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ADR IN THE COURTS: PROGRESS, PROBLEMS, AND POSSIBILITIES

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ADR in the Courts: Progress, Problems, and Possibilities

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You cannot simultaneously prevent and prepare for war.[1]

Never doubt that a small group of thoughtful, committed citizens can change the world: indeed it's the only thing that ever has.[2]

I. Introduction

ADR has come a long way in the last twenty-seven years. The institutionalization of ADR in the courts has led to far greater use of ADR throughout the country. The conception of the court's role has moved increasingly in the direction of the multi-door courthouse envisioned by Frank Sander in 1976.[3] Other benefits of institutionalization include increased public awareness of alternatives to litigation and growing sophistication regarding appropriate alternative processes among lawyers and judges. Parties can choose the dispute

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** Director, Colorado Judicial Branch Office of Dispute Resolution. The thoughts expressed in this article are the authors' alone and do not, necessarily, reflect any policies or positions of the Colorado Office of Dispute Resolution or the Colorado Judicial Branch.

1. Albert Einstein.
2. Margaret Mead.
3. The concept of the multi-door courthouse was first suggested in 1976 by Harvard Law Professor Frank E.A. Sander at the Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (commonly referred to as the Pound Conference). Frank Sander, Varieties of Dispute Processing, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), *in* 70 F.R.D. 79, 111 (1976). Sander proposed assigning certain cases to alternative dispute resolution processes, or a sequence of processes, after screening in a Dispute Resolution Center. *Id.*

resolution process that best meets their interests. Research and evaluation of court-connected ADR programs have enriched our knowledge of ADR as well.[4] There is evidence that ADR options can lead to more efficient use of resources by the courts, savings of time and money by litigants, and reduced levels of subsequent litigation. Mediation in particular enjoys consistently high satisfaction rates by participants.[5] There is also evidence that ADR options have increased the public's trust and confidence in the courts.[6]

But along with this progress have come problems, in particular with regard to the courts' use of mediation. The definition of what process is being provided is unclear. While what is being called "mediation" in the courts may encompass the interest-based, problem-solving, or relational approaches, which mediation advocates envisioned fifteen or twenty years ago, the combination of increased participation by lawyers and the close connection with litigation of court-referred mediation cases is leading to the increased "legalization" of mediation. Court referred clients often believe the desired outcome that propelled them to court initially will be met. Their misplaced assumptions about the type of process being ordered and the degree of court oversight can lead to disappointment with the process, the outcome, and the courts in general. Similar disappointment can result if promises that mediation is "faster, cheaper, and better" are not met.[7] Perhaps most dangerous, the blurring of boundaries in the court's roles can lead to confusion and leave room for the possibility of coercion.

It is not possible to turn back the clock, nor would it be in the interest of the public and the courts to do so. What is in the interest of the public and the courts is to note the benefits resulting from the institutionalization of ADR in the courts, explore the problems that have arisen in connection with the courts' administration of and embrace of mediation in particular, and propose some possibilities for addressing some of these problems. Part II of this article will describe the progress

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4. *See* NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH (S. Keilitz, ed. 1994) [hereinafter NATIONAL SYMPOSIUM]; Jennifer E. Shack, Saves What? A Survey of Pace, Cost, and Satisfaction Studies of Court-Related Mediation Programs, Paper Presented to the Mini-Conference on Court ADR 2 (Apr. 4, 2002); *see also* Roselle Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002); *see generally* Della Noce et al., *Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection*, 3 PEPP. DISP. RESOL. L.J. 1, 13 (2003).

5. *See* Shack, *supra* note 4.

6. Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93 (2002).

7. Indeed, some question whether these should be the goals of court-annexed ADR. *Id.*

that has been made in connection with the institutionalization of ADR in the courts. Part III will explore the problems that have accompanied that progress. Part IV will suggest six strategies for addressing these problems in order to maintain and improve the benefits of the partnership between the courts and ADR.

II. Progress

A. More Extensive Use of ADR

The use of ADR in cases that are in litigation or are potential lawsuits has exploded over the last twenty-seven years. When Frank Sander first proposed the multi-door courthouse in 1976, there were no state offices of dispute resolution, no ethical requirements that lawyers advise their clients of alternatives to litigation, and no explicit authorizations for courts to refer cases to ADR. As of June 30, 2003, there are now thirty-five state offices of dispute resolution,[8] a number of states have ethical requirements that lawyers advise their clients of alternatives to litigation,[9] and many states have explicitly authorized their judges to refer cases to ADR.[10] Many states mandate arbitration for certain types of cases as well. Florida, the state that has institutionalized ADR in its courts to the greatest degree, estimates that more than 113,000 cases were referred to ADR by the courts in 2001.[11] The federal district courts are required to offer at least one ADR process,[12] and all of the federal appellate courts have in-house ADR programs.

Historically, voluntary mediation programs have not been well attended.[13] Theories as to why this is so include: parties do not know about or do not understand the possible benefits of mediation; parties (and their lawyers) prefer to choose familiar processes (i.e., litigation); when angry, people tend to choose adversarial rather than cooperative processes; American culture has created a litigious society; barriers remain related to many attorneys' negative assumptions about the quality

8. THE POLICY CONSENSUS INITIATIVE AND THE NAT'L CENTER FOR STATE COURTS, KNOWLEDGE AND INFORMATION SERVICE (2003).

9. *See, e.g.*, COLO. R. PROF. CONDUCT R. 2.1; VA. R. PROF. CONDUCT R. 1.2 cmt. (2002) (requiring an attorney to consult with each client about the availability and appropriateness of ADR processes).

10. *See, e.g.*, COLO. REV. STAT. § 13-22-311, 313 (2002).

11. FLORIDA MEDIATION AND ARBITRATION PROGRAMS: A COMPENDIUM (15th ed. 2002)

12. 28 U.S.C. § 652 (2003).

13. *See, e.g.*, Arupa Varma & Lamont Stallworth, *Barriers to Mediation: A Look at the Impediments and Barriers to Voluntary Mediation Programs that Exist Within the EEO*, 55 DISP. RESOL. J. 32 (2000).

of volunteer mediators and doubts about the neutrality of mediators associated with a court program; and parties (and their lawyers) do not want to look weak by being the first to suggest mediation—or any other settlement process. Although still controversial, it has taken the mandate of the courts for many citizens to engage in mediation or other ADR processes, which has greatly increased participation in those processes.

B. *Increased Public Awareness*

Through mandatory referrals to ADR by the courts, the public has become more aware of alternatives to litigation. Each and every party and lawyer involved in the increasing number of cases referred to mediation by the courts now knows of at least one alternative to trial, and many of them have first-hand knowledge through participation in that ADR process. Florida's experience, though to a lesser degree, can be multiplied by the fifty states and added to by the federal court-annexed programs to estimate that millions of people participate in ADR processes, primarily mediation, every year. Even the media is beginning to reflect, as well as add to, this greater public awareness, for example by incorporating references to and scenes involving mediations (or processes called mediations) in law-related television shows.[14]

C. *Greater Sophistication Among Lawyers and Judges*

Lawyers and judges are becoming increasingly sophisticated about ADR. They are less apt to use the words "mediation" and "arbitration" interchangeably. They will sometimes engage in discussions with potential mediators about whether or not the mediator will provide an "evaluative"[15] approach to their case. In some parts of the country, lawyers are involved as volunteers in providing mediation services.[16] Some examples of the increasing involvement of knowledgeable lawyers and judges include the following: the Family Law Section of the Colorado Bar Association has co-sponsored[17] an Attorney-Mediator

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14. *See* Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 PENN ST. L. REV. 56 n.93 (2003). As with media representations about the trial process, portrayals of mediation are not always accurate or positive.

15. *See generally* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid For The Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). *But see* Leonard L. Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientations*, DISP. RESOL. MAG. (Winter 2003) (recanting the appropriateness of evaluation in any mediation process when it hinders self-determination) [hereinafter Riskin, *Who Decides What?*].

16. For example, the District of Columbia Multi-Door Courthouse Program and the Maryland Circuit Courts mediation conferences for civil and family cases.

17. Along with the Colorado Council for Mediators and Mediation Organizations,

Dialogue conference for the past fourteen years; lawyers in some jurisdictions engage in ongoing dialogues with the court and mediators about mediation in the courts;[18] and lawyers, judges, and magistrates have been involved in designing innovative ADR programs.[19]

D. More Matching of Cases and Dispute Resolution Process

Court referrals to ADR have increasingly been based on attempting to match cases with appropriate dispute resolution processes, which is the essence of the multi-door courthouse approach, whether or not the programs have been explicitly labeled "multi-door courthouse." The District of Columbia Multi-Door Courthouse is growing. Colorado has three multi-door courthouse programs; in the Second Judicial District Domestic Relations Post-Decree Program, the magistrates screen cases and refer to one of five ADR options: mediation, parenting coordination, child support worksheet conference, child support negotiation (by the county), or ADR Settlement Conference (a combination of mediation with a more traditional settlement conference approach, offered by senior judges); or, keep the case on the litigation track.[20] In the other two multi-door programs, domestic relations cases are generally referred to mediation, whereas civil cases are referred to ADR and it is the parties, in consultation with their lawyers, who determine the appropriate ADR process.[21] More varieties of ADR are being invented or designed to fit particular needs of disputes and of parties; for example, parenting coordination for high-conflict divorce and post-decree cases,[22] and one-day jury trial for soft-tissue personal injury cases.[23] There are half day

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Colorado Bar Association, Family Law Section, and the Colorado Council for Mediators and Mediation Organizations.

18. In Colorado's Twentieth Judicial District (Boulder), judges, lawyers, and mediators meet once a year to discuss mediation in the courts.

19. For example, in Colorado, the advisory committee for the One Day Jury Pilot in Colorado's Fourth Judicial District includes lawyers and judges; the advisory committee for Colorado's Second Judicial District Domestic Relations Post-Decree Multi-door Courthouse Program includes lawyers and magistrates. In Maryland, yearly Settlement Weeks have evolved into daily programs in many circuit courts in Maryland; these programs use volunteer lawyers as the "mediators" and settlement conference referees; Maryland District Courts' Civil Mediation Programs include volunteer attorneys and non-attorneys providing mediation services.

20. Cynthia Savage, *Post-Decree Multi-door Courthouse: A Pilot Program for the State*, 27 THE COLO. LAWYER 109 (1998).

21. In Colorado's Eighteenth Judicial District Multi-door Courthouse in Arapahoe County, program statistics show that most parties choose mediation. A much smaller percentage choose case evaluation, and less than a handful choose arbitration. *See* Kenneth Stuart & Cynthia Savage, *The Multi-Door Courthouse: How It's Working*, 26 THE COLO. LAWYER 13 (1997).

22. Colorado, Maryland, and Vermont offer this program.

23. Phoenix, Arizona and Colorado Springs, Colorado offer this program.

and one day programs for attorneys that instruct on how to prepare and empower clients in mediation;[24] and for litigants, there are orientation to mediation workshops, how to communicate and negotiate so that both parties get what they need, and communication, parenting, and conflict resolution classes for never married parents and for never co-habitating parents to attend prior to their court referred mediation.[25]

E. Increased Choice and Expertise of Providers

As the need for mediators has grown, so have the numbers and types of providers. There is increased choice and varying types of expertise of ADR providers, including public, private, and court-annexed ADR professionals who are lawyers, former judges, and non-lawyers; and the fees for services range from no charge to parties by some community mediation centers, up to hundreds of dollars per hour by some former judges and experienced family and commercial litigators. Many states have begun modest efforts to regulate mediators by requiring training, experience, and adherence to ethical codes.[26]

F. Increased Research and Evaluation

Use of ADR by the courts has led to increased research and evaluation as to the effects of such use. Studies of mediation offered both by the courts and court-annexed programs have consistently shown high satisfaction rates by the participants when measured against the prospects of going to trial.[27] Some studies have shown time and cost savings for parties and the courts through the use of ADR.[28] Research is beginning to look more closely at best practices in implementing ADR programs, including the most beneficial timing of court referral to

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24. The Maryland Mediation and Conflict Resolution Office, Maryland State Bar Association Section on Dispute Resolution, the Baltimore Mediation Center, and Maryland local bar associations offer these programs.

25. The Maryland Administrative Office of the Courts, Family Division, and private providers contracted by the courts such as the Sheppard Pratt Community Services for Baltimore City Circuit Court, offer these programs. Many Colorado courts also require attendance at parenting classes, but not necessarily prior to mediation.

26. These states include Alabama, Arkansas, California, Florida, Maryland, and others. Others, such as Colorado, encourage competence and ethical practice through a combination of voluntary guidelines and a small pool of performance-tested independent contractor court mediators.

27. *See* NATIONAL SYMPOSIUM, *supra* note 4.

28. *See* NANCY THOENNES, CENTER FOR POLICY RESEARCH, MEDIATING DISPUTES INCLUDING PARENTING TIME AND RESPONSIBILITIES IN COLORADO'S 10TH JUDICIAL DISTRICT: ASSESSING THE BENEFITS TO COURTS (2002) (finding evidence of savings to courts); *see also* Wissler, *supra* note 4.

ADR.[29]

G. Beginnings of a Culture Shift

The growth of ADR has contributed to the beginnings of a revolutionary change in the court's conception of its role, from that of a passive provider of trials to an active, problem solving case manager, or, as in some courts, to a catalyst in community change and conflict transformation.[30] Some of the principles of mediation (empowerment, problem solving) are being explicitly incorporated into the courthouse in Colorado, through case management conferences conducted early in domestic relations and juvenile cases by court facilitators, magistrates, or judges.[31] Courts are beginning to embrace the concept of litigation as a last resort, rather than a first resort, at least for some types of cases.

III. Problems: Causes for Concern with Court Administered and Court-Connected Mediation

The legal authority of the courts may be the single most important cause of the growth of mediation across the country. The mediation field would not be growing at such a fast pace without the institutionalization of mediation within the courts, which has exposed millions of citizens to mediation who otherwise would not have known about the process. But while the growth in the courts' use of ADR appears to have taken root, serious concerns are being raised, chiefly around the courts' use of mediation. The concerns stem from the courts' robust and rapid embrace of mediation, or of various processes labeled or referred to as mediation, without sufficient attention to and clarity about the goals and quality of the mediation process adopted.

A. Mediation's Core Values and Goals

Mediation was originally intended by many of its proponents as an alternative process to the otherwise alienating experience of adversarial,

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29. *See* THOENNES, *supra* note 28; *see also* JUDGE GEORGE C. FAIRBANKS, IV & IRIS C. STREET, TIMING IS EVERYTHING: THE APPROPRIATE TIMING OF CASE REFERRALS TO MEDIATION: A COMPARATIVE STUDY OF TWO COURTS (1999) (finding that early referral of custody and visitation issues to mediation resulted in a greater use of mediation, more successful mediations, and a significant reduction in court resources devoted to case resolution).

30. CHIEF JUDGE ROBERT BELL'S MARYLAND ADR COMM'N, JOIN THE RESOLUTION (1999) (outlining a statewide effort to bring mediation to courts, businesses, government, families, schools, and criminal justice).

31. Called "Simplified Dissolution" in the pilot program stages, this approach is in the process of being codified through proposed changes to Colorado Rule of Civil Procedure 16.3.

bitter, expensive, drawn out litigation and the posturing by representatives that often accompanies such legal disputing. Mediation as an alternative was intended as an opportunity to change a negative quality of conflict interaction to something more positive. It was intended as a process to bring together people who are part of or affected by a dispute or conflict, to have a conversation about the events or circumstances that have come between them, and to explore possible solutions. Stated in another way, the core value that mediation as an alternative offers litigants is the opportunity to have an experience with conflict that is not only *not* alienating, but actually enhances human connections.

This core value of mediation comes from the alternative it promises: voice and choice, for all participants.[32] In the court setting, mediation offers litigants, as well as their attorneys and other representatives, voice to speak freely without constraints and rules, and the choice to take opportunities to listen to others' perspectives, gain new information and insights, and to have a more meaningful dialogue about the dispute. Mediation offers participants the opportunity to explore the underlying or consequential aspects of the ongoing conflict, what its implications are, and how it might be changed or resolved within the unique context of each situation.

Mediation as an alternative does not lose sight of settlement; it is not, however, the core value. Settlement is only one possibility of many valuable outcomes. Other positive outcomes include: the ability to speak, to be heard, and to talk about what may be irrelevant in the litigation process, but very important to parties; narrowing of important issues; clarity about what is most important to the participants; freer more unfettered conversation between the participants; better understanding of those involved and their situations; good faith restored; reputation and stature strengthened; and agreements based on genuine terms created by the participants, both pecuniary and non-monetary. The core value of mediation could be fulfilled even without complete or total settlement, if in fact that is what the parties genuinely decided was the best course to take. The core value of mediation could also be fulfilled even if the parties decide it is best if the case continues through the litigation system, and the judicial system determines the legal outcome.

In the context of the courts, the original goal of at least some court mediation proponents was to increase the number of people exposed to,

32. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994); Ray Shonholz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 MEDIATION Q. (1984); *see also* Riskin, *Who Decides What?*, *supra* note 15.

or at least provided the opportunity to access, this core value of mediation. While settlement is often important to litigants in dispute, research suggests that this is not what is *most* important to litigants and other participants in mediation.[33] What is most important is the quality of the interaction at the mediation, including being respected, being understood, being able to face the other person and talk or to have questions addressed, and the responsiveness of the other person(s). What may also be important to litigants in mediation is the way their attorneys interact with each other and their appropriate responsiveness to the situation.

However, as more and more courts have embraced mediation, they have done so primarily based on the promise of increased efficiency: the promise that mediation would reduce court dockets, increase settlement rates, and speed up case processing. As with other settlement processes (and not necessarily inconsistent with mediation core values of empowerment and party self-determination, though perhaps for different reasons), the courts have relied primarily on attorneys to judge the relative values of settlement processes and outcomes. In part because of this hands-off approach, in part because of the elevation of settlement as the primary desired outcome, in part because of differences in values between mediators and lawyers and judges,[34] and perhaps due to a lack of sufficient resources, mediation in a significant number of court-annexed programs has begun to look more like the traditional pretrial settlement conference, and less like the alternative process originally intended by its proponents.

Getting one or both sides to compromise on their perceived positions or on their perceived amounts of damages is what mediation has come to mean and the way that mediation has come to be practiced in many court settings. Instead of providing litigants the originally intended alternative process of *mediation,* the courts' mediations have capitulated to a watered down version of the alternative—a process that is merely not a trial. This process that is merely not a trial is at best a settlement conference focused on a compromise, and at worst a non-productive posturing session for the attorneys without a genuine interest in attempting to settle the case. Either way, it is what mediation has often come to mean in the court context and the way that it has come to be practiced in many court settings. It is this assumption that mediation is simply a settlement conference that is at the heart of the concerns

33. *See* Robert A. Baruch Bush & Sally Ganong Pope, *Transformative Mediation: New Dimensions in Practice, Theory, and Research*, 3 PEPP. DISP. RESOL. L.J. 1 (2002).

34. *See* Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43 (1982) (exploring the lawyer's "standard philosophical map").

being raised around many courts' use of mediation.

Is this assumption the result of an irresolvable clash of core values between mediation's core values and the courts' core values, or is it that mediation as practiced in the court setting is actually a different process, intended to fulfill a different set of core values?

B. Courts' Core Values and Goals

The role of the courts in the American judicial system is to resolve disputes and interpret the law. Some of the core values the courts rely on in carrying out this role include the importance of due process, consistency of outcomes, and legally just results. The law, and courts in interpreting the law, may be concerned with the effect particular interpretations have on relations between people in general, but the legal system is *not* concerned with enhancing the relationship between the particular parties in front of them. The legal system relies on reason, not emotion; on people cast in roles (such as plaintiff, defendant, counsel), not as individuals; on authority, not consensus; on speedy resolution ("justice delayed is justice denied"), not ongoing process; on dispassionate distance, not intimate connection. Thus, the values of the legal system are quite different from the values of mediation as an alternative.

C. Capitulation to the Routine? Or Dispute Resolution by a Different Process?

Critics are beginning to raise the question of whether court-ordered mediation is "capitulating to the courts' routine," meaning that court-ordered mediation has lost sight of the core values of mediation and simply become absorbed into the courts' traditional methods of adversarial dispute resolution without providing a genuine alternative. Signs of capitulation to the routine include: half hour or one hour time allotments for mediations; attorneys and insurance companies or other representatives appearing at the mediation without their clients; attorneys dominating the mediation discussions to the exclusion of clients; attorneys requesting their clients not to speak or participate in the mediations; attorneys and attorney mediators asking litigants to leave the mediation room while the mediator and attorneys confer with each other; and attorneys, judges, and former judges conducting "mediations" without any training, to name a few. Such signs of capitulation may be unintended and merely related to reverting to what is familiar in a court setting, or at least what is familiar to attorneys and court personnel. Such signs of capitulation may be related to lack of confidence in the capabilities of litigants, or to lack of understanding of the differences

between mediation and a settlement conference, or to lack of understanding the alternative that mediation can provide.

Such signs of capitulation may be related to the rapid growth of mediation within the court context that has left court administrators overburdened and without resources to develop internal and external mediation quality controls. Such signs of capitulation may further be related to the assumptions that the American public makes about the judicial process and thus by inference attaches to court mediation. While these assumptions differ, they include assumptions that others speak for you, that others decide for you, and that the courts safeguard individual legal rights. Further complicating the process or leading to capitulation is the seemingly paradoxical public assumption that once a matter becomes a lawsuit, litigants must and indeed do willingly turn over one of their more serious life conflicts to others to handle and decide, including others that have no connection to the matter, and yet hold on to the suspicion that those acting within the litigation context are not to be trusted. These assumptions carry over to the expectations that many attorneys and parties have about their court ordered mediation. And these assumptions about the litigation experience are often fulfilled in the mediation experience as it is currently practiced in many court settings.

Perhaps, however, what is happening to mediation in many court programs is not "capitulation to the routine" at all, but rather that a process labeled "mediation" by the courts is actually a different process which is filling a need or needs of the courts.

IV. Possibilities: Six Strategies Proposed To Promote Mediation as an Alternative Process *and* To Satisfy the Needs of the Courts

A. Identifying Interests

As conflict resolvers well know, values conflicts are the most difficult kind of conflicts to resolve. Difficult, however, does not mean impossible. Resolution does not have to imply compromise. One approach to resolving values conflicts is to search for superordinate values that both (or all) parties can embrace.[35] The critics who charge that court-annexed mediation is "capitulating to the routine" raise important concerns, but ironically, do so using an adversarial, either/or approach, which falls prey to the very assumptions it critiques. It would be more helpful to have a meaningful and thoughtful exchange to increase understanding as well as to identify and explore possible options that would meet the interests of the courts and the adherents of mediation

35. *Id.*

as an alternative process. This article cannot explore all of the interests in depth, but can help begin to identify them. Shared interests include: confidence in the dispute resolution process; long-term efficiency; encouraging parties to resolve their own disputes rather than having courts decide; and notice to parties as to what is being required of them. Courts' interests also include: speed in resolution; finality; best use of limited resources; and maintaining its authority. Interests of proponents of mediation as an alternative include: party self-determination; increasing choice and voice; reducing alienation; and enhancing human connectedness.

Although more discussion needs to happen regarding identification of interests, it is helpful to start looking at possible changes that, although they cannot be implemented overnight, can serve as ideas which, over time, will help provide the courts with the additional case management and settlement tools the courts need, *and* preserve the concept of mediation as an alternative process that provides opportunities to enhance communication and the quality of the interaction between participants, and, if so chosen, to preserve and enhance relationships, reduce future destructive approaches to conflict, and increase capacity for constructive responsiveness.

This article will explore the first two shared interests listed, and then propose six strategies to resolve, reduce, or at least air, the growing discontent regarding court-annexed mediation.

B. Understanding Efficiency and Its Relationship to Public Confidence in Mediation and the Courts

Because courts are one of the pillars of our democratic society, the courts' embrace of mediation has powerful consequences.[36] If the courts' mediation programs do not adhere to the core values of mediation as an alternative, and yet an alternative is what mediation-educated parties expect, confusion and suspicion are fueled. This confusion may in turn cause or contribute to a systematic erosion of public confidence in mediation and ultimately to an erosion of confidence in the courts themselves. For those citizens whose first and perhaps only experience with mediation will be through the courts' mandate, as well as for those attorneys whose only experience with mediation has been as a settlement conference, mediation's core values may never be known, experienced, or understood.

Courts are mandated to resolve all filed cases, sometimes within

36. Chief Judge Robert M. Bell became the first state court judge to receive the American Bar Association Dispute Resolution Section's D'Alembarte/Raven award for innovation in the courts on March 21, 2003.

specific time frames, yet are given limited resources to do so. Thus, a primary goal for courts in offering mediation and supporting mediation programs is efficiency.[37] Related to that goal of efficiency is how the courts can best utilize their limited resources to most expeditiously and fairly dispose of cases on their docket. Efficiency is a strong motivator for promoting processes that increase the numbers of settlements before trial. An unbridled focus on short-term efficiency, however, can have harmful results for litigants and for society. Most notably, short-term efficiency can breed lack of quality and the use of various coercive tactics to effectuate settlement. Coercion in social institutions leads to disrespect of such institutions, malcontent, and erosion of democratic ideals.

Efficiency as a long-term goal is consistent with both court and mediation values. Long-term efficiency requires the need for court supported interventions that impact positively on the *quality* of dispute resolution such that the litigants do not repeatedly return to use the courts' resources as the answer to generalized conflict in their lives. Litigants engaged in conversation with each other and deciding how best to resolve a dispute in their own unique context can lead to the greatest long-term efficiency—being less hostile and more contented and productive citizens. When a negative dynamic is changed between the people involved, the likelihood of their returning to court on the same or similar matter is diminished. Courts paying attention to the human element of conflict beyond the legal dispute itself was the impetus for hundreds of state chief judges abandoning short-term efficiency goals and signing a pledge committing the courts to become more "problem-solving."[38] If the courts support this experience, the litigants are more than likely to view the judicial process in high regard.

While mediation is a process that may or may not always produce settlements, when mediation adheres to its core values, in many cases the possibility of participants reaching a settlement may be *more likely*.[39] Furthermore, the terms of such settlements or agreements can be more genuine and personally satisfying to the litigants *and*, as a result, more long lasting. This is exactly where the core values of mediation and the core values of the courts intersect. Long lasting, satisfactory outcomes are the fulfillment of long-term goals of efficiency. Mediation when practiced *not* as a settlement conference but rather as a conversation inviting litigants and attorneys to make decisions about not only

37. *See* THOENNES, *supra* note 28.

38. CONF. OF CHIEF JUSTICES, 52ND ANN. MEETING, RESOLUTION 22 (2000); CONF. OF STATE COURT ADMINISTRATORS, RESOLUTION IV (2000).

39. Riskin *supra* note 15; Robert A. Baruch Bush, *What Do We Need a Mediator For? Mediation's Value-Added for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL.14 (1998).

settlement but also other aspects of the conflict interaction has a better chance of bringing about these types of results. Mediation when practiced as a settlement conference may only achieve short-term efficiency: settlement on paper and, at least temporarily, off the docket. Courts thus have an interest in making sure both types of processes are available, and parties should be able to choose which type of process best meets their needs.

C. The Six Strategies

1. Strategy One: Clarify Mediation and Other ADR Process Terminology and Align Theory with Practice

First, terminology must be changed and clearly defined. There has already been much effort in this direction, for example, Professor Leonard Riskin's work differentiating between" facilitative" and "evaluative" mediation, and Professors Baruch Bush and Joseph Folger's work on "transformative mediation."[40] The authors of this article have separately suggested differentiating mediation processes into three conceptions: "agreement," "individual personal growth," and "relationship,"[41] or aligning mediation programs with either a transactional orientation or a transformative orientation, with settlement as possible outcomes in both—for the former approach settlement is the goal; for the latter approach, settlement is a likely by-product of a meaningful conversation.[42] A more traditional settlement approach in court-referred mediation is not necessarily negative, as long as the process is clearly defined and parties can choose from alternative processes offered either inside or outside of the court system: for example, at community mediation centers or through private practitioner mediators.[43] An example of a change in terminology would be calling settlement processes conducted by senior judges who have mediation training "ADR Settlement Conferences,"[44] employing mediation skills

40. 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 (1996).

41. Cynthia Savage, *Culture and Mediation: A Red Herring*, 5 AM. UNIV. J. GENDER SOC. POL'Y & L. 269 (1996).

42. Louise Phipps Senft, *Resolving Disputes: Portrait of a Good Mediator*, 8 MD. B.J. 4 (2003).

43. Research comparing the costs and benefits of mediation, traditional settlement conferences, and other ADR processes would help parties and attorneys make appropriate choices.

44. Senior judges in Colorado are judges who have retired and work for the state as

while providing a more traditional settlement conference approach. This terminology was adopted in at least one state on the advice of a senior judge who had been to a forty hour mediation training, who noted that what senior judges will do will be different from the process non-senior judge mediators will conduct.[45] Stated otherwise, it will not be mediation, yet can still be a useful process for short-term settlement goals.

If terms that courts use to describe mediation were clarified and the term "mediation" were used consistently to identify a process that reflected mediation's core values of being an alternative to an otherwise alienating experience, the mediation process would not be confused with a settlement conference and those providing the mediation services would not confuse their role with the different role of a settlement conference convener. While this might require some court-annexed programs to redefine themselves, others to rename themselves as "ADR Settlement Conference Programs," and others to require neutrals to clearly identify what process they are offering in a particular case, the result would be clearer distinctions in processes, higher standards, and improved likelihood for consistency and competence.

The alternative that mediation invites would more likely be met if it were clear that when the process is called mediation, it offers participants the opportunity to explore settlement while having a facilitated dialogue between and among them. Attorneys might be less reluctant to participate or to have their clients participate if they understand the core values of the process. Litigants might participate more fully if the process, a conversation, were familiar rather than foreign and alienating. Litigants might also participate more fully because their attorneys might encourage them to do so if their attorneys understand that mediation's core values extended beyond a mere settlement conference venue.

With clarified terms and education, standards of practice and ethical standards available to guide mediators would be better understood, more meaningful, and more respected rather than in tension due to unclear or conflicting expectations with court programs. Judges and court personnel might better appreciate a mediators' duty to confidentiality. The tension that many court appointed mediators experience between the mediator's duty to resist conflicts of interest, including the courts' pressures or expectations that the mediator settle the matter, would be removed as well.

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judges sixty or ninety days per year, performing work such as filling in for judges who are sick or on vacation, conducting settlement conferences, etc. *See* COLO. REV. STAT. § 24-51-1105 (2003).

45. The late Judge Donald P. Smith, during conversations in the course of setting up Colorado's Senior Judge ADR program in 1997.

With clarified terms, the definition of a successful mediation would reflect the core values of the mediation process: connection, voice, and choice by all participants. The definition of a successful mediation would recognize settlement as only one of many successful outcomes. Other outcomes of equal or even greater value include more perceived choices, the ability to have spoken fully and been heard, a better understanding of the situation, new understandings of those involved in the process, reduced hostility and confusion, greater personal satisfaction, feeling respected, and clarification of potential next steps or future changes. ADR settlement conferences, on the other hand, would more clearly focus on settlement as the primary goal.

2. Strategy Two: Eliminate Possibilities for Coercion in Mediation Process

Second, boundaries between court processes and mediation processes must be clearly defined and maintained, and possibilities for coercion rigorously eliminated. Methods for accomplishing these results include restricting court staff, judges, and magistrates with decision-making authority in a case from engaging with litigants in settlement-focused processes called "mediation" in that case; maintaining confidentiality for alternative processes, whether offered inside or outside the courthouse; mandating disclosure to the parties that they do not have to agree to settle their case; eliminating any "good faith" reporting requirements for mediation providers; and establishing disciplinary procedures for lawyers, judges, court staff, and/or mediators who put pressure on parties to settle based on express or implied threats of disclosure as to the "reasonableness" of efforts made.

Additionally, while the courts continue to order parties to mediation, the potentially coercive nature of mandatory mediation, whether unintended or purposeful, should come under scrutiny and, in some cases, lead to changes in program operating procedures. It is critical that all parties understand that mandatory mediation does *not* mean mandatory agreement or settlement. Court mediators to whom cases are referred or assigned may find themselves told by a court administrator or by the governing court rules that the case is to be resolved within a requisite amount of time, often one or two hours. This time parameter adds a coercive external pressure to the mediation process. Many mediators, however skillful in a particular approach to mediation, report not being able to apply what they know as competent and quality mediation because they are expected to settle the case in a short period of time. Parties in the mediation who may have received information prior to the mediation session, informing them that the

mediation process would afford them an opportunity to speak on matters important to them and to be heard, are often confused and dismayed when there is not time afforded them to engage meaningfully, or even to participate other than being present sitting next to their counsel. Time pressures placed on the process by the referring source have significant consequences as potential violations of basic standards of practice for mediators who may rush the parties or push them to settle.[46] If all attorneys, judges, and court mediation coordinators were schooled in mediator standards of practice, the potentially coercive aspects of the mediation within the court setting could be more easily spotted and addressed.

It is critical to instill in court personnel an appreciation for the potentially coercive nature of mandatory mediation and the isomorphic pressures that court rules and short time constraints impose on the process and on participants' informed decision making and self-determination. Court rules could be revised to state that courts could order mediation for, e.g., *at least* two hours, or such rules could be revised to set forth "at least two hours or longer as desired by the participants." Many attorneys do not know they can meet longer than the ordered twenty minutes or two hours if they so choose. Conforming court rules to mediator ethical standards of practice would lessen possibilities for coercion as well as further differentiate the mediation process from a settlement conference or an ADR settlement conference.

3. Strategy Three: Provide More Thorough Mediation Education for Litigants and Attorneys

Third, parties and attorneys should be educated about the goals and processes of any alternative procedures to which they are referred by the courts, as well as any alternatives available outside the courts, such as through community mediation centers or by private mediation practitioners and firms. This education can take place in many ways, including through information provided in case management conferences, video-taped orientations to court procedures, mandated attorney disclosures to clients, and court web site postings.

Given sufficient resources, courts could also make information about their rostered mediators more available online with links to

46. *See* ABA/SPIDR/AAA, *Conflicts of Interest,* STANDARDS OF PRACTICE ("Potential conflicts of interest may arise between the administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressures from outside of the mediation process should never influence the mediator to coerce parties to settle.").

mediation sites not affiliated with the courts; courts could educate their staff about the mediation process and differences among mediation, settlement, and ADR settlement processes, and make brochures and pamphlets available to them; websites could be created to inform the public about mediation; every court clerk could provide a litigant with a brochure upon a case being filed; the courts could add to the filing fee a five dollar to fund mediation programs; every litigant, not just the attorneys, could be sent a brochure about mediation and a telephone number to call if interested in learning more. Educating parties about mediation might include a radical rethinking of how to contact litigants who are represented by legal counsel. Information could be provided about the process and its goals, with a personal phone call to follow up and explain the process and answer any questions about the process. This approach would implement mediation standards of practice, in particular, the ethical tenet of party self-determination.

Clarification of terms and education about what mediation as an alternative mean would, over time, eliminate mixed messages to litigants, attorneys, and the public about what mediation as an alternative is supposed to be as compared with what is actually experienced in many court ordered mediations.[47] Instead of parties' capitulating to subtle and not so subtle "arm twisting" by some court mediators, or to benevolent persuasion to agree to something they do not want to agree to, more informed litigants would be more able to voice their concern that such tactics were not part of what was promised or appropriate. Likewise, clarifying expectations up front might reduce or eliminate reports of biased and directive court-annexed mediations by mediation educated attorney consumers. The confusion and resistance that many mediators experience regarding blurred roles when faced with parties and attorneys who expect a settlement conference could likewise be diminished with a mediation education campaign spearheaded by the courts. Courts should be leaders in the movement to clarify the differences and respective benefits of mediation and ADR settlement conferences and to improve the quality of mediation in court settings.

Currently, many litigants are not well informed about the mediation process prior to their arrival at mediation. Due to court imposed time restraints, some litigants leave the process still uninformed about what it was and what role they could have played. It is often after the mediation, during a mediation training or a discussion about their previous

47. For example, at the Maryland Mediation and Conflict Resolution Office, Mediator Quality Assurance Conference in Easton, Maryland in July 2003, litigants were invited and included in discussions about the mediation experience and how to improve it.

mediation experience, when they come to learn that what they experienced in the court was often not mediation, but rather another form of ADR designed to settle lawsuits. Litigants have reported, for example, that their court-appointed mediator assumed joint custody in family court ordered mediations, that the court-appointed mediator never gave them the option of talking to the other "side" but rather kept them in separate rooms away from each other, or that their court-appointed mediator pressured them into settling or accepting an offer made by the other party.[48]

If parties neither know what to expect, nor are educated enough to make an informed decision about the process and approach, they are more than likely *not* being given the meaningful opportunity to make a fully informed decision about their process or about their outcome.

There is another troubling double bind that mediation in the courts presents. When the courts mandate mediation as part of the court experience, litigants believe someone is going to protect their rights. Often this someone, in the eyes of the litigants, is the mediator, regardless of whether or not the litigants are represented. As a result, litigants often tend to take a more passive role in the court-ordered mediation process. When the mediator appropriately refuses to be judgmental and appropriately refuses to take a side, this confuses the litigants. With better education about clear and consistent expectations of the process and of the mediator, litigants may become greater participants in the mediation process, as envisioned by proponents of mediation as an alternative.

Mediators would have more time to educate parties if the time for the mediation were not limited and if mediation were offered earlier in the litigation process. By providing parties with more information about the process, there would be a better chance of empowering litigants to engage in and to use the process fully to their benefit. In many instances, an initial mediation session could occur immediately after a lawsuit is filed. In this way, those matters that could be talked through without discovery could be resolved and those that were more complex and emotionally charged could be addressed over time, at the pace of the litigants.

4. Strategy Four: Improve Program Quality Control with Training in Ethical Standards and Use of Performance-Based Measures of Competency

Fourth, either the process conducted by neutrals on court rosters

48. *Id.*

should be given a different name, or courts should improve program quality control by providing training for mediators, court roster administrators, and court program managers about ethics in mediation, and by instituting performance-based measures for mediators. Many court-connected or court-annexed mediation programs rely on rosters of mediators or subcontract for their mediation services with outside provider organizations. Requirements for being approved for many court rosters are minimal. Forty or sixty hours of mediation training and observations of two or three mediation sessions, do not, in and of themselves, ensure that a person could be relied upon to mediate competently and consistently. At this time, most courts have few means in place for knowing a mediator's mediation skills and/or for knowing if the rostered or otherwise approved mediator is mediating or conducting an ADR or traditional settlement conference. Mediator rosters and subcontracts with various mediator providers may give court mediation administrators a false sense of security and may give mediation consumers such as attorneys and litigants widely inconsistent experiences. Ongoing performance-based measures for mediators should be used and relied upon to assess competency. Examples of implementation of performance-based competencies already exist.[49] Additionally, court programs should require ongoing mediator development and provide regular ongoing meaningful feedback from participants to the mediators about the process they experienced. Courts should also create a mechanism for mediation participants to voice a complaint or grievance when dissatisfied with their mediator. Such a process could focus on mediation's core values and serve to educate litigants further, as well as to better the skill level of the mediator.

5. Strategy Five: Ensure the Availability of Mediation as an Alternative Process and Redefine Success

Fifth, courts should ensure the availability of mediation as an alternative process. Mediation as an alternative is *not* like other forms of ADR. Mediation is dramatically *different from* other forms of ADR such as arbitration and settlement conferences. Mediation has a radically different dimension: the face to face opportunity for the parties themselves, free from any court rules or rules of evidence, to discuss their dispute and their conflict and to decide for themselves their own outcome that is uniquely responsive to their situation. Mediation offers

49. These include: the Colorado Office of Dispute Resolution; the Institute for the Study of Conflict Transformation's Summative Assessment for Certified Transformative Mediator™; Mediator Certification by the Maryland Council for Dispute Resolution; and Mediator Certification by Family Mediation Canada.

the opportunity to have a positive personal experience *because of* the interaction. Courts should consider revising their court-annexed mediation programs, their expectations, and their definitions of mediation success to include the availability of mediation services that reflect the core values of mediation as an alternative.[50] Alternatively, such services could be made available outside of the court system, for example, in community mediation centers and/or by private practitioners or mediation firms, and made known to parties and attorneys as alternative ways to satisfy a court ADR mandate or mediation order.

6. Strategy Six: Incorporate ADR and Mediation Courses in Required Law School Education

Sixth, law schools should require all law students to take an experience-based (participation in roleplays or live client experience) ADR course that educates students about the differences between various ADR processes, such as arbitration and mediation, and different approaches to mediation, such as a transactional approach versus a transformative approach. A traditional academic course alone cannot convey the core values of mediation as an alternative process that offers the opportunity to enhance human connection. However, an integrated theory and experiential practice course can. Many, if not most, law schools already offer elective courses on ADR and/or mediation, some of which include live client experience.[51] These should be made part of the core curriculum.

It is critical that attorneys truly understand the alternatives available, so that they can effectively, accurately, and comfortably advise clients regarding different approaches to conflict resolution and participate in the process chosen when appropriate.

V. Conclusion

Mediators, other ADR providers, and court program administrators have a special responsibility to be clear and transparent about the process(es) they are offering and the goals that underpin these processes . If the process is mediation, court programs should maintain rosters that include only ethical and competent mediation providers as measured by performance-based evaluations and client feedback. Legislatures and courts have a special responsibility to provide sufficient funding to establish and maintain quality programs if they are to be offered.

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50. Senft, *supra* note 42; *see* Riskin, *supra* note 34.

51. For example, the University of Denver College of Law and the University of Maryland School of Law provide live client experience.

The current confusion and lack of clarity about what process is offered when it is called "mediation", has produced as a by-product, citizens who feel less empowered when issues that are most important to them, often non- legal issues, are overlooked or are viewed as irrelevant by settlement officers referred to as court mediators. This lack of clarity raises serious ethical considerations for mediators, attorneys, and the courts. It also provides an opportunity for change.

While it would be a gross injustice for the courts to have to say to their mediators: "We incorporated mediation; we trained you or asked you to be trained; we hired mediation coordinators; we reviewed your roster applications and put you on the roster; and now we may take away your opportunity to call what you do mediation because our way actually compromised your quality and your ethics," it is a larger injustice to continue the expansion of mediation services in the courts without first defining the core values and goals, and renaming programs if necessary, to more accurately and clearly describe the process required or offered. The need for continual education of the public and of members of the local and state bar associations, and of the new generation of attorneys being trained in law schools, can also not be understated.

Courts embraced ADR, and specifically mediation, because they wanted to do something good. It is in our courts' best interests to assure quality of the processes they offer. To do so will entail rethinking and expanding or changing the goals of many court-annexed and supported mediation programs to be more than pretrial settlement conferences, or alternatively to clarify that they are simply settlement programs.

Mediators and courts alike have a fully vested interest in understanding the basis for concerns and growing discontent regarding court-connected mediation and being appropriately responsive. ADR has been institutionalized in many, if not most, of the nations' courts, and this trend promises to continue. Serious concerns exist about this trend, particularly with respect to court-annexed mediation. Over time, with attention to helpful changes, these concerns can be addressed, and the benefits of mediation maintained both within and outside of the courts.