DRIVE-BY MEDIATION AND OTHER OPPORTUNISTIC DISTORTIONS OF PROCESS

Nancy A. Welsh*

Many states in the United States, along with many nations, have implemented special benefits and privileges to encourage parties' use of mediation to assist their communication, negotiation, and ultimate resolution of disputes. This is despite how loosely mediation is defined. This Article discusses how vague definitions, paired with special benefits and privileges, are incentivizing both the opportunistic distortion of mediation and the use of mediation for improper purposes. In Texas, for example, judges are extraordinarily limited in their ability to disapprove parents' mediated child custody agreements—even if there is reason to worry that an agreement is contrary to the best interests of the children. As a result, lawyers now advise clients to engage in "drive-by mediation" in which a mediator meets with the clients and their lawyers for just a half hour, often online, and only after the parties have already negotiated a complete agreement on their own. Several years ago, in California, lawyers learned that they could use an evidentiary statute uniquely protecting mediation communications to shield themselves from clients' potential legal malpractice claims—as long as the lawyers waited until mediation to advise their clients on settlement. In various states in the United States, but particularly in California, parties contract for something they call "binding mediation" in which mediators may impose decisions upon the parties. "Rogue mediation," meanwhile, superficially complies with courts' orders to mediate but does not actually involve any negotiation or discussion of settlement. In the international sphere, the Singapore Convention entitles mediated settlement agreements to expedited judicial enforcement but defines mediation even more vaguely than U.S. states and thus invites further distortion of mediation. This Article proposes several targeted reforms to address the opportunistic distortion of

* Frank W. Elliott, Jr. University Professor, Professor of Law, and Director, Dispute Resolution Program, Texas A&M University School of Law. I thank the participants in the AALS Dispute Resolution Section's Works-in-Progress Conference, Texas A&M University School of Law Research Retreat, and Park City Writers' Workshop for their encouragement and comments, with special thanks to Susan Fortney, Michael Z. Green, Jill Gross, Chris Honeyman, Michael Moffitt, Lydia Nussbaum, Kelly Browe Olson, Peter Reilly, Peter Salem, Guillermo Garcia Sanchez, and Andrea Schneider. I also thank the following Texas A&M Law students and alumni for their excellent assistance with various aspects and stages of this project: Tiana Pham, Bhavya Krishnan, Savannah Stassi, Sydney Shearouse, Robert Notari, Sarah Abouelseoud, Derek Hudiburg, and Jamonica Warren.

mediation. But because so many of these distortions are the result of the special benefits and privileges granted to mediation, the Article also considers whether it is simply time for these benefits and privileges to expire.

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INTRODUCTION

Countless testimonials speak to mediation's many benefits. The process can encourage parties' participation in the resolution of their disputes[1] and their

1. *See* Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 1001–02 (1997) [hereinafter Stulberg, *Facilitative Versus Evaluative Mediator Orientations*] ("Concepts of participation and empowerment are not idle pleasantries . . . but are central principles of a democratic society and critical features of consensual decision making processes, of which mediation is traditionally thought to be a prime example."); *see also* Roselle L. Wissler & Art Hinshaw, *The Initial Mediation Session: An Empirical Examination*, 27 HARV. NEGOT. L. REV. 1, 10 (2021) (empirically examining parties' participation in the initial joint sessions and caucuses occurring during mediation).

exchange of valuable information.[2] It can facilitate parties' discussion and use of important underlying interests to develop tailored settlement outcomes.[3] It can foster collaboration and the maintenance of parties' relationships.[4] It can provide parties with the opportunity to be heard and understood.[5] And besides offering all of these humanistic benefits, it settles lawsuits—ranging from divorce and post-divorce matters[6] to disputes as large and politically charged as Dominion Voting Systems' defamation case against Fox News[7]—in a manner that can be more efficient, less expensive, and less public.

However, debates have raged for a long time regarding exactly what "mediation" is—and what it *should* be—in the United States.[8] Leading definitions are spare. The American Arbitration Association ("AAA")/American Bar Association ("ABA")/Association for Conflict Resolution ("ACR")-approved Model Standards of Conduct for Mediators ("Model Standards"), for example, describe mediation as "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute."[9] The Uniform Mediation Act's ("UMA") definition is just as simple: "[A] process in which a mediator facilitates communication and negotiation

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2. *See* Theodore K. Cheng, *Words Matter: Being Mindful of Language in Mediation*, FED. LAW., Oct.–Nov. 2016, at 45, 45 ("[T]he exchange contemplated in connection with a mediation encourages counsel and their clients to work together cooperatively and share information and documents that will assist them in both conducting a more realistic assessment of the value of the dispute and helping to make the mediation session as productive as possible.").

3. *See* LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 12 (6th ed. 2019) ("The desired result [of mediation] is an agreement uniquely suited to the needs and interests of the parties.").

4. Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833, 869 (2004) (describing the "Story of Mediation" as "embrac[ing] . . . the creativity of collaboration . . . the moral goodness and value of collaboration and cooperation.")

5. *See* Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L. Q. 787, 792 (2001) [hereinafter Welsh, *Making Deals*] (discussing procedural justice research studies that indicate disputants' want and need to tell and control the telling of their story).

6. *See* Nancy A. Welsh, *But Is It Good: The Need to Measure, Assess, and Report on Court-Connected ADR*, 22 CARDOZO J. OF CONFLICT RESOL. 427, 440–42 (2021) [hereinafter Welsh, *But Is It Good*] (discussing state courts' reporting on use of mediation, including family cases).

7. Dominion Voting Systems and Fox News used mediation to reach a $787.5 million settlement, described as "the largest publicly known settlement ever for a U.S. defamation case against a media outlet." Marshall Cohen & Oliver Darcy, *Exclusive: Inside the Historic Settlement Talks Between Fox News and Dominion*, CNN BUS. (Apr. 19, 2023, 4:33 PM), https://www.cnn.com/2023/04/19/media/fox-dominion-how-it-happened/index.html [https://perma.cc/D327-GWBM] (last visited July 31, 2025).

8. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 9 (1996) [hereinafter Riskin, *Understanding Mediators*] ("[A]lmost every conversation about mediation suffers from ambiguity, a confusion of the 'is' and the 'ought.").

9. AM. ARB. ASS'N ET AL., THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS 1 (2005).

between parties to assist them in reaching a voluntary agreement regarding their dispute."[10] In the international sphere, representatives from around the world worked to develop a convention guaranteeing the swift enforcement of mediated settlement agreements, and they settled on an even more elastic definition of the process. According to the U.N. Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention"), mediation is a "process . . . whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking authority to impose a solution upon the parties to the dispute."[11]

According to these definitions, a negotiation (or a meeting) turns into a "mediation" if: (1) it includes a third party who lacks the authority to impose a solution but provides some sort of assistance to the parties, (2) the parties are attempting to reach decisions and settlement of their dispute, and (3) resolution will occur only if the parties voluntarily agree to it. But when is the third party a *mediator*? Exactly what sort of *assistance* must this mediator provide for the procedure to be considered *mediation*? What must *the parties* do for this procedure to be a mediation?

Why does any of this matter? In recognition of mediation's many potential benefits—and relying upon mediation proponents' representations regarding its attributes—the process has been institutionalized widely in our federal and state courts, in the private sector, and for all types of cases. And courts and legislatures have done even more to encourage the spread of mediation. They have granted those using mediation a variety of benefits and privileges—e.g., the promise that their conversations while in mediation cannot be discovered or admitted into evidence,[12] the promise of expedited enforcement of the agreements reached in mediation,[13] the presumption of the fairness of such agreements,[14] and even the ability to avoid judicial scrutiny almost entirely.[15] Mediation communications' inadmissibility,

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10. UNIF. MEDIATION ACT § 2 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2003).

11. G.A. Res. 73/198, art. 2, ¶ 3 (Dec. 20, 2018) [hereinafter Singapore Convention].

12. *See infra* Section II.B.

13. *See infra* Section II.E.

14. *See infra* Section III.A.; James R. Coben, *Creating a 21st Century Oligarchy: Judicial Abdication to Class Action Mediators*, 5 Y.B. ARB. & MEDIATION 162, 162 (2013) [hereinafter Coben, *Creating a 21st Century Oligarchy*] ("It is becoming a matter of routine for federal and state judges to cite the involvement of a private mediator as evidence that bargaining in a class action case was conducted at arms-length and without collusion between the parties . . . . [T]his approach to mediator participation (and haphazard delivery and uncritical acceptance of mediator evidence) is an abdication of judicial fiduciary duty to ensure that proposed class action settlements are fair to absent class members."); James R. Coben, *Barnacles, Aristocracy and Truth Denial: Three Not So Beautiful Aspects of Contemporary Mediation*, 16 CARDOZO J. CONFLICT RESOL. 779, 782 (2015) [hereinafter Coben, *Barnacles, Aristocracy and Truth Denial*] (describing "considerable evidence of unjustified judicial deference to the opinions of class action mediators on settlement process and settlement quality").

15. *See infra* Section IV.A.

along with the grant of judicial immunity,[16] also shield mediators from liability even as they earn substantial fees from parties' court-ordered participation in the process.[17]

Exactly how far should the procedural elasticity of mediation extend, particularly when legislatures and courts choose to grant significant benefits and privileges to reward its use? At what point does the pairing of privilege and elasticity encourage the inappropriately opportunistic use of mediation?[18]

This Article begins with a brief history of the aspirations and evolution of mediation in the United States, focusing in particular on the important effects of institutionalization within the nation's courts. It then tells four stories of parties' and lawyers' opportunistic use of the process. First is the story of "drive-by mediation" in Texas, where a state statute privileged mediated settlements in the family law sphere—specifically those affecting the parent–child relationship. With one narrow exception, judges were required to enter judgment on such mediated settlement agreements—even if they did not think the parents' agreements were in the children's best interests. A challenge to the statute followed, when a family court judge perceived an irreconcilable conflict between the best interests of a child and the terms of her parents' mediated settlement agreement, which risked exposing the child to a registered sex offender. The Texas Supreme Court and Legislature then weighed in, resulting in a very limited workaround that continues to allow the privileging of mediation in family cases. As a result, in Texas, while many child custody agreements are now apparently the result of mediation, it turns out that these procedures barely involve mediators. Family lawyers contact the mediators only after agreements have been fully negotiated. The mediators often meet with the lawyers and clients online and only for a short time period—essentially sprinkling "mediation holy water" on the negotiated agreement without any obligation to ensure that the agreement reflects the benefits that mediation purportedly brings. This is "drive-by mediation."

The Article next considers a story set in California. Again, this is a story that involves a state statute privileging mediation, this time by making mediation communications undiscoverable and inadmissible in judicial proceedings, due to the perceived beneficial effects of having parties participate in the process. As in Texas,

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16. *See infra* Section II.B.

17. *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 122 DICK. L. REV. 349, 378 (2017) (asserting that "if court mediation is just old wine in new bottles, then we ought to be questioning why courts are requiring litigants to engage in a private fee-for-service process that substitutes what once was available to all for a simple filing fee"); Marc Kalish, *Using Mediation to Settle Your Dispute: A Guide for Attorneys*, 37 ARIZ. ATT'Y 22, 26 (2001) (reporting in 2001 that in Arizona mediators' fees ranged from $150 to $350 per hour, $1,500 for a half-day, and $3,000 for a full day).

18. *See* Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69, 101–02 (2005) ("Of the critical questions facing mediation today, only a small subset demands bright-line, prescriptive definitions. Should the state take actions to prevent some from advertising their services as 'mediation?' To whom should the state grant (and deny) regulatory benefits linked to mediation? Such questions may demand prescriptive definitions and the predictable clarity they offer.").

the story continues with a litigated challenge, this time because a client sought to sue his lawyers as a result of the information and advice they provided while in mediation and when preparing for the process. As in Texas, this case reached the state supreme court, which enforced the literal language of the California statute, thus permitting the lawyers in the case to bar their client's use of any mediation communications as evidence—and as a result, shielding these lawyers from the client's legal malpractice claims. Also as in Texas, this was followed by a legislative workaround that addressed very little and continues to both privilege mediation and protect lawyers (and mediators) from claims of professional misconduct.

The third story involves lawyers and clients engaging in something they call "binding mediation"—essentially med–arb, in which the mediator is given the power of an arbitrator to impose his decision upon the parties. This appears to fly in the face of even the sparest of the definitions of mediation as a consensual, not an adjudicative, process. It is not entirely clear why lawyers would counsel their clients to engage in this procedure. Avoidance of the time and expense of an arbitration hearing may have something to do with it. Or the evidentiary statute protecting the confidentiality of mediation communications (but not arbitral hearings) may be the main attraction. Nonetheless, courts in California and elsewhere have either affirmed unhappy parties' obligation to participate in binding mediation or enforced its results.

The fourth story is international, describing the rise of "rogue mediation" as a means for parties to comply superficially with courts' orders to mediate, but with absolutely no intent to attempt to reach settlement. The innovation here is opposing parties' and mediators' collusion in faking use of the process to explore a negotiated resolution and thus gain the means to access the courtroom.

The Article then considers how the many procedural variations of mediation across the world led to the incredibly elastic definition of the process contained in the Singapore Convention, which provides for the expedited enforcement of mediated settlement agreements in international commercial matters. Admittedly, there are defenses to such enforcement also built into the Convention, but it is pretty clear that these defenses will rarely be effective in preventing parties from taking advantage of the privilege of expedited enforcement. One of the saving graces of the Singapore Convention, however, is its explicit inapplicability to consumer, family, inheritance, and employment-related disputes.

The bottom line? The benefits and privileges granted to mediation and mediated agreements encourage opportunistic use of the process. As long as it involves a third party at some point, the process can be pretty much anything that lawyers, judges, parties, and mediators want it to be. It can be used to "bless" an already-negotiated deal or enable lawyers to engage in heavy-handed counseling that may verge on malpractice. Or it can be a process in which the parties assemble separately for a brief period with no intent to try to reach settlement or in which a neutral third party makes a decision that will be binding upon the parties. And it can be a process in which pretty much anyone can serve as the mediator.

What should be done? Perhaps nothing. After all, regardless of what mediation looks like or who is involved, it provides an avenue to disposition. Many

would argue that this is ultimately what parties, their lawyers, and the courts want.[19] Our courts often serve a ministerial function, simply providing an official forum that serves to witness or ratify parties' actions—including their decisions to settle their disputes. In response to Professor Fiss's condemnation of settlement "as a highly problematic technique for streamlining dockets,"[20] Professor Menkel-Meadow famously queried, "Whose dispute is it anyway?"[21] And Professor Lande has urged that we must be realistic about mediation and courts and once even asked, quite provocatively, "How much justice can we afford?"[22]

And yet. It is problematic to explicitly promote the business of mediation by hijacking the old vision of the process, providing special benefits to encourage its use, and then doing absolutely nothing to increase the likelihood of consistency between that vision and how we implement mediations on the ground.[23] This is particularly problematic when the law grants mediation special benefits and privileges in contexts involving vulnerable and/or unsophisticated populations and/or very substantial risk. For those contexts, perhaps the Singapore Convention serves as a model by treating the disputes likely to involve unsophisticated parties—e.g., family matters, consumer matters, or employment matters—differently than disputes involving more sophisticated commercial parties. Perhaps in the contexts involving unsophisticated parties, no existing requirement of judicial review of settlement agreements should ever be abandoned (and as some within the American Law Institute are urging, perhaps judicial review should be newly required[24]). Or even more provocatively, perhaps in these contexts, mediators should be required to engage in some sort of review or assessment on their own of the substantive fairness of mediated outcomes.[25]

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19. *See* Nancy A. Welsh, *What Mediation Romantics Can Learn from the Model T (or Maybe the Chevrolet Trax)*, 26 CARDOZO J. CONFL. RESOL. 271, 287 (2024) (speculating that "the average lawyer . . . just sees mediation as a useful tool, not any sort of beauty"); *see also* Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 BERKELEY J. EMP. & LAB. L. 321, 343–44 (2005) (expressing skepticism regarding the transformative model of mediation because "the glow of it transcends the focus on doing what the parties want and can become more of a focus on what the mediator wants").

20. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

21. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995).

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

23. *See* Michael L. Moffitt, *The Four Ways to Assure Mediator Quality (and Why None of Them Work)*, 24 OHIO ST. J. ON DISP. RESOL. 191, 223 (2009) (describing four possible quality control mechanisms—licensure, state sanctioning for misbehavior, reputational markets, malpractice liability—and observing that "[n]o significant practice or professional operates so thoroughly outside of all four of these quality-assurance mechanisms as mediation currently does"); *see also* Art Hinshaw, *Regulating Mediators*, 21 HARV. NEGOT. L. REV. 163, 167–68 (2016).

24. *See* A.L.I., *Principles of the Law—High-Volume Civil Adjudication* (forthcoming) (Preliminary Draft No. 2, 2024 at 172–73).

25. Ellen Waldman & Lola Akin Ojelabi, *Mediators and Substantive Justice: A View from Rawls' Original Position*, 30 OHIO ST. J. ON DISP. RESOL. 391, 420–30 (2016)

Even outside of contexts involving vulnerable and/or unsophisticated populations and/or very substantial risk, however, the pairing of privilege and elasticity encourages the opportunistic use of mediation. This Article urges, first, that when legislatures or courts grant special privileges to parties, lawyers, or mediators due to their participation in mediation, the procedure ought to be more clearly defined to assure access to its presumed benefits. Several years ago, Professor Moffitt acknowledged that a more demanding "bright-line, prescriptive definition" may be required when "the state grant[s] (and den[is]) regulatory benefits linked to mediation."[26] The stories told in this Article suggest that time has arrived. Second, this Article urges that when courts and legislatures grant mediation special benefits, mediators should be required to certify to the court that the parties have engaged in the procedural elements contained in a more rigorous definition of mediation (i.e., the exchange of information between the parties, the discussion of settlement options, and the ability to refuse to enter into settlement) and also that the mediator has taken steps to support the parties' self-determination and informed consent. Third, this Article urges that in contexts generally involving vulnerable and/or unsophisticated populations, mediators should be required to review the terms of mediated settlement agreements for unconscionability. Fourth, this Article urges that neither lawyers nor mediators should ever be granted the ability to entirely avoid parties' claims of professional malpractice occurring during mediation. Finally, if these proposed measures cannot be taken or are ineffective, this Article urges that it may simply be time for courts and legislatures to revoke or very substantially narrow the special benefits and privileges granted to encourage and facilitate mediation's use.

This Article proceeds as follows. Part I discusses the aspirations that led to the successful institutionalization of mediation within our nation's courts, as well as the evolution of different models that still legitimately claim the name of "mediation." Part II turns to examples of the distortion of mediation, as a result of

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(using Rawls' "veil of ignorance" as well as ethical codes that permit mediators to withdraw due to concerns regarding unconscionability). The Model Standards of Practice for Family and Divorce Mediation require mediators to suspend or terminate mediations when the "mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons." Two possible reasons are when "the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable" or when "a participant is using the mediation process to gain an unfair advantage." AFCC, *Model Standards of Practice for Family and Divorce Mediation*, MEDIATE (May 11, 2001), https://www.mediate.com/articles/afccstds.cfm [https://perma.cc/RV4Y-NHM3] (adopted by the American Bar Association, Association of Family and Conciliation Courts, Association for Conflict Resolution, and Mediate.com). Meanwhile, the International Mediation Institute is considering revisions to its Code of Conduct for Mediators, including providing that a mediator's obligation to exercise professional integrity includes "preventing process abuse or substantive defects in the mediation process," which may include "where the mediated agreement appears to severely jeopardize the standing of and public trust in mediation. For example, a mediator reasonably believes that the settlement agreement's terms . . . are unconscionable or grossly unfair, 'shocking the conscience' of a reasonable person and violate accepted social norms." INT'L MEDIATION INST., NON-BINDING DRAFT FOR PUBLIC CONSULTATION: IMI CODE OF CONDUCT FOR MEDIATORS 10–11 (2024).

26. Moffitt, *supra* note 18, at 101–02.

benefits and privileges bestowed upon its use. This Part also discusses the background and implications of the Singapore Convention's provisions for the expedited enforcement of settlement agreements reached in mediation. Part III pauses to consider the benefits of the creative repurposing of mediation, as well as the harm caused by such repurposing. Part IV proposes responsive reforms. And then, of course, the Article concludes.

I. MEDIATION'S ASPIRATIONS AND EVOLUTION

A. Aspirations

The history of mediation in the United States[27] begins as far back as the colonial period, with a resurgence in the early 1900s as the nation addressed labor unrest[28] and the needs of a rapidly expanding urban immigrant population.[29] But today's expansive use of mediation is largely due to the "contemporary mediation movement"[30] of the 1970s and 1980s. Importantly, Professor Stulberg has urged that this movement and its aspirations were "sparked and shaped" by particular types of disputes occurring at that time, including the following:

> [N]eighborhood disputes; group controversies such as civil riots, student sit-ins, civil rights demonstrations, or rent strikes; and the emergence of collective bargaining in public sector labor relations and their attendant bargaining impasses. There was an overwhelming sense that these controversies—or social eruptions—could not be effectively addressed through traditional civic institutions. Engaging cooperation among the disputing parties required different approaches and, in important ways, new players.[31]

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27. *See, e.g.*, JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 19–20 (1983); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 15–33 (2001) [hereinafter Welsh, *The Thinning Vision of Self-Determination*]; Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 944–45 (2002); Hensler, *supra* note 17, at 354; Thomas J. Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution*, 18 CARDOZO J. CONFLICT RESOL. 513, 513–14 (2017); Amy J. Cohen, *The Rise and Fall and Rise Again of Informal Justice and the Death of ADR*, 54 CONN. L. REV. 197, 201 (2022); Peter Salem & Bernard Mayer, *Family Mediation, in* FAMILY DISPUTE RESOLUTION: PROCESS AND PRACTICE at 25, 29–47 (Peter Salem & Kelly Browe Olson eds., 2024); *see also* Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 2–4 (2000).

28. *See, e.g.*, Valerie A. Sanchez, *A New Look at ADR in New Deal Labor Law Enforcement: The Emergence of a Dispute Processing Continuum Under the Wagner Act*, 20 OHIO ST. J. ON DISP. RESOL. 621, 624, 629 (2005).

29. *See* Amalia D. Kessler, *Reflections on the Nexus of Procedure and History: The Example of Modern American Arbitration*, 169 U. PA. L. REV. 2401, 2416 (2021).

30. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 1 (1994) (introducing the term "contemporary mediation movement" to recognize earlier iterations of mediation).

31. Joseph B. Stulberg, *Honoring Our Past, Celebrating Our Future*, 14 NO. 1 DISP. RESOL. MAG. 27, 28 (2007); *see also* Robert A. Baruch Bush, *Staying in Orbit, or*

Funded by the federal and local governments, as well as national and local foundations, community (or neighborhood) justice centers arose to provide mediation services.[32] In San Francisco, the Community Boards Program provided an expansive alternative governance structure, including mediation.[33]

The mediators, who came from a wide variety of backgrounds, did not require parties to fit their disputes into legal categories. Instead, they encouraged parties to discuss their underlying concerns, interests, and goals and create their own customized resolutions.[34] Mediators were there to facilitate, ask questions, reflect what they had heard, and generally support the parties' communication with each other and their ability to negotiate effectively and reach a settlement.[35] As Professor Stulberg notes, "Talk worked. However messy or coarse the language, people could engage in disciplined, constructive dialogue using language authentic to their message."[36] In addition, the use of mediation "communicated to groups, particularly those who were disenfranchised, that their concerns were heard and there was a desire to include everyone as citizens of a shared community."[37] According to

Breaking Free: The Relationship of Mediation to the Courts Over Four Decades, 84 N.D. L. REV. 705, 709–714 (2008).

32. Hensler, *supra* note 17, at 356.

33. Raymond Shonholtz, *Justice from Another Perspective: The Ideology and Developmental History of the Community Boards Program*, *in* THE POSSIBILITY OF POPULAR JUSTICE (Sally Merry & Neal Milner eds., 1993).

34. *Id.*; *see also* Welsh, *The Thinning Vision of Self-Determination*, *supra* note 27, at 15–16.

35. *See* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 6 (1991); Zena Zumeta, *A Facilitative Mediator Responds*, 2000 J. DISP. RESOL. 335, 335 (2000).

36. Stulberg, *supra* note 31, at 27–28.

37. *Id.*

mediation proponents, the process furthered parties' agency or self-determination,[38] constructive talk, collaboration, conflict closure, healing,[39] and even social justice.[40]

But because disputing parties continued to bring most of their controversies to the courts for resolution rather than to community or neighborhood justice centers, mediation proponents began urging courts to refer cases to mediation.[41] After Professor Sander introduced the concept of the "multi-door courthouse"[42] to the lawyers and judges gathered at the 1976 Pound Conference[43]—and included

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38. *See* JAY P. FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 35 (1984) ("Using mediation to facilitate conflict resolution and encourage self-determination thus strengthens democratic values and enhances the dignity of those in conflict."); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 452 (1997) [hereinafter Menkel-Meadow, *Ethics in Alternative Dispute Resolution*] ("As I have argued for the substantive justification of ADR (and settlement) on the basis of democratic, party-empowering participation, consent and quality of solutions, and outcomes, then so must the ethics (and justice) of ADR be judged by these goals and purposes . . . ."); Stulberg, *Facilitative Versus Evaluative Mediator Orientations*, *supra* note 1, at 1001–02 ("Concepts of participation and empowerment are not idle pleasantries . . . but are central principles of a democratic society and critical features of consensual decision making processes, of which mediation is traditionally thought to be a prime example."); Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation Is An Oxymoron*, 14 ALT. TO HIGH COST LITIG. 31, 32 (1996) (describing the "primary objectives of mediation" as "promoting self-determination of parties and helping the parties examine their real interests and develop mutually acceptable solutions"); *see also* Alex Wellington, *Taking Codes of Ethics Seriously: Alternative Dispute Resolution and Reconstitutive Liberalism*, 12 CAN. J.L. & JURIS. 297, 299 (1999) (arguing that liberal, pluralistic, democratic theory provides coherent context for understanding and defending the value of alternative dispute resolution).

39. *See* Lois Gold, *Mediation and the Culture of Healing*, *in* BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 183 (Daniel Bowling & David Hoffman eds., 2003); Lois Gold, *Influencing Unconscious Influences: The Healing Dimension of Mediation*, 11 MEDIATION Q. 55, 58, 60 (1993).

40. *See* Isabelle R. Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. CONFLICT RESOL. 87, 87–88 (2004); *see also* Cohen, *supra* note 27, at 204–11.

41. Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 472 (1991); Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 385–88 (1994); Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 570–71 (1997).

42. FRANK E.A. SANDER, VARIETIES OF DISPUTE PROCESSING, THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 66–68, 83–84 (1979). According to Michael Moffit, this term was coined by a journal reporting on the conference, not Professor Sander himself. *See* Michael L. Moffitt, *Before the Big Bang: The Making of an ADR Pioneer*, 22 NEGOT. J. 437, 438 (Oct. 2006).

43. Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE: PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 27 (A. Leo Levin & Russell R. Wheeler eds., 1979). Excerpts from the Pound Conference are also found in Frank E.A. Sander, *Varieties of*

mediation as one of the processes that courts should offer—the courts' embrace of dispute mediation began in earnest. Importantly, however, judges, lawyers, and even mediators were more likely to emphasize mediation's ability to reduce caseloads and deliver efficient and inexpensive resolution than its encouragement of constructive talk and self-determination, fostering of collaboration and relationships, and opportunity to develop creative, tailored solutions.[44]

B. Evolution

Federal and state courts and legislatures got on board and authorized judges to order parties into mediation.[45] Even though we do not have reliable data regarding the number of cases currently going to mediation or settled in the process,[46] there is widespread agreement that mediation is now the dominant alternative dispute resolution ("ADR") process institutionalized in the nation's courts.[47] Certainly, parties can elect to use mediation voluntarily. In addition, however, both federal and state courts possess the authority to order parties to participate in mediation in civil litigation for a wide variety of case types—e.g., divorce and child custody, contract, personal injury, employment, medical malpractice, civil rights, etc.[48]

Dispute Processing, 70 F.R.D. 79, 111 (1976); *see also* Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 401–04 (2005).

44. *See* Carrie Menkel-Meadow, *supra* note 35, at 3 ("As a proponent of a particular version of ADR—the pursuit of 'quality' solutions—I am somewhat troubled by how a critical challenge to the status quo has been blunted, indeed co-opted, by the very forces I had hoped would be changed by some ADR forms and practices. In short, courts try to use various forms of ADR to reduce caseloads and increase court efficiency at the possible cost of realizing better justice."); *see, e.g.*, James R. Coben, *Gollum, Meet Sméagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65 (2004).

45. *See* Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71, 122–33 (2013) (describing the different approaches to mandatory mediation adopted by U.S. courts and its effects).

46. *See* Nancy A. Welsh, *Bringing Transparency and Accountability (with a Dash of Competition) to Court-Connected Dispute Resolution*, 88 FORDHAM L. REV. 2449, 2470–75 (2020); Welsh, *But Is It Good*, *supra* note 6, at 427.

47. *See* DONNA STIENSTRA, FED. JUD. CTR., ADR IN THE FEDERAL DISTRICT COURTS: AN INITIAL REPORT 5–6 (2011), https://www.fjc.gov/sites/default/files/2012/ADR2011.pdf, [https://perma.cc/4G84-HT3L] (last visited July 31, 2025).

48. *See id.* at 5; Bobbi McAdoo & Nancy A. Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution and the Experience of Justice*, *in* ADR HANDBOOK FOR JUDGES 1 (Donna Stienstra & Susan Yates eds., 2004). Within the last few years, the New York State Unified Court System launched a "Presumptive ADR" initiative, involving the referral of parties in all civil cases to mediation or another form of dispute resolution "as the first step in the case proceeding in court." Due to the prominence of the state of New York and its courts' previous unwillingness to adopt any form of mandatory mediation, this development is quite important for the field of dispute resolution. *See* Lawrence K. Marks, *Court System to Implement Presumptive Early Alternative Dispute Resolution for Civil Cases*, N.Y. STATE UNIFIED CT. SYS. (May 14, 2019) https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf

In addition, courts and legislatures have chosen to grant various benefits and privileges to mediation. Some have made participation in mediation a condition precedent to adjudicative proceedings.[49] In order to encourage parties to be frank with each other in mediation, many courts and legislatures have adopted rules and statutes providing for the confidentiality of mediation communications[50] as well as establishing an evidentiary privilege[51] to keep mediation communications from being discoverable or admissible at trial or in arbitral or administrative proceedings. Courts and legislatures have granted mediators absolute or qualified immunity.[52] Some legislatures have even provided explicitly for the presumptive enforceability of mediated settlement agreements,[53] while judges' rulings also signal that they are implicitly making such a presumption in certain contexts.[54]

As mechanisms for the encouragement and privileging of mediation were being adopted, the process developed variations that were a bit different from what had been advertised. By 1991, Professor Alfini was pointing out that the mediators handling court referrals in Florida were engaging in "trashing" and heavy-handed "bashing" to persuade reluctant parties to agree to settlements.[55] These mediators were not playing a supporting role—i.e., eliciting from the parties their underlying interests and concerns, facilitating their direct communication with each other, and ultimately helping them arrive at a solution that was *theirs*.[56] These mediators were focused on reality-testing, sharing their views on what would happen if the parties failed to take advantage of the opportunity to settle their cases and instead chose

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[https://perma.cc/7K3J-9J5V] (last visited July 31, 2025); *see also* Hon. Edwina G. Mendelson, Diana Colón, Esq. & Thomas V. O'Neill, Esq., *Reimagining ADR in New York Courts*, 22 CARDOZO J. CONFLICT RESOL. 521, 521–22 (2021).

49. *See* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 105–10 (2006).

50. *See* SARAH COLE ET AL., 1 MEDIATION: LAW, POLICY AND PRACTICE § 8:12 (3d ed. 2011 & Supp. 2021–22).

51. *See id.*

52. *See, e.g.*, Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994); Caroline Turner English, *Mediator Immunity: Stretching the Doctrine of Absolute Quasi-Judicial Immunity:* Wagshal v. Foster, 63 GEO. WASH. L. REV. 759, 760 (1996); Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 204 (2003).

53. *See infra* Section II.A (on drive-by mediation).

54. *See* Coben, *Creating a 21st Century Oligarchy*, *supra* note 14, at 162 ("It is becoming a matter of routine for federal and state judges to cite the involvement of a private mediator as evidence that bargaining in a class action case was conducted at arms-length and without collusion between the parties . . . . [T]his approach to mediator participation (and haphazard delivery and uncritical acceptance of mediator evidence) is an abdication of judicial fiduciary duty to ensure that proposed class action settlements are fair to absent class members."); Coben, *Barnacles, Aristocracy and Truth Denial*, *supra* note 14, at 782 (describing "considerable evidence of unjustified judicial deference to the opinions of class action mediators on settlement process and settlement quality").

55. James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66 (1991).

56. *Id.* at 66–71.

continued litigation.[57] These mediators were focused on delivering settlements, not facilitating talk or collaboration.[58]

A few years later, with his "Grid for the Perplexed,"[59] Professor Riskin signaled acceptance of a model of mediation in which the mediator was a subject-matter expert, used primarily evaluative (or directive) interventions (e.g., identifying the strengths and weaknesses in parties' cases, assessing what was likely to occur if the case went to trial, suggesting or recommending particular settlements, and generally reality-testing), and focused narrowly on legal issues rather than incorporating the psychological, relational, or communitarian issues that might also be important to the parties. A firestorm over facilitative vs. evaluative mediation followed publication of the "Grid."[60] Actually, the fire continues to simmer in some parts of the mediation field. Nonetheless, in some states, mediators now report that they have gone even one evaluative/directive step further—i.e., regularly delivering "mediator's proposals" in which the parties' remaining act of self-determination is choosing whether or not to accept the mediator's proposal to resolve their cases.[61]

Another firestorm has ignited over the extent to which parties should even be in direct communication with each other in mediation—i.e., negotiating in joint session—or in separate rooms ("caucusing") with the mediator shuttling back and forth between them. Early on in the contemporary mediation movement, it was assumed that the parties would talk directly with each other, at least for a significant part of the time. As early as the 1990s, however, researchers and commentators began reporting the marginalization of the joint session and the rise of caucus-dominant or even caucus-exclusive mediation sessions.[62] Mediators in some parts

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57. *Id.* at 66–68.

58. *Id.* at 66–71.

59. Riskin, *Understanding Mediators*, *supra* note 8, at 23–24 (distinguishing mediators' facilitative interventions from their evaluative interventions); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 30 (2003) [hereinafter Riskin, *Decisionmaking in Mediation*] (replacing the terms "facilitative" and "evaluative" with the terms "elicitive" and "directive").

60. *See, e.g.*, Kovach & Love, *supra* note 38, at 31; Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 942–43 (1997); Stulberg, *Facilitative Versus Evaluative Mediator Orientations*, *supra* note 1, at 1005 ("[The] vision of consensual decision making, and the facilitative role required to support it, should inform the meaning of the term 'mediation' in whatever statute, rule, or program it appears, and should constitute the standards by which we select and evaluate mediator performance."); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998).

61. *See* Debra Berman, *The Use of Mediator Proposals in Practice: What the Data Tell Us*, 28 NO. 3 DISP. RESOL. MAG. 24, 26 (2022).

62. *See* Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 124–25, 144–45 (1997); Elizabeth Ellen Gordon, *Attorneys' Negotiation Strategies in Mediation: Business as Usual?*, MEDIATION Q., Summer 2000, at 377, 382; Welsh, *The Thinning Vision of Self-Determination*, *supra* note 27, at 25; Welsh, *Making Deals*, *supra* note 5, at 810–11; Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401, 405–06, 434 (2002); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 524 tbl. 33 (2002).

of the United States now report that joint sessions are disappearing in commercial cases and that mediations occur entirely in caucus because that is the approach that the parties' lawyers (and perhaps also the parties) prefer.[63] Caucus-exclusive mediations occur even in the context of divorce and child custody matters. Although research conducted by Dr. Wissler and Professor Hinshaw, based on mediator responses to surveys, indicates that most civil and family cases at least begin with a joint session,[64] these joint sessions "often are a shadow of their traditional selves, especially in civil cases,"[65] because they are much less likely to include opening statements by the parties, discussion of substantive matters, or direct exchanges between the two sides. It is worth noting here that Dr. Wissler and Professor Hinshaw nonetheless conclude that parties are able to participate substantially in mediation.[66]

Some empirical research has tried to assist the debate about the appropriateness of mediation's evolution by identifying which mediator interventions—e.g., evaluative/directive vs. facilitative/elicitive; caucus vs. joint session—have had the most positive (or negative) effects for the parties, in terms of their perceptions and the likelihood of settlement. According to an ABA Section of Dispute Resolution task force reviewing all of the available research, the results have been largely inconclusive.[67]

Meanwhile, particularly as a result of the COVID pandemic, mediations often—perhaps even usually—now occur on Zoom or other video platforms,[68] with

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63. *See, e.g.*, Eric Galton & Tracy Allen, *Don't Torch the Joint Session*, 21 NO. 1 DISP. RESOL. MAG. 25, 25 (2014); Lynne S. Bassis, *Face-to-Face Sessions Fade Away: Why Is Mediation's Joint Session Disappearing?*, 21 NO. 1 DISP. RESOL. MAG. 30, 30 (2014); *see also* Jay Folberg, *The Shrinking Joint Session: Survey Results*, 22 NO. 2 DISP. RESOL. MAG. 12, 12 (2016); Thomas J. Stipanowich, *Insights on Mediator Practices and Perspectives*, 22 NO. 2 DISP. RESOL. MAG. 6, 7–8 (2016); Hiro Aragaki, *Making It Real*, *in* DISCUSSIONS IN DISPUTE RESOLUTION (VOLUME II): THE COMING OF AGE (2000–2009) (A. Hinshaw, A. Schneider, and S. Cole eds.) (Oxford University Press, forthcoming 2025) ("It is widely underappreciated, in my view, the extent to which that responsibility [for the underutilization of joint sessions] rests equally with the parties" and not only with the lawyers) (manuscript on file with author).

64. *See* Dwight Golann, *If You Build It Will They Come? An Empirical Study of the Voluntary Use of Mediation, and Its Implications*, 22 CARDOZO J. CONFL. RESOL. 181, 182 (2021); Wissler & Hinshaw, *supra* note 1, at tbls. 1 & 10.

65. Wissler & Hinshaw, *supra* note 1, at 40.

66. *Id.* at 26.

67. A.B.A. SECTION OF DISP. RESOL., REPORT OF THE TASK FORCE ON RESEARCH ON MEDIATOR TECHNIQUES 49 (2017), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf [https://perma.cc/P85N-GGHC]; Roselle L. Wissler & Gary Weiner, *How Do Mediator Actions Affect Mediation Outcomes?*, 24 NO. 1 DISP. RESOL. MAG. 26, 29–30 (2017).

68. *See* John Lande, *A Snapshot of How Mediators Are Using Technology*, 42 ALT. TO HIGH COST LITIG. 159, 160 (2024) ("Clearly, video platforms are essential for practitioners these days. It became the 'new normal' during the Covid pandemic. After restrictions on in-person interactions ended, practitioners continued to use video—a lot—and now it continues to be the new normal for many practitioners."); K. William Gibson, *Alternative Dispute Resolution Options*, 41 GPSOLO NO. 1, at 45 (2024) (lawyer reporting that "[s]ince the COVID-19 pandemic, most of my arbitrations and mediations have taken place over Zoom").

the parties and mediator never actually in the same room. Obviously, this model of mediation can be more convenient and less expensive. There are also reports that this model of divorce and child custody mediation is actually preferable for those who are the victims of intimate partner abuse.[69]

With this much variation, is the process called "mediation" still *actually* mediation? Well . . . yes. The AAA/ABA/ACR Model Standards of Conduct for Mediators describe mediation as "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute."[70] The UMA defines mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[71] Whether a mediator keeps parties in the same room or shuttles between them and shares his translations, the mediator is facilitating communication and negotiation. Whether a mediator asks questions regarding the parties' interests or shares his concerns regarding the strengths and weaknesses of the parties' cases, the mediator is assisting them to consider their options in reaching a voluntary settlement. Even a mediator who delivers a "mediator's proposal" at the very end of a mediation is merely offering the parties the option to agree upon the number or arrangement he has *proposed*. The parties retain the power to veto the mediator's proposal—and according to research conducted by Professor Shestowsky, that is as much self-determination as many parties wish to exercise.[72]

But other variations have arisen in recent years that are inaccurately called "mediation." They do not even meet the bare minimums of the sparse definitions shared above. This Article turns to those distortions of mediation now.

II. EXAMPLES OF OPPORTUNISTIC DISTORTION

As this Article details examples of the distortion of mediation, it is important to notice the role played by the *combination* of mediation's elasticity with the benefits or privileges being offered to parties, lawyers, and mediators to encourage use of the procedure. It is this pairing that has created both opportunity and temptation.

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69. *See, e.g.*, Amy Holtzworth-Munroe et al., *Intimate Partner Violence and Family Dispute Resolution: 1-Year Follow-Up Findings from a Randomized Controlled Trial Comparing Shuttle Mediation, Videoconferencing Mediation and Litigation*, 27 PSYCH. PUB. POL'Y & L. 581, 581–82 (2021). *But see* Jennifer Shack & Donna Shestowsky, *Implementing Online Dispute Resolution in Family Court*, *in* FAMILY DISPUTE RESOLUTION: PROCESS AND PRACTICE at 472, 475 (Peter Salem & Kelly Browe Olson eds., 2024) (describing potential dangers of videoconferencing mediation in cases involving intimate partner abuse—e.g., greater difficulty in detecting coercive presence of another person in one of the rooms).

70. AM. ARB. ASS'N ET AL., *supra* note 9, at 1.

71. UNIF. MEDIATION ACT § 2 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2003).

72. Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793, 828 (2016) ("[M]aintaining veto power over a third-party suggestion was as much decision control that litigants desired and they were indifferent between having this type of power and delegating decision-making authority to a third party or group of third parties.").

A. The Story of Drive-By Mediation

Family law, and more particularly, child custody and visitation are the substantive focus of the story of drive-by mediation, at least for now. The story begins in 1987 when Texas adopted the ADR Act to effectuate the state's policy of "encourag[ing] the peaceable resolution of disputes, with special consideration given to disputes involving the parent–child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures."[73] Section 154.023 defined (and continues to define) mediation as "a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them" and that "[a] mediator may not impose his own judgment on the issues for that of the parties."[74] The ADR Act applied to all civil matters.[75] Some of Texas's family court judges began referring cases to mediation, but in general, the family bar resisted use of the process.[76] According to some sources, one of the concerns impeding lawyers' use of mediation was their fear of "spend[ing] many hours in mediated negotiations only to have their agreement denied entry because one party had 'buyer's remorse'"[77] or because a judge disagreed with the parents' judgment.

In response, Texas enacted § 153.0071 in 1995 as part of the Family Code, amending it two years later. The statute made a mediated settlement agreement involving the parent–child relationship binding upon the parties if the agreement met three requirements: it included "a prominently displayed statement" that the agreement was "not subject to revocation"; it was "signed by each party to the agreement"; and it was "signed by the party's attorney, if any, who is present at the time the agreement is signed." If the mediated settlement agreement met these three requirements, a party was "entitled to judgment on the mediated settlement

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73. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002.

74. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002(a)–(b). Lydia Nussbaum has written approvingly regarding legislative encouragement of mediation under these circumstances, particularly when it appears that parties generally find it difficult to communicate effectively or understand what each other is saying. *See, e.g.*, Lydia Nussbaum, *Trial and Error: Legislating ADR for Medical Malpractice Reform*, 76 MD. L. REV. 247, 301 (2017).

75. *See* Honorable Leta S. Parks, In Re Lee*: How the Parental Right to Self-Determination Came to Trump Judicial Authority*, 57 S. TEX. L. REV. 483, 493 (2016); *see also* Walter A. Wright, *Texas Attorney-Mediators' Perceptions of Changes in Mediation Practice*, 40 THE ADVOC. (TEX.) 10, 15 (2007) (reporting that "mediation is an integral part of the litigation process" and that "Texas attorney-mediators perceive that most Texas judges and attorneys have accepted—even welcomed—mediation's role in litigation and its contribution to resolving cases in a timely and cost-effective manner"); Jeffry S. Abrams, *Compulsory Mediation: The Texas Experience*, INT'L MEDIATOR, http://www.internationalmediator.com/Articles/Compulsory-Mediation-The-Texas-Experience.shtml [https://perma.cc/C6DM-NQDU] (last visited Aug. 8, 2025); *see* Mike Amis et al., *The Texas ADR Experience*, *in* COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS 369, 369–70 (Edward Bergman & John Bickerman eds., 1998).

76. Parks, *supra* note 75, at 493.

77. *Id.*

agreement notwithstanding the requirements of any other rules of law."[78] There was no such entitlement for a *negotiated* settlement agreement. Thus, the judge was *required* to incorporate the terms of parents' mediated agreements into their judgments. The judge was not to engage in any sort of "best interests of the child" inquiry. This was even though Texas public policy per § 153.022 was that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child,"[79] and also despite the fact that in the United States, "custody and support agreements are usually subject to approval by the court, which provides an avenue for review on behalf of the child's interests."[80]

Concerns arose in Texas, focusing on the possibility that victims of domestic violence might be frightened, manipulated, or coerced by their abusive partners into agreeing to mediated settlement terms that were not in children's best interest.[81] The Texas Legislature therefore amended the statute again in 2005. Texas judges now had the authority to decline to enter judgment on parents' mediated settlement agreements, but only if the court found that "a party to the agreement was a victim of family violence, *and* that circumstance impaired the party's ability to

78. TEX. CIV. PRAC. & REM. CODE ANN. § 153.0071 (specifically exempting such agreements from the requirements of Rule 11 of the Texas Rules of Civil Procedure).

79. *Id.* § 153.022.

80. *See* SARAH COLE ET AL., 1 MEDIATION: LAW, POLICY AND PRACTICE § 15:2 (3d ed. 2011 & Supp. 2024) (January 2024) (citing Uniform Marriage and Divorce Act § 306(a) to (c)); *In re* S. Y.-B., 2022 WL 14812663, at *8 (Md. Ct. Spec. App. Oct. 26, 2022), *cert. denied*, 482 Md. 741, 290 A.3d 606 (2023) (affirming trial judge's refusal to incorporate the mediated agreement into its disposition in light of the best interest of the children); Moell v. Moell, 84 N.E.3d 741, 744 (Ind. Ct. App. 2017) (stating that the court will consider the interests of children in determining whether mediated court decree should be modified; noting court's greater role in reviewing settlement agreement regarding care of children than in reviewing settlement agreement involving property); Stone v. Stone, 991 N.E.2d 992, 999–1000 (Ind. Ct. App. 2013), *aff'd on reh'g*, 4 N.E.3d 666 (Ind. Ct. App. 2013) (stating that the trial court had authority to refuse to enforce portions of mediated settlement agreement dealing with parenting time while at the same time enforcing those portions dealing with property division); Blase v. Brewer, 692 N.W.2d 785, 788 (S.D. 2005) (entering an order contrary to terms of a mediation agreement because agreement was not in the best interest of the child); Lindner v. Lindner, 2005 WL 780395, at *4 (Neb. Ct. App. Mar. 29, 2005) (upholding modification to mediated parenting plan because it was in the best interest of the children); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 966 (1979) (discussing difference between theory and practice on this point); Bruce Menin, *The Party of the Last Part: Ethical and Process Implications for Children in Divorce Mediation*, 17 MEDIATION Q. 281, 285 (2000); Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203, 203 (2004).

81. *See, e.g.*, Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1584–85 (1991); Nancy Ver Steegh et al., *Look Before You Leap: Court System Triage of Family Law Cases Involving Intimate Partner Violence*, 95 MARQ. L. REV. 955, 959–60 (2012); Kelly Browe Olson, *Screening for Intimate Partner Violence in Mediation*, 20 NO. 1 DISP. RESOL. MAG. 25, 25 (2013); Kelly Browe Olson, *Intimate Partner Violence and Family Dispute Resolution: Coercion, Capacity, and Control*, *in* FAMILY DISPUTE RESOLUTION: PROCESS AND PRACTICE 243, 243 (Peter Salem & Kelly Browe Olson eds., 2024).

make decisions," *and also* that the mediated settlement agreement was "not in the child's best interest."[82]

Then came the case of *In re Stephanie Lee*.[83] This Article is not primarily about *Lee*. Others have thoroughly examined it.[84] Nonetheless, it is important to understand the basic facts of the case. Parents Stephanie Lee and Benjamin Redus agreed in mediation that mother Stephanie would have periodic access to and possession of their minor daughter, even though Stephanie had married a registered sex offender.[85] Various safeguards were built into this agreement—e.g., Stephanie's husband was not permitted to be within five miles of the child, and Benjamin was to be informed of the husband's whereabouts and his car's make and model.[86] The associate judge responsible for entering judgment nonetheless had questions about the agreement, and despite agreeing to these terms while in mediation, Benjamin decided to object to them.[87] The associate judge declined to enter judgment and was affirmed on appeal, and the court of appeals denied Stephanie's petition for a writ of mandamus.[88] The case thus ended up before the Texas Supreme Court, where a majority determined that the state's statute meant what it said, and the trial judge was required to enter judgment on the parents' mediated settlement agreement.[89]

The mediator in *Lee*, the Honorable Leta Parks, has described the decision as the majority of the Texas Supreme Court justices coming to the "inexorable conclusion that the right to self-determination by the parents is superior to judicial intervention."[90] That may be a substantial reason for their decision, but the majority opinion also highlighted the unique value of *mediation* to encourage and enable parents' exercise of enlightened self-determination. Indeed, if the right to self-determination was solely the reason for the majority's decision, then parents' *negotiated* settlement agreements should be just as deserving as their *mediated* settlement agreements.

Throughout Justice Lehrman's opinion for the majority (and in a portion of the opinion that was joined only by a plurality), she repeatedly highlighted why and how *mediation*, *in particular*, facilitates collaborative, child-focused parental behavior and produces settlement agreements that are entitled to judicial deference. These are just a few examples:

> Encouragement of mediation as an alternative form of dispute resolution is critically important to the emotional and psychological well-being of children involved in high-conflict custody

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82. TEX. CIV. PRAC. & REM. CODE ANN. § 153.0071 (emphasis added).

83. *In re* Stephanie Lee, 411 S.W.3d 445 (Tex. Sup. Ct. 2013).

84. Parks, *supra* note 75, at 484; Justice Debra H. Lehrmann, *Protecting Our Children*, 80 TEX. B.J. 506, 506 (2017).

85. *In re Stephanie Lee*, 411 S.W.3d at 447; *see also* Parks, *supra* note 75, at 484.

86. *In re Stephanie Lee*, 411 S.W.3d at 447–48; *see also* Parks, *supra* note 75, at 484.

87. *In re Stephanie Lee*, 411 S.W.3d at 448; *see also* Parks, *supra* note 75, at 485.

88. *In re Stephanie Lee*, 411 S.W.3d at 448–49; *see also* Parks, *supra* note 75, at 485.

89. *In re Stephanie Lee*, 411 S.W.3d at 448–49, 461; *see also* Parks, *supra* note 75, at 485.

90. Parks, *supra* note 75, at 484.

> disputes . . . . For the children themselves, the conflict associated with the litigation itself is often much greater than the conflict that led to a divorce or custody dispute. The Legislature has thus recognized that, because children suffer needlessly from traditional litigation, the amicable resolution of child-related disputes should be promoted forcefully . . . .[91]
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> . . . .
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> [T]he Legislature's choice to defer to the parties' best interest determination in the specific context of mediation recognizes that there are safeguards inherent in that particular form of dispute resolution compared to various other methods of amicably settling disputes. Under Texas law, "[m]ediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them . . . ." [T]he process itself is geared toward protecting children.[92]
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> . . . .
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> [T]he harmful effects of litigation in family disputes are well-documented, leading the Legislature to vigorously promote the avoidance of such litigation. This is particularly so when the parties reach agreement pursuant to the mediation process, which is itself designed to ensure that children are protected. The dissent engages in a tortured reading of the [Mediated Settlement Agreement] statute . . . and ignores the ramifications of discouraging mediation. And it does so unnecessarily, as our children's welfare can, and indeed must, be protected at the same time that the mediation process and its benefits are preserved.[93]
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> . . . .
>
> Under the dissent's interpretation, the trial court would . . . have significant leeway, in contravention of the statute's intent, to decide when entry of judgment on a statutorily compliant MSA is or is not appropriate. The possibility that this would lead to an increase in child-related litigation is very real, as parents would be encouraged to contest on best interest grounds the very agreements that they freely entered into through mediation. Even more concerning, parents would be discouraged from using the mediation process to begin with, out of concern that their agreements could be ignored and their efforts wasted.[94]

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91. *In re Stephanie Lee*, 411 S.W.3d at 449.

92. *Id.* at 457.

93. *Id.* at 459. The majority specifically listed several "other statutorily endorsed methods" available to trial courts "by which to protect children from harm without eviscerating section 153.0071(e)'s mandatory language or reading language into the statute under the guise of 'interpreting' it." *Id.* at 456.

94. *Id.* at 460.

Subsequently writing in the *Texas Bar Journal* regarding the significance of *Lee*, Justice Lehrman continued to explain why mediation and its outcomes should be protected: "By encouraging collaboration, the ADR process [of mediation] can prevent conflicts from needlessly escalating and can shift the parties' focus from 'winning' to a cooperative goal of allowing the children to continue their relationships with both parents."[95] Describing what she viewed as the two principles represented by *Lee*, she pointed first to this one: "[T]he Family Code recognizes the importance of mediation in family law cases."[96] Clearly, according to Justice Lehrman and those joining her, mediated settlement agreements deserved to be treated differently because the involvement of mediators and the attributes of mediation were particularly beneficial to parents and their children.

The Texas Legislature responded to the decision in *Lee* with another amendment to § 153.0071. The amendment was very narrowly drawn and continued to privilege the use of mediation. Now, the judge could refuse to enter judgment upon finding the parents' mediated agreement would permit a convicted sex offender or a person "who otherwise has a history or pattern of past or present physical or sexual abuse directed against any person to: (i) reside in the same household as the child; or (ii) otherwise have unsupervised access to the child."[97] In addition, of course, the statute required the court to find that the parents' mediated settlement agreement was not in the best interests of their child.[98] In sum, in Texas, judges' authority to refuse entry of judgment on parents' *mediated* settlement agreements remains incredibly narrow. And importantly, using mediation and engaging a mediator represent the keys to earning this extreme judicial deference.

Enter opportunism and the creation of "drive-by mediation" in the context of family law. Texas attorney and mediator Linda Meekins McLain describes this practice as follows: "[T]he parties/counsel negotiate a settlement and come sign it in the mediator's presence."[99] Former associate judge and now full-time mediator and arbitrator John Millard explains that the goal of drive-by mediation "isn't to hash out new agreements but rather to rubber stamp an existing one . . . . No muss, no fuss—just a quick meeting, a few signatures, and you're done."[100] This is a negotiated settlement agreement merely *witnessed* by a mediator.

However, a *negotiated* settlement agreement is *not* entitled to judicial deference. Apparently, that is because neither the Texas Legislature nor the Texas

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95. Lehrmann, *supra* note 84, at 506.

96. *Id.* at 507. The Family Law Section of the State Bar of Texas had also filed an amicus brief with the Texas Supreme Court supporting entry of judgment based on the mediated settlement agreement, "because to do otherwise would not only be contrary to statute, but would render mediation meaningless." Pamela E. George, *Foreword, Symposium: Ethical Issues in Family Law, Practice, and Policy*, 57 S. TEX. L. REV. xiii, xix (2016).

97. TEX. CIV. PRAC. & REM. CODE ANN. § 153.0071.

98. *See id.* § 153.0071(e-1)(2).

99. Linda Meekins McLain, *Family Law Mediation: Beyond the Basics*, 2020 ALT. DISP. RESOL. 8.2.

100. John R. Millard, *Drive-By Mediation: Just a Checkbox or a Genuine Resolution Tool?*, 88 TEX. BAR J. 364, 364 (2025). Judge Millard acknowledges that drive-by mediation is not appropriate when there are "[c]omplex issues, deep-seated conflicts, or significant disagreements [that] may require a more thorough mediation process." *Id.* at 365.

Supreme Court assumed that a negotiation would bear the characteristics they associated with mediation. With the brief and nearly meaningless engagement of a mediator, however, drive-by mediation transforms a negotiated agreement into a mediated settlement agreement. The mediator does not have to actually "facilitate[] communication between parties to promote reconciliation, settlement, or understanding among them." The mediation process does not have to be "geared toward protecting children."[101] The mediator does not even have to be authorized to handle court referrals of family mediations.

It is very easy to find Texas lawyers and mediators who are willing to engage in drive-by mediation and very open about its characteristics and reason for being. One Texas lawyer's website describes drive-by mediation as

> where parties to a family law dispute meet with a mediator to confirm an existing agreement. Unlike most mediations, which are convened to resolve differences, a drive-by mediation is used to cement an existing agreement . . . . The term "Drive-By Mediation" is used because the agreement is already made, and the mediation is a short formality to make it enforceable and irrevocable. Bargaining and negotiation are not part of a drive-by mediation.[102]

Texas mediator Tom King describes himself as the "pioneer" of *online* drive-by mediation and even specifies that the process takes place on weekdays at 8 a.m. and 5 p.m. at a cost of $200 per party.[103] Other Texas mediators praise King for his visionary leadership and describe drive-by mediation as "mediation on fast forward" or analogous to "cruising through a fast-food drive-thru."[104] One mediation firm has established the following conditions for its drive-by mediation services:

> Availability: This service is only offered for cases that have already reached a full settlement, requiring only a Mediated Settlement Agreement (MSA) to formalize the parties' existing agreement. You must schedule a half-day mediation session if a complete agreement has not been reached.
>
> Scheduling: we schedule these sessions at 8:00 a.m. or 6:00 p.m., lasting 30 minutes. Sessions are conducted exclusively via Zoom.
>
> Pricing: this service costs $200.00 per party, payable via credit card at least 24 hours before the session. Overtime, if any, is billed at $150.00 per party per hour, with a one-hour minimum due after mediation.
>
> Legal Representation: at least one of the parties must [be] represented by legal counsel.

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101. *In re* Stephanie Lee, 411 S.W.3d 445, 457 (Tex. Sup. Ct. 2013).

102. Brian McNamara, *What Is A Drive-By Mediation?*, MCNAMARA L. OFF. (Feb. 25, 2020), https://www.mcnamaralawyers.com/blog/what-is-a-drive-by-mediation/ [https://perma.cc/8D6D-GWX2].

103. MEDIATOR TOM KING, https://www.tomking.com/ [https://perma.cc/YQB5-7HTK] (last visited Feb. 14, 2024).

104. Millard, *supra* note 100, at 364.

> Documentation Required: the terms of the agreement must be provided in exhibit form or as a copy of the proposed order to be entered, in advance.
>
> Virtual Presence: before signing the MSA, all parties and their respective counsel must appear on camera via Zoom to confirm the agreement.
>
> E-signature: once the MSA is ready for signature and all parties have appeared via Zoom to confirm the agreement, it will be distributed to all parties and counsel for electronic signing.[105]

To her credit, McLain has cautioned at Texas continuing legal education programs on family law that "[t]he law is continuing to develop in this area, but my personal opinion is that it [drive-by mediation] is dangerous—ethically and professionally. Avoid this pitfall!"[106] Family lawyers and mediators in Texas are not avoiding drive-by mediation. Many have embraced it.

Could drive-by mediation begin to appear in other civil practice areas? There is certainly precedent for lawyers, judges, and neutrals to make use of other processes to ease the enforcement of their negotiated agreements. Professor Coben has observed, for example, that many judges approving class action settlements seem quite ready—without any evidentiary support—to assume the substantive and procedural fairness of settlements reached with the assistance of mediators.[107] Unlike the situation with drive-by mediation in Texas, these judges are not statutorily *required* to defer to the parties' self-determination, but if such negotiating parties realize that they can substantially increase the likelihood of gaining a judge's deference by engaging a mediator, even quite late in the process . . . the temptation

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105. *See* John Millard, *Drive-By Mediation: Just a Checkbox or a Genuine Resolution Tool?*, ARMATYS MILLARD MEDIATION & ARB., Sept. 5, 2024, https://mediationjudges.com/drive-by-mediation-just-a-checkbox-or-a-genuine-resolution-tool/ [https://perma.cc/7BN3-VH5Z]; *see also The Basics About Mediation,* NOELKE, MAPLES, ST. LEGER, BRYANT LLP, https://nmsb-law.com/practice-areas/mediation-representation/ [https://perma.cc/3N8Y-7HBP] (describing drive-by mediation as "a quick, flat-fee, Zoom mediation in which the parties and lawyers appear with an agreement ready to go (or almost ready, at least). The crucial benefit of Drive-By Mediation is that by signing the deal within the 'container' of mediation, the agreement becomes a Mediated Settlement Agreement (MSA) which is defined in Texas law as being immediately binding and irrevocable. In contrast, signing the same deal outside of mediation leaves some wiggle room for a party to renege on the deal.").

106. McLain, *supra* note 99, at 8.2. The Author has also spoken with some respected family mediators who acknowledge that while they offer "drive-by mediation," they also are careful to review settlement agreements with the parties to assure that they are aware of what they are agreeing to do.

107. *See* Coben, *Creating a 21st Century Oligarchy*, *supra* note 14, at 162 ("It is becoming a matter of routine for federal and state judges to cite the involvement of a private mediator as evidence that bargaining in a class action case was conducted at arms-length and without collusion between the parties . . . . [T]his approach to mediator participation (and haphazard delivery and uncritical acceptance of mediator evidence) is an abdication of judicial fiduciary duty to ensure that proposed class action settlements are fair to absent class members."); Coben, *Barnacles, Aristocracy and Truth Denial*, *supra* note 14, at 782 (describing "considerable evidence of unjustified judicial deference to the opinions of class action mediators on settlement process and settlement quality").

is obvious. Meanwhile, it is well known that—in the context of international commercial matters—parties, lawyers, and arbitrators have been quite ready to call a negotiated or mediated settlement an arbitral award, simply by having their arbitrator "convert" it into one.[108] Why do this? Once again, one need only look to the benefits derived from using the right process. Pursuant to the Federal Arbitration Act and the New York Convention, an arbitral award is entitled to expedited court recognition and enforcement.[109] A negotiated or mediated settlement agreement is not. (Of course, this situation will change if the United States ratifies the Singapore Convention, examined below.)[110]

B. The Story of Mediation as a Shield from Legal Malpractice Suits

This story begins in 1993, when the California Legislature passed a bill establishing a comprehensive scheme to promote the use of mediation for civil disputes. Among other reforms, the bill made mediation communications confidential, protected them from admissibility and discovery, generally precluded mediators from testifying, and eliminated a requirement for parties' advance and written agreement to the inadmissibility of mediation communications in a judicial proceeding.[111] Following additional provisions and amendments in 1995 and 1996, the Legislature passed a bill in 1997 creating a new chapter in the state's Evidence Code entitled "Mediation" and repealed the prior provisions on admissibility, discoverability, and confidentiality of mediation communications.[112] At that point, Evidence Code § 1119 provided—and continues to provide—the following:

> Except as otherwise provided in this chapter:
>
> (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation

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108. *See* Edna Sussman, *The New York Convention Through a Mediation Prism*, 15 NO. 4 DISP. RESOL. MAG. 10, 10 (2009) (regarding enforcement under the New York Convention); *see also* Ava Chetrit, *New N.J. Law Backs Creation of International Arbitration Centers*, 35 ALT. TO HIGH COST LITIG. 62, 63 (2017) (describing state statute's provision for conversion of settlement agreements into arbitral awards); *see also* David Weiss & Brian Hodgkinson, *Adoptive Arbitration: An Alternative Approach to Enforcing Cross-Border Mediation Settlement Agreements*, 25 AM. REV. INT'L ARB. 275, 284–85 (2014) (describing international dispute resolution statutes in California, North Carolina, and Hawaii that provide for conversion of settlement agreements into arbitral awards); Letter from Reginald M. Turner, President, American Bar Association, to The Honorable Antony J. Blinken, (October 5, 2021), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-letter-to-secretary-of-state-blinken-supporting-singapore-mediation-convention.pdf [https://perma.cc/LM4F-UG7F] (observing that "California, Texas, Ohio, North Carolina, and Oregon—have enacted statutes that treat mediated settlements of international commercial disputes like final arbitral awards for enforcement purposes"); Am. Arb. Ass'n, Employment/Workplace Arbitration Rules and Mediation Procedures, R-47 Award Upon Settlement, at 25 (2025) (providing for arbitrators in employment/workplace arbitration to be able to "set forth the terms of settlement in a 'consent award.'").

109. 9 U.S.C. §§ 9, 13, 207

110. *See infra* Part II.E.

111. CAL. L. REVISION COMM'N, RELATIONSHIP BETWEEN MEDIATION CONFIDENTIALITY AND ATTORNEY MALPRACTICE AND OTHER MISCONDUCT 26–27 (Dec. 2017).

112. *Id.* at 28–30.

> consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.[113]

California's very strong protection of the inadmissibility and confidentiality of mediation communications—whether oral or written—has been the subject of extensive litigation.[114] This Article will focus on one of those cases: *Cassel v. Superior Court of Los Angeles County*,[115] decided by the California Supreme Court in early 2011.

In *Cassel*, a client entered into a mediated settlement agreement upon the advice of his lawyers. Subsequently, however, he claimed that his lawyers "had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth."[116] He brought an action against his lawyers for legal malpractice, breach of fiduciary duty, fraud, and breach of contract.[117] More specifically, the client alleged that his lawyers wrongly advised him; failed to oppose a preliminary injunction granted to his significant detriment; had a conflict of interest in representing him in settlement negotiations; forced him to continue to participate in a 14-hour pre-trial mediation that did not conclude until midnight;[118] told him that he was "greedy"[119] to insist on a settlement of more than $1.25 million; "threatened to abandon him at the imminently pending trial";[120] misrepresented terms of the proposed settlement;[121] falsely assured him they would negotiate a side deal and waive a portion of their fees;[122] and even followed him into the bathroom and "hammered" him there.[123] Some of these communications

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113. CAL. EVID. CODE § 1119(a)–(c).

114. Cassel v. Super. Ct., 51 Cal. 4th 113, 123–28 (2011). Notably, however, California is not the only state that has adopted an "absolute approach" to protecting mediation confidentiality. SARAH COLE ET AL., 1 MEDIATION: LAW, POLICY AND PRACTICE § 8:28 (2024) (listing DEL. CODE ANN. tit. 6, § 7716; IND. CODE ANN. § 34-57-3-11; MASS. GEN. LAWS ch. 233, § 23C; OKLA. STAT. ANN. tit. 12, § 1805).

115. 51 Cal. 4th 113 (2011).

116. *Id.* at 118.

117. *Id.* at 118.

118. *Id.* at 120.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

allegedly occurred prior to the mediation, while others took place when the client was in caucus with his lawyers, outside the presence of any of the other mediation participants.[124]

Pursuant to the California statutes described above, the lawyers made a motion in limine for the exclusion of any evidence of the lawyers' communications with their client immediately before and during the mediation session regarding mediation settlement strategies and the advisability and terms of settlement.[125] After a two-day hearing, including examination of the client's deposition and further testimony from one of the lawyers, the trial court granted the motion in limine.[126] The Court of Appeals thereafter granted mandamus relief and vacated the trial court's order.[127]

The California Supreme Court reversed, holding that evidence of the lawyers' communications with their client immediately before and during the mediation session was undiscoverable and inadmissible.[128] Throughout the majority opinion affirming the inadmissibility of the mediation communications, the California Supreme Court emphasized that it was simply following the plain language of California's statutes and that if limitations on mediation communications' inadmissibility were warranted, such limitations had to come from the Legislature.[129]

Rather like the majority of the Texas Supreme Court in *Lee*, the majority in *Cassel* elaborated on the advantages of mediation and the California statutes privileging mediation communications:

> [T]hey serve the public policy of encouraging the resolution of disputes by means short of litigation. The mediation confidentiality statutes govern only the narrow category of mediation-related communications, but they apply broadly within that category, and are designed to provide maximum protection for the privacy of communications in the mediation context. A principal purpose is to assure prospective participants that their interests will not be damaged, first, by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement.[130]

The majority acknowledged the following very rational argument:

> [T]he Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the

124. *Id.* at 120–21.
125. *Id.* at 118.
126. *Id.* at 118, 121.
127. *Id.*
128. *Id.* at 119, 138.
129. *Id.* at 118, 124, 136.
130. *Id.* at 132–33.

> terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either. The Legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.[131]

The majority in this case was somewhat less solicitous of mediation than the court in *Lee*, observing that they

> express[ed] no view about whether the statutory language, thus applied, ideally balances the competing concerns or represents the soundest public policy. Such is not our responsibility or our province. We simply conclude, as a matter of statutory construction, that application of the statutes' plain terms to the circumstances of this case does not produce absurd results that are clearly contrary to the Legislature's intent. Of course, the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys.[132]

Justice Ming Chin wrote a reluctant concurrence, also explicitly inviting action by the Legislature and observing, "I doubt greatly that one of the Legislature's purposes in mandating confidentiality was to permit attorneys to commit malpractice without accountability."[133]

The California Legislature responded, directing the California Law Revision Commission ("the Commission") in 2012 to analyze the relationship between mediation confidentiality and attorney malpractice and consider certain Evidence Code provisions, the law in other jurisdictions, scholarly commentary, and any data regarding the impact of different confidentiality rules on the use of mediation.[134] Finally, the Legislature authorized the Commission to "make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability."[135]

The Commission conducted extensive national research that required several years. During that time, more clients found their lawsuits against their lawyers stymied by California's statutes protecting the confidentiality and inadmissibility of mediation communications.[136] Finally, in 2017, the Commission

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131. *Id.*

132. *Id.*

133. *Id.* at 139–40 (Chin, J., concurring).

134. Assemb. Con. Res. 98, 2012 Cal. Stat. Res. Ch. 108, at 4; CAL. L. REVISION COMM'N, *supra* note 111, at 4–5.

135. *See* Assembly Con. Res. 98, 2012 Cal. Stat. Res. Ch. 108, at 4; Assemb. B. 2025, 2012 Leg., 2011–12 Reg. Sess. (as amended May 10, 2012).

136. *See, e.g.*, Amis v. Greenberg Traurig LLP, 185 Cal. Rptr. 3d 322, 328–29 (2015) (affirming grant of summary judgment); Chan v. Packard, No. H040561, 2015 WL 5679865 (Cal. Ct. App. Sept. 28, 2015), at *4–5 (affirming grant of motion in limine);

released its impressive report and recommended the creation of a new and narrow exception to § 1119, in order to "hold[] attorneys accountable for mediation misconduct while also allowing attorneys to effectively rebut meritless misconduct claims."[137] Specifically, the Commission proposed creating an exception to the mediation confidentiality law that would permit disclosure of mediation communications in a disciplinary proceeding or a lawsuit claiming legal malpractice if such evidence was relevant to proving or disproving allegations of the lawyer's breach of professional duty while representing a client.[138]

A wide range of stakeholders—including mediators, judges, and lawyers—objected to the Commission's recommendation,[139] and the California Legislature chose to reject it. Instead, in 2018, the Legislature amended its current statutes to require lawyers to provide written disclosure to their clients regarding the confidentiality restrictions in mediation.[140] Such disclosure must be on a single, separate page and in the client's preferred language.[141] Lawyers also must obtain written acknowledgment, signed by their clients, that the clients have read and understood the confidentiality restrictions.[142] Notably, a lawyer's failure to comply with these requirements does not serve as a basis for setting aside a settlement agreement reached in mediation.[143]

Shaoxing City Maolong Wuzhong Down Prods. Ltd v. Landsberg & Assocs., No. B257823, 2015 WL 3897769, at *1 (Cal. Ct. App. June 25, 2015) (affirming grant of summary judgment); Biller v. Faber, No. B244232, 2016 WL 1725185, at *7 (Cal. Ct. App. Apr. 27, 2016).

137. CALI L. REVISION COMM'N, *supra* note 111, at 135.

138. *See id.* at 135–43 (specifying that the proposed exception was designed to protect the policies underlying mediation confidentiality by avoiding undoing settlements; applying only to state bar disciplinary proceedings, claims for damages due to legal malpractice, or attorney-client fee disputes; applying only to attorney misconduct in a professional capacity; applying only to alleged misconduct in representing a client and not to alleged misconduct in serving as a mediator; applying only to alleged misconduct that occurred in a mediation setting; generally not permitting a mediator to testify or provide documentary evidence; not permitting a litigant to go to another source to obtain or learn the content of a mediator's writing or oral communication; applying the same standard to govern admissibility and disclosure; limiting the extent of disclosure; expressly permitting a court to use judicial tools to limit public disclosure of mediation communications; requiring notice to mediation participants who could then take steps to prevent improper disclosure of mediation communications; and other features).

139. *See* Lyn Lawrence, *Everyone's A Critic: The Public Speaks on Attorney Malpractice and Mediation Confidentiality*, 35 ALT. TO HIGH COST LITIG. 104, 105–09 (2017).

140. CAL. EVID. CODE § 1129 (West 2019); *see* Ron Kelly, *New California Law Requires Informed Consent to Mediation*, MEDIATE.COM (Jan. 29, 2019), https://mediate.com/new-california-law-requires-informed-consent-to-mediation/ [https://perma.cc/ML8Q-TWJ3].

141. CAL. EVID. CODE § 1129(c) (West 2019).

142. *Id.* §§ 1122(a)(3), 1129.

143. *Id.* § 1129(e); *see also* Bret Linley, *Quis Custodiet Ipsos Custodes: How the Lack of Institutional Concern for Parties to ADR Protects and Incentivizes Lawyer Misconduct*, 45 J. LEGAL PROF. 115, 118 (2020); John Lande, *Charting a Middle Course for Court-Connected Mediation*, 2022 J. DISP. RESOL. 63, 67.

Clients in California continue to bring suits against their lawyers for actions taken and advice given in the course of mediation—and lawyers continue to invoke California statutes' strict protection of mediation confidentiality to successfully shield themselves from their clients' malpractice claims.[144] Mediators have made similar use of the statutes to avoid litigation and liability.[145] There are now changes afoot in California to provide for potential disciplinary action—but against mediators only.[146]

C. The Story of Binding Mediation

Despite the frequency with which commentators and judges describe "binding mediation" as oxymoronic,[147] the procedure comes up surprisingly often

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144. *See, e.g.*, Keshen v. Buffington, 2021 WL 3074409, at *3–6 (Cal. Ct. App. July 21, 2021) (affirming grant of summary judgment); Maraziti v. Griffin, No. D078527, 2022 WL 1703956, at *7 (Cal. Ct. App. May 27, 2022) (affirming trial court's judgment that plaintiff failed to prove his claims).

145. *See, e.g.*, Wolf v. Loring Ward Int'l, Ltd., No. B275678, 2019 WL 1922920 (Cal. Ct. App. April 30, 2019) (affirming grant of summary judgment); Mozer v. Augustine, No. B288162, 2019 WL 4439664, at *3–4 (Cal. Ct. App. Sept. 13, 2019) (affirming probate court's dismissal of petition opposing confirmation of mediated settlement agreement which was based on allegations of mediator misconduct); *see also* Chodosh v. Trotter, No. D070952, 2017 WL 4020447, at *1 (Cal. Ct. App. Sept. 13, 2017) (affirming grant of motion to strike pursuant to anti-SLAPP statute).

146. In September 2024, California Governor Newsom signed Senate Bill 940, which creates an avenue for the disclosure of mediation communications in disciplinary proceedings against mediators. The bill provides for the California State Bar to establish and administer a program for certification of individual mediators and mediation provider organizations. The new law also provides that mediation providers must have complaint procedures in place to comply with required standards and procedures to remedy mediators' failures to comply with such standards, and that in order to become certified, mediators must agree "that if an inquiry or a complaint is made about the conduct of the mediator, mediation communications may be disclosed solely for purposes of a complaint procedure conducted pursuant to rule 3.865 to address that complaint or inquiry." Ivana Ninic Osterle, *California Senate Bill 940: Introduction of an ADR Certification Program?*, INT'L MEDIATION INST. (Oct. 24, 2024), https://imimediation.org/2024/10/24/california-senate-bill-940-introduction-of-an-adr-certification-program [https://perma.cc/TC5U-BW2E].

147. *See, e.g.*, Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 719 n.3 (1999) (describing binding mediation as an "oxymoron"); Pine Terrace Assocs. v. Tri-Calc Indus., Inc., No. B157585, 2003 WL 21983867, at *1 n.4 (Cal. Ct. App. Aug. 21, 2003) ("Oxymoronic as it may be, this is the term used by the parties."); Lindsay v. Lewandowski, 43 Cal. Rptr. 3d 846, 851 (Ct. App. 2006) (Sills, J., concurring) (calling the concept of binding mediation "oxymoronic"); Kern Health Sys. v. Allied Mgmt. Grp. Special Investigation Unit, Inc., No. B258326, 2016 WL 1650523, at *10 (Cal. Ct. App. Apr. 25, 2016) (if "binding mediation" is understood as a "hybrid of mediation and arbitration," then "[a] failed, legally binding mediation is an oxymoron"); Wasinger v. Roman Cath. Diocese of Salina, 407 P.3d 665, 669 (Kan. Ct. App. 2017) (construing "binding mediation" clause in construction contract, the court noted "analytical tension between the agreed role of the mediator and the definition of mediation"); *see also* Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Y.B. ARB. & MEDIATION 219, 223 (2013) (describing binding mediation as a "confusing and inconsistent label"); Chris Honeyman, *A Sort of Career*, *in* EVOLUTION OF A FIELD: PERSONAL HISTORIES

in the dispute resolution literature.[148] In one sense, the meaning of "binding mediation" is clear. The procedure begins as a standard mediation that aims to facilitate the parties' communication, negotiation, and agreement. But if the parties are unable to reach agreement on all or some of the issues, the mediator is then empowered to make decisions that will be binding upon the parties.

"Binding mediation" strips parties of their right to reject a proposed outcome, fundamentally altering the voluntary, consensual nature that is core to mediation. Indeed, providing a mediator with the power to impose an outcome upon the parties is entirely inconsistent with the role that mediators are supposed to play according to the very basic definitions described above,[149] as well as the definitions contained in state statutes and court rules.[150] Binding mediation might be best

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IN CONFLICT RESOLUTION 171, 177 (Howard Gadlin & Nancy A. Welsh eds., 2020) (describing binding mediation as "a contradiction in terms" but a nonetheless useful precedent when "confronted with parties who *could not* be persuaded to do anything that had the remotest connection to logic").

148. *See, e.g.*, Matthew H. Ormsbee, *Music to Everyone's Ears: Binding Mediation in Music Rights Disputes*, 13 CARDOZO J. CONFLICT RESOL. 225, 237–38 (2011) (referencing "binding mediation" in copyright infringement cases); Robert C. Leventhal, *Between Mediation and Arbitration—Binding Mediation: The Third Alternative*, LEXOLOGY (Aug. 29, 2011), https://www.lexology.com/library/detail.aspx?g=01622aaf-9298-4492-aa05-eee504d06825 [https://perma.cc/VVA2-M4YC]; Jesse Molina, *Broken Promises, Broken Process: Repairing the Mandatory Mediation Conciliation Process in Agricultural Labor Disputes*, 21 SAN JOAQUIN AGRIC. L. REV. 179, 186 (2012) (binding mediation in labor law context); Kenneth A. Vogel, *Alternative ADR for Construction Disputes: A Litigator's Perspective*, 45 MD. B. J. 18, 22 (2012) (referencing "binding mediation"); Deason, *supra* note 147, at 223; Meagan T. Bachman, *Providing Value in the Resolution Construction Disputes*, ASPATORE, 2014 W.L. 4785613, at *6 (referencing "binding mediation"); Jean-Francois Roberge, *Sense of Access to Justice as a Framework for Civil Procedure Justice Reform: An Empirical Assessment of Judicial Settlement Conferences in Quebec (Canada)*, 17 CARDOZO J. CONFLICT RESOL. 323, 331–32 (2016) (referencing "binding mediation" by judges); Kimberly T. Aquino, Case Comment, *Family Law—Letting Go and Stopping the Continuous Cycle of Litigation: Massachusetts Supreme Judicial Court Affirms Scope of Judicial and Limited Non-Binding Parent Coordinator Authority in Custody Cases of Minor Children*—Bower v. Bournay-Bower*, 15 N.E.3d 745 (Mass. 2014)*, 21 SUFFOLK J. TRIAL & APP. ADVOC. 423, 425–27 (2016) (binding mediation involving parent coordinators in family context); Eric Strum, *Hollywood Accounting: Profit Participation and the Use of Mediation as a Mode of Resolving These Disputes*, 18 CARDOZO J. CONFLICT RESOL. 457, 484–85 (2017) (referencing "binding mediation"); William B. Gould, IV, *Some Reflections on Contemporary Issues in California Farm Labor*, 50 U.C. DAVIS L. REV. 1243, 1250–51 n.28 (2017) (binding mediation in labor law context); Lela Porter Love, Lisa Blomgren Amsler & Mansi Karol, *Dispute System Design Can Help: To Bring about the Future Envisioned by GPC Participants, We Need to Change the Structure of What We Do*, 24 NO. 3 DISP. RESOL. MAG. 15, 17 (2018) (equating binding mediation and med–arb); Cathy Hwang, *Faux Contracts*, 105 VA. L. REV. 1025, 1036, 1068 (2019); Kenneth J. Keith, *New Zealand and the International Court of Justice*, 21 MELB. J. INT'L L. 516, 528 (2021) (binding mediation in international, diplomatic context).

149. *See supra* text accompanying notes 8–11.

150. *See, e.g.*, CAL. EVID. CODE § 1115(a) (defining mediation as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement"); TEX. CIV. PRAC. & REM. CODE ANN. § 154.023 (defining mediation as "a forum in which an impartial person, the mediator,

described as an ill-named and ill-advised variation of another process: med–arb.[151] Med–arb is a two-step procedure, with the first step consisting of mediation (probably including joint sessions and caucuses) and if the mediation does not resolve the dispute, the parties and neutral then proceeding to a second distinct step involving a hearing or other "additional arbitral adversary proceedings."[152]

Binding mediation fails to include that second, evidentiary step,[153] and the mediator's decision may therefore be based entirely on what occurred during the mediation, in joint session, and in caucus. Also, although med–arb may involve a single neutral serving as both mediator and arbitrator, this approach is not advised and requires the parties' informed consent.[154] This is because the use of a single neutral presents several dangers. Parties are likely to be less willing to be frank and make useful disclosures in mediation if they know the mediator could become their arbitrator.[155] Meanwhile, their neutral's arbitral award may be influenced by what

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facilitates communication between parties to promote reconciliation, settlement, or understanding among them" and specifying that a mediator "may not impose his own judgment on the issues for that of the parties"); N.Y. COMP. CODES R. & REGS. tit. 22, § 160.1(e) (defining mediation as "an ADR process in which a neutral third party (referred to as a mediator) helps parties communicate, identify issues, clarify perceptions, and explore options for a mutually acceptable outcome").

151. In child custody disputes, the California Legislature also has authorized an advisory mediation procedure that must be called "child custody recommending counseling." The mediator is referred to as a "child custody recommending counselor." CAL. FAM. CODE § 3183(a). However, "[m]ediators who make those recommendations are considered mediators for purposes of the statutes governing custody and visitation mediation and are subject to all requirements for mediators for all purposes under the Family Code and the California Rules of Court." BARBARA J. VAN ARSDALE ET AL., 33 CAL. JUR. 3D FAMILY LAW § 1031 (2025); *see also* Peter Salem & Bernard Mayer, *Family Mediation*, *in* FAMILY DISPUTE RESOLUTION: PROCESS AND PRACTICE 25, 29 (Peter Salem & Kelly Browe Olson eds., 2024) (describing how California "renamed court-based *recommending mediation* to *child custody recommending counseling* in 2011"); Peter Salem, Kelly Browe Olson & Abby White, *Family Dispute Resolution: Toward a Differentiated Approach to Family Justice*, *in* FAMILY DISPUTE RESOLUTION: PROCESS AND PRACTICE 3, 7 (Peter Salem & Kelly Browe Olson eds., 2024) (describing Hennepin County (Minnesota) procedure in which parties who reached impasse in family mediation were then offered the opportunity to have the mediator conduct an evaluation to be shared with the court).

152. Deason, *supra* note 147, at 223.

153. *Id.*; *see also* Richard M. Calkins, *Mediation: The Radical Change from Courtroom to Conference Table*, 58 DRAKE L. REV 357, 390 (2010) ("In binding mediation, the mediator will conduct a traditional mediation, including joint sessions, private caucuses, and the transmission of demands and offers between the parties. If settlement is not reached, the mediator will decide the matter by reaching a fair settlement figure.").

154. *See* Nancy A. Welsh, *Switching Hats in Med–Arb: The Ethical Choices Required to Protect Process Integrity*, *in* MEDIATION ETHICS: A PRACTITIONER'S GUIDE 218, 218–23 (Omer Shapira ed., 2021) [hereinafter Welsh, *Switching Hats in Med–Arb*] (describing the disadvantages and ethical and legal implications of med–arb with a single neutral).

155. Kristen M. Blankley, *Keeping A Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR L. REV. 317, 332–33 (2011); ALAN S. GUTTERMAN, BUSINESS TRANSACTIONS SOLUTIONS § 101:28, Westlaw (database updated Aug. 2025); Thomas J. Stipanowich, *Arbitration,*

he learned or observed in an ex parte caucus during the mediation phase of the process.[156] Unlike med–arb, which thus ideally involves two different neutrals and a clear demarcation and transition from consensual mediation to adjudicative arbitration, binding mediation blurs these procedures, as well as the ethics and roles of two very different sorts of neutrals.

Interestingly, when state appellate courts have confronted situations in which *current judicial officers* have facilitated and presided over something called "binding mediation," the courts have turned to state statutes and court rules for guidance and have concluded that binding mediation does not meet their definitions of mediation. As a result, they have refused to enforce the mediators' awards or decisions.[157] In similar fashion, courts have refused to enforce binding mediation's outcomes when parties' participation in the procedure has been entirely due to courts' *orders* to submit to the procedure.[158]

But courts' responses to the distortion presented by binding mediation have been much more muddled when the procedure has occurred (or is alleged to be required to occur) pursuant to the dispute resolution clauses contained in parties' privately negotiated contracts. California has more of these cases than any other state, perhaps because med–arb is a common feature in California contracts.[159] Simply as a matter of contract law, courts deciding whether to enforce a binding mediation clause must determine whether the parties actually agreed on the meaning of "binding mediation." The internal inconsistencies of the term can make it difficult for a court to find its meaning to be reasonably certain. In the 2006 case of *Lindsay v. Lewandowski*,[160] the California Court of Appeals refused to enforce a retired judge–mediator's "binding mediation ruling" after determining that the parties did

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Mediation, and Mixed Modes: Seeking Workable Solutions and Common Ground on Med–Arb, Arb-Med, and Settlement-Oriented Activities by Arbitrators, 26 HARV. NEGOT. L. REV. 265, 291–93 (2021).

156. Welsh, *Switching Hats in Med–Arb*, *supra* note 154, at 221.

157. *See, e.g.*, Travelers Cas. & Sur. Co. v. Super. Ct., 24 Cal. Rptr. 3d 751, 763 (Ct. App. 2005) (treating Valuation Order issued by judge to be the result of mediation proceeding governed by rules applicable to mediation while also noting that rules of court addressing issues of voluntariness and coercion are supposed to guide sitting judges who mediate but are not directly applicable to such mediations); Team Design v. Gottlieb, 104 S.W.3d 512, 529 (Tenn. Ct. App. 2002), *overruled by*, Tuetken v. Tuetken, 320 S.W.3d 262 (Tenn. 2010) (stating that court-annexed "binding mediation" proceeding did not comply with then applicable version of Supreme Court ADR rule).

158. *See, e.g.*, Harris v. Hall, No. M200000784COAR3CV, 2001 WL 1504893, at *6–11 (Tenn. Ct. App. Nov. 28, 2001) (stating that the trial court had no authority to order case to dispute resolution procedure other than one established in Tenn. R. Sup. Ct. 31, which provides for mediation, not binding mediation, and therefore the mediating judge had no authority to dispose of the case or issue orders entering judgment); Aquino, *supra* note 148, at 426–27 (describing case in which appellate court determined that trial judge had "surpassed her inherent authority" in ordering parties to submit to binding mediation by parent coordinator and had made "an unlawful delegation of her judicial authority").

159. *See* Edna Sussman, *Med–Arb: An Argument for Favoring Ex Parte Communications in the Mediation Phase*, 7 WORLD ARB. & MEDIATION REV. 421, 424 (2013) (describing her involvement in med–arb procedure that sounds very much like binding arbitration and noting that it is "quite frequently utilized" in California contracts).

160. Lindsay v. Lewandowski, 43 Cal. Rptr. 3d 846, 848–49 (Ct. App. 2006).

not agree on the meaning of this non-obvious term in their contract; the contract language itself was inconsistent, and there were such "significant problems with the concept of binding mediation"[161] that the court could not determine its meaning or how its use would be governed:

> If binding mediation is to be recognized, what rules apply? The arbitration rules, the court-ordered mediation rules, the mediation confidentiality rules, or some mix? If only some rules, how is one to choose? Should the trial court take evidence on the parties' intent or understanding in each case? A case-by-case determination that authorizes a "create your own alternate dispute resolution" regime would impose a significant burden on appellate courts to create a body of law on what can and cannot be done, injecting more complexity and litigation into a process aimed at less.[162]

It is worthwhile to note that the court specifically recognized the interpretive burden presented by a mediation that does not look like mediation, including the potential complication of applying California's mediation confidentiality rules.[163] In a forceful concurrence in *Lewandowski*, Judge Sills described binding mediation as "unenforceably vague,"[164] "oxymoronic,"[165] and ultimately inconsistent with the definition contained in the California Rules of Court:

> [M]ediations are supposed to reflect a truly voluntary process. They have the advantage that, by definition, they reflect the consent of the parties. And for their part, arbitrations have the epistemological advantages of a truly adversarial process. Each side has an incentive to present its best case, and the result will not necessarily give either side everything it wants.[166]

Judge Sills warned that if courts permitted binding mediations to proceed, many lawyers might assume that "binding" meant only that they were compelled to attend and participate, not that "if a settlement is not reached, then, puff, the mediation becomes an arbitration."[167] He added that binding mediation might "actually retard settlement"[168] because "no lawyer in his right mind"[169] would be willing to share information regarding potential exposure or client control issues with a mediator who might become an arbitrator. And according to Judge Sills, "perhaps the more ominous consequence of the hybridization of mediation and

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161. *Id.* at 850.

162. *Id.* Similar questions could and should be asked about how the rules apply to the relatively new dispute resolution neutral called "court-appointed neutral." *See* Kristen Blankley & Irma S. Russell, *Court-Appointed Neutrals in Complex Litigation: Ethics Issues and Norms*, *in* CLASS ACTIONS AND OTHER COMPLEX LITIGATION: ETHICS §§ 5, 5.01 (Joshua P. Davis & Candice J. Enders eds., 2025).

163. *Lewandowski*, 43 Cal. Rptr. 3d at 850.

164. *Id.* at 853 (Sills, J., concurring).

165. *Id.* at 850.

166. *Id.* at 853.

167. *Id.* at 851.

168. *Id.* at 852.

169. *Id.* at 852–53.

arbitration may be damage to the very quality of justice yielded by the process, in effect having the worst of both worlds."[170]

Despite all of the concerns expressed in this 2006 case, California's courts now tend to enforce binding mediation clauses in parties' contracts, as well as the mediators' decisions resulting from these procedures.[171] In the 2007 case of *Estate of McDonald*, for example, where the parties entered into a mediated settlement agreement that included a provision for a binding decision by the retired judge–mediator on disputed items, the California Court of Appeals concluded that the probate court did not exceed its jurisdiction in refusing to set aside the mediator's decision, and that the objecting party was estopped from challenging a procedural settlement mechanism she had accepted.[172] A few years later, in 2012, the California Court of Appeals pointed out in *Bowers v. Raymond J. Lucia Co., Inc.*[173] that those objecting to a mediator's failure to hold an evidentiary hearing in their binding mediation procedure prior to the issuance of his decision were "sophisticated parties and knowledgeable counsel who could have explicitly provided for a separate arbitration had that been what they intended."[174] The court distinguished the decision in *Lewandowski* by pointing to the "various discrepancies"[175] in the parties' contract there that "prevented the appellate court from ascertaining what the parties actually meant when they used the term 'binding mediation.'"[176] There were no such discrepancies in this case, and the court apparently no longer considered the term "binding mediation" to be a non-obvious or internally inconsistent concept to grasp. In 2018, in *Mullahey v. Feldman*,[177] the California Court of Appeals again confirmed the use of binding mediation when it affirmed the lower court's enforcement of parties' settlement agreement that included a provision for the procedure.

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170. *Id.* at 853.

171. *See, e.g.*, Unite Here Loc. 30 v. Volume Servs. Inc., 723 F. App'x 403, 404–05 (9th Cir. 2018) (denying motion for arbitration when parties' binding mediation, conducted pursuant to collective bargaining agreement, had already resulted in decision). *But see* Powers v. Scarola, No. G040569, 2011 WL 135791, at *5 (Cal. Ct. App. Jan. 13, 2011) (reversing the trial court's confirmation of arbitration award, based on finding that even though "binding mediation" clause included provisions for decision-making by the mediator, it represented "nothing more than an agreement to agree" and only "laid the groundwork for a structured mediation that failed").

172. *In re* Est. of McDonald, No. B189178, 2007 WL 259872 at *4–5 (Cal. Ct. App. Jan. 31, 2007).

173. 142 Cal. Rptr. 3d 64, 71 (Ct. App. 2012) (affirming trial court's enforcement of award from "binding mediation" that did not include an evidentiary hearing).

174. *Id.* at 68–69. Also decided in 2012 was another case involving binding mediation. *Huh v. Jeong*, No. H037148, 2012 WL 1513689 (Cal. Ct. App. May 1, 2012) involved a construction law-related dispute. The California Court of Appeals reversed the trial court's enforcement of a settlement agreement that included a provision for the mediator to decide the amount owing, but such reversal was based on finding that the settlement agreement was inadmissible due to its failure to include statutorily required language. Therefore, the court was not required to address the question of whether the binding mediation clause was enforceable.

175. *Bowers*, 142 Cal. Rptr. 3d at 72.

176. *Id.*

177. No. B278653, 2018 WL 5275483, at *1 (Cal. Ct. App. Oct. 24, 2018).

Why use binding mediation rather than a two-stage, two-neutral med–arb procedure? A single stage involving a single neutral certainly can reduce costs. Further, perhaps the contracting parties, their lawyers, or the retired judges serving as mediators in so many of these cases preferred binding mediation because it has a nicer, gentler ring to it than either med–arb or judicial settlement conference.[178] Perhaps the parties, their lawyers, or the retired judge–mediators themselves felt confident that based on the mediators' past judicial experience, they could learn all they needed to know during the mediation and could easily distinguish between relevant and irrelevant or prejudicial evidence.[179] Thus, neither the retired judge–mediators nor the parties would have any need for two neutrals or a more formal, open evidentiary hearing before proceeding to a decision.

Or perhaps it is worthwhile to consider again the privileges uniquely granted to mediation. In California, these privileges include the protections offered by the mediation confidentiality statutes described above, and these may just make binding mediation more attractive than a procedure that begins with a confidential mediation process but may end with an arbitration proceeding that cannot claim the same statutory protection. In *Lewandowski*, the court specifically questioned whether and how the state's mediation confidentiality statutes should apply to something called binding mediation.[180] In *Pine Terrace Associates v. Tri-Calc Industries*,[181] the trial court granted a motion in limine to exclude the evidence from a binding mediation session—and the court's decision was affirmed on appeal.[182]

California, meanwhile, is not the only state that is dealing with difficulties arising out of courts' orders or parties' agreements to participate in binding

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178. This was one of Judge Sills' speculations. *See* Lindsay v. Lewandowski, 43 Cal. Rptr. 3d 846, 852 (Ct. App. 2006) (Sills, J., concurring).

179. *But see* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORN. L. REV. 1, 27–28 (2007) (finding that judges are "vulnerable to such distractions as absurd settlement demands, unrelated numeric caps, and vivid fact patterns"); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The Hidden Judiciary: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1522–23 (2009) (finding administrative law judges "relying on intuitive processing [that] allowed an irrelevant anchor to influence compensatory damage awards; the framing of payment options to influence evaluations of the appropriateness of a landlord's conduct; and the representativeness of a piece of information to influence evaluations of the likelihood of a defendant employer's conduct" and observing that the judges might have avoided judgment errors "by adopting a deliberative decisionmaking approach"); Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1256–57 (2006) (finding that bankruptcy judges were susceptible to some biases, but not others); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1323–26 (2005) ("Taken together, our studies show that judges do not disregard inadmissible information when making substantive decisions in either civil or criminal cases," particularly when judicial review is unlikely and therefore recommending separation of settlement and adjudicative functions).

180. *Lewandowski*, 43 Cal. Rptr. at 850.

181. No. B157585, 2003 WL 21983867 (Cal. Ct. App. Aug. 21, 2003).

182. *Id.* at *4 (affirming trial court's exclusion of evidence from "binding mediation" despite appellant's contention that such mediation was actually intended to be arbitration).

mediation. Illinois[183] courts have enforced binding mediation as a legitimate, meaningful procedure. Texas[184] and Pennsylvania[185] courts, meanwhile, have construed "binding mediation" clauses as calling for "arbitration" and have enforced them as such. Tennessee courts have primarily been required to deal with sitting judges providing binding mediation pursuant to their courts' local rules, which have been found to be in conflict with state court rules.[186] Cases involving binding mediation have also arisen in other states, including Kansas,[187] West Virginia,[188] Oklahoma,[189] Ohio,[190] and Washington.[191]

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183. *See generally* Pinske v. Allstate Prop. & Cas. Ins. Co., 44 N.E.3d 495, 501 (affirming dismissal of action seeking payment of interest on award because resolution had been reached through binding mediation and was thus enforceable as a settlement agreement, not an arbitral award); Michael P. Mazza, LLC v. Oil-Dri Corp. of Am., No. 1-22-0645, 2023 WL 2625440 (Ill. App. Ct. Mar. 24, 2023) (affirming trial court's grant of law firm's motion for judgment on the pleadings to enforce binding mediation provision in legal fee agreement with former client; trial court found binding mediation clause was "sufficiently definite" and "clearly mandate[d] a decision by the mediator on the merits of [Oil-Dri's] claims").

184. High Valley Homes, Inc. v. Fudge, No. 03-01-00726-CV, 2003 WL 1882261, at *4 (Tex. Ct. App. Apr. 17, 2003) (in appeal from judgment confirming arbitration award, clause in residential construction contract providing that "[t]he mediator shall be empowered to decide the controversy and issue a binding award" read as "manifest[ing] an agreement to submit disputes to binding arbitration").

185. Miller v. Miller, No. 797 WDA 2015, 2016 WL 6301602, at *10 (Pa. Super. Ct. Oct. 27, 2016) (treating and enforcing a "Binding Mediation Agreement" as an agreement to participate in common law arbitration when parties in divorce case signed the agreement).

186. Harris v. Hall, No. M200000784-COA-R3-CV, 2001 WL 1504893, at *1, *4–5 (Tenn. Ct. App. Nov. 28, 2001) (stating that the trial court had no authority to order case to dispute resolution procedure other than one established in Tennessee Superior Court Rule 31 which provides for mediation, not binding mediation, and therefore the mediating judge had no authority to dispose of the case or issue orders entering judgment); Team Design v. Gottlieb, 104 S.W.3d 512, 524 (Tenn. Ct. App. 2002), *overruled by*, Tuetken v. Tuetken, 320 S.W.3d 262 (Tenn. 2010) (stating that court-annexed "binding mediation" proceeding did not comply with then applicable version of Supreme Court ADR rule); *see also* Env't Abatement, Inc. v. Astrum R.E. Corp., 27 S.W.3d 530, 532, 535 (Tenn. Ct. App. 2000) (stating that the settlement judge—described as mediator and acting pursuant to local rules providing for both "non-binding mediation" and "binding mediation"—not permitted to enter consent decree based on settlement agreement after learning of withdrawal of consent by one of the parties).

187. *See* Wasinger v. Roman Cath. Diocese of Salina, 407 P.3d 665, 668–69 (Kan. Ct. App. 2017) (noting "analytical tension between the agreed role of the mediator and the definition of mediation" when construing "binding mediation" clause in construction contract).

188. *See* Hunter v. Blankenship, No. 22-0230, 2023 WL 4045232, at *3 (W. Va. June 16, 2023) (enforcing binding mediation provision in contract).

189. *See* Culley v. Classic Recreations, LLC, No. CIV-17-0769-F, 2017 WL 11306181, at *4 (W.D. Okla. Oct. 4, 2017) (refusing to order binding mediation based both on the contract and on the state's Dispute Resolution Act's definition of mediation).

190. *See* Oliver Design Grp. v. Westside Deutscher Frauen Verein, No. 81120, 2002 WL 3189158, at *2 (Ohio Ct. App. Dec. 19, 2002) (refusing to stay breach of contract action based on "binding mediation" provision in agreement).

191. *See* Atkinson v. Rose, 3 Wash. App. 2d 1024, at *3 (2018) (refusing to compel arbitration based on lack of deadlock that would precipitate right to invoke contractual provision for "binding mediation or arbitration").

D. The Story of Rogue Mediation

The next story—that of rogue mediation—bears substantial resemblance to controversies in the United States over the phenomenon and meaning of requiring parties to engage in "good faith participation" in court-ordered mediation.[192] Often, these controversies in the United States have involved a party who has attended a court-ordered mediation but has then refused to make an offer or otherwise negotiate. The opposing party, understandably disappointed at the waste of time involved in preparing for and attending the mediation, has then sought judicial sanction. At this point, however, it is relatively clear that parties may only be sanctioned for violating the obligation to participate in good faith in mediation if they have failed to comply with objective requirements—e.g., required attendance by persons with authority to settle or submission of required pre-mediation documents. Good faith participation does not require parties to negotiate.[193]

What differentiates rogue mediation is the apparent conspiracy among opposing parties, their lawyers, and mediators to engage in something that looks on its face like mediation but really is not, all in order to appear to comply with a court's pre-trial mediation requirement. Professor Alexander describes this practice as occurring in Hong Kong after the courts promulgated High Court Practice Direction 31 ("PD 31"), resulting in a marked increase in pre-trial mediations.[194] Thereafter, according to evidence that Professor Alexander describes as "anecdotal but still reliable," some lawyers' practices began to include participation in "rogue mediation."[195] The lawyers for both sides would agree to attend mediation as required by PD 31. On the day of the "mediation," however, the parties would immediately be placed in separate rooms where they would stay for 30 minutes or less. At that point, the mediation would be "declared 'unsuccessful,'" with a mediation certificate then issued to the parties that permitted them to proceed to trial.[196]

There are similarities here to drive-by mediation's primary focus on the production of a document apparently bearing the mediator's blessing, but without any real engagement in mediation. In the case of rogue mediation, the goal of

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192. *See* Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 OHIO ST. J. ON DISP. RESOL. 363, 365 (2011); John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 74–75 (2002); Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 594 (2001). *But see* Samara Zimmerman, *Judges Gone Wild: Why Breaking the Mediation Confidentiality for Acting in "Bad Faith" Should Be Reevaluated in Court-Ordered Mandatory Mediation*, 11 CARDOZO J. CONFLICT RESOL. 353, 355 (2009).

193. *Id.*

194. Nadja Alexander, *Mediation, Consent and Justice: Comparative Perspectives*, 20 J. JAPANESE ARB. & ADR 1, 29 (forthcoming 2025) (on file with author) (describing variety of mediation procedures and ultimately proposing that international dispute resolution organizations should undertake responsibility for assuring the sufficient exercise of parties' self-determination in mediated settlement agreements).

195. *Id.*

196. *Id.*

gaining the document was to enable access to trial. In the case of drive-by mediation, it is to enable the entry of judgment without any judicial review.

In Hong Kong, when the court's mediation committee became aware of the incidence of rogue mediation, they contacted the Bar Association and the Law Society, which subsequently issued "stern letters of warning" regarding the practice.[197] PD 31 was also amended to require "a minimum level of participation in mediation"[198] determined by the court or the parties.

Like the situation in the United States, when disputes arose over the obligation to participate in mediation in good faith, litigation ensued in Hong Kong regarding the specifics required by PD 31. In one such case, while urging that the minimum level of participation "should not be construed as the number of hours of mediation" and was instead more dependent upon the quality of the process and the sincerity of the parties, the court ultimately determined that "the minimum level of participation should be the standard term in Appendix C of the Practice Direction, viz: the parties shall participate in mediation up to and including at least one substantive mediation session (of a duration determined by the mediator) with the mediator."[199] Note that in Hong Kong, the court may impose cost sanctions for failure to meet this duty[200] and has done so on occasion.[201]

Interestingly, PD 31 currently provides that the required level of participation can be set by the court or agreed upon by the parties—which, it seems, could signal the return of agreements to engage in 30-minute caucused, no-negotiation "mediations."

E. The Singapore Convention—Another Story to Be Told . . . or a Key Corrective?

The U.N. Convention on International Settlement Agreements Resulting from Mediation—known more generally as the "Singapore Convention"—was adopted by the United Nations General Assembly in December 2018 and, at this point, has been signed by 58 nations and ratified by 18 of them.[202] The United States is a signatory but has not yet ratified the Convention.

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197. *Id.*

198. *Id.*

199. Hak Tung Alfred Tang v. Bloomberg LP, [2010] H.K.C.U. 1698, ¶¶ 11, 13 (H.K.C); *see also* NADJA ALEXANDER ET AL., THE HONG KONG MEDIATION MANUAL 212–13 (3d ed. 2022).

200. Mediation, 2014, H.K.P.D. 31, ¶ 4. Courts are empowered to impose adverse costs orders if parties unreasonably refuse to engage in mediation.

201. The court has imposed a sanction for failure to mediate in several cases, "either by ordering a successful party to pay part of the costs of an unsuccessful party or by reducing the costs payable to a successful party, as a penalty for an unreasonable refusal to mediate. The court will consider the relevant facts and background circumstances underlying the parties' failure to mediate." *Commercial Mediation in Hong Kong SAR, Does Failure to Mediate Attract Adverse Cost Consequences?*, LINKLATERS (May 24, 2022), https://www.linklaters.com/en-us/insights/publications/commercial-mediation-a-global-review/global-guide-commercial-mediation/hong-kong [https://perma.cc/JZ7D-A5R7].

202. SINGAPORE CONVENTION ON MEDIATION, https://www.singaporeconvention.org/ [https://perma.cc/E48X-RNAR]; *see also* UNITED NATIONS TREATY COLLECTION

The Convention enables expedited enforcement of written mediated settlement agreements resolving international[203] commercial disputes. Its intent is to encourage greater use of mediation, consistent with both the "development of harmonious international economic relations"[204] and business needs in the context of fast-moving global commerce. Importantly for purposes of this Article, the Convention specifically excludes consumer disputes, as well as disputes involving family, inheritance, or employment law, from its coverage.[205] As explained by Professor Deason, the carve-out acknowledges that these types of disputes are more likely to involve less sophisticated parties and unequal bargaining power. Defining "commercial" broadly to include such disputes would have been likely to "create barriers to consensus on an efficient procedure [for the enforcement of mediated settlement agreements] and make the instrument [the Convention] less attractive to States considering its ratification."[206] The Convention also does not apply to settlement agreements enforceable as court judgments (i.e., consent decrees, stipulated judgments, agreed judgments), settlement agreements approved by a court or concluded in the course of judicial proceedings, or settlement agreements recorded and enforceable as arbitral awards.[207]

Providing for expedited enforcement means that parties seeking to enforce a mediated settlement agreement will not need to initiate a contract action;[208] convert

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(available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en) [https://perma.cc/3JZD-DAYX].

203. In order to be international, at least two of the disputing parties must have their places of business in different nations or if all the parties have their place of business in the same nation, their dispute is nonetheless considered international if the nation where the businesses are located is different from the nation where a substantial part of the settlement agreement's obligations is to be performed or from the nation with the closest connection to the agreement's subject matter. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, art. 1, Jun. 10, 1958, 330 U.N.T.S. 38 ("This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."); *see also* 9 U.S.C. §§ 201–02; Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1441 (11th Cir. 1998) (joining First, Second, Seventh, and Ninth Circuits in holding that arbitration agreements and awards involving a non-domestic party are "non-domestic" even if the arbitration was conducted in the United States).

204. Singapore Convention, *supra* note 11, at pmbl., ¶ 5.

205. *Id.* at art. 1 ¶ 2.

206. Ellen E. Deason, *What's in a Name? The Terms "Commercial" and "Mediation" in the Singapore Convention on Mediation*, 20 CARDOZO J. CONFLICT RESOL. 1149, 1154 (2019) [hereinafter Deason, *What's in a Name?*].

207. Singapore Convention, *supra* note 11, at art. 1 ¶ 3.

208. Edna Sussman, *The Singapore Convention: Promoting the Enforcement and Recognition of International Mediated Settlement Agreements*, INT'L CHAMBER COM. DISP. RESOL. BULL., Nov. 2018, at 42, 46 [hereinafter Sussman, *The Singapore Convention*]; Edna Sussman, *A Brief Survey of U.S. Case Law on Enforcing Mediation Settlement Agreements Over Objections to the Existence or Validity of Such Agreements and Implications for Mediation Confidentiality and Mediator Testimony*, MEDIATION COMM. NEWSL., Apr. 2006,

their agreement into an arbitral award entitled to expedited enforcement (as described above);[209] or ask the court to either retain jurisdiction of their case or incorporate the terms of their settlement agreement into a consent decree or other judgment.[210] Once again, the Convention grants the privilege of expedited enforcement to parties specifically in order to encourage their use of *mediation* as the mechanism for reaching settlements in international commercial disputes.

The Convention's definition of mediation, however, is even more vague than the definitions in the Model Standards of Conduct or the UMA. According to the Convention, mediation is a "process . . . whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking authority to impose a solution upon the parties to the dispute."[211] There are only three elements that are clear in this definition. First, a third party must be involved. Expedited enforcement is not granted for settlement agreements reached and signed as a result of parties' unassisted negotiation (although there *are* some U.S. commentators now urging that member states could choose to extend this privilege to "*non-mediated* or *unmediated* settlement agreements"[212]—previously known by the old-fashioned term of "*negotiated* settlement agreements"). According to Edna Sussman, the Convention delegates engaged in "extensive deliberations"[213] regarding "whether an unassisted negotiation which leads to a settlement agreement should also be covered by the Convention"[214] and "questioned whether there was a sound basis for distinguishing between those two contexts."[215] Apparently and importantly for purposes of this Article, they were "persuaded that mediation provides a qualitatively different process."[216] At least in part, this was because the delegates learned that many jurisdictions regulate the mediation process and the conduct of mediators.[217] This Article will return to such regulations and requirements when considering their role under the Convention in determining whether to grant or refuse to grant expedited enforcement to a mediated settlement agreement. The second element that is (relatively) clear in the Convention's definition of mediation is that neither a *presiding* trial judge nor a *presiding* arbitrator—both of whom would have the

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at 32 (describing contract defenses in the context of enforcing mediated settlement agreements).

209. Sussman, *The Singapore Convention*, *supra* note 208, at 46–48.

210. *Id.* at 46.

211. Singapore Convention, *supra* note 11, at art. 2 ¶ 3.

212. *See* N.Y. CITY BAR, WORKING GROUP ON THREE PRIV. INT'L L. TREATIES ET AL., THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON THREE PRIVATE INTERNATIONAL LAW TREATIES: (1) THE HAGUE CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS; (2) HAGUE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS; AND (3) UNITED NATIONS CONVENTION ON INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION 56–57, 68 (March 2024).

213. Sussman, *The Singapore Convention*, *supra* note 208, at 51.

214. *Id.* at 51–52.

215. *Id.* at 52.

216. *Id.*

217. *Id.* at 51–52; *see also* Deason, *What's in a Name?*, *supra* note 206, at 1169–72.

authority to impose a solution while they are explicitly in these roles—would be considered a mediator under the Convention.[218] Third, the purpose of the parties' meeting must be to reach settlement.

Beyond that? During deliberations, some delegations (e.g., Finland, Germany, and the EU) argued that the privilege granted by the Convention for expedited enforcement should be limited to settlement agreements arising out of "structured" or "organized" mediations involving mediators operating in compliance with domestic regulations and should not be granted to agreements arising out of informal mediations involving pretty much anyone (e.g., those occurring in a pub).[219] Regardless of the concerns raised by these nations, the delegates chose not to require any particular organizational structure or compliance with domestic regulations. Indeed, they elected a broad understanding of what counted as mediation and decided it would be inappropriate to devalue the benefits of informal mediation sessions occurring outside a formal or institutionalized setting—even mediation in a pub.[220] The Canadian delegation, for example, urged that it was consistent with the spirit of mediation to embrace flexibility and encourage the use of methods responding to the situation rather than confining the process to a particular structural framework.[221] Other delegations pointed out that the requirement of a written and signed settlement agreement should sufficiently satisfy the need for formality that would then justify a competent authority in effectuating such a settlement, regardless of the formality or informality of the mediation producing the agreement.[222] Thus, if a third party with no mediation training and none of the credentials required by domestic regulations nonetheless "assists" parties in reaching a settlement agreement and then signs the parties' mediated settlement agreement as required by the Convention, the settlement will be recognized and given effect as a mediated settlement agreement. This is unless a nation has exercised the option of limiting the effect of the Convention "to mediated settlements to which the disputing parties affirmatively opted to have the Convention apply."[223]

And exactly what sort of "assistance" must the third party provide? Once again, it is clear that the third party cannot have the authority to impose an outcome upon the parties. That is not the "assistance" contemplated by the Convention. Beyond this, however, the Convention does not specify any particular approach or any particular procedural elements that must characterize the "assistance" provided.

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218. Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 17 (2019).

219. *Id.* at 16; Deason, *What's in a Name?*, *supra* note 206, at 1164; *see also* Chang-Fa Lo, *Desirability of a New International Legal Framework for Cross-border Enforcement of Certain Mediated Settlement Agreements*, 7 CONTEMP. ASIA ARB. J. 119, 132 (2014) (arguing that the presence of a mediator has a role in circumventing fraud and therefore "applying the enforceability rule only to those iMSAs made under a mediation institution, but not to ad hoc mediation, should be of importance").

220. Schnabel, *supra* note 218, at 16

221. *Id.*

222. *Id.*

223. *Id.* at 7.

Even the relatively bare-bones definition of mediation contained in the UMA specifies that it is "a process in which a mediator *facilitates communication and negotiation between parties* to assist them in reaching a voluntary agreement regarding their dispute."[224] There is no such additional language provided in the Convention's definition of mediation.

Those negotiating the Singapore Convention intentionally left the definition vague in order to incorporate processes as varied as facilitative mediation, conciliation, neutral evaluation, and even the mediation portion of a med–arb involving a single neutral.[225] As described above,[226] in some states in the United States, mediating parties frequently agree to settle their cases based on "mediators' proposals," which are shared with the parties when settlement movement has stalled and the mediator has developed a sense of the parties' likely zone of reluctant agreement.[227] It seems very likely that these mediations and their resulting settlement agreements would come within the limited definitions contained in the Convention.[228]

But others have proposed more difficult hypotheticals. Laurence Bolle, for example, imagined the following situation:

> [A] conventional mediation will be conducted, at the end of which the mediator will make recommendations on both liability and damages. The parties have seven days within which to indicate their intended rejection of the recommendation. If neither party rejects the recommendation within the designated period, it becomes

224. UNIF. MEDIATION ACT § 2(1) (Nat'l Conf. of Comm'rs on Unif. State L. 2003) (emphasis added).

225. *See* U.N. Comm'n on Int'l Trade L., Report of Working Group II (Disp. Settlement) on the Work of its Sixty-Eighth Session (New York, 5–9 February 2018), at 6, U.N. Doc. A/CN.9/934 (2018) (Convention to cover mediation portion of med–arb, even when "the appointed mediator [is] also expected to act as an arbitrator if the parties were not able to reach an amicable solution at the end of the mediation."); *see also* Thomas J. Stipanowich & Veronique Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay Between Mediation, Evaluation and Arbitration in Commercial Cases*, 40 FORDHAM INT'L L. J. 839, 872–74 (2017) (describing mediation, conciliation, and the confusion associated with their relationship to each other).

226. *See supra* Section I.B.

227. John DeGroote & Sydney Blalock Ritchie, *What Is a Mediator's Proposal? What Should a Mediator's Proposal Include?*, *in* THE MEDIATOR'S PROPOSAL: AN ADVANCED USER'S GUIDE 6.1-I (2019) (describing mediator's proposal as being made on a "double blind basis" and based not "on the mediator's opinion of the case value, but on what the mediator believes is within a range for the parties").

228. Sussman, *The Singapore Convention*, *supra* note 208, at 51 (observing that the Convention's definition of mediation "does not address whether or not the mediator can propose solutions. The Convention's usage of broad phrases provides coverage for all mediations, however . . . the process is carried out in different jurisdictions and by different mediators").

> automatically binding on both parties. Does this arrangement satisfy the mediation requirement in the contract?[229]

This hypothetical invites the creation of others, based on the opportunistic reconstructions of mediation discussed thus far. Suppose the parties have agreed to use binding mediation, authorizing the mediator to decide any issues that remain unresolved after a day of mediation. Suppose the parties have agreed to use drive-by mediation, inviting the mediator to join them only to witness the signing of their already-negotiated agreement. Turning to other actual cases in the United States, what about parties who initially attempt to reach settlement in a mediation, but are unsuccessful and only reach settlement later when they negotiate based in part on what they had learned and discussed in mediation?[230] If the mediator signs onto the settlement agreement to aver that it was based, at least in part, on the mediation that had taken place, would this agreement be entitled to expedited enforcement under the Convention?

Many supporters of the Convention likely would respond in the affirmative to all of these not-so-hypothetical hypotheticals, noting that procedural purity does not matter when it comes to ensuring the enforcement of agreements reached to resolve international commercial disputes. Arbitrators already convert mediated agreements into arbitral awards, for the simple reason that the parties can then gain the benefits of recognition and enforcement pursuant to the New York Convention.[231] It does not matter that the result was not actually the result of an arbitration hearing.

Other supporters of the Singapore Convention likely would point to the simple value of involving a third party at some point—even at the conclusion of a negotiation—to ensure that any settlement reached was not the result of coercion or disparity of power, or alternatively, not the result of two parties' collusion and fraud (e.g., fabricating a dispute and agreeing upon the transfer of property as their negotiated settlement in order to avoid collection by a creditor).[232] But the Singapore Convention does not require the mediator to aver to the quality of the parties' negotiation, the voluntariness of their consent, or the reality of the dispute that is being settled. Neither do any of the other statutes or rules discussed thus far.

Recall that at least some delegates were persuaded that mediated settlement agreements were entitled to more deference than negotiated settlement agreements

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229. Laurence Boulle, *International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework*, 7 CONTEMP. ASIA ARB. J. 35, 54–55 (2014).

230. *See, e.g.*, U.S. Fid. & Guar. Co. v. Dick Corp., 215 F.R.D. 503 (W.D. Pa. 2003).

231. Sussman, *The New York Convention Through a Mediation Prism*, *supra* note 108, at 12–13 (regarding enforcement under the New York Convention); *see also* Chetrit, *supra* note 108, at 63 (describing state statute's provision for conversion of settlement agreements into arbitral awards); Weiss & Hodgkinson, *supra* note 108, at 284–85 (describing international dispute resolution statutes in California, North Carolina, and Hawaii that provide for conversion of settlement agreements into arbitral awards).

232. Lo, *supra* note 219, at 123–24. Frankly, that latter reason explains why "fines"—the precursor of consent decrees—first arose in England in the Middle Ages. Judith Resnik, *Judging Consent*, U. CHI. LEGAL F. 43, 50–52 (1987).

because of nations' regulation of the mediation process and those serving as mediators.[233] Due to these protections, mediation was viewed as superior to negotiation. However, the protections earning mediation such respect are granted little real effect in the Singapore Convention in terms of their role in determining or limiting which settlement agreements are entitled to expedited enforcement. The Convention does not entirely ignore nations' regulation of mediators or their procedural requirements for the mediation process and mediated settlement agreements. Rather, the Convention permits courts to refuse to grant relief if a party provides proof of (1) a mediator's serious breach of the forum's standards applicable to the mediator or the mediation[234] or (2) the mediator's failure to make disclosures "that raise justifiable doubts as to the mediator's impartiality or independence."[235] However—and this is very important—the court is also required to find that without such breach of standards or failure to disclose, "the party would not have entered into the settlement agreement."[236] This causal requirement represents a high bar, one parties are very unlikely to reach.[237] The Convention's public-policy defense presents an equally high bar.[238] Nonetheless, some commentators have suggested that "the court in a jurisdiction where enforcement is sought could use its own standards to find, based on the mediator conduct, that it would violate the forum's public policy to enforce the settlement agreement."[239]

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233. In general, these regulations and requirements are meant to protect the consumers of mediation services; some commentators urge that they may even result in mediated settlement agreements achieving a level of fairness exceeding that provided by negotiated agreements involving no third-party oversight. *See* Lo, *supra* note 219, at 123–24.

234. Singapore Convention, *supra* note 11, at art. 5 ¶ 1(e); *see also* Schnabel, *supra* note 218, at 51 (applicable standards could be (1) mediator's licensing regime; (2) location of the mediation (if it took place in one location); (3) standards agreed to by the mediator in an agreement with the parties; (4) standards agreed to pursuant to the rules of an administering institution; (5) domestic law (enactment of Model Law); (6) codes of conduct; or (7) any relevant standards covering impartiality, confidentiality, and fair treatment of the parties).

235. Singapore Convention, *supra* note 11, at art. 5 ¶ 1(f).

236. *Id.* at art. 5 ¶¶ 1(e), (f). The Convention does not define or refer to what standards are applicable to the mediator's conduct and therefore, this exception will only apply if there are in fact applicable standards that governed the mediator or mediation. Schnabel, *supra* note 218, at 51.

237. Because the complaining party must show that but for the mediator's misconduct they would not have entered into the agreement, this standard is quite demanding. *See* James R. Coben, *Evaluating the Singapore Convention Through a U.S.-Centric Litigation Lens: Lessons Learned from Nearly Two Decades of Mediation Disputes in American Federal and State Courts*, 20 CARDOZO J. CONFLICT RESOL. 1063, 1097–98 (2019). It is also similar to the challenging and expensive standard used to determine lawyers' liability for malpractice. *See* John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 148 (1995) ("Much of the expense of legal malpractice litigation results from the 'case within a case' doctrine. This doctrine requires a client claiming malpractice in the conduct of another action to relitigate that other action to prove that the client would have prevailed but for the lawyer's malpractice.").

238. *See* Singapore Convention, *supra* note 11, at art. 5 ¶ 2(a).

239. UNIF. L. COMM'N, REPORT OF THE STUDY COMMITTEE ON U.N. CONVENTION ON INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION n.91 (2021).

Perhaps it is best to return to the delegates' decision that the Convention would not apply to—and instead would explicitly carve out from coverage—any and all settlement agreements resolving disputes arising out of consumer transactions "for personal, family or household purposes" as well as those "relating to family, inheritance or employment law."[240] This decision—to limit use of the Singapore Convention to agreements settling truly commercial disputes and very likely involving commercial actors—makes it much less problematic that the definition of "mediation" is so vague, the definition of "mediator" is basically nonexistent, and the bar for the meaningful invocation of nations' regulations is so high. The parties most likely to need the protections offered by nations' regulations, after all, are the same parties whose settlement agreements would not be entitled to expedited enforcement under the Convention. This choice represents an important corrective—and a potentially instructive one for mediation occurring in the United States.

III. ASSESSING THE OPPORTUNISTIC USE OF MEDIATION—GOOD, BAD, OR JUST BUSINESS AS USUAL?

In describing drive-by mediation, rogue mediation, binding mediation, lawyers' reliance on the shield provided by the mediation privilege, and mediation under the Singapore Convention as examples of the actual and potential opportunistic distortion of mediation, this Article is clearly taking a normative stance. There is, of course, another side to the story. Courts regularly rely on negotiated settlements for disposition of cases and nearly as regularly incorporate these negotiated settlement terms into agreed judgments, stipulated judgments, and consent judgments—and most of the time, they do this without any significant review.[241] It also important to acknowledge that each of the mediation variations

240. *See* Singapore Convention, *supra* note 11, at art. 1 ¶ 2.

241. This is particularly true in state courts, even though there is some variation in the showing required before these courts issue consent decrees, consent judgments, agreed judgments, or stipulated judgments that incorporate parties' settlement terms. Most state courts require a very minimal showing—perhaps only consent and even then, there is no indication that this must be "informed" consent. *See, e.g.*, Wold v. Jeep Corp., 367 N.W.2d 421, 423 (Mich. Ct. App. 1985) (finding no judicial review required prior to Michigan courts' approval of consent judgments); State *ex rel.* Prosser v. Indiana Waste Sys., Inc., 603 N.E.2d 181, 186 (Ind. Ct. App. 1992) (holding no judicial review required prior to entry of agreed judgment or consent judgment by Indiana courts); City of New Haven v. Allen Cnty. Bd. of Zoning Appeals, 694 N.E.2d 306, 310 (Ind. Ct. App. 1998) (stating Indiana courts perform a ministerial duty); *In re* Joint Petition for Consent Decree, No. 93-1004, 1993 WL 183563, at *1 (Fla. Cir. Ct. Mar. 10, 1993) (stating Florida courts are not required to conduct any substantive or procedural review before approving consent decree). *But see* U.S. Fire Ins. Co. v. Hayden Bonded Storage Co., 930 So. 2d 686, 690–91 (Fla. Dist. Ct. App. 2006) (noting settlement agreements between an insured and a claimant that obligate payment by a liability insurer are subject to Florida courts' review prior to entry as consent decree). Only a few states seem to require a showing of fairness on a regular basis, and it is not always clear how rigorously this requirement is enforced. *See, e.g.*, Long v. State, 807 A.2d 1, 9 (Md. 2002) (holding Maryland courts are required to find that proposed terms for consent decrees are "fair, adequate and reasonable"); Reed v. United Tchrs. L.A., 145 Cal. Rptr. 3d 454, 465 (Ct. App. 2012) (requiring notice of hearing at which California court will consider approval of consent decree, with such approval requiring inquiry into fairness of proposed settlement).

described here (except for mediation under the Singapore Convention) has acquired its own, unique (if somewhat confusing) name. That could and should signal that each is something other than plain-vanilla mediation. Most important, it is definitely not always a bad thing to recognize opportunities that others do not yet see and make new, creative uses of available and entirely legal resources. Quite the opposite.

A. The Benefits of Creatively Repurposing Mediation

In the context of diligent lawyering, the creative repurposing of available legal devices and procedures can be worthy of great praise.[242] Is that the case here? In arranging for drive-by mediation or rogue mediation and even in inserting binding mediation into clients' contracts, lawyers may actually be providing their clients with an enhanced degree of the self-determination *that is supposed to be foundational to mediation*.[243] This is a very important point. Mediation—or a particular approach to mediation—should not be reified. It is only valuable if it provides a benefit to those participating in it.

Drive-by mediation enables parents to craft their own resolutions to apply to their children and neatly avoids the troublesome meddling of judges who may know very little about Texas family law or may impose idiosyncratic notions regarding the proper environments for raising and caring for children.[244] Recent research affirms the American public's general preference for settlement without interference from judges.[245] Similarly, rogue mediation permits parties to avoid

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Federal courts' approach to approving consent decrees is consistently more demanding. Before approving a consent decree, they must determine that it is "fair, adequate, and reasonable, as well as consistent with the public interest." *See, e.g.*, United States v. Lexington-Fayette Urb. Cnty. Gov't, 591 F.3d 484, 489 (6th Cir. 2010) (quoting United States. v. Cnty. of Muskegon, 298 F.3d 569, 580–81 (6th Cir. 2002)) (stating a number of conditions, including "the strength of the plaintiff[s'] case, the good faith efforts of the negotiators, and the possible risks involved in litigation if the settlement is not approved" are relevant to determine if a consent decree is fair) (quoting United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1435 (6th Cir. 1991)).

242. *See, e.g.*, Michael Z. Green, *Expanding the Ban on Forced Arbitration to Race Claims*, 72 KAN. L. REV. 455, 504–06 (2024) (discussing mass arbitration); Myriam Gilles, *Arbitration's Unraveling*, 172 U. PA. L. REV. 1063, 1101–05 (2024) (discussing mass arbitration); J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1283 (2022) (describing mass arbitration as "[a] surprising counteroffensive designed to use individual arbitration to the plaintiff's advantage"); Cheryl Wilson, *Mass Arbitration: How the Newest Frontier of Mandatory Arbitration Jurisprudence Has Created a Brand New Private Enforcement Regime in the Gig Economy Era*, 69 UCLA L. REV. 372, 377–78 (2022).

243. *See* Peter R. Reilly, *The Unfulfilled Promise of Self-Determination in Court-Connected Mediation*, 50 FLA. ST. U. L. REV. 861, 898–900 (2023).

244. *See supra* Section II.A.; *supra* notes 68, 81–82, 85.

245. A recent empirical study involving a survey of more than 1,000 American adults found that a majority preferred private contractual settlements over resolution overseen by judges. The researchers reported:

> [M]ost (66%) participants agreed to some degree that "The parties themselves should be able to decide how to resolve their dispute." Most also thought that "Parties should be able to agree to things in settlement that other people would see as unfair." (51%) and that "Settlement is nobody's business but their own" (59%).

wasting time in court-ordered mediation while also sidestepping direct defiance of courts' objective requirements. Rogue mediation thus represents parties' assertion of their self-determination in the face of courts' mandate to participate in an undesired procedure. As several courts in California have recognized, as long as contracting parties truly understand that binding mediation permits the mediator to impose an outcome based on what he learned during the mediation's joint sessions and caucuses, this again represents the fulsome exercise of self-determination[246] and enables the parties to avoid the time and expense associated with hiring another neutral and/or holding an arbitration hearing. Even permitting lawyers and mediators to use mediation as a shield from malpractice claims has its benefits. As the majority pointed out in *Cassel*, this sort of protection may enable lawyers (and mediators) to be especially candid with their clients and share very bad, very hard news with less fear of negative repercussions. In addition, lawyers are now statutorily required to advise their clients regarding California's strict protection of mediation's confidentiality.[247] Last, even the very vague definition of mediation in the Singapore Convention has its benefits for the presumably-more-sophisticated parties involved in commercial disputes. By enabling expedited enforcement and the avoidance of judicial review or other unusual requirements—existing primarily outside the United States but also in some states that require special language in agreements to mediate or mediated settlement agreements[248]—these parties will gain the benefits of the faster, less expensive enforcement they desire.[249] Once again, this creative repurposing of mediation serves parties' self-determination.

But, of course, there is the other side of this coin.

B. The Harms of Opportunistically Distorting Mediation

There are also harms associated with the opportunistic distortion of mediation. This is probably most obvious in connection with drive-by mediation, binding mediation, rogue mediation, and use of the mediation privilege to shield lawyers and mediators from malpractice claims. Regarding drive-by mediation, Texas's statute removes the courts' traditional ability to take a second look and ensure children's best interest is sufficiently addressed in the settlement agreements that parents have reached. Though the legislators apparently assumed mediation would uniquely serve the interests of the children, the mediator bears no obligation

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Jessica Bregant, Jennifer K. Robbennolt & Verity Winship, *Settlementality*, J. EMPIRICAL LEGAL STUD. (forthcoming 2025) (manuscript at 1, 31), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4773926 [https://perma.cc/7XEF-4YAK].

246. *See* Reilly, *supra* note 243, at 898–900 (discussing self-determination in parties' potential selection of "mixed-mode" procedures).

247. CAL. EVID. CODE § 1129.

248. *See, e.g.*, Williams v. Kan. City Title Loan Co., 314 S.W.3d 868, 871 (Mo. Ct. App. 2010) (stating that per court rule, agreements arising out of court-ordered mediation must be in writing to be enforceable); Haghighi v. Russian-Am. Broad. Co., 577 N.W.2d 927, 929–31 (Minn. 1998) (stating that per state statute's requirements, a mediated agreement was not enforceable due to its failure to include required language regarding binding nature of mediated settlement agreements).

249. *See* Deborah Masucci, *From Skepticism to Reality—The Path to the Convention for the Enforcement of Mediated Settlements*, 20 CARDOZO J. CONFLICT RESOL. 1123, 1124–28 (2019).

under the statute to check for the appropriateness of the parents' agreement or the degree of informed consent or self-determination they have exercised.[250] The parents, meanwhile, may not have their children's best interests at heart, or they may simply be following their lawyers' advice, both regarding the decision to participate in drive-by mediation and all of the decisions associated with child custody arrangements.[251] Similarly, and particularly in light of its oxymoronic nature, parties signing agreements to participate in binding mediation are quite unlikely to realize what it entails. They may thus share information during a caucus with their mediator that comes back to haunt them—or they may be haunted by what the *other* side alleged while in *their* private caucus with the mediator—as the mediator then uses that information to make a decision that will be binding upon the parties.[252] Rogue mediation simply seems to represent a waste of everyone's time. And despite the ethical obligation to serve as their clients' fiduciary, lawyers' recommendations to use mediation obviously serve their own self-interest in gaining the protections offered by California's mediation confidentiality statutes.

These distortions of mediation harm the procedure's reason for being—i.e., meaningfully assisting parties' communication and negotiation, as well as their ability to make decisions and reach resolution[253]—the very same reasons mediation's use has been granted special benefits and privileges. It is worrisome that mediators are complicit in many of these distortions. For example, when a mediator openly acknowledges that he is simply enabling parties to gain a "rubber stamp" on their already-negotiated agreement, it seems obvious that the mediator is behaving in a manner inconsistent with the ethical obligation to protect the quality of the mediation process and to avoid conducting "a dispute resolution procedure other than mediation but label[ing] it mediation in an effort to gain the protection of rules, statutes, or other governing authorities."[254] Legislatures' and courts' decisions permitting lawyers to use mediation to shield themselves from malpractice claims raise concerns regarding the legitimacy and trustworthiness of the mediation profession, the legal profession, legislatures, *and* the courts.[255] Professor Cole has

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250. In addition, it is difficult to see how mediators offering these very abbreviated procedures can conscientiously meet their obligation to report suspected child abuse. *See* TEX. CIV. PRAC. & REM. CODE § 154.073(f).

251. *See* Andrea C.F. Wolfs, Donna Shestowsky & Deborah Goldfarb, *Justice Via Chat? How Litigants' Preferences and Attorneys' Recommendations Influence the Choice to Use Online Dispute Resolution*, 30 PSYCHOL. PUB. POL'Y & L. 348, 349–50 (2024) (referencing results of empirical study finding that in reporting why they chose to use a particular dispute resolution procedure, "[t]he most common factor" listed by parties was "the advice of a lawyer") (citing Donna Shestowsky, *Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedures*, 36 CONFLICT RESOL. Q. 69, 77 (2018)).

252. *See* Welsh, *Switching Hats in Med–Arb*, *supra* note 154, at 218–20 (describing the disadvantages of med–arb with a single neutral).

253. *See* OMER SHAPIRA, A THEORY OF MEDIATORS' ETHICS: FOUNDATIONS, RATIONALE, AND APPLICATION 61–72 (2016).

254. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard VI(A)(6) (Am. Arb. Ass'n, A.B.A. & Ass'n of Conflict Resol. 2005).

255. *See* Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the* Batson *Principle*, 38 GA. L. REV. 1145, 1220–21 (2004) (observing how dishonorable, illicit practices—like discrimination in the selection of arbitrators or jurors—"can undermine public

urged that judges deciding whether to affirm the use or results of nontraditional procedures should consider whether such approval will undermine the courts' institutional integrity.[256] Even the Singapore Convention's provisions, which should only affect sophisticated parties involved in international business transactions, could nonetheless have the downstream effect of undermining the power of nations' regulation of mediation and mediators—and thus ultimately harming the unsophisticated parties who most need to be protected by such regulations.[257]

At this point, it is important to recall once again that it is *not* mediation in and of itself that is inviting creative repurposing or opportunistic distortion. Rather, *it is the fact of privileges or benefits paired with the use of mediation*—i.e., avoidance of judicial scrutiny, faster and less expensive enforcement, protection from professional malpractice claims, and quicker access to the courtroom—that is inviting both creativity and opportunism. And so, what is to be done?

IV. POTENTIAL SOLUTIONS

To counteract the harms described above, this Article proposes targeted reforms designed to preserve mediation's benefits while limiting its misuse. It may simply be time for legislatures to make context-specific updates to the "procedural architecture" in place to encourage the appropriate use of mediation and "to advance the general public's welfare."[258] However, because mediation is now well-

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confidence in our system of justice"); Matthew A. Shapiro, *Democracy, Civil Litigation, and the Nature of Non-Representative Institutions*, 109 CORN. L. REV. 113, 125–28 (2023) (describing democratic defenses of civil litigation).

256. Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L. J. 1199, 1202–03 (2000).

257. In the U.S., this sort of downstream effect can be seen in the U.S. Supreme Court's decisions applying rules created for international commercial matters to domestic consumer matters. *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 585 (1991) (applying the analysis of forum selection clauses that was created in the context of an international commercial matter to consumers' personal injury lawsuit brought against a cruise company); *see also* Guillermo J. Garcia Sanchez & Ian C. Stephens, *The Return of Context to the Federal Arbitration Act*, 15 U.C. IRVINE L. REV. (forthcoming 2025) (manuscript at 4–6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5122243 [https://perma.cc/Z58P-W5VZ] (demonstrating how the U.S. Supreme Court has abandoned a context-based approach to interpreting federal arbitration statutes and now applies interpretive rules from labor and international arbitration to domestic cases involving nonunionized employees and consumers); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 1, 3 (2007) (urging that courts' procedural rules should be treated as default rules, with parties able to negotiate deviations, limited only by constitutional and statutory provisions, the public's interest in litigation, and the prevention of harm to nonlitigants). *But see* Dorcas Quek Anderson, *A Matter of Interpretation? Understanding and Applying Mediation Standards for the Cross-Border Enforcement of Mediated Settlement Agreements*, 38 CONFLICT RESOL. Q. 27, 28 (2020) (suggesting that the Singapore Convention actually transforms soft law and standards into something more influential).

258. Lydia Nussbaum, *Mediation as Regulation: Expanding State Governance Over Private Disputes*, 2016 UTAH L. REV. 361, 403 (2016); Lydia Nussbaum, *ADR, Dynamic (In)justice, and Achieving Access: A Foreclosure Crisis Case Study*, 88 FORDHAM L. REV. 2337, 2355 (2020).

established and because the targeted reforms suggested here may themselves unintentionally create new opportunities for distortion, the Article also raises the prospect of a more extreme approach—wholesale disentanglement of mediation from the special benefits and privileges introduced to encourage its use.

A. Pairing Privileges and Benefits with Increased Definitional Clarity and Enhanced Duties for Mediators

At the very least, if certain privileges or benefits are being uniquely granted to mediation in order to increase its use—e.g., expedited enforcement, avoidance of judicial review, earlier access to trial, etc.—such privileges or benefits should be paired with increased definitional clarity and mediator duties. This situation requires the more demanding "bright-line, prescriptive definition" that Professor Moffitt admitted might be needed when "the state grant[s] (and den[ies]) regulatory benefits linked to mediation."[259] To respond to both drive-by mediation and rogue mediation, such a definition should specifically provide that the mediator shall assist the parties with the following items: their ability to be heard by the mediator and/or the other party; their communication with each other, directly or through the mediator, regarding the dispute and potential settlement options; their exchange of information with each other; and their negotiation and decision-making regarding settlement. To respond to binding mediation, such definition should specifically provide that the neutral playing the role of mediator shall not, at any point, be given the authority to impose decisions upon the parties.

But even additional definitional clarity is unlikely to be enough. Mediators should also be required to certify to the court the completion of certain milestones: that they have met certain training/certification requirements;[260] that they have made required disclosures to the parties (regarding, for example, potential conflicts of interest, limits on the mediator's authority, and the parties' freedom to decline to reach agreement); that *with the mediator's assistance*, the parties have engaged in the prescriptive elements of mediation listed above (i.e., parties were heard, communicated with each other, exchanged information, engaged in negotiation and decision-making); and that the mediator took actions to support or enable the parties' exercise of self-determination and informed consent (including parties' possession of decision-making capacity, voluntary agreement, and awareness of available legal options).[261]

B. Pairing Privileges and Benefits with Additional Protections in Certain Contexts

The Singapore Convention explicitly took context into account in determining that expedited enforcement of mediated settlement agreements would

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259. Moffitt, *supra* note 18, at 101–02.

260. After all, even notaries have to meet certain requirements.

261. Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 799–823 (1998); Omer Shapira, *The Challenge of Developing Genuine Pluralism in Mediation Ethics: A Reply to Professor Robert A. Baruch Bush*, 36 OHIO ST. J. ON DISP. RESOL. 311, 363 (2020) (citing OMER SHAPIRA, A THEORY OF MEDIATORS' ETHICS: FOUNDATIONS, RATIONALE, AND APPLICATION 137–42 (2016)); Shusuke Kakiuchi, Shôhisha, Funsô Kaiketsu Tetsuzuki-hô no Taikei-ka/Gendai-ka [Systematization and Modernization of Consumer Dispute Resolution Law], 60 GENDAI SHŎHISHA-HŎ [MODERN CONSUMER LAW] 134, 139 (2023).

not be available for agreements reached in consumer, family, inheritance, or employment cases. Perhaps in certain contexts—e.g., those characterized by extreme power differences and regularly involving unsophisticated self-represented parties (e.g., debt collection, landlord–tenant) or affecting the welfare of vulnerable third parties (e.g., children)—any existing requirements of judicial review of settlement agreements should never be abandoned, even if such agreements are reached through mediation. If this were the case, Texas would not have a statute limiting judges' ability to review parents' mediated agreements to determine whether they sufficiently meet the best interests of the children. Some within the American Law Institute are even urging that judicial review should be newly required in the high-volume, low-value cases that represent such a significant portion of state courts' dockets. Proposals range from providing parties with court-approved boilerplate settlement agreements to providing for judicial clerks' ministerial review of settlement agreements and even to requiring full-blown judicial review when parties fail to use the court-approved settlement agreements.[262]

There is much to commend regarding these proposals, and mediators could be given responsibility for ministerial review in cases that result in parties' use of court-approved forms for their mediated settlement agreements. If the parties reaching settlement in mediation choose not to use the courts' approved forms, perhaps mediators should be obligated to engage in some sort of review or assessment of the substantive fairness (or at least the *not*-unconscionability) of the parties' mediated outcomes.[263]

C. Considering Professional and Fiduciary Duties in Determining Whether to Grant Privileges and Benefits

Those who have particularly salient professional, ethical, and fiduciary responsibilities—and that certainly includes lawyers representing clients in mediation and mediators facilitating parties' communication, negotiation, and attempts to reach settlement—should never be granted the privilege of using the procedure to deprive parties of the ability to bring legitimate claims of professional malpractice that occurred during the procedure. As the California Commission carefully revealed in its impressive survey of the law in this area, there are many options available to statutorily balance the benefits of the confidentiality[264] offered by mediation with the courts' need to be able to evaluate parties' allegations of malpractice or other professional misconduct and as appropriate, hold professionals accountable.[265] As the Commission concluded, "public confidence in the administration of justice depends on providing such an opportunity to . . . citizens."[266]

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262. *See* A.L.I., *supra* note 24, at 154–63.

263. Waldman & Ojelabi, *supra* note 25, at 420–30.

264. The Commission notes that while it is not quite accurate to refer to California's statutes as conferring a "mediation privilege," their effect can be functionally equivalent to such a privilege. CAL. L. REVISION COMM'N, *supra* note 111, at 9–10.

265. *Id.* at 133–35.

266. *Id.*

The Commission[267] and others[268] have thoroughly examined (and praised[269]) the UMA, which *explicitly* provides for exceptions to the mediation privilege.[270] The approach taken by the UMA garnered approval from the National Conference of Commissioners on Uniform State Law and at this point, has been adopted and implemented[271] by 13 states and the District of Columbia.[272] Although the UMA provides that mediators may not be compelled to testify,[273] it otherwise provides quite clearly:

> [T]here is no privilege under Section 4 [establishing the mediation privilege] for a mediation communication . . . sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation . . . .[274]

This obviously covers allegations of legal malpractice occurring during the mediation. And the UMA goes further, also providing an exception to the mediation privilege for communications required to prove or disprove allegations of mediator misconduct, with no bar on the ability to compel mediators to testify under those circumstances.[275]

Meanwhile, many states have adopted their own approaches to protecting the mediation privilege while also finding ways to permit the introduction of mediation communications in connection with claims of legal malpractice. For example, although Texas also has a statute that makes mediation communications

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267. *Id.* at 50–59.

268. Eric Van Ginkel, *Another Look at Mediation Confidentiality: Does It Serve Its Intended Purpose?*, 32 ALTS. TO HIGH COST LITIG. 119, 121–22 (2014); Maureen E. Laflin, *The Mediator as Fugu Chef: Preserving Protections Without Poisoning the Process*, 49 S. TEX. L. REV. 943, 960–90 (2008); Ellen Deason, *The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach*, 54 U. KAN. L. REV. 1387, 1387–92 (2006); Peter Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should Be Embraced and Broadened*, J. DISP. RESOL. 135, 135 (2003); Ellen Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 317–19 (2002) (urging adoption of a federal mediation privilege consistent with the UMA).

269. James R. Coben, *My Change of Mind on the Uniform Mediation Act*, 23 NO. 2 DISP. RESOL. MAG. 6, 6 (2017).

270. Gerald F. Phillips, *Where Mediation Hurts Clients: How ADR Is Shielding Legal Malpractice*, 30 ALTS. TO HIGH COST LITIG 195, 197 (2012) (noting that "[a] UMA-style exception may help in California").

271. CAL. L. REVISION COMM'N, *supra* note 111, at 59–61.

272. *Mediation Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=45565a5f-0c57-4bba-bbab-fc7de9a59110#LegBillTrackingAnchor [https://perma.cc/VA78-BCGF] (last visited June 19, 2025).

273. UNIF. MEDIATION ACT § 6(c) (Nat'l Conf. of Comm'rs on Unif. State L. 2003).

274. *Id.* § 6(a)(6).

275. *Id.* § 6(a)(5). This provision does not include the restriction on compelling mediator testimony.

inadmissible,[276] its courts have developed a workaround that permits the admissibility of mediation communications as long as they are needed only in connection with the litigation of a separate, independent action that will not affect the settlement achieved in mediation. A claim of legal malpractice based on a lawyer's behavior while in mediation would be considered just such an "independent tort" that would not threaten to undo a mediated settlement agreement. As such, Texas's "offensive use doctrine" allows the introduction of mediation communications to prove or disprove this independent tort, provided that the trial judge conducts an in camera hearing and has determined that disclosure is required.[277]

D. Engaging in a Wholesale Revocation of the Privileges and Benefits Granted to Use of Mediation

It is relatively easy to see problems with every one of the reforms just listed. How meaningful will new definitions be? How meaningful will mediator certifications be? How well will boilerplate settlement agreements protect unsophisticated parties? How conscientiously will mediators undertake these new duties? How much will legislators or courts care about distortions of mediation if the resulting processes nonetheless produce settlements and relieve court dockets? How quickly could any one of these reforms also be distorted?

At this point, mediation is well-known and well-entrenched in state and federal civil litigation. It may simply be time to remove the training wheels meant to protect mediation and encourage its use. The simplest—and thus perhaps the most elegant and effective—way to address the opportunistic distortion of mediation is to remove the temptations presented by the privileges and benefits currently granted to encourage use of the process. Perhaps it really is time for courts and legislatures to revoke or much more narrowly target these special privileges and benefits. Alternatively, perhaps it is time to extend the same privileges and benefits to parties' negotiations.[278]

CONCLUSION

This Article has described the many wonderful qualities of, and potential effects produced by, mediation. There are good reasons for its widespread institutionalization. There are also good reasons for the evolution of different models of mediation in response to the needs and preferences of those using it to settle litigated matters. Though many have objected to evaluative mediator interventions or caucus-exclusive mediation, this Article is not objecting to their emergence. Indeed, even as there has been controversy over some models of mediation, the procedure has remained true to its basic definition and purpose. There is a third party

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276. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West, Westlaw through 2023 Legis. Sess.).

277. *See* Alford v. Bryant, 137 S.W.3d 916, 920, 922 (Tex. Ct. App. 2004); Avary v. Bank of Am. N.A., 72 S.W. 3d 779, 801–02 (Tex. Ct. App. 2002).

278. *See generally* Nancy A. Welsh & Donna Shestowsky, *Lawyers' Client-Inclusive Negotiations: The "New Mediation?"*, HARV. NEGOT. L. REV. (forthcoming 2025–2026) (on file with author) (proposing that courts should permit lawyers' client-inclusive negotiations to meet comply with mediation mandates).

who does not have the authority to impose an outcome but instead assists the parties' communication and negotiation as they determine whether and how to reach a voluntary resolution of their dispute.

There also were many good reasons for the introduction of benefits and privileges to encourage parties' and lawyers' use of mediation. As this Article has demonstrated, however, these benefits and privileges are inviting opportunistic distortion and harm—particularly to the parties using the process, to the process itself, to the mediation profession, and to the courts ordering the process and enforcing its results. This Article has detailed several targeted reforms—a more prescriptive definition of mediation; the establishment of mediators' duty to certify that a mediation has actually occurred in a manner consistent with the definition and with protection of the parties' self-determination and informed consent; special protections in the context of certain case types that are likely to involve unsophisticated or self-represented parties or vulnerable third parties; and an absolute bar on use of the mediation privilege to shield lawyers (and mediators) from claims of professional malpractice.

This Article has also raised the possibility that it may be time to allow for expiration of the special benefits and privileges enacted in pursuit of a goal that has been achieved—i.e., widespread acceptance and use of mediation. Ironically, this may be exactly what is needed now to ensure that it is actually mediation's value that takes the fore when parties or their lawyers are considering its use.[279] For those of us who are advocates of mediation, let us be sure that in our zeal to encourage the use of something *called* mediation, we do not end up losing the procedure that truly *is* mediation.

279. There are similarities here to the story of the young heiress pointing proudly to her many suitors sitting in her drawing room. Upon closer examination, however, it becomes clear that the suitors are not there because of the young woman's sparkling personality or her great intellect or even her beauty. Those are all very nice, but the suitors are there because the young woman represents the means to lay claim to her father's fortune. The focus is the fortune. The young woman is merely attached. *See generally* HENRY JAMES, WASHINGTON SQUARE (Signet Classics 2004) (1880) (Catherine Sloper); HENRY JAMES, PORTRAIT OF A LADY (Geoffrey Moore & Patricia Crick eds., Penguin Classics 2003) (1881) (Isabel Archer). Of course, there are also plenty of stories of women marrying men for their money, not out of love. *See generally* JANE AUSTEN, PRIDE AND PREJUDICE (Modern Library 2023) (1813) (William Collins); JANE AUSTEN, MANSFIELD PARK (Penguin Books 2003) (1814) (James Rushworth).