NOTES

PRO SE, NO SAY?: THE IMPACT OF PRESUMPTIVE MEDIATION IN THE NEW YORK STATE COURT SYSTEM ON SELF-REPRESENTED LITIGANTS

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In May 2019, the New York State Unified Court System announced its plan to refer all civil cases to various forms of alternative dispute resolution at the earliest stage of litigation. The presumptive alternative dispute resolution initiative aims to decrease costs associated with litigation, improve case outcomes, and reduce case delays. In the context of mediation, litigants, both represented and self-represented, may be seated across from each other at a table to discuss their disputes with the assistance of a neutral third party. This Note examines mediation and discusses the policy implications of a presumptive mechanism for pro se parties. In evaluating the fundamental issues that pro se litigants face while bargaining with represented adversaries, this Note proposes that the judiciary adopt a six-factor test and expand limited-scope representation to better ensure pro se litigants' access to justice in this alternative dispute resolution forum.

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INTRODUCTION

Picture this: it is the dead of winter and the outside temperature has not crept past an average low of thirty-one degrees Fahrenheit. Your heat does not work, no matter how hard your fist bangs the radiator, and you have no hot water, so forget about washing dishes tonight. You try your super's number for the fifth time today, only to hear his voicemail message suggesting that you leave your name and number at the beep. You know you have some right to these things. You know those rights are being disrespected. You decide to sue, but there is another problem: you cannot afford a lawyer.

After you figure out how to file charges, someone somewhere tells you that you must go to something called presumptive mediation. You likely have never heard of it. Maybe a court clerk hands you a brochure or gives you a five-minute overview of what the process entails: you tell your story, a person is there to help facilitate conversation, and (hopefully) you get your heat and hot water back. This sounds simple enough, but then you wonder if your landlord will be there, and if he will have a lawyer present. You do not know the law. You have never done this before. What do you do?

If you happen to file a lawsuit in New York State court, this could be your new reality. From personal injury suits and foreclosures to medical malpractice claims and contract disputes, a wide array of civil cases will now be referred to various forms of alternative dispute resolution at the earliest stage of litigation.[1]

1. *See generally* Press Release, Lawrence K. Marks, Chief Admin. Judge, Court System to Implement Presumptive, Early Alternative Dispute Resolution for Civil Cases (May 14, 2019), https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf [https://perma.cc/5MLP-37LE].

In 2018, 1,341,290 civil lawsuits were filed in New York's trial courts.[2] Of those lawsuits, 462,237 civil suits were filed in the state's highest trial court, the New York Supreme Court.[3] For those 462,237 suits, it cost litigants $210 to obtain an index number[4] and another $95 for a "Request for Judicial Intervention."[5] After the discovery phase, it cost a party another $30 to file a Note of Issue[6] and an additional $45 to file a motion or cross-motion.[7]

Public policy favors settlement of legal disputes.[8] Absent attorney's fees and additional litigation expenses, the numbers above indicate that people need a forum where they can resolve claims more efficiently and at lower costs.[9] Judges, scholars, and practitioners alike feel that alternative dispute resolution (ADR), and specifically presumptive mechanisms, can achieve these goals.[10]

The Department of Justice (DOJ) studied the benefits of ADR processes in use from 2013 to 2017.[11] Three quarters of cases that were voluntarily

2. This number includes cases filed in the New York State Supreme Court, Civil Court of the City of New York, city and district courts outside New York City, county courts, Court of Claims, and Small Claims Assessment Review Program. *See* N.Y. STATE UNIFIED COURT SYS., 2018 ANNUAL REPORT 39 (2018), https://www.nycourts.gov/legacypdfs/18_UCS-Annual_Report.pdf [https://perma.cc/79EB-3VFJ]; *see also* JANET DIFIORE, THE STATE OF OUR JUDICIARY 2019, at 5 (2019), http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19_SOJ-Speech.pdf [https://perma.cc/GV98-CZPS].

3. The New York Supreme Court is responsible for cases outside the lower courts' purview. It handles a broad range of matters including those "civil matters beyond the monetary limits of the lower courts' jurisdiction; divorce, separation and annulment proceedings; equity suits, such as mortgage foreclosures and injunctions; and criminal prosecutions of felonies." *See* N.Y. STATE UNIFIED COURT SYS., *supra* note 2, at 40.

4. N.Y. C.P.L.R. 8018(a) (McKinney 2020). But if someone happened to file a foreclosure action to under article 13 of the Real Property Actions and Proceedings Law, it would be an additional $190 fee. *See id.* 8018(a)(1)(ii).

5. *See id.* 8020(a). A "Request for Judicial Intervention" is a form that a party files with the court to request that a judge become involved in a matter. *See Glossary*, N.Y. ST. UNIFIED CT. SYS., https://www.nycourts.gov/CourtHelp/GoingToCourt/glossary.shtml [https://perma.cc/567J-YES] (last visited Feb. 14, 2020).

6. *See* N.Y. C.P.L.R. 8020. A "Note of Issue" is a form that informs "the court that all documents are ready for the court's review or that the case is ready for trial." *See Glossary*, *supra* note 5.

7. N.Y. C.P.L.R. 8020(a).

8. *See, e.g.*, Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1, 12 (1988); *see also* Overeem v. Neuhoff, 722 N.Y.S.2d 580, 581 (App. Div. 2001) ("The law is well settled that stipulations of settlement are favored by the courts.").

9. *See* ADR ADVISORY COMM., INTERIM REPORT AND RECOMMENDATIONS OF THE STATEWIDE ADR ADVISORY COMMITTEE 1, 7 (2019), https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/InterimReportRecommFeb-2019.pdf [https://perma.cc/DS8T-Q6MJ].

10. *See generally* Press Release, Marks, *supra* note 1; *see also* ADR ADVISORY COMM., *supra* note 9, at 3–4. A "presumptive" ADR mechanism assumes that every civil case can be resolved using an alternative dispute resolution process. *See infra* note 133 and accompanying text (describing presumptive mediation in detail).

11. *See Alternative Dispute Resolution at the Department of Justice*, U.S. DEP'T JUST., http://www.justice.gov/olp/adr/doj-statistics.htm [https://perma.cc/K4VE-LXR3] (last updated June 6, 2018).

referred, and almost half of all those that were court-ordered, settled.[12] The DOJ estimated that, in 2017 alone, it saved the following as a result of ADR: $15,521,275 of litigation and discovery expenses, 13,886 days of attorney and staff time, and 1967 months of litigation.[13]

With over 19 million people in New York State[14] and approximately 8.4 million in New York City alone,[15] the judiciary's new "Presumptive, Early Alternative Dispute Resolution" initiative has the potential to be "transformational."[16] However, the degree to which this undertaking will be beneficial for *all* parties involved remains to be seen. At present, it is unclear what will happen to those who enter a presumptive ADR session without a lawyer present to help them navigate this unknown terrain.

This Note analyzes the system-wide initiative that the New York State Unified Court System[17] has adopted and explores the policy implications of adopting a presumptive ADR program for unrepresented litigants.[18] This Note proceeds in three parts. Part I provides background on mediation and illuminates both its social and legal significance. Part II explains the new presumptive ADR program in New York State and explores how it could potentially impact unrepresented parties within the context of mediation. Lastly, Part III recommends that the New York judiciary adopt a six-factor test and expand limited-scope representation to help protect and support this vulnerable population.

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12. *Id.*

13. *Id.*

14. *See QuickFacts: New York; United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/NY,US/PST045218 [https://perma.cc/AUL3-GCQA] (last visited Feb. 14, 2020).

15. New York City has a population of 8,398,748 as of July 1, 2018. *See QuickFact: New York City, New York*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/newyorkcitynewyork [https://perma.cc/9AZN-FC8Y] (last visited Feb. 14, 2020).

16. *See* Press Release, Marks, *supra* note 1, at 1 (calling this new initiative "a transformational move to advance the delivery and quality of civil justice in New York"); *see also* Michael J. Graetz, *Trusting the Courts: Redressing the State Court Funding Crisis*, DAEDALUS, Summer 2014, at 96, 97 (noting that the state courts "resolve the vast majority of our legal disputes" and "hear more than 95 percent of all court cases filed in the United States").

17. The New York State Unified Court System is a system of courts and court administration set forth in article VI of the New York State Constitution. *See* N.Y. CONST. art. VI, § 1. This Note refers to the system as "the New York State courts," "the court system," or "the judiciary."

18. Although this large-scale effort calls for presumptive early alternative dispute resolution, this Note focuses solely on mediation as it is the most commonly used process in both state and federal courts. *See* Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 HARV. NEGOT. L. REV. 61, 70 (2012). For purposes of this Note, the term unrepresented will be used interchangeably with the terms pro se (Latin for "for oneself" or "on one's own behalf") and self-represented to refer to individuals who are not accompanied by a lawyer. *See* Reginald A. Holmes, *Unrepresented Party (Pro Se) Arbitrations—Part 1: The Arbitrator's Duty and the Fairness Imperative*, 70 DISP. RESOL. J. 97, 98 (2015).

I. PRESUMPTIVE MEDIATION: HOW WE GOT HERE

To understand why presumptive mediation puts pro se litigants in a precarious position, it is necessary to appreciate not only what it is but also how it developed. Part I.A focuses on mediation, its development, and how it functions today. It then outlines the merits of mediation within the legal dispute context. Part I.B discusses how presumptive mediation found its way to New York State courts.

A. Laying the Groundwork: The Ins and Outs of Mediation

Because litigation can be expensive, time-consuming, and disruptive,[19] courts, scholars, and lawmakers developed ADR processes as alternative methods for resolving conflicts in the legal arena.[20]

While adjudication is generally an adversarial, win-lose process, ADR contemplates fairness[21] and encompasses a number of different processes that resolve disputes, conflicts, and cases using creative methods.[22] The most common processes are negotiation, arbitration, and mediation.[23] These methods can be court-annexed, meaning they are supervised by a court in some manner,[24] or they can be entirely independent of the court system, proceeding solely by agreement of the parties.[25] Despite their differences in formality and derivation, each was designed to help parties obtain a resolution both quickly and efficiently.[26]

ADR processes are not new phenomena. While mediation can be traced back to ancient China over 4000 years ago,[27] litigation largely took center

19. *See* Janet DiFiore, *The Excellence Initiative and the Rule of Law*, 93 N.Y.U. L. REV. 1053, 1058 (2018) (noting that "long delays and excessive costs lead to an inevitable loss of public respect for our justice system").

20. *See* KIMBERLEE K. KOVACH, MEDIATION, PRINCIPLES & PRACTICE 1 (3d ed. 2004).

21. *See* KENNETH CLOKE, MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION 168 (2001) (highlighting how adjudication encourages lawyers to manipulate, tell half-truths, deny responsibility, and withhold critical information in the interest of their clients).

22. *See* KOVACH, *supra* note 20, at 1–2.

23. Each of these processes resolves disputes outside formal litigation procedures. *See* Gerald Lebovits & Lucero Ramirez Hidalgo, *Alternative Dispute Resolution in Real Estate Matters: The New York Experience*, 11 CARDOZO J. CONFLICT RESOL. 437, 438–39 (2010).

24. *See* Joan Hogarth, *Access to Justice for the Pro Se Litigant in Mediation: A New York City Experience*, 65 FED. LAW. 86, 88 (2018).

25. *See* Holly A. Streeter-Schaefer, Note, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 371 (2001) (noting the fundamental difference between mandatory and voluntary mediation); *see also* Danny McFadden, Practice Note, *Developments in International Commercial Mediation: US, UK, Asia, India and EU*, 8 CONTEMP. ASIA ARB. J. 299, 302 (2015) (highlighting the use of ADR clauses in contracts of large U.S. corporations).

26. *See* KOVACH, *supra* note 20, at 6.

27. *See* Kevin C. Clark, Student Article, *The Philosophical Underpinning and General Workings of Chinese Mediation Systems: What Lessons Can American Mediators Learn?*, 2 PEPP. DISP. RESOL. L.J. 117, 117 n.3 (2002); *see also* Shahla F. Ali, *The Legal Framework for Med-Arb Developments in China: Recent Cases, Institutional Rules and Opportunities*, 10 DISP. RESOL. INT'L 119, 127–28 (2016) (discussing the development of mediation in ancient China).

stage in the United States until 1976, when the Pound Conference offered Americans a new way to approach dispute resolution.[28] This was the country's first step towards systematically developing and coordinating mediation programs.[29] Federal judges, legal scholars, and the American Bar Association, among others, gathered to debate and discuss the overcrowded, costly court system.[30] From there, Neighborhood Justice Centers (NJCs) emerged across the nation and the concept of the "multi-door courthouse" was born.[31]

Since 1976, mediation has gained recognition and widespread approval in the United States.[32] Moreover, "during the last thirty years . . . [it has] expanded beyond its century-long home in collective bargaining to become an integral and growing part of the processes of dispute resolution in the courts."[33]

To understand why mediation has become a pervasive mechanism in court systems across the country, this Note first examines what mediation entails and then assesses both its advantages and disadvantages.

1. What It Is: A Catalyst for Settlement

In the context of legal conflicts, mediator Kenneth Cloke said that "the law is designed to contain and control conflict, not resolve or transform it; . . . to suppress emotions, not complete them; to settle cases, not search for underlying issues; to announce third-party decisions, not facilitate consensus."[34] When questioning whether there is anything better than the rule of law, Cloke posited that there is in fact something better—something that resolves and transforms conflict, contemplates emotions, searches for

28. *See* KOVACH, *supra* note 20, at 30–31; Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, 81 ST. JOHN'S L. REV. 77, 81 (2007); *see also* Thomas O. Main, *Mediation: An Unlikely Villain*, 34 OHIO ST. J. ON DISP. RESOL. 537, 545 (2019) (supporting the Pound Conference's noteworthiness by highlighting how it ushered in a broad-based ADR movement supported by those outside the judiciary and academia: corporate counsel, the media, consumer advocates, and both ends of the political spectrum).

29. *See* KOVACH, *supra* note 20, at 32.

30. *Id.*

31. These centers are "organizations designed to provide mediation services for resolving interpersonal disputes as an alternative to going to court." U.S. DEP'T OF JUSTICE, NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT, at iii (1980), https://www.ncjrs.gov/pdffiles1/Digitization/65513NCJRS.pdf [https://perma.cc/2FHN-PW6C]. NJCs were first adopted as a pilot project after the Pound Conference to see if mediation could help resolve minor disputes referred by local courts. They are known today as Dispute Resolution Centers and their work has led to the institutionalization of ADR in court systems in jurisdictions around the country. *See* KOVACH, *supra* note 20, at 33.

32. *See* KOVACH, *supra* note 20, at 33–34.

33. *See* UNIF. MEDIATION ACT prefatory note (UNIF. LAW COMM'N 2003), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9b244b42-269c-769e-9f89-590ce048d0dd&forceDialog=0 [https://perma.cc/9ES5-GXDY].

34. *See* CLOKE, *supra* note 21, at 168.

underlying issues, and facilitates consensus—and that something is mediation.[35]

Mediation is a process of resolving conflict by which a neutral third party, not otherwise involved in the dispute, assists parties in their negotiations.[36] The neutral third party, known as the mediator, is tasked with facilitating communication between the parties.[37] First, the mediator seeks to understand the nature of the problem and each side's underlying interests.[38] Then, the mediator helps generate various options or potential solutions that might resolve the issue in an effort to promote settlement.[39] This third party has a duty to be neutral while assisting in the resolution of a conflict[40] and has no authority to impose a binding decision.[41]

Further distinguishing mediation from adjudication, the session does not follow traditional rules of evidence or procedure.[42] Parties also are not typically bound by their communications, meaning that statements made during mediation are not admissible in subsequent judicial proceedings.[43] Additionally, this flexible model allows the parties to dictate the mediator's style of negotiation, letting them tailor the process and the resolution to their

35. *Id.* at 169–70.

36. *See* SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE 1 (2018). Negotiation is a process whereby parties identify issues, develop options that respond to those issues, and work together to attempt to find a resolution. *See* JOSEPH B. STULBERG & LELA P. LOVE, THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY 12 n.4 (2009). It is one of the least formal methods for resolving disputes. *See* Streeter-Schaefer, *supra* note 25, at 369.

37. *See* COLE ET AL., *supra* note 36, at 2 (noting that the mediator "listens, empathizes, encourages emotional outbursts when constructive, presses the parties to face facts, urges them to listen, and commends their efforts to accommodate"); *see also* STULBERG & LOVE, *supra* note 36, at 5.

38. *See* KOVACH, *supra* note 20, at 36.

39. *See* JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 1 (2d ed. 2006); *see also* James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 OHIO ST. J. ON DISP. RESOL. 263, 266 (2013). Stark and Frenkel explain that most mediators use persuasive interventions like group brainstorming practices and role reversals because facilitation alone is not enough to help parties reach a resolution. Stark & Frankel, *supra*, at 273.

40. *See* STULBERG & LOVE, *supra* note 36, at 5; *see also* KOVACH, *supra* note 20, at 211. However, the word "neutral" is considered a misnomer by some ADR scholars in part because a third party can never be entirely neutral. *See, e.g.*, CLOKE, *supra* note 21, at 12–14 (discussing the debate around the word "neutral"); *see also* KOVACH, *supra* note 20, at 211 (recognizing that neutrality is central to mediation theory and practice, but that there are no specific guidelines for it).

41. *See* STULBERG & LOVE, *supra* note 36, at 5.

42. *See* Prigoff, *supra* note 8, at 2 (discussing the benefits of confidentiality in mediation); *see also* CLOKE, *supra* note 21, at 169–70.

43. *See* Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 950–51 (1997) (discussing the importance of confidentiality in mediation). However, jurisdictions have different approaches to protecting disclosures made by parties during mediation. *Id.* at 951.

needs.[44] Thus, the mediation process can differ depending on the mediator's approach, as well as the type of dispute and the parties' relationship.[45]

2. Why Some Like It: The Advantages of Mediation

As one of the most commonly used ADR processes, mediation is unique, and favored, for many reasons.[46] First and foremost, the features of mediation provide parties with distinct advantages that other ADR processes lack.[47] ADR is designed to foster independent decision-making[48] and encourage the parties to reach a compromise themselves.[49] This differs vastly from arbitration where parties submit their dispute for resolution by a third-party neutral who functions as the decision maker.[50]

The process also enables mediators to offer different perspectives that parties may not have previously considered.[51] For example, one practitioner noted that during a mediation, the mediator "pointed out to both sides the risks inherent in going to court."[52] She said, "Weaknesses in my case that I had dismissed as minimal were suddenly food for thought—who really knew what a jury might do?"[53]

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44. *See* UNIF. MEDIATION ACT prefatory note (UNIF. LAW COMM'N 2003), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9b244b42-269c-769e-9f89-590ce048d0dd&forceDialog=0 [https://perma.cc/9ES5-GXDY]. Mediators commonly adopt either a facilitative or evaluative technique. The former focuses on enhancing communication between the parties while the latter evaluates the merits of the case and can express opinions regarding the strength or viability of claims. *See* Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 155–56 (1998); *see also* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996).

45. *See* KOVACH, *supra* note 20, at 15.

46. *See generally* Dorcas Quek, *Mandatory Mediation: An Oxymoron?: Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 482–83 (2010) (highlighting the general benefits of mediation).

47. *See* Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 27 (calling mediation "the equivalent of a multifunctional Swiss Army knife" in the "'toolbox' of approaches to conflict").

48. *See* STULBERG & LOVE, *supra* note 36, at 129.

49. *See* Prigoff, *supra* note 8, at 13 (stating that "[t]he trend towards compromise and settlement of disputes, which mediation advances, is clear").

50. The arbitrator reaches a conclusion on the disputed issue, and that advisory ruling is generally binding. It is less formal than a trial because the rules of evidence and court procedure are rarely meticulously applied. However, it is still considered quite formal on the spectrum of all ADR processes. *See* KOVACH, *supra* note 20, at 7; STULBERG & LOVE, *supra* note 36, at 12 n.2.

51. *See* Robert A. Baruch Bush, *"What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 13 (1996) (discussing how mediators add value to negotiations by helping parties (1) offer more information and ensure its reliability and (2) perceive each other "more fully and accurately" than if left to their own devices).

52. *See* Lorraine M. Brennan, *Start Spreading the News: Mandatory Mediation Comes to New York*, LAW.COM (July 23, 2014), https://www.law.com/sites/lorrainebrennan/2014/07/23/start-spreading-the-news-mandatory-mediation-comes-to-new-york/ [https://perma.cc/PR8C-LEJS].

53. *Id.*

In addition to the advantages a third-party neutral can provide, mediation itself offers procedural benefits and protections to parties that they would not have in a traditional court setting. Each side can veto a proposed solution[54] or craft a resolution that benefits all.[55] This "informality and infinite capacity for creative results"[56] are critical when parties want to maintain a personal or professional relationship,[57] when there are interests that the parties cannot isolate and explore on their own,[58] or when parties want to maintain control over their dispute.[59] The process is also shielded from public exposure because parties' agreements, statutes, and ethical codes call for confidentiality.[60]

Prominent ADR scholars also argue that mediation increases the probability that all involved will comply with the outcome because it requires those affected to participate in developing solutions.[61] Moreover, studies have shown that party participation in the process and control over the results contribute to greater party satisfaction overall.[62]

One cannot talk about mediation without discussing its effects on transactional costs, both direct and indirect.[63] ADR scholars, practitioners, and courts agree that "the sooner ADR intervention occurs, the greater the amount of monetary savings."[64] Parties can avoid spending on direct costs like attorney's fees, management costs,[65] and employees' productivity, as well as indirect costs like the emotional expense that comes from the dispute and the general court process.[66]

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54. *See* STULBERG & LOVE, *supra* note 36, at 12–13.

55. *See* CLOKE, *supra* note 21, at 169–70.

56. *Id.* at 169.

57. *See* KOVACH, *supra* note 20, at 15.

58. *Id.* at 75–76.

59. *See* ALFINI ET AL., *supra* note 39, at 1–2 (noting the consensual nature of the process whereby parties may choose to pursue other remedies and not settle). *See generally* Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211 (2004) (discussing an experiment on party preferences in ADR processes which revealed that participants value control over the process, substantive rules, and outcome).

60. *See* Nolan-Haley, *supra* note 18, at 82 (calling confidentiality the "hallmark of the mediation process").

61. *See* STULBERG & LOVE, *supra* note 36, at 12–13; *see also* Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 65–68 (2004).

62. *See* Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 887–88 (1998). Mediation literature also indicates that parties are satisfied with the mediation process even if they do not reach an agreement because it can help clarify legal issues or bring about settlement in the future. *See* Frank E. A. Sander, *Another View of Mandatory Mediation*, DISP. RESOL. MAG., Winter 2017, at 16, 16 n.4.

63. *See* KOVACH, *supra* note 20, at 126–27.

64. *See id.* at 126; *see also* Press Release, Marks, *supra* note 1, at 2 (explaining that the transition to an early ADR model will partially play a role in decreasing costs).

65. Parties that are involved in disputes often have to sacrifice time normally devoted to their managerial roles. *See* KOVACH, *supra* note 20, at 126–27.

66. *Id.* at 127.

Finally, the last common assertion is that mediation benefits judicial economy by reducing congested court dockets.[67] In a society with backlogged courts,[68] courts have looked to mediation as a solution—a mechanism to provide more efficient and swift access to justice.[69]

3. Why Some Question It: The Disadvantages of Mediation

Despite its much-lauded benefits, mediation can be an inapt device for resolution for a number of reasons. One of the primary drawbacks of mediation is its lack of formality, which implicates both procedural and constitutional justice.[70] In adjudication, there are formal rules where lawyers can call witnesses to testify and procure evidence, but "mediation is not bound by evidentiary and procedural rules."[71] Without procedural and constitutional protections, an unjust settlement can result especially in cases where parties have disparate levels of sophistication and resources.[72]

Mediation is also not an appropriate avenue if one or both parties desire a resolution for precedential value.[73] Often, personal disputes involve issues of collective interest that sometimes implicate national policy.[74] Therefore, the decision to mediate them in a private setting has political overtones.[75] And because "cycles of litigation attend recognition of and creation of new rights," moving these conversations into the black box of mediation potentially stunts the development of law on issues of public concern.[76]

Along similar lines, one downside to mediation's private nature is that it precludes a public record.[77] This means that individuals on a local, national,

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67. *See* Lebovits & Hidalgo, *supra* note 23, at 438; *see also* Jacqueline Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?*, 37 N.C. J. INT'L & COM. REG. 981, 1007 (2012).

68. *See, e.g.*, N.Y. STATE UNIFIED COURT SYS., *supra* note 2, at 3–4 (highlighting the backlog reduction in New York courts).

69. *See id.* at 19; *see also* Nolan-Haley, *supra* note 67, at 1007 (noting that advocates of mandatory mediation find it practical—especially when taking into account the appeal of reducing overcrowded court dockets).

70. *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–86 (1984) (highlighting how mediations lack of both a trial and judgment renders subsequent judicial involvement problematic).

71. Nolan-Haley, *supra* note 18, at 70; *see also supra* notes 42–43 and accompanying text.

72. As indicated, courts have procedural mechanisms that can make up for imbalances of power between the parties. Judges can ask magistrate judges to develop factual records or ask law clerks to do research. *See* Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 260 (1996) (discussing the procedural mechanisms judges can utilize to make sure "mismatching of resources will not skew the substantive result").

73. *See* Robert A. Baruch Bush & Joseph B. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 5 (2012) (In discussing the "wide-reaching aggregate impact" of *Brown v. Board of Education* on structural inequality, Bush and Folger recognize that "mediation could never have more than minimal effects, if any, on problems of structural injustice.")

74. *Id.*

75. *See* Weinstein, *supra* note 72, at 255 (highlighting the shift in societal perception of domestic violence matters from a historically private context to a national one).

76. *Id.* at 256.

77. *Id.* at 263.

and global scale can be denied important information that involves issues which concern the community at large.[78]

Lastly, it is simply not appropriate for every dispute.[79] For example, when there is an imbalance of power, litigation may be a better option since mediators cannot guarantee equality between the parties because party autonomy shifts power to the parties.[80] When a party treats the process of mediation as little more than a reconnaissance mission to gain a tactical advantage over their opponent, the benefits of the process dissolve.[81] Thus, every case must be ripe and ready for compromise.[82] Otherwise, mediation's overriding goal of efficiency will not be realized.

B. How It Made Its Way to the Big Apple

In 1947, the federal government passed the Taft-Hartley Act,[83] which created the Federal Mediation and Conciliation Service and effectively recognized mediation for the first time.[84] By 1990, with ADR's benefits growing ever more prominent, Congress passed the Civil Justice Reform Act of 1990,[85] commencing pervasive ADR use in federal courts.[86] Eight years later, Congress passed the Alternative Dispute Resolution Act of 1998,[87] which required each federal district to use ADR in civil actions and strongly defined federal rules for ADR procedures.[88]

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78. *Id.* (using the example of a products liability suit where potentially negative health effects of a particular drug may not yet be public).

79. *See* KOVACH, *supra* note 20, at 76 (highlighting instances that experts have determined are inappropriate for mediation).

80. *See infra* notes 198–215 and accompanying text (discussing the unequal bargaining power that can result when a pro se party faces a represented party in mediation).

81. *See* Nolan-Haley, *supra* note 18, at 82; *see also* Lebovits & Hidalgo, *supra* note 23, at 449.

82. *See* Hazel Genn, Essay, *What Is Civil Justice for?: Reform, ADR, and Access to Justice*, 24 YALE J.L. & HUMAN. 397, 406 (2012) (noting that important factors in settlement include the readiness of parties to mediate). *See generally* Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

83. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–197 (2018)).

84. This agency was created in part to "promote the development of sound and stable labor management relationships" and to minimize the effect of lockouts and strikes on the free flow of commerce. *See Mission & Values*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/aboutus/mission-values/ [https://perma.cc/VY3D-FULQ] (last visited Feb. 14, 2020); *see also* David L. Cole, *Government in the Bargaining Process: The Role of Mediation*, 333 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 43–44 (1961) (highlighting the role of this "best known" federal mediation agency in the early 1960s).

85. Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of the U.S.C.).

86. *See* KOVACH, *supra* note 20, at 87 n.33. *See generally* Jerome B. Simandle, *Enhancing Access to ADR for Unrepresented Litigants*, A.B.A. DISP. RESOL. MAG., Spring 2016, at 6.

87. Pub. L. No. 105-315, 112 Stat. 2993 (codified as amended at 28 U.S.C. §§ 651–658 (2018)).

88. *See* KOVACH, *supra* note 20, at 87 n.33. Shortly thereafter, the First Circuit affirmed the power of courts to compel mediation. *In re* Atl. Pipe Corp., 304 F.3d 136, 147 (1st Cir. 2002).

1. The Feds Ushered It in

New York has four U.S. district courts—the Eastern, Northern, Western, and Southern Districts of New York—three of which employ automatic mediation programs and all of which have witnessed the benefits of mediation.[89]

On January 1, 2006, the Western District became the first New York district court to adopt what was considered a "visionary and unconventional" approach to resolving disputes.[90] Its ADR pilot program was "designed to provide quicker, less expensive, and potentially more satisfying alternatives to continuing litigation, without impairing the quality of justice or the right to trial,"[91] and it was renewed annually until it was fully instituted in 2010.[92] The program mandated automatic mediation for almost all civil cases, unless parties agreed to a different ADR intervention or they fell within a number of exemptions.[93] Although no specific exemptions were provided for pro se litigants, parties could file a motion to opt out, which would be granted only on a showing of "good cause."[94] The court explicitly provided that "[i]nconvenience, travel costs, attorney fees, or other costs shall not constitute 'good cause.'"[95] The party seeking relief carried the burden of showing "why ADR has no reasonable chance of being productive."[96]

Of the 3011 cases that were subject to this default process in 2014 alone, 2360 were settled before mediation, at the session, or within sixty days following it.[97] Given the Western District's success, the Northern District implemented a similar pilot program for mandatory mediation in January 2014, which was fully adopted in May 2016.[98] The Northern District

89. *See* Gary Shaffer, *Automatic Court-Annexed Mediation in New York's Federal District Courts: Sometimes Number Don't Lie*, ALTERNATIVES TO HIGH COST LITIG., Apr. 2019, at 51, 51; *see, e.g.*, U.S. DIST. COURT W. DIST. OF N.Y., ALTERNATIVE DISPUTE RESOLUTION PLAN 1 (2019), https://www.nywd.uscourts.gov/sites/nywd/files/ADR%20Committee%20--%20Amended%20ADR%20Plan%20Effective%20Date%205-11-2018%20.pdf [https://perma.cc/VA9K-CZ8U] [hereinafter W.D.N.Y. PLAN].

90. *See* Michael Petro, *Federal ADR Chips Away at Court Docket*, BUFF. L.J. (June 22, 2015, 10:46 AM), https://www.bizjournals.com/buffalo/news/2015/06/22/federal-adr-chips-away-at-court-docket.html [https://perma.cc/GR68-WX47]; *see also* W.D.N.Y. PLAN, *supra* note 89, at 1.

91. *See* W.D.N.Y. PLAN, *supra* note 89, at 1.

92. *See* Shaffer, *supra* note 89, at 51.

93. Exemptions included habeas corpus and extraordinary writs, social security and bankruptcy appeals, and cases that exclusively or predominantly implicated issues of public policy. *See* W.D.N.Y. PLAN, *supra* note 89, at 3, 7.

94. *Id.* at 3–4.

95. *Id.* at 4.

96. *Id.*; *see also* Shaffer, *supra* note 89, at 51 (explaining that "the rule does not refer to the chance of settlement" and mediation offers other benefits like "narrow[ing] issues, expeditiously work[ing] through discovery, and begin[ning] the foundation for settlement talks").

97. *See* Shaffer, *supra* note 89, at 51–52 (using information supplied by Barry Radlin, ADR program administrator for the Western District of New York).

98. *Id.* at 52. *See generally* U.S. DIST. COURT N. DIST. OF N.Y., GENERAL ORDER #47: MANDATORY MEDITATION PROGRAM (2018), https://www.nynd.uscourts.gov/sites/nynd/

explicitly called for mediation, captioning it the "Mandatory Mediation Program" and included one notable exception to automatic referrals—civil pro se actions.[99] From January 1, 2014, to January 28, 2020, 1134 cases went through the program, 36 percent (or 410 cases) of which settled.[100] While these figures are significantly lower than those of the Western District, this data does not include those matters that settled before or within sixty days after mediation.[101]

In 2011, the Southern District followed suit by automatically referring certain cases to mediation.[102] Currently, the Southern District refers all counseled employment discrimination cases,[103] some Fair Labor Standards Act cases,[104] and certain § 1983 police and city misconduct claims[105] to mediation at early litigation stages before the formal discovery process.[106] The judge assigned to a case can exempt it with or without the request of the parties.[107] Additionally, for employment discrimination claims filed by pro se litigants, the Southern District allows judges to refer cases to mediation on a case-by-case basis and offers pro se plaintiffs free limited-scope representation.[108]

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files/general-ordes/GO47_0_0.pdf [https://perma.cc/VU4H-KMQR] [hereinafter N.D.N.Y. ORDER].

99. The order noted that "these actions may be referred to the Court's Assisted Mediation Program." *See* N.D.N.Y. ORDER, *supra* note 98, at 3, 12 n.3.

100. 52 percent of (or 593) cases did not settle through the program and 12 percent of (or 131) cases are undergoing mandatory mediation but were not completed during this time frame. *See ADR Program Statistics*, U.S. DISTRICT CT. N. DISTRICT N.Y., http://media.nynp.uscourts.gov/adrms/display_website_stats.cfm [https://perma.cc/B2VK-L9DF] (last visited Feb. 14, 2020).

101. *See* Shaffer, *supra* note 89, at 52.

102. *See Mediation/ADR*, U.S. DISTRICT CT. S. DISTRICT N.Y., https://nysd.uscourts.gov/programs/mediation-adr [https://perma.cc/JN89-TCKX] (last visited Feb. 14, 2020).

103. *See* Second Amended Standing Administrative Order, 11 Misc. 003 (S.D.N.Y. 2015); *see also* REBECCA PRICE, U.S. DIST. COURT S. DIST. OF N.Y., MEDIATION PROGRAM ANNUAL REPORT 2 (2017), https://nysd.uscourts.gov/sites/default/files/pdf/Mediation/Mediation%20Program%20Annual%20Reports/Annual%20Report.2016.Final%20Draft.pdf [https://perma.cc/C73Q-HLMS] [hereinafter 2016 ANNUAL REPORT].

104. *See* Press Release, Office of the Dist. Court Exec., Southern District of New York ADR Program Announces Pilot Programs for FLSA and § 1983 Effective October 3, 2016 (Sept. 28, 2016), https://nysd.uscourts.gov/sites/default/files/pdf/Mediation/Mediation%20Rules%20and%20Procedures/FLSA%20Announcement%20and%20Order.pdf [https://perma.cc/GLT8-PZ5P]; *see also* 2016 ANNUAL REPORT, *supra* note 103, at 2.

105. *See Mediation/ADR*, *supra* note 102; *see also* 2016 ANNUAL REPORT, *supra* note 103, at 2.

106. *See* 2016 ANNUAL REPORT, *supra* note 103, at 2.

107. The local rules do not list any guidelines for exemption. *See* JUDICIAL COUNCIL OF THE SECOND CIRCUIT, LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK 80 (2018), https://nysd.uscourts.gov/sites/default/files/local_rules/rules-2018-10-29.pdf [https://perma.cc/ZW2N-XSDB].

108. *See generally* Rebecca Price, *Limited-Scope Pro Se Program Provides Access and Justice*, GPSOLO, Sept./Oct. 2016, at 60; *see also Mediation in Pro Se Employment Discrimination Cases*, U.S. DISTRICT CT. S. DISTRICT N.Y., https://nysd.uscourts.gov/attorney/probono/mediation-in-prose-employment-discrimination-cases [https://perma.cc/5VDY-BBPF] (last visited Feb. 14, 2020). Limited representation is also referred to as "discrete tasks, unbundled services or limited-scope assistance." *See* Hogarth, *supra* note 24, at 88 (providing more details regarding this limited-scope representation program). Pro se

In 2016, 1072 cases were placed into the program, and 1051 of those were closed by December 5, 2017.[109] Excluding § 1983 cases, the settlement rates for the cases sent to mediation were largely consistent with the rates reported in 2015; roughly 43 percent of automatic employment cases, 48 percent of pro se employment cases, and 35 percent of § 1983 cases were settled.[110] The Southern District also reported that pro se employment cases that were resolved through mediation took, on average, 160 days from date of referral to closing.[111]

The Eastern District has a court-annexed mediation program, but unlike its counterparts, it is not compulsory and a district or magistrate judge must designate civil cases for inclusion.[112] The local rule governing mediation does not mention any exemptions or opt-out provisions.[113] However, like the Southern District, it offers pro se litigants free limited-scope representation for the purpose of mediation in employment discrimination cases.[114]

In 2018, 501 cases were referred to mediation, representing a 43 percent increase from the same reporting period in 2017.[115] Roughly 60 percent of the 501 cases were Fair Labor Standards Act and employment discrimination cases.[116] Of those cases, a session was conducted in 397 cases, and 64 percent of those referred were settled.[117]

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plaintiffs have fourteen days to object to the mediation or to the appointment of counsel. Defendants can request that the judge vacate the referral order. If the plaintiff accepts appointment, they meet with the pro bono attorney to define the scope of the representation which ends at the end of the mediation. *Id.* at 88–89.

109. *See* 2016 ANNUAL REPORT, *supra* note 103, at 2. As in the Northern District, this date did not include settlements made before and within sixty days after the mediation. *See* Shaffer, *supra* note 89, at 53.

110. *See* 2016 ANNUAL REPORT, *supra* note 103, at 6. In 2015, 46 percent of automatic employment cases, 66 percent of pro se employment, and 64 percent of § 1983 cases settled. *Id*. at 3.

111. *Id*. at 3.

112. *See* JUDICIAL COUNCIL OF THE SECOND CIRCUIT, *supra* note 107, r. 83.8(b)(1). Under the Mediation Advocacy Program, a judge refers the case to mediation if litigants identify mediation as a means for resolution or if the judge decides the case is apt for that ADR process. *See* Hogarth, *supra* note 24, at 89.

113. *See generally* JUDICIAL COUNCIL OF THE SECOND CIRCUIT, *supra* note 107.

114. *See Pro Se Mediation Advocacy Program*, U.S. DISTRICT CT. E. DISTRICT N.Y., https://www.nyed.uscourts.gov/pro-se-mediation-advocacy-program [https://perma.cc/DY5L-QH58] (last visited Feb. 14, 2020). The court depends on a roster of volunteer attorneys, so there is no guarantee that a pro se litigant will be appointed a lawyer. If assigned one, the pro se litigant determines the scope of representation with counsel. *See* Hogarth, *supra* note 24, at 89.

115. 88 percent were referred by magistrate judges and 12 percent were referred by district judges. *See* U.S. DIST. COURT E. DIST. OF N.Y., ALTERNATIVE DISPUTE RESOLUTION REPORT 2 (2018), https://img.nyed.uscourts.gov/files/local_rules/2018%20ADR%20Annual%20Report.pdf [https://perma.cc/QYB5-YFTM].

116. Fair Labor Standards Act cases constituted about 53 percent of the mediation referrals and employment discrimination cases constituted 10 percent. The report notes, however, that employment discrimination matters that were referred and involved pro se plaintiffs were resolved at a lower rate. *See id.* at 3.

117. This settlement rate includes cases that were resolved at the end of mediation and those that resolved after a referral but before a formal mediation session. Some cases that

As a whole, the data presented above suggests that there is enthusiasm for mediation in the federal district courts. It also suggests that each court's mediation program has some level of effectiveness. At the very least, when parties reached a settlement agreement, they were spared "the rigors of full discovery and the expense of motion practice and trial," which serves as a testament to some of mediation's most prominent benefits.[118] Lastly, most districts appear to recognize pro se litigants' positions in these spheres and to design protective measures that aim to support this population during the mediation process.

2. The State Followed Suit

Following in the federal district courts' footsteps, the New York State courts adopted a pilot program for mandatory mediation in July 2014.[119] Established exclusively for the New York Supreme Court's commercial division in Manhattan,[120] the program automatically referred every fifth case to mediation.[121] It was scheduled to run for eighteen months to allow enough time for both practitioners and the judiciary to evaluate its efficacy.[122] Lawyers, professors, and judges believed a mandatory process was necessary because, while court rules allow commercial division judges the authority to direct parties to mediation, they felt judges often do so at an "infrequent, tentative pace."[123]

In February 2016, the judiciary ended this program despite acknowledging that it was "positive and instructive."[124] They felt that "the most effective means of promoting mediation [was] for Commercial Division Justices to

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were resolved before a session were aided by mediator assistance or were resolved via direct negotiation by the parties. *See id.* at 2.

118. Colleen McMahon, *ADR in the Southern District of New York: Quality Is Key*, FED. LAW., Aug. 2018, at 80, 80.

119. *See ADR Overview*, N.Y. ST. UNIFIED CT. SYS., http://ww2.nycourts.gov/courts/comdiv/ny/ADR_overview.shtml [https://perma.cc/BQ6X-KJWL] (last visited Feb. 14, 2020).

120. Established in 1995, the commercial division is a state court trial division devoted solely to business cases. *See* Timothy S. Driscoll, *Keeping Current: The New York State Supreme Court Commercial Division: Past, Present, and Future*, BUS. L. TODAY, Oct. 2014, at 1, 1.

121. *See ADR Overview*, *supra* note 119.

122. *See* Brennan, *supra* note 52.

123. *See* Suevon Lee, *With Few Exceptions, Proposed Pilot Mediation Program Draws Support*, LAW.COM (Feb. 16, 2019, 11:15 PM), https://www.law.com/newyorklawjournal/almID/1202644396857/ [https://perma.cc/QJ4P-AM42]; *see also* THE CHIEF JUDGE'S TASK FORCE ON COMMERCIAL LITIG. IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 26 (2012), https://www.nycourts.gov/LegacyPDFS/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf [https://perma.cc/7GMH-JPG6] (claiming that mediation is substantially underutilized in New York in part "because there is a broad disparity in the degree to which judges refer matters to mediation").

124. *See Administrative Order*, N.Y. ST. UNIFIED CT. SYS. (Jan. 28, 2016), https://www.nycourts.gov/LegacyPDFS/courts/comdiv/ny/PDFs/AO-ADR22016.pdf [https://perma.cc/45HA-49TX].

consider each and every case as a candidate for mediation."[125] However, this did not mark the end of the state's attempts to utilize an automatic referral process for mediation.

In April 2017, the New York Supreme Court established a new pilot project subjecting certain commercial cases filed outside the commercial division to mandatory mediation.[126] This new project offered exemptions for those who could show that participation would subject them to "unreasonable hardship or burden."[127] It also offered an unequivocal exemption for cases involving self-represented parties.[128]

In January 2019, the judiciary extended this pilot project to include cases involving a business entity, insurance, the Uniform Commercial Code, or "other commercial" matters.[129] The exemption for self-represented parties remained.[130]

Just one month later, Chief Judge of the New York State Court of Appeals Janet DiFiore presented an address on the state of the New York judiciary.[131] In her address, she highlighted the progress state courts have made to eliminate case delays and announced reforms intended to enhance both the delivery and quality of justice in the state court system.[132] One of those reforms was a presumptive,[133] early court-sponsored ADR program for civil cases meant to reduce litigation expenses and speed the litigation process.[134]

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125. The court noted that the commercial division justices have reiterated their fundamental commitment to mediation and their intention to consider seriously every case for referral. They also agreed to consider making referrals in the early stages of litigation, including at the preliminary conference. *See id.*

126. The pilot project applied to cases: (1) assigned to any justice who does not serve in the commercial division, (2) designated as a contract matter on the Request for Judicial Intervention by the filing party, and (3) where the filing party has requested a preliminary conference. *See Administrative Order*, N.Y. ST. UNIFIED CT. SYS. 1 (Apr. 19, 2017), https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/AO-MandMedLong42017.pdf [https://perma.cc/M5KB-H4Q5].

127. *Id.* at 2.

128. *See id.*; *see also Rules and Procedures of the Alternative Dispute Resolution Program*, N.Y. ST. UNIFIED CT. SYS. 7 (May 1, 2017), https://www.nycourts.gov/LegacyPDFS/courts/comdiv/ny/PDFs/ADR-rules.pdf [https://perma.cc/53JX-MHTW].

129. *See Administrative Order*, N.Y. STATE UNIFIED CT. SYS. 1 (Jan. 22, 2019), http://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/AO-12219-MAND-MED.pdf [https://perma.cc/NBY4-XWP2].

130. *Id.*

131. *See also* Press Release, Lawrence K. Marks, Chief Admin. Judge, Chief Judge Janet DiFiore Presents Her State of Our Judiciary Address, Highlighting Further Progress to Eliminate Case Delays, Announcing Additional Reforms to Enhance the Delivery and Quality of Justice in NY (Feb. 26, 2019), http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PR19_06.pdf [https://perma.cc/GRG4-N545]. *See generally* DIFIORE, *supra* note 2.

132. *See* Press Release, Marks, *supra* note 131. *See generally* DIFIORE, *supra* note 2.

133. The rule of presumptive mediation stands for the notion that "mediation . . . should, absent compelling indications to the contrary, be the first procedure used." Thus, the mediator first attempts to resolve disputes using customary mediation techniques and, if unsuccessful, makes an informed recommendation for a different procedure. The presumption is overcome when the goals of one or both parties cannot be satisfied, or mediation does not get the parties to overcome barriers to settlement. *See* Sander & Goldberg, *supra* note 82, at 59.

134. *See* DIFIORE, *supra* note 2; *see also* Press Release, Marks, *supra* note 131, at 4.

II. WHERE DO SELF-REPRESENTED PARTIES FIT IN?

The United States has long recognized the right of self-representation.[135] In 2014, the New York State Permanent Commission on Access to Justice reported that 1.8 million New Yorkers exercised this right, navigating civil cases in state courts without an attorney.[136] While this was a welcome 22 percent decrease from the 2.3 million reported in 2010, Helaine M. Barnett, the commission chair, echoed Chief Judge DiFiore's sentiment that "we still have a long road ahead of us" to ensure an accessible civil justice system for every New Yorker.[137]

At a joint legislative hearing on the 2019–2020 judiciary budget, Chief Administrative Judge Lawrence K. Marks remarked that the New York State "court system is large, and its challenges are complex. Every day, it serves 19 million people in 62 counties, over 60 cities, well over a thousand towns and villages, and hundreds of courthouses across a physically large state."[138] This new measure will undoubtedly impact a substantial number of people, leaving the most vulnerable populations, those that cannot afford to hire representation, in potentially compromised positions. As evidenced, mediation's advantages and disadvantages have generated a lively academic debate.[139] There is also ample literature regarding access to justice, or the lack thereof, for pro se parties.[140] When looking at this program within the context of this dense scholarship, one must assess its viability and efficacy. Does it balance its goal of expediting the litigation process while safeguarding justice for the self-represented party?[141]

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135. On September 24, 1789, the first United States Congress passed the Judiciary Act of 1789, which recognized "[t]hat in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of counsel." Ch. 20, 1 Stat. 73. The U.S. Supreme Court in *Faretta v. California* reaffirmed this legal entitlement and held that a criminal defendant has a Sixth Amendment right to defend himself or herself. 422 U.S. 806, 818–21, 834 (1975).

136. *See* THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 2, 7 (2014), http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/CLS%20TaskForce%20Report%202014.pdf [https://perma.cc/9N8E-9VRP].

137. *See* PERMANENT COMM'N ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 2 (Nov. 30, 2018), http://ww2.nycourts.gov/sites/default/files/document/files/2019-10/18_ATJ-Comission_Report.pdf [https://perma.cc/MZ49-WL2U].

138. *See Joint Legislative Public Hearing on 2019–2020 Executive Budget Proposal: Topic Public Protection Before the S. Fin. Comm. & Assemb. Ways & Means Comm.*, 2019–2020 Leg., Reg. Sess. 2 (N.Y. 2019) (statement of Chief Admin. Judge Lawrence K. Marks), https://www.nysenate.gov/sites/default/files/testimony_given_by_chief_administrative_judge_of_the_unified_court_system.pdf [https://perma.cc/98JN-V2C9] [hereinafter *Legislative Hearing*].

139. *See supra* Part I.A.

140. *See infra* Part II.B (defining access to justice and explaining it in relation to self-represented litigants).

141. The New York State court system's mission is "to promote the rule of law and serve the public by achieving just and timely resolution of all matters before the courts." *See*, *Excellence Initiative*, N.Y. ST. UNIFIED COURT SYS., https://www.nycourts.gov/excellence-initiative/ [https://perma.cc/NU5W-EKH5] (last visited Feb. 14, 2020).

Part II.A addresses what the presumptive ADR program entails and the motivations behind its implementation. Part II.B then delves into how this process could potentially affect unrepresented litigants.

A. On Paper, the Program Says . . .

On May 14, 2019, the judiciary officially announced details of a statewide initiative.[142] Calling it a "transformational" move, the judiciary revealed that all parties in civil cases will now be referred to some form of ADR, with a focus on court-sponsored mediation, at the onset of each case.[143] The court system will allow for "appropriate" opt-out exceptions but did not define what will qualify as appropriate.[144] Nevertheless, the court system believes that an early and presumptive model will help reduce case delays, improve case outcomes, and lower costs for both the parties and the judiciary.[145]

The judiciary intends to take advantage of and build upon the courts' existing network of ADR programs and resources.[146] With the help of its ADR office, the court system plans to work with the state's trial courts, law schools, and nonprofit community dispute resolution centers (CDRCs)[147] to offer parties access to free or reduced-fee ADR services.[148] The court system stated that it will issue uniform rules and each jurisdiction will develop local protocols, guidelines, and best practices to aid in the development and expansion of existing mechanisms.[149] Rollout began in September 2019.[150]

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142. *See generally* Press Release, Marks, *supra* note 1.

143. *Id.* at 1. For purposes of this Note, this will be considered a categorical referral to ADR, as defined by Professor Frank Sander's formulation, which applies when a legislative mandate requires specific types of cases to undergo ADR. *See* Sander, *supra* note 62, at 16.

144. *See* Press Release, Marks, *supra* note 1, at 2.

145. *See id.*

146. *See id.*

147. In the New York context, a CDRC is a "community-based, private, not-for-profit program." N.Y. STATE UNIFIED COURT SYS. DIV. OF PROF'L & COURT SERVS., STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY DISPUTE RESOLUTION CENTER MEDIATORS 1 n.1 (2009), http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/Standards_of_Conduct.pdf [https://perma.cc/2XBB-S3MJ]. CDRCs contract with the chief administrative judge of the state court system "to provide conciliation, mediation, arbitration, or other types of dispute resolution services. *Id.* They are primarily funded by the court system and every county in New York State has a CDRC program. *See* N.Y. STATE UNIFIED COURT SYS., COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAM: ANNUAL STATISTICAL REPORT 1 (2017–2018), http://ww2.nycourts.gov/sites/default/files/document/files/2019-01/17-18_CDRCP-ASR.pdf [https://perma.cc/BH8C-6G2T].

148. *See* Press Release, Marks, *supra* note 1, at 2.

149. The press release states that Deputy Chief Administrative Judges George Silver and Michael Coccoma and the statewide ADR coordinator will work with administrative judges and trial court judges along with "local bar associations and other stakeholders" to implement this initiative. *Id.* at 2–3.

150. *Id.* at 3. Kings County Supreme Court is one jurisdiction that has adopted an ADR plan to date. Effective November 12, 2019, it provides an opt-out provision "[u]pon good cause shown at the first mediation, or anytime thereafter," but it does not define what would constitute good cause. *See Presumptive ADR Plan: Kings County, Civil Term*, N.Y. ST. UNIFIED CT. SYS. 2 (Nov. 12, 2019), https://www.nycourts.gov/LegacyPDFS/courts/2jd/kings/civil/PRESUMPTIVE-ADR-PLAN.pdf [https://perma.cc/Y8HP-TZHA].

The model came about as part of the Chief Judge DiFiore's "Excellence Initiative," a "top-to-bottom examination of [court] operations aimed at improving efficiency" and eliminating delays.[151] By evaluating current court processes and procedures, the judiciary wanted to ascertain what was working well and what needed to be improved.[152] Since the start of this initiative in 2016, its reforms have led to reduced case backlogs and expedited dispositions of matters.[153] Thus, the judiciary and practitioners alike hope that court-sponsored automatic presumptive referral of disputes to early mediation will advance the goals of the initiative and enhance the overall administration of justice.[154]

1. The Direct Approach: A Presumptive Mechanism

It is apparent from the judiciary's statements that improving the administration of justice involves, in part, two critical components: requiring mediation for certain cases and implementing it at the earliest stage of litigation.[155]

Looking at the first component, there is an active debate among ADR scholars and professionals regarding whether participants must opt in or opt out.[156] That is, should parties be required to participate unless they can show why it is not a good choice? Or should parties be offered mediation and allowed to choose whether to pursue it?

In the federal district courts and the state court, the opt-out procedures prevail, for the courts believe that they will result in a higher rate of participation.[157] Because the state court noted that court-sponsored mediation remains underutilized, despite the growth of ADR programs in

151. *See* Craig Doran, *Guest Essay: Excellence Initiative Encourages Judicial Accountability*, DAILY MESSENGER (Jan. 6, 2018, 2:01 AM), https://www.mpnnow.com/news/20180106/guest-essay-excellence-initiative-encourages-judicial-accountability [https://perma.cc/8CJT-6JU3].

152. *See* N.Y. STATE UNIFIED COURT SYS., THE STATE OF OUR JUDICIARY, at i (2017), http://ww2.nycourts.gov/sites/default/files/document/files/2018-11/SOJ-2017.pdf [https://perma.cc/Z62F-CG5R].

153. *See Legislative Hearing*, *supra* note 138, at 1–2, 6. From January 2016 to February 2019, the judiciary reported a decrease in backlogs ranging from 24 percent in the civil term of Bronx Supreme Court to more than 70 percent in other districts across the state. *See* DIFIORE, *supra* note 2, at 5–6.

154. *See* Press Release, Marks, *supra* note 1.

155. *See supra* Part II.

156. *See* Quek, *supra* note 46, at 479; Wissler, *supra* note 61, at 565. This Note focuses solely on opt-out and opt-in schemes. However, ADR scholars have developed a "continuum of mandatoriness," which distinguishes different levels of compulsion that can be imposed on parties. *See* Quek, *supra* note 46, at 488–90.

157. *See supra* Part I; *see also* Press Release, Marks, *supra* note 1. Along similar lines, social scientists have studied the impact of default options with respect to organ donation volunteer rates. Some countries utilize opt-in policies that require citizens to indicate a willingness to participate while others adopt opt-out policies that require citizens to indicate their unwillingness to participate. One study revealed that donation rates were 82 percent under an opt-out method and only 42 percent under an opt-in method. *See* Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 SCIENCE 1338, 1338–39 (2003).

recent years,[158] it follows that opt-in provisions pose a risk that parties may not choose mediation if they do not understand and appreciate the option.[159]

By design, using opt-out provisions means that neither party has to request mediation, which is beneficial for those who do not want to ask for it for fear that their case will look weaker if they do.[160] Moreover, some ADR scholars argue that "[v]oluntariness is not about attendance."[161] Even when mediation is required, the process remains voluntary because the parties decide the outcome for themselves.[162] This concept of self-determination, or who makes the decision, can be protected by the mediator who is tasked with making sure parties understand the process.[163] Moreover, if a settlement does not come to fruition and the mediator makes recommendations for the next steps, it might be more readily accepted by both parties than those made by any attorney present.[164]

2. The Urgency: An Immediate Method

While ADR is beneficial at any stage of litigation, Chief Judge DiFiore's Advisory Committee on ADR, which recommends presumptive mediation, claims that courts tend to achieve greater results when they use mediation as early as possible in a dispute.[165] Additionally, the committee and other ADR scholars have argued that the sooner the mediation takes place, the more likely the parties are to settle.[166]

Beyond achieving a resolution, using mediation at the onset of a case can save money and evade the emotional challenges that parties endure during litigation.[167] By avoiding a full-fledged discovery process, the parties will

158. *See* Press Release, Marks, *supra* note 1.

159. *See* ANDREA DONEFF & ABRAHAM P. ORDOVER, ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION, AND THE ART OF DISPUTE RESOLUTION 20 (3d ed. 2014); Quek, *supra* note 46, at 483 (underscoring the benefits of court-mandated mediation when parties are unfamiliar or ignorant of the process).

160. *See* Quek, *supra* note 46, at 483 (noting that when a party initiates a mediation, it can be interpreted as a sign of weakness).

161. *See* DONEFF & ORDOVER, *supra* note 159, at 137.

162. *See* Bullock & Gallagher, *supra* note 43, at 948 ("No party can be forced to settle or otherwise alter his or her position in a mediation . . . .").

163. *See* DONEFF & ORDOVER, *supra* note 159, at 136–37.

164. It can be difficult to determine the appropriate forum, and parties often fear that their adversaries make suspect suggestions to obtain a tactical advantage. *See* Sander & Goldberg, *supra* note 82, at 59.

165. Results include an enhancement of "parties' sense of personal agency and self-determination in pursuing a resolution" and improvement of "parties' communications with each other and understanding of each other's positions." *See* ADR ADVISORY COMM., *supra* note 9, at 3.

166. *See id.* at 3–4 (noting that "high settlement rates and participant satisfaction [are] achieved from court referrals to early, presumptive mediation"); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 677 (2002).

167. *See* ADR ADVISORY COMM., *supra* note 9, at 16–17 ("The goal of reducing avoidable litigation costs is often best served by early mediation."); Guthrie & Levin, *supra* note 62, at 895 n.31 (construing the phrase "cost savings" that results from mediation "to include savings of time and emotional stress associated with protracted litigation").

spend less money and may avoid escalating the dispute.[168] Involving mediation at an early stage might also help the parties narrow issues or provide parties with inexpensive early discovery of their adversaries' claims or defenses.[169]

B. In Practice, Others Argue . . .

In contrast to proponents' beliefs regarding presumptive mediation outlined in Part II.A, critics argue that an ADR process of this nature is worrisome.[170] Although this initiative is termed "presumptive" mediation, many people are construing it to be mandatory and refer to it in that manner.[171] Thus, Part II.B focuses on the concerns opponents raise regarding mandatory mediation, specifically in the context of pro se representation.

Before delving into these viewpoints, it is important to explain the concept of access to justice and assess where self-represented litigants stand within that framework.

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168. *See* THE CHIEF JUDGE'S TASK FORCE ON COMMERCIAL LITIG. IN THE 21ST CENTURY, *supra* note 123, at 27 (explaining that mediation is cost-effective for parties and the court system when it is introduced at earlier stages of litigation because parties who have incurred substantial legal fees may feel that they have little incentive to stop litigation and pursue ADR practices).

169. Absent settlement, it can be valuable to know how and even if to proceed with litigation. *See* STULBERG & LOVE, *supra* note 36, at 127 (noting that "[u]sing a mediator earlier rather than later, can reduce strife, minimize problems, lower disputing costs, and establish a framework for dealing constructively with issues that arise").

170. *See infra* Part II.B.2 (discussing how a mandatory scheme affects parties' self-determination and constitutes coercion); *see also* Letter from Roger Juan Maldonado, President, N.Y.C. Bar, to Anthony Cannataro, Admin. Judge, Civil Court of the City of N.Y. (Oct. 8, 2019), https://s3.amazonaws.com/documents.nycbar.org/files/2019577-PresumptiveADR_FINAL_10.8.19.pdf [https://perma.cc/3L3S-BV6T] (expressing concerns regarding the implementation of presumptive ADR in New York City's Civil and Housing Courts).

171. *See, e.g.*, Adina L. Phillips & Samuel J. Ferrara, *Mandatory Mediation Debuts at the Mat Center This Fall*, NASSAU LAW., Oct. 2019, at 9, 9; Ira S. Slavit, *Presumptive ADR in Torts and Medical Malpractice Cases*, NASSAU LAW., Oct. 2019, at 10, 21 ("Participation in presumptive ADR will be mandatory . . . ."); *Changes in Kings County as to Jury Selection and New Mandatory Alternative Dispute Resolution*, PILLINGER MILLER TARALLO, https://pmtlawfirm.com/changes-in-kings-county-as-to-jury-selection-and-new-mandatory-alternative-dispute-resolution [https://perma.cc/VZ3K-CG7F] (last visited Feb. 14, 2020); Rafal Morek, *Presumptive Mediation*, KLUWER MEDIATION BLOG (Sept. 18, 2019), http://mediationblog.kluwerarbitration.com/2019/09/18/presumptive-mediation [https://perma.cc/4AHU-GNV4] (noting that "while the Report [of the New York State ADR Advisory Committee] does not use the term 'mandatory mediation', but 'presumptive mediation', in some respects the concept does resemble existing schemes typically referred to as mandatory"); *NYS Courts to Implement Early Mandatory Mediation*, BARCLAY DAMON LLP (Nov. 12, 2019), https://www.barclaydamon.com/alerts/nys-courts-to-implement-early-mandatory-mediation [https://perma.cc/PB7J-MUTA]; *What Is Mandatory Presumptive Divorce Mediation?*, LONG ISLAND FAM. L. & MEDIATION BLOG (Nov. 10, 2019), https://www.longislandfamilylawandmediation.com/what-is-mandatory-presumptive-divorce-mediation [https://perma.cc/C9KE-PL5C].

1. Access to Justice and the Self-Represented Litigant

Access to justice is defined as the "ability to avail oneself of the various institutions, governmental and non-governmental, judicial and non-judicial, in which a claimant might pursue justice."[172] It is a foundational theme in our society that centers "on empowering individuals to exercise their rights in the civil justice system,"[173] and it means different things to different people.[174] Traditionally, scholars have equated increased access to justice with increased access to legal representation.[175]

There has been a long history of debate in the ADR field regarding ADR's relationship to access to justice.[176] One side of the debate "critiques mediation as impeding the access of disadvantaged groups to justice," while the other "values voice and autonomy in the disputing process" and emphasizes remedies outside those present in courts.[177] Despite differing perspectives, scholars and commentators have recognized: (1) there is a crisis in our justice system with respect to the delivery of justice; (2) there are gaps in that system; and (3) there must be concurrent efforts to address those gaps.[178]

Almost all ADR service providers recognize the right of parties to choose self-representation in ADR proceedings.[179] Since the 1970s, an increasing number of litigants have chosen to appear unrepresented in court.[180] This surge is the result of a number of factors, the most evident being a party's inability to pay for a lawyer.[181] The New York State Courts Access to Justice Program reported that "efforts to document the justice gap estimate that 80%

172. *See* Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115, 115–16 (2010).

173. *See* Nolan-Haley, *supra* note 67, at 986.

174. *See* Price, *supra* note 108, at 60 (remarking that, for some, access is straightforward—they simply hire an attorney to oversee a case—and for others it is complex—they must traverse a complex court system without counsel's support).

175. *See* Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 473–74 (2010).

176. *See* Ellen E. Deason et al., *ADR and Access to Justice: Current Perspectives*, 33 OHIO ST. J. ON DISP. RESOL. 303, 305 (2018).

177. *Id.*

178. *See* Hogarth, *supra* note 24, at 87. *See generally* Jonathan Lippman, *New York's Template to Address the Crisis in Civil Legal Services*, 7 HARV. L. & POL'Y REV. 13 (2012). Judge Jonathan Lippman is the former chief judge of the state of New York and chief judge of the New York Court of Appeals. He acknowledged this local and national crisis, stating that "[t]here is a growing justice gap between the dire need for civil legal services and the dwindling resources available." *Id.* at 13.

179. *See* Holmes, *supra* note 18, at 98.

180. American courts have experienced a significant increase in the number of pro se litigants. *See* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1987 n.1 (1999); Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 441–42 (2009); Richard W. Painter, *Pro Se Litigation in Times of Financial Hardship—A Legal Crisis and Its Solutions*, 45 FAM. L.Q. 45, 45–46 (2011).

181. *See* Landsman, *supra* note 180, at 443–44. Other factors include (1) an unwillingness to pay for counsel; (2) a desire to do legal work without the assistance of counsel; and (3) "anti-lawyer attitudes." *Id.* at 444–47.

of the civil legal needs of low-income Americans go unmet."[182] As expected, this leads impoverished litigants to have very different experiences with access to justice as compared to wealthy litigants.[183] The wealthy tend to hire counsel, reducing the risk that they will "mak[e] poor decisions in mediations,"[184] whereas the poor are likely to encounter "understaffed, poorly funded public program[s] with volunteer mediators who may, or may not, have received adequate training."[185] Moreover, as it stands, minorities make up a disproportionate number of litigants who cannot afford a lawyer, which means access to justice can be compromised across racial, social, and cultural lines.

2. The Self-Represented Litigant and a Presumptive Scheme

Self-represented litigants who participate in mediation "are often vulnerable to pressure to settle and to accept unfair results."[186] In 1991, it took only one mediation session with a mediator-arbitrator for a 74-year-old pro se tenant, Ms. Brockett, to agree to relinquish the apartment she lived in for almost twenty years.[187] Despite signing a settlement agreement, Ms. Brockett refused to vacate her apartment and successfully challenged the agreement in court.[188] In part, she argued that coercion, the absence of legal representation, and the mediator's failure to explain her rights each played a role.[189] It is possible that a poor pro se litigant might find themselves in a position like Ms. Brockett based on (1) presumptive mediation's effects on informed self-determination and (2) the resulting effects of unequal bargaining power.[190]

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182. N.Y. STATE COURTS ACCESS TO JUSTICE PROGRAM, WORKING TOWARD 100% MEANINGFUL ACCESS TO JUSTICE 2016, at i, v (2017), https://www.nycourts.gov/LegacyPDFS/ip/nya2j/pdfs/NYA2J_2016report.pdf [https://perma.cc/KSF2-D7SS] (noting that "[e]fforts to document the justice gap estimate that 80% of the civil legal needs of low-income Americans go unmet").

183. *See* Ellen Waldman, *Inequality in America and Spillover Effects on Mediation Practice: Disputing for the 1 Per Cent and the 99 Per Cent*, LAW CONTEXT, 2017, at 24, 27 (highlighting how "poorly resourced 'one-shotters' fare poorly as compared to more sophisticated repeat-players").

184. *Id.* at 43 (noting instead that the 1 percent tend to face a "straight-forward numbers game" during mediation where the parties volley bottom lines until they reach a middle ground).

185. *Id.* at 42–43.

186. *See* CTR. FOR DISPUTE SETTLEMENT & INST. OF JUDICIAL ADMIN., NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS § 1.4 (1999), https://www.aboutrsi.org/library/national-standards-for-court-connected-mediation-programs [https://perma.cc/7ZJ6-MFQA].

187. A Bronx criminal court referred this landlord-tenant dispute to a local dispute resolution center. Wright v. Brockett, 571 N.Y.S.2d 660, 661–62 (Sup. Ct. 1991).

188. *Id.*

189. *Id.* at 662.

190. In its opinion, the court noted that Ms. Brockett was not alone because the facts of the case were "typical of the more than 100,000 actions which ha[d] been diverted from the criminal process into alternative dispute resolution over the past 10 years." *Id.* at 661.

The principal objection against requiring mediation is that it impinges upon parties' self-determination.[191] Self-determination typically encompasses a voluntary decision to mediate and a voluntary decision to come to a resolution.[192] This self-determination has been argued to enhance "the development of parties' problem-solving capacities, their ability to craft individualized justice on their own terms based on their own interests and values."[193]

A prominent argument against mandatory mediation is that it constitutes coerced consent because it impinges on parties' voluntary choice to mediate in the first instance.[194] While some ADR scholars believe that it is fair to make parties attempt the process,[195] others argue that when we do so, we thwart self-determination and leave pro se parties at greater risk for coercion throughout the process.[196] Under this notion, "settlement rates alone cannot be an indicator of whether coercion exists."[197]

Another objection to requiring mediation for pro se litigants is that it can result in an imbalance of power among the parties, which precludes equality in access to justice.[198] In 1984, Owen Fiss raised this concern, stating that "settlement is . . . a function of the resources available to each party to finance the litigation, and those resources are frequently distributed unequally."[199] Unequal bargaining power can result in part from pro se parties' lack of familiarity with the mediation process[200] and knowledge of the law.[201]

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191. *See* Quek, *supra* note 46, at 483.

192. *See* Nolan-Haley, *supra* note 18, at 69 (explaining that voluntariness is a "central ideology and distinguishing feature of mediation"); *see also* Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45, 53–54 (2005) (discussing the two ways informed consent has been distinguished in mediation literature: participation consent and outcome consent).

193. *See* Nolan-Haley, *supra* note 18, at 69.

194. *See* Quek, *supra* note 46, at 490–91; *see also* Lee, *supra* note 123 (quoting a commercial mediator who called it "coerced mediation"). Coercion has been defined in two subcategories: coercion into mediation and coercion within the mediation process. *See* Quek, *supra* note 46, at 485–86; *see also* Bullock & Gallagher, *supra* note 43, at 948 (discussing coercion with respect to settlement agreements).

195. *See* Frank E. A. Sander, H. William Allen & Debra R. Hensler, *Judicial (Mis)use of ADR?: A Debate*, 27 U. TOL. L. REV. 885, 886 (1996) (claiming that this does not force parties to settle so it does not constitute coercion).

196. *See* Quek, *supra* note 46, at 491 (stating that coercion into mediation "will then readily lead to parties sensing that they are being coerced within the mediation process"); *see also* Jacqueline Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 60–62 (1996).

197. Quek, *supra* note 46, at 487 (outlining the conflicting results of a number of empirical studies on settlement rates in mandatory and voluntary mediation).

198. *See* Hogarth, *supra* note 24, at 87 (arguing that every person should be afforded a lawyer to assist him or her to ensure equality in access to justice).

199. *See* Fiss, *supra* note 70, at 1076. Fiss noted that one critical problem underlying ADR is that it "implicitly asks us to assume a rough equality between the contending parties." *Id.*

200. *See infra* notes 202–07.

201. *See infra* notes 207–09. Power differentials can also manifest when a pro se party is facing a "repeat player," like a landlord, represented by legal counsel. *See* Robert Rubinson, *Indigency, Secrecy, and Questions of Quality: Minimizing the Risk of "Bad" Mediation for Low-Income Litigants*, 100 MARQ. L. REV. 1353, 1369 (2017). Repeat players can "maximize

There is a lack of public awareness of the mediation field, its process, and its benefits.[202] With respect to low-income litigants in particular, a large percentage know nothing about mediation.[203] Even though mediators are required to promote informed decision-making throughout the mediation,[204] ADR scholar Ellen Waldman argues that the focus tends to be on explaining the procedural mechanics of the mediation process.[205] She says that "we gloss over what it is [that pro se parties] need to understand about the substantive decisions they are making," which inhibits their access to justice.[206]

Lack of proficiency regarding legal matters also puts pro se parties at a disadvantage because the law is an important tool in the settlement process.[207] Indigent pro se individuals are particularly at risk given that they often take cases to court without a lawyer and do so "with little or no knowledge of the law or the legal nature of their claim."[208]

In instances where one participant has more resources, the mediation process becomes unfair.[209] The power imbalance "invariably infect[s] the bargaining process," and pro se litigants' access to justice is compromised.[210] Today, lawyers are controlling mediation sessions,[211] which puts pro se

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long-term gain in litigation by developing advance intelligence, planning for future engagement, developing trust and legitimacy with court personnel and, playing for favourable rule development." Waldman, *supra* note 182, at 27 n.22 (citing Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98–103 (1974)).

202. *See* Alyson Carrel & Noam Ebner, *Mind the Gap: Bringing Technology to the Mediation Table*, 2019 J. DISP. RESOL. 1, 43 (suggesting that technology could enhance mediation's process and outcome).

203. *See* Rubinson, *supra* note 201, at 1355.

204. *See* Michael T. Colatrella Jr., *Informed Consent in Mediation: Promoting Pro Se Parties' Informed Settlement Choice While Honoring the Mediator's Ethical Duties*, 15 CARDOZO J. CONFLICT RESOL. 705, 705 (2014); Deason et al., *supra* note 176, at 318.

205. *See* Deason et al., *supra* note 176, at 319.

206. *Id.* Generally, ethical codes allow mediators to provide legal information but not legal advice. Since it is difficult for mediators to distinguish the two, Waldman argues that mediators often avoid conversations with pro se litigants "that might place them at odds with state regulatory structures as well as unauthorised practice prohibitions." Waldman, *supra* note 182, at 37.

207. *See* Nolan-Haley, *supra* note 196, at 65–66 (noting that legal rights are, in part, a matter of bargaining in the mediation process, so parties should have knowledge of the law).

208. *See* Hogarth, *supra* note 24, at 87.

209. *See* Robert Rubinson, *Stories of Experience: Economic Inequality in Mediation*, 70 S.C. L. REV. 85, 101 (2018).

210. *See* Fiss, *supra* note 70, at 1076 ("[T]he settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant."). Fiss outlines three ways a disparity in resources can influence settlement: (1) the poorer party may not be as able to gather and examine data needed to forecast the outcome; (2) the poorer party may be induced to settle because they need money as soon as possible, even though they realize they might get less now than if they waited; and (3) the poorer party might be forced to settle because they do not have resources to finance the litigation. *Id.*

211. *See* Nolan-Haley, *supra* note 18, at 63 (noting that lawyers are employing adversarial posturing "in the name of zealous advocacy"); *see also* KOVACH, *supra* note 20, at 165 (noting that some lawyers utilize competitive or adversarial styles even though advocacy in mediation is premised on a nonadversarial approach).

parties at risk.[212] Without a lawyer, these individuals can only rely on mediators to help alleviate some inequality through their duties to promote informed decision-making.[213] But since mediators cannot provide pro se individuals any legal advice, self-represented parties are left "to make decisions in an informational vacuum," which can lead to conversations "not in the parties' long-term best interests."[214] Although mediators must also maintain neutrality, it is unclear what responsibility they have, if any, to balance power differentials.[215]

III. A UNIFORM OPT-OUT PROVISION

The lack of self-determination and likelihood of unequal bargaining power that can result when parties are required to mediate support the conclusion that pro se litigants may be severely disadvantaged by a presumptive mediation model. Despite the state court initiative's forward-thinking agenda, mediation still occurs largely in the dark.[216] Since "[a]ccess to justice is not a luxury, affordable only in good times,"[217] this Part proposes that the judiciary adopt a six-factor test to determine whether pro se parties should be exempt from presumptive mediation at the onset of a case.

The six factors to be considered derive from the seminal 2004 English court case *Halsey v. Milton Keynes General NHS Trust*.[218] The defendant refused to take a dispute to mediation.[219] In its holding, the *Halsey* court acknowledged that ADR processes can have their advantages and disadvantages and noted that "they are not appropriate for every case."[220] The court then outlined the following factors to be considered when assessing whether a party has unreasonably refused ADR:

> (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in

212. *See* Rubinson, *supra* note 201, at 1373.

213. *See generally* Colatrella, *supra* note 204 (discussing the debate regarding the nature of mediator duties and how they should be discharged).

214. *See* Waldman, *supra* note 182, at 36–37, 43. Waldman agrees with prominent access to justice scholar Russell Engler, who said that court-connected mediators' duties should change when disputants are unrepresented because it is not a fair or impartial system if represented parties routinely win. *Id.*

215. *See* Rubinson, *supra* note 209, at 101; *see also* Bernie Mayer, *Mediation: 50 Years of Creative Conflict*, 51 FAM. CT. REV. 34, 36 (2013). For a general overview on the debate regarding how responsible mediators are for the results of a mediation, see Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 46–47 (1981) (arguing that mediators are obligated to ensure just, stable, and fair negotiated agreements) and Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 107–09 (1981) (asserting that mediators do not have an obligation to contribute to socially desirable outcomes because it would undermine their neutrality).

216. *See supra* note 60 and accompanying text.

217. Lippman, *supra* note 178, at 19.

218. *See generally* [2004] EWCA (Civ) 576 (Eng.).

219. *See id.* [3].

220. *See id.* [16].

> setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success.[221]

A blanket exemption for pro se litigants, similar to those which were adopted in the Northern District of New York and as part of the pilot project for state court commercial cases, would certainly address some of these concerns.[222] However, there may be certain contexts where mediation is appropriate for pro se litigants.[223] Therefore, there exists a legitimate concern that pro se litigants may never choose to opt in to mediation under that scheme.[224] To balance these factors, these six considerations would prevent cases from arbitrary referral absent any examination of their specific circumstances.

In practice, a pro se litigant would request to opt out of presumptive mediation.[225] One example of how this could work would follow the Western District's model, where the court would then grant the motion only on a showing of "good cause."[226] A judge would consider good cause within the context of these six factors and the pro se litigant's adversary would be allowed to make a showing that the pro se party was being unreasonable in their refusal to attempt presumptive mediation. For example, if the pro se litigant claims that mediation has no reasonable prospect of success, the court, like the one in *Halsey*, would place the burden on the adversary to show that there was a reasonable prospect that mediation would be successful.[227] This scheme would effectively balance "the need for the courts to freely direct cases to mediation" with the "need for the parties to request for exemption due to exceptional circumstances."[228] Additionally, specific exemption criteria that require the courts to conduct a holistic review will result in a more balanced application of ADR processes.[229]

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221. *See id.* The court held that it has no power to compel parties to enter into mediation against their will because "to oblige truly unwilling parties . . . would be to impose an unacceptable obstruction on their right of access to the court," a right guaranteed under article 6 of the European Convention of Human Rights. *Id.* [9].

222. *See supra* notes 99, 128 and accompanying text. An inequitable result could arise from only one mediation session between a pro se litigant and a represented party. *See supra* Part II.

223. *See supra* Part I.A (discussing the general advantages of mediation and situations where parties benefit from the process).

224. *See supra* notes 156–59 and accompanying text.

225. *See* Quek, *supra* note 46, at 491 ("Categorical referral very readily leads to coercion unless parties are allowed to request an exemption from mediation.").

226. *See supra* notes 94–95 and accompanying text.

227. *See* Halsey v. Milton Keynes Gen. NHS Tr. [2004] EWCA (Civ) 576 [28] (Eng.).

228. *See* Quek, *supra* note 46, at 500.

229. *See id.* at 508 (warning that criteria for opt-out provisions should not be "couched in vague terms" or "set at too lenient a standard"). Quek critiques *Halsey*'s six factors, noting that it is difficult for a court to accurately assess whether a party has unreasonably refused mediation. *Id.* at 503–04. Quek then supports a model used in court-connected ADR programs in Florida because it allows parties to choose their mediators, file grievance complaints against mediators, and outlines clear requirements regarding obligations to mediate. *Id.* at 505–07. While Quek's concerns are warranted, the Florida measures are not enough to redress the loss of self-determination that parties experience when they are mandated to mediate. Moreover, a repeat player might have the upper hand in choosing a mediator or pro se parties might lack

This criteria should be adopted as part of the uniform state rules, not as part of the guidelines and protocols each local jurisdiction will develop.[230] To maintain the efficacy and legitimacy of presumptive mediation, it is imperative that one standard is enforced and reaffirmed across the state's sixty-two counties.

In addition to this six-factor test, the New York State courts should take another page from the federal system's book and expand their limited-scope pro bono representation for pro se litigants whose cases are subject to presumptive mediation.[231] Under this scheme, pro se litigants must decide whether or not to proceed with mediation in the first instance. If they decide they want to opt out, they will then have to convince the requisite body. Thus, limited-scope representation is critical because, as evidenced, pro se litigants are typically not familiar with either mediation's procedural or substantive components.[232]

Currently, the judiciary offers limited-scope representation to litigants in family, divorce, consumer credit, and landlord-tenant cases through its New York State Courts Access to Justice Program.[233] Expanding this representation to all civil cases subject to presumptive mediation would allow lawyers to provide discrete services when the pro se client is aware of, or has requested, limited service offerings.

Chief Judge DiFiore rightfully acknowledged that "the delivery of justice in the state courts must continually evolve and improve to keep pace with the needs of our modern society."[234] The judiciary's implementation of presumptive mediation across New York State is a powerful and significant step in the right direction. However, the adoption of uniform opt-out criteria and the expansion of limited-scope representation will enable that measure to better address the needs of those most vulnerable in our society. By placing substantive justice at the forefront of system design, these recommendations would more fully address the systemic problems pro se litigants face while negotiating with represented parties and hopefully help prevent parties from settling "while leaving justice undone."[235]

CONCLUSION

To date, the New York State court system has not established uniform rules with respect to pro se litigants and presumptive mediation. Without uniform rules, it has left the door open for jurisdictions across the state to devise their

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the knowledge to assess mediator quality. Thus, the unequal bargaining power typically present in mediations with pro se parties could thwart any benefit derived from letting parties choose their own mediators or file grievance complaints.

230. *See supra* note 149 and accompanying text.

231. *See* Hogarth, *supra* note 24, at 88.

232. *See supra* Part II.B.

233. *See New York State Courts Access to Justice Program*, N.Y. ST. UNIFIED CT. SYS., http://ww2.nycourts.gov/ip/nya2j/ourwork.shtml [https://perma.cc/8YCC-43FZ] (last visited Feb. 14, 2020).

234. *See* DiFiore, *supra* note 19, at 1055.

235. *See* Fiss, *supra* note 70, at 1085.

own, potentially dissimilar, standards. The goal of the U.S. legal system is to obtain justice through law, empowering participants first before turning to concerns like docket control. Parties, pro se and otherwise, deserve equal access to justice. They deserve to have their day in court. To prevent this transformative measure from just becoming another tool of mass justice, this Note advocates that the judiciary adopt a six-factor test to be considered when deciding whether pro se litigants should be required to mediate civil suits at the onset of a case.