings for the courts, including an estimated reduction in 479 judge days per year in San Diego with an estimated value of $1.4 million.[93]

San Diego had by far the most significant participation of any of the five pilot programs, generating 5,395 referred unlimited civil cases of the 9,166 total, and 2,112 referred limited civil cases of the 2,571 total.[94] San Diego saw 3,676 unlimited civil cases actually mediated, of which, 2,133 settled as a direct result of the early mandatory mediation, a 58% settlement rate; and 1,357 limited civil cases actually mediated with 990 settled as a direct result of the early mandatory mediation, a 76% success rate.[95] It is important to note that the 9,166 unlimited civil cases represented only 39% of the unlimited civil cases eligible for early mediation.[96] Similarly, the 2,571 limited civil cases represented only 33% of limited civil cases eligible for the early mediation programs.[97] Had all eligible cases among the five participating counties been sent to early mediation with the mediations actually occurring, and if the average settlement rates held, there would have been almost 13,800 unlimited civil cases settled and almost 5,500 limited civil cases settled.[98]

To extrapolate the possibilities this data suggests even further, of the roughly 1.2 million civil cases filed each year in California, assuming mandatory early mediation for all of those cases and maintaining the average 58% success rate,[99] that equates to approximately 696,000 cases being settled near the beginning of the litigation process.[100] The settlement rate may end up

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[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* Los Angeles had an estimated judge day reduction of 132 with an estimated value of $400,000, Sonoma had an estimated 3 judge day reduction with estimate value of $9,700, and Fresno's decreases were offset by "special conferences required under its pilot program's procedures."

[94] *Id.* at 35–36. Again, these figures encompass cases from years 2000 and 2001 only.

[95] *Id.*

[96] *Id.* at 36.

[97] *Id.*

[98] *Id.* at 35–36 (using the total number of reported eligible cases for the unlimited and limited categories and multiplying by the total percentage of cases settled for unlimited and limited categories respectively).

[99] *Id.* at 36 (evaluation extrapolated this overall average mediation settlement success rate across the pilot programs from unlimited cases).

[100] This does not take into account cases that are filed but never deemed at issue; for example, when defendants cannot be served or fail to answer and are defaulted, or when plaintiffs simply withdraw their filings. The calculations are designed to take the rough

being higher, since the 58% rate is the rate for unlimited civil cases, and there is a significantly higher settlement rate for limited civil cases (71% average from the 2004 California Study).[101] The cost and time savings would be enormous. Satisfaction with the court system would likely increase, and access to justice would also be likely to increase with the reduction in demand for court resources and the increase in number of mediators that would necessarily occur from an across-the-board mandatory early mediation for all civil cases.[102]

After this study, California did not adopt mandatory early mediation for civil cases but has, since 1981, required mandatory mediation for family law cases where custody of a minor child is at issue[103] and otherwise strongly encourages and promotes mediation, albeit on a generally voluntary basis.[104] While California has done a great job promoting the use of ADR, more can, and should, be done. Given the widely undisputed benefits and success rates, California should adopt a mandatory early mediation requirement for all civil cases. The infrastructure is largely in place and the increases in mediator and administrative needs can certainly be accomplished through tiered enactment dates for case types and courthouses, similar to what occurred with electronic filings for court documents, pleadings, and briefs. The additional initial costs should be more than offset by the overall savings, as shown from the 2004 California study.[105]

V. EUROPEAN UNION AND THE COUNCIL OF EUROPE DIRECTIVE TO PROMOTE AND ENSURE A BALANCED RELATIONSHIP BETWEEN MEDIATION AND JUDICIAL PROCEEDINGS

The European Union recognized the need for increased mediation in

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numbers and show how impactful an early mandatory mediation program could be.

[101] *See* EVALUATION OF EARLY MEDIATION PILOT PROGRAMS, *supra* note 11, at 36 (evaluation extrapolated this overall average mediation settlement success rate across the pilot programs from limited cases).

[102] There are certainly some classes of cases where the parties should not be required to mediate jointly; for example, victims of domestic violence should not be required to attend a mediation with their alleged abuser. But, for the most part, the author feels that all cases can be mediated, and that mediation is beneficial, even when the case does not settle or when the mediation must occur solely in caucus, whether at the same time or at different times. The increased use and popularity of virtual mediation is also a viable option.

[103] CAL. FAM. CODE § 3170 (2018).

[104] *See, e.g.*, CAL. EVID. CODE §§ 1115–29; Cal. Case Mgmt. Statement Form CM-110 at 2–3, ¶ 10 (filed for every civil case before case management conference, indicating the ADR packet has been given to the parties providing and explaining ADR options, requiring affirmative statements as to whether the case is subject to mandatory judicial arbitration, and affirmatively indicating what ADR process or processes the party is willing to participate in, including mediation).

[105] *See* EVALUATION OF EARLY MEDIATION PILOT PROGRAMS, *supra* note 11.

the various judicial systems throughout Europe and adopted a directive in 2008, known as Directive 2008/52.[106] Directive 2008/52's "objective" was to "facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings."[107] Directive 2008/52 failed to define "balanced relationship;" however, it did define "mediation" in such a way as to emphasize a "structured process" where the disputants attempt to reach a "voluntary" settlement and specifically mentioned mediation being initiated by the parties, court order, "or prescribed by law."[108]

In 2011, the European Parliament commissioned a study, called Quantifying the Cost of Not Using Mediation—A Data Analysis (the "Quantifying the Cost Study"), to determine the impact of Directive 2008/52.[109] The Quantifying the Cost Study noted what it called a "mediation paradox across many EU jurisdictions."[110] The "paradox" was that mediation resulted in very high settlement rates but mediation was rarely being used.[111] The Quantifying the Cost Study focused on two types of benefits, namely cost and time. It determined that "mediation is a cost and time-effective dispute resolution mechanism at almost every level of success rate;" in other words, mediation saves time and cost almost regardless of settlement rates.[112] In an attempt to help define "balanced relationship" for Directive 2008/52, the Quantifying the Cost Study determined the cost break-even success rate and time-saving break-even success rate of mediation across the board.[113] It found that a mediation settlement rate of only 19% would result in time-savings for disputants in the EU.[114] It further found that a mediation settlement rate of 24% would result in cost-savings for disputants in the EU.[115] The Quantifying the Cost Study did not take into account the benefits to legal systems as a whole,

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[106] *See generally* Directive 2008/52, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136).

[107] *Id.* at art. 1, ¶ 1.

[108] *Id.* at art. 3; *see also* art. 5, ¶ 2 ("This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions . . . provided that such legislation does not prevent the parties from exercising their right to access to the judicial system.").

[109] Giuseppe De Palo et al., *Quantifying the Cost of Not Using Mediation—A Data Analysis*, DIRECTORATE-GENERAL FOR INTERNAL POLICIES (Apr. 2011), https://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf.

[110] *Id.* at 3.

[111] *Id.*

[112] *Id.* at 4.

[113] *Id.* at 3.

[114] *Id.* at 4.

[115] *Id.*

including reductions in caseloads at the courts, greater access to justice for disputants, increased satisfaction in the legal system, and improvements in trade and economic relations. Such additional benefits would likely lower the break-even points for both time and cost savings, since such measurements would include expanded time and cost benefits to society as a whole, rather than just focusing on the benefits to disputants.

By the year 2012, mediation was used "in far less than one case out of a thousand" within the European Union.[116] Four years after Directive 2008/52, mediation usage at such a dismal rate that it could hardly be said to have achieved the "balanced relationship" sought. The European Parliament commissioned another study in 2013, called the Rebooting Study, to further examine the implementation of Directive 2008/52.[117] By the end of 2013, only four EU countries were seeing more than 10,000 cases annually being mediated, with many countries reporting fewer than 500.[118] Italy, however, was conducting approximately 200,000 mediations per year.[119]

The difference in numbers was not due to the quality of mediators, strengthening confidentiality legislation, or otherwise providing incentives to mediate. It was not a matter of "getting the word out" or a lack of advertising, either. Rather, the most significant difference was that in Italy, mediation was mandatory before a lawsuit could be filed in certain classes of cases.[120] Italy implemented a mandatory opt-out program as opposed to the voluntary opt-in model commonly seen in other jurisdictions.[121] The power of opt-out versus opt-in policy-models is highlighted in a study conducted regarding different organ donation programs in EU countries.[122] The EU member states with opt-in organ donation programs saw participation rates between 4.25% to 27.5%.[123] The EU member states with opt-out organ donation programs, meaning a person was automatically an organ donor unless that person affirmatively checked a box to opt-out, saw participation rates between 85% and close to 100%.[124]

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[116] Giuseppe De Palo, *A Ten-Year-Long "EU Mediation Paradox" When an EU Directive Needs to be More... Directive*, JURI COMMITTEE BRIEF 3 (Nov. 2018), https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf.

[117] Giuseppe De Palo et al., *'Rebooting' the Mediation Directive: Assessing The Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*, DIRECTORATE-GENERAL FOR INTERNAL POLICIES (Jan. 2014), https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf.

[118] *Id.* at 6, fig.B.

[119] De Palo, *supra* note 117, at 4.

[120] Legislative Decree no. 28/2010, Art. 5(1).

[121] See *infra* note 138.

[122] *Id.* at 5 n.18.

[123] *Id.* at 5.

[124] *Id.*

The Rebooting Study concluded that the best way to increase mediation participation and to ultimately achieve the "balanced relationship" sought in Directive 2008/52 was to implement mandatory mediation with an easy opt-out.[125] The European Union and Council of Europe have not yet followed the mandatory mediation recommendation and as such, mediation levels across the EU member states as a whole have not risen to a level that would be considered "balanced" by any observer, although efforts in Europe continue to be made to increase mediation participation.

VI. THE ITALIAN EXPERIENCE

In 2010, Italy adopted a form of mandatory mediation for certain types of civil cases that went into effect in 2011.[126] This was done in relation to the Council of Europe Directive 2008/52.[127] Parties were required to mediate before being able to file their lawsuit with the court.[128] Prior to Italy's adoption of mandatory mediation, mediation in the country was, for all intents and purposes, non-existent.[129]

When mandatory mediation began in 2011, there was a success rate between 51-59% when all the parties were present; however, a final agreement only happened in 15% of mediations.[130] It also took three to four months of mediation to reach a deal.[131] As the program progressed, the percentage of mediations with all parties present increased, but the success rate continued to drop.[132] This drop in the success rate has been attributed to the fact that the mediator's fee would double when an agreement was reached, and as a result, many parties did not attend the final mediation session where the agreement was to be signed.[133]

Lawyers revolted against the mandatory mediation requirement,

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[125] *Id.*

[126] Matteucci, *supra* note 6, at 194 (identifying the mandates as Legislative Decree no. 28/2010 and Ministry Decree no. 180/2010).

[127] *See* Legislative Decree no. 28/2010.

[128] *Id.* at Art. 5(1) ("Any person who intends to bring legal proceedings concerning a dispute over joint ownership, property rights, division inheritance rights, family contracts, leases, loans-for-use, leases of businesses, compensation for damage resulting from vehicle and boat traffic, medical liability and defamation through the press and other media, or insurance, banking and financial contracts, shall be required, as a preliminary step, to use mediation within the meaning of the present decree…The carrying out of mediation shall be a precondition for bringing legal proceedings.").

[129] Matteucci, *supra* note 6, at 194 ("mediation had been introduced in 2003…[i]t was voluntary mediation, though, and it was totally ignored.").

[130] *Id.* at 197–98.

[131] *Id.* at 198.

[132] *Id.*

[133] *Id.*

eventually succeeding in having the requirement declared unconstitutional in 2012.[134] During this first experience with mandatory mediation, Italian lawyers did not see ADR as Alternative Dispute Resolution, but rather as an "Alarming Drop in Revenue."[135] To them, mediation was an enemy.

Italy revisited mandatory mediation in 2013, this time with the help and input from the Italian bar.[136] The mandatory mediation requirement would again only apply to a few select case categories and would continue to be a prerequisite before going to court.[137] This time though, the Italian law made it a requirement that lawyers assist the parties, that lawyers get paid by the parties for their time spent in mediation, and that the mandatory mediation session be only an informative session with the mediator where the parties can opt-out of mediation or voluntarily agree to continue the process.[138] This mandatory informative session is essentially free of charge from the mediator's perspective, requiring only a small administrative fee of forty-eight euros to be paid to the mediator.[139] Also, sanctions could be imposed upon parties who failed to first meet with the mediator at the informative session prior to initiating court proceedings.[140]

Italy saw mediation go from virtually non-existent, to being used in over 200,000 cases in 2011, back down to a few thousand cases when the mandatory law was declared unconstitutional in 2012, then up again to approximately 150,000 mediations per year since the 2013 reboot.[141] Leonardo D'Urso, CEO and co-founder of ADR Center Global, has been involved in the Italian mediation movement since the early 2000s and is quick to point out that the current Italian model is not purely a mandatory mediation model.[142] Rather, it allows three avenues to mediation: 1) voluntary agreement of the parties; 2) referral by judge; and 3) voluntary agreement during the required initial informative mediation session for those case categories designated for this third avenue (i.e., real estate, division of assets, inheritances, family business agreements, real property leases, medical malpractice, bailments, libel claims, damages from insurance, and banking and financial contracts), which only constitute approximately 10% of all civil lawsuits in Italy.[143]

Judge referrals account for approximately 1,900 mediations in Italy,

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[134] *Id.* at 198–99.
[135] *Id.* at 193.
[136] *Id.* at 199–200 (Legislative Decree no. 69/2013).
[137] *Id.*
[138] *Id.* at 200.
[139] *Id.*
[140] De Palo, *supra* note 117, at 6.
[141] *Id.* at 5–6.
[142] Leonardo D'Urso, *Italy's 'Required Initial Mediation Session': Bridging the Gap between Mandatory and Voluntary Mediation*, ALTS. TO HIGH COST LITIG. (Newsletter of the International Institute of Conflict Prevention & Resolution), April 2018, at 56, 57.
[143] *Id.* at 57.

representing fewer than 0.1% of civil cases pending in the Italian courts.[144] The mediations done by purely voluntary agreement among the parties generate approximately 20,000 mediations a year and have a success rate of 60%.[145] The overwhelming majority of mediations come from the third avenue mentioned above, where parties are required to attend a mediation information session with a mediator prior to initiating court proceedings, generating 90% of all mediations in Italy.[146] Of those "mandatory" mediation sessions, roughly 50% of them agree to continue with mediation after the initial session, and of those that continue, the settlement rate is approximately 50%.[147]

According to D'Urso, the first informative meeting with the mediator has been found to work well under the following five conditions: 1) all the lawyers are present with their clients (someone who has settlement authority); 2) the session is conducted by an experienced, well-trained mediator; 3) the session should be held very close in time to the filing of the lawsuit and the initial fee should be minimal so as to not become a barrier to access to justice; 4) the parties present can easily decide to opt-out of continuing the mediation without sanctions; and 5) strong sanctions should be given to a party for failure to attend the first meeting.[148] Additionally, Italy's opt-out mandatory mediation model has reduced the number of new civil case filings in the required mediation categories by 30%, including a reduction of almost 50% in lawsuits involving real estate.[149] Italy's mandatory mediation with an easy opt-out at the first session has proven to be an effective model that provides benefits of both voluntary and mandatory mediation, while at the same time mitigating concerns and disadvantages of both.

Italy's next step should be to expand its program by requiring more classes of cases to participate in the first mediation session with an easy opt-out. The benefits of the program have been proven to litigants, lawyers, and the court system. Of the 4–5 million civil cases filed each year, if 50% of them ended up agreeing to continue with mediation after the first informative session, and then 50% of those cases settled, that would amount to 2–2.5 million annual mediations with 1–1.25 million cases settling before they even officially entered the court system. The cost and resource savings would be enormous, as would the expanded access to justice. Additionally, it is reasonable to expect the cases that do not settle to be resolved faster, since the court should have more resources and time available to devote to them.

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[144] *Id.* at 58.
[145] *Id.*
[146] *Id.*
[147] *Id. See also* De Palo, *supra* note 117, at 9 (indicating that in the first semester of 2018 there were 79,159 mediations conducted with a settlement rate of 44.3%).
[148] D'Urso, *supra* note 142, at 58.
[149] De Palo, *supra* note 117, at 9.

VII. RECOMMENDATIONS AND CAVEATS

Mandatory mediation is not without its critics and resistance, indeed, well-respected authorities on the subject consider voluntary mediation to be the purest form of mediation and it is often looked upon as one of its major defining features.[150] This article does not attempt to address the myriad criticisms or concerns,[151] but will instead focus on a couple recommendations and caveats that the author believes deserve special consideration.[152]

The first is that mandatory mediation for will and trust contests should be carefully scrutinized against existing statutory laws and public policy that place the intent of the testator as the most important element in deciding how an estate and/or trust corpus are to be disbursed.[153] Among the primary concern is that mediation of a will or trust contest places too much control in the hands of the disputants as to how to resolve things, and the mediator cannot be, and is not, expected to uphold or decide the testamentary intent like a court would.[154] One possible remedy to consider in developing mandatory mediation or even voluntary mediation as it related to will and trust contests would be to

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[150] *See, e.g.*, DWIGHT GOLANN & JAY FOLBERG, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL, 89 (Aspen Publishers, 2nd ed. 2011).

[151] The intention of this article is not to minimize or downplay criticisms and concerns, but rather to express what is seen as the overwhelming benefits that come from mandatory mediation. The author feels confident that the more serious concerns, such as constitutional concerns, will be fully addressed and worked out when mandatory mediation programs and legislation are enacted, as has been the case in the limited circumstances where mandatory mediation exists. *See, e.g.,* Gerawan Farming, Inc. v. Agricultural Labor Relations Board, 3 Cal.5th 1118 (2017) (upholding th constitutionality of legislatively enacted mandatory mediation in the collective bargaining context).

[152] Every legal system is unique and requires its own tailored scrutiny to address concerns related to implementing a mandatory early mediation program. As the Italian experience demonstrated, it is important to involve the various stakeholders, customize the system to fit within the current legal system, and to adapt for cultural uniqueness. Additional scholarship and analysis to address the various issues for each unique jurisdiction may be helpful for successful implementation of a mandatory early mediation program, as there is no "one-size fits all" approach that will work. This article recognizes that customization across jurisdictions, regions, and cultures is necessary, and at the same time advocates that certain base elements should be incorporated, where possible, such as requiring mediation to occur early in the process, providing the first mediation session or portion thereof at little to no cost (subsidized by the court if possible), and providing for easy opt-out for any reason at any time. Furthermore, the requirement to mediate early does not, and should not, preclude the parties from engaging in additional mediation sessions either with the same mediator or different mediators throughout the litigation process. Mediation conducted in parallel with ongoing litigation can be a very powerful mechanism for resolving disputes, and parties should be encouraged to visit and revisit mediation if initial attempts do not result in settlement, but outside the initial mandatory mediation session the author firmly believes that additional sessions should be strictly voluntary.

[153] *See generally*, Victoria J. Haneman, *The Inappropriate Imposition of Court-Ordered Mediation in Will Contests*, 59 CLEV. ST. L. REV. 513 (2011).

[154] *Id.* at 530.

require any settlement be contingent upon court approval. In this way, at least a judicial officer would, either in practice or in theory, approve a settlement only if its terms were in accordance with the jurisdictional laws and with an eye toward testamentary intent. Additionally, there is the practical notion to consider, that testamentary intent can be and often is overcome by unanimous agreement among the beneficiaries.[155] Within this practical notion is a recognition that a mediated agreement, or consensus among beneficiaries, is often more desirable than a long drawn-out litigation that may well devour the estate, leaving everyone in a worse situation, reminiscent of Charles Dickens' famous novel Bleak House.[156]

The second criticism/concern is that "good faith" requirements should generally be avoided.[157] The basic premise here is that if you make mediation mandatory, how can you ensure that it will be used appropriately and not become another hurdle to justice or turned into a mockery by unwilling participants?[158] Good faith requirements impose a nebulous legal notion into an already complex situation. How will the legislatures or courts define "good faith"? Will consequences of failing to act in "good faith" require additional motion practice, thereby increasing the burden on the courts? As one commentator pointed out:

> [A]lthough mandatory mediation statutes require the parties to sit down together, they do not dictate the form of participation [and a] good faith requirement that expands such obligations greatly jeopardizes the parties' rights to decide how to present and argue their case, what information to reveal and whether to make offers and settlement decisions.[159]

Another concern is that a nebulous "good faith" requirement may act as improper coercion to settle.[160]

The author agrees that "good faith" requirements should be avoided. Rather than impose "good faith" requirements on the parties, the closest any

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[155] *See, e.g.*, CAL. PROB. CODE §§ 15403–15404 (2018).

[156] CHARLES DICKENS, BLEAK HOUSE (Norman Page ed., Penguin Books 1971) (1853) (Exemplifying a once noble and wealthy family who spends years in litigation fighting over their inheritance only to find that when the litigation is over, the wealth had been consumed by legal fees).

[157] Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIM. LAW. 70 (2001).

[158] *Id.* at 81.

[159] *Id.* at 93 (citing Edward F. Sherman, *Good Faith Participation in Mediation: Aspirational, Not Mandatory*, DISPUTE RESOLUTION MAGAZINE, Winter 1997 at 14.)

[160] *Id.* at 93–94.

requirement should come is to require the parties to be present (someone with settlement authority) at the mediation session and possible sanctions if that requirement is not met. There should be no requirement that parties participate beyond going to the first mediation session, at which time any party should be free to opt-out of continuing the process for any reason, regardless of good or bad faith intent. There will be some bad actors but trying to "solve" that problem with a "good faith" requirement is counterproductive and will likely increase complexity and reduce the efficiency and efficacy of the process.

VIII. MANDATORY MEDIATION SUGGESTED CHARACTERISTICS FOR COURTS AND GOVERNMENTS

There is no one-size-fits-all solution for mandatory mediation. Each country is unique, each court system is unique, and there are countless factors at play, including cultural, financial, constitutional, and more. Additional surveys and studies focused on specific legal systems and/or jurisdictions are needed to help promote and ultimately implement mandatory early mediation programs throughout the world. That said, there are some features that should be considered by governments and courts everywhere when deciding how to structure and set up their mediation systems. This article suggests that all civil cases throughout the world are capable of, and would benefit from, mediation.[161] This article also suggests that all court systems would benefit from requiring all civil cases to be mediated, understanding there will be a wide range of what is considered beneficial across the various jurisdictions, regions, cultures, and legal systems. In order to strike necessary balances and to achieve the benefits of mediation, the author suggests that any mandatory scheme should include the following basic characteristics:

- The mandatory mediation requirement should occur early in the litigation process. In Italy, that means having the requirement as a prerequisite to initiating court proceedings. In California's pilot program, that means scheduling mediation at the first hearing. This article strongly suggests that a court-approved mediator should be automatically assigned to each civil case at the time of filing, similar to

[161] Even in court systems that are highly efficient, the author believes there is great benefit in allowing parties to have more control, flexibility, and certainty in the outcome of their disputes. Mediation provides this control, flexibility, and certainty. Additionally, mediation, as a more informal process than appearing in court, benefits the parties through the information gained, including an increased understanding of each factual and legal position in the dispute, as well as a better understanding of the personalities of the parties and advocates. There are several benefits that could be discussed in addition to those in this article and anecdotally. The author has personally experienced benefit from each mediation he participated in, even though the benefits were not always the same.

how many systems in the U.S. assign a judge at the time of filing. If the participants (either plaintiff or defendant) would rather use a different mediator other than the one assigned, they should be free to select a mediator from the private marketplace, so long as both parties agree to the private mediator and their fees.

- The mandatory mediation requirement should provide either the first mediation session (or a portion thereof) at no charge to the disputants or at a nominal charge. This is similar to the forty-eight euros per party fee assessed for the first mediation session (informational only) in Italy and in some jurisdictions in California's pilot program where the court paid the first three to four hours of the first mediation session. The author recommends a price point that is not considered cost-prohibitive within each jurisdiction and culture (which could include mediator fees being voluntarily capped for the first session or a portion thereof or subsidized by the court itself) and also includes fee waivers for indigent litigants.
- The mandatory mediation requirement should provide for an easy opt-out by either party and for any reason without repercussions or sanctions. The Italy model appears to have perfected this and found it to be particularly beneficial, and even with the easy opt-out coupled with a general hostility from legal practitioners to participate in mediation, the mediators are still able to convince participants to continue the mediation process 50% of the time. This characteristic can be seen as a variation of the recommendation and caveat against "good faith" requirements.

Outside of these main characteristics, each court and country/state should customize to fit their specific and unique circumstances and situation.[162] This may include efforts to increase awareness among legal practitioners, judges, and litigants. There may need to be some cultural shifts, such as changing perceptions about going to mediation as a weakness in your case or legal position. Also, some areas, such as California and the United

[162] Additional resources for lawmaking, including some suggested statutory language for mandatory mediation systems and monetary incentives and sanctions can be found in EU initiatives. *See generally*, EUR. COMM'N FOR THE EFFICIENCY OF JUSTICE, *European Handbook for Mediation Lawmaking* (2019); EUR. COMM'N FOR THE EFFICIENCY OF JUSTICE, *Mediation Development Toolkit Ensuring Implementation of the CEPEJ Guidelines on Mediation* (2018).

States in general, may need to start thinking of mediation as a process rather than a four to eight-hour event. This is especially true for early mediation where initial disclosures and traditional discovery likely have not been completed or even begun. Mediation may require multiple sessions over the course of several weeks or even months and can be done alongside information disclosures and discovery.

IX. CONCLUSION

The benefits of mediation are well-documented and have been proven in those locations that have successfully persuaded disputants to participate. Court systems across the globe appear to be overworked, and their traditional resources stressed. In most legal systems, access to justice is a major concern, as is the cost and time to resolve disputes through the civil court systems. The time has come for each government, legislature, and court to seriously consider imposing or expanding its mediation programs. This author believes the time for mandatory early mediation for all civil cases is now.

On a worldwide basis, assuming there are 100 million new civil lawsuits filed annually, and only 30% choose to continue the mediation beyond the first mandatory session, that equates to 30 million mediations annually. If we further assume a conservative settlement rate of 30%, that means 9 million cases will settle within the very initial stages of the lawsuit.[163] Imagine the impact that that would have on the individuals involved in those disputes.[164] Imagine the savings of resources, financial and otherwise, the reduction in court congestion, and the increased access to justice.

It may be a challenging endeavor to promote, implement, and perfect a mandatory early mediation system for each jurisdiction, but it is not insurmountable. There have been decades of trial and error and several model systems exist, in both civil and common law systems, that demonstrate success and efficacy. Worldwide mandatory early mediation for all civil cases will take bold action from bold decisionmakers at every level of government, the legal profession, and the disputants themselves. This article will hopefully act as another voice in the growing chorus promoting peacemaking through dispute resolution by effectively using the tools of alternative dispute resolution, primarily, mediation.[165]

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[163] Historical data shows that settlement rates are likely to be significantly higher than 30% and will probably be closer to 50%. *See, e.g., supra* notes 27–28, 48–59, 64, 69, 84, 101.

[164] There may be significant financial, emotional, and mental relief as compared to the stress and costs associated with protracted litigation.

[165] It is very encouraging and exciting to see that governments across the world continue to recognize the importance of ADR, and mediation in particular. *See, e.g.*, U.N. GAOR, 73rd Sess., 80th plen. mtg., U.N. Doc. A/73/PV.62 (Dec. 20, 2018). The

Convention was open for signatures on 7 August 2019 in Singapore and was signed by forty-six states. Signatory states must now ratify the Convention for it to be binding upon them. This Convention only applies to international disputes and therefore will have no direct impact on increasing domestic mediations, though it will hopefully act as a reminder and possibly a catalyst for nations to further develop their domestic mediation programs, given the significant benefits mediation brings.