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## Practitioners' Perception of Court-Connected Mediation in Five Regions: An Empirical Study

Shahla F. Ali

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## Practitioners' Perception of Court-Connected Mediation in Five Regions: An Empirical Study

Shahla F. Ali\*

### ABSTRACT

*Courts throughout the world face the challenge of designing court mediation programs to provide opportunities for party-directed reconciliation on the one hand, while ensuring access to formal legal channels on the other. In some jurisdictions, mandated programs require initial attempts at mediation, while in others, voluntary programs encourage party-selected participation. This Article explores the attitudes and perceptions of eighty-three practitioners implementing court mediation programs in five regions in order to understand the dynamics, challenges, and lessons learned from the perspectives of those directly engaged in the work of administering, representing, and mediating civil claims. Given the highly contextual nature of court mediation programs, this Article highlights achievements, challenges, and lessons learned in the implementation of mediation programs for general civil claims. The principal findings indicate that overall, from the perspective of the court mediation practitioners surveyed,*

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*practitioners report slightly higher levels of confidence in mandatory mediation programs, higher perceptions of efficiency with respect to voluntary programs, and regard voluntary and mandatory mediation programs with relatively equal perceptions of fairness. Program achievements largely depend on the functioning of the civil litigation system, the qualities and skill of the mediators, safeguards against bias, participant education, and cultural and institutional support.*

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## I. INTRODUCTION

Drawing on a three-year empirical study, this Article explores the attitudes and perceptions of practitioners implementing court mediation programs in five regions of the world. The aim of the survey is to provide insights into the dynamics, challenges, and lessons learned from the perspectives of those directly engaged in the work of administering, representing, and mediating civil claims. It aims to respond to calls for data regarding the relative effectiveness within and between alternative dispute resolution (ADR) program types, including mandatory and voluntary programs, and for empirical studies of the effectiveness of ADR, especially outside of the United States.<sup>1</sup>

The principal finding of this Article, based on survey data and follow-up questions, is that from the perspective of the practitioner, both mandatory and voluntary mediation programs are perceived with relatively equal levels of confidence, perceptions of fairness, and of efficiency. While slight variation exists such that practitioners report higher levels of confidence in mandatory mediation programs (70 percent) as opposed to voluntary programs (64 percent), and higher perceptions of efficiency with respect to voluntary programs (77 percent) as opposed to mandatory programs (68 percent), both regard voluntary (81 percent) and mandatory (82 percent) mediation programs with relatively equal perceptions of fairness.<sup>2</sup>

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1. See generally Lisa Blomgren Bingham et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. DISP. RESOL. 1 (2009).

2. No statistically significant variation exists with respect to such findings.

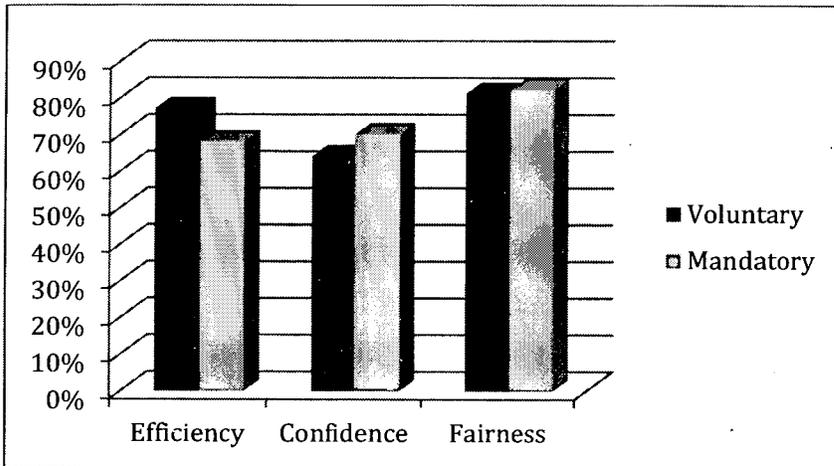


Figure 1: Percentage of Practitioners Rating Very High/High Perceptions of Efficiency, Confidence, and Fairness in Court Mediation by Program Type<sup>3</sup>

The findings of this Article echo recent insights from scholars of civil mediation reform. In particular, the provision of high-quality mediation coupled with contextual understanding will have a positive impact on meaningful outcomes in increasingly complex forms of mediation.<sup>4</sup> Moreover, the relative advantages and disadvantages of mediation in a given jurisdiction vary according to the functioning of the underlying national civil litigation system.

The survey faces a number of limitations including the fact that it represents a small-*n* sample, and as such, the findings cannot be considered generalizable. In addition, as prior studies have noted, self-reported perceptions are subject to bias and statements may not always reflect actual practice.<sup>5</sup>

3. With the permission of the publisher, figures from the forthcoming book, SHAHLA ALI, *COURT MEDIATION REFORM: EFFICIENCY, CONFIDENCE AND PERCEPTIONS OF JUSTICE* (Edward Elgar Publishing, forthcoming 2018). For full discussion, see the forthcoming publication.

4. See generally Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH U. J.L. & POL'Y 37 (2002) (discussing the benefits of mediation over litigation and how mediation mechanisms will increase in the near future due to greater use of ADR).

5. See James Wall & Kenneth Kressel, *Research on Mediator Style: A Summary and Some Research Suggestions*, 5 NEGOT. & CONFLICT MGMT. RES. 403, 406–407 (2012) (summarizing what mediators have had to say about self-reported data and perceptions that may naturally stem from such data).

### A. *Summary of Findings*

The findings of this Article can be grouped into three areas: correlation between program type and perceptions of the process, insights from practitioners regarding strengths and weaknesses of existing programs, and synthesis of practitioner suggestions for improving the current mediation process.

The first area reports on the correlation between mediation program type and perceptions of confidence, fairness, and efficiency of the process. Here the data suggests that while slight variation exists such that practitioners report higher levels of confidence in mandatory mediation programs, and higher perceptions of efficiency in voluntary programs, they regard voluntary and mandatory mediation programs with relatively equal perceptions of fairness. No statistically significant variation exists with respect to such findings.

The second area reports on insights from practitioners regarding the strengths and challenges of existing court mediation programs by voluntary or mandatory program type. The findings here indicate that practitioners working in mandatory court mediation programs identified several key benefits of such programs including normalizing party-driven resolution, improving efficiency and speed through effective case screening, and facilitating relational repair. Practitioners working in voluntary programs identified the key strengths of those such programs as the development of a well-established and supportive mediation culture, self-determined party engagement, simple procedures, welcoming facilities, high quality mediators, and ongoing monitoring and evaluation.

With respect to program challenges, mandatory mediation practitioners noted limited party understanding of the mediation process, lawyer conflicts of interest, mediator quality, lack of good faith, inexperience in managing power imbalances, and resource limitations. Challenges within voluntary court mediation programs included difficulties associated with encouraging party participation, limited resources, and mediator quality.

The final area of this Article synthesizes practitioner suggestions for improving the overall court mediation process by program type. Mandatory mediation program practitioners had a number of useful suggestions for improving the quality of court mediation systems, including: enhanced training, public education on the benefits of mediation, funding and organizational resources, mediator incentives, ongoing evaluation, and greater flexibility in settlement arrangements. Voluntary mediation program practitioners identified similar suggestions, including enhanced mediator training, greater financial resources, increased public education, improved facilities, and more directed encouragement of litigants' attempts of mediation. The findings of this Article engage with the recent series of Global Pound Conference (GPC) sessions suggesting that greater

consideration may be given to the development of legislation supporting the enforcement of mediated settlements.<sup>6</sup>

## II. SURVEY DATA COLLECTION METHOD

Survey data was collected from eighty-three practitioners in order to gain insight into the dynamics of mandatory and voluntary court mediation programs and the impact of program type, if any, on perceptions of confidence, fairness, and efficiency among selected practitioners. The survey examined how practitioners working in voluntary and mandatory mediation programs viewed existing strengths, challenges, and lessons learned. Given the small sample size ( $n=83$ ), the purpose of the survey was to supplement case studies by offering insights into how practitioners are learning to advance program development in both mandatory and voluntary court mediation contexts, rather than to provide generalizable findings.

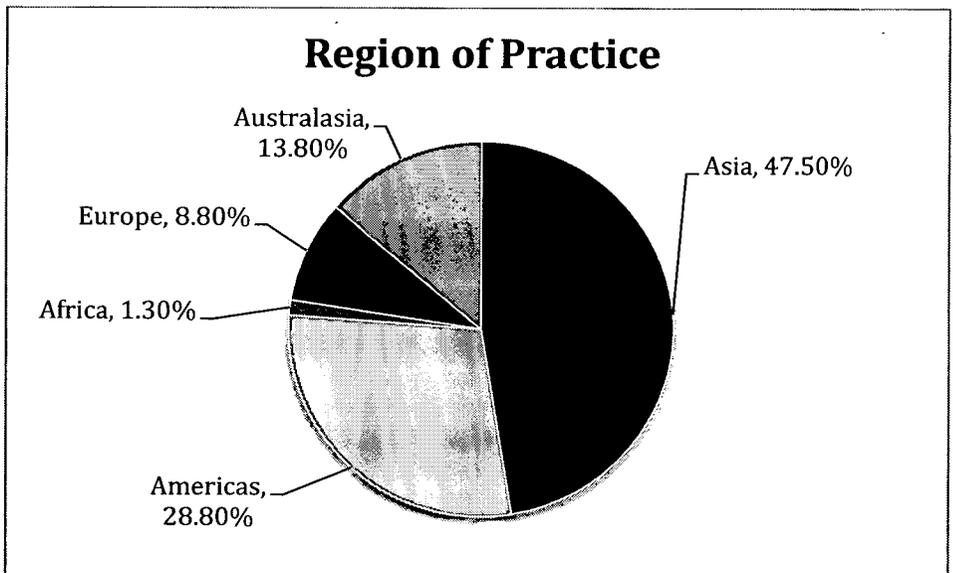


Figure 2: *Region of Practice*<sup>7</sup>

The survey questionnaire contained a quantitative part asking for yes-no answers and numerical responses in the form of percentage estimates or evaluations according to a five-point scale, as well as a

6. For detailed analysis and country breakdowns, see Int'l Mediation Inst., *GPC Series Data*, GLOBAL POUND CONFERENCE, <https://www.globalpound.org/gpc-series-data/> (last visited Sept. 2, 2018) [<https://perma.cc/9Q2F-CBSY>] (archived Aug. 4, 2018).

7. ALI, *supra* note 3.

supplemental part containing qualitative, open-ended questions asking for personal observations, judgments, and proposals.

The first part of the survey asked participants for background information on their region of practice, the nature of their court mediation system (whether voluntary or mandatory), and cost coverage of the program. The second part of the survey examined the impact, if any, of court mediation program type on participants' perceptions of confidence in the system, fairness, and efficiency. The final part examined the strengths, challenges, and suggestions for improving the overall functioning of both voluntary and mandatory court mediation programs. These findings will be discussed in greater detail below.

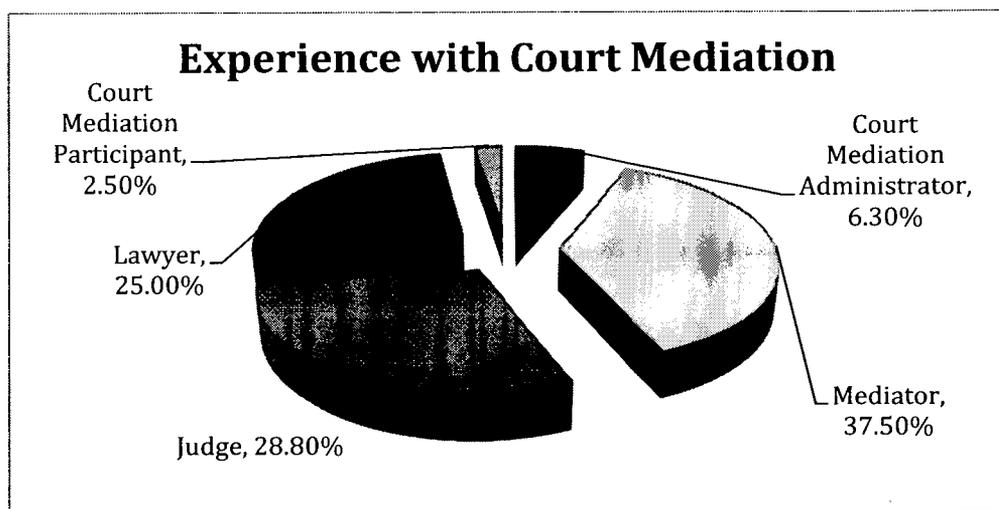


Figure 3: *Experience with Court Mediation*<sup>8</sup>

The survey was conducted between September 2015 and January 2017. A total of 120 surveys were distributed in person and initiated via a web link portal and eighty-three surveys were completed. Given the small sample size ( $n=83$ ), the survey aimed to provide insights into the dynamics of voluntary and mandatory court mediation programs rather than provide for generalizable findings. The sample pool consisted of a convenience sample of voluntary and mandatory mediation practitioners selected from contacts made with members of professional court associations including members of the American Bar Association (ABA) Young Lawyers Division, the ABA Section of Dispute Resolution, the Mediator Network, the CPR Institute, the National Centre for State Courts, Mediators Beyond Borders, the Hong Kong Mediation Network, the Resolution Systems Institute, the Asia

8. *Id.*

Pacific Mediation Forum, the Court Annexed and Judicial Mediation Network, and the Collaborative Justice Institute. In addition, the survey was distributed through contacts made at an Asia-Pacific UNCITRAL Conference on Harmonizing Trade Law, the UC Hastings Center for Negotiation and Conflict Resolution, the Singapore International Arbitration Forum, the Center for International and Comparative Law, the Peace Chair at the University of Maryland, the UC Berkeley Center for the Study of Law and Society, the Chiangmai Provincial Court Mediation Program, the Siam Legal ADR Group, the Knight Group Mediation Program, the ADR Unit of the U.S. District Court, the Superior Court of California, the World Bank Group, the New York State Unified Court System, the Center for Understanding Conflict, Shanghai Law School, the Pepperdine Straus Institute for Dispute Resolution, the Dubai International Court, and the Japan International Mediation Centre. The respondents consisted of 6.3 percent administrators of a court mediation program, 37.5 percent mediators, 28.8 percent judges, 25 percent lawyers, and 2.5 percent users of a court mediation program.

#### A. Court Mediation Costs

Models of mediation financing vary by jurisdiction. The survey found that in terms of cost coverage, court mediation programs employed a number of models ranging from no financial support to full support for mediation, reflecting the wide variation in current practice.<sup>9</sup> For example, the Netherlands introduced the extension of legal aid funding to include mediation.<sup>10</sup> In Saskatchewan, Canada, compulsory mediation is free before a mediator selected by the Ministry of Justice.<sup>11</sup> Some jurisdictions, such as Quebec, regulate the fees while others, such as Ontario, do not.<sup>12</sup>

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9. See generally Bingham, *supra* note 1; Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, ST. JOHN'S L. REV. 77 (2007); Carrie J. Menkel-Meadow, *Dispute Resolution*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH (Peter Cane & Herbert Kritzer eds., 2010).

10. See generally Annie de Roo & Rob Jagtenberg, *Mediation in the Netherlands: Past-Present-Future*, 6.4 ELECTRONIC J. COMP. L. 127 (2002).

11. Alain Prujiner, *Recent Developments in Mediation in Canada*, in GLOBAL TRENDS IN MEDIATION 83–106 (Nadja Marie Alexander ed., 2006) (referencing article 4, section 4.3.2).

12. *Id.*

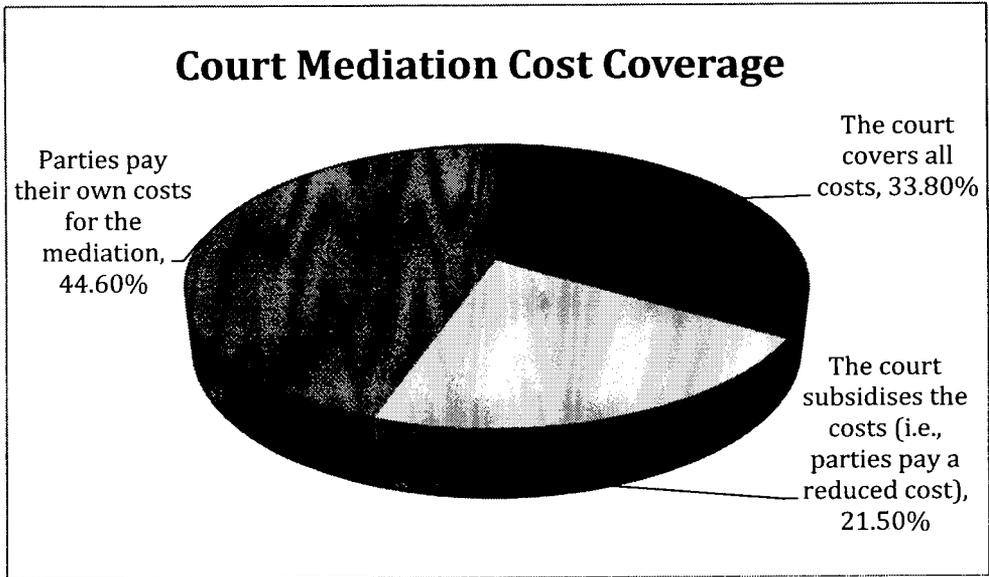


Figure 4: Court Mediation Cost Coverage<sup>13</sup>

The survey similarly found that in most cases, mediator fees are either borne by the court up to a certain number of hours or paid directly by the parties. Several practitioners noted, however, that in their jurisdictions, there is no fee for mandated mediation, particularly if the mediation is facilitated by the assigned judge. However, “if [the] party choose[s] the mediator . . . then the party . . . pay[s] the mediator fee.”<sup>14</sup> Some mandated court mediation programs have a standard nominal fee for court mediation services. For example, in the Philippines, parties are assessed a “standard fee of (Mediation fee) P500.W Philippine peso.”<sup>15</sup> In Florida, a sliding scale exists such that “Florida [fully] subsidizes [a two-hour] mediation for parties with joint income under \$100k, [and reduces costs to] \$60/person if they make between \$0–\$50k jointly, and \$120/person if between \$50–\$100k. After that, you have to use private mediation.”<sup>16</sup>

13. ALI, *supra* note 3.

14. Cost Coverage Survey, Shahla Ali (response date Mar. 3, 2016, 7:57 AM) (on file with author).

15. *Id.* (response date Mar. 2, 2016, 12:41 PM).

16. *Id.* (response date Sept. 20, 2015, 3:18 AM).

### B. Rationale for Introducing Court Mediation Programs

Scholarship has examined the varying rationales motivating courts to introduce mediation programs.<sup>17</sup> As discussed earlier, existing intrinsic and extrinsic rationales for introducing court-based mediation in civil justice systems include efficiency,<sup>18</sup> reduction of caseloads,<sup>19</sup> and private- and public-sector cost reductions,<sup>20</sup> as well as extrinsic factors including relational,<sup>21</sup> societal,<sup>22</sup> and process-based<sup>23</sup> considerations.

This study compared motivating rationales behind the introduction of court mediation programs from the perspective of practitioners by program type (voluntary or mandatory). It found consistency in the top two motivating factors cited by practitioners among both types of programs, with primary importance placed on “reduc[ing] costs/time involved in litigation” (efficiency considerations) and secondary importance placed on “giv[ing] parties a voice in the outcome” (relational and process-based considerations). For the motivating factors next in level of importance, practitioners in voluntary mediation programs placed value on improving court access (ranked at #3) and improving the quality of outcomes/decisions (ranked at #4), while mandatory programs did the reverse, placing importance on improving the quality of outcomes/decisions (ranked #3) and then improving court access (ranked #4).

17. See generally Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System* 108 PENN ST. L. REV. 165 (2004) (discussing how ADR has changed the legal system in only two decades).

18. See Maria Dakolias, *Court Performance Around the World: A Comparative Perspective 2* (The World Bank, Technical Paper No. 430, 1999) (outlining how many countries' current judicial systems operate inefficiently and are riddled with delay, while ADR regimes seem to avoid certain delays).

19. Chee Hock Foo et al., *Civil Case Management in Singapore: Of Models, Measures and Justice*, ASS'N SOUTHEAST ASIAN NATIONS L.J. 1, 15 (2014).

20. See Whitney Maclons, *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (Nov. 26, 2014) (unpublished LLM thesis, University of the Western Cape) (on file with the University of the Western Cape Department of Mercantile and Labour Law) (discussing the cost savings of mediation as an ADR mechanism from various countries throughout).

21. See YONA SHAMIR, *ALTERNATIVE DISPUTE RESOLUTION APPROACHES AND THEIR APPLICATION* 24 (2003).

22. Nadja Alexander et al., *Engineering Peace—Achieving the promise of mediation in the world's most difficult conflicts*, *MEDIATE* (Sept. 2013), [http://www.mediate.com/articles/engpeace.cfm#\\_edn7](http://www.mediate.com/articles/engpeace.cfm#_edn7) [<https://perma.cc/Z5XH-EC6X>] (archived Aug. 4, 2018).

23. Robert Zeinemann, *The Characterization of Public Sector Mediation*, 24 *ENVIRONS: ENVTL. L. & POL'Y J.* 49, 51–53 (2003). See also generally Michelle LeBaron & Nadja Marie Alexander, “*The Alchemy of Mediation*,” *Essays in Mediation* (Singapore Management University School of Law Research Paper No. 11/2017, 2016).

Response	Ranking by Program Type	
	<i>Voluntary</i>	<i>Mandatory</i>
<i>To Reduce Cost/Time Involved in Litigation</i>	1	1
<i>To Give Parties a Voice in the Outcome</i>	2	2
<i>To Improve Court Access</i>	3	4
<i>To Improve the Quality of Outcomes/Decisions</i>	4	3

Table 1: Rationale for Court Mediation by Program Type, 2015–2017<sup>24</sup>

### III. SURVEY FINDINGS: CONFIDENCE, FAIRNESS, AND EFFICIENCY

#### A. Confidence in Court Mediation Programs

While the survey findings show no statistically significant variation in the level of confidence in voluntary or mandatory court mediation programs, the survey reflects a slightly higher level of confidence among practitioners in mandatory mediation programs. Such programs benefit from increased exposure, thereby offering parties a chance to observe possible beneficial results of mediation. These benefits, scholars note, include opportunities to tell one's side of the story, to participate in the process, and to help craft the final outcome.<sup>25</sup> This echoes findings from recent studies showing that parties who entered mediation reluctantly nevertheless benefitted from the process,<sup>26</sup> regardless of how the mediation was initiated.<sup>27</sup> This also correlates with findings that show higher compliance rates for judgments arrived at through mediation as compared with litigation.<sup>28</sup> Such beneficial perceptions alongside higher compliance rates may explain relatively higher levels of confidence in mandatory programs.

24. ALI, *supra* note 3.

25. Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 482 (2010); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. DISP. RESOL. 641, 690 (2002).

26. Craig McEwen & Thomas Milburn, *Explaining a Paradox of Mediation*, 9 NEGOT. J. 23, 23 (1993); Jessica Pearson & Nancy Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 COLUM. J.L. & SOC. PROBS. 451, 464 (1985).

27. See Frank E.A. Sander, *Another View of Mandatory Mediation*, DISP. RESOL. MAG., Winter 2007, at 16 (discussing the fact that even mediation participants who entered into mandatory mediation, as opposed to voluntary, found benefits in the results of mediation).

28. Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC'Y REV. 11, 45 (1984); Neil Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. SOC. ISSUES 127, 129 (1985).

Response	Program Type		Total
	Voluntary	Mandatory	
Highly Confident/Confident	64%	70%	(55)
Somewhat/Not Confident	36%	30%	(26)
Total	(31)	(50)	81

Note: The chi-square statistic is 0.264. The *p*-value is 0.607364. This result is not significant at *p* > 0.05.

Table 2: Confidence in Mediation Program by Program Type, 2015–17<sup>29</sup>

### B. Fairness

The survey results found no statistically significant difference in perceptions of outcome fairness among court mediation practitioners across voluntary and mandatory mediation programs. Nearly an identical proportion of practitioners working in voluntary (81 percent) and mandatory (82 percent) programs believed that outcomes arrived at through their court mediation programs were either very fair or fair.<sup>30</sup> Such consistency of response appears to indicate that the mechanism by which parties are introduced to court mediation has a limited impact on perceptions of fairness. It must be noted that the survey did not ask practitioners about perceptions of process fairness<sup>31</sup> rather than outcome fairness, components of which are requiring informed participation;<sup>32</sup> non-coercion;<sup>33</sup> absence of undue influence;<sup>34</sup>

29. ALI, *supra* note 3.

30. Much of the ADR literature uses the terms “fairness” and “justice” interchangeably. See, e.g., Jacob Bercovitch, *Mediation Success or Failure: A Search for the Elusive Criteria*, 7 CARDOZO J. CONFLICT RESOL. 289, 291 (2006) (joining the “abstract concepts” together in discussion); Jonathan M. Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 19, 19 (2004) (“justice might more easily be understood as ‘fairness’”); Omer Shapira, *Conceptions and Perceptions of Fairness in Mediation*, 54 S. TEXAS L. REV. 281, 286 (2012) (stating clearly the article uses the terms interchangeably); Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213, 215 (2005) [hereinafter *Stulberg Mediation and Justice*] (stating that fairness is required to complement and sustain the author’s thesis regarding justice).

31. See generally Shapira, *supra* note 30.

32. See Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 778 (1999) (discussing informed consent in mediation and its two related components: disclosure and consent).

33. See CAL. R. CT. 3.857(b) (stating that mediations should be completed in an uncoerced manner).

34. See, e.g., FAMILY MEDIATION CAN., MEMBERS CODE OF PROF’L CONDUCT 3 (2013), [http://www.fmc.ca/wp-content/uploads/2016/10/FMC-Members-Code-of-Conduct\\_0.pdf](http://www.fmc.ca/wp-content/uploads/2016/10/FMC-Members-Code-of-Conduct_0.pdf) [<https://perma.cc/Y5AP-MJGM>] (archived Sept. 30, 2018).

the opportunity to terminate at any time;<sup>35</sup> absence of bias;<sup>36</sup> impartiality;<sup>37</sup> taking account of power differentials;<sup>38</sup> and providing an opportunity for a wide expression of views.<sup>39</sup> Rather, the focus on “outcome fairness,” as traditionally assessed by standards of equity,<sup>40</sup> legality,<sup>41</sup> beneficial impact on parties,<sup>42</sup> relational improvement,<sup>43</sup> and upholding of human dignity,<sup>44</sup> appears to be independent of the mechanism by which parties arrive at mediation—whether voluntarily or through a mandatory process. The consistency of perceptions of fairness across mandatory and voluntary mediation program types appears to support suggestions that given the “educative functions” of mandatory programs, it is worthwhile “to at least consider some form of dispute settlement procedure before trial.”<sup>45</sup>

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35. See GA. COMM'N ON DISPUTE RESOLUTION, ETHICAL STANDARDS FOR MEDIATORS § IV (providing links to mediator ethics information, containing contention that parties to mediation must be able to terminate any time).

36. See Sarah E. Burns, *Thinking About Fairness & Achieving Balance in Mediation*, 35 FORDHAM URB. L.J. 39, 41 (2008) (discussing the different types of bias that can be present and instructing mediators to avoid allowing biases, lest the mediation's credibility be called into question).

37. See, e.g., Joan Dworkin & William London, *What Is a Fair Agreement?*, 7 MEDIATION Q. 3, 5 (1989) (stating that “criteria for procedural fairness” in mediation proceedings certainly includes impartiality of the mediator).

38. LAURENCE BOULLE & MIRYANA NESIC, *MEDIATION: PRINCIPLES PROCESS PRACTICE* 454–55 (2001); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1550 (1991); see Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1375–83 (discussing the theories of prejudice and ADR).

39. See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 817 (2001) (discussing how all parties to a mediation must be offered the opportunity to tell their story and to have the resolution process based on full information).

40. See Bercovitch, *supra* note 30, at 293 (discussing equity as an indicator that may help prove the success of a mediation).

41. See, e.g., John W. Cooley, *A Classical Approach to Mediation—Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 U. DAYTON L. REV. 83, 130 (1993) (citing illegality as a primary reason for the mediator to review the resulting agreement of a mediation or to use such a review as a rhetorical technique for the parties to evaluate the agreement).

42. See, e.g., Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. DISP. RESOL. 909 (1998) (discussing the fairness of mediation in regards to the participating parties); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 14–18 (1981) (discussing the need for a beneficial impact of the mediation on parties for the process to matter at all).

43. See Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 186 (2002); Kent E. Menzel, *Judging the Fairness of Mediation: A Critical Framework*, 9 MEDIATION Q. 3, 6–16 (1991) (discussing relational improvement through mediation).

44. See Stulberg *Mediation and Justice*, *supra* note 30, at 215 (naming dignity as one of the six principles of the governing elements of mediation).

45. Carrie J. Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals*, 46 UCLA L. REV. 1871, 1893 (1997).

Response	Program Type		Total
	<i>Voluntary</i>	<i>Mandatory</i>	
<i>Very fair/fair</i>	81%	82%	(67)
<i>Somewhat/Not fair</i>	19%	18%	(15)
<b>Total</b>	<b>(32)</b>	<b>(50)</b>	<b>82</b>

Note: The chi-square statistic is 0.0073. The *p*-value is 0.93171. This result is not significant at  $p > 0.05$ .

*Table 3: Fairness of Mediation Program by Program Type, 2015–2017*<sup>46</sup>

### C. Efficiency

Overall, the findings show no statistically significant difference in perceptions of efficiency between voluntary and mandatory court mediation programs. However, surveyed practitioners regard voluntary mediation programs as slightly more efficient than mandatory court mediation programs. When examined from the court's operational cost perspective, voluntary mediation programs generally place the burden of financing such services on the parties, and therefore overall voluntary mediation costs are lower than mandatory programs. From the perspective of the user, when mediation is successful, litigation expenses may be reduced. Several studies have identified a reduction in litigation costs when parties are successful in mediating their disputes.<sup>47</sup> However, when mediation is unsuccessful,

46. ALI, *supra* note 3.

47. For example, a study conducted by the International Finance Corporation in 2006 found that in more than one thousand cases resolved through mediation in Serbia, Bosnia and Herzegovina, and Macedonia, direct costs of mediation averaged \$225, which represented about 50 percent of the cost of litigation (approximately \$470). See generally ROBERT G. HANN ET. AL. EVALUATION OF THE ONTARIO MANDATORY MEDIATION PROGRAM (RULE 24.1): EXECUTIVE SUMMARY AND RECOMMENDATIONS (2001) (discussing how Rule 24.1 in the Ontario Superior Court of Justice in Ottawa and Toronto, Canada has resulted in costs savings for the court and users of the program since its inception); CARLOS JORQUIERA & GABRIEL ALVAREZ, MULTILATERAL INVESTMENT FUND, THE COST OF DISPUTES IN COMPANIES AND THE USE OF ADR METHODS: LESSONS FROM NINE LATIN AMERICAN COUNTRIES (2005) (providing a comprehensive data set regarding the costs of mediation in the corporate setting, as well as analysis of such data); John Barkai & Gene Kassebaum, *Hawaii's Court-Annexed Arbitration Program: Final Evaluation Report* (Univ. of Haw. at Manoa Program on Conflict Resolution Working Paper Series, 1992) (providing numerical figures on how Hawaii's court-annexed arbitration program have resulted in savings for all); Inessa Love, *Settling Out of Court: How Effective is Alternative Dispute Resolution?*, VIEWPOINT, Oct. 2011, at 2 (discussing costs and results of mediation throughout different countries and regions).

overall costs of litigation generally go up.<sup>48</sup> In light of the impact of costs on overall efficiency, some mandatory mediation programs provide an opt-out mechanism for parties in the event that “the costs of mediation would be higher than the requested relief”<sup>49</sup> and suggest that ongoing monitoring be required to ensure high quality mandatory court mediation programs, particularly when parties are required to pay for mediation fees.<sup>50</sup> Original advocates of the multi-door courthouse have also cautioned that requiring that parties pay for court-mandated ADR may contradict the key idea of making a justice system that provides parties with a range of options for dispute resolution.<sup>51</sup> Concerns have also been raised regarding the possibility that mandatory mediation systems in which users pay for mediation services may lead to satellite litigation and “ultimately increase the costs for litigants and result in general inefficiency within the court system.”<sup>52</sup> For voluntary programs, it is possible that because the decision regarding whether to proceed with mediation is left to the parties, once a decision is reached, a final agreement may be more likely. It is also important to recognize, as has been described by several mediation scholars, that a narrow focus on efficiency as measured by costs and time, while important, may nevertheless overlook the more important relational benefits of mediation.<sup>53</sup>

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48. For cases that failed to settle through mediation, expenses were \$2,000 to \$4,000 higher. HAZEL GENN ET AL., *TWISTING ARMS: COURT REFERRED AND COURT LINKED MEDIATION UNDER JUDICIAL PRESSURE* 98 (2007). Similarly, ENE processes that did not result in settlement in California courts added approximately \$4,000 to the cost of litigation. Joshua Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1487–1551 (1994). See also Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 390 (1986) (suggesting that there are no savings in costs, stating such savings are “speculative”); Roselle Wissler, *The Effectiveness of Court Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 80–82 (2004) [hereinafter *Wissler Effectiveness*] (reporting mixed results in cost savings).

49. COLO. REV. STAT. ANN. § 13-22-311(1) (West 2009).

50. FLA. R. CIV. P. 1.710(b); see also FLORIDA DISPUTE RESOLUTION CENTER, *FLORIDA'S COURT-CONNECTED ADR HISTORY IN FLORIDA MEDIATION & ARBITRATION PROGRAMS: A COMPENDIUM* 12 (Earnestine Reshard ed., 19th ed., 2005–06).

51. Frank E.A. Sander, *Paying for ADR*, 78 A.B.A. J. 105, 105 (1992) (noting that for ADR to work, funds must be provided for it; the justice system cannot expect individuals to pay for the entire ADR process).

52. Quek, *supra* note 25.

53. See, e.g., LEILA P. LOVE & ERIC GALTON, *STORIES MEDIATORS TELL* (2012); Carrie J. Menkel-Meadow, *Alternative and Appropriate Dispute Resolution in Context Formal, Informal, and Semiformal Legal Processes*, in *THE HANDBOOK OF CONFLICT RESOLUTION* 1–28 (Peter T. Coleman et al. eds., 2014).

Response	Program Type		
	<i>Voluntary</i>	<i>Mandatory</i>	Total
<i>Very efficient/efficient</i>	77%	68%	(58)
<i>Somewhat/Not efficient</i>	23%	32%	(23)
Total	(31)	(50)	81

Note: The chi-square statistic is 0.835. The *p*-value is 0.360821. This result is not significant at  $p > 0.05$ .

*Table 4: Efficiency of Mediation Program by Program Type, 2015–2017*<sup>54</sup>

In addition to court and user costs, mediation programs impact court and user time. No doubt, mandatory mediation requires an additional time commitment on the parts of disputing parties, which in some cases reduces overall disputing time if the mediation is successful.<sup>55</sup> However, when mediation fails to result in resolution, overall disputing time is extended.<sup>56</sup> Given mixed empirical findings,<sup>57</sup> there is no overall consensus on time savings in mediation.

#### IV. SURVEY FINDINGS REGARDING STRENGTHS AND CHALLENGES OF COURT MEDIATION PROGRAMS

Survey respondents shared what they believe is working well in both mandatory and voluntary mediation programs. The responses are analysed in greater detail below.

54. ALI, *supra* note 3.

55. See generally ALEJANDRO ALVAREZ DE LA CAMPA, *THE PRIVATE SECTOR APPROACH TO COMMERCIAL ADR: COMMERCIAL ADR MECHANISMS IN COLOMBIA* (2009); Barkai, *supra* note 47; Bingham, *supra* note 1; Hann, *supra* note 47; Rosenberg, *supra* note 48.

56. See, e.g., JAMES S. KAKALIK, *AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 31* (1996). However, critiques of the study questioning the representativeness of the sample and other design flaws exist. See generally Thomas Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. EMPIRICAL LEGAL STUD. 843 (2004).

57. See GENN, *supra* note 48 (showing no significant impact of mediation on case duration); see also Wissler *Effectiveness*, *supra* note 48.

<i>Mandatory Programs</i>	<i>Voluntary Programs</i>
Normalizing party-driven resolution Improved efficiency & speed through case-screening Relational repair	Well-established and supportive mediation culture Self-determined engagement High quality mediators Ongoing monitoring and evaluation

Table 5: Key Achievements in Mandatory and Voluntary Programs, 2015–2017<sup>58</sup>

A. Key Achievements in Mandatory and Voluntary Mediation Programs

1. Achievements—Mandatory Programs

For practitioners working in mandatory mediation programs, the key areas of achievement were identified as normalizing party-driven resolution, improving efficiency and speed through effective case screening, and facilitating relational repair.

A key benefit of mandated programs is the normalization of a process of autonomous party-driven resolution. One practitioner noted that “parties now expect that they will mediate—it is now a ‘normal’ part of the legal process.”<sup>59</sup> While “self referral is also encouraged,”<sup>60</sup> a practitioner added, “it helps that we are court mandated . . . Many have never encountered this process and have no idea what to expect . . . We draft our own agreements, usually, which I personally feel makes them more neutral and accurate than if a non-professional or the more motivated attorney gets a chance to write it.”<sup>61</sup>

In terms of both efficiency and efficacy, one practitioner noted that in her experience, mandatory programs tend to be “effective, [efficient], low cost, [and] fast.”<sup>62</sup> High settlement rates have also been achieved in some mandatory programs in spite of limited resources. One practitioner noted that his mandatory programs have achieved a “high success ratio despite lack of facilities, low pay for mediators, and lack of office supplies.”<sup>63</sup>

Mandatory programs work well when intake officers are vigilant in screening out inappropriate cases—for example, disputes involving domestic violence or PTSD. One practitioner noted the importance of

58. ALI, *supra* note 3.

59. Challenges and Successes of Mandatory Mediation Survey, Shahla Ali, (response date Mar. 2, 2016, 9:12 AM) [hereinafter Mandatory Mediation] (on file with author).

60. *Id.* (response date Sept. 13, 2015, 3:37 AM).

61. *Id.* (response date Sept. 20, 2015, 3:18 AM).

62. *Id.* (response date Mar. 3, 2016, 7:33 AM).

63. *Id.* (response date Mar. 2, 2016, 12:41 PM).

“the availability of exemptions for violence . . . so that cases that are inappropriate or urgent come straight to court.”<sup>64</sup> Another practitioner agreed, observing that “veteran mediations are compromised by PTSD issues.”<sup>65</sup> Another echoed the fact that “domestic violence is an issue in ~25% of our cases, regularly, but we have a screening questionnaire that is mailed with our order, and we always ask if people want to start together or separately, which helps.”<sup>66</sup> In sum, “getting certain types of cases to mediation quickly . . . saves a great deal of time and avoids hardening of positions.”<sup>67</sup>

The fact that mediation is “less formal than court,”<sup>68</sup> practitioners noted, provides opportunities for parties to “talk together”<sup>69</sup> to get to the heart of issues and take ownership of resolution options. This is particularly effective when “parties make their own plans, rather than having a judge make the decisions.”<sup>70</sup> The fact that such cases are “court ordered” rather than discretionary was highlighted in providing “parties . . . an opportunity to resolve matters between them more effectively.”<sup>71</sup>

## 2. Achievements—Voluntary Programs

For practitioners in voluntary mediation programs, the key areas of achievement were identified as the development of a well-established and supportive mediation culture, robust engagement, high quality mediators, and ongoing monitoring and evaluation.

For voluntary programs, a well-established and supportive mediation culture including clear court rules was cited as key to their success. For example, one practitioner noted that “the culture of mediation . . . is very strong.”<sup>72</sup> Supportive court rules are also important. One practitioner noted that “what works well are the rules of court that encourage mediation, confidentiality, and parties’ confidence in the process.”<sup>73</sup> Another practitioner added that the process “works better at an early stage of litigation.”<sup>74</sup>

In addition to a supportive formal infrastructure, informal support in the form of welcoming facilities and simple procedures were credited with positive voluntary mediation outcomes. One practitioner

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64. *Id.* (response date Mar. 2, 2016, 12:44 PM).

65. *Id.* (response date Sept. 16, 2015, 6:21 PM).

66. *Id.* (response date Sept. 20, 2015, 3:18 AM).

67. *Id.* (response date Sept. 7, 2015, 9:49 PM).

68. *Id.* (response date Mar. 2, 2016, 9:58 AM).

69. *Id.* (response date Sept. 13, 2015, 3:00 AM).

70. *Id.* (response date Oct. 14, 2015, 9:20 PM).

71. *Id.* (response date Sept. 14, 2015, 9:50 AM).

72. Challenges and Successes of Voluntary Mediation Survey, Shahla Ali (response date Feb. 14, 2016, 11:44 AM) [hereinafter Voluntary Mediation] (on file with author).

73. *Id.* (response date Jan. 13, 2016, 10:50 PM).

74. *Id.* (response date Sept. 8, 2015, 1:07 PM).

made positive reference to the fact that the “court provid[es] coffee/tea and biscuits.”<sup>75</sup> Such informal support “creat[es] an opportunity for parties to resolve disputes in an environment that supports parties to attempt resolution before further escalation and maintain (where applicable) important relationships.”<sup>76</sup> In addition, “reducing of technicality in the process”<sup>77</sup> was cited as having a positive influence on voluntary outcomes.

Party engagement was also noted as a strength within voluntary programs. A practitioner noted that once parties decide to try voluntary mediation, the program “works well.”<sup>78</sup> Another noted that the program “gets rid of many small claims which would be financially inefficient to take to trial”<sup>79</sup> with “outcomes [that] are mostly fair.”<sup>80</sup>

High quality mediators were credited with contributing to the success of voluntary mediation programs. One practitioner noted that “good mediators who are proactive”<sup>81</sup> are able to achieve positive results. Another noted that “experienced mediators’ ability to elicit objective information and evaluation, and collaborative negotiations”<sup>82</sup> have contributed to the success of the program.

Ongoing reflection through data collection, monitoring, and evaluation allows for continued refinement of voluntary programs. As one practitioner noted, “we have an excellent data collection system that allows us to monitor, evaluate and improve the program.”<sup>83</sup>

### B. Key Challenges of Mandatory and Voluntary Programs

Practitioners working in both mandatory and voluntary program shared some of the challenges facing their programs. These will be examined in greater detail below.

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75. *Id.* (response date Dec. 7, 2015, 12:47 PM).  
76. *Id.* (response date Oct. 15, 2015, 1:56 AM).  
77. *Id.* (response date Sept. 13, 2015, 6:59 AM).  
78. *Id.* (response date Sept. 9, 2015, 12:53 PM).  
79. *Id.* (response date Nov. 13, 2015, 3:45 AM).  
80. *Id.* (response date Oct. 17, 2015, 6:38 PM).  
81. *Id.* (response date Nov. 12, 2015, 3:39 PM).  
82. *Id.* (response date Sept. 7, 2015, 9:05 PM).  
83. *Id.* (response date Sept. 11, 2015, 8:05 PM).

<i>Mandatory Programs</i>	<i>Voluntary Programs</i>
Lack of good faith on the part of lawyers and parties	Encouraging party participation
Limited party understanding of the mediation process	Limited resources
Lawyer conflicts of interest	Mediator quality
Mediator quality	
Managing power imbalance	
Limited resources	

*Table 6: Key Challenges in Mandatory and Voluntary Programs, 2015–2017*<sup>84</sup>

### 1. Challenges—Mandatory Programs

Practitioners working in mandatory mediation programs described a number of challenges. These included: (1) lack of good faith on the part of lawyers and parties, (2) limited party understanding of the mediation process, (3) lawyer conflicts of interest, (4) mediator quality, and (5) managing power imbalances and resource limitations.

The challenge most frequently cited by practitioners in mandatory programs was the generally low settlement rate due to a perception of a lack of good faith by lawyers and parties, many of whom saw the process as a step toward an ultimate court battle. According to one practitioner, “in Indonesia based on a 2014 survey . . . only 4% of cases that [were] submitted to court were able to reconcile [through] the court mediation program.”<sup>85</sup> This was partly attributable to the lack of “good faith of both parties.”<sup>86</sup> One practitioner explained that “the problem is that because it is compulsory, parties in dispute aren't putting their ‘heart’ (effort and good faith) [in]to the mediation process. Mediation has a tendency to become just a ‘station’ that must be ‘visited’ on a ‘journey’ and not as a destination . . .”<sup>87</sup> Another practitioner added that many parties “just take it as an obligation in a court process.”<sup>88</sup>

Closely related to the issue of lack of good faith is the issue of limited party understanding of the mediation process. One practitioner noted that “when parties come to mediation, they've already been exposed to the combative nature of the court process and it takes a while sometimes to help them understand that they are empowered to

84. ALI, *supra* note 3.

85. Mandatory Mediation, *supra* note 59 (response date Mar. 3, 2016, 7:57 AM) (on file with author).

86. *Id.*

87. *Id.* (response date Mar. 3, 2016, 7:48 AM).

88. *Id.* (response date Mar. 2, 2016, 9:46 AM).

make decisions collaboratively.”<sup>89</sup> Similarly, another practitioner noted, “some times people want to court to solve their problem.”<sup>90</sup> Parties have unclear “expectations of the outcome,”<sup>91</sup> or simply “want to make a consensus.”<sup>92</sup> Overall this points to a “lack of awareness [among] people [of how] to solve their problems by mediation.”<sup>93</sup>

A related challenge in some mandatory court mediation programs is the existence of conflicts of interest on the part of lawyers representing parties to court proceedings. As one practitioner noted, “parties are represented by lawyer[s] and there [are] so many conflict[s] of interest there.”<sup>94</sup> Such conflicts include the perception that lawyers stand to lose hourly fees if the case settles quickly; the point at which cases are “referred to mediation [is already a] very [costly stage] in the litigation process.”<sup>95</sup> In many cases, “parties [will] not . . . participate in the mediation process because they [are] represented by their lawyer.”<sup>96</sup>

Mediator quality was cited as a challenge among some practitioners working in mandatory programs. One noted that the “[list] of mediators [and] quality of the mediators”<sup>97</sup> impeded the success of the program. Another noted that it was difficult to find “a mediator who understands the process and [who does] not impose . . . [jargon] legalese.”<sup>98</sup> Someone else explained that “because the mediation is free . . . sometimes the mediator do[es] not [fulfill] their obligations.”<sup>99</sup>

Addressing power imbalances in the context of mandatory mediation also presented a challenge for many practitioners. One noted that it is “challenging when dealing with people in different positions of power.”<sup>100</sup> Another observed instances in which “an attorney representing one party push[ed] an unrepresented party to settle.”<sup>101</sup>

Resource limitations were cited as important challenges in mandatory programs. One practitioner noted that although the program in her court was “work[ing] well . . . the problem is [an] overload of cases.”<sup>102</sup> Another noted that “poor funding creates

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89. *Id.* (response date Oct. 14, 2015, 9:20 PM).

90. *Id.* (response date Mar. 3, 2016, 7:35 AM).

91. *Id.* (response date Sept. 13, 2015, 3:16 AM).

92. *Id.* (response date Mar. 3, 2016, 8:03 AM).

93. *Id.* (response date Mar. 2, 2016, 12:06 PM).

94. *Id.* (response date Mar. 3, 2016, 8:01 AM).

95. *Id.* (response date Mar. 2, 2016, 12:35 PM).

96. *Id.* (response date Mar. 3, 2016, 7:59 AM).

97. *Id.* (response date Mar. 3, 2016, 7:20 AM).

98. *Id.* (response date Sept. 13, 2015, 1:19 PM).

99. *Id.* (response date Mar. 2, 2016, 12:20 PM).

100. *Id.* (response date Mar. 2, 2016, 9:58 AM).

101. *Id.* (response date Sept. 21, 2015, 1:57 PM).

102. *Id.* (response date Mar. 3, 2016, 7:41 AM).

delay.”<sup>103</sup> Similarly, another practitioner observed that “time is limited [in the mediation sessions] and parties [are] rushed to complete the session.”<sup>104</sup> A practitioner described that it’s a matter of “availability . . . we have three cases per day, sometimes we are slammed, sometimes we have no shows, but each of us staff members chews through hundreds of cases per year.”<sup>105</sup> In some cases, lack of support for execution of mediated settlements leads to the impression that “the mediation [is] not effective, [since] some cannot be executed.”<sup>106</sup>

## 2. Challenges—Voluntary Programs

Practitioners working in voluntary court mediation programs also shared a number of challenges facing such programs. These included encouraging party participation, limited resources, and mediator quality.

Among the most frequently cited challenges for practitioners working in voluntary mediation programs was “encouraging party participation”<sup>107</sup> given the dynamic of party entrenchment once cases enter the court system. One practitioner noted that “parties are often more entrenched in [a] conflict due to court proceedings, [and they receive] . . . conflicting advice about mediation from legal representatives who would rather not lose clients.”<sup>108</sup> This view was shared by other practitioners who observed a “resistance [on the part] of counsel in embracing the process.”<sup>109</sup> Others noted that once parties “are already in the adversarial court system . . . it is not always [possible] to get [an] amicable outcome”<sup>110</sup> and it is “hard to get cases in, [with] lawyers on board”<sup>111</sup> since “it is voluntary.”<sup>112</sup>

In addition to party and counsel entrenchment, limited resources present another obstacle to quality mediation outcomes. As one practitioner noted, there are “not enough resources to further engage neutrals (in program policy and planning, training, appreciation events, roster solicitation).”<sup>113</sup> Another practitioner added that a major challenge is “budget/funding, adequate resources, and the high supply of mediators in relation to demand.”<sup>114</sup> Limited time for mediation preparation presents a related challenge. According to one practitioner, “we take case[s] with no time to prepare; often we go into

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103. *Id.* (response date Mar. 2, 2016, 12:44 PM).

104. *Id.* (response date Mar. 2, 2016, 9:24 AM).

105. *Id.* (response date Sept. 20, 2015, 3:18 AM).

106. *Id.* (response date Mar. 2, 2016, 9:26 AM).

107. Voluntary Mediation, *supra* note 72 (response date Sept. 11, 2015, 8:05 PM).

108. *Id.* (response date Oct. 15, 2015, 1:56 AM).

109. *Id.* (response date Sept. 13, 2015, 6:59 AM).

110. *Id.* (response date Oct. 13, 2015, 3:52 AM).

111. *Id.* (response date Sept. 9, 2015, 12:53 PM).

112. *Id.* (response date Sept. 10, 2015, 12:53 PM).

113. *Id.* (response date Jan. 19, 2016, 9:18 PM).

114. *Id.* (response date Jan. 13, 2016, 10:50 PM).

mediation knowing that we have a very limited time frame in which to work.”<sup>115</sup> Such resource challenges limit “accessibility”<sup>116</sup> of the system.

Finally, mediator quality was cited as an additional challenge facing voluntary programs. One practitioner noted, “the quality of the mediators varies greatly, and since it is done by the mediators on a pro bono basis, the commitment of the mediators also varies.”<sup>117</sup> Another practitioner agreed observing that “the biggest challenge . . . [is] ensuring mediator quality”<sup>118</sup> in particular when “judges act as mediators.”<sup>119</sup>

V. SURVEY FINDINGS: PRACTITIONER SUGGESTIONS FOR IMPROVING COURT MEDIATION PROGRAMS

Practitioners working in both mandatory and voluntary mediation programs had a number of suggestions for improving the court mediation system. These suggestions included: (1) enhanced training, (2) public education on the benefits of mediation, (3) funding and organizational resources, (4) mediator incentives, (5) ongoing evaluation, and (6) and greater flexibility in settlement arrangements.

<i>Mandatory Programs</i>	<i>Voluntary Programs</i>
Enhanced training	Enhanced training
Public education on mediation benefits	Financial resources
Funding/Organizational resources	Public education
Quality mediator incentives	Improved facilities
Ongoing evaluation	Encourage greater party participation
Flexibility in settlement arrangements	

Table 7: *Suggestions for Improvement of Mandatory and Voluntary Mediation Programs*<sup>120</sup>

A. *Enhanced Mediator Training*

Perhaps the most commonly voiced suggestion for improving court mediation fell within the area of enhanced mediator training. Several

115. *Id.* (response date Oct. 14, 2015, 8:02 PM).

116. *Id.* (response date Mar. 2, 2016, 12:29 PM).

117. *Id.* (response date Dec. 12, 2015, 10:25 PM).

118. *Id.* (response date Sept. 11, 2015, 8:05 PM).

119. *Id.* (response date Oct. 15, 2015, 8:33 AM).

120. *ALI, supra* note 3.

practitioners noted an urgent need to “give judges training”<sup>121</sup> as well as “more training for mediator[s] so they can work efficiently and properly.”<sup>122</sup> Other practitioners noted a need for “improv[ing] the soft skill[s] of mediator[s], especially the judge mediator,”<sup>123</sup> “to recruit more mediators from outside of the court,”<sup>124</sup> and to provide “continu[ing] . . . training”<sup>125</sup> in order “to increase capacity building of mediator[s].”<sup>126</sup> Some court mediation practitioners suggested that there is a “need [for] more professional opportunities . . . for young mediators. Mediation is not seen as a start-off career choice for young attorneys. Most people come . . . burned out at the end of their careers . . . I believe mediation-oriented law clerkships would be a very valuable thing.”<sup>127</sup>

Similarly, among voluntary mediation practitioners, the most frequently cited suggestion was the need for “more mediator training”<sup>128</sup> as well as independent mediators who are not members of the judiciary. Several practitioners echoed the view that “mediators need continued training and debriefing.”<sup>129</sup> Several believed that such mediators must be “non-judge mediators with no KPI/agenda to force/achieve [settlement] at any cost.”<sup>130</sup> This view was echoed by others who suggested the need to “use proper mediators, who are trained to mediate.”<sup>131</sup> The court can be encouraged to support such non-judge mediators “with more referrals by judges to the process.”<sup>132</sup> Mediator quality could also be enhanced through “us[ing] feedback . . . to rate the mediators”<sup>133</sup> and “improve autonomy and decreas[ing] evaluative outcomes.”<sup>134</sup> Evaluation and reflection, it was suggested, could improve the process through “us[ing] the data we collect to change the program [and] implement mediator standards and peer review.”<sup>135</sup>

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121. Suggestions for Improvement in Mandatory Mediation Survey, Shahla Ali (response date Mar. 3, 2016, 8:03 AM) [hereinafter Mandatory Mediation Improvement] (on file with author).

122. *Id.* (response date Mar. 3, 2016, 7:59 AM).

123. *Id.* (response date Mar. 3, 2016, 7:57 AM).

124. *Id.* (response date Mar. 3, 2016, 7:41 AM).

125. *Id.* (response date Mar. 3, 2016, 7:23 AM).

126. *Id.* (response date Mar. 2, 2016, 9:26 AM).

127. *Id.* (response date Sept. 20, 2015, 3:18 AM).

128. Suggestions for Improvement in Voluntary Mediation Survey, Shahla Ali (response date Mar. 2, 2016, 12:29 PM) [hereinafter Voluntary Mediation Improvement] (on file with author).

129. *Id.* (response date Oct. 15, 2015, 1:18 AM).

130. *Id.* (response date Mar. 2, 2016, 12:25 PM).

131. *Id.* (response date Nov. 13, 2015, 3:45 AM).

132. *Id.* (response date Oct. 15, 2015, 8:33 AM).

133. *Id.* (response date Dec. 12, 2015, 10:25 PM).

134. *Id.* (response date Oct. 17, 2015, 6:38 PM).

135. *Id.* (response date Sept. 11, 2015, 8:05 PM).

### B. Public Education

In addition to the training of court mediation practitioners, enhancing general public education<sup>136</sup> was a frequently cited suggestion. Some mandatory mediation practitioners noted the need to better “train people . . . to [understand the] benefits of the ADR program”<sup>137</sup> and to give more public “education about mediation.”<sup>138</sup> Another observed that “because the mediation process mainly concerns . . . problems arising within the society—when the society itself has been exposed to retributive justice and mediation has been alienated, how can mediation be successfully implemented? I think . . . continuous legal counselling [for] society is paramount.”<sup>139</sup> In addition to general awareness, another noted the need for “more effort in preparing people before they participate in mediation,”<sup>140</sup> while another expressed a “hope [that] in the future these individuals will realise that, it is not about just the money . . . but creating [peace].”<sup>141</sup> This require[s] “education of lawyers as gatekeepers to be more involved and less resistant.”<sup>142</sup>

Similarly, voluntary mediation practitioners noted the need for “judicial education [with] relevant law reform that encourages parties and legal professionals to promote mediation”<sup>143</sup> and “changing the mind-set of lawyers and creating more awareness of the benefits of the process.”<sup>144</sup>

### C. Financial and Organizational Resources

Many practitioners noted the need for additional financial and organizational resources. One practitioner suggested that the programs be “better funded to reduce delay”<sup>145</sup> and maintain “better consistency between service providers.”<sup>146</sup> Another added that “more time [should be] made available for the mediation.”<sup>147</sup> In addition to court mediation programmatic support, some suggested a need for greater party-based support in the form of “network support for people

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136. Mandatory Mediation Improvement, *supra* note 121 (response date Sept. 13, 2015, 3:37 AM).

137. *Id.* (response date Mar. 3, 2016, 7:57 AM).

138. *Id.* (response date Mar. 3, 2016, 7:22 AM).

139. *Id.* (response date Mar. 3, 2016, 7:48 AM).

140. *Id.* (response date Mar. 2, 2016, 9:58 AM).

141. *Id.* (response date Mar. 3, 2016, 7:27 AM).

142. *Id.* (response date Mar. 2, 2016, 12:44 PM).

143. Voluntary Mediation Improvement, *supra* note 128 (response date Oct. 15, 2015, 1:56 AM).

144. *Id.* (response date Sept. 13, 2015, 6:59 AM).

145. Mandatory Mediation Improvement, *supra* note 121 (response date Mar. 2, 2016, 12:44 PM).

146. *Id.*

147. *Id.* (response date Sept. 13, 2015 3:00 AM).

and their families [including those] with traumatic injuries.”<sup>148</sup> Furthermore, online resources in the form of mediation templates have been found to be helpful:

[I]n Florida, the standardized forms that are used state-wide . . . allow us to create a consistent process that helps us guide the parties to a satisfying, self-developed outcome. [As] it's on the court's public website . . . we treat it as information that can be shared, not legal advice. We have a state-wide ethics commission that produces advisory opinions that are guidance, not binding—but still a good fall back, and a resource for when we run into the need for external guidance.<sup>149</sup>

Voluntary mediation practitioners similarly suggested the need for greater financial and infrastructure resources for court mediation programs. One noted the need for “more funding—we have an established program with bench and bar support, the only thing we are lacking since 2009 is sufficient funding to maintain our programs.”<sup>150</sup> This view was echoed by other practitioners who noted the need for “better funding, [and] more resources (i.e. staff, technology, equipment).”<sup>151</sup> In addition to financial resources, the necessity of improved facilities to support the mediation process was also highlighted. One noted that “environment is crucial. [The] scheme [was less effective] when the court . . . just provided a room, [but] no dedicated staff and no refreshments.”<sup>152</sup> Others suggested the need for “more time for mediation.”<sup>153</sup>

#### D. Rewards and Incentives

Some believed a system of rewards and incentives meant to enhance mediator and court practitioner quality could improve programs. One noted that “successful . . . mediation [should be] reward[ed] [though] promotion.”<sup>154</sup> “Regulations [are needed] to empower”<sup>155</sup> and support mediators.<sup>156</sup> Many identified a need to “develop independent mediators”<sup>157</sup> who are not also acting as judges.<sup>158</sup> As a corollary, practitioners suggested that “lawyers should

148. *Id.* (response date Sept. 16, 2015 6:21 PM).

149. *Id.* (response date Sept. 20, 2015 3:18 AM).

150. Voluntary Mediation Improvement, *supra* note 128 (response date Jan. 19, 2016 9:18 PM).

151. *Id.* (response date Jan. 13, 2016 10:50 PM).

152. *Id.* (response date Dec. 7, 2015 12:47 PM).

153. *Id.* (response date Mar. 2, 2016 12:29 PM).

154. Mandatory Mediation Improvement, *supra* note 121 (response date Mar. 2, 2016, 10:04 AM).

155. *Id.* (response date Mar. 2, 2016, 9:46 AM).

156. *Id.* (response date Sept. 14, 2015, 9:50 AM).

157. *Id.* (response date Mar. 3, 2016, 7:20 AM).

158. *Id.* (response date Mar. 2, 2016, 9:24 AM).

keep their legal opinions to themselves”<sup>159</sup> and “provide parties with advice [regarding] realistic outcome[s] at mediation.”<sup>160</sup>

### E. Flexible Settlement Arrangements

Greater flexibility in settlement arrangements was suggested by several practitioners. For example, “allow[ing] for partial mediated settlement on some issues and reversion to court on others rather than [an] all or nothing [approach]: and expanded scope for referral” could be beneficial.<sup>161</sup> Other practitioners suggested expanding the types of cases open to mediation to empower people to resolve conflicts on their own.<sup>162</sup> Other practitioners suggested “allowing judges to rule on settlements the day they are reached”<sup>163</sup> and “hav[ing] a two-step mediation process, before discovery and then after discovery.”<sup>164</sup>

### F. Access

Practitioners, particularly those working in voluntary programs, suggested the need to “encourage and enable access as early as possible in the process, encourage court buy-in and support, and dedicate resources to have well qualified, impartial mediators”<sup>165</sup> including “more screening and funnelling of cases into mediation.”<sup>166</sup> Finally, some working in well-established voluntary programs believed such programs could be improved if they were made mandatory and the scope of eligible cases were widened. Several suggested “[m]ak[ing] this a court mandated process”<sup>167</sup> and “widen[ing] [the scope beyond] small claims.”<sup>168</sup>

### G. Ongoing Evaluation

Finally, practitioners suggested that ongoing qualitative and quantitative evaluation could enhance the development of court mediation guidelines and best practices. One noted the need to “mov[e] from purely quantitative measures to qualitative measures to ensure party decision making and self-determination.”<sup>169</sup> This process could

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159. *Id.* (response date Sept. 13, 2015, 1:19 PM).

160. *Id.* (response date Sept. 13, 2015, 3:16 AM).

161. *Id.* (response date Mar. 2, 2016, 12:20 PM).

162. *Id.* (response date Oct. 14, 2015, 9:20 PM).

163. *Id.* (response date Sept. 21, 2015, 1:57 PM).

164. *Id.* (response date Sept. 7, 2015, 9:49 PM).

165. Voluntary Mediation Improvement, *supra* note 128 (response date Sept. 7, 2015, 9:05 PM).

166. *Id.* (response date Jan. 13, 2016, 10:50 PM).

167. *Id.* (response date Sept. 13, 2015, 6:27 AM).

168. *Id.* (response date Sept. 10, 2015, 12:53 PM).

169. Mandatory Mediation Improvement, *supra* note 121 (response date Mar. 2, 2016, 12:35 PM).

be supported through “[revision] of mediation guidelines.”<sup>170</sup> In terms of supporting the court mediation process, another suggested “limiting the time between mediation orders and the deadline to complete mediation.”<sup>171</sup>

Such findings engage with the recent series of Global Pound Conference (GPC) data<sup>172</sup> suggesting that greater consideration may be given to the use of pre-action protocols as well as the development of legislation supporting the enforcement of mediated settlements.<sup>173</sup>

## VI. CONCLUSIONS

The attitudes and perceptions of practitioners implementing court mediation programs in these five regions provide insight into the dynamics, challenges, and lessons learned from those directly engaged in the work of administering, representing, and mediating civil claims. The principal finding, based on survey data and follow-up questions, is that from the perspective of the practitioner, both mandatory and voluntary mediation programs are perceived with relatively equal levels of confidence and perceptions of fairness and efficiency. While slight variation exists—in that practitioners report higher levels of confidence in mandatory mediation programs and higher perceptions of efficiency with respect to voluntary programs—practitioners regard both voluntary and mandatory mediation programs with relatively equal perceptions of fairness. However, given that the survey did not narrowly define the concepts of “confidence,” “efficiency,” and “fairness,” varying judicial and cultural understandings of such terms may also influence results. No statistically significant variation exists with respect to such findings.

Practitioners working in mandatory court mediation programs identified several key benefits of such programs, including normalizing party-driven resolution, improving efficiency and speed through effective case screening, and facilitating relational repair. Meanwhile, practitioners working in voluntary programs identified the key strengths of voluntary programs as the development of a well-established and supportive mediation culture, self-determined engagement, simple procedures, high quality mediators, and ongoing monitoring and evaluation.

Finally, practitioner suggestions for improving the overall court mediation process included enhanced mediator training, expanded public education, funding and organizational resources, mediator

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170. *Id.* (response date Mar. 2, 2016, 12:41 PM).

171. *Id.* (response date Oct. 19, 2015, 7:16 PM).

172. *See generally* Int’l Mediation Inst., *supra* note 6 (presenting detailed analysis and country breakdowns).

173. *See generally id.*

incentives, on-going evaluation, and greater flexibility in settlement arrangements.

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