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*Court-Annexed Mediation Program for Civil Cases in Brazil*

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# Designing a Court-Annexed Mediation Program for Civil Cases in Brazil: Challenges and Opportunities

Fernando Vieira Luiz\*

## ABSTRACT

*In this article, I demonstrate that mediation is an important form of dispute resolution, displaying benefits when compared with adjudication. I try to refine what mediation is by contrasting it with judicial settlement conferences and conciliation. Regarding the ongoing process in Brazil, I state that every society should adapt a mediation program that is attainable for its social-economic and cultural reality. Criticizing the current Brazilian policies, I present the positive and negative aspects of the Resolution No. 125 of the National Council of Justice (CNJ), analyzing a possible program design feasible for the country, focusing on the issues of funding, referral system, and the selection and training of possible mediators.*

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## I. INTRODUCTION

Every citizen is entitled to have access to justice. However, it is not always clear what that means. Usually, it is viewed simply as access to the courts. In other words, everybody has the right to a day in court, where liability will be decided in a given case. However, this rights based approach does not represent the best explanation of access to justice.

Access to justice is related to the empowerment of citizens to resolve their own conflicts in a peaceable way. In that sense, access to justice calls for guaranteeing a forum where people can communicate their feelings and the possibility of building together the desirable outcomes. Therefore, the courts are not the only public place where access to justice can be granted and measured, and alternative dispute resolution (ADR) programs also play an important role in accessing this right.

If ADR programs are valid ways of promoting access to justice, governments and the courts are required to implement public policies that deliver such programs to citizens. Because “mediation is the most prominent component of a successful ADR program,”<sup>1</sup> the courts should give litigants access to this service.

In order to achieve these objectives, different courts around the world are creating court-annexed mediation programs.<sup>2</sup> The aim of this study is to analyze how these programs should be designed to meet their objectives, specifically in Brazil. Mediation may present some objections both theoretically and in practice. I will address these issues, concluding that despite the difficulties it may present, mediation is a valuable tool for

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1. Steve Gizzi, *Judging Mediation*, 10 JOHN F. KENNEDY U. L. REV. 135, 135 (2004).

2. In 2000, Germany amended its legislation permitting that all German states launch mandatory court-annexed mediation programs. *Zivilprozessordnung [ZPO] [Code of Civil Procedure]*, 2000, § 15. Portugal created its first law on the subject in 2013. Law No. 29/2013. India is creating new court-connected mediation centers, as the Bangalore Mediation Center and Dheli Mediation Center. *See generally* LAILA T. OLLAPALLY & SHIV KUMAR, BANGALORE MEDIATION CENTRE: MANUAL FOR THE TRAINING OF MEDIATORS (2008).

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dispute resolution as long as it is cautiously adapted for the context in which it will be used.

Rather than answering questions about court-annexed mediation programs, the core purpose of this article is to raise the questions one must ask when planning such programs. It is not a matter of a right or a wrong answer to each question. Each place has its own culture and idiosyncrasies that will be imprinted on any attempt at institutionalizing mediation through the court system. The main objective here is to show the different alternatives for each step of a program's creation and the way it can develop to achieve its own goals.

In Part II, I outline basic concepts of mediation and the issues raised by scholars as to its benefits and pitfalls. In order to analyze a court-annexed mediation program in Brazil, in Part III I delineate the current state of the art of mediation in Brazil, arguing the dangers of transplanting a foreign system without taking into consideration the cultural diversity and necessity displayed by each country. Also, I work on issues one must address when designing a court-annexed mediation program. Then, I analyze the core questions faced when implementing these programs. I argue that the National Council of Justice (CNJ), the Brazilian institution created to be the policy-maker for the judiciary, is addressing the question in the best way possible, regardless of the merits in creating such programs in Brazil, and I suggest what seems most feasible for Brazilian reality.

## II. CONCEPTS

Courts all over the world are facing a large backlog and the delay in jurisdiction is a direct side effect. One way of trying to control this backlog is through ADR institutions. The courts have usually been concerned with their duty of judging. However, because judging has not solved all the problems of the courts' docket and management, other solutions are being

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considered. Among all the ADR techniques, mediation is the one most internationally utilized.<sup>3</sup>

However, mediation is not just a way of for the courts to manage their caseload. More than that, there are qualitative differences that make mediation “less traumatic, more humane, and far more capable of healing and reconciliation than adjudication.”<sup>4</sup>

#### A. *What is Mediation?*

Generally, mediation is the informal process in which a neutral third party helps litigants resolve the problem through a mutually acceptable solution. Using communication skills, the mediator’s main goal is to facilitate dialogue between the parties, empowering them to solve their own dispute. The idea of having someone help litigants find a middle ground for their conflict is not new, and all societies have had their own ways of implementing some kind of dispute resolution with some mediation components.<sup>5</sup> However, modern mediation as a structured process was developed in America in the ‘70s,<sup>6</sup> and nowadays it is the ADR method most widely used in the world.<sup>7</sup>

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3. Nadja Alexander, *Global Trends in Mediation: Riding the Third Wave*, in GLOBAL TRENDS IN MEDIATION 1, 1 (Nadja Alexander ed., 2d ed. 2006).

4. Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 6 (1989).

5. Alexander, *supra* note 3, at 1 (“Mediation is a process which is both new in terms of its emergence in the legal arena and old in terms of its timeless universality.”); Doug Marfice, *The Mischief of Court-Ordered Mediation*, 39 IDAHO L. REV. 57, 57 (2002) (stating that ADR in general is a new name for an old process); James A. Wall et al., *Mediation: A Current Review and Theory Development*, 45 J. CONFLICT RESOL. 370, 370 (demonstrating mediation initiatives among Vikings, and also in China, Korea, Malaysia, Poland, Azerbaijan, Israel, Norway, and Japan).

6. An important development in ADR in general and mediation in particular is the concept of the multi-door courthouse, introduced by Professor Frank Sander at the Pound Conference. Frank E. A. Sander, *Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Varieties of Dispute Processing*, in 70 F.R.D. 79, 111-16 (1976). The

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Frenkel and Stark highlight the main characteristics of the mediation process:<sup>8</sup>

1 – Assisted Negotiation: The main role of a mediator is to facilitate communication between the parties, helping them to find the best possible solution to their own case. Different techniques are used to reach this goal, mainly communicative ones.<sup>9</sup> Mediators have different styles; some more facilitative, others more evaluative. They can use a narrow or a broad approach regarding defining the problem. However, in all cases mediators have no authority to impose an outcome; they are not decision makers. That's why "mediation, broadly speaking, is a process of assisting the negotiations of others."<sup>10</sup>

2 – Consensual Process: The parties completely control the outcome of the process. In adjudication, a judge, a jury, or an arbitrator will issue a ruling, stating who was right and who was wrong, imposing damages or proper relief for the winner. In mediation, the neutral party will not rule on

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conference was organized by Chief Justice Burger to study the judicial process, mainly to reduce cost and time of litigation. Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 23, 29-32 (A. Levin & R. Wheeler eds., 1979) ("There is nothing dangerous about studying and considering basic change, if the alterations will preserve old values and 'deliver' justice at the lowest possible cost in the shortest feasible time."). For historical background of mediation programs in the United States, see Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, 81 *ST. JOHN'S L. REV.* 79, 81-89 (2007).

7. For an overview of mediation in a global context, see *GLOBAL TRENDS IN MEDIATION*, (Nadja Alexander ed., 2d ed. 2006). The book shines a light on mediation in different jurisdictions, such as the United States, Australia, Canada, England, Germany, France, Austria, Denmark, Belgium, Scotland, Germany, Switzerland, Italy, the Netherlands, and South Africa. *Id.*

8. DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION* 2-3 (2d ed. 2012).

9. About mediators techniques, see Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 *Alternatives to High Cost Litig.* 111 (1994); see also FRENKEL & STARK, *supra* note 8, at 74-92.

10. FRENKEL & STARK, *supra* note 8, at 2.

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the case or compel the parties to settle.<sup>11</sup> Even when the mediation is mandated by the court, the parties must always have the option of dropping the process at any time, and can refuse any proposed agreement with no reasons.<sup>12</sup>

3 – Informal Process: Even though mediation is a structured process, parties may bring up and discuss whatever issue they wish. In a lawsuit, the parties are constrained by their legal rights and the elements of their claims. As an example, in a tort suit the discussion will be about the existence of duty, breach, causation, and damages.<sup>13</sup> The discussion of other questions is unnecessary. In mediation, one may bring to the table other considerations that may affect the parties' behavior, regardless of the legal elements of the claim.<sup>14</sup> In that sense, the questions discussed are not delimited by the pleas. Moreover, in mediation the rules of evidence and procedural rules do not apply.<sup>15</sup> This informality is genuinely good for the production of creative outcomes where parties can expand the pie so that each one can get as much as possible. The zero-sum of adjudication is replaced by win-win situations.

4 – Producing Binding Agreements: If the parties reach an agreement, it can be enforced through the court system.<sup>16</sup> In other words, the solution found by the litigants is binding.

5 – Private Process: Even though there may be some exceptions, court proceedings are public.<sup>17</sup> The court's opinion circulates not just between the

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11. *Id.* at 3.

12. *Id.*

13. *See generally* DAVID WEISSBRODT ET AL., *THE COMMON LAW PROCESS OF TORTS* (2012).

14. OLLAPALLY & KUMAR, *supra* note 2, at 6 ("In the Mediation process, the APPROACH to the problem is informal. However, the process itself is structured and formalized. It is not an extemporaneous or casual process but has clearly identified stages.")

15. Lela P. Love, *Images of Justice*, 1 PEPP. DISP. RESOL. L.J. 29, 32 (comparing jurisdiction and mediation process, Love stresses that "[u]nlike the blindfolded lady, the mediator sees all that is offered unprotected by formal procedure or rules of evidence.")

16. FRENKEL & STARK, *supra* note 8, at 3.

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parties but also to an unknown number of people. We can search the Internet or use private services to learn the outcome of a given case. In mediation, the parties may establish a secrecy clause, placing the entire content of the agreement far from public scrutiny. Some critics say this is a negative point, causing lack of accountability; however, if the parties reached the terms of settlement through an informed decision considering all the possible alternatives, I cannot see any negative aspect in this confidentiality. The confidentiality applies to the mediator as well,<sup>18</sup> which means that the mediator is not allowed to serve as a witness for the case and cannot tell strangers what happened in the sessions, not even (and especially not) the judge.

#### *B. Mediation vs. Conciliation*

Are mediation and conciliation the same? Like other things in life, the answer is: It depends. The legal framework and the practice in each jurisdiction for each process will define whether mediation and conciliation are equivalent or if they are different mechanisms.

In America, mediation encompasses all processes in which a third party neutral with no decision-making power helps people to reach an agreement in a litigious situation.<sup>19</sup> Therefore, use of the term conciliation is rare. However, in various countries, such as Brazil, the term conciliation is often used to describe the same process. Moreover, in some countries, such as India, there are some distinctions and legal consequences in the use of mediation or conciliation. Therefore, it is important to explore their similarities and divergences in different places.

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17. Court proceedings traditionally have been open to public to ensure accountability, even though some restrictions apply as in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

18. FED. R. EVID. 408 & 501.

19. Mediation involves “a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.” BLACK’S LAW DICTIONARY 1070-71 (9th ed. 2009).

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Regarding Brazil, academic scholars differentiate mediation from conciliation in the sense that in the former, the third party simply facilitates communication between the parties, while in the latter, the conciliator plays a direct role in resolving the dispute by evaluating the position of both parties, the possible outcome for the case in court, and even advising the litigants on available solutions.<sup>20</sup> From a Brazilian academic point of view, a mediator would be the equivalent of American's facilitative mediator, while a conciliator would be the American's evaluative mediator. This article argues that there is no sense in making such a difference in Brazil because the process and legal consequences of mediation and conciliation are the same. In practice, the mediator or conciliator will use the same techniques to reach the same goals. There is no difference between the two institutes' legal frameworks. No matter the label given to the process, the outcome will have the same legal value and will be reviewable in the same legal hypothesis. Moreover, if the parties need to go to court to enforce the agreement, it will be executed in exactly the same way.<sup>21</sup> Therefore, in Brazil, they are interchangeable terms in process.<sup>22</sup>

In some countries, such as India, there are slight divergences that should be noted. In addition to the same theoretical differences between mediation and conciliation that occur in Brazil, Indian practice and its legal framework display some peculiarities that make the two ADR mechanisms slightly

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20. ANDRÉ GOMMA DE AZEVEDO, *MANUAL DE MEDIAÇÃO JUDICIAL* 42 (2009).

21. C.P.C. art. 475-N, III (Braz.) (stating that agreements reached by conciliation or any other transaction are executed by the same court proceedings).

22. Don Peters, *It Takes Two to Tango, and to Mediate: Legal Cultural and Other Factors Influencing United States and Latin American Lawyers' Resistance to Mediating Commercial Disputes*, 9 RICH. J. GLOBAL L. & BUS. 381, 385 (2010). The author stresses the identity of the two institutes in Latin America: "Now widely viewed as identical to conciliation, mediation offers an enhanced negotiation approach to resolving commercial disputes. . . . Some Latin American countries use different words to describe this process and define it differently, often labeling it conciliation." *Id.*

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different, even though the two terms are generally used interchangeably.<sup>23</sup> Section 89 of the Code of Civil Procedure (CCP) was amended in 1999 (becoming effective in 2002) to establish ADR methods in India.<sup>24</sup> Among them, there are separate provisions for mediation and conciliation, treating the two as different concepts. Thus, the Arbitration and Conciliation Act of

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23. Sriram Panchu, *About Mediation*, SRIRAM PANCHU MEDIATION (2011), <http://www.srirampanchumeditation.com/page/about-mediation> (“In India, presently the terms ‘mediation’ and ‘conciliation’ are used synonymously . . .”).

24. CODE CIV. PROC. § 89(1)-(2)(d), *available at* <http://bombayhighcourt.nic.in/libweb/acts/cpc1908/pt5.pdf>.

- (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for—
  - (a) arbitration;
  - (b) conciliation;
  - (c) judicial settlement including settlement through Lok Adalat; or
  - (d) mediation
- (2) Where a dispute has been referred—
  - (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;
  - (b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authorities Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;
  - (c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authorities Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
  - (d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

*Id.*

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1996 also differentiates between the two processes.<sup>25</sup> In a recent case,<sup>26</sup> the Supreme Court of India addressed the issue, and if we analyze the opinion, the main differences are the following:

1 – Mandated Mediation, Voluntary Conciliation: The judge may refer the case to mediation regardless of the parties' consent, while both parties must agree for conciliation to happen.<sup>27</sup> Even though the parties may ask the court to refer the case to mediation, the court may do that even if the two litigants disagree on reference.<sup>28</sup> There is no penalty for a party that does not participate in the session or for a party that wishes to leave the process at any time.<sup>29</sup> However, mediation is or could be mandated by the court. On the other hand, reference of the case to conciliation requires the prior acceptance of both parties.<sup>30</sup>

2 – Value of the Outcome: While an agreement reached through mediation must always be placed before the court and wait for its seal of

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25. M. Jagannadha Rao, *Concepts of Conciliation and Mediation and Their Differences*, L. COMM'N OF INDIA, available at [https://www.lawcommissionofindia.nic.in/adr\\_conf/concepts%20med%20Rao%201.pdf](https://www.lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf) (analyzing the differences between mediation and conciliation in the Indian legal system).

26. *Afcons Infrastructure Ltd. & Anr. v. Cheria Varkey Construction Co. (P) Ltd. & ORS.*, (2010) 8 S.C.C. 24.

27. CODE CIV. PROC. § 89(1)-(2)(d).

28. *Afcons Infrastructure Ltd. & Anr. v. Cheria Varkey Construction Co. (P) Ltd. & ORS.*, (2010) 8 S.C.C. at 25.

29. *Id.* at 26.

30. *Id.* 25-26 (“If both parties do not agree for conciliation, there can be no ‘conciliation.’ As a consequence, as in the case of arbitration, the court cannot refer the parties to conciliation under section 89, in the absence of consent by all parties. . . . If the parties are not agreeable for either arbitration or conciliation, both of which require consent of all parties, the court has to consider which of the other three ADR processes (Lok Adalat, Mediation and Judicial Settlement) which do not require the consent of parties for reference, is suitable and appropriate and refer the parties to such ADR process.”).

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approval to be enforceable, the settlement in conciliation may bind the parties when signed, dispensing with further judicial disposal.<sup>31</sup>

### C. *Mediation vs. Judicial Settlement Conference*

There has been an evolution of the judge's role in mediation all over the world—from a static figure who remained far from the litigants in the name of neutrality to an active case manager.<sup>32</sup> In the famous term coined by Resnik, they have become “managerial judges,”<sup>33</sup> and one of these postures encourages settlement and even participation in the negotiations.

Since the 1983 amendment of Rule 16 of the Federal Rules of Civil Procedure (FRCP), the discussion of settlement solutions routinely takes place at pre-trial conferences.<sup>34</sup> The 1993 amendment further increased the possibility of judge intervention in the mediation process.<sup>35</sup> Approximately

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31. *Id.* at 28 (“When a matter is settled through conciliation, the Settlement Agreement is enforceable as if it is a decree of the court having regard to Section 74 read with Section 30 of the AC Act. . . . Where the reference is to a neutral third party (‘mediation’ as defined above) on a court reference, . . . the mediation settlement will have to be placed before the court for recording the settlement and disposal.”).

32. James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, 6 DISP. RESOL. MAG. 11, 11 (1999) (“Judges are no longer simply passive adjudicators, but are now active case managers”).

33. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 374 (1982). The author describes the evolution of judges’ roles in the United States and the pitfalls of the “managerial judges” approach. *Id.*

34. Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 232 (2003) (“Pretrial conferences conducted under Rule 16 of the Federal Rules of Civil Procedure afford the trial judge an opportunity to engage in a range of settlement activities.”).

35. Michael E. Tigar, *Pretrial Case Management under the Amended Rules: Too Many Words for a Good Idea*, 14 REV. LITIG. 137, 149 (1994) (stressing that trial judges and lawyers have great discretion in using pretrial conferences to settle a case under the current Rule 16).

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40% of federal district courts have judicial settlement conference programs and use them.<sup>36</sup>

If settlement is the goal of both mediation and judicial settlement conferences, what are the differences between them? The techniques used are mostly the same.<sup>37</sup> The salient distinction lays in the fact that the third party who will help the parties reach an agreement is a judge or a magistrate. This slight difference seems to be irrelevant for the process or for the solution because the parties control outcome in theory, and they are still not obligated to settle the dispute. However, there are still theoretical and practical aspects that set mediation apart from judicial settlement conferences.

There are two main models of the judicial settlement conferences: the “traditional” and the “modern.”<sup>38</sup> In the former, the trial judge is in charge of the settlement conference; in other words, the judge tries to settle cases.<sup>39</sup> If the case is not settled, the judge continues to sit in court for further proceedings and trial.<sup>40</sup> In the latter, a different judge is assigned to the case solely to conduct the conference.<sup>41</sup> Afterwards, if the parties did not reach

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36. ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 6, 20-28 (1996), available at [http://www.fjc.gov/public/pdf.nsf/lookup/adrsrbk.pdf/\\$File/adrsrbk.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adrsrbk.pdf/$File/adrsrbk.pdf).

37. An empirical study demonstrates a consistency of 80% between the techniques used in mediation and in settlement conferences. See Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise and Fear*, 17 HARV. NEGOT. L. REV. 97, 99-100 (2012).

38. Brunet, *supra* note 34, at 232 (labeling the models as “traditional” and “modern”); see Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 274 (2011) (highlighting the same models).

39. *Id.* at 233.

40. *Id.*

41. *Id.*

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an agreement, the trial judge resumes trying the case.<sup>42</sup> In the United States, courts vary in the way they hold judicial settlement conferences. Some use one model, some the other, and some both.<sup>43</sup> However, from a theoretical point of view, the modern approach is preferable. Few studies highlight any benefit in the traditional approach.<sup>44</sup>

The modern approach is used in India. Judicial settlement is one of the techniques for solving disputes according to section 89 of the CCP.<sup>45</sup> Interpreting the Code, the *Afcons* court stated that “judicial settlement” refers to “a settlement of a civil case with the help of a judge who is not assigned to adjudicate upon the dispute.”<sup>46</sup> Therefore, in a pending case, “[i]f the court feels that a suggestion or guidance by a Judge would be appropriate, it can refer it to another Judge for dispute resolution.”<sup>47</sup>

The traditional model is the rule for civil law countries, where “the settlement function takes place within the courtroom and is conducted by the same judge who will hear the matter if no settlement is reached.”<sup>48</sup> This is true for the Brazilian’s style of mediation, where the judge is the person in

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42. Alfini, *supra* note 32, at 13. Alfini calls it a “Buddy System”, in “which has one judge buddying up with another judge who presides at their pretrial settlement conferences and vice versa. . . .” *Id.* at 13-14.

43. Wissler, *supra* note 38, at 273 (“Some courts use both models; which one is used in a given case may depend on whether the case will be tried before a judge or jury or whether the parties have consented to a settlement conference with the judge assigned to the case or requested another judge.”).

44. See Gregory D. Brown, *The Judicially Hosted Settlement Conference My Case in the Balance: Musings of a Trial Attorney*, 17 DISP. RESOL. MAG. 8, 8 (2011) (arguing that judicial settlement conferences are cheaper, better, and faster).

45. CODE CIV. PROC. § 89 (2)(c).

46. *Afcons Infrastructure Ltd. & Anr. v. Cherian Varkey Construction Co. (P) Ltd. & ORS.*, (2010), 8 S.C.C. 24 at 8.

47. *Id.* at 26.

48. Alexander, *supra* note 3, at 22.

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charge of any attempt to settle the disputes, and may even be assisted by an appointed staff member in some cases.<sup>49</sup>

Regardless of the model, even though it is possible, it is not desirable for a judge to sit as a mediator and, worse still, when he is the one assigned to adjudicate the case if it is not settled. The modern approach is less controversial because the final decision maker does not participate in the conversations and negotiation process. However, in order to compare and analyze the main concerns and differences between mediation and judicial settlement conferences, this article will use the traditional model, commenting on some useful issues concerning the modern approach.

Judicial settlement conferences differ from mediation in the same way that the mediation differs from litigation. For different purposes and processes, it is natural that different persons with different backgrounds, training, and abilities are needed. Therefore, the first pitfall of having judges settle cases—which makes judicial settlement conferences distinct from mediation—is the lack of competency and training.<sup>50</sup> Mediation and litigation call for different skills. Judges are trained to master the law and apply it to a certain situation. The Constitution, statutes, and case law are the raw materials that will be filled out by the particular facts of each dispute. The goals of litigation are establishing facts and narrowing down legal issues, so consequently the judge is the personification of such attributes. The judge guarantees these goals and avoid proceedings that stray from those objectives. In the end, there will be a clear ruling for the plaintiff or the defendant with no room for compromise in between. Even though legal texts are not disregarded in mediation, they are not the main point of the process. While a judge is a well-versed interpreter of the law, the mediator is an expert interpreter of people. The mediator's focus is on the parties' interests, not their legal positions; the mediator should master the

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49. C.P.C. art. 277, § 1 (Braz.); Law No. 9.099/95, art. 22.

50. Alfini, *supra* note 32, at 11.

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psychological aspects of the conflict to enhance dialogue that will lead to an amicable environment propitious for producing creative solutions. In this sense, “there are times when a sophisticated, knowledgeable neutral can be much better than a judge.”<sup>51</sup>

Some lawyers still prefer judicial settlement conference over mediation, arguing that the judges’ authority and lack of time make the process faster because judges force parties to get straight to the point.<sup>52</sup> The absence of a specific fee for the conferences makes it cheaper than mediators’ fees, and a judge’s experience from the bench and knowledge of recovery in similar cases make the process better.<sup>53</sup> I do not agree with that perspective. Actually, those factors make a judge an unsuitable third party neutral for a number of reasons.

First, if a judge has a limited amount of time and parties are expected to spend not more than one or two hours with the judge,<sup>54</sup> it is clear that the judge is not the best person to resolve the problem because there will not be enough time to explore all the legal and extralegal issues around the relationship between the parties. Short of time and using a going-straight-to-the-point approach, no one can build up trust, which is essential for disclosure of all the information needed and for a sound evaluative approach.

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51. Dorothy Wright Nelson, *ADR in the Federal Courts-One Judge’s Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*, 17 OHIO ST. J. ON DISP. RESOL. 1, 4 (2001).

52. Brown, *supra* note 44, at 8 (arguing that judicial settlement conferences are cheaper, better, and faster).

53. *Id.* (arguing that judicial settlement conferences are cheaper, better, and faster).

54. *Id.* at 9 (“Lawyers have a knack for expanding the amount of work they perform to fit the time allotted. After all, we have all day, right? No, not in a settlement conference, where you know you will get only an hour, maybe two, of the judge’s time. If you hope for any progress, you must use this time efficiently.”).

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Second, a judge's "status and authority do not trump skill and experience as a neutral."<sup>55</sup> In a mutually accepted agreement the last thing parties want is a judge displaying authority by superseding the free will of the parties and imposing a solution. Research suggests that "former judges who serve as mediators tend to adopt a 'bashing' style," which exemplifies a tendency to display such authority.<sup>56</sup> In this regard, judges or former judges need even more training to act as neutrals because they need "to unlearn or modify some tendencies."<sup>57</sup>

As to fees, the estimate of which process is more expensive will vary from court to court and from jurisdiction to jurisdiction. In India, for instance, mediation is cheaper than judicial settlement because courts do not charge for their mediation program and return all the court's fees if the case is settled.<sup>58</sup>

On the issue of experience, it is true that experience from the bench may be somehow useful. Knowing how juries behave in a specific area or how much damages one may usually get are assets when evaluating the options for a settlement. However, it is preferable to have someone who is experienced in the process, rather than someone experienced in the field of law discussed. Settlement methods involve more than how much one can get, and usually anyone without specific training is unable to see farther than that. They are structured processes that have certain distinct phases so as to

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55. Claudia L. Bernard, *Is a Robe Ever Enough? Judicial Authority and Mediation Skill on Appeal*, 17 DISP. RESOL. MAG. 16, 17 (2011). In this article, the author describes a method created by her and an appellate judge from the Ninth Circuit, in which both conduct the negotiation process of a case, one at a time, concluding that "the combination of a judge's status and authority with a mediator's skill, time, and patience is a dynamite combination in the right case." *Id.*

56. Alfani, *supra* note 32, at 14.

57. *Id.*

58. Mediation and Conciliation Project Committee, *Mediation Training Manual of India*, SUPREME COURT OF INDIA, DELHI, [supremecourtindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf](http://supremecourtindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf) ("Refunds of court fees is permitted as per rules in the case of settlement in a court referred mediation.").

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guarantee the empowerment of every participant and to make sure the parties are well informed about their decisions.<sup>59</sup> Therefore, having someone who has mastered negotiating techniques and is able to conduct the process in the right way is more important than having experience on the bench.

A confusion in the role they play may arise for judge, lawyers, and parties when the judge in charge of the negotiation process decides the case if it is not settled.<sup>60</sup> How will a judge decide a case based on its legal aspects alone after urging the parties to observe their interests and not their position? How can the judge reduce the pie just trying to extend it? The judge—and everybody else—is expected to forget and simply dismiss everything said during the negotiating rounds to be able to perform ordinary function.

In my capacity as a trial judge, I experienced this problem recently. The case was the following: After the marriage of his son, the plaintiff let the new couple live on one of his properties, a medium-size apartment. Some twenty years later, the couple decided to get divorced and the former wife kept on living in the apartment even though no disposition was made on this in the divorce settlement. Some months after the husband left the place, his father, the owner, filed suit against his daughter-in-law, demanding his apartment back. He included in his injunctive relief pleading that he wanted to have the apartment back since the beginning of the lawsuit. In her answer, she argued that the plaintiff had verbally donated the apartment to the couple, and, therefore, she owned the place or half of it at least.

The parties, their lawyers, and I were at the preliminary hearing, where the main objective is trying to settle the dispute. After some hours of conversation in both joint and private sessions, the interests were clear. The woman needed a place to live, at least for six months in order to find a smaller place where she could afford the rental and some amount of money

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59. OLLAPALLY & KUMAR, *supra* note 2, at 6 (“In the Mediation process, the APPROACH to the problem is informal. However, the process itself is structured and formalized. It is not an extemporaneous or casual process but has clearly identified stages.”).

60. *Id.*

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to start a new life. The plaintiff did not need the place for himself, although his son, the ex-husband, was living in a small rented bedroom in a poor neighborhood far from his job and amenities, such as supermarkets, drugstores, and gas stations. Therefore, the plaintiff wanted the place in order to let his son live there, and if he could not get the apartment back, the relationship with his son would be harmed.

As the one in charge of the process, I tried to show the parties the advantages and disadvantages of both settlement and a future trial, and satisfy them with a speedy resolution. Also, I stimulated the parties to find creative solutions. For instance, the proposition of letting the defendant live in the apartment for four months with no recovery of money was seriously considered by both parties. However, I knew from the outset that the defendant's defense was very weak, and if not settled, the injunction would be granted almost immediately. Brazilian law does not accept the verbal donation of real estate.<sup>61</sup> There are certain formalities that must be observed, and one of them is a written instrument. Therefore, even if the verbal donation were proven, injunctive relief would be granted because the alleged donation was not legally enforceable.

At the end of the hearing, the parties did not settle the case, and I found myself in a most difficult situation. According to Brazilian law, I could not recuse myself for the case.<sup>62</sup> I spent hours trying to find creative solutions that would have some mutual gains for the parties' interests and convincing them of the advantages of a negotiated agreement, even proposing some of the possible outcomes. Afterwards, as a trial judge, I was quite simply unable to use any of the remedies I suggested to the parties earlier. I could decide on the injunction, but I could never arrive at any solution that would

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61. C.C. art. 541 ("Donation shall be made by public deed or private instrument. A verbal donation shall be valid if, dealing with moveable assets of small value, tradition occurs forthwith.")

62. Cf. C.P.C. art. 134-35 (Braz.) (establishing the cases from which a judge can be recused, but there is no mention of holding a settlement conference as a cause of being recused).

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be at least minimally acceptable to one of the parties. I could not enforce even the solution I proposed to them in the hearing.

This case is one example of millions that might happen where the roles of judges are in conflict, generating problems for the judge but also for lawyers, and especially the parties. Particularly regarding the parties' confusions, I cannot imagine the reaction of both plaintiff and defendant when they were reading my decision after listening to my suggestions in the hearing. Thus, "it is unfair to call upon judges to adopt the conflicting roles of adjudicator and settlement agent. The dictates of the adjudicator and settlement agent roles may often be in conflict."<sup>63</sup>

Any advantage of using a trial judge as a settlement officer—such as greater prestige for the process, authority, or powers of persuasion<sup>64</sup>—comes with a high cost: the possibility of undue coercion. Am I saying that judges are careless of people and would do anything to get rid of cases as soon as possible? No, of course not. However, the mere presence of a judge may create such an atmosphere in parties and lawyers. "They have the inherent ability to coerce parties into a settlement either consciously or unconsciously."<sup>65</sup> Therefore, coercion may potentially come about, regardless of the judge's behavior.

All judges are interested in clearing their court's dockets. It is a natural assumption that judges, just like ordinary people, maximize their time and

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63. Alfini, *supra* note 32, at 13.

64. Timothy D. Record, *Alternative Dispute Resolution: Magistrate Judges Used as ADR Neutrals—Benefits and Pitfalls*, 13 ADELPHIA L.J. 1, 18 (1999) ("Trial judges bring with them the 'prestige and power of the judicial system.' Their persuasion powers carry more weight with clients and clients are more likely to be persuaded by hearing the judge's take on their case.").

65. *Id.* at 19 ("Trial judges also carry with them undesirable baggage by virtue of their position in the case. They have the inherent ability to coerce parties into a settlement either consciously or unconsciously. 'Trial dockets are growing and judges have increasingly more to do.' There is peer pressure to clear the docket and keep dispositions high. And some judges have taken the power of their office to heart in settlement conferences. For example, Judge Weinstien in the Agent Orange litigation used tactics considered 'coercive' while another judge sanctioned a party for not settling.").

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efforts while working and want to improve their efficiency and promote their well-being at the courthouse.<sup>66</sup> Cleaning up dockets is surely part of it.<sup>67</sup> Because parties and lawyers are aware of this, they might feel pressure to reach an agreement as soon as possible. They may accept a settlement without full knowledge of all issues necessary to form an informed decision, not least to avoid angering the judge who will decide the case if not settled.<sup>68</sup>

The lack of accountability, information, guidance,<sup>69</sup> and ethical rules<sup>70</sup> regarding what happens in the judge's chambers<sup>71</sup> are other points that may lead to undue coercion. Aside from the accountability problem, which is a similar criticism for both mediation and judicial settlement conferences, the others are less sensitive in mediation, where current theoretical

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66. Richard Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 39-41 (1993) ("Judges are rational, and they pursue instrumental and consumption goal of the same general kind and in the same general way that private persons do. . . . I have focused on the federal judiciary but the approach can and should be extended to elected judges, to Continental European judges, to jurors, and to legislators.").

67. In an interesting analogy, Judge Weinstein attests to the interest of judges in clearing their dockets and the use of ADR for this purpose. Jack B. Weinstein, *Comments on Owen M. Fiss Against Settlement (1984)*, 78 FORDHAM L. REV. 1265, 1265 (2009) ("Federal judges tend to be biased toward settlement. We are the kitchen help in litigation. We clean the dishes and cutlery so they can be reused for the long line of incoming customers. Settlements are the courts' automatic washer-dryers.").

68. Alfani, *supra* note 32, at 13 ("The judge has a personal interest in clearing that case off his or her docket. The parties know this and there is a high likelihood that the parties and their representatives will feel pressure, however subtle, to enter into a settlement agreement.").

69. *Id.* at 14.

70. John C. Cratsley, *Judges and Settlements: So Little Regulation with So Much at Stake*, 17 DISP. RESOL. MAG. 4, 4 (2011).

71. Robinson, *supra* note 37, at 99 ("Some critics have expressed concern that the need to manage dockets may cause judges to be coercive in encouraging settlements. One aspect of this concern is that the settlement efforts of judges are largely conducted in chambers and without the presence of a court reporter; as such, there is rarely a record of exactly how a judge encouraged a particular settlement.").

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developments present that practice and written ethical standards can add a positive aspect to mediation.<sup>72</sup>

The last important difference, but not least, of having a judge instead of a mediator as the settlement officer lays in the disclosure of information. One of the most important advantages of having a non-adversarial way to resolve a dispute is that we have a forum where the officer gathers all the information available and makes an informed decision as to what is the best solution, accommodating the interest of both parties.<sup>73</sup> In order to achieve that goal, information is obtained from the other party as well as furnishing the information required. In this process, neither party need be afraid to put all the cards on the table, as there is no record and the information cannot be used in court.<sup>74</sup> However, if the settlement agent is the judge who will hear the case, everything changes. There is no reason for parties to disclose information during judicial settlement conferences that may put them at a disadvantageous position in a future trial.<sup>75</sup> A judge cannot forget what was said and done by parties and lawyers during the process. The judge knows exactly what people think about their own case, and the judge, the parties, and counsel evaluated the case in advance. All this information may create some psychological bias, and “because of this, lawyers may be tempted to

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72. See James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Question and Tentative Proposals From an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 769 (1997).

73. FRENKEL & STARK, *supra* note 8, at 37 (“If parties can identify and prioritize their own interest and then at the negotiation table are willing and able to explore each other’s interest in an open way, they will often discover that some are shared, some are different but complementary and only some are antagonistic. The more interests that negotiators unearth and the more interests they are willing to lay on the table, the more likely they will be able to find trades that create value by giving everyone more of what they value most, making both sides better off or at least making one of the side better off without hurting the other.”).

74. *Id.*

75. Frank E. A. Sander, *A Friendly Amendment*, 6 DISP. RESOL. MAG. 11, 21 (1999) (“To be effective, the mediation process must inspire candor by both parties, something that is unlikely to happen if the mediator can later don his judicial robe and render a decision, perhaps based in part on confidential information that was imparted to him in the mediation session.”).

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hold back and not share all the information relevant to the case in the settlement conference.”<sup>76</sup>

*D. Is Mediation Beneficial?*

There are controversies as to whether mediation is as beneficial as its supporters argue. They suggest that the process is highly advantageous for parties, enumerating the following positive aspects when compared to litigation:

1 – Cost: Mediation is generally less expensive. One study concludes that the cost in federal government litigation is reduced significantly. The average fee paid to the mediator was \$869.00, saving approximately \$10,735.00 per case.<sup>77</sup>

2 – Time: A lawsuit can take a long time to come to trial, and afterwards years if the case is appealed. Mediation saves time because once litigants reach an agreement, they do not need to wait for a court date and trial proceedings. Even though empirical data is not unanimous, most recent research shows that ADR programs in general reduced disposition time by 10% to 45%.<sup>78</sup> Particularly for federal government litigation, ADR saved 88 hours of staff work and 6 months of time to disposition.<sup>79</sup>

3 – Satisfaction: Though in adjudication there is a third party who imposes a decision to the dispute, in mediation parties may be more satisfied with the outcome because solutions are mutually agreed upon. Empirical studies conclude that mediation brings more satisfaction to parties than

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76. Record, *supra* note 64, at 20.

77. Lisa Blomgren Bingham et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. ON DISP. RESOL. 225, 252 (2009) [hereinafter *Dispute Resolution and the Vanishing Trial*].

78. *Id.* at 241-44.

79. *Id.* at 234.

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adjudication.<sup>80</sup> Even when the case is not settled, parties tend to prefer mediation over judicial settlement conferences or trials.<sup>81</sup> Also, if the first two benefits are true, satisfaction increases when people get their cases resolved in a faster and cheaper way.

4 – Compliance: People are more likely to comply with solutions they reached themselves with obligations they agreed on rather than comply with an imposed decision. An empirical study mentions that the compliance rate for mediated agreements is almost twice that of decisions imposed in litigation.<sup>82</sup>

5 – Customized Solutions: Through mediation, parties can discuss both legal and extralegal matters and reach outcomes more compatible with their particular interests. It allows “people to deal with the emotional as well as financial features of disputes.”<sup>83</sup>

6 – Party Control: The parties are in control of the outcome of their case. They are able to predict the gains and losses in negotiating the best alternative to a negotiated agreement (BATNA).<sup>84</sup>

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80. Daniel Bowling & David Hoffmann, *Bringing Peace Into the Room: the Personal Qualities of the Mediator and Their Impact on the Mediation*, 16 NEGOTIATION J. 5, 5 (2000) (“Empirical studies of the mediation process consistently show high rates of settlement, as well as high levels of participant satisfaction”); Alexander, *supra* note 3, at 16 (“Results coming out of Anglo-American jurisdictions also indicate a high level of satisfaction with mediation.”); *see also* ALLEN LIND & TOM TAYLOR, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 106 (1988).

81. NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* 404 (1999).

82. Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC’Y REV. 11, 20 (1984) (“The likelihood that mediation defendants would live up to the terms of their agreements was almost twice the likelihood that adjudication defendants would fully meet the obligations imposed upon them by the court. . . . The failure to pay anything is about four times as likely in adjudicated as in mediated cases.”).

83. STEPHEN N. SUBRIN ET AL., *CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT* 653 (2012).

84. ROGER FISHER ET AL., *GETTING TO YES: HOW TO NEGOTIATE AGREEMENTS WITHOUT GIVING IN* 98 (1991).

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7 – Empowerment and Self-Determination: When people are facing their own problems and are able to solve the dispute through their own efforts, there is a self empowerment that is important for personal development.<sup>85</sup> They notice that they are able to make their own choices to preserve whatever interest is at risk.

8 – Preservation of Relationships: In some matters (such as child custody, for instance), the relationship between parties will continue after the decision on the case. In these cases, an agreed settlement that addresses both parties' interests can preserve or even heal the relationship because both parties are working together with their eyes on the interests of both. In mediation, litigants and the mediator can focus on both the problem and on the relationship, something that is not likely to happen in court, where the focus will be mainly, if not exclusively, on legal issues.

9 – Workable and Implementable Decisions: In an agreed settlement, parties can refine the details of its implementation, unlike judicial decisions, which are usually not tailored in terms of how their contents will be carried out.<sup>86</sup> This also helps to increase the likelihood of compliance with the solution.

10 – Decisions That Hold up Over Time: Mediated agreements tend to hold up over time.<sup>87</sup> If a future case results, litigants are more likely to utilize a negotiation process to solve their dispute rather than use an adversarial approach.<sup>88</sup>

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85. ROBERT A. B. BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 12 (1994) (stating that mediators' goal in the process is to empower parties and let them grow morally).

86. McEwen & Maiman, *supra* note 82, at 42-43 ("The internal and interactional dynamics of consensual settlement processes combine to create pressures toward compliance that are largely lacking in adjudication. In the interactive process, opportunities exist for reciprocal obligations that provide powerful incentives for performing in accordance with the agreement.").

87. *Id.* at 21.

88. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982).

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The following chart summarizes the comparison between mediation and litigation:

Mediation	Litigation
Saves cost (less expensive)	Costly (motion practice, discovery, and trial)
Saves time	Time consuming
High satisfaction rate	Low satisfaction rate
Flexibility – informal (procedure can be modified to suit the demands of each case)	Rule-bound
Disputants in control of both the dispute and its outcome	Dispute and outcome controlled by the court
Confidential	Public
Creative solutions for mutual benefit (win-win)	Zero sum (win-lose)
Restores broken relationships/reduces hostility between the parties	Focus on legal issues only

*E. The Other Side of the Coin: Can Mediation Be Disadvantageous?*

If there is a group of supporters of mediation, of course there is another group who highlight the potential disadvantages of this method of ADR. Professor Owen Fiss' article *Against Settlement* is the main, and still the most important, study highlighting the disadvantages of mediation.<sup>89</sup> The author accentuates that "settlement is a poor substitute for judgement; it is an

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

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even poorer substitute for the withdrawal of jurisdiction”.<sup>90</sup> Fiss lists some factors that may undermine the negotiated solution, such as the imbalance of power,<sup>91</sup> the absence of authoritative consent,<sup>92</sup> the lack of foundation for continuing judicial involvement,<sup>93</sup> and the lack of substantial justice and improvement of public values.<sup>94</sup>

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90. *Id.* at 1089.

91. *Id.* at 1076. Fiss suggests that wealthy parties are at an advantage over poorer ones, and that the bargaining and outcome may represent the submission of one litigant over another. *Id.* (“First, the poorer party may be less able to amass and analyze the information needed to predict the outcome of the litigation, and thus be disadvantaged in the bargaining process. Second, he may need the damages he seeks immediately and thus be induced to settle as a way of accelerating payment, even though he realizes he would get less now than he might if he awaited judgment. . . . Third, the poorer party might be forced to settle because he does not have the resources to finance the litigation, to cover either his own projected expenses, such as his lawyer’s time, or the expenses his opponent can impose through the manipulation of procedural mechanisms such as discovery.”).

92. *Id.* at 1080. The author highlights the difficulties of generating authoritative consent from corporations, public institutions, and social groups (such as ethnic or racial minorities, inmates of prisons, or residents of institutions for the mentally retarded) and the relevant judicial function for the protection of procedural and substantial guarantees. *Id.* (“There is a conceptual and normative distance between what the representatives do and say and what the court eventually decides, because the judge tests those statements and actions against independent procedural and substantive standards. The authority of judgment arises from the law, not from the statements or actions of the putative representatives, . . .”).

93. *Id.* at 1082-84. Fiss accents that court involvement is necessary after a ruling or settlement, and that the judge is in a difficult position when called to enforce or modify an agreement as he did not participate in the settlement process. *Id.* (“Often, however, judgment is not the end of a lawsuit but only the beginning. The involvement of the court may continue almost indefinitely. In these cases, settlement cannot provide an adequate basis for that necessary continuing involvement, and thus is no substitute for judgment. . . . Soon, however, the inevitable happens: One party returns to court and asks the judge to modify the decree, either to make it more effective or less stringent. But the judge is at a loss: He has no basis for assessing the request. . . . Settlement also impedes vigorous enforcement, which sometimes requires use of the contempt power.”).

94. *Id.* at 1085-86. The author claims that the public values implemented through jurisdiction should be more important than the private outcome, which may not take justice into consideration. *Id.* For Fiss, we must have justice rather than peace. *Id.* (“Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring

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Besides the concerns highlighted by Fiss, critics point out other disadvantageous issues in mediation that may be synthesized as follows:

1 – When It Does Not Result in an Agreement: Some argue that mediation can be more costly and time-consuming for parties when the mediation process does not lead to a settlement.<sup>95</sup> After spending money and time, they decide that the adversarial process is the one most feasible to resolve their dispute. Therefore, they could have started litigation before without bearing the cost of the prior process. Regarding this issue, it is important to note that both sides, supporters and critics, are highly concerned about the settlement rates of any court-annexed mediation program, seeing it as the best way to measure the success of a mediation program. A high settlement rate would justify the supporters and show that the waste of money and time is not a big issue, while a low rate would afford some basis for this kind of criticism. In this sense, both are wrong. Quality, efficiency, or successfulness cannot be measured by a program's settlement rate exclusively. Therefore, even when a settlement does not occur, mediation may be successful in its goals, such as improving the relationship, enhancing communication, and narrowing down some issues for the court proceedings.

2 – Lack of Procedural and Constitutional Guarantees: The informality of mediation could be beneficial—empowering parties to find a customized

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reality into accord with them. . . . A court cannot proceed (or not proceed very far) in the face of a settlement. . . . To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone. The settlement of a school suit might secure the peace, but not racial equality. Although the parties are prepared to live under the terms they bargained for, and although such peaceful coexistence may be a necessary precondition of justice, and itself a state of affairs to be valued, it is not justice itself. To settle for something means to accept less than some ideal.”). Recently, reaffirming his ideals, Fiss argued that “[o]n occasion, bargaining might produce a just outcome, just as the judicial process might sometimes fail and produce an unjust outcome. But there is no reason to presume that the outcome of the bargaining process—a settlement—is just.” Owen Fiss, *The History of an Idea*, 78 *FORDHAM L. REV.* 1273, 1277 (2009).

95. See Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 *U. PA. L. REV.* 2169, 2211 (1993).

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solution for the protection of their interests—yet it may be a disadvantage to the process.<sup>96</sup> Differences of wealth and power may result in the submission of one weaker part and the production of an inequitable agreement.<sup>97</sup> It is the same point that Fiss makes when describing the imbalance of power.<sup>98</sup> Also, some argue that informality constitutes a “second-class justice,”<sup>99</sup> excluding poor litigants from a formal system that guarantees the fairness of the process.

3 – Precedent Cannot Be Set: In a common law system, the disposal of cases is important for the adjudication of future similar ones, where the same rationale will be applied. This is the forward-looking aspect of the precedent. If all or most cases are resolved by mediation, the courts are unable to set judicial policies and rights, and the development of the system is impaired.<sup>100</sup>

4 – Lack of Discovery: If information is not disclosed, the parties will not be able to reach an informed decision. As long as a key tenant of mediation is that a party cannot compel disclosure of all information from another party, the process risks leading to inequitable settlements.

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96. FOLBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND THE LAW* 258 (2010) (“Some commentators also see mediation as inherently unjust, arguing that the very informality of the process allows the intrusion of prejudice that is suppressed by more formal procedures.”).

97. SUBRIN ET AL., *supra* note 83, at 654 (“Because of its greater informality, ADR does not guard against the imbalances in power between disputing parties and instead allows more powerful parties to take advantage of less powerful parties.”).

98. *See* note 57.

99. Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 865, 865 (1998) (analyzing the argument: “From this perspective, mediation programs were largely aimed at the poor and disadvantaged, diverting them away from courts where they had rights and where procedural protections gave them a chance to prevail against more advantaged parties. This critique relies on a view of justice as the vindication of legally defined rights through formal and public procedures. Legal policies that block access to courts where those rights presumably are vindicated thus demand scrutiny.”).

100. *See generally Dispute Resolution and the Vanishing Trial, supra* note 77, at 234.

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*F. So, is Mediation Worthwhile?*

Because there are vigorous supporters of mediation and critics of the process, it is important to state that its harmful aspects are less frequent in quantity and less important in quality when compared to its benefits. Just like adjudication, mediation is not perfect, presenting some risks that will be lesser or greater depending how it is used and developed.<sup>101</sup> This aspect underlines the importance of adjusting mediation to fit the particular population served and the context in which they live. However, the positive outcomes of the process overcome its potential disadvantages, and its usage may bring positive outcomes for parties and for the judiciary as well.

The first objection to the imbalance of power problem is that it is even greater in adjudication. If one party is tremendously more powerful and richer than the other, that party can shoulder the cost more easily and may also make the proceedings even more expensive for the poorer through tactics such as endless and expensive discovery. As a result, nothing will be left for the poorer party but to accept whatever is offered before trial. At least in mediation, if the party feels that money is whirling away, abandoning the process without justification or harm is allowed.

Moreover, the mediator can adjust this imbalance and can guarantee the self-determination of the poorer party, which is why mediation is a structured process. The parties control the outcome but the mediator controls the process.<sup>102</sup> From the beginning of the process, a knowledgeable mediator can balance the parties' positions, laying down clear ground rules and distributing time between the parties in a way that both can formulate their impressions equally, consequently empowering the disadvantaged party to overcome the imbalanced circumstances. The use of caucus is another

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101. For a good overview of this discussion, see Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1 (2012).

102. About the structure and mediator's role, see FRENKEL & STARK, *supra* note 8, 123-32.

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technique that may enable and empower disadvantaged parties in mediation.<sup>103</sup>

The mediator's intervention may create tension with the neutrality of the process. The mediator's ability to protect the weaker party from an unfair agreement might be seen as a lack of impartiality. However, this substantive intervention does not violate the neutrality of the process as long as the mediator does not advise parties about the options constructed during the discussion or does not substitute parties' will.<sup>104</sup> Instead of choosing the best alternatives for parties, a diligent mediator may raise questions to the parties—even about substantive law or future evidence collection—to construct a truthful informed decision for an equitable and feasible solution for their conflict. In case of litigation, a virtuous judge would not be able to go so far because he could be seen as judging the case in advance. Because mediators have no decision-making power, that would not be a valid objection to the mediation process.

In addition of raising question, Moore proposes other techniques a mediator may use to overcome the imbalance of power: managing communication between and within the parties, arranging the physical environment, encouraging and at times directing the exchange of information, and adjusting the pace of the sessions.<sup>105</sup>

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103. Caucus designates "a confidential mediation session that the mediator holds with an individual party to elicit settlement offers and demands. When separate caucuses are used, the mediator typically shuttles between the two (or more) sides of a dispute to communicate offers and demands." BLACK'S LAW DICTIONARY 248 (9th ed. 2009).

104. A good example is proposed in Omer Shapira, *Conceptions and Perceptions of Fairness in Mediation*, 54 S. TEX. L. REV. 281, 306 (2012). For example, if one party is incapable of understanding the mediator or other parties, the party should receive assistance in various forms, such as translation, slower talking, or additional time for expressing himself, even though this would mean that he received a different treatment. *Id.* To ignore the differences between the parties in such circumstances and insist on treating the parties in the same manner would in fact favor the stronger party. *Id.*

105. CHRISTOPHER MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 327 (2d ed. 1996).

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In the United States, some states have standards and rules on this issue to guarantee a fair process. For example, in Illinois the mediator may suspend or terminate the process when facing an impairment, such as when a party “appears not to understand the negotiation, or the prospects of achieving a responsible agreement appear unlikely.”<sup>106</sup> Michigan has similar rules that authorize the proactive mediator behavior when facing an imbalance of power, suggesting that the mediator “should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party’s capacity to comprehend, participate, and exercise self-determination.”<sup>107</sup> Specifically, the mediator “shall not continue the mediation process” if this imbalance is not overcome.<sup>108</sup> Judges do not have the power to end a case without a final disposal, exemplifying how the imbalance of power may be better resolved in the mediation process.

Overseas, a study shows that mediation can be used in places of high economic and cultural diversity as a capacity-building program.<sup>109</sup> Such a program in Liberia “helped women take action together and increased mutual acceptance; and to develop enhanced trauma recovery skills.”<sup>110</sup> Along the same path, a study concludes that mediation can be used to empower people with disabilities.<sup>111</sup> This shows the transformative character of mediation when designed for a particular situation and context.

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106. 17th Cir. R. 6(a)(4)(b).

107. MICH. SUP. CT., MEDIATOR STANDARDS OF CONDUCT, STANDARD VII(2)(C) (2013).

108. *Id.*

109. Gail Ervin et al., *Mediators Beyond Borders: How Mediators Can Build Partnerships for a Culture of Peace*, in 2 TIEMPO DE MEDIACIÓN LIDERAZGO Y ACCIÓN PARA EL CAMBIO 15, 19 (María Alejandra Ramírez Cuenca ed., 2012).

110. *Id.*

111. Gloria Álvarez Ramírez, *Mediación y Discapacidad*, in TIEMPO DE MEDIACIÓN LIDERAZGO Y ACCIÓN PARA EL CAMBIO 76, 78 (María Alejandra Ramírez Cuenca ed., 2012) (“Por tanto, resulta interesante volver la mirada hacia la mediación como instrumento de gestión de los conflictos en el ámbito de la discapacidad, valorando su carácter equitativo, participativo, y

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Regarding the absence of authoritative consent, current practice disallows Fiss' hypothesis. In multiparty and mass litigation, which is dominated by large, faceless companies, mediation is used to achieve early solutions that benefit both the companies and the public harmed.<sup>112</sup> The Zyprexa users' claims are an illustrative example of this. Most of the 30,000 litigants have settled their dispute with the pharmaceutical producer without any problem in recognizing the consent of any party.<sup>113</sup> Moreover, mediation is a better process for resolving these kinds of cases, which would

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fundamentalmente, la fuerza personal que imprime a las partes en el afrontamiento del conflicto, en la corresponsabilización hacia las situaciones. Diseñar y ofertar estructuras de mediación que incidan en la autonomía individual, en la libertad para tomar las propias decisiones y en la capacidad de cada persona para superar las diferencias, supone un paso significativo hacia la transformación individual y social respecto de la discapacidad; pero sobre todo, supone un reto para alcanzar una sociedad pacífica, justa y respetuosa con la diferencia.” [“Therefore, it is interesting to look back at mediation as a tool for conflict management in the field of disability, assessing this equitable, participatory and, fundamentally the personal strength it gives to the parties in conflict, in the joint responsibility in any situation. Design and offer mediation structures that affect individual autonomy, the freedom to make their own decisions and the ability of each person to overcome differences is a significant step toward individual and social transformation regarding disabilities issues; but above all, a challenge to achieve a peaceful, just and respectful society with differences.”] (author's translation)).

112. Weinstein, *supra* note 67, at 1266.

113. *Id.* at 1266 (“Most mass tort cases must be disposed of by settlement. Trying each of them would completely overwhelm the nation's courts. For example, Zyprexa, an antipsychotic drug, was administered to hundreds of thousands of people with psychiatric illnesses, causing a large number of them to suffer serious side effects such as weight gain and diabetes. Zyprexa users have brought claims and potential suits based on the drug company's failure to warn of these dangerous side effects and on illegal sales programs for off-label usage. More than 30,000 of these cases were transferred to the U.S. District Court for the Eastern District of New York from federal district courts throughout the United States pursuant to an order of the Judicial Panel on Multidistrict Litigation. Almost all of these individual Zyprexa claims have been settled. Similar cases have been litigated and almost all have been settled in state courts. Had all such cases been tried, they would have overwhelmed our courts for many years. There are less than 2,500 civil jury trials in the U.S. federal courts each year. Trying tens of thousands of individual Zyprexa and other civil cases would require multiplying the number of federal and state judges. This prospect alone casts serious doubts on Professor Fiss's aspiration of litigation-without-settlement.”).

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otherwise derail the courts, consuming the greater part of their time and resources.

One of the supposed pitfalls of mediation is the lack of foundation for continuing judicial involvement. However, this conclusion is unwarranted. First, any settlement is legally enforceable. Therefore, judicial overview and involvement will occur if any of the parties fail to perform his or her assumed obligations. Lack of participation in the previous events where the agreement was reached does not impair the judges' duty. Each case that comes to court involving a breach of an obligation or even a matter involving the free will of parties—such as contract cases—does not have previous judicial participation and is fully cognizable. There is no reason for any impairment of a judge to implement a breached agreement.

Second, there are cases where a judge must oversee and implement a settlement. In class action settlements, the agreement only becomes binding after the judge's approval.<sup>114</sup> In a hearing the judge will determine if the solution is "fair, reasonable, and adequate".<sup>115</sup> However, he cannot change the settlement, discuss the merits of the case, or discuss the strength of the parties' pleadings. If a judge can continue to be involved with this kind of settlement, what would impair that judge from being involved in other agreements? No reason, I would say.

The question of a lack of justice or legal guarantees demands another version of justice. Justice is usually taken as a metaphysical idea that exists regardless of constraints of time and space.<sup>116</sup> In this version, there is a definition of one or more criteria to serve as a basis for the equitable distribution of benefits and obligations.<sup>117</sup> Once the criteria are defined, the act the act can adequately be analyzed as just or unjust depending on how

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114. FED. R. CIV. P. 23 (e).

115. FED. R. CIV. P. 23 (e)(2).

116. See generally ARISTOTLE, *NICOMACHEAN ETHICS* (2009) (explaining the classical vision of justice that derives from ancient philosophers).

117. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

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well it correlates to the criteria. This is distributive justice, which “emphasizes fairness in the allocation of outcomes.”<sup>118</sup> This is the typical kind of justice used when someone is referring to legal processes. Law represents the criteria for justice adopted by a society, and the courts guarantee the application of such standards to individual cases. When critics complain of mediation’s lack of justice, they are usually referring to distributive justice.

Regarding litigation and ADR methods, each form of dispute resolution has its own standpoint of justice.<sup>119</sup> Thus, there is another kind of justice that is just as important as distributive, and critics often do not take it into consideration.<sup>120</sup> This is procedural justice, whose main concern is “with the fairness of the procedures or processes that are used to arrive at outcomes.”<sup>121</sup> Mediation can achieve justice if we adopt a procedural approach, where “justice entails empowerment of individuals to shape decisions about their own lives and conflicts on terms that are meaningful to them.”<sup>122</sup> Self-determination is the central figure of procedural justice in

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118. Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 34 (2008) [hereinafter *Designing Justice*].

119. Love, *supra* note 15, at 29. The author creates an “I have a dream” speech for a judge, an arbitrator, and a mediator, which contain the elements of justice pertaining to each view. *Id.*

120. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L. Q. 787, 818 (2001) (“[P]erceptions of procedural justice profoundly affect people’s perceptions of distributive justice, their compliance with the outcomes of decision-making procedures and processes, and their perceptions of the legitimacy of the authorities that determine such outcomes. Perhaps surprisingly, perceptions of distributive justice generally have a much more modest impact than perceptions of procedural justice.”).

121. *Id.* at 817.

122. McEwen & Williams, *supra* note 99, at 865. A criticism of such position may be found in Ellen Waldman, *The Concept of Justice in Mediation: A Psychobiography*, 6 CARDOZO J. CONFLICT RESOL., 247, 250-263 (2005) (stating that each person’s conception of justice is based on a psychological autobiography according to past experiences).

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mediation.<sup>123</sup> This is the perception of parties who undergo the process, regarding mediation as “procedurally just.”<sup>124</sup>

Substantive justice has certain limitations because it represents a bivalent model with a Manichean approach of good/bad, right/wrong, or just/unjust that does not fit the complexity of modern life. The inflexibility of such dichotomies raises difficulties for the implementation of justice.<sup>125</sup> Therefore, the procedural justice approach may lead to better results for parties because they can find a place in between the dichotomies where both are satisfied.

The most powerful issue in Fiss’ analysis (that is highly controversial even today) is the implementation of public values through litigation,<sup>126</sup> which also addresses the lack of precedent problem. Fiss assumes that the main function of adjudication is not to resolve individual cases, but to advance public values like the ones laid down in the Constitution.<sup>127</sup> Scholars are still debating the issue and there is no firm answer to it.<sup>128</sup> Fiss is correct when he states that adjudication has an important role in guaranteeing the Constitution and the law of the land.<sup>129</sup> There is no doubt that cases such as *Brown*<sup>130</sup> and *Wade*<sup>131</sup> were more feasible for jurisdiction

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123. For more about self-determination in court-annexed mediation programs, see Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L. Q. 47, 90-92 (1996).

124. McEwen & Williams, *supra* note 99, at 867.

125. Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 926 (1998) (classifying legal rules as ill-equipped to promote justice due to their rigidity and inflexibility).

126. Fiss, *supra* note 57, at 1085-86.

127. *Id.* at 1089.

128. In 2009, Fordham Law School promoted a symposium to celebrate the 25th anniversary of Fiss’s *Against Settlement* where the topic of implementation of public values was one of the most discussed. Symposium, *Against Settlement: 25 Years Later*, 78 FORDHAM L. REV. 1117 (2009).

129. FERNANDO VIEIRA LUIZ, *TEORIA DA DECISÃO JUDICIAL: DOS PARADIGMAS DE RICARDO LORENZETTI À RESPOSTA ADEQUADA À CONSTITUIÇÃO DE LENIO STRECK* (2012).

130. *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955).

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during their time period. The public policies questioned in the cases have an interest larger than the parties involved.<sup>132</sup> However, my point in defending mediation is another, answered by analyzing two questions: 1) Does the current practice of litigation guarantee the achievement of public values in all cases?; and 2) Can mediation and litigation live together in order to achieve these public values?

To answer the first question, I would like to analyze the current practice in courthouses. If Fiss is completely right, trials should be encouraged and the system must be designed to have as many juries and appeals as possible because they are the expression of these public values.<sup>133</sup> Still, as time goes by, more and more cases are not getting to trial.<sup>134</sup> This is not just an effect of mediation or other ADR methods. Summary judgment is the “acknowledged ‘workhorse’ of federal pretrial practice.”<sup>135</sup> Also, since *Twombly*<sup>136</sup> and especially *Iqbal*,<sup>137</sup> the motion to dismiss under Rule

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131. *Roe v. Wade*, 410 U.S. 113 (1973).

132. Sander, *supra* note 6, at 84 (“I am not maintaining that cases asserting novel constitutional claims ought to be diverted to mediation or arbitration. On the contrary, the goal is to reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique capabilities.”).

133. Fiss, *supra* note 57, at 1089.

134. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUDIES 459, 459 (2004).

135. Bernadette Bollas Genetin, *Summary Judgment and the Influence of Federal Rulemaking*, 43 AKRON L. REV. 1107, 1107 (2010) (citing Robert K. Smits, *Federal Summary Judgment: The “New” Workhorse for an Overburdened Federal System*, 20 U.C. DAVIS L. REV. 955 (1987)).

136. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). An empirical study, conducted before the *Iqbal* opinion, concludes that courts have applied *Twombly* to various non-antitrust settings, just citing the case “without any explanation of the standard.” Anthony Martinez, *Plausibility Among the Circuits: An Empirical Survey of Bell Atlantic Corp. v. Twombly*, 61 ARK. L. REV. 763, 785 (2009).

137. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

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12(b)(6) is being widely used (and granted), and it is harder to even get to the discovery phase of trial.<sup>138</sup>

Moreover, the Supreme Court's discretionary jurisdiction is not compatible with Fiss' premises. If the Constitution determines the public values of society, adjudication implements those values, and the Supreme Court is the highest authority in interpreting the Constitution, then following Fiss' argument, it would be important for the Court to adjudicate all cases before it.<sup>139</sup> The higher the number of cases the Court adjudicates, the more public values would be enforced. However, this is not the case historically. Throughout their history, Congress and the Supreme Court have adopted measures to reduce the Court's caseload and restrain its jurisdiction. The creation of nine courts of appeals in 1891,<sup>140</sup> the creation of the writ of certiorari in 1925,<sup>141</sup> and its role expansion in 1988<sup>142</sup> are examples of such measures that do not fit Fiss' ideas. In conclusion, even though courts are important for the implementation of public values, this is not what they do most of time when they are disposing of cases as soon as possible, regardless of any analysis of the cases' merits and the history of the administration of justice focuses on other areas.

Fiss may not be completely right, but he is not completely wrong either. The answer to the second question is that litigation and mediation may live together as complementary processes. There is a place in between. This is already happening. Galanter uses the expression "litigotiation" to explain it.<sup>143</sup> Modernly, the court system "gives parties bargaining chips or

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138. Stephen R. Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1294 (2010).

139. Fiss, *supra* note 57, at 1089.

140. 28 U.S.C.A. ch.3 (1891).

141. Judiciary Act of 1925, 43 Stat. 936 (1925).

142. Act to Improve the Administration of Justice, 102 Stat. 663 (1988).

143. Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

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counters,” or “bargaining endowments.”<sup>144</sup> After parties mobilize the courts, they will pursue a strategic settlement with a better bottom line. Even so, it is a negotiated agreement, which keeps fairness (even from a substantial viewpoint) while using judicial analysis of the case as the basis for any proposal and untimely, for the solution.

In conclusion, many of the alleged negative aspects of mediation are highly questionable, and even if some are truly prejudicial, the benefits of the process overcome them. Therefore, it is worth promoting mediation as an important alternative dispute resolution mechanism that obviously will not replace litigation, but will help it achieve its mission of peace-making.

### III. DESIGNING AN APPROPRIATE COURT-ANNEXED MEDIATION PROGRAM IN BRAZIL

#### A. *State of the Art of Mediation in Brazil: How Are Things?*

It is important to highlight mediation’s state as an art form in Brazil in order to adapt a court-annexed program to a Brazilian context because cultural and legal backgrounds influence how mediation works in practice. As previously stated, the development of mediation in civil law countries is slower when compared to common law jurisdictions.<sup>145</sup> This seems to be the case in Brazil. ADR in general and mediation in particular are still new concepts to Brazilian reality.<sup>146</sup> There is no culture of using non-adversarial

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144. *Id.* at 268-69.

145. Alexander, *supra* note 3, at 7 (“In contrast, civil law countries have displayed a greater reluctance to embrace the practice of mediation to settle legal disputes. Compared with the common law experience, mediation in jurisdictions such as Germany, Austria, Denmark, Scotland, Italy, France and Switzerland has travelled, and is still travelling, a more difficult path to recognition as a legitimate and valuable alternative to litigation.”).

146. For an historical overview of ADR in Brazil, see Valeria Ferioli Lagrasta Luchiar, *Comentários da Resolução Nº 125, do Conselho Nacional de Justiça, de 29 de Novembro de 2010*,

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methods to resolve disputes, and society is accustomed to the idea that justice can only be found in the judge's ruling.<sup>147</sup> Also, there is confusion as to what mediation is. Few people (or even jurists) think of it as a structured process. A good mediator is commonly viewed as a naturally gifted person who has the right "hunch" to settle cases, but not a person who can be trained in a set of techniques to master the process.

This is reflected in the lack of legal education in the field. It is rare to find any course in law schools dedicated to this topic. The mentality forged in law schools and applied in legal practice is that the judge's imposed decision is the only road to social pacification.<sup>148</sup> Law students are trained only to litigate and the clinical courses focus on litigation alone. Usually, law schools offer one term of clinical training in each main area of substantive law (family, employment, criminal, and civil law)<sup>149</sup> in their curriculum and the procedural aspects of each field. Therefore, mediation in Brazil is an empiricist endeavor of jurists; a learn-by-doing process whereby reiterated practices have become a behavior for the resolution of new cases. Even though there have been efforts to develop mediation in Brazil (usually through the courts), there has been no advanced theory to explain the practice of mediation—in other words, there is a mismatch between ADR theory and its practice. This is not just a Brazilian problem, it is a common gap created in places "where practice skills have developed more rapidly

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in *MEDIAÇÃO NO JUDICIÁRIO: TEORIA NA PRÁTICA E PRÁTICA NA TEORIA* 283-90 (Claudia Frankel Grosman & Helena Gurfinkel Mandelbaum eds., 2011).

147. Kazuo Watanabe, *A Mentalidade e os Meios Alternativos de Solução de Conflitos no Brasil*, in *MEDIAÇÃO E GERENCIAMENTO DO PROCESSO: REVOLUÇÃO NA PRESTAÇÃO JURISDICIONAL 7* (Ada Pellegrini Grinover et al. ed., 2008); see also Fabiana Marcello Goncalves, *Mediação Pós-Judicial: Um Caminho Alternativo Rumo à Pacificação Social*, 9 *REVISTA ELETRÔNICA DE DIREITO PROCESSUAL* 142, 154 (2012).

148. Watanabe, *supra* note 147, at 7.

149. In civil law jurisdiction, "civil law" means the issues that are codified in the Civil Code. Usually, it encompasses the following issues: torts, contracts, property, commercial law, succession and wills, and family law.

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than theory.”<sup>150</sup> The gap produced by lack of theory behind these practices is being filled by a new generation of scholars,<sup>151</sup> lawyers,<sup>152</sup> and judges<sup>153</sup> who are committed to the development of ADR mechanisms in Brazil. “[A]t an incipient stage, which is the case of Brazilian law, a certain amount of education and pedagogy is called for.”<sup>154</sup>

The legal framework of ADR mechanisms in Brazil is inadequate. Even though there is a statute addressing arbitration,<sup>155</sup> it is important to note that there is no specific law regarding mediation in Brazil. Currently, there is a bill for a new law on mediation that has been under discussion since 1998.<sup>156</sup> It is in the final phase of discussion and voting at the Legislative Branch, with the expectation that it will be approved soon.<sup>157</sup>

Even though there is no specific law concerning mediation, there are some provisions in the Brazilian legal system that try to uphold the process

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150. Alexander, *supra* note 3, at 18.

151. Professors Humberto Dalla Bernardina de Pinho and Kazuo Watanabe.

152. Gabriela Asmar, director of the NGO Parceiros Brasil.

153. Judge Andre Gomma de Azevedo, from the State of Bahia, Appellate Judge Roberto Bacellar, from the State of Parana, Appellate Judge Victor José Sebem Ferreira, from the State of Santa Catarina, Federal Appellate Judge Germana Moraes, and Justice Marco Aurélio Gastaldi Buzzi, from the Higher Court of Justice, are judges that stand out for their performance in mediation.

154. Humberto Dalla Bernardina de Pinho, *A Procedural Reading of Human Rights: The Fundamental Right to Proper Protection and the Option for Mediation as a Legitimate Route for the Resolution of Conflicts*, 44 REVISTA JURÍDICA UNIVERSIDAD DE PUERTO RICO, 545 (2010) [hereinafter *A Procedural Reading*].

155. Lei No. 9.307, de 23 de setembro de 1996, D.O.U. de 24.9.1996. (Brazil), available at [https://www.planalto.gov.br/ccivil\\_03/leis/19307.htm](https://www.planalto.gov.br/ccivil_03/leis/19307.htm) (in Portuguese). There is an English version available at: <https://abearb.org/arquivos/138/abearb---bal-final.pdf> or at <https://cbar.org.br/site/legislacao-nacional/lei-9-30796-em-ingles>.

156. *A Procedural Reading*, *supra* note 154, at 552 (“In the year 2008 Legislative Bill 4,827 notched up ten years in congress, having received various drafts while generating endless debate on the mechanism of mediation in the most varied sectors of civil society.”).

157. For the development and history of this project, see Humberto Dalla Bernardina de Pinho, *O Novo CPC e a Mediação: Reflexões e Ponderações*, available at: [http://www.humbertodalla.pro.br/arquivos/O\\_novo\\_CPC\\_e\\_a\\_Mediacao.pdf](http://www.humbertodalla.pro.br/arquivos/O_novo_CPC_e_a_Mediacao.pdf).

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or something like it. In labor disputes, parties can contact Prior Conciliation Commissions before filing a suit.<sup>158</sup> These commissions were created in 2010 and consist of both employers' and employees' representatives appointed by companies or labor unions.<sup>159</sup> While there is a period of ten days after the employee's complaint for the first mediation session to take place, there is no specific deadline for the process.<sup>160</sup> This is why statutes of limitation will not count during the period while the parties are trying to mediate the case. If the parties reach a settlement, the decision is submitted to the Labor Court, which will then pass a decree.<sup>161</sup> If they do not reach a settlement, they get a document stating that they tried to resolve the dispute before going to court.<sup>162</sup>

In civil matters, litigants can negotiate on their own or look for private mediation services before going to court.<sup>163</sup> However, due to its incipient development in Brazil, people would most likely not be aware of the existence of private mediation providers or would not be willing to pay for this service. Moreover, even if parties are aware and agree with fees, it would be rare to find trained people who could serve as private mediators.

Because Brazil lacks a culture of trying to resolve the case before filing suit in court, most mechanisms to settle a case are used during the court proceedings. This is illustrated in Brazil by the ordinary proceeding of a civil action (the most common proceeding). After the complaint and the response, the judge will set a preliminary hearing, in which he or she will try to settle the case. If they settle, the judge will pass a final decree. If not, the

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158. Consolidation of Labor Law § art. 625-A (1943) ("Companies and unions may establish Prior Conciliation Commissions, equally composed, with the representative of the employees and employers, for trying to conciliate individual labor conflicts.").

159. *Id.*

160. *Id.* art. 625-F.

161. C.P.C. art. 269, III (Braz.).

162. Consolidation of Labor Law § art. 265-F (1943).

163. C.C. art. 840 (stating that is lawful to prevent or terminate disputes through mutual concessions).

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judge will analyze the procedural issues and set a new hearing for taking evidence. For the purposes of this study, there is no need to analyze the pleas, how evidence is collected, or even further steps of the civil action.<sup>164</sup> It suffices to highlight how the justice system works regarding mediation. Many scholars regard this preliminary hearing as a “judicial mediation”<sup>165</sup> process. I disagree. By definition, mediation is the process where a third person, who has no decision-making power, helps the litigants to find a mutually agreed outcome. When the person playing that role is the same as will decide the case if not settled, the process cannot be labeled as mediation.

Confusion between mediation and other processes, such as judicial settlement conferences, should be avoided. Judicial mediation is a different process. It will happen when a judge who will not hear the case at any other stage of the proceedings serves as a mediator. In this case, the judicial officer is appointed specifically to mediate between the parties, while other judges would be in charge of previous proceedings (such as pleading) and would hear the case, if it is not settled.

The United Kingdom has an interesting program of judicial mediation, where the Employment Tribunals can refer cases to mediation held by Mediation Case Management Discussion, in which a trained Employment Judge will serve as mediator.<sup>166</sup> However, “the Employment Judge mediating is precluded from any further involvement in the case.”<sup>167</sup>

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164. Regarding civil procedure in Brazil, see ANGEL R. OQUENDO, *LATIN AMERICAN LAW* (2d ed. 2011). See also Keith S. Rosenn, *Civil Procedure in Brazil*, 34 AM. J. COMP. L. 487, 487 (1986).

165. *A Procedural Reading*, *supra* note 154 (“Incidental or judicial mediation can already be done today under our legal system, in two cases: either the judge himself handles the process, acting as a conciliator or appointing an assistant to this end [articles 331 and 447 of the CPC], or the parties ask the judge to suspend the proceeding, for a maximum of six months, to hold conciliation negotiation, out of court [article 265, sub-item II, with 3<sup>rd</sup> paragraph, also of the CPC].”).

166. Regarding the UK program, see PETER URWIN ET AL., *EVALUATING THE USE OF JUDICIAL MEDIATION IN EMPLOYMENT TRIBUNALS* (2010), available at: <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/evaluating->

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In Brazil, the hearings that try to settle disputes are more like the U.S. judicial settlement conferences<sup>168</sup> than mediation itself because the same judge who will try to settle the case is the one that will hear it, if not settled. Even in other kinds of civil proceedings the same route is taken.<sup>169</sup> There are two exceptions to this in Brazil. In the summary proceeding<sup>170</sup> and in the small claims courts<sup>171</sup> the judge can appoint an assistant to mediate the case under his supervision. However, even in these cases, there is no confidentiality clause. Since the conciliator is supervised by the judge, the judicial officer is still in charge of the process and may participate in the sessions. Therefore, communication between the judge and the conciliator may—and probably will—happen. Furthermore, incidental mediation may happen. Litigants can ask the judge to suspend the proceedings for a period no longer than six months.<sup>172</sup> During this time the parties may settle the case through any ADR method, including mediation. In this scenario, the negotiation process takes place out of court. If an agreement is reached, the court passes a decree on it. If not, the proceeding continues until a final decision.

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judicial-mediation-march10.pdf; see also, Andrew Boon et al., *What Difference Does It Make? Facilitative Judicial Mediation of Discrimination Cases in Employment Tribunals*, 40 INDUS. L.J. 45, 45-81 (2011).

167. URWIN ET AL., *supra* note 166.

168. In some jurisdictions, even these conferences are sometimes held by magistrate, whose courts will not hear the case.

169. Such as alimony and divorce cases.

170. C.P.C. art. 277 (Braz.) (“The judge will appoint a conciliation hearing to be held within thirty days, giving notice to the defendant with at least ten days and under warning provided in § 2 of this article, determining the attendance of the parties.” (author’s translation)).

171. Lei No. 9099/95, art. 22, de 26 de setembro de 1995 (“The conciliation shall be conducted by a career or a lay judge, or by a conciliator under judge’s guidance” (author’s translation)).

172. C.P.C. art. 265, II, (3) (Braz.) (“The suspension of proceedings by agreement of the parties, dealt in section (II), can never exceed six (6) months; expiring that period, the clerk will send the file to the judge, who will order the continuation of the suit.” (author’s translation)).

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## 1. Current Public Policies

At present, Brazil has 92.2 million cases pending.<sup>173</sup> This immense backlog is a problem that affects all levels of the Brazilian justice system. For instance, at the Federal Supreme Court (STF) there are 69,277 cases pending.<sup>174</sup> In order to face this problem, Congress approved Constitutional Amendment n. 45 (called “Reform of the Judiciary”) on December 30, 2004.<sup>175</sup> The main aim was to improve the judiciary’s efficiency, enhancing its capacity to dispose of cases more expeditiously.

Creation of the National Council of Justice (CNJ) was one the main actions taken to improve the administration of justice in Brazil.<sup>176</sup> The CNJ was created to be the policymaker for the judiciary, regarding administrative and financial aspects of the courts and case management.<sup>177</sup> Since its inception, the CNJ has demonstrated that non adversarial processes would be favored.<sup>178</sup> Its first measure was promoting “settlement weeks” nationally once or twice a year.<sup>179</sup>

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173. *Justice in Numbers Project*, NATIONAL COUNSEL OF JUSTICE, <http://www.cnj.jus.br/programas-de-a-a-z/eficiencia-modernizacao-e-transparencia/pj-justica-em-numeros> (last visited Jan. 7, 2015).

174. *Statistics of the Federal Supreme Court*, FEDERAL SUPREME COURT, <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=acervoatual> (last visited Jan. 7, 2015).

175. Explanatory Memorandum No. 204, de 16 de Dezembro de 2004, MINISTRY OF JUSTICE DE 12.16.2004 (Brazil), at 8.

176. See C.F. art. 103-B (Braz.) (“The National Council of Justice is composed of 15 (fifteen) members appointed for a two-year term of office, with one reappointment permitted . . .” (author’s translation)).

177. CONSTITUIÇÃO FEDERAL [C.F.] art. 103-B, § 4º (Braz.).

178. *Access to Justice*, NATIONAL COUNSEL OF JUSTICE, <http://www.cnj.jus.br/programas-de-a-a-z/acesso-a-justica> (last visited Feb. 8, 2015). CNJ developed its access to justice policies based in settlement weeks and mediation and conciliation programs. *Id.*

179. *Id.*

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In 2010, the CNJ issued Resolution No. 125, which established the policies for non adversarial methods of dispute resolution in Brazil.<sup>180</sup> According to this Resolution, mediation and conciliation are the most important ADR methods for courts' implementation.<sup>181</sup> For the implementation of such ADR techniques, each court must create a "Permanent Center of Consensual Methods of Conflict Resolution" to develop strategies locally, provide training, and start court-annexed mediation programs.<sup>182</sup> Also, due to the lack of awareness of mediation among judges, lawyers, prosecutors, and court staff, the CNJ and the Ministry of Justice created the National School of Mediation and Conciliation to provide basic and advanced training in ADR techniques.<sup>183</sup> Most training programs are offered through distance learning and some through multipliers who have received personal training at the CNJ.<sup>184</sup>

Before the Resolution No. 125, most courts were trying to initiate their own court-annexed programs. For example, there were some attempts in the state of São Paulo,<sup>185</sup> Rio Grande do Sul,<sup>186</sup> and the Federal District.<sup>187</sup> The main problem was the lack of uniformity in those programs; the way courts provided such services varied widely, and it was really difficult to know what initiatives each court adopted and how they managed their ADR

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180. C.N.J. Res. 125, available at [www.cnj.jus.br/images/atos\\_normativos/resolucao/resolucao\\_125\\_29112010\\_16092014165812.pdf](http://www.cnj.jus.br/images/atos_normativos/resolucao/resolucao_125_29112010_16092014165812.pdf).

181. *Id.* art. 1º.

182. *Id.* art. 7º.

183. *Ambiente Virtual de Aprendizagem*, ESCOLA NACIONAL DE MEDIAÇÃO E CONCILIAÇÃO, <http://moodle.cead.unb.br/enam/> (last visited Feb. 8, 2015) [hereinafter ENAM].

184. *Id.*

185. Luchiari, *supra* note 146, at 290-92.

186. GENACÉIA DA SILVA ALBERTON & IZABEL CRISTINA PERES FAGUNDES, *Experiência Pioneira no Poder Judiciário do Rio Grande do Sul – Brasil*, in 2 TIEMPO DE MEDIACIÓN LIDERAZGO Y ACCIÓN PARA EL CAMBIO 23, 23-26 (María Alejandra Ramírez Cuenca ed., 2012).

187. GOMMA DE AZEVEDO, *supra* note 20.

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programs.<sup>188</sup> It is true that this situation still persists today. However, even though the Resolution does not solve many of the critical problems people face when starting a program, at least there is more basic guidance now; a path to follow. I hope it creates some uniformity among programs and helps to foster a well informed view of mediation as a structured process in Brazil.

The Resolution sets out the design of mediation programs that must be implemented by the courts. It is based in the creation of “Judicial Centers for Conflict Resolution and Citizenship” (centers).<sup>189</sup> The main function of these centers is to provide mediation services under the judiciary’s oversight.<sup>190</sup> On January 31, 2013, the CNJ amended Resolution No. 125, presenting considerable changes.<sup>191</sup> It maintained the same structures and institutions, but changed their organization, updated the functions, set new principles for mediation programs, and conceived of new goals to be achieved. When creating the Resolution and its amendment, the CNJ, as a policymaker, had to make some important decisions. In spite of the improvement of mediation in general and court-annexed programs specifically, plus the advance in many issues involving the process, some critical aspects were not addressed and others were wrongly stated.<sup>192</sup>

Discussion of the CNJ’s policies for such centers is the principal part of this study. It is important to stress that to date few centers have been

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188. Some states have planned court-annexed programs, such as São Paulo, Paraná, and Santa Catarina. However, there is little information available on how each state runs their program, how it works, and the results of program creation.

189. C.N.J. Res. 125, art. 8º.

190. *Id.* art. 9º.

191. C.N.J. Res. 125, Emenda Regimental n. 01/2013 de 24 de abril de 2013, available at [http://www.tjac.jus.br/downloads/pdf/emendas\\_regimentais/2013/emenda\\_regimental\\_TJAC\\_01\\_13.pdf](http://www.tjac.jus.br/downloads/pdf/emendas_regimentais/2013/emenda_regimental_TJAC_01_13.pdf).

192. *Id.* For example, the structure of the process is not addressed and the minimum requirements to become a mediator are wrongly stated. *Id.*

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installed in the way outlined by the Resolution.<sup>193</sup> Actually, most of them are a continuation of the court's previous independent programs,<sup>194</sup> and it is hard to say how much their services are consistent with the CNJ's model. From the 2013 amendment, the CNJ gave courts four months to start running the program in the capital cities of each state and a year to initiate it in other counties.<sup>195</sup> However, most courts are still planning and organizing such institutions by providing training to judges and court staff.<sup>196</sup> It is therefore

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193. São Paulo was the first state that created such centers. *Notícias Relacionadas*, NATIONAL COUNSEL OF JUSTICE, [www.cnj.jus.br/imprensa/conciliacao/16833-sao-paulo-ganha-1-centro-judiciario-de-solucao-de-conflitos-e-cidadania](http://www.cnj.jus.br/imprensa/conciliacao/16833-sao-paulo-ganha-1-centro-judiciario-de-solucao-de-conflitos-e-cidadania) (last visited Feb. 15, 2015). Other states—such as Ceará, Goiás, and Minas Gerais—created new centers as well. *Fórum Clóvis Beviláqua: Centro Judicial de Solução de Conflitos e Cidadania*, TRIBUNAL DE JUSTIÇA DO ESTADO DO CEARÁ, [www.tjce.jus.br/forum\\_clovis/forum\\_central\\_de\\_conciliacao.asp#](http://www.tjce.jus.br/forum_clovis/forum_central_de_conciliacao.asp#) (last visited Feb. 15, 2015) (explaining the Ceará program); *Segundo Centro Judiciário de Solução de Conflitos e Cidadania é implantado em Faculdade de Goiânia*, TRIBUNAL DE JUSTIÇA DO ESTADO DE GOIÁS, [www.tjgo.jus.br/index.php/projetos-e-acoas/conciliacao-goias/noticias/3742-colocar-titulo](http://www.tjgo.jus.br/index.php/projetos-e-acoas/conciliacao-goias/noticias/3742-colocar-titulo) (last visited Feb. 15, 2015) (explaining the Goiás program); *Centro Judiciário de Solução de Conflitos e Cidadania*, TRIBUNAL DE JUSTIÇA DO ESTADO DE MINAS GERAIS, [www.tjmg.jus.br/terceiravice-presidencia/centros-judiciarios/](http://www.tjmg.jus.br/terceiravice-presidencia/centros-judiciarios/) (last visited Feb. 15, 2015) (explaining the Minas Gerais program).

194. For example, a court-annexed mediation program was created in 2009 in the state of Rio de Janeiro through Resolution n. 19/2009 of its Appellate Court, establishing mediation centers and the process to select mediators and to refer cases. C.N.J. Res. n. 19 de 14 de dezembro de 2009, available at [portaltj.tjrj.jus.br/documents/10136/7abcbf66-7116-4311-b31e-386c47730c76](http://portaltj.tjrj.jus.br/documents/10136/7abcbf66-7116-4311-b31e-386c47730c76). After Resolution No. 125 of the CNJ, the Rio de Janeiro Appellate Court modified the name of the centers to adapt to the CNJ's policies and continue to run its program with the same structure. *Lista dos Centros de Mediação*, PODER JUDICIÁRIO ESTADO DO RIO DE JANEIRO, [www.tjrj.jus.br/web/guest/institucional/mediacao/cejusc](http://www.tjrj.jus.br/web/guest/institucional/mediacao/cejusc) (last visited Feb. 15, 2015).

195. C.N.J. Res. 125, art. 8º, §§ 3-4.

196. Judges and staff members of different states are participating in training sessions delivered by the CNJ and the National School of Mediation and Conciliation, such as Bahia, Rio Grande do Norte, and Roraima. *Tribunal Faz Treinamento em Conciliação e Mediação para Juízes*, CNJ, [www.cnj.jus.br/index.php?option=com\\_content&view=article&id=24021:tribunal-faz-treinamento-em-conciliacao-e-mediacao-para-juizes&catid=224:judiciario&Itemid=584](http://www.cnj.jus.br/index.php?option=com_content&view=article&id=24021:tribunal-faz-treinamento-em-conciliacao-e-mediacao-para-juizes&catid=224:judiciario&Itemid=584) (last visited Feb. 15, 2015) (explaining the Bahia training); *Magistradas do TJRN Realizam Treinamento Sobre Conciliação e Mediação no PI*, TRIBUNAL DE JUSTIÇA DO ESTADO DO RIO GRANDE DO NORTE (June 14, 2013), [www.tjrn.jus.br/index.php/comunicacao/noticias/3028-magistradas-do-tjrn-realizam-treinamento-sobre-conciliacao-e-mediacao-no-pi](http://www.tjrn.jus.br/index.php/comunicacao/noticias/3028-magistradas-do-tjrn-realizam-treinamento-sobre-conciliacao-e-mediacao-no-pi) (explaining the Rio Grande do Norte training);

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important to analyze such structures seeking to improve the program before its implementation.

*B. How Should Mediation Work in Brazil? Mediation and Culture: Not a “Copy and Paste” Policy*

Mediation as a process can be used everywhere.<sup>197</sup> As described, all societies have had their own way of pacifying conflicts through history. However, cultural differences lead to different approaches to the same process, and the institutionalization of ADR programs is one of these cases. It will vary from country to country, reflecting this cultural diversity. A study comparing court-annexed ADR programs in India, Israel, and the United States concluded that cultural differences definitely influence the methods used for settling cases in each country.<sup>198</sup> These difference “signal caution to those planning or, indeed, attempting the transplantation of mediation process from one legal system to another.”<sup>199</sup> As stated before, the mediation process should be cautiously adapted to the context and the particularities of the place in which it will be used. Therefore, when

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*Juizes de Roraima Recebem Treinamento em Políticas Públicas de Conciliação e Mediação*, TRIBUNAL DE JUSTIÇA DO ESTADO DE RORAIMA (Mar. 22, 2013), [www.tjrr.jus.br/index.php/noticias/751-juizes-de-roraima-recebem-treinamento-em-politicas-publicas-de-conciliacao-e-mediacao](http://www.tjrr.jus.br/index.php/noticias/751-juizes-de-roraima-recebem-treinamento-em-politicas-publicas-de-conciliacao-e-mediacao) (explaining the Roraima training).

197. Alexander, *supra* note 3, at 2 (“Mediation is a universal process that has the ability to transcend differences in legal systems.”); see also Elena Nosyreva, *Alternative Dispute Resolution in the United States and Russia: A Comparative Evaluation*, 7 ANN. SURV. INT’L & COMP. L. 7, 11 (2001) (“It is fair to conclude that alternatives to litigation per se are universal and could be applied to any country regardless of local conditions and rules.”).

198. Janet Martinez et al., *Dispute System Design: A Comparative Study of India, Israel and California*, 14 CARDOZO J. CONFLICT RESOL. 807, 827 (2013) (“Cultural differences have definitely influenced some of the methods described here. Therefore, certain modalities should be tested before being applied outside the system in which they originated. However, the use of the same framework to analyze the systems facilitates the sharing of experiences.”).

199. Alexander, *supra* note 3, at 3.

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creating, analyzing, or evaluating such programs, we should see not only if it is compatible with a pre-established formula—no matter how good and successful it is—but also if it suits and benefits the target society for whom it was developed. Consequently, even though America is the birthplace of modern mediation—and probably the most advanced country in the field—transplanting the American formula may not be the best option in every aspect of a court-annexed program. Of course, as an example of good practice it deserves full consideration, and it is the starting point for a comparative approach.

India is a good source of comparison as well.<sup>200</sup> Despite their cultural differences, Brazil and India are members of the BRIC countries<sup>201</sup> and share common problems (such as poverty, lack of education and lack of legal assistance, for instance) as they become important economies in the world. Most significantly, both countries have a substantial backlog of cases in their courts.<sup>202</sup> Courts are increasingly relying on ADR methods as a way to solve, or at least to alleviate, this problem and provide access to justice for all members of society.<sup>203</sup>

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200. For more information regarding mediation in India, see SRIRAM PANCHU, *MEDIATION – PRACTICE & LAW: THE PATH TO SUCCESSFUL DISPUTE RESOLUTION* (2011); Martinez et al., *supra* note 198; Srimati Basu, *Judges of Normality: Mediating Marriage in the Family Courts of Kolkata, India*, 37 SIGNS 469 (2012); Hiram E. Chodosh, *The Eighteenth Camel: Mediating Mediation Reform in India*, 9 GERMAN L.J. 251 (2008); Anil Xavier, *Mediation: Its Origin & Growth in India*, 27 HAMLIN J. PUB. L. & POL'Y 275 (2006); DELHI HIGH COURT MEDIATION AND CONCILIATION CENTRE, REFLECTIONS (2010); DELHI HIGH COURT MEDIATION AND CONCILIATION CENTRE, SAMADHAN: REFLECTIONS-2 (2012).

201. JIM O'NEILL, *BUILDING BETTER GLOBAL ECONOMIC BRICS* (Goldman Sachs & Co, Nov. 2001) (coining the acronym "BRIC," referring to the economies and states of Brazil, Russia, India, and China).

202. Martinez et al., *supra* note 198, at 808 ("[A]bout thirty million cases are pending in different courts in India. With the present rate of disposal, it would likely take over 300 years to clear the backlog.").

203. The experience was acquired from the Summer Internship of six weeks in the Bangalore Mediation Center and Samadhan Mediation Centre (New Delhi), founded by the Victor Schachter '64 Rule of Law Award from the University of Connecticut Human Rights Institute.

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### C. *Designing the Program*

The “system of rules, processes, steps, and forums”<sup>204</sup> for managing conflict is known as Dispute System Design (DSD).<sup>205</sup> The development of different designs and the implementation and evaluation of court-annexed programs are the raw material for generating the general knowledge of ADR that is essential for a new generation of practitioners and policy-makers.<sup>206</sup> While the first step to starting an analysis of DSD is to define who is designing the system—whether the two parties are in controversy, one of them stronger in their relation (one party design), or a third party (such as the court)<sup>207</sup>—in court-annexed mediation programs, this question is irrelevant since they are by definition “programs organized, funded, run, or endorsed by the courts.”<sup>208</sup> Specific to Brazil, the CNJ as a policymaker provides the framework for such programs.

#### 1. First Things First: Strategic Planning

It is important to establish some prior points to be discussed by the program’s designers, as this preliminary step will guide the other phases and

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204. *Designing Justice*, *supra* note 118, at 2 (“DSD encompasses the creation of systems for processing many similar claims in court, as in massive torts. It also encompasses the creation of systems within administrative agencies for handling both their own internal conflict and for carrying out their public mission to create, implement, and enforce public policy.”).

205. *See generally* WILLIAM URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988); CATHY A. CONSTANTINO & CHRISTINA SICKLES-MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* (1996).

206. Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 255 (2006) (“[T]he people who design and run court ADR programs are uniquely positioned to generate learning that can be valuable for ADR practitioners and policymakers in a wide range of private and public settings.”).

207. *Designing Justice*, *supra* note 118, at 21.

208. Yishai Boyarin, *Court-connected ADR—A Time of Crisis, a Time of Change*, 95 MARQ. L. REV. 993, 993 (2012).

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shape the program, maximizing the most desirable aspects of mediation. Sometimes, different goals of the mediation process may come into conflict. As an example, parties and mediator may be focused on setting a certain amount of money to settle the case, but quite often they are concerned about continuing an ongoing relationship. What should be favored when the goals do not align? This is the question to be answered by each program since its commencement. Therefore, strategic planning helps to answer this kind of questions because it will establish what the program is, where it wants to be in the future, and what are the most important values and goals for the program. The development of strategic planning before starting any court-annexed mediation program is critical. It is said that “a program with insufficient management is skating on thin ice.”<sup>209</sup> I do not intend to give an exhaustive description of all that strategic planning entails within the limits of this study. However, it is important to highlight some basic assumptions and concepts that may make a court-annexed mediation program successful.

Strategic planning is the process through which an institution defines or reviews its mission, vision, values, goals, and objectives. It develops a plan of action for the medium and long run, defining the most suitable way to timely reach each goal of the organization.<sup>210</sup> In this way, strategic planning is “a pattern of purposes and policies defining the company and its business.”<sup>211</sup> In a court environment, strategic planning will help to articulate and make clear: a) What the program wants to achieve (clear outcomes for the processes), b) What steps are needed to reach this, c) The time needed to reach each objective, and d) How to measure its efficiency in

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209. Susan M. Yates, *Elements of a Successful Court Mediation Program*, RESOLUTION SYSTEM INSTITUTE (2008), <http://www.courtadr.org/files/Elements.pdf>.

210. PETER DRUCKER, *AN INTRODUCTORY VIEW OF MANAGEMENT* 584 (1977) (defining strategic planning as “the planning for a company’s long term future that includes the setting of major overall objectives, the determination of the basic approaches to be used in pursuing these objectives, and the means to be used in obtaining the necessary resources to be employed.”).

211. Hayley Carter, *Strategic Planning Reborn*, 48 *WORK STUDY* 46, 46 (1999).

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achieving the goals proposed.<sup>212</sup> This helps the decision-makers take actions that enhance the institution's efficiency by analyzing its environment; formulating, executing, and evaluating its strategies; and setting principles that focus on identifying and avoiding barriers to reaching the vision for the future of the organization. Even though strategic planning is somewhat complex, it would assist the organization because discussion by the authorities in charge of establishing the mediation program is necessary. Before implementing the program, the policymakers must clarify its mission, vision, values, and proposed goals. Then, the program will be monitored and evaluated in relation to the premises established in this preliminary phase.

**Mission** is a short and objective sentence that expresses the reason for an institution's existence, what it is, and what it does. A mission statement defines the organization's purpose. It is important to be both short and objective to be properly understood by both the internal and external public. A well established mission gives a sense of direction for people within the organization, making them come together and achieve the institution's success.

As examples of a feasible mission statement for mediation centers for a court-annexed program, there are some private centers that give a good idea

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212. John A. Martin et al., *Five Reasons Why Judicial Leaders Should Be Involved with and Support Strategic Planning in Their Courts*, 40 JUDGES J. 5, 5-6 (2001) ("Strategic planning is a collection of concepts, processes, and tools that advances a court's agenda in the following ways: Clarify purpose and define a vision for the future, by examining the court's mandates, identifying reasonable expectations of the judiciary and the public, determining how well the court meets these expectations, and mapping a vision of optimal performance. Identify sources, extent, and potential consequences of long-term demands on the court system, by conducting detailed trend analyses and constructing future scenarios. Assess the court's capacity to respond to current and future demands, by examining the structure and organization of the court and related justice agencies, reviewing case flow management and processing, work habits of judges and staff, and resources of the system as a whole. Develop comprehensive strategies to move the court in the desired direction, to enhance performance in key areas or to adapt fundamental processes that are likely to impede efficient and effective justice and other court services.").

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of what to include. Concord Mediation Center, located in Nebraska, defines its mission as:

Concord Mediation Center creates pathways of constructive dialogue and conflict resolution. We achieve our mission through the processes of mediation, facilitation and education.<sup>213</sup>

The Wayne Mediation Center, located in Michigan, presents the following mission:

Wayne Mediation Center strives to provide the community we serve with a process for resolving disputes through:

**Empowerment:** Our process provides parties with the opportunity to choose their own solution.

**Education:** Through skills training and increased awareness programs, we promote alternatives for conflict resolution.

**Effectiveness:** The WMC advantage is an excellent pool of highly trained mediators and a skilled staff dedicated to ensuring exceptional quality.<sup>214</sup>

Cleveland Mediation Center (CMC) sets out its mission in the following words:

CMC promotes just and peaceful community in Northeast Ohio by honoring all people, building their capacity to act, and facilitating opportunities for them to engage in conflict constructively.<sup>215</sup>

**Vision** expresses the institution's destiny. "A vision statement defines an organization's desired future; it provides a picture of what the court

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213. *Concord Mediation Center's Mission*, CONCORD MEDIATION CENTER (2012), <http://www.concordmediationcenter.com/about/our-mission-and-values/>.

214. *Strategic Plan*, WAYNE MEDIATION CENTER, <http://www.mediation-wayne.org/strategicplan.aspx> (last visited Jan. 7, 2015).

215. *About Us*, CLEVELAND MEDIATION CENTER (2014), <http://www.clevelandmediation.org/about-us/> (last visited Jan. 7, 2015).

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should be under ideal conditions.”<sup>216</sup> It encompasses where the institution wants to be and how it wants to get there. In other words, it presents the direction the organization wants to take to achieve its purposes. Regarding mediation programs, the vision of the Wayne Mediation Center is that Wayne Mediation Center is the preferred choice of individuals, families, and organizations seeking an effective process for solving disputes in Wayne County, and that their programs serve as a model of excellence for understanding, managing, and resolving conflict.<sup>217</sup> Concord Mediation Center states its vision as being “a community leader in providing progressive and empowering approaches to conflict resolution and effective decision making.”<sup>218</sup>

**Values** are the fundamental ideals of an institution. It contains the principles and beliefs that guide the institution’s behavior and attitudes. “Firms that excel at living and breathing their core values integrate them into a lot of discussions as it relates to the firm.”<sup>219</sup> The Concord Mediation Center values are:

Concord Mediation Center holds a set of values that provide the foundation of its relationship with all constituents and the community:

Commitment to the future: Concord Mediation Center acknowledges the past while focusing on opportunities for the future.

Integrity: Concord Mediation Center provides an environment for respectful, understanding alternative perspectives and building positive resolutions.

Respect: Concord Mediation Center actively promotes the betterment and interconnectedness of the Omaha community through leadership,

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216. Martin et al., *supra* note 198, at 33.

217. *Strategic Plan*, *supra* note 214.

218. *Concord Mediation Center’s Mission*, *supra* note 213.

219. Allan D. Kotlin, *What Does It Take to Have a Successful Strategic Plan?!*, 4 CPA PRAC. MGMT. F. 20, 20 (2008).

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collaboration, education, and service.<sup>220</sup>

**Goals** are the results the institution wants to achieve in a given time. They are the fulfillment of its mission and vision. In this regard, the Wayne Mediation Center goals for the three-year period are:

In conducting this plan, we looked closely at the strengths, vulnerabilities and opportunities of the Wayne Mediation Center (WMC). As a result, it was determined that WMC would focus over the next three years on the following four areas:

1. Building relationships with the community, schools, courts and government entities to increase case referrals;
2. Developing and expanding new programs, mainly focused upon children;
3. Operational efficiency;
4. Board of Directors/Governance.

To be effective in these four areas, WMC will embark on a path of continuous improvement, consistent effort, and intelligent collaboration. In addition, the plan also recognizes that if WMC is to continue providing quality services to the community, it must ensure that it has a strong enough infrastructure to sustain current and future programs as well as invest in its most valuable resource – its staff.<sup>221</sup>

Mediation presents numerous benefits, and different goals can be elected as the primary focus of the program. I shall suggest a simple example of the main points of a strategic plan suitable for the “Judicial Center for Conflict Resolution and Citizenship,” encompassing the premises of CNJ Resolution No. 125 and the state of mediation in Brazil.

Because the justification for adopting the Resolution was to guarantee access to justice,<sup>222</sup> and because the Judiciary Reform included in the Constitution a fundamental right that: “a reasonable length of process and

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220. *Concord Mediation Center’s Mission*, *supra* note 213.

221. *Strategic Plan*, *supra* note 214.

222. C.F. art. 5, XXXV (Braz.) (“[T]he law shall not exclude any injury or threat to a right from the consideration by the Judicial Power . . . .” (author’s translation)).

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the means to guarantee their expeditious consideration” are ensured to everyone, in both the judicial and administrative spheres,<sup>223</sup> it is important to make clear in the program’s mission the commitment to both access to justice and to a speedy proceeding. Adding a quality element to the process, it seems essential to include the empowerment of parties in mediation. Most courts are using mediation to manage their dockets, making the judicial machinery more efficient (quicker and cheaper), while forgetting about the goal of self-determination and fairness.<sup>224</sup> It is, therefore, pertinent to stress the commitment to these forgotten ideals, showing that adoption of a court-annexed program is more than an escape valve for unwanted cases.

Regarding the program’s vision, it is crucial to express the willingness of serving citizens with quality, and more than that, the Center wants to be recognized publicly as a leading institution for dispute resolution. In a way, the Center is like Caesar’s wife; it must be above suspicion.<sup>225</sup>

As to its values, it seems important to take in some positive aspects of mediation, as analyzed previously. It is relevant to instill in the people involved in development of the Center that creating awareness of the process is essential for the development of mediation in Brazil and for the sustainability of a court-annexed program. Along the same path, efficiency and saving time are aspects that make the process attractive to people, while self-determination can bring the transformative factor into mediation.

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223. *Id.* art. 5, LXXXVIII.

224. Boyarin, *supra* note 208, at 1005 (“The primary goal for mediation for courts with such a narrow focus has become more and more the efficient—quick and cheap—settlement of cases, which is certainly an important goal for court ADR programs, but one that must not trump other important goals, such as self-determination, fairness, and justice.”).

225. *See Caesar, Gaius Julius*, HISTORIA (2014), <http://www.dl.ket.org/latin1/historia/people/caesar.htm>. Just as Caesar’s wife, Pompeia, could not even be suspect of any wrongdoing, the Center must perform its services with high quality and efficiently to be recognized as an institution that fosters the process and helps litigants solve their problems. *See id.* Otherwise, citizens may view the center as a time consuming process without any or few results. *See id.*

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Notwithstanding the existence of other interesting values, I believe that these may represent the basic aspirations of a successful program.

In attention to the goals, training is the core issue. The adaptation of mediation to Brazilian context requires the creation of a skilled body of mediators. As a new program in a place where there is no culture of trying to mediate a case before filing suit, training would enhance awareness and is essential for creating a group of good mediators, managers, and qualified staff members for the program. I have no doubt that there are other important aspects that could serve as sound goals. However, if the institutionalization of mediation is based on a service of high standards, training is a precondition for that. Goals are subject to change and must start by fulfilling the most basic needs of the program. For example, even though it would be desirable, it is unreal to try to expand the program when it is not even well established. Features like creating community, peers, or online mediation will be a consequence of doing the most basic things first. As no one can build a castle in a swamp, we need to construct enduring foundations without haste so as to guarantee the best consequences for the long term.

Summarizing, I propose the following strategic planning chart for the Mediation Centers in Brazil:

**Mission**

The Judicial Center for Conflict Resolution and Citizenship promotes and supports the use of mediation as a form of empowerment of citizens, and as a channel for speedy and fair access to justice.

**Vision**

The Judicial Center for Conflict Resolution and Citizenship will be recognized by society as an institution where high standards and quality mediation can be nurtured, and where people can find an efficient and fair process to solve their disputes.

**Values**

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*Awareness*: to spread awareness of mediation in the community, organizations, and businesses in general, particularly in the legal profession.

*Efficiency*: to provide efficient and high quality mediation services at minimal cost.

*Saving time*: be a space where resolution is available at the earliest point of conflict.

*Self-determination*: to provide settlements that are mutually acceptable and satisfying to the parties and also legally enforceable and binding.

#### **Goals**

Knowing that a successful program depends on a highly trained staff, knowledgeable judges, and competent managers with participation from lawyers and the public, the Center will focus on training and awareness programs in its first two years:

- To deliver basic training in mediation to all judges in the Center's jurisdiction;
- To provide referral training for all civil jurisdiction judges;
- To deliver advanced training to a minimum of 50% of judges in the Center's jurisdiction;
- To provide awareness programs for advocates at least twice a year;
- To provide training for at least fifty mediators for cities with more than 300,000 citizens;
- To provide advanced training in mediation to a minimum of 50% of mediators who are on duty.

## 2. Where does the Money Come From? Funding the Program

After defining what kind of program will be established and where it wants to go in the future, it is crucial to find funding sources to get there. Unfortunately, it is impossible to provide the best service with the lowest budget. From staff salaries to the energy bill, everything costs money; and financial contingences will affect the program design. It is essential to

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consider both start-up and long-term sources of funding and how to manage these. Therefore, one important question on the development of a successful court-annexed program is to apportion the cost of mediation. In other words, should all parties pay for the process, or would it be free from any charge? If so, who is going to cover the costs of the program? There are four main sources for funding the program:

- 1 – From the Court Budget: The court's annual budget may establish provision of a specific amount of money to the Center, covering its costs for the fiscal year.
- 2 – From Fees Levied on Litigants: They are charged at either a market or an official rate.
- 3 – From Pro Bono Service: Mediators and/or staff members are not paid for their work, as a charitable activity.
- 4 – From Extra-Judicial Sources: The program may receive grants from an NGO or any other sponsor for a variety of reasons. For example, in the United States, the National Institute for Dispute Resolution and the State Justice Institute used to give start-up grants for new ADR programs.<sup>226</sup>

In America, there are different ways of allocating the cost of mediation. In spite of some free programs, in most of them (around two-thirds) parties pay a fee for the process,<sup>227</sup> including the neutral party's fee.<sup>228</sup> Parties may pay the mediator an hourly rate (that usually ranges from \$100 an hour to \$350 an hour) or an equivalent daily rate.<sup>229</sup> Also, in some places, courts set

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226. Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029, 1034 (1992); see generally Sheila Purcell, *Court Program Funding*, 9 DISP. RESOL. MAG. 19 (2003) (explaining the importance of grants).

227. Kimberlee K. Kovach, *The Costs of Mediation: What Should They Be and Who Should Pay Them?*, 3 DISP. RESOL. MAG. 13, 15 (1996).

228. Record, *supra* note 64, at 6 ("Fees for the ADR process are required in most districts. A minority of courts requires neutrals to serve pro bono but by and large, the parties pay for the neutral to sit in on their dispute.").

229. Kovach, *supra* note 227, at 13.

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a rate for the mediator, while in others, the mediator has to serve a number of pro bono hours before starting to be paid.<sup>230</sup> Fees are becoming the most common way of funding because courts' budgets are getting leaner,<sup>231</sup> raising questions about access to the courts.<sup>232</sup>

Whether parties have to pay for the process or the judiciary has to shoulder this burden is a key point for implementation of a court-annexed mediation program in developing countries. In a country like Brazil or India, where the low-income participant is the rule, the costs of mediation are impossible to afford for the general population. Since Brazilians have almost no contact with ADR techniques in general and with mediation in particular, at least in the beginning, the best choice is to make it free from any cost to litigants. The judiciary must stimulate its own program and give all possible incentive to parties to seek mediation. Making it free is a great way of throwing light on the program and making people participate because "parties won't use mediation if they find it too expensive."<sup>233</sup>

Moreover, mediation programs are prima facie suspects when they impose costs on parties, diminishing their capacity to litigate if they want to

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230. *Id.* ("Of the forty-one federal district courts that offer or require mediation, two-thirds make the parties pay a fee to the mediator, and only nine provide the service pro bono. Some courts stipulate that mediators, as a prerequisite to serving on a court roster, must agree to provide a specified number of hours of pro bono mediation. Some mediation programs establish fees on a sliding scale. Another alternative is subsidized mediation, where the mediators are employed by the courts. This approach is endorsed by Frank Sander, who believes that litigants should not have to pay for ADR processes. Rather, courts ought to offer an array of options for dispute resolution, the multi-door courthouse, and each option should be available at no additional cost to the litigants. Sander suggests using either a filing fee supplement or, ideally, public funds to compensate those who serve as the neutrals.").

231. Press, *supra* note 226, at 1035.

232. Christopher E. Austin, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U. L. REV. 768, 768 (1982).

233. Kovach, *supra* note 227, at 13 (stating that the "use of mediation could diminish if a significant number of participants in mediation think that they are paying excessive fees or that mediation is just another way for lawyers to make money").

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exercise that option.<sup>234</sup> It is important to note that even in America, mediation in its early stages was provided at no cost to litigants.<sup>235</sup> If a court wants to spread awareness of mediation to construct a solid and successful program, it must provide the service to all litigants, regardless of ability to pay. This was the choice made in India. In order to foster mediation in that country, courts charge no additional fees when cases are referred to mediation. More important than that, if the case is settled through mediation, the court returns all the filing fees paid by the parties when submitting their pleas. This system is still working and is bringing countless benefits to the establishment and development of mediation in the country, especially in the much needed awareness process and regarding access to justice.<sup>236</sup>

At present in Brazil, there is no provision close to the Indian alternative. Each state or federal circuit sets its own filing fees.<sup>237</sup> There is no uniform approach to incentives to settlement since each one of them has its own policies.<sup>238</sup> In Santa Catarina State, for instance, there is a discount of 50% in the final fees when the case is settled, regardless of whether settlement occurred during the court's proceedings or in negotiations outside of court. However, because most of the fees are advanced within the filing fees, the discount is not quite as embracing as it might seem.

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234. McEwen & Williams, *supra* note 99, at 865.

235. Kovach, *supra* note 227, at 13 ("Early in its development, mediation was generally provided to parties at no cost, by volunteer mediators. Mediation was often offered at the point of intake by prosecutors' offices, social service agencies, and small claims courts.").

236. See Mediation and Conciliation Project Committee, *Mediation Training Manual of India*, SUPREME COURT OF INDIA, DELHI, [supremecourtindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf](http://supremecourtindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf) ("Refund of court fees is permitted as per rules in the case of settlement in a court referred mediation").

237. CONSTITUIÇÃO FEDERAL [C.F.] art. 96, I, a (Braz.) (authorizing each court to organize and establish its internal regulations).

238. *Id.*

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Regarding the national policies, Resolution No. 125 is not explicit as to the costs of the process. As a policymaker, the CNJ should have made clear and objective what funding instruments will be used for the implementation and development of its mediation program. Even though it suggests that courts may seek partnership with public or private entities,<sup>239</sup> there is no specific consideration of what makes up these partnerships. As an example, the CNJ should foresee and answer questions as to whether the courts can receive money from private companies that have many lawsuits pending in the court's jurisdiction or use companies' employees as staff members to run the mediation program; situations that would raise ethical concerns. These are questions that the courts would face, and consequently would need guidance from the CNJ to resolve. Moreover, because the CNJ manages a considerable part of the judiciary budget, it could fund these programs at least partially or establish pilots programs to test out its policies. None of the alternatives are established in the Resolution No. 125.<sup>240</sup> In conclusion, it is an enormous failure not to specify objective funding sources for at least the program start-up, nor to fund the program directly.

If imposing who will undergo the mediation process is unwise for the program, it is important to analyze the three other options. All of them can be used together to fund the program. If the courts are in charge of implementing the programs, it is a natural consequence that they should participate financially in the project. This means that courts need to fund the mediation program, if not exclusively. As in America, the Brazilian courts'

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239. C.N.J. Res. 125, art. 5 ("The program will be implemented with the participation of a network, consisting of all the organs of the Judiciary and public and private partner organizations, including universities and educational institutions" (author's translation); C.N.J. Res. 125, art. 7, IX (stating that the Permanent Center of Consensual Methods of Conflict Resolution shall "establish, when necessary, agreements and partnerships with public and private entities to meet the purposes of this Resolution" (author's translation)).

240. Cf. C.N.J. Res. 125.

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budgets are getting leaner too.<sup>241</sup> Therefore, the other alternatives may compliment the courts' investments in the program. First, using pro bono mediators and staff would reduce the expenses of the program.<sup>242</sup> The Indian experience of pro bono mediators has been successful.<sup>243</sup> In it, there is no salary or remuneration, although a few expenses (such as transport) are partially reimbursed. While the main reason for serving as a pro bono mediator is fulfillment in helping others, it is true that it is not easy for an advocate to take some time off of from a law firm to devote time to pro bono work. The legal market in India is extremely beneficial for a small number of well trained lawyers.<sup>244</sup> However, the majority of them are not wealthy.<sup>245</sup> Court-Annexed programs have been running in India for the last ten years and pro bono mediators are still motivated.

Notwithstanding the Indian success, there are some concerns with relying exclusively on pro bono work for running the mediation program. If we want to build ADR as a serious field of inquiry and profession, and to maintain the programs' quality, the mediators should be recognized and well paid.<sup>246</sup> "[W]hat do we say to our talented young graduates who want to make a career of helping others resolve their disputes? That they should find some other work to support themselves and do dispute resolution in their

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241. Press, *supra* note 226, at 1035 ("As state budgets have become leaner, courts have increasingly been asked to establish independent sources of funding.").

242. Kovach, *supra* note 227, at 14 ("The problem [of funding] can be partially remedied by the use of pro bono mediators.").

243. See, e.g., *General Statistical Report*, BANGALORE MEDIATION CENTRE (Aug. 30, 2014), <http://bangaloremediationcentre.kar.nic.in/statistics.html>.

244. Kian Ganz, *Demystifying India's Legal Market* (Nov. 25, 2011), <http://origin-www.livemint.com/Opinion/7wgxY0tcuLyw2yG2G0HcvL/Demystifying-India8217s-legal-market.html>.

245. *Id.*

246. F. E. A. Sander, *Who Should Pay for Court-Connected ADR?*, 78 A.B.A. J. 105, 105 (1992).

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spare time?”<sup>247</sup> A study funded by the State Justice Institute concluded that, “the most short-sighted of the available options is the exclusive reliance on volunteers. Not only does it risk the demise of programs, or at the very least, a severe dilution of quality, after initial enthusiasm has waned and volunteer mediators want to be compensated; it also denigrates what should be a profession, with continuing commitment to improving skills, into a hobby.”<sup>248</sup> In Portugal, for instance, the mediator’s payment is a basic right,<sup>249</sup> and should be paid by the parties when used through private providers<sup>250</sup> or by the public entity that runs a program.<sup>251</sup>

Since in Brazil the pilot programs are relying solely or mainly on pro bono work to deliver mediation services, and there are no signs that this will change in the near future, the services of pro bono mediators are welcome for the programs’ start-ups. It might not be the best option for the long-run, but it is surely the most feasible one for the current Brazilian context, as it happens in India. However, the CNJ and courts should be concerned about those risks and must organize a paid career for mediators for the future. While there can always be some pro bono mediators, this should not be the rule for the future.

If courts cannot take on all the expenses of the process and costs on litigants, and pro bono work has its pitfalls, the question remains: How to

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247. *Id.*; see also Purcell, *supra* note 226, at 21 (“[I]t is unfair to ask neutrals to waive fees for civil litigants who can otherwise afford an array of professional services.”).

248. Center for Dispute Settlement, *National Standards for Court-Connected Mediation Programs*, STATE JUSTICE INSTITUTE, <http://courtadr.org/files/NationalStandardsADR.pdf>.

249. Lei No. 29, art. 25, de 19 de abril de 2013 (Port.) (“The mediator has the right to: . . . (b) be paid for the service provided . . .” (author’s translation)).

250. Lei No. 29, art. 29, de 19 de abril de 2013 (Port.) (“The mediator fee is agreed upon between the parties, who are responsible for its payment, and is fixed in the established mediation protocol at the beginning of each procedure.” (author’s translation)).

251. Lei No. 29, art. 42, de 19 de abril de 2013 (Port.) (“The mediator fee in the realm of public systems of mediation is established in accordance with the constitutive or regulatory acts of each system.” (author’s translation)).

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fund the program? The most feasible way of funding the Brazilian court-annexed mediation program is by creating additions to the filing fees. The use of an add-on filing fee has become a popular method of revenue (used, for example, in California, Florida, Michigan, and Oregon) and presents one important advantage: it provides a steady and reliable source of funding.<sup>252</sup> Also, it is a fair way of spreading the costs over all users of the court system because adjudication is not the only service courts deliver to resolve a case.<sup>253</sup> When cases are being referred to mediation centers, even the litigants that do not use such services are benefited “by more timely access to the traditional tribunal.”<sup>254</sup>

The potentially negative aspect of adding filing fees to fund the program is hampering access to justice. However, this does not apply to Brazil. In the Brazilian justice system, filing fees are much lower than in the United States, as are lawyers’ fees, and, therefore, access to the courts is much more affordable.<sup>255</sup> Many litigants are excluded from paying any fee because federal law protects not just indigents, but all persons who would have their capacity for sustenance impaired, regardless of their assets or income.<sup>256</sup>

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252. Press, *supra* note 226, at 1034; Purcell, *supra* note 226, at 21 (“[F]iling fees have been a steady source of nonprofit ADR funding in California, generating approximately 8 million dollars statewide in 1998—the last year for which there are reliable data. Some of these centers, but certainly not all, work closely with the courts. The California Dispute Resolution Programs Act (DRPA) allows counties the option of increasing fees by up to \$8 per filing.”).

253. Sander, *supra* note 246, at 105 (arguing that it is “a fairer form of assessment since the costs of improving the public dispute system are thus spread over all litigants, not simply imposed on the immediate disputants seeking to avail themselves of ADR procedures”).

254. Press, *supra* note 226, at 1034; Nelson, *supra* note 51, at 5 (“ADR procedures can reduce pretrial demands on judges and allow them to give more time to trials.”).

255. State Complementary Law No. 156/1997, de 15 de maio de 1997, DIÁRIO OFICIAL DO ESTADO DE SANTA CATARINA [D.O.U.S.C.] de 15.5.1997 (Brazil), *available at* [cgj.tjsc.jus.br/consultas/liberada/regcustas\\_emolumentos.pdf](http://cgj.tjsc.jus.br/consultas/liberada/regcustas_emolumentos.pdf) (establishing court fees in Santa Catarina). Filing fees range approximately from \$20 to \$1,200. *Id.* No court fee over this limit is permitted. *Id.*

256. Lei 1.060 de 05 de fevereiro de 1950 (Brazil) (“In order to take advantage of the benefits of judicial assistance, in one’s own initial petition, one must declare that he is not in a position to pay

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The legal standard is broad and encompasses a considerable portion of litigants. Therefore, an addition to filing fees is not per se a barrier to access to justice, and it is unlikely that it would considerably impair any citizen's access to courts in Brazil.

### 3. Mandatory vs. Voluntary Referral

There are two main referral systems in mediation programs; mandatory or voluntary. In the latter, all parties must agree previously to use mediation for resolving their case. Portugal is one of the countries that uses this model, requiring prior consent from the parties.<sup>257</sup> In the former, the judge or the person responsible for selecting cases may refer the case to mediation without the previous consent of any party.<sup>258</sup> It is important to stress that what is mandatory is not the mediation itself but the referral.

Mediation as a mandatory process is “an oxymoron and a plain placebo for the crisis of access to justice.”<sup>259</sup> Parties submitting to the process without an opt-out or refusal mechanism would impair access, constructing insurmountable barriers for parties to have their day in court. Also, it would impair the rule of law because quite often mandatory mediation is used

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for the costs of the process and the fees of the attorney without prejudice to himself or to his family.” (author's translation)).

257. Lei No. 29, art. 4, section 1 de 19 de abril de 2013 (Port.) (stating that mediation is a voluntary process, in which previous parties' consent is necessary).

258. Robert J. Niemic et al., *Guide to Judicial Management of Cases in ADR*, FEDERAL JUDICIAL CENTER 9 (2001) (“If a judge or court refers cases to ADR only with consent of the parties, the referral is voluntary. If participation in ADR is required by the court, whether by an individual judge's order or by a court rule that certain types of cases will automatically be referred to ADR, the referral is presumptively mandatory. We say ‘presumptively’ because local rules generally provide a mechanism by which the parties, individually or jointly, may request to have their case removed from ADR after a mandatory referral.”).

259. Humberto Dalla Bernardina de Pinho & Michele Paumgarten, *Mediação Obrigatória: Um Oxímoro Jurídico e Mero Placebo para a Crise do Acesso à Justiça*, [http://www.humbertodalla.pro.br/arquivos/mediacao\\_obrigatoria\\_conpedi.pdf](http://www.humbertodalla.pro.br/arquivos/mediacao_obrigatoria_conpedi.pdf) (author's translation).

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solely to reduce courts' backlogs, despite its important mission of empowering citizens to decide their own future, improve relationships, or find creative solutions.<sup>260</sup> Some countries, such as Italy and Argentina, have enacted statutes obligating parties to participate in mediation before filing new cases.<sup>261</sup> In Brazil, there is a legislative project following the same route.<sup>262</sup> It is dangerous to create such programs because mandatory mediation is not consistent with mediation philosophy, as mediation presumes a voluntary process where people will construct the solution together for their own disputes.<sup>263</sup>

However, it is one thing to make mediation a mandatory proceeding before filing suit or during the suit without an opt-out or refusal mechanism; quite another is mandatory referral to mediation. In this case, the case is referred to mediation without the parties' consent. However, parties may refuse to participate or drop the process at any point without giving reasons. In mandated programs, "the referral is only presumptively mandatory"<sup>264</sup> because there are unquestioned opt-out opportunities for parties. Courts provide mechanisms for seeking removal. "These programs seem to be mandatory in name only and really only require active consideration of ADR. The 'mandatory' nature merely requires the parties actively request the case be removed from that ADR process and into another one."<sup>265</sup> That is why coercion *into* the mediation process does not lead to coercion *in* the

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260. Brett Walker & Andrews S. Bell, *Justice According to Compulsory Mediation*, J. NSW BAR ASS'N 7, 7-8 (2000).

261. Decreto Legislativo 4 marzo 2010, n. 28 (It.); Law No. 24.573, 1996 (Arg.).

262. Legislative Project No. 517 (Braz.).

263. Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 481 (2010) ("Any attempts to impose a formal and involuntary process on a party may potentially undermine the *raison d'être* of mediation. In view of this danger, there must be *compelling* reasons to introduce mandatory mediation." (second emphasis added)).

264. PLAPINGER & STIENSTRA, *supra* note 36, at 7.

265. Record, *supra* note 64, at 8.

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mediation process.<sup>266</sup> Notwithstanding some potential disadvantages of having a mandated referral system,<sup>267</sup> there are compelling reasons to use mandated referrals to start up the mediation program in Brazil, as long as the mechanism for seeking removal are largely accepted.

First, most parties and lawyers are not accustomed to ADR mechanisms in general and mediation in particular.<sup>268</sup> Therefore, a mandated referral would create awareness among society and jurists about the process, helping people to evaluate its benefits and pitfalls for each situation. In Brazil, where court-annexed mediation programs are just starting, there is a need both to educate parties and their lawyers, but also to create a body of good neutrals.<sup>269</sup> Second, it may reduce or terminate parties' reluctance.<sup>270</sup> In countries, like Brazil, where citizens still see litigation as the only form of dispute resolution, "initiating mediation may also be perceived as a sign of

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266. Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 568 (1997); see Quek, *supra* note 263, at 485-88 (discussing the distinction between *coercion into* and *coercion within* mediation).

267. See generally Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593 (2005) (advocating against mandated referrals in ADR); see also Ward, *supra* note 6, at 79.

268. See *A Procedural Reading*, *supra* note 154, at 553.

269. Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 384 (2001) ("With many state mediation programs in their infancy, mandatory mediation is necessary to inform parties and lawyers about this type of alternative dispute resolution. Judicially mandated mediation 'will also result in the creation of a body of skilled neutrals who specialize in mediation, which, in itself, will enhance the process and encourage lawyers to use mediation on a voluntary basis.' Not only should practicing attorneys become familiar with mediation and other ADR processes, information on dispute resolution possibilities other than litigation could also be a valuable for their clients.").

270. Quek, *supra* note 263, at 483 ("Where the parties reticence towards mediation is due to unfamiliarity with or ignorance of the process, court-mandated mediation may be instrumental in helping them overcome their prejudices or lack of understanding. Studies show that parties who have entered mediation reluctantly still benefited from the process even though their participation was nor voluntary.").

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weakness.”<sup>271</sup> Therefore, if the referral is mandated, no party will have this burden of initiating the process.

Third, if cases are referred to mediation without consent of the parties, it is most likely that more cases will be referred, and consequently, more cases will be resolved by mediation. It is true that “a number of studies have found that voluntary and mandatory ADR programs are about equally effective at settling cases.”<sup>272</sup> This effectiveness is measured by the ratio of cases settled through mediation against the total of cases referred.<sup>273</sup> The benefit of mandated referral is that while keeping up the same settlement rate, it increases the use of mediation without forfeiting its advantages. In England’s Central London County Court, for instance, the number of cases referred to mediation increased by 141% when courts changed from a voluntary to a mandated referral system.<sup>274</sup> Thus, if settlement rates keep stable, it is true that more cases have been resolved by mediation since X% of 241 is necessarily higher than the same X% of 100. Actually, some studies suggest that settlement rates are even higher in mandated programs.<sup>275</sup>

Fourth, the success of the process is not impaired by mandatory referral. “[T]he perception of having freely chosen mediation is not associated with the success of the process. . . . Thus, it does not appear that those who said they chose mediation were more pliable and compromise-oriented than those who felt they were required to participate in this procedure.”<sup>276</sup> Therefore,

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271. *Id.*; Streeter-Schaefer, *supra* note 269, at 383-84 (stressing that “mandatory mediation allows parties that are reluctant to initiate settlement discussions—due to a feeling of weakness related to giving in or to a fear of not using litigation—the opportunity to have the court order the parties into settlement discussions.”).

272. *Dispute Resolution and the Vanishing Trial*, *supra* note 77, at 240.

273. *Id.*

274. Quek, *supra* note 263, at 483.

275. S. GOLDBERG ET AL., *DISPUTE RESOLUTION* 395 (4th ed. 2003); *see also* Frank E. A. Sander, *Another View of Mandatory Mediation*, *DISP. RESOL. MAG.* 16, 16 (2007).

276. McEwen & Maiman, *supra* note 82, at 26.

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the court's referral without the consent of any party is not an impairment for mediation to happen nor a serious threat to the process.

Many of the states' programs in the United States use some kind of mandatory referral, which has not prevented the mediation program from reaching good results, such as empowerment, high rates of settlement, and satisfaction of the parties.<sup>277</sup> Indiana, Nevada, North Carolina, Delaware, Louisiana, Alabama, Montana, and Maine are some of the states that run mediation programs where mandated referrals are used.<sup>278</sup>

It is important to stress that the mandatory nature of the referral is not consistent with the sanction of parties. In the United States, the most common situations where penalties are imposed are for failing to attend mediation sessions or failing to mediate in good faith.<sup>279</sup> However, most programs do not set a minimum level of participation, and the ones that establish a "good faith" requirement do not explain what level of participation this factor embraces.<sup>280</sup>

In such circumstances, the use of a mandatory referral system is useful for Brazil. It is important to foster mediation in the country and the mandatory system can help that. Of course, it should be a temporary mechanism, until we create awareness among parties, lawyers, and judges. This system may be used "as a kind of temporary expedient, à la affirmative action."<sup>281</sup> Also, there should be opt-out opportunities with no penalties for

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277. Streeter-Schaefer, *supra* note 269, at 374.

278. *Id.* at 374-77 ("Mandatory mediation is being used all over the country.").

279. On the good faith requirement, Sander stresses that it is more difficult to apply than it seems. Sander, *supra* note 275, at 16 ("[S]uch provisions, though perhaps conceptually appealing, have proved to be difficult to apply, and hence productive of ancillary litigation. A better approach is to specify what is expected of mediation participants. For example, each party could be required to meet with the mediator and the opposing party, to be prepared to present its position and the reason for it, and then to react to the opponent's demand. Parties could also be required to participate in the mediation for a specified minimum period of, say, one hour.").

280. Streeter-Schaefer, *supra* note 269, at 386.

281. Sander, *supra* note 275, at 16.

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non-compliance or failing to participate as this may undermine the process, creating new fears for parties and lawyers about the process.

#### 4. Which Cases?

Which cases are appropriate for mediation? Many people think that mediation is appropriate for any kind of case.<sup>282</sup> Their point is that mediation is a process that can lead to a better outcome, no matter the nature of the case. Others believe that some cases are more appropriate for the process than others,<sup>283</sup> arguing that it is important to establish which cases will be referred to improve the performance and efficiency of the program. Notwithstanding the pros and cons of each view, it is essential to decide which approach to take when designing a mediation program. In other words, the policymaker must decide whether all cases may be referred to mediation or whether it would be interesting to have clear limits of which kinds of cases should be referred.

In categorical referral, the policymaker sets objective criteria for case referral eligibility, such as the nature of the case or size of damages the parties seek.<sup>284</sup> In this case, the policymaker defines a list of hypotheses where referral must be made, leaving no discretion for judges or parties.<sup>285</sup>

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282. Nancy Stanley, Director of Dispute Resolution for the D.C. Circuit, stresses that “our view, programmatically, is that virtually any civil case may have ADR potential. We encourage judges and litigants to look at each case individually with that in mind.” Genevra Kay Loveland, *Two ADR Administrators Reflect on Developing and Implementing Court-Annexed Programs*, 7 FJC DIRECTIONS 18, 20 (1994).

283. Boyarin, *supra* note 208, at 1009 (“[M]ediation, even when practiced appropriately, is not always the right intervention for all disputes, which may involve parties that, to different extents, lack the ability or desire to self-determine.”).

284. Press, *supra* note 226, at 1041 (“Typical case categories are based on: monetary limits, court jurisdiction, case subject, and type of relief sought.”).

285. Carrie J. Menkel-Meadow, *Judicial Referral to ADR: Issues and Problems Faced by Judges*, 7 FJC DIRECTIONS 8, 8 (1994) (“With this method, decisions about which types of cases

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“[S]ome types of cases are automatically referred to ADR at filing or when some other triggering event occurs.”<sup>286</sup> Critics argue that this is not the preferred method because “such criteria lack an individual assessment of which ADR process best meets the needs of the particular case and litigants.”<sup>287</sup> On the other hand, courts would benefit from such a structure because case screening would be easier, saving the court’s time and resources. Also, it would be positive for parties, as it would make their case management more predictable.

It is true that modernly, “few of the [United States] mediation programs refer cases mandatorily and automatically by case type. Most leave to the judge or parties the identification of cases suitable for ADR.”<sup>288</sup> The judge has become the focal point in the referral system. There are some advantages to this method, namely that in a case-by-case analysis all particularities are taken into consideration, generating a customized and fairer referral.<sup>289</sup>

The bases for such referral are not detailed. Usually, courts analyze the nature of the case and the parties and lawyers involved in the case.<sup>290</sup> As to parties and lawyers, courts will consider if there is a long-term relationship between the parties, if they or their lawyers are receptive to the process, or whether the lawyers differ strongly on the merits of the case.<sup>291</sup> On the

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belong in which type of process are dealt with by court policy, and neither judges, ADR staff, clerks, nor parties need to exercise discretion.”).

286. Donna Stienstra, *ADR in the Federal Trial Courts*, 7 FJC DIRECTIONS 4, 4 (1994).

287. Niemic et al., *supra* note 258, at 21; *see also* Quek, *supra* note 263, at 491 (“Categorical referral presents a slightly thornier situation, since classes of cases are arbitrarily referred for mediation regardless of the characteristics of each case.”).

288. PLAPINGER & STIENSTRA, *supra* note 36, at 7.

289. Quek, *supra* note 263, at 490 (“Discretionary referral is meant to be a customized and fairer form of mandatory mediation, in comparison to categorical referral of entire classes of cases.”).

290. Niemic et al., *supra* note 258, at 14-15.

291. Record, *supra* note 64, at 7.

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nature of the case, it is important to evaluate if the case involves new legal issues, ambiguous precedent, constitutional issues, or public policies (considering whether a future judgment on the merits would contribute to the development of the law); if the public should have information about the case and its resolution; if there are many issues or multiple parties; if the parties have already attempted settlement and failed; or if the case is of a type that would generally be decided based on the papers (such as habeas corpus or extraordinary writs).<sup>292</sup>

Notwithstanding current practice in the United States, for a program in Brazil, categorical referral would display some advantages over discretionary, at least for the beginning of a court-annexed program. The cultural differences and the development of mediation in both countries suggest that categorical referral would be more feasible for the adaptation of the process to the current Brazilian context. It is reasonable to assume that most Brazilian judges have little, if not any, prior knowledge of mediation and especially the referral system. Therefore, a categorical referral system would make the process simpler and easier to administrate.<sup>293</sup> Moreover, efficient referral is essential for the success of a program.<sup>294</sup> The number and nature of the elements to be weighed, as noted, shows that the referral process is not as easy as it may look. It is a “difficult threshold question.”<sup>295</sup> If few cases are referred, the program will become superfluous and will probably represent an unjustified drain of resources. If cases are wrongly referred in the program, it will not be able to respond to all parties, which

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292. Niemic et al., *supra* note 258, at 26-30.

293. See Press, *supra* note 226, at 1041 (noting that besides the problem of not considering unique factors of cases, the mandatory referral of a category of cases is simple to administer and provides for consistency).

294. Heather Scheiwe Kulp, *Increasing Referrals to Small Claims Mediation Programs: Models to Improve Access to Justice*, 14 *CARDOZO J. CONFLICT RESOL.* 361, 367 (2013) (stressing that “understanding the characteristics in that decision-making process [referral] could lead to greater numbers of people actually mediating and reaching a mutually beneficial agreement.”).

295. Menkel-Meadow, *supra* note 285, at 8.

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certainly affects its quality. In this sense, a categorical system could give the referral process greater consistency.

More than that, since “time and caseload pressures more than case factors led judges to seek mediation,”<sup>296</sup> categorical referral would help judges avoid temptation to refer most or all cases to mediation as a way of cleaning up their dockets. Discretionary referral allows the judges to exercise their discretion as a “blanket rule.”<sup>297</sup> If such a system were applied in Brazil since the start of the program, lack of training and pressures from an enormous backlog might lead judges to refer their cases to mediation, even if not the most appropriate method of dispute resolution for a given case. Therefore, it seems beneficial to start off the program with categorical referral while judges are being trained to identify correctly the cases that fit mediation best. It is not by chance that one of the first goals for the program must be training, especially for judges. Once they master the referral system, the policy may be reviewed and judges may become more active in the process.

According to Resolution No. 125, the current policy establishes a broad list of cases that may be referred. Small claims and civil cases, government litigation, social security and family issues are the object of referral.<sup>298</sup> The choice for these categories of cases seems appropriate because there is a high likelihood that mediation may resolve the litigious situations in both number and quality of settlements. However, if it is important to have some guidance as to what cases may be resolved through mediation, it is also important to refine these guidelines to ensure that referral leads to good results in the process, avoiding the risks listed above.

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296. McEwen & Maiman, *supra* note 82, at 26.

297. Quek, *supra* note 263, at 490 (“In a discretionary referral regime, a judge can easily fail to actively exercise his discretion and consequently refer all cases for mediation as a blanket rule.”).

298. C.N.J. Res. 125, art. 8.

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### 5. When? Timing the Mediation

In which phase should a case be referred to mediation? Usually, there are many opportunities for referring a case to mediation: 1) Before court filing, 2) Immediately after court filing, 3) Immediately after the preliminary court process (e.g., preliminary motions, discovery), 4) At a pre-trial conference, and 5) As the trial begins. At the beginning of the ADR movement, the prevailing assumption was that a case could be referred to an ADR mechanism after discovery because it would ensure that the parties and their lawyers knew all the information needed to assess the case and make informed decisions on their positions.<sup>299</sup> Even judicial settlement conferences were designed with this methodology in mind.<sup>300</sup>

However, recent studies have argued that cases should be referred to mediation as soon as possible. Their point is that the probability of settling a case increases with early referral.<sup>301</sup> Therefore, it is becoming common to refer cases right from the beginning of a civil suit. For instance, in Seattle, litigants may choose the court-annexed mediation program in a small claims suit “in the notice to the defendant.”<sup>302</sup> Small claims suits in Brazil follow

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299. Niemic et al., *supra* note 258, at 13-14 (“When ADR first began to be implemented in court settings, the prevailing view was that ADR procedures should not be used until discovery was well under way, if not completed. This view was based on a belief that each party had to have a solid understanding of its case before ADR could be effective.”).

300. Brown, *supra* note 44, at 9 (“Theoretically, this should be the right time for a resolution. The lawyers should have actually evaluated their cases carefully and provided their clients with an informed-risk analysis. However, the settlement conference that occurs within eight or ten days before trial usually occurs after most of the money has been spent, when positions frequently have hardened, and when the lawyers have come to feel more firmly in control of the fate of the lawsuit: not the best chemistry for the resolution of many cases.”).

301. George C. Fairbanks IV & Irirs C. Street, *Timing is Everything: The Appropriate Timing of Case Referrals to Mediation: A Comparative Study of Two Courts*, NAT’L CTR. STATE CTS. (2001); *see also* Kulp, *supra* note 294, at 385-86 (“There is some evidence from this study that early referral achieves high settlement rates.”).

302. Kulp, *supra* note 294, at 383.

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the same path. Within their court notice, parties receive a date in court for a judicial settlement conference, which may be conducted by a judge or a designed mediator.<sup>303</sup> If not settled, the defendant must present a response at the hearing.<sup>304</sup>

There is no right or wrong answer for the question of when the case should be referred to mediation. It seems that the sooner the case is settled, the less time and money litigants will spend. Therefore, when the parties have the information they want, it would be beneficial to have an opportunity to negotiate and at least have a forum to discuss the issues as soon as possible. Because of this, the courts should provide that opportunity and stimulate parties to seek mediation before filing their cases. In Brazil, the Mediation Centers must embrace a pre-litigation mediation process, as designed by the CNJ. Even though these Centers are still not running or are not focused in pre-litigation mediation, it would be highly advisable to create and develop such a system of conflict resolution. After implementing that program, measures to encourage pre-litigation mechanisms are needed. Portugal has found an intelligent alternative to foster pre-litigation mediation.<sup>305</sup> There, the statute of limitations is suspended during the pre-litigation process.<sup>306</sup> The same expedient is likely to stimulate the process in Brazil because there would be no potential harm, as parties would still have the same time to file their cases if they are not settled.

Even if parties do not seek pre-litigation mediation, it is important to keep some mechanisms in which they may choose to mediate their dispute during the case pending at the earliest possible time, considering that a party can make an informed decision. In Brazil, the judicial settlement conference

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303. Lei No. 9.099, art. 16 & 22 de 26 de setembro de 1995 (Braz.).

304. *Id.*

305. Lei No. 29, art. 13, 2 de 19 de abril de 2013 (Port.).

306. *Id.* (stating that the statute of limitations shall not run “from the date on which the mediation protocol is signed or, in case of mediation held in public systems, on the date which all parties have agreed to mediate.”).

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is designated after notice in small claims<sup>307</sup> and divorce cases, so in the summary proceeding,<sup>308</sup> cases may be referred at that point. Thus, after the complaint the judge might refer the case to the Centers where mediation will be held. It is important to note that when a settlement is not reached in the judicial settlement conferences, the defendant must present a response at the end of the hearing. In the case of mediation, it would be necessary to suspend the deadline for response and provide some time for the defendant to present the answer. A possible way out is to concede fifteen days for the defendant to present an answer, which happens in the ordinary proceeding, starting from the end of the mediation process.<sup>309</sup> Another possibility is to refer the case after the plea hearing, where all the documents will be on the court's record, and most or all the information will be available. Therefore, the parties will be able to evaluate the possible outcomes and predict the court's behavior in the case. This still saves time and resources, since the phase of collecting evidence is just starting and the case has a long way to go until reaching a final decision.

In some cases, usually when the factual issues are highly controversial, the parties will be able to reach an informed decision only after the collection of most, if not all, the information. In these circumstances, even though a considerable amount of time and resources have already been lost, it is the most feasible moment for mediation to take place and the time where it will be most effective because the parties will be in a better situation to weigh the pros and cons of their cases and the possible outcomes. Having this option after judgment mediation may be positive, as well. It is not uncommon for parties to appeal and have the case reversed for further proceedings after the judge's decision. In this case, besides the time, energy, and resources spent on the appeal, there will be new expenses and delays during the new trial proceeding. Therefore, the use of mediation after

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307. Lei No. 9.099, art. 21 de 26 de setembro de 1995.

308. C.P.C. art. 277 (Braz.).

309. C.P.C. art. 297 (Braz.) (stating that the defendant shall present its defense in fifteen days).

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judgment may help appellate courts to manage their dockets and would benefit parties in the same way it would help at any other time in the dispute. This measure would be especially appropriate in Brazil, where the trial courts are not the only judicial bodies with vast backlogs of cases; appellate and higher courts have huge dockets as well.

It is difficult to define the right moment for the referral of each case. There are many circumstances and specificities that make it uncertain to establish the right time to refer a case for mediation. It is important to open up space for parties to participate in defining this by providing them with some kind of input on the timing of mediation. If courts find it is difficult to implement party participation on this point, a reasonable compromise is to refer the case after pleading. As a rule the parties would be aware of a considerable part of the information needed, would still save most of their time and resources, and would be empowered to solve their own disputes; while courts also would save their time and reduce costs because the cases would be at an initial stage.

#### F. Who Will Be the Mediator?

The key element of any mediation program is undoubtedly the mediator. There are various ways of selecting mediators and several factors to consider when planning a court-annexed mediation program. When choosing the mediators, the policymakers must be aware that the background, training, and experience of mediators will considerably impact the program's goals and success. Since the referral proposed is mandated, the courts bear an extra responsibility to ensure the quality of mediators assigned to each case. For example, in India, mediators are selected amongst lawyers with more than fifteen years of legal experience, who receive prior training on meditation and serve on a pro bono basis.<sup>310</sup> The ten years of experience

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310. Salem Advocate Bar Association v. Union of India, (2005) 5 S.C.C. 344; see Mediation and Conciliation Project Committee, *Mediation Training Manual of India*, SUPREME COURT OF

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ensures that the mediator is knowledgeable of the law and litigation practice, even with field expertise. The training is aimed at providing the mediators with skills to master the mediation process. Due to lack of resources to pay for the services, the judiciary is implementing the programs on a pro bono basis. Usually petty expenses, such as gas and meals, are reimbursed, but no fixed fee is provided.

Often, programs rely on the following persons to serve as a mediator: private mediators, pro bono mediators, trial or magistrate judges, or court staff members.<sup>311</sup> On the role of judges as mediators all remarks have already been made when the differences between mediation and judicial settlement conferences were analyzed. Suffice to recall that there are theoretical and practical concerns that lead to the conclusion that the judge is not the best person to serve as mediator.

The use of pro bono mediators has likewise already been discussed. It is important to stress that it is imperative to use pro bono mediators in countries like Brazil due to financial constraints, where courts' budgets are restricted. Notwithstanding the importance of pro bono work for the program's start-up, it should not be a long-term policy. Voluntary mediators should always be part of any program, although they must not be the only mediators available. The number of voluntary mediators must be balanced with other sources, such as private mediators or staff member mediators. If the country wants to develop mediation as a professional field of law with high standards, it should not rely exclusively on unpaid mediators.

With regard for private mediators, it is highly unlikely that the private market could meet the needs of the country in the short run. There are two main causes for this. First, there are few lawyers specialized in mediation,<sup>312</sup>

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INDIA, DELHI,  
supremecourtindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf.

311. Niemic et al., *supra* note 258, at 67.

312. *A Procedural Reading*, *supra* note 154, at 545 (stressing the incipient stage of mediation in Brazil).

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and it is, thus, improbable that parties could easily find a private mediator to help resolve their conflicts. Aside from large corporations that usually use international providers to mediate their conflicts with one another, the majority of cases and users of the justice system are excluded from private mediation practice. Second, the market for private mediation in regular cases is restricted; similarly it is difficult to believe that average citizens would be able to afford private mediator's fees, as noted previously.

The use of staff members is a feasible alternative. Courts can hire neutrals as members of the court staff or may train some of the current staff as mediators. As court employees, they are more accountable and have special responsibility in the process. Also, as they will be performing this role permanently, they would gain experience while working and in the not-too-distant future, the court would have a body of highly experienced mediators. Many programs use court employees as neutrals. "[F]or example, court staff members were trained as mediators beginning with a pilot program in the Los Angeles Conciliation Court in 1973."<sup>313</sup> The negative point in using staff members as neutrals is the courts' lack of resources, as setting up staff members as mediators is likely to demand more initial investment from courts. Because court budgets are not voluminous, and there are positive and negative aspects of each alternative, the most feasible choice for Brazil is to use a mix of sources to select mediators. Besides judges, all the other options may be used in conjunction to form a body of skillful mediators for the court-annexed program.

Regarding current public policy, the CNJ stated that anyone who receives the officially provided training may serve as a mediator.<sup>314</sup> This is a wise choice and a dangerous one at the same time. It is wise in that it gives flexibility to the Center's managers to recruit as many mediators as possible, to find mediators with diverse backgrounds and different areas of expertise,

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313. Boyarin, *supra* note 208, at 997.

314. C.N.J. Res. 125, art. 12, § 2°.

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and to renew its mediators from time to time at a low cost. However, it is a dangerous choice as it does not set basic standards that must be met to act as a neutral. In current practice, many pilot programs are relying on law students to serve as mediators.<sup>315</sup> This is a major pitfall because they do not have a minimum number of years of experience, both in law and in the process. Mediators lead the process and must create respect and trust among the parties and lawyers involved in the process. It is improbable to believe that a law student will be able to manage the parties, and particularly the lawyers when the latter will have more knowledge and experience in the process and legal practice than the mediators. It is important to stress that in Brazil, law students do not have a prior university degree because the professional law degree is the bachelor of law (LL.B.). In such a scheme, it is likely that the lawyers will take initiative in the process, which may become a much more court-like proceeding, forfeiting many of the advantages of the process and the benefits that make mediation different from adjudication. Therefore, the policies should establish minimum prerequisites for the mediator's role. Besides the official training, some experience in legal practice is preferable.

An interesting example of minimum requirements that guarantee an appropriate level of professionalism comes from Spain. There, according to Law 5/2012, mediators must fulfill the following requirements:

To have full civil rights and not have any criminal records; (ii) To have a university education or similar education; (iii) To be formally trained to act as a professional mediator; (iv) To respect the principles of equality, impartiality, confidentiality, neutrality

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315. *Programa Acadêmico Conciliador*, PODER JUDICIÁRIO DE SANTA CATARINA, [www.tjsc.jus.br/institucional/academicoconciliador/academicoconciliador.html](http://www.tjsc.jus.br/institucional/academicoconciliador/academicoconciliador.html) (last visited Feb. 15, 2015) (showing that in the state of Santa Catarina, the Judiciary runs a program with law schools to train law students as mediators in the settlements).

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and independence; (v) To hold civil liability insurance for those conflicts they mediate in;  
(vi) To be enrolled in a public registry.<sup>316</sup>

Similar requirements could be established in Brazil to guarantee the quality of mediators, and consequently, the provision of high quality services for the citizens. We may all disagree on who is the best option to serve as a mediator. One would choose someone who has mastered the process, even though that person has no background in law, while others would prefer someone with a long career as a lawyer, regardless of prior knowledge of the mediation process. However, everyone would (or at least should) agree that the person serving as mediator must be qualified and properly trained.

The Brazilian policy on training is probably the best part of the program's design. It encompasses all the basic skills a mediator must have, and is longer and more detailed if compared to the usual forty hour training most programs provide. Because mediation is still something new in Brazil, training is a key point and it is important that Resolution No. 125 lists further careful basic training in the process. Like everywhere else, the basic training includes a foundation of ADR skills, specialized mediation skills, and ethical issues (including an ethical code for the mediator).<sup>317</sup> In addition, role-playing exercises and field experience with supervision are mandatory. The National School of Mediation and Conciliation was created in November 2012 to deliver such training.<sup>318</sup> Even though it is a new institution, it has been performing an important role and is in the vanguard of mediation training in the country, publishing high quality material while

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316. Aura Esther Vilalta & Rosa Pérez Martell, *Overview of the New Normative on Mediation in Spain*, AM. J. MEDIATION 1, 10 (2011).

317. Niemic et al., *supra* note 258, at 72 (considering that basic training provides "a foundation of ADR skills, specialized skills for the specific ADR process, and exposure to come of the ethical problems that can arise in ADR").

318. ENAM, *supra* note 183.

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its faculty delivers speeches and talks, creating awareness among citizens in general and jurists specifically.<sup>319</sup>

The only point that warrants some attention is the ongoing education of mediators. It is essential that all the efforts to constitute a body of highly skilled mediators should continue to deliver further training. Regular training sessions should follow the creation of Brazilian mediation centers. It is highly recommended that at least once a year, the National School of Mediation and Conciliation should provide specific training for its panel of mediators. A lack of training may create stagnation in the ongoing model for selecting and training mediators. Moreover, ongoing training enables the Centers to increase the number of mediators regularly. This would potentially create more leaders with new ideas for mediation's future in the county, fostering the process, and would certainly generate greater awareness among lawyers and judges. Ongoing training generates new ideas, brings in new talents, and creates a drive for expansion of the program.

#### IV. CONCLUSION

Mediation is here to stay. Notwithstanding potential threats, the advantages of the process are without doubt beneficial to both parties and the courts. Due to its benefits, the courts are developing court-annexed programs, and this implementation raises many important questions. Brazil is inserted into this context and is making efforts to create mediation centers to stimulate the process in the country. With regard for this attempt, the program's design is a key point in its progress and results. Policymakers must be aware that today's choices will forge tomorrow's practice, and will

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319. See, e.g., *Eventos*, MINISTÉRIO DA JUSTIÇA, [www.justica.gov.br/sua-protecao/reforma-do-judiciario/enam/eventos](http://www.justica.gov.br/sua-protecao/reforma-do-judiciario/enam/eventos) (last visited Feb. 8, 2015) (showing how the National School of Mediation and Conciliation held a national workshop on mediation of business law cases, mock mediation competitions, and mediators training).

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be determinant for the development of mediation in Brazil. That is why a program must be carefully designed to fit Brazilian culture, respecting the habits of its population because mediation is a valuable worldwide tool for dispute resolution when adapted to each particular place.

In this sense, the CNJ is giving guidance and establishing the framework for the court-annexed program. However, the study and criticism of this model of institutionalizing mediation in the country is fundamental. Even though the debate must be amplified in both regional and international forums, comparing different initiatives around the globe, the Brazilian attempt may find its own way of implementing mediation, respecting our cultural background, idiosyncrasies, and our social-economic reality. The discussion raised and the necessary ongoing debates that must follow seeks to shed new light on this important matter that is changing the way we practice law and solve our social disputes. By rethinking and reframing our presuppositions, challenging the status quo and current policies regarding mediation in Brazil, celebrating the positive aspects of the proposed program, and criticizing the negative, Brazil can take a step forward to promote the development of a suitable court-annexed mediation program in the country.