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The Unfulfilled Promise of Self-Determination in Court-Connected Mediation

Peter Reilly

THE UNFULFILLED PROMISE OF SELF-DETERMINATION IN COURT-CONNECTED MEDIATION

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ABSTRACT

In the context of mediation, party self-determination refers to the ability of disputants to have power, control, and autonomy in the process. There are numerous process design questions involved in running a mediation, no matter its subject matter. Consider just one example: "Should the mediation be conducted in person, or virtually?" *The answer to this question can have a profound impact on the direction and course of a mediation, including its outcome. Yet, in the context of court-connected mediation, disputing parties are not consistently provided the opportunity to give input on how such process design questions are resolved. In fact, these decisions are typically made by mediators, courts, program administrators, counsel, or others—which conflicts with the Model Standards of Conduct for Mediators's declaration that* disputing parties *may exercise self-determination at any stage of a mediation, including process design. In effect, this dynamic represents a significant failure regarding one of mediation's core promises. This Article proposes a novel solution to this unfulfilled promise: the institution of an Opening Negotiation Session at the start of every court-connected mediation. This joint meeting would involve all participants (mediators, disputants, and counsel) to ensure party interests are accounted for in deciding how four specific process design questions, all explored in the Article, will guide the mediation. This opening negotiation can immediately impact how the mediation will be run as it moves forward, thereby dramatically enhancing party self-determination and leading to a more tailored, empowering, and accountable resolution process for all participants.*

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INTRODUCTION

Self-determination, which enables parties engaged in mediation to achieve voluntary, uncoerced agreements, has been called "the fundamental principle of mediation."[1] It requires that parties be permitted to make "free and informed choices as to process and outcome,"[2] and it may be exercised by parties "at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from

1. *See* STANDARDS OF CONDUCT FOR MEDIATORS App. B (AM. BAR. ASS'N ET AL. 1994). Standard I states: "Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement." *Id.*

2. MODEL STANDARDS OF CONDUCT FOR MEDIATORS § IA (AM. ARB. ASS'N ET AL. 2005). The Model Standards were approved by the ABA House of Delegates on August 9, 2005.

the process, and outcomes."[3] Self-determination's importance can hardly be overstated: Professor Carrie Menkel-Meadow has said "the animating impulse behind most of the 'ADR movement' has advocated for client choice in dispute resolution and 'self-determination' in mediation."[4] Professor Amy Cohen believes that mediator neutrality and party self-determination are principles "that today largely define mediation within the field of American ADR."[5] Judge Wayne Brazil has written that some people believe mediation's primary goal "is to increase the parties' involvement in, power over, and sense of responsibility for the resolution of their problems. The phrase 'party self-determination' is used in some quarters to capture the spirit of these kinds of purposes."[6] Professor Lisa Blomgren Amsler suggests self-determination also includes aspects of procedural justice—specifically a disputant's "perceptions of control and fairness."[7] Professor Jacqueline Nolan-Haley suggests that consent and self-determination are inextricably linked, stating that in the context of mediation, "[t]he value of consent promotes self-determination and autonomy giving parties control. Disputing parties are said to be empowered jointly in owning their dispute, participating in the process of its resolution, and controlling its outcome."[8] Thus, at its core, party self-determination refers to the ability of disputants to have autonomy, control, and power in the mediation process.

Despite this strong consensus surrounding the importance of party self-determination in mediation, scholars point out that, as state and

3. *Id*. The document does not define "process design," but the Reporter's Notes reference "designing procedural aspects of the mediation process to suit individual needs." JOSEPH B. STULBERG, REPORTER'S NOTES 9 (2005), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/mscm_reporter-notes.pdf [https://perma.cc/3TV2-Q9K9]; *see also Practical Guidance for Inclusive Mediation Process Design*, U.N. DEP'T POL. & PEACEBUILDING AFFAIRS, https://peacemaker.un.org/sites/peacemaker.un.org/files/Inclusive_Mediation_Process_Design_infographic.pdf [https://perma.cc/V7F4-CEGQ] (last visited Sept. 23, 2023) (stating that mediation process design "is the formulation of a plan or a strategy on the approach and organization of the mediation, in order to facilitate a successful prevention, resolution or management of conflict").

4. Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 88 (2002).

5. Amy J. Cohen, *The Rise and Fall and Rise Again of Informal Justice and the Death of ADR*, 54 CONN. L. REV. 197, 200 (2022).

6. Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 726 (1999).

7. *See* Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 880 (2002); *see also* G. Alexander Nunn, *Law, Fact, and Procedural Justice*, 70 EMORY L.J. 1273, 1296 (2021) ("[T]he procedural justice movement posits that people's willingness to accept outcomes is motivated more readily by their perceptions of how fairly they were treated throughout the process rather than their opinions about the court's decision."); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 820-21 (2001) (identifying four factors that enhance procedural justice).

8. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 777 (1999).

federal courts increasingly began turning to voluntary (and sometimes mandatory) mediation programs to resolve many kinds of civil cases, "[r]espect for parties' self-determination was not a guiding principle."[9] Rather than disputants, it has often been mediators, courts, program administrators, and others who have been dominant in making process decisions pertaining to court-connected mediations.[10] And rather than disputants, it has often been *lawyers* who have been dominant in framing issues and setting the tone for interaction in mediations—oftentimes influenced by hard-edged norms of litigation.[11] This Article is an attempt to reignite interest in the importance of *disputants'* self-determination in court-connected mediation, and it sets forth a novel proposal on how to bring the theory of its importance into practice. This Article argues that disputing parties should have input into four specific process design decisions guiding the mediation and proposes the institution of a brief Opening Negotiation Session among all participants (mediators, parties, and counsel) at the start of every court-connected mediation to ensure a "meeting of the minds" on these four decisions.[12] This negotiation would provide an opportunity for participants to engage directly with each other as they help decide important process design questions in a way that takes into account disputing parties' interests, preferences, and concerns. These insights can result in an immediate reconfiguration of how the mediation will be organized and run as it moves forward.[13]

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9. Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMU L. REV. 721, 727 (2017); *see also* James R. Coben, *Mediation's Dirty Little Secret: Straight Talk about Mediator Manipulation and Deception*, 2 J. ALT. DISP. RESOL. 4, 4 (2000) (noting that a close examination of mediation training methodologies, as well as mediation interventions used in practice, "confirms a distinct hollowness in the rhetoric of self-determination").

10. *See* James A. Wall & Timothy C. Dunne, *Mediation Research: A Current Review*, 28 NEGOT. J. 216, 235 (2012) ("[F]requently, mediation does not allow for self-determination by the disputants because the mediator or active outsiders determine the process and outcomes of the process." (citation omitted)).

11. Welsh, *supra* note 9, at 727.

12. *See* Thomas J. Stipanowich, *Arbitration, Mediation, and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med, and Settlement-Oriented Activities by Arbitrators*, 26 HARV. NEGOT. L. REV. 265, 344 (2021) (discussing the importance of forming a "meeting of the minds" among participants regarding how mediators will conduct themselves in the context of international dispute resolution given the many possible options available).

13. *See infra* Part I. Note that having disputants participate in this manner is a commonplace occurrence within complex private mediations, wherein pre-mediation meetings can be used to provide participants with the opportunity to negotiate process design issues, detailing how the mediation will be organized and run; these decisions can then be formalized in retainer agreements or "agreements to mediate." Similarly, projects such as Beyond Intractability provide parties with guidance regarding how to work together in deciding important issues of process. *See* Heidi Burgess, *Ground Rules*, BEYOND INTRACTABILITY (May 2013), https://www.beyondintractability.org/coreknowledge/ground-rules [https://perma.cc/ZW28-JDDY].

This Article is divided into three parts. Part I discusses why an Opening Negotiation Session at the start of every court-connected mediation would provide an effective way to protect and promote party self-determination and describes how such a negotiation session would operate in practice. It also discusses two court-connected mediation programs—a new statewide program in New York and a longstanding federal program in California—to get a sense of the challenges involved in creating and administering such programs. Finally, Part I discusses how and why court-connected mediations should be held to a higher standard of protection against pressure, coercion, and exploitation faced by disputants as compared to non-court-connected mediations. Part II explores four specific questions dealing with mediation process design that must be answered before a mediation session can begin, bolstering the proposition that party self-determination would be significantly enhanced if disputing parties could play a role, through the Opening Negotiation Session, in thinking through and deciding answers to those four questions. Part III answers the most likely objections to implementing the ideas put forth in this Article.

I. OPENING NEGOTIATION SESSIONS

Supreme Court Chief Justice Warren Burger, in his 1984 *State of the Judiciary* address to the American Bar Association, said the legal profession had become "so mesmerized with the stimulation of the courtroom contest" that it had failed to pursue more efficient and productive ways to resolve disputes.[14] Burger stated that "[f]or many claims, . . . trials by the adversarial contest must in time go the way of the ancient trial by battle and blood."[15] He further declared the legal system to be "too costly, too painful, too destructive, [and] too inefficient for a truly civilized people."[16] Since the time of those remarks, the legal profession has moved dramatically in the direction urged by Justice Burger: today, less than five percent of state and federal legal cases nationwide, both civil and criminal, are resolved through courtroom trials.[17] The vast majority are instead resolved through

14. David Margolick, *Burger Says Lawyers Make Legal Help Too Costly*, N.Y. TIMES, Feb. 13, 1984, at A13.

15. *Id.*

16. *Id.*

17. *See* Tracy Carbasho, *ADR Hits 10-Year Milestone*, 18 No. 25 LAWS. J. 1 (2016) ("Approximately 97[%] of all civil cases are resolved without going to trial as a result of using ADR."); John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/short-reads/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/DQ9A-6W9U] (noting that only 2% of federal criminal defendants go to trial); *see also* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, 101 JUDICATURE 26, 28 (2017) ("One study found that by 2002, civil cases were resolved by juries

alternative dispute resolution (ADR) processes such as negotiation (including plea bargains and court-conducted settlement conferences), arbitration, summary jury trials, and mediation.[18] The use of mediation in particular has been expanding to address disputes worldwide,[19] likely due to its relative affordability,[20] efficiency,[21] and broad

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in state court less than 1[%] of the time. The comparable number for criminal cases was 1.3[%]. The rates are even lower today." (citations omitted)). *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

18. The broad goals of alternative dispute resolution in the context of resolving legal disputes are numerous, including reducing court congestion and helping to clear judicial dockets, reducing the time and resources consumed in trials, improving access to justice, providing a wider array of procedures and forums through which to resolve disputes, and providing vehicles leading to creative outcomes that oftentimes cannot be achieved through traditional litigation. *See generally* Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, A Time of Change*, 95 MARQ. L. REV. 993 (2012).

19. *See* BAKER MCKENZIE, THE YEAR AHEAD: DEVELOPMENTS IN GLOBAL LITIGATION AND ARBITRATION IN 2020 (2020) (noting that mandatory mediation is currently used in Australia, Italy, and the Philippines, with other jurisdictions following suit, including initiatives at various stages in Greece, India, Romania, and Turkey); *see also* BAKER MCKENZIE, THE YEAR AHEAD: DEVELOPMENTS IN GLOBAL LITIGATION AND ARBITRATION IN 2021, at 17-22, 27 (2021) (discussing Japan's creation of an international dispute resolution hub through opening the Kyoto International Mediation Center and the Japan International Dispute Resolution Center; the growing use of pre-litigation mediation in Vietnam; the increasing use of mediation in Brazil and Chile; the launching, in 2020, of an expedited mediation process by the Singapore International Mediation Centre; and the Singapore Mediation Convention (formally the United Nations Convention on International Settlement Agreements), which entered into force in 2020 to ensure cross-border enforceability of mediated settlement agreements and has been signed by more than fifty jurisdictions worldwide); Klaus J. Hopt & Felix Steffek, *Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 3 (Klaus J. Hopt & Felix Steffek eds., 2013) (comparing laws and regulatory models of mediation in numerous countries, including Australia, Austria, Bulgaria, Canada, China, England and Wales, France, Germany, Greece, Hungary, Ireland, Italy, Japan, the Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Spain, Switzerland, and the United States); CARRIE MENKEL-MEADOW, MEDIATION AND ITS APPLICATIONS FOR GOOD DECISION MAKING AND DISPUTE RESOLUTION 25-26 (2016) (discussing "newer nations" such as post-colonial Africa and post-military dictatorship South America that "are *transitional and dialogic* (combining traditional legal processes with either indigenous processes like *gacaca* in Rwanda or Truth and Reconciliation Commissions in Argentina, Chile, Bolivia, South Africa and Liberia, which provide modifications to and innovations in the use of mediative processes for intranational conflicts, thereby often creating new or hybrid institutions as well as new processes)").

20. Adam S. Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275, 2283-84 (2017) (discussing the low cost of mediation when compared to litigation). *But see* Horst Eidenmüller, *Competition Between State Courts and Private Tribunals*, 21 CARDOZO J. CONFLICT RESOL. 329, 336 (2020) (explaining that mediation is cost-efficient only in disputes that go beyond a certain dollar amount given the "relatively high fixed costs" involved, such as hiring mediators and paying them by the hour).

21. *See* Kristen M. Blankley et al., *ADR Is Not a Household Term: Considering the Ethical and Practical Consequences of the Public's Lack of Understanding of Mediation and Arbitration*, 99 NEB. L. REV. 797, 799 (2021) (describing the advantages of mediation and other ADR processes, including "cost and time efficiencies, creative problem-solving, confidentiality, party autonomy and control over the process and outcome," as well as flexibility and accessibility). *But see* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 3 (1991)

applicability.[22] Despite these advances in the field of dispute resolution, there are nevertheless clear signs that more work needs to be done, especially with respect to the American civil justice system.[23]

There are numerous process design questions involved in organizing and running a mediation that must be answered before the session begins. Answers to those questions will vary depending on the context or type of case: Is it a small claims case or a high-dollar case? Does it deal with a family matter, an injury, a business dispute, a public policy issue, or another area of concern? Are the disputing parties self-represented or represented by counsel? Are there multiple parties involved, or just two? However, no matter the context, there are certain questions that must be answered before a mediation session begins; this Article explores four key questions that likely apply to *every* mediation, no matter the context or type of case at issue.

By way of example, consider the following question: *"Should the mediation be conducted in person, or virtually?"* Typically, if program administrators have not put into place a specific policy to address that question, it will fall upon the mediators (or sometimes mediators working together with disputants' counsel)[24] to decide the answer, and

(noting concerns that "courts try to use various forms of ADR to reduce caseloads and increase court efficiency at the possible cost of realizing better justice").

22. The American Bar Association points to the wide variety of cases in which mediation can play a useful role, including those in the business context (e.g., contract, insurance, real estate, construction, workplace, landlord-tenant, consumer-merchant, farmer-lender, and labor-management disputes), the community context (e.g., land use, parking, zoning, nuisance and environmental issues, multiparty public policy disputes, and neighborhood, roommate, and family disputes), in divorce and child custody cases (e.g., custody, visitation, property division, and alimony issues), in schools and universities (e.g., truancy, discipline, conduct code, and disability rights issues), and in some areas of criminal law (e.g., vandalism, theft, passing bad checks, and juvenile cases). *See Mediation: In What Cases Might Mediation Be Used?*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/mediation_whenuse/ [https://perma.cc/MCE6-H22Q].

23. According to one report, the current American civil justice system is "in crisis," with 66% of the population experiencing at least one legal issue in the past four years and only 49% of those issues being "completely resolved." *See* THE HAGUE INST. FOR INNOVATION OF L. & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. DENVER, JUSTICE NEEDS AND SATISFACTION IN THE UNITED STATES OF AMERICA 2021: LEGAL PROBLEMS IN DAILY LIFE 2, 6 (2021). The report also states that, of the 260 million legal problems experienced by 55 million Americans every year, 120 million of them "are not resolved fairly." *Id.* at 6. In addition, according to the World Justice Project's *Rule of Law Index*, the United States is ranked 36th out of 128 countries worldwide on the civil justice factor, which measures whether a nation's civil justice systems "are accessible and affordable as well as free of discrimination, corruption, and improper influence by public officials." THE WORLD JUST. PROJECT, WORLD JUSTICE PROJECT RULE OF LAW INDEX 2020 28 (2020). It also measures "the accessibility, impartiality, and effectiveness" of a nation's ADR mechanisms. *Id.*

24. Howard A. Herman, who for more than twenty-three years led the highly regarded ADR program of the U.S. District Court for the Northern District of California, states: "In my experience, counsel are at least as important as mediators and program administrators in making process decisions about mediation." E-mail from Howard Herman to Peter Reilly (Dec. 2021) (on file with author).

the decision will likely be guided by their training, experience, and professional style or approach. This Article argues that party self-determination would be enhanced if *disputing parties* can be involved in making these process design decisions, ideally as part of a negotiation at the start of the mediation process.[25] Under this scenario, mediation participants could engage in discussion, facilitated by the mediator or another dispute resolution professional, that helps decide the answers to the process questions posed. That decision would become effective immediately, impacting how the mediation is run as it continues to move forward. Following is a list of four questions (including the question on in-person versus virtual mediations) that raise difficult process design issues within mediations and which will be explored in Part II:

- To what extent should parties learn about, and have a say in choosing, a mediator's approach, methods, and technique?
- To what extent should the "caucus" be used during a mediation?
- Should mediations be conducted in person, or virtually?
- Should parties be empowered to design a hybrid mediation process to address their dispute?

This Article argues that greater party involvement in answering these process design questions is key to party power and self-determination. Including a negotiation—or Opening Negotiation Session—at the start of every court-connected meditation would provide an effective vehicle to ensure such party involvement and would have the following positive impacts. It would help to reveal the personality, temperament, and negotiation style of everyone involved. It would allow for rules, or a code of conduct, to be negotiated regarding how people, including the mediator,[26] will interact during the rest of the mediation (e.g., no interrupting other speakers, no using inflammatory language, etc.).[27] An Opening Negotiation Session would allow parties to decide if the mediation should start immediately or should be postponed to give parties additional time for research and

25. *See* Omer Shapira, *A Theory of Sharing Decision-Making in Mediation*, 44 MCGEORGE L. REV. 923, 945 (2013) (noting that mediators should "not . . . make decisions for the parties, decisions on process included").

26. *See* Jennifer W. Reynolds, *Luck v. Justice: Consent Intervenes, but for Whom?*, 14 PEPP. DISP. RESOL. L.J. 245, 308 (2014) (suggesting that law schools should teach students creative problem solving, listening, empathy, and other skills).

27. Jonathan Iwry, *Open to Debate: Reducing Polarization by Approaching Political Argument as Negotiation*, 37 NEGOT. J. 361, 385-86 (2021) (providing examples of "a productive self-imposed code of conduct" for difficult negotiations). *But see* Sharon Press & Ellen E. Deason, *Mediation: Embedded Assumptions of Whiteness?*, 22 CARDOZO J. CONFLICT RESOL. 453, 490 (2021) (discussing the idea of "inclusive mediation," which "eschews communication guidelines or ground rules in order to foster the inclusion of all ideas, feelings, and values").

discovery—activities that, depending on the facts and circumstances surrounding the case, could lead to better-informed decisions when the mediation finally takes place.[28]

An Opening Negotiation Session would also help set a tone of balanced power among participants because these first tasks of forming rules and making decisions on how the mediation will be run would be completed through negotiation and collaboration rather than through a single person (the mediator) or entity (the mediation program) making proclamations. An Opening Negotiation Session would help equalize participants' knowledge of mediation theory and practice (especially for those who are new to the process)[29] and help them understand how certain design choices can impact mediation experiences and outcomes.[30] Finally, an Opening Negotiation Session would help level the playing field in those instances where repeat players might otherwise be advantaged from their previous mediation experience.[31] Instituting negotiation sessions at the start of mediations could potentially be educational for everyone present, with mediators in effect becoming teachers, helping to educate participants so that they too can be involved in making critical process design decisions.

A. Two ADR Programs

To get a sense of the challenges involved in creating and administering court-connected mediation programs, following is a brief discus-

28. *See* John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 116 (2002) (noting arguments for referring a case to mediation early versus late in the litigation process); *see also* 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, 594 (1997) (concluding that settlement is more likely when the time between filing a case and mediation is shorter).

29. *See* Michael Geigerman, *New Beginnings in Commercial Mediations: The Advantages of Caucusing Before the Joint Session*, 19 DISP. RESOL. MAG. 27, 30 (2012) (noting that first-time mediation participants "arrive with nothing to compare the mediation with except perhaps a TV courtroom drama, a prior distasteful deposition experience, a divorce court fiasco or an aggravating experience in traffic court").

30. Jacqueline M. Nolan-Haley, *Comments on Cases 5.3 and 5.4*, *in* MEDIATION ETHICS: CASES AND COMMENTARIES 146, 147 (Ellen Waldman ed., 2011) (highlighting that participation consent in mediation "requires that parties make a conscious, *knowledgeable* decision to enter into the mediation process and to continue participating in good faith" (emphasis added)); *see also* Geigerman, *supra* note 29, at 29 (noting that in "most commercial mediation cases," due to economic and time constraints, "attorneys may not take the time to prepare the case and their clients for mediation, and so *the mediator is often the one who has to get the client ready*" (emphasis added)).

31. *See* Catherine R. Albiston et al., *The Dispute Tree and the Legal Forest*, 10 ANN. REV. L. & SOC. SCI. 105, 118 (2014) (noting that many of the repeat-player advantages that occur in the context of litigation also exist in the context of ADR); *see also* James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 77 (2004) (discussing the advantages accrued by "sophisticated repeat players" in the context of mediation).

sion of two ADR programs—one a new statewide program (the "presumptive early ADR" program of New York) and one a longstanding federal program (the ADR program of the U.S. District Court for the Northern District of California).

1. New York State

In the first program, the State of New York has decided that "presumptive early ADR" will be the hallmark of its civil case management system. Under this program, all civil cases (with limited exceptions) are given referrals early in the process to court-sponsored ADR programs, including mediation, arbitration, neutral evaluation, summary jury trials, and court-connected settlement conferences.[32] Chief Judge Janet DiFiore suggests that resolving cases through these processes on the "front end" will reduce court congestion, conserve judicial resources, and provide disputants with "cost-effective resolutions and better quality outcomes."[33] As Judge DiFiore states in her 2021 *State of Our Judiciary* address, "We remain fully committed to implementing our model of presumptive early ADR in order to transform the old culture of 'litigate first' to the new culture of 'mediate first' in all appropriate cases."[34]

Leaders and teams developing the mediation program within New York's Unified Court System—among the largest and most complex court systems in the country[35]—will have to make countless decisions, determine how to quickly change and adapt as they incorporate newfound insights and lessons, and finally, work to share results and information with numerous courts scattered throughout a massive and complicated system.[36] The ultimate goal appears to be creating a system designed for never-ending adjustment and improvement,[37] and the program appears to exhibit an ethos of creativity and experimentation necessary to achieve such a goal.

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32. CHIEF JUDGE JANET DIFIORE, N.Y. STATE UNIFIED CT. SYS., THE STATE OF OUR JUDICIARY 2020, at 12 (2020), https://www.nycourts.gov/ctapps/news/20_SOJ-Speech.pdf [https://perma.cc/33QA-S7E9].

33. *Id.*

34. CHIEF JUDGE JANET DIFIORE, N.Y. STATE UNIFIED CT. SYS., THE STATE OF OUR JUDICIARY 2021, at 8 (2021), https://www.nycourts.gov/whatsnew/pdf/21_SOJ-Speech.pdf [https://perma.cc/3SZR-RNNW].

35. New York's Unified Court System receives over three million filings each year; it encompasses twelve distinct trial and appellate courts; it operates in more than 300 separate locations throughout the state; and employs more than 1,300 judges and 15,000 nonjudicial staff. *See Judiciary*, N.Y. STATE, https://publications.budget.ny.gov/pubs/archive/fy22/ex/agencies/appropdata/Judiciary.html [https://perma.cc/Q8HA-RFD8] (last visited Sept. 23, 2023).

36. *See id.*

37. *See* Peter S. Adler, *State Offices of Mediation: Thoughts on the Evolution of a National Network*, 81 KY. L.J. 1013, 1022 (1992) (discussing the creation of ADR systems through which dispute resolution practices and procedures can be continuously adjusted and improved).

Mindful of the "transformational change" she is spearheading, Judge DiFiore has commented directly on the importance of harnessing local customs, cultures, and talent within a given court or jurisdiction to help drive that change, stating: "Our Administrative Judges have taken great care to work with their judicial colleagues and local bar associations to develop individualized ADR plans for their courts and districts. In support of their efforts, we have created a statewide infrastructure to facilitate integration of ADR into local court operations."[38] Thus, rather than having a top-down, hierarchical approach to implementing these changes, the Chief Judge is making it clear that local courts and districts will retain appropriate power and control as they collaborate with the State to reshape and improve the current system.

2. Northern District of California

The second program is one of the oldest and most well-respected ADR programs in the country: the ADR program of the U.S. District Court for the Northern District of California ("Northern District"). A key figure in the development of that program is Judge Wayne Brazil, who spent twenty-five years as a magistrate judge on that court, including more than fifteen years as the court's first ADR Magistrate Judge. After retiring from the bench in 2009, Judge Brazil joined the faculty of the U.C. Berkeley School of Law and later joined Judicial Arbitration and Mediation Services ("JAMS") to work as a mediator, arbitrator, and special master.

In his book *Early Neutral Evaluation*,[39] the judge describes some of the history involved in integrating ADR processes within the Northern District. For example, Judge Brazil describes how, beginning in 1978, the court would assign (at the time of a case's filing and without seeking consent of the parties or their counsel) certain personal injury and contract cases[40] to be resolved through nonbinding arbitration.[41] Judge Brazil states the program was enormously successful, with the late 1980s seeing approximately 600 cases assigned each year, including "endorse[ment] by about 80% of the lawyers whose cases had been ordered into it."[42]

However, once the court started expanding its ADR offerings—including adding mediations, early neutral evaluations, and settlement conferences—it was decided that arbitration would henceforth be merely one of many *voluntary* ADR choices available to disputants,

38. DIFIORE, *supra* note 32, at 13.

39. WAYNE D. BRAZIL, EARLY NEUTRAL EVALUATION (2012).

40. Cases were automatically assigned to arbitration if their value did not exceed $100,000—a figure that was later raised to $150,000. *Id.* at 32.

41. *Id.*

42. *Id.*

meaning that parties would no longer be compelled to arbitrate.[43] Interestingly, with increased choices, and with the court no longer directing them to the arbitration track, disputing parties and their counsel almost completely stopped using arbitration to resolve their disputes.[44] Judge Brazil suggests a "significant factor" in the drop-off was "the absence . . . of any opportunity to use any part of the arbitration hearing to try to negotiate a settlement—or to use the arbitrator to try to help the parties find common ground."[45] As Judge Brazil puts it:

> [U]nlike mediation, arbitration does not offer the flexibility of process, the informality, and the opportunity to find leverage toward solutions by searching the parties' underlying interests—independent of law and evidence. Simply stated, lawyers and litigants seem to feel more comfortable with the considerable play in both the procedural and substantive joints that they expect in mediation. So, as mediation's popularity has soared, nonbinding arbitration's has plummeted.[46]

Disputing parties nonetheless continue to have access to a full array of ADR options within the Northern District. In addition to early neutral evaluation, mediation, and settlement conferences (the latter hosted by a magistrate judge),[47] the court's website recommends other court ADR processes including non-binding summary bench or jury trials, as well as the use of special masters.[48] In addition, the court's ADR staff can work with parties to "customize" an ADR process or tailor it to a unique set of facts and circumstances.[49]

The programs in New York and the Northern District exhibit attributes necessary for continuing success in ADR, including engaging in never-ending listening, learning, and adaptation. It appears the keys to building successful ADR programs are similar to those necessary to guiding productive mediations: helping all parties see and understand the needs and underlying interests of everyone else; being

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43. *Id.* at 32-33. Parties were also given the ability to retain a private provider of ADR services if that was their preference. *Id.* at 32.

44. *Id.* at 33. Interest in arbitration as an ADR option has dropped off dramatically in the Northern District. The most recent ADR Annual Report available on the court's website, the ADR Program Report for Fiscal Year 2019, indicates there were zero cases referred to arbitration in the three prior years (2016, 2017, and 2018). *See* U.S. DIST. CT. FOR THE N. DIST. OF CAL., ADR PROGRAM REPORT 4 (2019), https://cand.uscourts.gov/wp-content/uploads/2020/02/ADR-Annual-Report-2019.pdf [https://perma.cc/4SFV-HZMB].

45. BRAZIL, *supra* note 39, at 33.

46. *Id.*

47. *See generally* N.D. CAL. ADR R.

48. *See Other Processes*, U.S. DIST. CT. FOR N. DIST. CAL., https://cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/other-processes/ [https://perma.cc/3S7D-FUUT] (last visited Sept. 23, 2023). The court also encourages disputing parties to turn to ADR providers in the private sector, instead of court processes, for services including mediation, arbitration, fact-finding, neutral evaluation, and private judging. *See* N.D. CAL. ADR R. 3-4(b).

49. *Other Processes*, *supra* note 48.

open-minded and creative in brainstorming potential options; and helping parties discover which options are strong and which are weak, and why. Most importantly, the dispute resolution professionals working to build, maintain, and administer the programs in New York and the Northern District exhibit the mindset of researchers and investigators working collaboratively toward nonstop inquiry, experimentation, assessment, and improvement. This is underscored by the Northern District program's willingness to design and "customize" a unique resolution process for any given dispute[50] and by Chief Judge DiFiore's declaration that New York's "massive ADR initiative is a work in progress."[51]

B. Holding Court-Connected Mediation to a Higher Standard

Many courts encourage (or even mandate) participation in ADR processes before permitting disputants to proceed with traditional litigation. Pursuant to the Alternative Dispute Resolution Act of 1998, "Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration."[52] For example, in the U.S. District Court for the Northern District of California, most civil cases are assigned, immediately upon filing, to the ADR Multi-Option Program; the parties are then "presumptively required" to participate in one of the non-binding ADR processes offered by the court (early neutral evaluation, mediation, or a settlement conference—the latter hosted by a magistrate judge).[53] The state of New York is currently in the process of deciding the narrow set of circumstances under which a party will be permitted to opt out from attending mediation as directed by the state's presumptive early ADR program.[54] In the end, if parties feel pressured, or even compelled, to participate in court-connected mediation programs, it could be argued

50. *Id.*

51. DIFIORE, *supra* note 32, at 13.

52. 28 U.S.C. § 652(a). Numerous federal district courts have elected to require ADR. District-by-district summaries can be found at https://www.justice.gov/archives/olp/file/827536/download [https://perma.cc/D3X7-YWW9].

53. *See* N.D. CAL. ADR R. 3-3, 3-4. Note that if the assigned Judge gives approval, parties are permitted to instead use an ADR process that is offered by a private provider. *Id.*

54. *See* Memorandum from Eileen D. Millett, Request for Public Comment on Proposal to Adopt a New Part 60 of the Rules of the Chief Judge and a New Part 160 of the Rules of the Chief Administrative Judge, to Establish General Statewide Rules for the Referral of Civil Disputes in the Trial Courts to Alternative Dispute Resolution (Feb. 3, 2022) (on file with the New York State Unified Court System Office of Court Administration).

that such pressure interferes with the extent to which those parties *voluntarily* entered into resulting mediation agreements.[55] As one scholar writes:

> Research and appellate court filings demonstrate that many disputants experience substantial pressure: judges may pressure parties to enter mediation, mediators may pressure them to continue with mediation, and any number of actors and factors may pressure them to settle. Questions remain about the appropriate level of pressure, however: when does encouragement become coercion? Courts must ensure that court-connected mediation is delivered as promised—that self-determination is maintained throughout.[56]

In addition to the possibility of pressure and coercion,[57] there are also situations where the process and dynamics of mediation could result in exploitation. Professor Lela Love, who has written extensively on the many advantages of using mediation in resolving disputes, has also written about circumstances in which turning to mediation is less than ideal. Professor Love reports on the work of a law school mediation clinic where "students had their fill of heart-warming reconciliations"[58] but also experienced "cases where one party, in ignorance and doubt, signed on to an agreement that the student felt was clearly disadvantageous."[59] Students helping to mediate small claims cases specifically mentioned "savvy repeat players

55. *See* Jacqueline M. Nolan-Haley, *Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent*, 5 Y.B. ON ARB & MEDIATION 152 (2013) (suggesting court-connected mediation is not necessarily a voluntary undertaking); *see also* Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 142 (2004) (arguing that courts should end their reliance on mandatory mediation).

56. Timothy Hedeen, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, but Some Are More Voluntary Than Others*, 26 JUST. SYS. J. 273, 273 (2005); *see also* Vittiglio v. Vittiglio, 824 N.W.2d 591, 597 (Mich. Ct. App. 2012) ("[A] certain amount of pressure to settle is fundamentally inherent in the mediation process, and is practically part of the definition."). Some scholars argue that parties should be permitted to opt out of mandatory mediation programs, without having to provide any reason whatsoever for doing so. Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep On Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 427 (2005); Welsh, *supra* note 55, at 130-32.

57. *See* James R. Coben, *Evaluating the Singapore Convention Through a U.S.-Centric Litigation Lens: Lessons Learned from Nearly Two Decades of Mediation Disputes in American Federal and State Courts*, 20 CARDOZO J. CONFLICT RESOL. 1063 (2019) (discussing a review of Westlaw cases reported from 2013 to 2017 and finding the most frequently raised issue in the context of mediation to be enforcement of mediated settlement agreements, where complaining parties generally try to avoid complying with a mediated settlement by alleging mediator misconduct (e.g., coercion, bias, or exercising undue influence) or various contractual defenses (e.g., duress, misrepresentation, or mistake)); *see also* John Lande, *Proposal for Standard Explanation in Mediation* 1 (Univ. of Mo. Sch. of L. Legal Stud. Rsch. Paper, Paper No. 2021-10, 2021) ("Coercion is problematic in any mediation regardless of whether parties have been ordered to mediate.").

58. Lela P. Love & Ellen Waldman, *The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation*, 31 OHIO ST. J. ON DISP. RES. 123, 135 (2016).

59. *Id.* at 136.

who seemed to be using the mediation process to extract settlements more favorable than anything they could have obtained in court."[60]

How might court-connected mediation programs confront these potential dangers of pressure and exploitation? At the beginning of the mediation session, parties could be presented with quick lessons regarding important elements of mediation theory and practice, leading to a more informed and transparent process—especially for participants with no previous mediation experience. Programs might vary in how this information is delivered: some might choose to deliver the information by recorded trainings and lectures in the weeks or days leading up to the mediation itself; other programs might decide to deliver the information in person, just before the actual mediation begins.[61] Programs could experiment with the most appropriate person for content delivery—it might be a judge of the court, a trained mediator, another dispute resolution professional involved in the program, or someone else. The lessons regarding important elements of mediation theory and practice could include the following:

1. Provide a Standard Explanation Regarding Rights of Parties

Professor John Lande suggests that court-connected programs provide parties (and counsel) with a "standard explanation" about their rights during the mediation.[62] Lande offers the following language, which courts can edit as they wish:

> This court has ordered the parties in this case to mediate and try to reach an agreement that they all find acceptable. Mediation is a valuable opportunity for parties to communicate, negotiate, and settle cases. Although parties can request to opt out of mediating, sometimes they are surprised that they reach good agreements in mediation. Parties can save monetary and emotional costs of litigation by mediating at the earliest appropriate time in a case. If parties are not ready to settle at the outset, early mediation can lay the groundwork for a satisfactory settlement later in the case.
>
> Mediators do not represent any party. If mediators offer opinions or suggestions, parties are free to disregard the opinions and suggestions. Parties have the right to leave mediation without settling (or making offers), and they may continue to litigate. In the end, it is up to parties to decide if they want to settle or continue to litigate, possibly going to trial.

60. *Id.*

61. *See* Lande, *supra* note 57, at 1 (suggesting that "[w]hen courts order parties to mediate, the courts have an obligation to minimize the risk of coercion," which can include having courts "produce and disseminate educational materials, or require parties to attend educational sessions, among many other options").

62. *See id.*

> The mediator will work as hard as possible to help the parties make good decisions by considering the benefits and risks of settling their cases as well as the benefits and risks of proceeding to trial. Parties usually find mediation to be very helpful, and this court asks all parties to work hard to find a mutually agreeable resolution of your case if reasonably possible.[63]

Some of this language might not work for certain programs, of course—such as the statement that "parties can request to opt out of mediating," which might not be true for all court-connected mediation programs. Other parts of this language might have to be tweaked as well. Consider, for example, the statement that "[p]arties have the right to leave mediation without settling." That language would have to be clarified if a given program has instituted a requirement that parties engage in the mediation process *for a minimum amount of time* before being permitted to leave without settling. Nonetheless, Professor Lande's "standard explanation" offers a helpful outline of important points that should be covered in this kind of statement. Program administrators will, of course, also have to consider the most effective manner and timing for dissemination of the information once it is effectively tailored to their own rules and policies. For example, should it be provided to parties well in advance of the mediation session? And if the information is delivered through a videotaped recording, should the messenger be a respected judge? A program administrator, perhaps? These kinds of details would have to be ironed out.[64]

2. Provide Information on Post-Mediation "Cooling Off" Periods

Another promising possibility for protection would be considering the implementation of a short "cooling off" period to begin immediately after the mediated agreement is made, during which time any party is able to withdraw from the agreement for any reason. Professor Nancy Welsh has suggested a period of three days during which any party may withdraw before the agreement becomes enforceable.[65] Welsh argues a cooling off period would do two things. First, it would protect parties who have already been subjected to high pressure tactics (such as when parties are pressured to continue mediating even after they have indicated they want to stop, or to approve a deal even after they have indicated they oppose it). Second, a cooling off period would reduce the likelihood that people would choose to employ high pressure tactics in the first place.[66]

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63. *Id.* at 2.

64. *Id.* at 3; *see also* Nolan-Haley, *supra* note 8, at 799-823 (advocating that parties be provided with information regarding their legal rights and remedies to ensure informed consent if they make an agreement through mediation).

65. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 87 (2001).

66. *Id.* at 89.

Professor Welsh defends the idea that a cooling off period would provide participants of court-connected mediation with more protection than is provided to participants of deal making outside the courthouse, stating, "it may be necessary *to embrace and advocate for* a protection that holds court-connected mediation to a higher standard than traditional negotiation."[67] A brief lecture explaining the advantages of a "cooling off" period might lead to a group of disputants deciding to implement the idea as part of their own individual mediation process, even if the wider court-connected program does not mandate the idea.

3. Coach Parties on Measures to Counter Possible Abuse

Disputing parties sometimes use mediation as a tool not for achieving resolution, but instead for reconnaissance or manipulation, including trying to learn about the underlying strengths and weaknesses of another party's case, attempting to dig for clues regarding how another party might approach litigation,[68] or trying to "co-opt,"[69] "game,"[70] or spin[71] the mediators or other parties within the mediation. A brief lecture on what these potential abuses look like can help dissuade parties from engaging in the behaviors and can inoculate parties against their negative impacts. Indeed, calling attention to such behaviors might be more effective than attempting to enforce some kind of conduct code.[72] Participants can be told that such behaviors are

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67. *Id.* at 87.

68. *See* Jeffrey Krivis, *The Settlement Drift*, WOLTERS KLUWER: KLUWER MEDIATION BLOG (June 16, 2014), https://mediationblog.kluwerarbitration.com/2014/06/16/the-settlement-drift/ [https://perma.cc/BED4-NWG3] (noting that lawyers and companies use mediation "as a sort of 'scratch and sniff' opportunity. The idea is to check out what might be below the surface, but don't let the other side know you're open to settlement").

69. *See* Alison E. Gerencser, *Confused by ADR? Changing Conduct Standards Would Help*, 18 ALTS. TO HIGH COST LITIG. 65, 82 (2000) (noting that mediation has "become part of the adversary process" and that lawyers see it "as merely a step in the litigation process"); Menkel-Meadow, *supra* note 21 (arguing that ADR has been co-opted by the adversary system).

70. Scott R. Peppet, *Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?*, 19 OHIO ST. J. ON DISP. RESOL. 283, 321 (2004) (noting that "a mediator's ability to add value by overcoming information asymmetries" between the parties could be sabotaged if there is "widespread successful gaming of mediators").

71. Nolan-Haley, *supra* note 55, at 157 ("[S]ome lawyers are so familiar with the [mediation] process that they have become skilled in mediation tricks—spinning the mediator, using mediation for discovery purposes, lying and transforming mediation into a legal process that fits more with their adversarial inclinations." (citations omitted)); *see* John T. Blankenship, *The Vitality of the Opening Statement in Mediation: A Jumping Off Point to Consider the Process of Mediation*, 9 APPALACHIAN J.L. 165, 178 (2010) (suggesting that separating parties into their own rooms might make it easier for them to spin the mediator).

72. *See* Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 424 (2008) ("[A]n inoculation message can make the audience resistant to a broad array of attacks on the message. It does not merely deflect the particular attack anticipated and rebutted, but also provides some protection against any number of novel, unanticipated attacks."); HERB COHEN, YOU CAN NEGOTIATE ANYTHING 133 (1980) (noting that "a tactic perceived is no tactic" (emphasis omitted)).

neither productive nor welcome. They can be implored to engage instead in the kinds of behaviors that research has demonstrated to be effective in leading to resolution and agreement, including the following: engaging in candid information exchange and debate regarding facts, interests, and possible solutions; listening to other participants without interrupting them;[73] bringing people to the mediation who have authority to sign off on a deal; remaining engaged for a reasonable amount of time working toward resolution; and putting forth reasonable offers and workable solutions.[74]

Of course, many mediators (and mediation programs) attempt to realize these productive behaviors through encouragement and requests rather than through rules and sanctions[75]—an approach that comports with guidance from documents such as the ABA's *Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs*.[76] The key is for disputants to learn about these important issues and then be permitted to give impactful input into any "rules" that will apply during the mediation.[77] In the end, parties to a mediation might decide to adopt rules that would seem to militate *against* achieving the most "effective" and "productive" mediation experience possible. For example, the parties might agree that acceptable behavior during the mediation does *not* require a party to make any offers,[78] to accept any offers, or to be willing to

73. *See* Lindsey P. Gustafson et al., *Teaching and Assessing Active Listening as a Foundational Skill for Lawyers as Leaders, Counselors, Negotiators, and Advocates*, 62 SANTA CLARA L. REV. 1 (2022) (introducing the Active Listening Milestone Rubric for Law Students).

74. *See* Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 197 (2002) (discussing behaviors exhibited by lawyers that are effective in negotiation and problem solving).

75. *See* Lande, *supra* note 57, at 1-2 (suggesting that "courts have great legitimacy to help shape legal and mediation practice cultures" and presenting specific language to be provided to parties and their counsel as part of a "standard explanation[]" of mediation).

76. *See* A.B.A. SEC. OF DISP. RESOL., RESOLUTION ON GOOD FAITH REQUIREMENTS FOR MEDIATORS AND MEDIATION ADVOCATES IN COURT-MANDATED MEDIATION PROGRAMS 5-6 (2004) (stating that good-faith mediation "is a subjective concept that cannot be completely or accurately defined" and noting that "[c]ourts generally cannot promote productive negotiation behavior by creating rules and imposing sanctions"). Note that the resolution approved by the ABA's Dispute Resolution Section Council concedes that "courts should refrain from imposing requirements interfering with litigants' and lawyers' discretion to negotiate in ways that they believe to be in the litigants' interests." *See id.* at 6; *see also* Lande, *supra* note 28, at 139-40 ("Actively enforcing a good-faith requirement would subject *all* participants to uncertainty about the impartiality and confidentiality of the process and could heighten adversarial tensions and inappropriate pressures to settle cases. Although such a requirement could deter and punish truly egregious behavior[,] . . . it would do so at the expense of overall confidence in the system of mediation." (citation omitted)).

77. Party self-determination "is the act of coming to a voluntary, uncoerced decision in which each party makes *free and informed choices* as to process and outcome." MODEL STANDARDS OF CONDUCT FOR MEDIATORS § IA (AM. ARB. ASS'N ET AL. 2005) (emphasis added).

78. *See* A.B.A. SEC. OF DISP. RESOL., *supra* note 76, at 2 ("Rules and statutes that permit courts to sanction a wide range of subjective behavior create a grave risk of undermining

compromise on positions or demands.[79] Parties should, of course, be informed of minimum standards of conduct that are dictated by the Model Rules of Professional Conduct[80] or that can be mandated and enforced in court-connected programs (such as requirements to attend the mediation or to provide pre-mediation memoranda, for example).[81] Beyond those minimum requirements, however, parties should be able to decide together as a group what will constitute "good-faith" or even "good enough" behavior during the mediation itself. That discussion should include efforts toward encouraging productive behavior and toward coaching parties on how to recognize and counter possible abuse. All of this can lead to greater self-determination and to a more level playing field, where parties are empowered to spot and help neutralize participants who are more interested in using mediation for reconnaissance or manipulation than for resolution.[82]

C. Justifying the Higher Standard

Given that people make deals daily outside the courthouse *without* employing the "higher standard" set forth in the previous section, it could be argued that adding such protections for court-connected mediations amounts to unnecessary paternalism. However, the conditions surrounding deals made outside the courthouse versus deals made through court-connected mediation are markedly different.

Consider, for a moment, a plea agreement made between a prosecutor and an accused person. Judge William G. Young states that when a judge accepts that agreement and then moves to the sentencing phase, the court thereby "places the imprimatur of legitimacy, as an independent branch of government, on the parties' bargain."[83] In a

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core values of mediation and creating unintended problems. Such subjective behaviors include but are not limited to: a failure to engage sufficiently in substantive bargaining; failure to have a representative present at the court-mandated mediation with sufficient settlement authority; or failure to make a reasonable offer.").

79. *See* Raphael Cohen-Almagor, *Genuine, Principled and Tactical Compromise*, 30 STUDIA IURIDICA LUBLINENSIA 11, 13 (2021) (noting that "not all forms of cooperation require compromise").

80. Specifically, Rule 1.2 outlines the general scope of representation between attorney and client, and Rule 1.4 (b) mandates that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *See* MODEL RULES OF PRO. CONDUCT r. 1.2, 1.4(b) (AM. BAR ASS'N 2022).

81. *See* Lande, *supra* note 28, at 84-85 (reviewing numerous cases dealing with allegations of bad faith in court-connected mediation programs and concluding that "courts have interpreted good faith narrowly to require compliance with orders to attend mediation, provide pre-mediation memoranda, and, in some cases, produce organizational representatives with sufficient settlement authority").

82. *See* Menkel-Meadow, *supra* note 21, at 17 (suggesting that ADR has become "just another stop in the 'litigotiation' game which provides an opportunity for the manipulation of rules, time, information, and ultimately, money").

83. United States v. Orthofix, Inc., 956 F. Supp. 2d 316, 325 (D. Mass. 2013). There are a number of cases dealing with deferred prosecution agreements where federal judges have

similar fashion, in the context of court-connected mediation, there are numerous ways the resulting agreement (and the process surrounding it) are given a court's imprimatur: the mediation process is often recommended or mandated by the court; the mediation program is oftentimes housed and administered within the courthouse (including security screenings and rules excluding weapons);[84] mediators are oftentimes recommended by, appointed by, approved by, trained by, or employed by the court or the court's ADR office[85] (and even if there is a line that technically separates "court" from "ADR" personnel, it is likely that outside observers see both as part of a unified, cohesive unit); and agreements resulting from court-connected mediations are oftentimes "approved" by the court or in some way become part of official court records.[86]

These five aspects help to form an imprimatur by the court, adding momentum to the mediation process and legitimacy to the resulting agreements—legitimacy that might not exist if the deals were achieved outside the court-connected process.[87] Thus, practices must be employed in court-connected programs to achieve mediated *justice* rather than simply mediated *deals*—similar to criminal prosecutors being obligated "to ensure that justice is done" instead of merely "to win cases."[88] If the notion of parties achieving justice (or something closely related to it) through mediation is taken seriously, then having court-connected programs working to educate all participants regarding these important ideas—including their rights during the

stated that parties are requesting the court to "lend" its judicial imprimatur to the negotiation agreement. *See, e.g.*, United States v. Fokker Services B.V., 79 F. Supp. 3d 160, 165 (D.D.C. 2015) ("The parties are, in essence, requesting the Court to lend its judicial imprimatur to their DPA."); United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *6 (E.D.N.Y. July 1, 2013) ("The parties have asked the Court to lend . . . a judicial imprimatur to the DPA . . . .").

84. Erin R. Archerd, *Online Mediation and the Opportunity to Rethink Safety in Mediation*, 52 STETSON L. REV. 307, 313 (2022).

85. *See* Edwina G. Mendelson et al., *Reimagining ADR in New York Courts*, 22 CARDOZO J. CONFLICT RESOL. 521, 525 (2021).

86. *See* Amy Holtzworth-Munroe et al., *Intimate Partner Violence (IPV) and Family Dispute Resolution: A Randomized Controlled Trial Comparing Shuttle Mediation, Videoconferencing Mediation, and Litigation*, 27 PSYCH. PUB. POL'Y & L. 45, 61 (2021) (discussing dispute resolution in divorce cases where "any agreements reached in mediation must be reviewed and approved by the court").

87. *See* Welsh, *supra* note 55, at 142 (noting that "courts are lending their legitimacy to mediation in requiring its use").

88. *See* Eileen Libby, *A Higher Law: Some Ethics Obligations Go Beyond Constitutional Requirement*, 95 A.B.A. J. 28, 28 (2009) ("The obligation of prosecutors is not simply to win cases, but to ensure that justice is done.").

mediation process, the advantages of a post-mediation "cooling off" period, and measures to protect against certain kinds of mediation abuse—could be effective steps toward that end.[89]

II. FOUR PROCESS QUESTIONS

With respect to the process design issues surrounding a mediation, self-determination would be significantly enhanced if parties could play an impactful role in thinking through and deciding those issues. Key questions involving process design could be presented within a mediation's Opening Negotiation Session, wherein participants could be guided through a conversation addressing different ways those questions might be addressed. Listed below are four core questions pertaining to how any given mediation—no matter the context, subject matter, or type of case involved—might be organized and run with respect to process design.[90] Following each question is a brief sketch of the kinds of issues, arguments, and concerns that would likely arise as the question is being debated and decided upon during the Opening Negotiation Session.

There would need to be experimentation within court-connected mediation programs regarding the depth to which each question could realistically be explored, given time constraints and given most participants' limited knowledge of mediation.[91] Guiding participants through this conversation will require qualities and abilities that a skilled teacher, mentor, or advisor might have, including empathy, patience, and fairmindedness—in short, the same qualities that drive excellence in mediation.

Programs could also experiment with the most appropriate person to guide this conversation—it might be the mediator assigned to the case, another dispute resolution professional involved in the program, or someone else entirely. Importantly, that person will underscore that going through the process of debating and answering the questions will allow participants to influence how their mediation is organized and run as it moves forward. In other words, it should be made clear

89. Justice is but one of many different possible interests, goals, and objectives sought by parties, counsel, and others. *See, e.g.*, Carrie Menkel-Meadow, *Whose Dispute Is It, Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2666 (1995) ("The diverse interests of the participants in the dispute, the legal system, and society may not be the same. Issues of fairness, legitimacy, economic efficiency, privacy, publicity, emotional catharsis or empathy, access, equity among disputants, and lawmaking may differ in importance for different actors in the system, and they may vary by case . . . .").

90. Of course, different mediation programs might decide to focus on a more expanded, or perhaps entirely different, list of core process design questions.

91. *See* Colette R. Brunschwig, *Multisensory Law and Therapeutic Jurisprudence: How Family Mediators Can Better Communicate with Their Clients*, 5 PHOENIX L. REV. 705, 710 (2012) (noting that although mediators have "expert knowledge . . . in law, psychology, and mediation," normally the lay parties in the mediation "only possess limited knowledge, or, if they have more extensive knowledge, such knowledge is sometimes inaccurate").

that last-minute adjustments to the mediation process can be made based upon what is learned and decided while working through the four questions.

Question #1: To What Extent Should Parties Learn About, and Have a Say in Choosing, a Mediator's Approach, Methods, and Technique?

Depending on variables such as context, culture, and party goals, there are countless ways for a mediator to approach the task of mediating.[92] And there are numerous questions that could be asked by the parties: What style or approach would be most productive for the mediator to employ? Should the mediator contribute an independent evaluation of the case? Must the mediator be an expert in the case's subject matter? Enhancing party self-determination requires that choices deciding a mediator's approach, methods, and technique be driven more by the wants, needs, and interests of the *parties* than by programmatic needs or "the mediator's own ideological or philosophical preferences."[93] And yet, if these decisions are to be driven by parties' interests and needs, then court-connected mediation programs must ensure that parties are made *aware* of the issues involved and are given input in resolving them—both of which could be accomplished through Opening Negotiation Sessions.

1. What Style or Approach Should the Mediator Employ?

Approximately twenty-five new models of mediation practice have been formulated since the 1990s.[94] Most of these models employ aspects of the three most well-known approaches to mediation: "evaluative," "facilitative," and "transformative."[95] *Evaluative mediators* tend to want to hear all the facts of the case in order to help parties identify and understand the issues, assess the strengths and weaknesses of each side's case, and analyze legal arguments—oftentimes with an overriding goal of trying to determine who would likely prevail

92. CARRIE J. MENKEL-MEADOW ET AL., MEDIATION: PRACTICE, POLICY, AND ETHICS 82 (3d ed. 2020).

93. *See* Christian-Radu Chereji & Constantin-Adi Gavrilă, *What Went Wrong with Mediation?*, WOLTERS KLUWER: KLUWER MEDIATION BLOG (Feb. 6, 2014) https://mediationblog.kluwerarbitration.com/2014/02/06/what-went-wrong-with-mediation/ [https://perma.cc/5CXV-FLWA].

94. *See* Kenneth Kressel, *How Do Mediators Decide What to Do? Implicit Schemas of Practice and Mediator Decisionmaking*, 28 OHIO ST. J. ON DISP. RESOL. 709, 735 (2013). *See generally* Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69 (2005).

95. LISA BLOMGREN AMSLER ET AL., DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT 48 (2020) (noting that mediation models generally correspond to these three categories, "although there is some controversy associated with these labels"). Note that new theories of mediation practice continue to emerge, such as *therapeutic mediation*, which is used in high-conflict family divorce situations, and *narrative mediation*, which is "an outgrowth of postmodernism and research on how people construct reality in a social context." *Id.* at 50.

at trial and what a reasonable remedy (e.g., monetary compensation) might look like.[96] Evaluative mediators tend to exhibit a more directive style (e.g., "I think it would be productive for you to give more consideration to 'X' as we move forward in this case"),[97] and they are rarely shy about proposing settlement terms to resolve the matter.[98]

Facilitative mediators tend to focus on helping to clarify the issues in a way that parties will clearly understand each other's underlying needs and interests—oftentimes with an overriding goal of helping to engineer an interest-based settlement, hopefully achieving benefits to all parties.[99] Facilitative mediators might help to "reality test" different options to ensure the weakest ideas are discarded,[100] but they tend to shy away from evaluating the case or predicting who would prevail at trial.[101]

Transformative mediators' overriding goal is to create an environment that allows parties to clarify their own goals, options, and preferences and to understand and consider the perspective of the other party.[102] In doing this, transformative mediators become skilled

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96. Lisa Blomgren Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 12 (2009); *see also* Jonathan M. Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 19, 45 (2004) (noting that in evaluative mediations, "the mediator giv[es] the parties specific opinions, ranging from opinions about what the courts would do if the matter were to come to trial, to opinions about how proposals will work in the real world, and even to opinions about what is the right thing to do").

97. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 30-33 (2003).

98. Evaluative mediators are oftentimes experts in the subject matter of the dispute, or even former judges who have overseen factually similar cases in their courtrooms—backgrounds that can increase the legitimacy of their proposed settlement. Bingham et al., *supra* note 96, at 12. Scholars have discussed potential drawbacks linked to mediation evaluation, including: the evaluation could jeopardize the perceived neutrality of the mediator; the evaluation could interfere with party self-determination if parties yield to the neutral's analysis and conclusions rather than analyzing the issues themselves; the evaluation could be wrong if it is based on incomplete or inaccurate information, faulty reasoning, etc.; the evaluation might increase party polarization and intensify entrenchment of positions; and parties and counsel anticipating evaluation might focus on influencing the evaluator rather than engaging other parties through collaborative behaviors (such as sharing information and engaging in creative brainstorming) necessary to negotiate mutually-satisfying agreements. *See* John W. Cooley & Lela P. Love, *Midstream Mediator Evaluations and Informed Consent*, DISP. RESOL. MAG., Winter 2008, at 11, 12-13.

99. Bingham et al., *supra* note 96, at 12; *see* Lloyd Liu, *Coming Down from the Bench*, WASH. LAW., Nov.-Dec. 2021, at 35, 35 (noting that Judge Gerald Bruce Lee, who retired from the U.S. District Court for the Eastern District of Virginia, said he enjoyed his transition to becoming a mediator "because I can come off the bench and get side by side with the litigants and their lawyers and talk to them and help them find a pathway to the resolution").

100. *See* Riskin, *supra* note 97, at 30-33.

101. Bingham et al., *supra* note 96, at 12.

102. *See* Lisa Blomgren Bingham et al., *Mediation in Employment and Creeping Legalism: Implications for Dispute Systems Design*, 2010 J. DISP. RESOL. 129, 137-38 (noting that in transformative mediation, "the mediator attempts to highlight moments in the discourse when one participant recognizes and acknowledges the perspective of the other").

at "recognizing and calling attention to opportunities for empowerment and recognition" among and between the parties;[103] they allow parties to open up and express themselves completely, including expressing emotions;[104] and they put a priority on helping parties achieve greater understanding of and connection to the other parties, rather than agreement or resolution.[105] Transformative mediators tend to engage parties in an "elicitive" manner,[106] using questions and dialogue to slowly draw out issues, feelings, alternatives, and proposals.[107] Judge Wayne Brazil suggests this model creates a space for transcendence and interpersonal connection, stating, "In this school of thought, the ultimate purpose of mediation is to encourage individuals to transcend themselves—to deepen their concern about others and to intensify their sense of social connection."[108]

The Opening Negotiation Session in a mediation could include a quick tutorial on these major mediation approaches, explaining what each approach entails and why a particular model might (or might not) be helpful in achieving agreement with respect to a particular kind of dispute. For example, if maintaining a positive future working relationship between disputants is central, the parties could learn about the advantages of using a model with a facilitative or transformative approach. If the case involves compensation over a minor automobile fender-bender between two people who will likely never see each other again, the parties could learn that a model using an evaluative approach could be the most useful and productive.[109] Still, other cases might warrant a combination of approaches[110]—indeed, research

103. Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263, 267 (1996).

104. *Id.* at 271.

105. *See* Bingham et al., *supra* note 102, at 137 ("The transformative mediator does not evaluate or offer opinions on the merits of the dispute, does not pressure participants to settle, and does not recommend particular settlement terms or options."); *see also* Folger & Bush, *supra* note 103, at 275.

106. Riskin, *supra* note 97, at 23.

107. *Id.* at 20; *see also* Carol Pauli, *Transforming News: How Mediation Principles Can Depolarize Public Talk*, 15 PEPP. DISP. RESOL. L.J. 85, 87 (2015) ("[T]ransformative mediation has some intriguing similarities to news interviews; both highlight the areas of disagreement in a conflict, and both unabashedly and precisely repeat even the hurt and hostile words of the disputing parties.").

108. Brazil, *supra* note 6, at 726.

109. *But see generally* Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997).

110. *See* Thomas J. Stipanowich & Véronique Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay Between Mediation, Evaluation and Arbitration in Commercial Cases*, 40 FORDHAM INT'L L.J. 839, 868 (2017) (noting that "some mediators 'mix modes' and engage in both non-evaluative and evaluative activities during the course of attempting to assist parties reach informal resolution of disputes"); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 109, 110 n.176 (1998) (arguing that evaluations by a neutral should not be called

shows that many, perhaps most, mediators employ a combination of facilitative, evaluative, *and* transformative approaches.[111] It would be helpful for parties to learn, through the Opening Negotiation Session, about the advantages and disadvantages of models that employ a single or combined approach.[112]

In setting up a court-connected program, there are numerous questions surrounding the mediators that could potentially be addressed: Will disputing parties be told there are different styles of mediation and be provided a brief sketch of each? If the program has assembled a roster from which it draws mediators, will disputing parties be informed of the style or approach used by each mediator appearing on that roster? Will disputing parties be permitted to give input regarding which mediator will be assigned to their case? In reality, even when a court-connected program provides public information regarding the training, experience, and ethics standards that must be achieved by its mediators,[113] it is less likely the program will allow disputing parties to play a role in actually *selecting* their mediator (although if a court-connected program allows disputing parties to use private sector ADR services,[114] those services sometimes allow parties to play a role in selecting their mediator). In general,[115]

"mediation" but suggesting there are nevertheless certain instances where "mixed" facilitative and evaluative processes can be useful).

111. *See* Donald T. Saposnek, *Commentary: The Future of the History of Family Mediation Research*, 22 CONFLICT RESOL. Q. 37, 44 (2004).

112. Professional mediator and arbitrator David Reif, who has extensive background in litigation arising out of distribution relations, states the following to prospective clients: "I am neither facilitative nor evaluative—and am both. That's the flexibility that a mediator needs to bring to a given situation; each matter needs its own approach." *Mediation*, DAVID REIF—ARB. & MEDIATOR, reifadr.com/mediation/ (last visited Sept. 23, 2023); *see also* Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1887 (1997) ("In actual practice, many mediators' functions vary from facilitating communication, to probing the parties' own thinking about the strengths and weaknesses of their cases, to neutral evaluation of the merits, to prediction of how courts will decide cases, to forms that include suggesting solutions (with or without the use of shuttle diplomacy) or approaching decision-like arbitration.").

113. Mendelson et al., *supra* note 85, at 525.

114. In the U.S. District Court for the Northern District of California, parties are permitted, with approval by the assigned judge, to use an ADR process that is offered by a private provider. *See* N.D. CAL. ADR R. 3-4(b); *see also* Debra Berman & James Alfini, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 MARQ. L. REV. 887, 919 (2012) (noting that "[w]hile many court programs have full-time, on-site staff mediators, financial restraints" are forcing them to "contract out to local mediators and pay them a minimal flat fee for their services").

115. Some mediation programs are employing dispute design techniques that shift some of the decisionmaking power to the disputants. For example, the program being developed by the New York State Unified Court System makes available a Statewide Mediator Directory, created in collaboration with local judicial districts, enabling court users to locate a Community Dispute Resolution Center or one of 800 qualified mediators. Users can search the directory by location or case type; they can also use filters to find mediators who are also attorneys, mediators willing to conduct online mediations, and mediators capable of speaking different languages. Mendelson et al., *supra* note 85, at 526.

court-connected mediation programs "simply hand off the case" to one of the program-affiliated mediators, who is then "free, within extremely broad limitations, 'to work her magic' on the participants."[116]

So how might the workings of this typical process be altered if the end goal is to increase party self-determination? Ideally, all mediators in a given court-connected program would be trained in and adept at using several different mediation approaches (or at least the three major ones, evaluative, facilitative, and transformative), and parties would be permitted to help choose which approach—or which combination of approaches—will be employed for their particular mediation.[117] The parties have lived through their dispute from its beginning and they, more than anyone else, know the history, details, and nuances of the friction. Accordingly, they likely have keen insights regarding which style of mediation should be employed. In addition, after the mediation process begins to unfold, if a reasonable amount of time passes trying to reach agreement but little progress is being made, parties could be given the power to request that a *different* style or approach be implemented—either by having the same mediator use a different approach or by assigning a new mediator.[118] Thus, using an Opening Negotiation Session to educate disputing parties on these issues, and then giving them input in assigning a mediator, could lead to increases in their autonomy, informed consent, and self-determination in the overall process.[119]

2. Should Mediators Be "Expert" in the Issue(s) Being Mediated?

This question is complicated by the question immediately preceding this one, where it was argued that all mediators should be trained in and adept at using (at the very least) the three major mediation approaches (evaluative, facilitative, and transformative), thereby allowing the *parties* to help choose which style will be used during their session. A mediator skilled in all three approaches would need subject matter expertise regarding the dispute because the parties might decide they want an evaluative mediator for parts of their

116. Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 513-14 (2004).

117. *See* Chereji & Gavrilă, *supra* note 93.

118. *See* Stipanowich, *supra* note 12, at 347 (noting that decisions for having a neutral change roles "should be left to the parties").

119. *See* Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 571-72 (2008); *see also* Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 109; Nolan-Haley, *supra* note 8, at 778 ("At a minimum, the principle of informed consent requires that parties *be educated about the mediation process* before they consent to participate in it . . . . The disclosures required by informed consent promote autonomous decisionmaking. This in turn reduces the likelihood that parties will attempt to rescind settlement agreements, thereby enhancing the efficiency of mediation as a dispute resolution system." (emphasis added)).

session (meaning a mediator capable of proposing solutions and evaluating solutions proposed by others—tasks that would be hindered if the mediator has no subject matter expertise, especially for highly specialized areas that are difficult to understand without specific training or experience).[120]

If the parties were to decide instead that they want the mediator to employ a facilitative or transformative approach (or a combination thereof), that mediator would then have to tamp down evaluative-type behaviors, or as Professors Baruch Bush and Joseph Folger put it, the mediator would have "to put down the mantle of expertise[] to start moving away from the directive, problem-solver role."[121] The issue of subject matter expertise, then, appears to add a layer of complexity to the parties' choice of mediator style. In order to enhance party self-determination as much as possible, the mediation's Opening Negotiation Session should include a discussion about the advantages and disadvantages of the three major mediation approaches *combined with* a discussion of the advantages and disadvantages of choosing a mediator with subject matter expertise. *Advantages* of such expertise include the ability to quickly recognize and understand the most essential aspects of the case (and ignore red herrings and irrelevant tangents); the ability to ask penetrating questions that illuminate the strengths and weaknesses of all parties' positions;[122] the ability to think up innovative, effective solutions; and the ability to "reality check" viewpoints and resolution ideas.[123]

Disadvantages are that expertise can lead mediators to prematurely dismiss ideas that do not conform to the "current thinking" among experts in a given field—in effect swatting down otherwise worthy proposals;[124] to offer opinions when the parties have not asked for them and might not be interested in hearing them; to offer input too early in the process (thus cutting off exploration of other potentially fruitful avenues); and to offer expertise in a manner that is

120. *See* Bingham et al., *supra* note 96, at 12; *see also* Cooley & Love, *supra* note 98, at 12.

121. Robert A. Baruch Bush & Joseph P. Folger, *Reclaiming Mediation's Future: Re-Focusing on Party Self-Determination*, 16 CARDOZO J. CONFLICT RESOL. 741, 750 (2015) (criticizing mediators who "surrender[] to the culture of directiveness and expertise" and calling upon mediators to "[b]egin reclaiming the job of truly supporting our fellow human beings who, when in difficult straits, need only modest assistance from us to find their own strength, their own solutions, and their own compassion for each other").

122. *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 46-47 (1996).

123. *See* Haavi Morreim, *Mediating in Healthcare's Clinical Setting: Time for a Course Correction*, 35 OHIO ST. J. ON DISP. RESOL. 81, 103-04 (2019).

124. *See* J. Michael Keating, Jr., *In Mediation, Caucus Can Be a Powerful Tool*, 14 ALTS. TO HIGH COST LITIG. 85, 85 (1996) ("The mediator needs to nurture fresh ideas and restrain parties from dismissing them peremptorily.").

overly forceful or dominating.[125] As mentioned previously, it is the *parties* who have lived through their dispute from the beginning. They, more than anyone else, know the history and details of the friction and can offer important insights regarding the degree to which the mediator should be a subject matter expert of the dispute, as well as the degree to which that person's expertise should play a role during the mediation itself.

Question #2: To What Extent Should the "Caucus" Be Used During a Mediation?

I once co-mediated a divorce case that began with a joint meeting of a husband and wife who had spent the previous year sending nasty messages back and forth through their respective attorneys. Both parties wanted to conduct the entire mediation encamped in separate caucus rooms so they would not have to face each other in person. As co-mediators, we insisted that the disputants initially meet together in joint session, if only briefly, to get a broad picture of the situation. The parties reluctantly agreed. The joint session opened with the husband saying, "I cannot believe she wants a divorce." The wife quickly interrupted and said, "I don't want a divorce—it's *you* who wants a divorce." My co-mediator then said, "It sounds like you need to speak together in private to figure out if you want to move forward today." The couple talked briefly in the corner of the room, informed us they no longer needed our services, and walked out of the building together. I have often wondered how the matter would have turned out if we had agreed to their initial request for complete spatial separation, without a face-to-face meeting.

Caucuses are private meetings taking place between a mediator and one of the parties involved in the mediation (or, in a multiparty mediation, between the mediator and a subset of parties involved in the mediation). Sometimes the mediation is structured in a way that a caucus would constitute a quick side meeting, where a mediator and one party would step away from the session to briefly confer privately before returning to continue meeting with all participants. At other times, spatially separated caucus areas are set up as the permanent structure for the mediation, with mediators carrying offers and

125. Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work*, *in* WHEN TALK WORKS: PROFILES OF MEDIATORS 459, 473 (Deborah M. Kolb & Associates eds., 1994) ("[M]ediators who frame the primary task as one of settlement tend to be directive in their style. They orient their activities toward concrete problem solving and frequently make suggestions on matters of substance. Most are comfortable with the notion that they are expert in the particular substantive domain in which the dispute occurs, and they use this expertise as the touchstone of their efforts at persuasion and influence.").

counteroffers between the separate camps,[126] as diplomats would do via "shuttle diplomacy" between parties that do not wish to confer together in the same physical space.[127]

The opposite of the caucus is the "joint session," where all participants engage face-to-face (either in person or virtually), working together as a group. Some mediation experts suggest the joint session represents the core of mediation, enabling the unfolding of a "learning conversation" where "listening is elevated over talking and better understanding and clarity are advanced over 'winning' or making someone lose."[128] These experts argue that joint sessions and the "human connection" invigorated by them are not only critical for disputes laden with emotion and interpersonal dynamics (such as those dealing with family, employment, or personal injury issues, for example), but also for disputes that at first glance appear to be more dry and less personal (like those dealing with commercial transaction or business issues, for example).[129] Finally, these experts suggest that when parties work in a potentially more collaborative fashion through joint sessions, the outcome is "less contentious and more satisfying and durable," adding that the strengthened relationships resulting from such a process may lead to avoiding future conflicts.[130]

Another mediation expert suggests additional positive aspects, including that parties speaking directly to each other in joint session can deliver messages with greater force and clarity than can go-between mediators attempting to deliver the same message on another's behalf during caucus;[131] that joint sessions allow for direct apologies, as well as the direct expression of emotion (which can lead to productive venting but also to unproductive defensiveness);[132] that

126. *See* Krivis, *supra* note 68 ("[M]ediators and parties have gone to extremes to avoid direct dialogue," which "often reduce[s] the role of the mediator to a 'water carrier' of offers and counter offers, similar to a production worker. This automated approach reduces what has been the main ingredient in successful mediation practice—creativity.").

127. *See* MENKEL-MEADOW ET AL., *supra* note 92, at 369 (discussing how shuttle diplomacy was used effectively by Secretary of State Henry Kissinger and President Jimmy Carter, who would move from party to party, relying only on caucuses and private meetings to broker agreements that "are much more likely to be suggested by the mediators than developed in direct negotiations between the parties").

128. Eric Galton et al., *The Decline of Dialogue: The Rise of Caucus-Only Mediation and the Disappearance of the Joint Session*, 39 ALTS. TO HIGH COST LITIG. 95, 96 (2021). "When people are in the same room—or on the same screen—they behave differently, and often better, when confronted with their own common humanity." *Id.* at 100.

129. *Id.* at 97.

130. *Id.*

131. *See* DAVID A. HOFFMAN, MEDIATION: A PRACTICE GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS § 1.6.1 (2013).

132. *See id.*; *see also* Stephen B. Goldberg et al., *Dealing with Difficulties: What to Say When Parties Won't Settle and Only Want to Prove They Are Right*, 35 ALTS. TO HIGH COST LITIG. 145, 150-51 (2017) ("The advantage of venting in joint session is that speaking about one's anger, hurt, or disappointment directly to the other party in the presence of the mediator should help reduce the speaker's emotions. The risk is that the other party may become

joint sessions allow participants to assess the credibility of a speaker (based on their words, voice, and body language);[133] and finally, that joint sessions might increase the quality and accuracy of information being exchanged because participants can immediately respond to, challenge, or contradict what is being stated.[134]

Of course, other experts argue that it is the *caucus*, rather than the joint session, that can lead to advantages and favorable results during a mediation. It has been suggested that employing the caucus enables mediators to more easily control information flow[135] (which some caution as possibly leading to mediator manipulation[136] and others praise as key to value creation within the mediation process);[137] that caucusing can help to avoid a "prisoner's dilemma" issue that can occur in mediation when parties are fearful that exhibiting cooperative behavior toward another party might lead the recipient to *exploit* that

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defensive and emotional in return, jeopardizing the mediation."); David A. Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 NEGOT. J. 263, 269 (2011) (noting that when President Jimmy Carter was mediating between disputing parties in the Middle East, a face-to-face meeting nearly resulted in the sudden departure of one of the parties; fortunately, "Carter was able to salvage the talks through further shuttle diplomacy").

133. *See* HOFFMAN, *supra* note 131, § 1.6.1.

134. *See id.*; *see also* GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING 29 (2009) (arguing that joint sessions in mediation are necessary to promote true dialogue and understanding, to avoid mediator misconduct, and to promote a complete and accurate flow of information among disputants).

135. Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 326 (1994) (noting it is during caucusing "that the mediator most clearly controls the flow of information between the disputants" (emphasis omitted)).

136. *See* Hoffman, *supra* note 132, at 299 (noting that with caucusing, mediators end up with more information than any of the parties have separately, thereby putting the mediator "in a position of power." The author suggests this "informational advantage" could potentially turn the mediator "into more of a judge or an arbitrator," or could lead to manipulation by the mediator). *But see* David E. Matz, *Mediator Pressure and Party Autonomy: Are They Consistent with Each Other?*, 10 NEGOT. J. 359, 365 (1994) (suggesting that some people likely attend mediation because they want the mediator to manipulate, albeit perhaps with a light touch, by applying pressure to the parties); David A. Hoffman, *Ten Principles of Mediation Ethics*, 18 ALTS. TO HIGH COST LITIG. 147, 169 (2000) (noting that mediators are in a "unique and privileged position" when meeting with parties separately and confidentially in caucus sessions, and they must "not abuse the . . . trust" parties place in them, which means telling the truth even when they "believe[ ] that bending the truth will further the cause of settlement"); Lorig Charkoudian et al., *What Works in Alternative Dispute Resolution? The Impact of Third-Party Neutral Strategies in Small Claims Cases*, 37 CONFLICT RESOL. Q. 101, 117 (2019) (in researching small claims cases settled by ADR, investigators concluded that "the greater the percentage of time spent in caucus, the more likely participants reported that the neutral controlled the outcome, pressured them into solutions, and prevented issues from coming out").

137. *See* Brown & Ayres, *supra* note 135, at 364-65 (noting the importance of mediators being skilled at making a "noisy transmission of information" between parties, or a less-than-precise information translation from one party to another through private meetings with each party. As the authors put it: "Value creation through mediation turns crucially on the way the mediator translates private reports. *Imprecision is a necessary element.* If the mediator precisely restates what was revealed during a caucus, the mediator accomplishes nothing that could not be accomplished by unmediated communication between the parties" (emphasis added)).

move rather than respond cooperatively in kind;[138] that caucusing enables parties to communicate via the mediator when they are uncomfortable doing so in person because of racial, cultural, gender, or other differences—or even when parties simply cannot stand communicating face-to-face because of personality conflicts, feelings of anger, distrust, disgust, etc.;[139] that caucusing allows mediators to reframe messages and information that could otherwise raise defenses or come across as accusatory, condescending, or otherwise inflammatory;[140] that caucusing can lead to increased honesty and trust between parties and the mediator; [141] and that caucusing gives mediators the opportunity to engage in brainstorming and "reality testing" in ways that might appear biased if it were done during joint session.

Finally, there can be a mix of the two, or hybrid models, where *both* caucusing and joint sessions are employed. For example, in multiparty public policy mediations, the mediator might begin by meeting separately with each party to assess the situation, gather information, and develop rapport and trust with each party.[142] Then, after that initial stage, joint sessions could take place on a regular basis—perhaps with the mediator caucusing separately with different parties between those joint sessions.[143]

In 2019, a survey was developed involving the participation of 129 mediators from the International Academy of Mediators (hereinafter, "IAM Survey").[144] Although 95% of the mediators surveyed had been trained to use joint sessions when mediating, there appeared to be a preference for *not* doing so—and using caucuses instead—when it

138. *See* Hoffman, *supra* note 132, at 274 (describing the mediator's ability to circumvent the prisoner's dilemma as follows: "When a mediator enters a negotiation, he or she has the ability, through the use of caucuses, to secure, on a confidential basis, a commitment from Party A to cooperate on an issue if (but only if) the mediator can secure a reciprocal commitment from Party B. Thus, the mediator will communicate to the parties their willingness to cooperate on that issue only when each party has privately made such a commitment").

139. *See* Flavia Fragale Martins Pepino, *Mediation and Reluctant Lawyers: Suggestions for Mediators' Approaches*, 5 APPALACHIAN J.L. 241, 244 (2006) (noting the benefits of caucusing, including avoiding damage to party relationships, preventing parties from engaging in emotionally manipulative behaviors, and allowing mediators to confront parties without causing loss of face).

140. *See* Jared Bishop, *Implementing Mediation into NHL Salary Negotiations for Restricted Free Agents Prior to Salary Arbitration*, 23 SPORTS LAWS. J. 137, 151 (2016) (discussing the 2012 National Hockey League lockout, in which the mediator "used a private caucus technique to keep the parties apart and avoid confrontational disputes").

141. *See* Hoffman, *supra* note 132, at 293 (noting that although mediators can "build strong relationships" with parties during joint sessions, it is during the "more intimate setting" of caucus meetings that trust and rapport can be forged to the point where parties will "begin to disclose . . . their deepest fears, concerns, and hopes").

142. *Id.* at 268.

143. *Id.* (noting that even in cases where mediators favor caucusing (like commercial cases) or cases where mediators favor using joint sessions (like family cases), mediators have created many variations and hybrids).

144. Galton et al., *supra* note 128, at 97. The survey was developed by Galton, Love, and Weiss, with the added assistance of Professor Lisa Blomgren Amsler. *Id.*

came to their own mediation practices: only 29.5% of the practicing mediators said they were "usually" or "sometimes" in *joint sessions* while mediating in practice, compared to 66.5% who said they were "always," "usually," or "sometimes" in *caucus*.[145]

Why is there such a tilt toward spending time caucusing rather than in joint session? One element influencing this decision appears to be the culture that dominates within different areas of dispute. For example, commercial mediation in the United States tends to involve extensive caucusing, while divorce mediation tends to involve mostly joint sessions.[146] Professor David Hoffman concludes that "the most powerful factor" influencing whether a mediator will use joint sessions or caucus sessions "is whether the disputants will likely have a relationship of some kind in the future."[147] If that is accurate, it would follow that if disputing parties play a role in deciding the extent to which caucuses should (or should not) play a role in a given mediation, those parties should try to determine the degree to which they wish to have a continuing relationship after the mediation ends.[148]

But there appears to be another powerful factor that can influence whether a mediation will favor using joint sessions or caucuses: it was reported through the IAM Survey that mediators' primary source of cases was referrals from practicing lawyers.[149] It is therefore not surprising that those conducting the survey concluded that "the main reasons [the mediators] did not use a joint session was that attorneys and, second choice, parties did not want a joint session. *In other words, attorneys are having a mighty influence on the default process used by mediators*."[150] Does this mean attorneys are sometimes purposefully influencing their clients to push for the use of caucuses during mediations? And if so, what exactly does that look like?—i.e., is it a gentle nudge or a hard sell? It will be important for future researchers to determine exactly how much the *parties* (as compared to the

145. *Id.* at 98.

146. Hoffman, *supra* note 132, at 267; *see also* JOHN W. COOLEY, THE MEDIATOR'S HANDBOOK 28 (2d ed. 2006) (noting that when insurance claim cases are mediated, "[m]ultiple caucusing is the primary technique," while in family law cases, some mediators "as a matter of practice never caucus separately with the parties"); Geigerman, *supra* note 29, at 28 (noting that "[e]xperienced mediators are retreating from the joint session" and that advocates from around the nation have reported to the author that "they prefer to use the joint session only as a 'meet and greet' opportunity").

147. Hoffman, *supra* note 132, at 267.

148. *See* Geigerman, *supra* note 29, at 27-28 ("In most tort cases and many contract disputes, the only continuing relationship will be between opposing counsel.").

149. *See also* Shestowsky, *supra* note 119, at 592-93 (including the following statement by Les Lopes, former chairperson of the Metropolitan Board of the Society of Professionals in Dispute Resolution ("SPIDR"): "[T]he disputants who come and go are not the customer, but rather the lawyers who continually frolic in the murky waters of conflict, thus changing our very focus of who it is we serve as mediators").

150. Galton et al., *supra* note 128, at 99 (emphasis added). The authors also state that "caucus-only mediators report that their primary goal is getting a deal done, many believing perhaps that 'closing deals' is the primary way to get repeat business." *Id.*

attorneys) are driving these decisions away from joint sessions and toward caucusing,[151] especially given that a core tenet of self-determination in mediation is that "each party makes free and informed choices as to process and outcome."[152]

The issue of joint sessions versus caucusing, or the many hybrids that creatively encompass elements of both,[153] is clearly another topic that should be addressed by the participants during the mediation's Opening Negotiation Session. It would be one more example of providing disputants with as much information and transparency as possible surrounding a long-debated issue in the mediation field, including explaining the advantages and disadvantages that attach to each of the two possibilities, then empowering parties to make what they believe would be the most fair, reasonable, and effective process design choice pursuant to the history and dynamics of their particular dispute.[154]

Question #3: Should Mediations Be Conducted in Person, or Virtually?

During the COVID-19 pandemic, many courts in New York shifted from in-person to virtual mediation.[155] Although a more nuanced picture of the impacts from such a shift will emerge in the coming months and years, preliminary investigations suggest that mediating virtually can potentially play an important role in protecting (and even augmenting) party self-determination in mediation. Consider, for example, the issue of caucusing within mediation: there are some

151. Attorneys sometimes report that they do not like to begin mediations with a joint session because it can lead to extreme and polarizing opening statements. This problem could be addressed by having parties exchange briefs several days in advance, giving parties time to digest the core of each side's case, and allowing time for emotional aspects to dissipate before the mediation begins. *See* Lela P. Love & Thomas J. Stipanowich, *Dear 1L: Five Guideposts for Your Future Professional Practice*, 22 CARDOZO J. CONFLICT RESOL. 529, 537 (2021) (discussing the approach and mindset of the typical litigator, who "functions as a partisan champion in an adversarial contest where the aim is unilateral victory"); *see also* Geoff Sharp, *The Californication of Mediation*, WOLTERS KLUWER: KLUWER MEDIATION BLOG (Dec. 10, 2014), https://mediationblog.kluwerarbitration.com/2014/12/10/the-californication-of-mediation/ [https://perma.cc/FE36-YW62]; Krivis, *supra* note 68.

152. MODEL STANDARDS OF CONDUCT FOR MEDIATORS § IA (AM. ARB. ASS'N ET AL. 2005) (addressing the topic of "self-determination"). The document states that "[a] mediator shall not undermine party self-determination by any party for reasons such as . . . increased fees, or outside pressures." *Id.* § IB. The Model Standards were approved by the ABA House of Delegates on August 9, 2005.

153. *See* Hoffman, *supra* note 132, at 303-04 (describing hybrids and variations in the context of joint sessions and caucusing).

154. MODEL STANDARDS OF CONDUCT FOR MEDIATORS § IA (AM. ARB. ASS'N ET AL. 2005) ("Parties may exercise self-determination at any stage of a mediation, *including . . . process design* . . . ." (emphasis added)).

155. Donna Erez-Navot, *Reimagining Access to Justice: Should We Shift to Virtual Mediation Programs Beyond the Covid-19 Pandemic, Especially for Small Claims?*, 94 N.Y. ST. B.A. J. 38 (2022) (discussing shift to virtual mediation during the COVID-19 pandemic).

kinds of cases (like sexual harassment cases or highly charged employment matters) where placing parties into separate caucus rooms is entirely appropriate.[156] Moving those mediations to a virtual format allows participants to experience aspects of both "joint" and "caucus" mediation formats simultaneously: having all parties gathered together on the same screen allows them to be both face-to-face (at least virtually) *and* spatially separated because they are engaging from different physical locations. Preliminary research suggests the advantages of mediating virtually might, in some cases, outweigh the disadvantages (but of course facts and circumstances unique to any given case might change the calculation in various ways).

Advantages of mediating virtually include the following. It eliminates the need for travel and the time and expense that goes with it—allowing parties located anywhere in the world, as well as low-income people who normally experience many in-person participation barriers,[157] to easily join in. Participants report that virtual mediations produce less fatigue than in-person mediations,[158] possibly because participants can move in and out of a session for needed breaks by pushing a button or clicking a mouse, unlike in-person mediations which tend to be marathon sessions with no reprieve.[159] Virtual mediation makes it easier to convince time-strapped, high-level decisionmakers (like executives and insurance adjusters) or other experts to participate in the process.[160] Parties appear to be more

156. Galton et al., *supra* note 128, at 97 (noting that "caucus has an important role" in "cases where parties are too traumatized to speak to their abusers").

157. *See* Robert Rubinson, *Of Grids and Gatekeepers: The Socioeconomics of Mediation*, 17 CARDOZO J. CONFLICT RESOL. 873, 891-92 (2016) (discussing the difficulties facing low-income parties when they are required to attend court-connected mediation, including difficulty finding child care, difficulty traveling to the courthouse by public transportation, and difficulty securing time off from work for a mediation, especially from low-wage jobs).

158. Dwight Golann, *"I Sometimes Catch Myself Looking Angry or Tired . . .": The Impact of Mediating by Zoom*, 39 ALTS. TO HIGH COST LITIG. 73, 85-86 (2021). *But see* Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Processes*, 71 DEPAUL L. REV. 537, 554-55 (2022) (noting that so-called "Zoom fatigue" is a "real" occurrence for numerous reasons, including that videoconferencing involves a tremendous amount of sustained eye gaze; that "gallery view" while videoconferencing can produce a kind of brain overload as participants attempt to understand multiple people during the same conversation; and that videoconferencing can require increased effort and energy in making sure one is being listened to and understood by other parties).

159. *See* Michael Pressman, *Remote Jury Trials: Reporting on Judge Matthew W. Williams's Experiences in King County, Washington*, JURY MATTERS, Feb. 2021, at 7. Judge Williams noticed jurors' strong ability to focus during virtual trials and hypothesized the courtroom "is a foreign environment for the jurors, and as a result, their minds might be on other things while in the courtroom (even pre-pandemic); but at home, they are in a place that they find safe." *Id.*

160. *See* Jasmine Floyd, *Better on Zoom: Attorneys Are Creating Strategies to Aid Videoconferencing in Mediation*, LAW.COM (Nov. 17, 2021, 12:32 PM), https://www.law.com/dailybusinessreview/2021/11/17/better-on-zoom-attorneys-are-creating-strategies-to-aid-videoconferencing-in-mediation/ [https://perma.cc/4L4G-NMP5] (a managing partner within an

active during virtual mediations compared to those taking place in person,[161] something that might result from how participants are configured on the screen and how the technology functions.[162] With the Zoom platform, for example, everyone is represented by an equal-sized "square" on the screen, with a participant's square lighting up when the person speaks—a feature that tends to prevent other participants from interrupting.[163] Virtual participants can choose the physical location from which they will engage, oftentimes leading to a relaxed home setting with comfortable chairs and easy access to refreshments.[164]

Virtual mediation participants also appear to more readily form personal connections with fellow participants than tends to occur in person.[165] With virtual mediations, there are sometimes brief interruptions from pets or children that can result in participants relating to each other more informally.[166] Virtual participants seeing themselves on the screen in real time leads to improved behavior, meaning participants (including lawyers) "are less likely to be nasty or insulting

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international law firm reports mediating virtually enables her to "get[] the real decision makers to make themselves available"); *see also* Golann, *supra* note 158, at 85 (concluding that "[e]xecutives who would never travel to a mediator's office will participate in the process if it is held over the web" and that virtual mediations result in faster case conclusions because "parties more often make decisions on issues that in an in-person process would be taken back to the office"); E. PATRICK MCDERMOTT & RUTH OBAR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATORS' PERCEPTION OF REMOTE MEDIATION AND COMPARISONS TO IN-PERSON MEDIATION 7 (2022) (noting that virtual mediations allow for "the positive role played by insurance adjusters, and the real-time ability to invite other persons such as a key decision-maker into the mediation").

161. *See* Pressman, *supra* note 159, at 7 (noting that Judge Williams "has observed and received reports that remote trials have led to enhanced engagement of jurors and an enhanced ability of jurors to understand exhibits").

162. *Id.* at 6 (noting that Judge Williams found juror participation during voir dire—a process of interaction having some similarities to that which takes place during mediation—is "much greater and freer when done remotely rather than when it is done in person" and that "jurors feel safer and more comfortable when they are in a safe place," including "shar[ing] more personal perspectives").

163. Golann, *supra* note 158, at 73. Golann quotes a mediator who concludes that "[t]he clients have the same 'front row' seat to the mediator (and the other participants) and seem to feel more empowered by this." Golann suggests this dynamic leads to "parties engag[ing] more readily and lawyers find[ing] it more difficult to block or override them." *See also* Pressman, *supra* note 159, at 6 (noting that when trials are conducted virtually rather than in person, female jurors feel less intimidated when men speak, and it is more difficult for men to "talk over women").

164. *But see* Sternlight & Robbennolt, *supra* note 158, at 556 (noting that "too much comfort might lead some participants to forget the importance of the process and become disengaged").

165. *See* Pressman, *supra* note 159, at 7 (noting that Judge Williams stated that "both attorneys and jurors reported a greater connection to each other over remote technology than has been the case in in-person trials"); *see also* Golann, *supra* note 158, at 73 (observing that people are more likely to talk about daily life during Zoom mediations, "or something in the background will strike a spark." Professor Golann quotes a mediator who concludes that connections made during Zoom mediations can be "most intimate . . . candid . . . sometimes people even say that they forget they're on Zoom").

166. Golann, *supra* note 158, at 73.

or seek to bully an opponent."[167] It is easier for virtual participants to speak privately with each other, either one-on-one or in small groups; these private meetings can take place in a separate breakout room or through a private "chat" messaging function.[168] Finally, early indications suggest that settlement rates for mediations conducted virtually are approximately the same as for those conducted in person.[169]

Disadvantages of mediating virtually include the following. Because participants do not have to put forth the time and expense associated with traveling to a mediation site, virtual mediations can make process boundaries more "fluid," such as enabling participants to more easily postpone a mediation at the last minute (as postponement will not burden anyone with having to cancel transportation or hotel arrangements, pay airline cancellation fees, etc.).[170] Virtual mediations also enable parties to transform the typical marathon-like in-person session into a number of shorter online sessions that are spread intermittently over multiple days, weeks, or months.[171] All of this translates into a less powerful "settlement event" because it lacks the urgency, hard deadlines, and momentum that go along with in-person mediations.[172] Having the mediation take place virtually also eliminates informal contacts and exchanges that tend to occur in person, such as brief exchanges in the parking lot, in a hallway, or at the coffee machine—although technology experts suggest that similar interactions can be made available in the virtual context.[173]

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167. *Id.* at 85 (noting that participants tended to be less confrontational and more friendly compared to in-person mediations).

168. *See* MCDERMOTT & OBAR, *supra* note 160, at 18 (noting that 58% of Equal Employment Opportunity Commission mediators use the "chat" tool during their mediations); *see also* Golann, *supra* note 158, at 86 (noting one mediator who said that he "admits clients to breakout rooms first if he wants a chance to talk with lawyers privately").

169. *See* Linda R. Singer, *Update on Remote Mediations and the Virtual Evolution of ADR*, JAMS: JAMS ADR INSIGHTS (Oct. 29, 2020), https://www.jamsadr.com/blog/2020/update-on-remote-mediations-and-the-virtual-evolution-of-adr [https://perma.cc/N9YW-PBJB]. *But see* MCDERMOTT & OBAR, *supra* note 160, at 9 (noting that in this study of the Equal Employment Opportunity Commission's online mediation program, 20% of mediators had *higher* settlement rates for virtual mediations compared to in-person mediations, and 9% of mediators had *lower* settlement rates for virtual mediations compared to in-person mediations).

170. Golann, *supra* note 158, at 86; *see also* Genreis, Inc. v. Brown, No. 8:22CV74, 2022 U.S. Dist. LEXIS 126930, at *4 (D. Neb. July 18, 2022) (recording one party's argument to the court that in-person mediation is more effective than virtual mediation because in-person disputants are "physically confined in one location with each other" and "they invest a significant amount of energy to attend mediation").

171. *See* John Lande, *A Survey of Early Dispute Resolution Movements*, 40 ALTS. TO HIGH COST LITIG. 57, 68 (2022).

172. Golann, *supra* note 158, at 86. Historically, hard deadlines have been imposed by things like a previously booked return flight and similar scheduling demands.

173. *See* Steven Zeitchik, *MIT Expert on Work Says Any Boss Who Thinks Employees Will Return to Offices Is Dreaming*, WASH. POST (Oct. 26, 2021, 8:00 AM), https://www.washingtonpost.com/technology/2021/10/26/thomas-malone-mit-faq-work/ [https://perma.cc/P24A-ZZCQ]. MIT Professor Thomas Malone states in this interview that he and colleagues

In addition, virtual mediators are not able to use snacks and meals as a way to incorporate periodic breaks into the proceedings, thus eliminating the use of a subtle and useful tool that normally can result in participants lowering emotional barriers, interacting more informally, and generally building connection and goodwill.[174] Further, if the virtual mediation includes participants from different time zones, it can create scheduling difficulties (for example, a starting time of 9:00 a.m. in San Francisco means it is already noon in New York City). Finally, virtual mediations present various cyber-security and "access to justice" issues and challenges—e.g., ensuring that the mediations remain truly confidential (including the prevention of secret recordings and possible leaking of those recordings to outside parties) and ensuring that all parties have access to the internet and required software and hardware.[175]

There was one important finding that seemed to go in different directions for different mediators: in comparing virtual and in-person mediations, some mediators found it easier to "read" participants in the virtual context (through facial expressions, body language, etc.), and other mediators found it easier to read people in person.[176] In a study of the Equal Employment Opportunity Commission's virtual mediation program, 57% of the mediators reported they could "effectively" read body language online, while one-quarter reported they could not.[177] Given the importance of this topic, additional research should be conducted to achieve more definitive conclusions. In

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have created a computer program prototype that enables online participants "to have that informal mingling you'd normally have after a meeting." *Id.*

174. *See* Colleen Maher Ernst, *Breaking Bread Together: The Role of Food in Mediation*, 69 DISP. RESOL. J. 25, 35 (2014) (discussing mediators' use of "mood-improving foods such as chocolate in order to facilitate productive dialogue").

175. Mendelson et al., *supra* note 85, at 527 (acknowledging that, among those turning to the New York State Unified Court System, "there are still users who do not have sufficient access to technology to meaningfully participate in these initiatives, due to a lack of computer or mobile devices, reliable internet, or the knowledge base to participate in court-approved video conferencing and document sharing platforms." The authors suggest this "digital divide" amounts to a "justice divide").

176. Golann, *supra* note 158, at 86; *see also* David T. Nguyen & John Canny, *More Than Face-to-Face: Empathy Effects of Video Framing*, *in* PROCEEDINGS OF THE 27TH INTERNATIONAL CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 423, 431 (2009) (noting that if virtual participants are careful to make their upper body visible (meaning their head, torso, and hands) rather than only their face, the ability to develop empathy among the speakers is similar to that which occurs in face-to-face meetings). *But see* Sean D. O'Brien et al., *Put Down the Phone! The Standard for Witness Interviews is In-Person, Face-to-Face, One-on-One*, 50 HOFSTRA L. REV. 339, 348 (2022) ("Building rapport requires interpersonal communication skills that cannot be used in a . . . video conference, such as making eye contact and detecting and responding to a subject's apprehension or anxiety.").

177. MCDERMOTT & OBAR, *supra* note 160, at 22; *see also* Morton Denlow, *6 Steps to Effective Zoom Mediation*, 34 CBA REC. 25, 26 (2020) (noting that virtual mediation can result in a "[d]ecreased ability to study 'the room,' such as body language or the dynamics between counsel and their clients").

the meantime, however, there is clearly enough information comparing virtual and in-person mediation to warrant its consideration during the Opening Negotiation Session.

Question #4: Should Parties Be Empowered to Design a Hybrid Mediation Process to Address Their Dispute?

Jeremy Lack, an ADR expert and practicing lawyer, points out that when people are faced with a dispute, they "tend not to think as *consumers*, nor of . . . *choice*[]."[178] Programs like New York's presumptive early ADR program are changing this mindset; such programs are expanding *resolution choices* inside the courthouse, thereby turning disputants and their counsel into more savvy dispute resolution consumers.[179] In New York, a civil case can be addressed through one of several different court-sponsored ADR programs, including mediation, arbitration, neutral evaluation, summary jury trials, and court-connected settlement conferences.[180] Practitioner-scholars such as Jeremy Lack are writing about creative ways to *further* expand resolution choice, such as combining two or more ADR processes—sometimes called "mixed mode"[181]—in a way that the "combined processes can be sequential, separate but parallel or true hybrids, in which the roles of the neutrals can evolve or blend, and it becomes more difficult to distinguish one part of the process from another."[182]

The Global Pound Conference Series—a project focusing on the resolution needs of both individuals and companies when facing civil and commercial disputes—took place in 2016 and 2017. The series hosted more than 4,000 people in person (with hundreds more participating

178. Jeremy Lack, *Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties*, *in* 2 ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES 339, 339 (Arnold Ingen-Housz ed., 2011) (emphasis added).

179. Professor Frank Sander delivered a now-famous address at the 1976 Pound Conference where he outlined his idea for a "multi-door courthouse," in which disputants could be matched up with the most appropriate process (arbitration, mediation, traditional trial, etc.) for addressing their particular type of dispute. *See* Lara Traum & Brian Farkas, *The History and Legacy of the Pound Conferences*, 18 CARDOZO J. CONFLICT RESOL. 677, 685-86 (2017).

180. DIFIORE, *supra* note 32, at 12.

181. See the work of the Mixed Mode Task Force, a combined effort by the College of Commercial Arbitrators (CCA), the International Mediation Institute (IMI), and the Straus Institute for Dispute Resolution at Pepperdine Caruso School of Law. Chaired by Professor Thomas J. Stipanowich, the task force

> has been charged with examining and seeking to develop model standards and criteria for ways of combining different dispute resolution processes that may involve the interplay between public or private adjudicative systems (e.g., litigation, arbitration, or adjudication) with non-adjudicative methods that involve the use of a neutral (e.g., conciliation or mediation), whether in parallel, sequentially or as integrated processes, which the Task Force has called "Mixed Mode Scenarios."

Mixed Mode Task Force, INT'L MEDIATION INST., https://imimediation.org/about/who-are-imi/mixed-mode-task-force/ [https://perma.cc/7L88-QPEY] (last visited Sept. 23, 2023).

182. Lack, *supra* note 178, at 357.

virtually) at twenty-eight conferences in twenty-four countries worldwide.[183] Attendees were polled on a series of questions, and one of four key global themes identified was the central role that mixed-mode processes can play in effective dispute resolution:

> [T]here is near universal recognition that Parties to disputes should be encouraged to consider processes like mediation before they commence adjudicative dispute resolution proceedings and that non-adjudicative processes like mediation or conciliation can work effectively in combination with litigation or arbitration.[184]

Large and active court-connected programs like the U.S. District Court for the Northern District of California's multi-option ADR program, or New York's presumptive early ADR program, are ideal laboratories for experimenting with mixed-mode processes. There are numerous ways in which these processes can be mixed and blended, and programs can experiment with those combinations, collecting data on them to track things like court expenditures and efficiencies and disputant perceptions of fairness. A good deal of research has already been conducted on various mixed-mode and hybrid processes, such as the advantages and disadvantages of combining mediation with arbitration (e.g., "med-arb"[185] and "arb-med"[186]). Mediation programs interested in experimenting with hybrid processes can have staff members advise parties on the many options available, including the incorporation of tools (such as stipulation agreements) that can be used to further strengthen flexibility and party self-determination.[187]

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183. GLOB. POUND CONF. SERIES, GLOBAL POUND CONFERENCE: GLOBAL DATA TRENDS AND REGIONAL DIFFERENCES 2 (2018).

184. *Id.* at 2-3.

185. In "med-arb," which is one of the most common hybrids used, mediation is followed by arbitration. Numerous organizations have advocated using this hybrid, including the International Chamber of Commerce (ICC), the World Intellectual Property Organization (WIPO), the American Arbitration Association (AAA), and the Chartered Institute of Arbitrators (CIArb). Lack, *supra* note 178, at 357; *see also* Carrie Menkel-Meadow, *Hybrid and Mixed Dispute Resolution Processes: Integrities of Process Pluralism*, *in* COMPARATIVE DISPUTE RESOLUTION 405, 408 (Maria Moscati et al. eds., 2020) (noting that "[m]ed-arb has probably been used for centuries in various forms of indigenous and historical communities," where village elders or party officials, after first attempting consensual processes, "may then potentially command a decision—not only for the parties in dispute, but also for the 'harmony' or better interests of the community").

186. In "arb-med," the parties begin by engaging in arbitration and an award is rendered. However, the award is not announced but is instead sealed in an envelope and kept secret until later in the process. The neutral then switches hats and becomes a mediator, helping the parties to negotiate an agreement (or, if the parties prefer, they can bring in a *new* neutral to act as mediator). If the parties cannot reach an agreement during the mediation segment, the sealed envelope will then be opened and the parties will be legally bound by the award therein. Lack, *supra* note 178, at 358. "The sealed envelope is . . . helpful in that it puts the parties under psychological pressure to reach an agreement, because the fear of the unknown ruling in the envelope adds an incentive to settle on the parties' own terms." *Id.*

187. Consider, for example, if the disputing parties decided to combine mediation with binding summary judgment (where the latter would occur if the mediation fails to result in

Staff members of the U.S. District Court for the Northern District of California not only advise parties on court-connected ADR processes, but they also "work with parties to customize an ADR process to meet the needs of their case or to design an ADR process for them."[188]

Consider a hypothetical situation wherein two disputing parties call upon the Northern District's ADR office to help them customize an ADR process combining a summary jury trial immediately followed by mediation. A summary jury trial "is a flexible, non-binding process designed to promote settlement in complex, trial-ready cases headed for protracted trials."[189] The trial takes place through a brief hearing, often including witness testimony, with evidence presented in condensed form.[190] Disputing parties are able to ask questions of jury members and listen to their responses, and the process concludes with an "advisory verdict" that is not binding upon disputants.[191]

Returning to the hypothetical situation with two disputing parties, one can imagine that a summary jury trial has recently concluded, and the parties are now turning to the second part of the mixed-mode process: the mediation. At this point, the disputing parties will have access to a treasure trove of information resulting from the summary jury trial—including witness testimony, jury reactions to evidence, and the non-binding advisory verdict. In sitting down to mediate, if all parties concur with the non-binding advisory verdict, the mediation can serve as an opportunity to quickly reduce that decision to a binding contract, perhaps with minor revisions. However, if the parties do *not* agree with the advisory verdict, the mediation process then allows for a longer negotiation to take place. During that negotiation, disputants will be able to draw upon information gained through the summary jury trial—information that can potentially play an important role in shaping the conversation, in bolstering certain positions, and in helping the parties achieve resolution.

These services offered by the Northern District, to customize and design dispute resolution processes, can be replicated in other court-connected mediation programs, leading to increased innovation and

agreement). The parties could stipulate that although the summary judgment would be binding, there would be a "high-low" clause, allowing the disputants to protect themselves from an extreme summary judgement decision. Specifically, the agreement could state that the plaintiff "shall recover no less than $____, and no more than $____." Such a guarantee would likely decrease the parties' fears of turning over award-making powers to a judge or jury. The parties could further use the stipulated agreement to limit the rights of either party to set aside or appeal the summary judgment verdict. *See* Richard Lorren Jolly, *Between the Ceiling and the Floor: Making the Case for Required Disclosure of High-Low Agreements to Juries*, 48 U. MICH. J.L. REFORM 813, 813 (2015) (arguing that disclosure of high-low agreements to the judge or jury should be required, because a non-disclosed agreement would be "a type of procedural contract modifying the jury's core adjudicative function").

188. *See Other Processes*, *supra* note 48.

189. *See* N.D. CAL. ADR R. 8-1(b).

190. *Id.*

191. *Id.*

effectiveness in resolution alternatives. Again, there are numerous ways for processes to be mixed and blended, and it is important for programs to experiment with various combinations. This experimentation is far more likely to be considered, and implemented, if such possibilities are made known and explored during a mediation's initial Opening Negotiation Session.

III. MOST LIKELY OBJECTIONS

Below are ten objections (or queries) that would likely be prompted by the ideas and proposals put forth in this Article, as well as responses to those objections:

1. Might there be instances when mediating parties are not interested in retaining power that flows from self-determination, preferring instead to relinquish such power to their counsel?

This Article argues for knowledge, transparency, and choice as it relates to party self-determination in court-connected mediation. Thus, if a party represented by counsel chooses to turn over any or all power and control to their counsel, that would not be at odds with the Article's arguments or recommendations. Indeed, attorneys are oftentimes experienced at making the various process decisions discussed throughout this Article, and many parties rely on counsel for that experience and expertise, with some parties wanting counsel to provide limited guidance and others wanting counsel to fully take charge. A party's ability to make that choice is a good example of self-determination being successfully employed: *if they so choose*, parties can sit quietly as counsel takes control and negotiates on their behalf during the course of a mediation.

However, in watching their mediation unfold, even a party who initially decided to "leave everything up to counsel" might decide to change directions and start participating more actively and directly. That decision, too, would be an example of self-determination being successfully employed. Thus, it is the conversation taking place during the Opening Negotiation Session that sets forth the important information, tone, and models of behavior for the remainder of the mediation: parties come to realize during that inclusive, transparent, and educational opening negotiation that they are empowered to *choose* whether to hold onto and exhibit control and power themselves, to share it with their counsel, or to hand it over completely to counsel. Not surprisingly, research suggests that parties *not* represented by counsel are more satisfied with their level of participation in mediation

than are parties guided by counsel.[192] One researcher suggests satisfaction decreases with representation because parties with lawyers tend to have less of a chance to talk themselves and little control over what is said by their lawyers.[193]

2. Is using an Opening Negotiation Session the same as "contracting" within the well-known "understanding" mediation model?

Gary Friedman and Jack Himmelstein have developed a powerful model of mediation called "mediation through understanding."[194] However, there are distinct differences between this Article's Opening Negotiation Session and the "contracting" stage within the Friedman/Himmelstein model. Friedman and Himmelstein insist that, under their model, parties are "going to be responsible for decisionmaking, willing to deal directly with each other (in spite of the discomfort), and willing to work toward mutual and acceptable decisions."[195] This means each party "needs to be able and willing to realize and express what is important to him or her even in the face of tensions that so often accompany dealing with conflict."[196] As Friedman and Himmelstein put it: "*The parties need to be able to stand on their own.*"[197] In addition, Friedman and Himmelstein are well aware there can be power imbalances among mediating parties, and they urge mediators who observe such imbalances to help create "a level playing field for the decisions the parties will be making together."[198] The goal of "contracting" within the "understanding"

192. *See* Arup Varma & Lamont E. Stallworth, *Participants' Satisfaction with EEO Mediation and the Issue of Legal Representation: An Empirical Inquiry*, 6 EMP. RTS. & EMP. POL'Y J. 387, 403 tbl.3 (2002); *see also* Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341, 371 tbl.11 (2002).

193. *See* Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 446 (2010). Wissler adds:

> How well parties believe their representative understands their interests and objectives, and how accurately their representative communicates their views and concerns when speaking for them, may play a large role in parties' sense of voice and satisfaction with their level of participation in mediation, and is likely to vary across mediation contexts and representatives.

Id. at 447; *see also* Welsh, *supra* note 9, at 733-34 ("[P]eople tend to perceive a process as fair or just if it includes the following elements: (1) 'voice' or the opportunity for people to express what is important to them; (2) 'trustworthy consideration' or a demonstration that encourages people to believe that their voice was heard by the decision-maker or authority figure; (3) a neutral forum that applies the same objective standards to all and treats the parties in an even-handed manner; and (4) treatment that is dignified." (footnotes omitted)).

194. FRIEDMAN & HIMMELSTEIN, *supra* note 134.

195. *Id.* at 54.

196. *Id.* at 55.

197. *Id.* at 56 (emphasis added).

198. *Id.* at 57.

model, then, appears to be ensuring that parties are empowered to fulfill their responsibilities of making decisions and dealing directly with other parties during the mediation.

However, that is not the case with the Opening Negotiation Session model presented in this Article, where there might be parties who prefer *not* to stand on their own and instead wish to have their counsel make decisions and deal directly with the other parties. In essence, this Article suggests that parties should have the self-determination to be able to decide to be a mere observer of the process and watch their attorney handle matters, if that is what they choose. There might be instances during the Opening Negotiation Session where all parties employ the various skills and abilities that Friedman and Himmelstein set as requirements for engaging in their "understanding" model, but that will not always be the case. The Opening Negotiation Session proposed in this Article, then, provides more options—and the increased power that accompanies more options—for parties when determining how they will engage with other parties during the mediation.

3. Might requiring parties to engage in an Opening Negotiation Session result in cognitive or emotional overload?

Court-connected mediation programs that choose to implement Opening Negotiation Sessions will have to determine if the sessions place too much cognitive or emotional demand on the parties. If such overload occurs, programs might experiment with ways to convey the information in advance of the mediation itself, such as by sending written statements, questionnaires, videotaped recordings, or other educational materials to participants prior to the mediation. This might be less effective because disputants would be attempting to understand fairly complex information without being able to discuss it with dispute resolution professionals or ask follow-up questions. In addition, some parties might fail to engage with the educational materials in advance, requiring programs to figure out another way to get all parties up to speed at the start of the mediation.

4. Might an Opening Negotiation Session be redundant if a court-connected program already permits participants to negotiate process issues prior to mediating?

Some mediation programs permit and even encourage pre-mediation conversation among participants. For example, ADR Local Rule 6-6 for the U.S. District Court for the Northern District of California requires a pre-session telephone conference between counsel and the mediator "to discuss matters such as the scheduling of the Mediation, *the procedures to be followed*, compensation of the neutral,

the nature of the case, the content of the written Mediation statements, and which client representatives will attend."[199] The rule adds that "[t]he mediator may schedule additional pre-session calls either jointly or separately as appropriate."[200] This clearly presents an opportunity to customize the session and negotiate process decisions that are best suited to the needs of a particular case and its parties. However, it is ordinarily only the mediator and counsel who participate in this phone call, even if disputing parties sometimes participate as well.[201] It appears, then, that while this rule *permits* a conversation similar to what would occur in an Opening Negotiation Session, it falls short because the conversation does not ordinarily include disputants. This Article attempts to demonstrate that these kinds of conversations will be most effective if they are institutionalized, normalized, and include *all* participants: mediators, disputing parties, and counsel.

5. Might lawyers representing disputants resist using an Opening Negotiation Session to decide important process questions?

There are a number of reasons why attorneys representing disputants might resist having everyone (mediator, disputants, and counsel) participate in the Opening Negotiation Session: the attorneys might believe it is strategically advantageous to negotiate procedural questions without clients being present. Counsel may also feel protective of clients in various ways and might want to retain control regarding who will be present at various points during the mediation, including the Opening Negotiation Session. In effect, the lawyers might feel that requiring everyone to attend the opening meeting begins to interfere with their own power, autonomy, and expertise as counsel. However, court-connected programs are different from private mediation programs in that they do not have to cater to the preferences of disputants' lawyers to win referrals or repeat business. Instead, court-connected programs can focus predominantly on the *interests of disputants*. This can be done by experimenting with new ideas—such as using Opening Negotiation Sessions—whose impacts can then be assessed to determine if they are accomplishing the intended goals of increasing party self-determination and producing a more fair and productive resolution process.

6. Might instituting Opening Negotiation Sessions be cost-prohibitive?

It is common, as a cost-control measure, for court-connected programs to limit mediation sessions for each case to less than one full

199. *See* N.D. CAL. ADR R. 6-6 (emphasis added).

200. *Id.*

201. E-mails between Howard Herman and Peter Reilly (Dec. 2021) (on file with author).

day.[202] Utilizing Opening Negotiation Sessions, because they would likely lengthen the amount of time involved in the mediation process, could potentially increase expenses involved in running mediation programs. However, Opening Negotiation Sessions could be shortened by having disputants consider a subset of the four questions presented in Part II—or even just *one* of those questions. In various ways, this Article encourages court-connected mediation programs to experiment with how they are organized and run. The potential impacts of implementing ideas from this Article (including negative impacts like increases in cost or positive impacts like increases in party self-determination, satisfaction, or "sense of fairness") could be tracked and assessed through interviews, questionnaires, and other such metrics.[203] Ultimately, programs will have to conduct their own cost-benefit analyses to determine if the resulting positive impacts are worth the negative impacts that might ride along with those gains.

7. Might the Opening Negotiation Session require increased training for mediators?

This Article underscores the importance of disputants having access to a variety of mediation styles in resolving their dispute. Such access is made possible if (1) each mediator is trained in and capable of employing several different mediation styles, or (2) if each mediator knows just one style, so long as disputants are permitted to turn to other mediators, each trained in a different style, who can be rotated in and out of the mediation at the parties' discretion. Depending on how a given program recruits, trains, and employs its mediators, ensuring disputant access to a variety of mediation styles might require additional training for mediators.

202. *See* SUP. CT. OF FLA. COMM'N ON TRIAL CT. PERFORMANCE & ACCOUNTABILITY, RECOMMENDATIONS FOR ALTERNATIVE DISPUTE RESOLUTION SERVICES IN FLORIDA'S TRIAL COURTS 6 (2008) (noting that financial considerations can force court-connected mediation programs to limit the time available for each mediation session; for example, court-subsidized mediation sessions in Florida are limited to two to three hours).

203. It is now becoming clear to investigators that the *timing* involved in asking participants questions might play an important role in how they respond—especially as it relates to assessing perceptions of fairness. For example, in trying to determine whether disputants prefer adjudicative processes (e.g., arbitration) or non-adjudicative processes (e.g., mediation), Professor Donna Shestowsky has conducted research suggesting such preferences are subject to temporal change: specifically, disputants' attraction to various alternatives can depend on *what point along the trajectory of a given dispute* investigators assess their perceptions—i.e., disputants might evaluate a resolution process differently depending on whether their perceptions are assessed at the *outset*, before using the process (ex ante), or at the *conclusion*, after using the process (ex post). *See* Donna Shestowsky, *Great Expectations? Comparing Litigants' Attitudes Before and After Using Legal Procedures*, 44 LAW & HUM. BEHAV. 179, 180 (2020); Shestowsky, *supra* note 119, at 554.

8. What happens if parties disagree on how to answer the "four process questions" during the Opening Negotiation Session?

Part of the message that should be conveyed during the Opening Negotiation Session is that parties are empowered to be open-minded and flexible. Thus, in answering any of the four process questions presented in this Article, even if the parties cannot agree on one specific answer, the group can agree they will start by adopting *one of the possible choices*, and if that fails to achieve the desired result, the group may then transition to another possible choice. For example, it would be relatively easy for disputants to transition from mediating in a joint session to employing caucuses and vice versa. Likewise, it would be relatively easy to transition from using a transformative model of mediation to one that is facilitative, evaluative, or a combination of various models.

9. Might Opening Negotiation Sessions result in mediator manipulation?

One might suggest that allowing a freewheeling conversation during a mediation's Opening Negotiation Session would give mediators too much opportunity to influence, or even manipulate, the other participants and therefore the final outcome of the process.[204] However, it could be argued that utilizing an Opening Negotiation Session would have the exact *opposite* effect. Having a discussion taking place at the very beginning of the process, in a joint meeting with all participants, would help to create an atmosphere that is so open and transparent that it would *decrease* the ability of mediators to "control, manipulate, [or] suppress" information or participants both during this critical opening phase as well as throughout the rest of the mediation process.[205]

10. Might the success in using an Opening Negotiation Session depend upon whether or not parties are represented by counsel?

The fact that a party is represented by counsel does not guarantee the mediation will be productive or that the mediation will go in a

204. *See* Robert D. Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 MEDIATION Q. 3, 17 (1995) (noting that mediators "deceive, manipulate, and sometimes even lie").

205. Opportunities for mediator manipulation are increased through the use of private caucus meetings, which permit the mediator to gain significant control over information. *See* John W. Cooley, *Defining the Ethical Limits of Acceptable Deception in Mediation*, 4 PEPP. DISP. RESOL. L.J. 263, 265 (2004) (stating that a mediator can engage in deception because "the mediator is the Chief Information Officer who has near-absolute control over what nonconfidential information, critical or otherwise, is *developed*, what is *withheld*, what is *disclosed*, and *when it is disclosed*"); *see also* CHRISTOPHER M. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 269 (1986) ("The ability to control, manipulate, suppress, or enhance data, or to initiate entirely new information, gives the mediator an inordinate level of influence over the parties.").

particular direction. Some parties are heavily influenced by their counsel, and others are not. Some attorneys, based on ego, strategy, or other concerns, might try to encourage or persuade their clients to engage in certain kinds of behavior (like not speaking during the mediation or not making realistic offers). Other attorneys might try to encourage or persuade their clients to engage in altogether different kinds of behavior (like participating collaboratively in the mediation process, openly sharing information, or making reasonable offers). In short, whether or not a party is represented by counsel can have a significant impact on how an Opening Negotiation Session (or how an *entire mediation*) will play out, but it would be difficult to predict what that impact might look like, including whether the impact would tend to help or hurt in achieving the goal of having a productive Opening Negotiation Session or the goal of having a productive mediation thereafter.

CONCLUSION

This Article argues that all parties involved in a court-connected mediation deserve the opportunity, through an Opening Negotiation Session, to give input in deciding four important process design questions, regardless of whether or not a party is represented by counsel. Instituting this negotiation at the start of every court-connected mediation would potentially be educational for everyone present. Mediators would in effect become teachers within a collaborative and participatory process. They would help to educate parties so that those parties can be involved in making critical process design decisions. This would usher in a revolutionary change, advancing from the typical current practice of mediators, courts, program administrators, or counsel making these decisions with little or no input from the disputing parties themselves. After all, standards of conduct that promote the most ethical way to structure mediations unequivocally state that self-determination requires that parties be permitted to make "informed choices" regarding the mediation process.[206] Indeed, the standards state specifically that self-determination may be exercised by parties at "any" stage of a mediation, including during process design.[207] Although adhering to these standards might cause a certain amount of inconvenience or additional expense for court-connected mediation programs, *not* doing so is unacceptable.

To be clear, the Opening Negotiation Sessions proposed in this Article would entail not merely teachings and discussions for the sake of educating participants; rather, the sessions would involve active negotiation, through which disputing parties would help decide how the mediation should be organized and run as it moves forward. By

206. MODEL STANDARDS OF CONDUCT FOR MEDIATORS § IA (AM. ARB. ASS'N ET AL. 2005).
207. *Id.*

empowering parties to play a significant role in shaping the rules and procedures that will guide their mediation, the process is transformed from one that is prefabricated and one-size-fits-all into one that is tailored, by the parties themselves, to meet their actual needs and interests. Moreover, when parties experience the power of self-determination within the context of a mediation's Opening Negotiation Session, that experience can in turn provide the blueprint and momentum necessary for achieving self-determination throughout the rest of the mediation process and beyond.