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Consent in Mediation

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M ost people probably agree that consent is an important requirement in dispute resolution procedures. Judges cannot coerce parties into settlement. Arbitrators cannot adjudicate without party consent. Mediators cannot decide the outcome of parties' disputes. But, compared to dispute resolution through judicial settlement conferences and arbitration, mediation is inherently attractive because it is a voluntary process. The centrality of consent is transparent in the rhetoric of mediation. We tell parties that the mediation process is about empowerment and self-determination. It allows them to decide how their dispute will be resolved—that they have nothing to lose if they fail to reach settlement because they can always go to trial.

But we take a lot for granted when it comes to consent in mediation. We assume that parties know what they are consenting to in a process, in a particular mediator style, and in the contents of the final agreement. We also generally assume that the principle of informed consent governs the lawyer/client relationship when lawyers represent clients in mediation. In reality, though, we know very little about how consent operates in mediation, what I will refer to as “mediation consent.”

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To what extent does consent matter in contemporary mediation practice? For what issues? The decision to mediate? The choice of a mediator style or approach? The decision to reach an agreement? The contents of the agreement? This essay attempts to peel away some layers of the assumptions surrounding mediation consent. I begin by discussing the theory of consent and its disconnect from mediation practice. I then suggest and sketch the structural dimensions of consent, and, finally, I share some comparative research on England’s approach to consent. The historical connections between English and American mediation practice provide some guidance in this inquiry. The foundations of American mediation practice borrow from the tradition of English equity jurisdiction, an alternative dispute resolution system that developed to soften the harshness of common law rules. Likewise, mediation developed in the United States as an alternative to court adjudication based on the rule of law. Today, England’s approach to mediation remains somewhat more faithful to the original understanding of mediation as a voluntary process.

Why Consent Matters

The legitimacy of mediation depends in large measure upon consensual decision making by disputing parties. Consent promotes fairness and enhances human dignity, and it is linked to durability and sustainability in negotiated agreements. Frequently, the fatal flaw in agreements that ultimately unravel is the absence of authentic consent.
Finally, an understanding of consent has implications for how we train mediators, how we train lawyers to represent clients in mediation, and how we educate consumers about what to expect in the mediation process.

Theory–Practice Divide

My interest in mediation consent practices derives from my experience for more than 20 years mediating in the small claims courts of New York City as part of a mediation clinic. Working frequently with pro se parties and in situations where only one party is represented by counsel, I have been struck by the disconnect between the way in which we train students to mediate and the advice we give them about self-determination, consent, voluntariness, and neutrality; and then what really happens in court. Litigants come to small claims court with the expectation of having a trial before a judge. Typically, they are asked to participate in mediation before the court will hear their case. If the parties decline the invitation to mediate and insist upon a trial, their cases are put back on the calendar, and they are required to return to court in several months for a trial. Few parties are eager to come back and, therefore, agree to mediate. What does this say about their “consent”?

Multiple variations of mandatory mediation exist in the United States, whether through court rule, judicial referral, or legislation; courts take mandatory mediation laws seriously. The case of the disputing pig farmers recently discussed in this journal shows that even parties who slip through the screen and go directly to trial ultimately will pay the price if mediation was a condition precedent to trial.

How do we explain the disconnect between the theory and practice of mediation—between the popular understanding of mediation as a voluntary, consensual process and the reality of mediation, which often actually involves mandates to mediate camouflaged under the guise of strong judicial recommendations for mediation? The traditional response to this question in the United States has been that there is a distinction between requiring parties to enter into a mediation process and coercing them to reach an agreement. The former is permissible; the latter is forbidden. As I will discuss later in this article, England makes no such distinction.

Dimensions of Consent

Mediation consent as a stand-alone concept is amorphous. Consent to what? To whom? When? In an effort to give this concept some flesh and meaning, I conceptualize consent as having a two-part structure: front-end or entry-level consent, which is required for participation in the mediation process, and back-end or outcome consent that supports an authentic agreement.

In the United States, we generally have no problem dispensing with front-end consent in mediation. Many statutes require "good faith" participation, mandatory mediation programs flourish, and judges impose sanctions when parties refuse to mediate when required to do so by court rule or statute. Some literature suggests that people who are required to participate in mediation report high levels of satisfaction with the process.

The Model Standards of Conduct for Mediators define mediation as a process that emphasizes voluntary decision making and honors self-determination as its controlling principle. Thus, Americans are quite comfortable requiring back-end consent in mediation, insisting that parties voluntarily consent to the outcome and that no coercion take place during the mediation process.

What Is the Problem?

Mediation, once considered an alternative to the court adjudication of disputes, is now generating its own set of disputes as evidenced by the volume of litigation related to consent practices. A review of developing mediation case law shows that most cases relate to issues dealing with mandates to mediate, good faith requirements, and challenges to the enforceability of mediated agreements.

These are all issues that relate to consent. And, for the most part, these consent cases are not brought by pro se litigants whom we might assume would be the most vulnerable parties in mediation. Rather, they are brought by parties who were represented by attorneys. Some of the cases involve claims against attorneys and mediators and not just opposing parties.

In addition to the fact that the volume of consent cases is growing, the outcome of these cases is problematic. The majority of parties who challenge the enforceability of mediated agreements are not successful. This is true

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England’s Experience with Mediation Consent

Beginning in the mid-1990s, England underwent a major overhaul of its litigation procedures under the leadership of Lord Woolf, one of its leading senior judges. Lord Woolf conducted an extensive study of the civil justice system and issued a report entitled “Access to Justice.” As a result of the report, the longstanding Rules of the Supreme Court of England were replaced by a new set of Civil Procedure Rules (CPR) that required courts to encourage parties to use ADR processes where appropriate. In a series of cases beginning with Cowl v. Plymouth City Council, English courts strongly encouraged parties to use ADR—a term used almost interchangeably with “mediation.”

Despite its newfound appeal in the courts, ADR raised critical questions about consent. Could parties be required to participate in mediation? What consequences would occur if they refused? For several years, the courts grappled with these questions, going back and forth on the necessity of front-end consent. Finally, in Halsey v. Milton Keynes General NHS Trust, the Court of Appeal resolved the uncertainty in favor of requiring front-end consent. Parties could not be compelled to participate in mediation for two reasons. First, such compulsion would interfere with a litigant’s right of access to the courts, which is guaranteed by Article 6 of the European Convention on Human Rights. The court believed that “to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court.” The second reason for rejecting mandatory mediation was a practical one. Requiring unwilling parties to mediate would achieve nothing, but it could have negative effects, including adding to the costs to be borne by the parties, possibly postponing the time when the court determined the dispute, and possibly damaging the perceived effectiveness of the mediation.

While costs have been awarded in some cases for parties’ refusals to mediate, this is by no means an inevitable result. While costs have been awarded in some cases for parties’ refusals to mediate, this is by no means an inevitable result. In several cases, courts have found that it was not unreasonable for parties to withhold consent to mediation or even to delay in going to mediation. For example, in Hickman v. Blake Latham, a claimant who had suffered serious head injuries in a traffic accident brought an action against his solicitors and counsel for negligence in advising him to settle the accident claim for too low an amount. Judgment was rendered in favor of the claimant, and liability was apportioned as one-third to the first defendant solicitors and two-thirds to the second defendant barrister. The first defendants argued that the second defendant should pay all costs after a specific date because of its unreasonable attitude in refusing to negotiate and mediate. Finding no unreasonableness on the part of the second defendant, the court noted that the second defendant’s view of the case had been formed after a review of the case by experienced solicitors and counsel.

**Was it unreasonable in the light of that estimation to refuse mediation and to refuse to see what could be achieved by negotiation? It is apparent that the second defendant’s insurers were not prepared to take a “commercial” view like the first defendants; they were not prepared to pay more than they thought the claim was worth because, if costs were taken into account, it would save them money. I consider this was a legitimate stance because, as I have stated, otherwise the threat of costs consequence can be used to extract more than a claim in worth.**

**Likewise, in Chaudhry v. Yate,** an employment case involving unfair dismissal, the court found that the success-
ful petitioner should not be deprived of his costs for failing to mediate because the respondent had not demonstrated a genuine interest in mediation. Although the respondent made repeated suggestions that the parties mediate, it offered no specific proposals for mediators or provider organizations. The court found that this behavior was inconsistent and uncertain, not a "serious engagement in the process of mediation."

Few post-Halsey cases have challenged the enforceability of mediated agreements.

Concluding Reflections

This brief comparative analysis of the United States and English approaches to mediation consent raises policy questions about the merits of mandatory mediation. Is England on a better course by requiring consent at the front end of mediation? Will mediation be stronger in the long run when it has a consensual foundation? Arguably, the use of cost sanctions in England's mediation regime makes it close to a mandatory mediation system. For some litigants, participating in mediation will be potentially less costly than arguing that it was not unreasonable to refuse mediation. But despite the mandatory gloss, mediation is still a consensual process in England, both in terms of the front end and the back end. Leaving aside the differences in procedural systems, whether the English model would work in our system "as is," as well as the long-term effects of U.S. consent litigation, and English reasonableness litigation, on the integrity of the mediation process. ♦

Endnotes

1. This analysis is part of a larger research project I am conducting on comparative mediation law and practice. I thank Lela Love for her comments on this article.

From the Chair (continued from page 2)

13. E.g., compare Dunnett v. Railtrack Plc, [2002] EWCA Civ. 303 (refusing to order an unsuccessful party to pay costs), with Hurst v. Leeming, [2002] EWHC 1051 (upholding a defendant's refusal to mediate on the grounds that the mediation had no realistic prospect of success).
15. The Wethered Estate Ltd. v. Davis, Davis and Foundations for Living, [2005] EWCA Civ. 1935 (Ch.).
17. [2004] EWHC 3880 (Ch.).