

## IS THAT ALL THERE IS?: “THE PROBLEM” IN COURT-ORIENTED MEDIATION\*

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### INTRODUCTION

A cartoon shows a king and his queen seated on either side of an advisor, who is looking at the king. “You *said*, ‘Off with her head,’” says the advisor, “but what I *heard* was ‘I feel neglected.’”<sup>1</sup> Plainly, this advisor was trying to do something that a good mediator should do<sup>2</sup>—help the parties understand the psychological and emotional “interests” that precipitated the king’s “position” and consider whether that position actually fosters his interests.<sup>3</sup> Such attention to underlying interests, the real concerns of the parties, has been one of the great promises of mediation, at least to many early “mediation imperialists”<sup>4</sup> who saw its potential for loosening the pinched perspective that typically dominates litigation practices and settlement discussions in cases that are, or are likely to be, in the litigation stream. The idea was that mediation could help the parties exercise auton-

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<sup>1</sup> Drawing by Mike Ewers, in RONALD B. ADLER ET AL., *LOOKING OUT, LOOKING IN* 27 (2005).

<sup>2</sup> See Deborah R. Hensler, *In Search of “Good” Mediation: Rhetoric, Practice and Empiricism*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 231, 254-55 (Joseph Sanders & V. Lee Hamilton eds., 2001) (describing attorneys’ process evaluations, as well as their assessments of how satisfactory and fair mediation was for their clients, based on new analyses of the Rand ADR data).

<sup>3</sup> A “position” is what a party says she wants or is entitled to; an “interest” is the need or goal that motivates the party to assert the position. See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 40-42 (2d ed. 1991).

<sup>4</sup> We are inspired by Professor Robert Mnookin’s likely half-humorous characterization of himself as a “negotiation imperialist.” Robert Mnookin, *When Not to Negotiate: A Negotiation Imperialist Reflects on Appropriate Limits*, 74 U. COLO. L. REV. 1077, 1083 (2003).

omy,<sup>5</sup> not only in agreeing to a solution, but also in determining the focus of the mediation (“the problem definition”<sup>6</sup>); such autonomy, the reasoning goes, could lead to a broader problem definition and to processes and solutions that were better suited to the parties’ real needs.<sup>7</sup>

This Article focuses on what we call “court-oriented” mediations in “ordinary”<sup>8</sup> civil, non-family disputes (such as personal injury matters, employment cases, contract and property damage disputes, medical malpractice claims, and the like). Generally, these mediations take place in the shadow of the courthouse, as someone has already filed a lawsuit or contemplates doing so if the mediation does not produce an agreement. They typically include one individual plaintiff and one or more defendants. Lawyers and insurance claims representatives are nearly always involved. In some of these cases, courts order or coax the parties into mediation; in others, the parties enter mediation voluntarily. The mediation sessions may be conducted as part of a court-connected program or privately. Without doubt, some of these mediations deal with the parties’ underlying interests and non-legal issues.<sup>9</sup> Based upon available empirical evidence and conversations with mediators around the country, however, it appears that the problem definition in most court-oriented mediation sessions is quite narrow, dominated by litigation-oriented risk analysis and valuation.<sup>10</sup> Similarly, these mediations’ outcomes do not vary much from those produced by lawyers’ traditional bilateral negotiations.<sup>11</sup>

The plaintiffs in these cases are often “one-shot players”; that is, they have very little or no experience with litigation and the ways of courts.<sup>12</sup> The same is true for many defendants. For one-shot players, involvement in litigation is far from ordinary. Indeed, many have resorted to the courts only because they have been caught up in once-in-a-lifetime, unique, or catastrophic events. Only the lawyers, mediators, and insurance claims representa-

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<sup>5</sup> Autonomy is more likely to be described as “self-determination” in mediation literature. See, e.g., Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 16 (2001).

<sup>6</sup> Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 18 (1996) (describing problem definition as “[t]he focus of a mediation—its subject matter and the problems or issues it seeks to address”).

<sup>7</sup> See Mnookin, *supra* note 4, at 1083.

<sup>8</sup> These types of cases have also been described as “ordinary litigation” involving individual plaintiffs. E.g. HERBERT M. KRITZER, LET’S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 30 (1991); HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION 36, 38 (1990).

<sup>9</sup> See *infra* Part I, notes 43-47 and accompanying text.

<sup>10</sup> See *infra* notes 48-55 and accompanying text.

<sup>11</sup> *Id.*

<sup>12</sup> See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97-110 (1974) (generally theorizing that repeat players hold an advantage over one-shot players; categorizing personal injury insurers as repeat players and personal injury plaintiffs as one-shot players).

tives—the “repeat players”<sup>13</sup> in the litigation system—consider such cases “ordinary” and effectively narrow both the definition<sup>14</sup> of the problem to be resolved and the set of available remedies. These repeat players<sup>15</sup> set the scope of inquiry and the procedures, often without any explicit discussion

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<sup>13</sup> See Lisa Blomgren Bingham, *When We Hold No Truths to Be Self-Evident: Truth, Belief, Trust, and the Decline in Trials*, 2006 J. DISP. RESOL. 131, 145-46 (observing that though corporations may be institutional repeat players, the managers and officers involved in litigation generally are not repeat players and do not express faith in the courts) (citing John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 39 (1998)); Galanter, *supra* note 12, at 97-110. Some commentators have focused on the fates of one-shot players and repeat players in ADR processes. See, e.g., J. ANDERSON LITTLE, MAKING MONEY TALK 42-46 (2007) (describing differences between repeat players and one-time plaintiffs and their relationship to their lawyers in mediation sessions); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 58 (1999) (“We have little empirical verification of the claims made both for and against arbitration and ADR, including positive assertions made about reduced cost, speed, and access to dispute mechanisms, as we really do not have much data about whether one-shotters always do worse in institutionally established ADR, although the Bingham and Engalla data do demonstrate some clear areas for concern.”). Other commentators have considered the differing interests and expectations of one-shot and repeat players in various contexts. See, e.g., H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 152-54 (1970) (examining the interests of repeat players, specifically insurance claims adjusters and lawyers, largely in routine cases involving small amounts in controversy); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 55-56 (1963) (examining expectations of businessmen and lawyers in contract disputes, and the “functions and dysfunctions of using contract to solve exchange problems”); Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153 (1984) (focusing primarily on the interests of individual plaintiffs and finding that once they seek assistance from courts or attorneys, they want vindication). See generally JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1994) (examining the day-to-day behavior of police and other legal actors to see how they come to interpret legal constraints). A slightly different but related focus involves comparing individual and organizational litigants’ characteristics and resolution patterns. See, e.g., Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1280-81 (2005) (finding that “individual plaintiff cases are substantially more likely to be determined by an adjudication—especially a non-trial adjudication—than are organizational plaintiff cases” and finding “evidence that organizational plaintiffs—when pitted against either individual or organizational defendants—are substantially more likely to settle their cases than to have them decided either by trial or nontrial adjudication.”). Hadfield also finds that if federal lawsuits for the recovery of defaulted student loans are excluded from consideration, “organizations are defendants in more than 80% of all federal civil litigation; individuals are plaintiffs in almost 70%.” *Id.* at 1298.

<sup>14</sup> We are not referring to the private mediation of large commercial disputes with sophisticated parties on both sides. In these cases, it is quite likely that the parties are involved in the development of the mediation process and influence the problem definition. See Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 930-33 (2002).

<sup>15</sup> See *infra* notes 53-55 and accompanying text.

or recognition of the many available alternative formulations<sup>16</sup> and often without the influence of the one-shot players. They tend to focus narrowly on two questions: First, what would happen if the parties litigated this case? Second, how much is the defendant willing to pay and the plaintiff willing to accept to avoid the delay, risks, and costs of trial? The lawyers and mediators then implement mediation procedures that they think will enable them to address those questions efficiently.<sup>17</sup> Such procedures typically exclude a consideration of the parties' motivations. In addition, they usually emphasize private caucuses rather than joint sessions,<sup>18</sup> and offer few, if any, opportunities for the parties to speak or listen to each other directly.<sup>19</sup> Thus, such mediations foster a bracketed understanding of the dispute and rational-cognitive-legal approaches to resolving it,<sup>20</sup> which generally preclude explicit, shared attention to underlying interests,<sup>21</sup> particularly the psychological and emotional needs of the parties, or other non-legal concerns.

For many one-shot players who have chosen (or might choose) litigation to resolve their disputes, this narrow approach may be wholly appropriate and even preferable.<sup>22</sup> In *some segment* of cases, though, the exclusive focus on litigation means that at least some of these parties miss out on opportunities for processes and outcomes that could be far better suited to their needs.

This gap between the expansive potential of mediation and the constricted reality of most court-oriented mediation—which has many causes and many effects—is the challenge this Article seeks to address. Ultimately, this Article proposes that all parties, including the one-shot players in ordinary civil cases, should have opportunities to influence the development of the problem definition. We hope such opportunities can lead to the selection

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<sup>16</sup> Bryant Garth has noted that there is a growing difference between the mass processing offered by court-connected mediation programs and the individualized treatment offered to “larger” clients with “larger” cases. See Garth, *supra* note 14, at 930.

<sup>17</sup> See *infra* Part I.B.2.

<sup>18</sup> See *infra* notes 53-55 and accompanying text.

<sup>19</sup> See *infra* notes 53-54 and accompanying text.

<sup>20</sup> See Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 137 (1997).

<sup>21</sup> Meanwhile, recent research indicates that repeat mediation users assess mediators' ability to listen for interests as very important. See John Lande & Rachel Wohl, *Listening to Experienced Users: Improving Quality and Use of Commercial Mediation*, DISP. RESOL. MAG., Spring 2007, at 18.

<sup>22</sup> See 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, 422-23 (2004-2005) (observing that “most parties participating in court-connected mediation” perceive outcomes as fair or satisfactory, and research indicates that parties “appreciate mediators' help in achieving outcomes that are consistent with the rule of law”). Also, as Professor Robert Ackerman has observed, when plaintiffs invoke the power of the courts, it is reasonable to assume that they seek the application of legal norms. Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 55 (2002).

of the problem definition that is most appropriate. In Part I, the Article elaborates upon the gap between court-oriented mediation's potential for broad problem definition and the narrow focus of most mediations, using a case study for illustration. Part II sets forth a systematic method for "setting" the appropriate problem definition in a given mediation, and then describes three approaches that courts (and private providers) could undertake to encourage and assist parties in developing the most appropriate problem definitions and processes. We offer these approaches to begin a dialogue regarding the most effective and administrable mechanisms to give parties the opportunity to influence the focus of their mediations. Part III explains why we propose that courts provide these opportunities to parties, rather than relying on the parties themselves or their lawyers to take the initiative.

#### I. THE GAP BETWEEN ASPIRATION AND REALITY IN COURT-ORIENTED MEDIATION

With the advent of notice pleading,<sup>23</sup> the easing of access to the courts,<sup>24</sup> and legislative encouragement of private litigation to enforce public rights,<sup>25</sup> state and federal courts in the U.S. attend to a strikingly wide variety of private and public ills.<sup>26</sup> And in the public imagination, courts provide a unique function as the public forum that can best discover the details of an individual case and adjudicate it.<sup>27</sup> Yet the courts condition access upon a particular focus. In civil proceedings, the "problem" defined by the pleadings must state a sufficiently recognizable legal claim.<sup>28</sup> If the plaintiff meets this relatively low hurdle,<sup>29</sup> the court permits discovery—but

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<sup>23</sup> See FED. R. CIV. P. 8(a)(2).

<sup>24</sup> See Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 59-63 (1991) (discussion of the expansion of no-fault divorce and no-fault torts).

<sup>25</sup> See, e.g., 29 U.S.C. § 2617(a)(3) (2000) (fee-shifting provision of the Family Medical Leave Act allowing plaintiffs to recover attorney's fees, expert witness fees, and other costs in addition to the judgment).

<sup>26</sup> See Herbert M. Kritzer, *American Adversarialism*, 38 LAW & SOC'Y REV. 349, 349-51 (2004); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 99-105 (J.P. Mayer ed., George Lawrence trans., Perennial Classics 2000) (1835).

<sup>27</sup> In a foreword to the published proceedings of the 1976 Pound Conference, three former ABA presidents observed that Americans "feel and see that they are getting a measure of justice in the courts, the kind of respectful attention and thoughtful consideration that they do not think they get anywhere else . . ." THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE: PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 11 (A. Leo Levin & Russell R. Wheeler eds., 1979) (internal quotation marks omitted).

<sup>28</sup> See Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727, 736-37 (2005).

<sup>29</sup> The precise height of this hurdle, however, remains a matter of contention. Compare Conley v. Gibson, 355 U.S. 41, 45-46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which

only for information that is relevant to the legal claims and defenses in the case.<sup>30</sup> In pre-trial motions and at trial, the “problem” remains narrow: what is the applicable law, what are the legally relevant facts, and how do they mesh?<sup>31</sup>

But mediation is an entirely different story—or at least that has been a dominant theory.<sup>32</sup> Conventional wisdom among a segment of influential

would entitle him to relief.”) *with* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1968-69, 1974 (2007) (criticizing *Conley* as an “incomplete, negative gloss” and requiring that a complaint contain “enough facts to state a claim to relief that is plausible on its face”).

<sup>30</sup> FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense . . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”).

<sup>31</sup> See FED. R. CIV. P. 50(a)(2) (requiring the moving party to specify the law and facts in a motion for judgment as a matter of law); FED. R. CIV. P. 56 (stating that a motion for summary judgment should be granted if the pleadings, discovery materials, and affidavits establish that the moving party is entitled to judgment as a matter of law).

<sup>32</sup> There has been great debate over the definition and purpose of mediation. Many commentators, for example, have written regarding the occurrence and appropriateness of evaluative interventions in mediation. See David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC’Y REV. 613, 637-38 (1989) (identifying “selective facilitation” as a technique for mediators to use to influence outcomes); Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31, 31 (1996) (declaring that evaluative mediation activities “are inconsistent with the role of a mediator”); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71, 75-77 (1998) (arguing that the definition of mediation should not include evaluative services); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 937-38 (1997) (analyzing why evaluative activities are inconsistent with a mediator’s role); Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669, 675 (1997) (theorizing that “mediator evaluation can assist the parties in their self-determination efforts”); Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 775-77, 796-99 & n.105 (1999) (arguing that self-determination is undermined by the absence of informed consent and noting that some commentators suggest that evaluative techniques can increase informed consent); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985, 985-86, 1001-02 (1997); Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 44-45, 47 (1996) (acknowledging that evaluative techniques “can interfere with the parties’ coming to understand fully their own and each other’s positions and interests” and “with the development of creative solutions”); Donald T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 511 (1997) (“Rather than interfering with the self-determination of parties to resolve their own dispute, activist interventions by the mediator may enhance the parties’ empowerment by educating them and by aiding their realistic understanding of the alternatives to agreement.”). Particularly for court-connected cases, some commentators have urged that mediation should produce outcomes that are consistent with the justice norms that the disputants had invoked by being in court. See James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457, 487 (1996); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator’s Role*, 24 FLA. ST. U. L. REV. 949, 966 (1997) (suggesting that “the formalist ‘facilitative’ model of mediation” should not be elevated “above the practical needs of disputants and the fairness concerns that must animate decisionmaking in any government-sponsored pro-

commentators on mediation holds that the process has several capacities that courts lack.<sup>33</sup> It can empower the parties to work together in a respectful and productive manner; allow a focus on the parties' real needs and interests, in addition to their legal claims; offer a flexible process customized to fit the parties' situation, emotions, and interests; and encourage the development of a range of creative and responsive outcomes.<sup>34</sup> In appropriate situations, mediation may even enable the parties to heal or restructure their relationships, both personal and professional.<sup>35</sup>

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ceeding"); Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 745-57 (1997) (describing appropriate settings for a norm-advocating approach to mediation). Some also have argued for the primacy of the transformative model of mediation. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 95 (1994).

<sup>33</sup> See, e.g., Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308, 328-27 (1971) (analyzing mediation as one of the only forms of social ordering that does not have government power or authority as its primary focus).

<sup>34</sup> See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982); Welsh, *supra* note 5, at 16-20. See also JAN B.M. VRANKEN, *EXPLORING THE JURIST'S FRAME OF MIND: CONSTRAINTS AND PRECONCEPTIONS IN CIVIL LAW ARGUMENTATION* 104-06 (2006) (urging the greater suitability of mediation for cases in which courts cannot "protect" an important emotional interest with judicial remedies or a party's legal claim does not represent her real interest).

<sup>35</sup> See Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1664 (1985) (recognizing settlement as "a process of reconciliation"). See also Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where it Fits in a System of Justice*, 3 NEV. L.J. 289 (2002-2003) (urging a system of justice to consider protecting rights and improving relationships). Research indicates, however, that civil non-family mediation frequently does not realize this potential. See Dwight Golann, *Is Legal Mediation a Process of Repair—or Separation? An Empirical Study, and its Implications*, 7 HARV. NEGOT. L. REV. 301, 331 (2002) ("Even when able mediators work with parties whose dispute arises in the context of a significant prior connection with each other, relationship repairs in legal mediation appear to be uncommon events . . ."); Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 67 (2004) (identifying four studies where only a minority of litigants believed that mediation improved the relationship between the parties, with most studies finding that a significant percentage of litigants did not perceive litigation as improving the relationship between the parties). It could be that academics and practitioners who appreciate mediation's potential for a more humanistic, relation-oriented approach find themselves at odds with the psychological and rights-oriented profile of those who dominate actual civil non-family mediation sessions. Professor Susan Daicoff observed that one response to the dissonance between a rights-oriented profile and an ethic of care may be to "attempt[] to change the lawyer's role and lawyering to incorporate a care orientation." Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1402 (1997). Other responses can include denial of the conflict or dividing one's personality so that the ethic of care dominates personal and family life while the analytical side dominates one's professional life. *Id.* See also Nancy A. Welsh, *Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically*, 2008 J. DISP. RESOL. (forthcoming) (describing psychological, professional, and business reasons that lawyers may resist a more humanistic approach to resolving disputes).

In recent years, many state and federal trial and appellate courts have begun to order or proffer mediation in large numbers of civil non-family<sup>36</sup> cases.<sup>37</sup> After some initial resistance, many lawyers now voluntarily select mediation for their cases, either before or after filing.<sup>38</sup> In-house counsel for major corporations regularly report that they favor the use of mediation over arbitration or other processes.<sup>39</sup>

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<sup>36</sup> We emphasize that we are focusing here on civil non-family mediation. Though court-connected family mediation also employs this narrow conception of the problems mediation should address, there is evidence that the process frequently addresses a broader array of issues. See Nancy A. Welsh, *Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 420, 423-24 (Jay Folberg et al. eds., 2004). This may be because all of those involved in a custody dispute (i.e., judge, lawyers, mediator, perhaps even the parents) recognize that the court does not have the resources (or probably the desire) to serve as a close monitor of the ongoing implementation of the agreement reached by the parents, and greater participation by the parents in the creation and customization of a consensual agreement should increase their rate of compliance with it. See Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 *LAW AND SOC'Y REV.* 11, 37-38 (1984).

<sup>37</sup> In 2004, for example, 13,566 federal district court cases were referred to mediation; in 2005, 68 of 94 federal district courts had authorized referral to mediation. See Donna Stienstra, *Emerging Issues in Federal Court ADR*, Presentation at The Dickinson School of Law of Penn State University (Sept. 12, 2005) (presentation materials on file with author). In 2006-2007, 2,070 general district court mediations and 280 circuit court mediations occurred in Virginia. See ADR—The Wave of the Future, Overview and Statistics, [http://www.courts.state.va.us/drs/general\\_info/overview\\_and\\_statistics.pdf](http://www.courts.state.va.us/drs/general_info/overview_and_statistics.pdf). In 2005-06, all twenty Florida judicial circuits ordered some percentage of substantial (\$15,000) non-family civil cases (i.e., “circuit” cases) into mediation. FLA. STATE COURTS, FLORIDA MEDIATION & ARBITRATION PROGRAMS: A COMPENDIUM 73 (19th ed., 2005-2006), [http://www.flcourts.org/gen\\_public/adr/bin/2006%20Compendium.pdf](http://www.flcourts.org/gen_public/adr/bin/2006%20Compendium.pdf). Seven of those circuits kept sufficient data to report that they had ordered 8,947 circuit court cases into mediation in 2005-2006, while 6,494 of these were mediated. *Id.* at 75. See also Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 *PENN ST. L. REV.* 43, 55 (2003) (observing that Florida’s “official” statistics only tell part of the story because court supported mediators and mediation programs exist alongside a thriving private mediator sector”).

<sup>38</sup> See Roselle L. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys’ ADR Recommendations*, 2 *PEPP. DISP. RESOL. L.J.* 199, 207-17 (2002) (observing that lawyers are more likely to use ADR if they had previously used ADR and that some attorneys voluntarily use mediation in anticipation of a court order). See also McAadoo & Welsh, *supra* note 22, at 407-08 (noting that attorneys’ selection of mediation, motivated by Minnesota’s mandatory consideration rule and judges’ routine ordering of ADR, helped lead to the institutionalization of mediation).

<sup>39</sup> A recent survey in ADR trends asked the following question: “How would you rank the adoption of ADR techniques in your organization over the past 3 years?” With 5 meaning “high” and 1 meaning “low,” corporate counsel assigned the following scores: mediation (4.00); early case assessment (4.00); arbitration (2.74); multi-step ADR clauses (2.84); internal ADR training (2.67); ADR training for business clients (2.12); lawyers at law firms assigned the following scores: mediation (3.89); early case assessment (3.37); arbitration (3.76); multi-step ADR clauses (3.28); internal ADR training (2.99); ADR training for business clients (2.55). CPR Int’l Inst. for Conflict Prevention & Resolution, *The CPR Survey on Alternative Dispute Resolution Trends* (conducted first quarter 2007), [http://www.cpradr.org/pdfs/surv\\_apr07.pdf](http://www.cpradr.org/pdfs/surv_apr07.pdf). See also David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 *U. PA. J. LAB. & EMP. L.* 133, 136, 138-39 (1998) (describ-



Available evidence is mixed at best, however, regarding whether these mediation sessions fulfill the expansive promise described above.<sup>40</sup> Certainly, some people and programs work hard to develop the most appropriate problem definition in mediation. Many mediators, for example, are committed to offering parties opportunities to exercise influence<sup>41</sup> and to understand and address all of the issues and interests that are important to them.<sup>42</sup> There is evidence that a growing percentage of lawyers who handle

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ing a survey of corporate counsel of the 1,000 largest U.S.-based corporations conducted for the Cornell/PERC Institute on Conflict Resolution in which over a majority believed "mediation provided parties with a more satisfactory process than litigation" by "provid[ing] more satisfactory settlements" and "preserv[ing] good relationships").

<sup>40</sup> See Elizabeth Ellen Gordon, *Attorneys' Negotiation Strategies in Mediation: Business as Usual?*, *MEDIATION Q.*, Summer 2000, at 377, 382 (stating that in the North Carolina Mediated Settlement Conference Program, of attorneys surveyed, "[t]here is less evidence of lawyers' adopting problem-solving (integrative) strategies" and that "[s]ixty-three percent (63%) of respondents thought that exchanging offers and demands until settlement is reached is the main purpose of mediation."). See also Stevens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settling: Court-Ordered Civil Case Mediation*, 19 *JUST. SYS. J.* 311, 332 (1997) (reporting that mediation has not changed lawyers' approach to settlement negotiation).

<sup>41</sup> We believe that this is consistent with the current version of the Model Standards of Conduct for Mediators (also called the "Joint Standards") which provides in Standard I "Self-Determination" that:

A mediator shall conduct a mediation based on the principle of party self-determination. 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. *Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.*

MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I (2005) (emphasis added), available at <http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf>. The parties' right to self-determination as to process design implies their influence in developing the problem definition. As we will show, however, in actual practice the design choice often is made almost automatically by the repeat players. See *infra* Part I.B.1. One challenge in getting at this problem is the common assumption that the lawyer ordinarily carries out the client's wishes. Recently commentators have promoted the importance of the concept of informed consent in mediation. See, e.g., John W. Cooley & Lela P. Love, *Midstream Mediator Evaluations and Informed Consent*, *DISP. RESOL. MAG.*, Winter 2008, at 11; Jacqueline Nolan-Haley, *Consent in Mediation*, *DISP. RESOL. MAG.*, Winter 2008, at 4; Frank E.A. Sander, *Achieving Meaningful Threshold Consent to Mediator Style(s)*, *DISP. RESOL. MAG.*, Winter 2008, at 8. None of these writings, however, explicitly identifies the problem definition as a topic on which the parties should exercise self-determination,

<sup>42</sup> This may be unrelated to whether a mediator explicitly subscribes to a particular model of mediation. Some models of mediation, however, focus explicitly on the attainment of these goals. For example, many mediators have been trained in the "understanding-based" model of mediation, as well as "transformative" mediation. The understanding-based model focuses on the enhancement of mutual understanding and eschews the use of caucuses. See generally GARY J. FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT: THE UNDERSTANDING-BASED MODEL OF MEDIATION* (forthcoming 2008). The transformative model emphasizes disputants' "voice and choice." See BUSH & FOLGER, *supra* note 32, at 95. The first explication of this approach urged mediators to view settlement as a by-product of mediation, rather than its goal. *Id.* at 106-07. In subsequent work, Bush and Folger have clarified their conception of the place of conflict resolution in transformative mediation:

significant commercial litigation,<sup>43</sup> as well as parties who are involved in multi-party, polycentric disputes,<sup>44</sup> recognize the value of uncovering and addressing interests in mediation. The rules of some court-connected programs explicitly include interests in their descriptions of mediation and

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By focusing firmly on the parties' own deliberation, decision making and perspective taking, transformative mediators encourage genuine, voluntary, fully informed settlements to emerge as and when the parties deem appropriate. But they do not prescribe the parameters of the agreement or define settlement as the only possible successful outcome for a mediation session. Reaching agreement is one decision the parties *may* make if they so choose.

ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 217 (Revised ed., 2005) (emphasis in original).

<sup>43</sup> A group of lawyers with significant commercial mediation experience (often in the roles of both lawyers and mediators), for example, recently identified "satisfy[ing] parties' underlying interests" as one of their usual goals for the process. See ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON IMPROVING THE QUALITY OF MEDIATION, FINAL REPORT: APRIL 2006–MARCH 2007 7 (2007), [http://www.abanet.org/dispute/documents/Final\\_Report\\_TaskForce\\_Mediation\\_Quality.pdf](http://www.abanet.org/dispute/documents/Final_Report_TaskForce_Mediation_Quality.pdf) (reporting that "[s]atisfying the parties' underlying interests is also an important goal for users and mediators in about half or more of their cases (81% mediation users, 92% mediators)"); ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON IMPROVING MEDIATION QUALITY, Mean Survey Responses by Respondent Type, at 3 (Apr. 16, 2007 Draft) (on file with authors) (on a scale of 1 to 5, with 1 described as "not at all important" and 5 as "essential," "understanding parties' interests" received a mean score of 4.29 from mediation users in response to the question "How important are the following skills, qualities, or functions for mediators to be effective?"). See also Lande & Wohl, *supra* note 21, at 18-20 (reporting focus group results identifying various goals for mediation besides settlement); Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 266 (listing mediation's secondary benefits besides bringing parties together and providing one's own client with a "reality check").

<sup>44</sup> The exploration of interests seems to be a relatively common feature of the mediation of environmental disputes, the reform of public institutions, and other public policy disputes, which also are the sorts of cases that are not easily resolved by civil litigation. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 398 (1978) (explaining the value of "knowing when the polycentric elements have become so significant and predominant [in a dispute] that the proper limits of adjudication have been reached"). Particularly, in environmental mediation, it is common to have a separate stage in which the mediator conducts a "conflict analysis" and, based on interviews and documents, reports to the parties regarding "what the conflict is." See Interview with mediator Howard Bellman, in Dedham, Mass. (June 18, 2006). See also Lawrence E. Susskind, *Consensus Building and ADR: Why They Are Not the Same Thing*, in THE HANDBOOK OF DISPUTE RESOLUTION 358, 364 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (describing how mediators in the consensus-building process must identify stakeholders and underlying interests, in contrast to court-connected mediators). It is also not unusual to invite a broader focus in public policy disputes or cases involving the reform of large institutions. See *id.* at 360-61. Mediators may do something similar in other cases by conducting "pre-mediation" sessions with each side. See JEFFREY KRIVIS, *IMPROVISATIONAL NEGOTIATION: A MEDIATOR'S STORIES OF CONFLICT ABOUT LOVE, MONEY, ANGER—AND THE STRATEGIES THAT RESOLVED THEM* 8-9 (2006) (relaying a story about a post-termination mediation where the mediator went outside with the former employee to contextualize the problem before setting an agenda that might prove counterproductive). Another alternative would be including such caucuses in the mediation or urging the parties to introduce deeper aspects of their conflict in joint sessions. See *infra* Part II.B.2.

mediation procedures.<sup>45</sup> Some courts and private alternative dispute resolution, or "ADR," providers offer continuing education programs or reflective practice sessions for their mediators that include discussion of the importance of exploring underlying interests and non-legal issues in appropriate cases.<sup>46</sup> And at least one court program can point to evaluation results

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<sup>45</sup> The local rule of the U.S. District Court of the Eastern District of New York, for example, states that the mediator:

[H]elps parties articulate their interests and understand those of the other party . . . [and] mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.

E.D.N.Y. R. 83.11. The U.S. District Court of the Northern District of California uses similar language, declaring that the mediator "helps parties articulate their interests and understand those of their opponent" and that "[a] hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy." N.D. CAL. ADR R. 6-1. The U.S. District Court of the Middle District of Pennsylvania includes the following sentence in its definition of mediation: "Benefits of a mediated settlement may include reduced cost to the litigants and agreements which serve the underlying interests of the parties." Mediation in the United States District Court for the Middle District of Pennsylvania, <http://www.pamd.uscourts.gov/docs/mediat.htm> (last visited Apr. 22, 2008). And in the U.S. District Court of the Western District of Missouri, mediation is defined as "a process in which a neutral third party assists the parties in developing and exploring their underlying interests (in addition to their legal positions)." General Order, Western District of Missouri, Early Assessment Program VII.B.1.a. (Sept. 13, 2007). See also U.S. Court of Appeals for the Ninth Circuit, Circuit Mediation Office, Procedures Governing the Circuit Mediation Office 3, <http://www.ca9.uscourts.gov/ca9/Documents.nsf> (follow "Download by Topic (order by Subject)" hyperlink; then scroll down to "Mediation – Forms" and follow "Memo re: Procedures Governing the Ninth Circuit Mediation Program" hyperlink) (last visited Apr. 22, 2008) (directing counsel, prior to the settlement conference, to "discuss with their clients what the clients believe must be present to achieve a fair settlement, encouraging them to explore not only their legal positions but also the interests that underlie their positions").

<sup>46</sup> For example, staff of the U.S. District Court for the Northern District of California regularly facilitate "brown bag" lunches for the program's mediators to provide an opportunity to discuss current issues and encourage reflective practice. U.S. District Court for the Northern District of California, Continuing Education, <http://www.adr.cand.uscourts.gov> (follow Neutral Education hyperlink) (last visited Apr. 22, 2008). The Maryland Judiciary's Mediation and Conflict Resolution Office has adopted a Maryland Program for Mediator Excellence (MPME) that will provide self-reflection opportunities, case discussion, videotaped assessments, and mentoring to assist mediators in developing their skills. Mediation and Conflict Resolution Office, Maryland Program for Mediator Excellence, Task Group Reports, Status Report (Sept. 2005), [http://www.courts.state.md.us/macro/task\\_group\\_rpts.html](http://www.courts.state.md.us/macro/task_group_rpts.html). Some private ADR organizations have also institutionalized opportunities for reflective practice. See, e.g., Craig McEwen, *Giving Meaning to Mediator Professionalism*, DISP. RESOL. MAG., Spring 2005, at 3, 4-5 (calling upon mediators to develop "collegial control" over their work and noting that for such "control to be meaningful, broad identities with the mediation community must be complemented by personal contacts that reinforce professional standards and expectations and help practitioners with problem-solving, reflection and professional growth"); Margaret L. Shaw, *Style Schmyle!: What's Evaluation Got To Do With It?*, DISP. RESOL. MAG., Spring 2005, at 17, 20 (describing regular monthly conference calls held by groups of JAMS mediators). Courts with staff mediators who are in easy and frequent contact actually may find it easier to develop a shared sense of professional identity. Wayne D.

showing that the use of underlying interests in mediation sessions was helpful.<sup>47</sup>

Nonetheless, we believe that the majority of court-oriented, non-family civil mediations employ the same narrow problem definition that typically prevails in lawyers' negotiations of ordinary cases.<sup>48</sup> Most lawyers continue to prefer that retired judges or experienced litigators with relevant substantive expertise serve as their mediators.<sup>49</sup> Given this preference, it is not surprising that lawyers are more likely to report that they value media-

Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 795 (1999) (“[F]ull-time staff-neutrals are likely to have the greatest ego-investment in the quality of the ADR program. And, other things being equal, the people with the greatest ego-investment in a program are the people likely to bring the most energy and effort to their work.”).

<sup>47</sup> For example, 87% of mediators and 62% of lawyers surveyed about their participation in mediations under the ADR Program of the U.S. District Court for the Northern District of California said “the mediation had helped the parties identify their underlying interests, needs, and legal priorities beyond their legal positions.” Wayne D. Brazil, *Hosting Mediations as a Representative of the System of Civil Justice*, 22 OHIO ST. J. ON DISP. RESOL. 227, 251-53 (2007).

<sup>48</sup> See HERBERT M. KRITZER, *LET’S MAKE A DEAL*, *supra* note 8, at 30; HERBERT M. KRITZER, *THE JUSTICE BROKER*, *supra* note 8, at 38.

<sup>49</sup> See Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLIN L. REV. 401, 405-06, 434 (2002) (reporting that lawyers perceive that the most important qualifications for mediators are “substantive experience in the field of law related to case” [84.2% of respondents] and “being litigators and lawyers” [66.2%]); James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 66-71 (1991) (describing new techniques brought into mediation because of the use of legal professionals as mediators); Elizabeth Ellen Gordon, *Why Attorneys Support Mandatory Mediation*, 82 JUDICATURE 224, 228 (1999) (noting that attorneys prefer mediators who “have courtroom experience”); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 524 tbl.33 (2002) (reporting that 87% of lawyers indicated that a mediator should know how to value a case and 83% indicated that a mediator should be a litigator); Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer’s Philosophical Map?*, 18 HAMLIN J. PUB. L. & POL’Y 376, 390 (1997) (reporting that the majority of Hennepin County lawyers interviewed wanted lawyers or litigators as mediators and for them to give their view of settlement ranges); Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 124-25, 144-45 (1997) (reporting that almost 78% of attorneys wanted mediators to provide opinions on the merits of medical malpractice cases and that attorneys highly valued mediators who possessed substantive expertise in medical malpractice); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 685 (2002).

If the mediators suggested possible settlement options, attorneys felt the mediation process was more fair than if the mediators did not suggest options. . . . [I]f the mediators helped the parties evaluate the merits of the case (by using reality testing, risk analysis, or asking other questions) or assisted the parties in assessing the value of the case, attorneys viewed the mediation process as more fair than if the mediators did not assist in those forms of evaluation.

*Id.* (footnotes omitted). See also ROBERT G. HANN & CARL BAAR, *EVALUATION OF THE ONTARIO MANDATORY MEDIATION PROGRAM (RULE 24.1): FINAL REPORT—THE FIRST 23 MONTHS* 80 (2001) (reporting that mediations in which the parties selected the mediator were significantly more likely to reach complete settlement than mediations in which the mediator was assigned by local court coordinator).

tion for its potential to settle cases quickly and provide litigation-focused "reality testing,"<sup>50</sup> rather than its creative potential<sup>51</sup> or its ability to respond to non-monetary concerns.<sup>52</sup> The lawyers, not the clients, dominate the discussions that take place in most mediation sessions,<sup>53</sup> and the defendants do

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<sup>50</sup> See McAdoo, *supra* note 49, at 429 (reporting that the top factors motivating lawyers to voluntarily choose mediation include saving litigation expenses (67.9%), making settlement more likely (57.4%), providing a needed reality check for opposing counsel or party (52.2%), and providing a needed reality check for own client (47.7%)); McAdoo & Hinshaw, *supra* note 49, at 512-13 (reporting that top factors motivating lawyers to choose mediation are: saving litigation expenses (85%), speeding settlement (76%), providing a needed reality check for opposing counsel or party (69%), making settlement more likely (69%), helping everyone value the case (69%), and providing a needed reality check for own client (67%)); DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 187-88 (1997) (reporting that 80% of attorneys surveyed said that resolving the case quickly was a "very important factor" in choosing mediation and 16% responded it was a "somewhat important factor"); KEITH SCHILDT ET AL., MAJOR CIVIL CASE MEDIATION PILOT PROGRAM: 17TH JUDICIAL CIRCUIT OF ILLINOIS, PRELIMINARY REPORT 34 (1994) (reporting that attorney satisfaction with the mediation program is partly due to the reality check function mediation provides); HEATHER ANDERSON & RON PI, EVALUATION OF THE EARLY MEDIATION PILOT PROGRAMS 61-62 (2004) (reporting that lawyers' satisfaction with the mediation *process* was moderately or strongly correlated with whether they believed the process was "fair," "resulted in a fair/reasonable outcome," and "helped move the case toward resolution quickly" as well as whether the "mediator treated all parties fairly"; lawyers' satisfaction with mediation *outcomes* was correlated with whether they believed the "mediation resulted in a fair/reasonable outcome" and "the mediation helped move the case toward resolution quickly").

<sup>51</sup> See McAdoo, *supra* note 49, at 429 tbl.10 (reporting that about 31% of attorneys voluntarily choose mediation to "[i]ncrease potential for creative solutions"); Metzloff et al., *supra* note 49, at 151 (noting that during the course of a study involving court-ordered mediation in the malpractice context, parties rarely considered "creative solutions"); Gordon, *supra* note 40, at 384. One survey showed that less than 12% of "plaintiffs settling at a mediated settlement conference received nonmonetary relief." *Id.* In contrast, nearly 30% of plaintiffs who opted for adjudication "received some type of nonmonetary relief." *Id.*; Clarke & Gordon, *supra* note 40, at 321 (research finding that in North Carolina, mediated settlement outcomes were indistinguishable from conventional negotiation settlements). *But see* Macfarlane, *supra* note 43, at 272-77 (observing that when parties attend mediation, many lawyers perceive that the outcomes are changed to reflect the parties' needs and interests).

<sup>52</sup> See Deborah R. Hensler, *The Real World of Tort Litigation*, in EVERYDAY PRACTICES AND TROUBLE CASES 156-66 (Austin Sarat et al. eds., 1998) (contrasting tort plaintiffs' desire to vindicate their rights and to use the legal system with lawyers' focus on monetary concerns); Gordon, *supra* note 40, at 384 ("[M]ost attorneys (56.1%) feel that litigants are not necessarily involved in these suits to satisfy some sense of justice; instead, they think litigants are concerned about money."); ANDERSON & PI, *supra* note 50, at 62 (reporting that in contrast to lawyers, parties' satisfaction with the mediation process was moderately or strongly associated with "what happened within the mediation process—whether they felt heard, whether the mediation helped their communication or relationship with the other party, and whether the cost of mediation was affordable").

<sup>53</sup> See, e.g., Gordon, *supra* note 40, at 383 ("[A]ttorneys rather than disputants are unquestionably the main negotiators in mediated settlement conferences."); Gordon, *supra* note 49, at 227 (reporting that in observed mediations, lawyers dominated negotiation, the minority of clients who did "play active roles" were "supporting rather than starring players," and that three-quarters of responding attorneys disagreed with the statement, "Litigants should be the most active participants in mediation, with attor-

not even attend most personal injury and medical malpractice mediations.<sup>54</sup> In addition, settlement-focused caucuses dominate most mediations, rather than joint sessions designed to promote parties' mutual understanding.<sup>55</sup>

The dominant practice of court-oriented mediation largely reflects the influence of the repeat players. Its consequence is that some parties—most

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neys standing by to offer legal advice.”); McAdoo & Hinshaw, *supra* note 49, at 523 tbl.32 (reporting that 51% of lawyers perceive that mediators speak primarily with or to the lawyers, but 42% of lawyers perceive that mediators encourage the clients to speak for themselves); Metzloff et al., *supra* note 49, at 123-25 (discussing the limited involvement of plaintiffs and defendants during medical malpractice mediation sessions); Wissler, *supra* note 49, at 658 (when comparing mediators' ratings of the amount of time the parties and lawyers in the same case talked during the session, the lawyers spent more time talking than the parties in 63% of the cases; in 6%, the parties spent more time talking, and in 31%, the parties and lawyers spent about the same time talking). *But see* McAdoo, *supra* note 49, at 435 tbl.14 (reporting that nearly 80% of attorneys perceive that mediators always or frequently encourage clients to participate in the mediation process).

<sup>54</sup> See Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. 445, 456-59 (2007) (observing that data from various studies of Toronto-based mediation centers showed that lawyers rarely invited defendant doctors to attend mediation sessions); Press, *supra* note 37, at 62 (reporting anecdotal evidence that parties increasingly do not attend mediation sessions in Florida); Metzloff et al., *supra* note 49, at 109, 124-25 (stating that defendant physicians “were absent with some degree of frequency” in “a major empirical study conducted on the use of court-ordered mediation in the North Carolina court system”). *But see* Bobbi McAdoo, *All Rise, The Court Is In Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 398-99 tbl.8 (2007) (observing that one of the top reasons that judges order cases to mediation is because they believe the process “gets clients directly involved in discussions”).

<sup>55</sup> See Gordon, *supra* note 49, at 379, 382 (“Observations suggest that mediation conferences typically involve extensive caucusing, a structure that supports bargaining rather than open information exchange or direct communication between the parties.”); Deborah R. Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999, at 17 (“After initial presentation of the dispute, evaluative mediators appear to move quickly to ‘shuttle diplomacy.’ Parties may not meet together again until an agreement has been struck . . . .”); McAdoo, *supra* note 49, at 435 tbl.14 (reporting that approximately 73% of attorneys perceive that mediators always or frequently use caucuses effectively and approximately 49% of attorneys perceive that mediators always or frequently ask each side to present an opening statement); McAdoo & Hinshaw, *supra* note 49, at 523 tbl.32 (reporting that approximately 62% of lawyers perceive that mediators use caucuses almost exclusively but approximately 3% of lawyers perceive that mediators use joint session almost exclusively; also reporting that about 85% of lawyers indicated that mediators ask each side to present an opening statement in joint session); McAdoo & Welsh, *supra* note 49, at 391 (reporting that when twenty-three civil litigators throughout Minnesota were interviewed, several “observed that opening statements could promote unproductive adversarial posturing and thus should not be part of the typical mediation”); Metzloff et al., *supra* note 49, at 119 (describing the structure of mediation sessions, which typically involve a series of private caucuses). *See also* Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 638 & n.313 (1997) (raising concerns about the absence of the right to present evidence in ADR proceedings and that a disputant may be “essentially silenced by a biased or rushed mediator”). *See generally* Alfini, *supra* note 49, at 66-73 (reporting that “trashers” discourage direct party communication and quickly move to caucuses as opposed to “bashers” who focus on initial settlements offers “and spend most of the session bashing away at those initial offers” and “hashers” who “adopt a style that encourages direct party communication to hash out an agreement” but may borrow from other styles).

commonly the one-shot, individual players involved in ordinary cases—miss opportunities for dialogue and outcomes that would better suit their needs.

A. *An Example: The Sabia Damages Case*

A poignant example of the common mediation practices in ordinary cases that we have been describing comes from Barry Werth's *Damages: One Family's Legal Struggles in the World of Medicine*,<sup>56</sup> an in-depth study of a medical malpractice case that has been required reading in courses at a number of law schools.<sup>57</sup> We use this case because it is familiar and well-documented, and Werth describes the mediation sessions in some detail. The mediations fall within the category of court-oriented mediation, but they were conducted privately, not as part of any court-connected program.<sup>58</sup>

In April, 1984, Donna Sabia gave birth to twins at Norwalk Hospital in Norwalk, Connecticut.<sup>59</sup> One child was stillborn; the other, who came to be known as "Little Tony," was born brain damaged and so severely compromised that he would never be able to walk, talk, or care for himself in any way.<sup>60</sup> He would require extensive medical and nursing care for his entire life. Donna and Tony, her husband, worked heroically to care for Little Tony.<sup>61</sup> They suffered both economically and emotionally, struggling to provide their son with the care he needed.<sup>62</sup>

Three years after Little Tony's birth, the Koskoff law firm—perhaps the leading plaintiff's medical malpractice firm in Connecticut<sup>63</sup>—filed suit in Superior Court on behalf of Donna and Little Tony against Norwalk

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<sup>56</sup> BARRY WERTH, *DAMAGES: ONE FAMILY'S LEGAL STRUGGLES IN THE WORLD OF MEDICINE* (1998).

<sup>57</sup> The schools that require the reading of *Damages* include the University of Missouri-Columbia, the University of Connecticut, and William Mitchell College of Law. Melody Richardson Daily, Chris Guthrie & Leonard L. Riskin, *Damages: Using a Case Study to Teach Law, Lawyering, and Dispute Resolution*, 2004 J. DISP. RESOL. 1, 9 n.42. For an essay on how to use this book in law school teaching, see Tom Baker, *Teaching Real Torts: Using Barry Werth's Damages in the Law School Classroom*, 2 NEV. L.J. 386, 386-87 (2002). In addition, Professor Bruce Hay at Harvard Law School has used it in Civil Procedure. E-mail from Bruce Hay, Professor of Law, Harvard Law School, to Leonard Riskin (Oct. 5, 2007) (on file with author), and Professor Dom Vetri of the University of Oregon School of Law uses the book in his Torts course and in a Personal Injury seminar. E-mail from Professor Dom Vetri, B.A. Klicks Professor of Law, University of Oregon School of Law, to Leonard Riskin (Aug. 4, 2007) (on file with author).

<sup>58</sup> WERTH, *supra* note 56, at 298.

<sup>59</sup> *Id.* at 16.

<sup>60</sup> *See id.* at 19, 25, 31-33.

<sup>61</sup> *See id.* at 31-33.

<sup>62</sup> *See id.*

<sup>63</sup> *Id.* at 41.

Hospital and Maryellen Humes, M.D.<sup>64</sup> Dr. Humes, an obstetrician-gynecologist, had never seen Donna before being called in to perform the delivery.<sup>65</sup> The complaint alleged numerous acts of negligence involving both nonfeasance and misfeasance.<sup>66</sup> In reality, neither side was quite clear about what produced Little Tony's condition, or whether the hospital or Dr. Humes caused it or could have prevented it.<sup>67</sup>

The lawyers engaged in settlement negotiations throughout the course of the litigation. In April 1991, the Sabias' lawyers demanded a total of \$15 million to settle the claims against the hospital and Dr. Humes.<sup>68</sup> The hospital's insurance company, Travelers, offered \$5 million, which the Sabias declined.<sup>69</sup> In February 1992, under pressure from her insurance company, Dr. Humes settled for \$1.35 million.<sup>70</sup> The hospital then remained as the only defendant.<sup>71</sup>

While a trial was in sight, Donna and Tony<sup>72</sup> Sabia hoped for vindication, some recognition of the injury that they and their son had suffered,<sup>73</sup> and an end to the emotional turmoil and sense of desperation that had engulfed them.<sup>74</sup> Instead of trial, though, their case went to private, voluntary mediation—twice.<sup>75</sup> The lawyers on each side entered into the process anticipating that mediation would encourage the *other* side to moderate its

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<sup>64</sup> WERTH, *supra* note 56, at 65-66. Although the older Tony was not a plaintiff, he played a central role in the litigation, negotiation, and mediation of the case. Therefore, we treat him as a party in our discussion.

<sup>65</sup> *Id.* at 17-18.

<sup>66</sup> The complaint alleged that the hospital was negligent in not treating Donna's pregnancy as high risk, not having adequate procedures for twin pregnancies, and failing to follow even the procedures it did have in place. *Id.* at 66. It also alleged that the hospital was negligent in providing nurse-midwives rather than physicians, ignoring the fact that the fetal heartbeat was not audible on admission, delaying the ultrasound and C-section, and not arranging for an obstetrician to attend to Donna as soon as she arrived at the hospital. *Id.* The claim against Dr. Humes asserted that she failed to meet the appropriate medical standard of care in not examining Donna earlier and not delivering the twins by C-section immediately after an ultrasound. *Id.*

<sup>67</sup> Dr. Humes also suffered greatly, working to defend her reputation and maintain malpractice insurance coverage. *Id.* at 75.

<sup>68</sup> WERTH, *supra* note 56, at 186-87.

<sup>69</sup> *Id.* at 187.

<sup>70</sup> *Id.* at 209-12.

<sup>71</sup> *Id.* at 211.

<sup>72</sup> Though Tony Sabia was not a party to the lawsuit, *id.* at 65, he played a major role in the plaintiffs' case and decision-making, *e.g.*, *id.* at 359 (discussing with Donna whether to settle).

<sup>73</sup> WERTH, *supra* note 56, at 298. *See also* Hensler, *supra* note 52, at 157-158 (describing tort and medical malpractice plaintiffs' desires in pursuing litigation).

<sup>74</sup> WERTH, *supra* note 56, at 31.

<sup>75</sup> *Id.* at 310-25 (describing the first mediation); *id.* at 356-63 (describing the second mediation). For extensive analyses of these mediations, see generally Leonard L. Riskin, *Teaching and Learning from the Mediations in Barry Werth's Damages*, 2004 J. DISP. RESOL. 119.



expectations<sup>76</sup> and thus enable the parties to reach a monetary settlement.<sup>77</sup> Donna and Tony sought a financial resolution, particularly because they needed a good deal of money to provide around-the-clock care for Little Tony.<sup>78</sup> But they also wanted something more, and different. They likely felt a need to understand what had caused Little Tony's terrible condition.<sup>79</sup> They wanted recognition and acknowledgment of how they had suffered and how well they had coped.<sup>80</sup> Neither of the mediations fulfilled these interests.<sup>81</sup>

From the very beginning, the Sabias' participation in mediation was severely limited. At the first mediation, Tony, Donna, and Little Tony left the mediation room after they were introduced to the lawyers, the insurance company representatives, and the mediator.<sup>82</sup> Donna and Tony participated only in the private caucuses with their lawyers and the mediator.<sup>83</sup> The case did not settle.<sup>84</sup> In the second mediation, Tony insisted that he and Donna

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<sup>76</sup> See McAdoo, *supra* note 49, at 429 (reporting that one of the top factors motivating lawyers to choose mediation voluntarily was providing a needed reality check for opposing counsel or party (52.2%)); McAdoo & Hinshaw, *supra* note 49, at 513 tbl.25 (reporting that one of the top factors motivating lawyers to choose mediation was providing a needed reality check for opposing counsel or party (69%)).

<sup>77</sup> WERTH, *supra* note 56, at 365.

<sup>78</sup> *Id.* at 251, 319-20.

<sup>79</sup> See *id.* at 311. See also STEPHEN L. FIELDING, *THE PRACTICE OF UNCERTAINTY* 107-09 (1999) (summarizing research that indicates that plaintiffs in medical malpractice cases want to learn the truth about what happened and that learning what happened and holding a provider accountable are important steps in the emotional healing process for plaintiffs); Stephen L. Fielding, *Changing Medical Practice and Medical Malpractice Claims*, 42 SOC. PROBS. 38, 50-51 (1995) (observing that a group of plaintiffs from Massachusetts and New York, when asked why they sued, stated that "they sued, not just for the money, but because they wanted to learn the truth"). But see Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 J. AM. MED. ASS'N 1359, 1361 (1992) ("The most frequently reported reason families filed was that they had been advised or influenced to sue by someone outside the immediate family (33% of the sample). . . . [The second most mentioned reason for suing (24%)] was that they needed money to pay for long-term care."). See generally Marlynn L. May & Daniel B. Stengel, *Who Sues Their Doctors?: How Patients Handle Medical Grievances*, 24 LAW & SOC'Y REV. 105, 116 (1990) (finding that patients who sue are more likely to question their doctors' competence prior to their injury and perceive that their doctors failed to show care for them personally).

<sup>80</sup> WERTH, *supra* note 56, at 359-60. Professors Bush and Folger have written most extensively about "recognition" in the "transformative" approach to mediation that they developed. See BUSH & FOLGER, *supra* note 32, at 84-99. But even academics and mediators who do not promote or practice transformative mediation emphasize the importance of recognition. See, e.g., Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 665 (2004) (discussing how parents involved in a mediation with school officials appreciate the aspects of mediation that enhance their voice and the respect officials are likely to show them as a result).

<sup>81</sup> WERTH, *supra* note 56, at 365.

<sup>82</sup> *Id.* at 314-15.

<sup>83</sup> *Id.* at 314.

<sup>84</sup> *Id.* at 324-25.

be present in the joint session.<sup>85</sup> The Sabias' lawyer, Michael Koskoff, agreed, but only on the condition that (in Werth's words) they "held their questions until the end."<sup>86</sup> Koskoff was worried that Tony would lose control.<sup>87</sup> His apprehension proved to be justified. Well before the end of the mediation, Tony exploded at Bill Doyle, the lead defense counsel.<sup>88</sup> According to Werth, Tony "wanted [the defense lawyers] to concede that he, Tony, had taken all the world could throw at him, and was still standing. He wanted respect."<sup>89</sup> Tony particularly sought recognition from Doyle. He believed, incorrectly, that Doyle could not possibly understand or empathize with the Sabias' situation.<sup>90</sup>

Doyle's presentation concentrated on legal argument,<sup>91</sup> which must have only confirmed Tony's perception of the gulf between them. Ironically, Doyle *could* understand Tony's predicament. He had grown up with a sibling who needed extensive care.<sup>92</sup> Years later, Doyle said that he had felt he could not afford to allow himself to feel or express empathy toward Tony because that would have interfered with his ability to represent his client.<sup>93</sup>

After Tony's explosion (or cry for recognition, depending on one's point of view) the co-mediators "threw everyone out" of the room and began to caucus with each other.<sup>94</sup> They wanted to discuss what they considered the "key issue"—causation.<sup>95</sup> Eventually, the second mediation produced a settlement with the hospital for \$6.25 million.<sup>96</sup> This resolution, combined with the earlier settlement with Dr. Humes and Tony's hard work, gave the Sabias enough money to support Little Tony and keep their family together.<sup>97</sup> But it also left them in a raw, emotional state, feeling confused and victimized by their son's disability *and by the mediation itself*.<sup>98</sup> Donna and Tony were angry, in part because the mediations totally

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<sup>85</sup> *Id.* at 356-57.

<sup>86</sup> *Id.* at 357.

<sup>87</sup> WERTH, *supra* note 56, at 357.

<sup>88</sup> *Id.* at 359-60.

<sup>89</sup> *Id.* at 359-60.

<sup>90</sup> *See id.* at 359-60.

<sup>91</sup> *Id.* at 358-59.

<sup>92</sup> *Id.* at 315.

<sup>93</sup> Interview by Leonard Riskin with William Doyle, in Columbia, Mo. (Apr. 11, 2003). Tony learned about Doyle's family history only when he read Werth's book about this case, which, ironically, gave him the recognition he thought he would get from his lawsuit or mediation. *Id.*

<sup>94</sup> WERTH, *supra* note 56, at 360.

<sup>95</sup> *Id.* at 360. *See also* Riskin, *supra* note 75, at 139 (observing that "[v]irtually any book on mediation and nearly any mediation training program would say that, at a minimum, the mediator should have used 'active listening,' i.e., paraphrased the content and named the emotions connected with Tony's outburst.").

<sup>96</sup> WERTH, *supra* note 56, at 365-67.

<sup>97</sup> *Id.* at 371-75.

<sup>98</sup> *Id.* at 369.

ignored their interests in learning what really happened to their son and in gaining respect and acknowledgement for what they had gone through and how well they had performed.<sup>99</sup>

One way to understand what happened in this mediation is through a framework described by Professor Bernard Mayer. He suggests exploring conflict along three dimensions—behavioral, cognitive, and emotional—and argues that full resolution requires resolution along all three dimensions.<sup>100</sup> All the participants in the Sabias’ case achieved behavioral resolution in the sense that they stopped contesting this case. On the cognitive dimension, which addresses how the parties understand what happened and how they understand their settlement,<sup>101</sup> most of the repeat players achieved resolution even though no one *really* understood what led to Little Tony’s disabilities. In author Barry Werth’s words:

The question of exactly what Travelers had paid for remained unresolved. Koskoff believed absolutely it was for Norwalk Hospital’s negligence in causing Little Tony’s brain damage in 1984. Travelers and Doyle just as vehemently thought the insurer had paid in order to avoid paying much more if a jury agreed with Koskoff.<sup>102</sup>

Thus, the plaintiffs’ lawyers understood the settlement as an admission of liability. The defendant and its insurer and lawyer understood the settlement as risk management. Despite the repeat players’ differing interpretations of the agreement, it resulted from and accorded with conventional practices and valuation schema that they generally understood and accepted; in other words, they seemed cognitively content with “knowing” what happened in the limited sense that they could make, and believe, adversarial arguments about what happened.<sup>103</sup> The behavioral and cognitive

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<sup>99</sup> *Id.* at 359.

<sup>100</sup> BERNARD S. MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER’S GUIDE* 41-46 (2000).

<sup>101</sup> *See id.* at 98-100.

<sup>102</sup> WERTH, *supra* note 56, at 370.

<sup>103</sup> Michael Koskoff believes that the discovery process did produce an understanding of the events that led to Little Tony’s disabilities. Koskoff has written:

Unfortunately, I also never believed that the mediation process would give the Sabias ‘the answers’ they sought; though I do believe, through the discovery process and investigation, we were able to arrive at a thorough understanding of what happened to Little Tony and why it happened. Most of the time I spent on this case was addressed to finding the answers to those questions. I’m convinced that I did find the answers and communicated them to the Sabias. I recognize that this communication is not a complete substitute for a formal finding by a tribunal or an admission by an adversary under cross examination. However, the explanation was thorough and, in my view, convincing. I also recognize that Bill Doyle feels he has a different answer to what happened and that Barry [Werth] feels that the whole thing is unknowable.

Letter from Michael P. Koskoff, Partner, Koskoff, Koskoff & Bieder, PC, to Leonard Riskin (Feb. 8, 2008) (on file with the authors).

resolutions that the repeat players achieved also enabled emotional resolution, at least for most of them.<sup>104</sup>

In contrast, the Sabias never achieved cognitive comfort with the fact that they did not learn what really happened to Little Tony or why.<sup>105</sup> As a result, these one-shot players also did not achieve emotional resolution. After the settlement, which happened to occur on Christmas Eve, the Sabias thanked their lawyers, but:

[T]hey were too conflicted to be settled. . . . “You mean I’m going to walk out of here with a check and that’s going to be it? Is that all it means?” Tony asked, his voice steeped in remorse. Already he was “kicking [him]self in the ass, because [he] watched that guy [Doyle] agree with everything Michael [Koskoff] said.” They had gotten it over with, Donna would say, but for what purpose, and at what price, she and Tony still didn’t know.<sup>106</sup>

The essential reason that neither mediation provided Tony and Donna with the knowledge, respect and acknowledgment that they sought—which might have enabled them to achieve cognitive and emotional resolution—is that none of the professionals considered these goals to be an appropriate part of the mediation process.<sup>107</sup> Instead, the lawyers, insurance adjusters, and mediators adopted a narrow problem definition: What monetary result would a trial produce, and what financial and other costs would the parties incur before completing a trial?<sup>108</sup> What kind of financial settlement was feasible for both sides? For the repeat players in the room, the only information that seemed relevant was that which would bear on these questions.<sup>109</sup> To them, procedures that excluded other sorts of information

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<sup>104</sup> At least one lawyer on the defense side, though, did not reach cognitive resolution or emotional resolution. Werth observed that “[u]nlike Doyle, [Beverly Hunt had] been unable to put her identification with her client aside, and the mediations had proved unsupportable—‘the most castrating experience of my life,’ she calls them.” WERTH, *supra* note 56, at 368.

<sup>105</sup> *Id.* at 310-11.

<sup>106</sup> *Id.* at 369. Other books also describe plaintiffs’ dissatisfaction with processes that produce monetary settlements but do not respond to other psychological and emotional needs. *See, e.g.*, JONATHAN HARR, *A CIVIL ACTION* 452-454 (1995); GERALD M. STERN, *BUFFALO CREEK DISASTER* 272 (1976). *See also* Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1015-23 (1999) (observing that apologies provide a variety of benefits to injured parties, but also can benefit offenders).

<sup>107</sup> It likely was impossible for them to have gotten an accurate understanding of what actually caused Little Tony’s injuries. In our view, no one actually knew the cause, though the lawyers on both sides, of course, argued as if they did.

<sup>108</sup> Arguably, this focus is consistent with a desire to emulate the form of substantive justice produced by trial. *See* McAadoo & Welsh, *supra* note 22, at 409. But the repeat players’ task orientation ignores another important product of trials—perceptions of procedural justice with all of its important consequences for perceptions of substantive justice and legitimacy, as well as compliance. *See* Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH U. L.Q. 787, 817-20 (2001).

<sup>109</sup> *See* Jack M. Sabatino, *ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1327-30 (1998).

seemed appropriate.<sup>110</sup> The definition of "the problem" could have been different, and we turn to that now.

B. *Finding the Most Appropriate Problem Definition in the Sabia Mediations*

In this section, we illustrate in more detail how the mediations failed to give the Sabias some of what they thought they needed and how the mediations might have been structured to respond to such needs. We do not claim that Donna and Tony would necessarily have been better off with such adjustments, though we believe they would have been happier with the process and outcome.<sup>111</sup>

The following discussion will be clearer if we explain how we are using three common terms: *positions*, *interests*, and *issues*. A *position* is essentially a statement, demand, or want.<sup>112</sup> When plaintiffs' lawyer Michael Koskoff demanded multiple millions of dollars on behalf of his clients, he was asserting a position. An *interest* is a need or goal that motivates someone to assert a position.<sup>113</sup> In the Sabias' case, that positional claim for money was meant to serve a number of interests, including Tony's and Donna's interest in supporting Little Tony and their family. But it was not

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<sup>110</sup> Michael Koskoff recently described his goal for the mediation:

In my experience, mediations in these types of cases do not achieve the "catharsis" provided by jury trials. I never felt it would or could achieve emotional satisfaction for the Sabias, or their attorneys for that matter. What the Sabias really wanted, on some level, was for the hospital to suffer, as Tony and Donna had. They also wanted formal acknowledgement that they had been wronged. They did not achieve those goals.

From our perspective, the Sabia mediation had, as its *only* goal, the quest for a monetary settlement. I believe that their active participation in the mediation process would have been counter-productive to that goal. They would have heard arguments from the defense that would have left them, not only unsatisfied, but angrier than when they started. From Bill Doyle's perspective, he had to make those arguments to convince us and the Sabias of the weaknesses in the case.

In the end, the Sabias came away from the process not fully satisfied, but not fully unsatisfied either. They live, now, in relative comfort as opposed to abject poverty; and, on a daily basis, are satisfied that they are able to provide a decent and healthy life for their son. I don't believe that the mediation failures you enumerate affect them on an ongoing basis. I view the mediation as a success. An apt metaphor for this experience is childbirth. For a mother, "natural" childbirth may be the most satisfying experience and a C-section the least satisfying. However, the overriding goal is the healthy baby. No mother would want to risk the baby for a satisfying experience. Regardless of how unsatisfying the experience of the C-section may be, to a mother with a healthy baby, it is of little consequence.

Letter from Michael Koskoff, Partner, Koskoff, Koskoff & Bieder, PC, to Leonard Riskin (Feb. 8, 2008) (on file with authors).

<sup>111</sup> We humbly acknowledge the burgeoning body of research suggesting that people are not very good at predicting what will make them happy in the future. See, e.g., DANIEL GILBERT, STUMBLING ON HAPPINESS 89-95 (2006); Chris Guthrie & David Sally, *The Impact of the Impact Bias on Negotiation*, 87 MARQ. L. REV. 817, 818-20 (2004).

<sup>112</sup> See FISHER ET AL., *supra* note 3, at 4.

<sup>113</sup> *Id.* at 42.

intended to serve some of their other interests, such as knowing what really happened to cause their son's disability and receiving recognition from others of how well they had performed in tragic and challenging circumstances.<sup>114</sup> An *issue*, in this context, is a question that could be included as part of the subject matter or problem definition in a dispute resolution procedure. For example, and as we illustrate more fully below, in the negotiation to settle a case such as this one, the focus could be on litigation issues, business or other economic issues, personal "core" issues, or community issues. If the problem definition is limited to litigation and economic issues, then the procedures adopted may allow no room for other issues.

### 1. The Problem Definition Continuum

The "problem definition" or subject matter of a mediation is depicted in Figure 1 along a continuum running from narrow to broad.<sup>115</sup> A narrow focus means that one or a small number of issues will be relevant.<sup>116</sup> A broad problem definition permits the inclusion of a diverse array of issues and typically allows more readily for the mediation to focus explicitly on underlying interests.<sup>117</sup> The particular sequencing of potential issues along the continuum usually is affected by the context within which the mediation occurs. In other words, the context helps to determine which set of issues the participants are most likely to view as central or peripheral to dispute resolution and decision-making. As we will explain more fully below, the *Sabia* mediations focused primarily on Point I: Litigation Issues, and, at least implicitly, on Point II: Business/Economic Issues; this is the usual focus in the "ordinary" non-family civil mediations we are discussing. The mediations gave no attention to Point III: Core Issues or Point IV: Community Issues. Each point on the problem definition continuum may offer opportunities for addressing any of Mayer's dimensions of conflict—behavioral, cognitive, and emotional<sup>118</sup>—depending on the circumstances of the case and the needs of the participants.<sup>119</sup>

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<sup>114</sup> We are distinguishing here between recognition of the harm that their son had suffered—which arguably was acknowledged through the provision of monetary compensation—and recognition of his parents' heroic efforts to manage their lives.

<sup>115</sup> This is a modified version of previously published graphic depictions of the Problem-Definition Continuum. Riskin, *supra* note 32, at 22.

<sup>116</sup> *Id.* at 18-22.

<sup>117</sup> *Id.*

<sup>118</sup> See *supra* notes 100-01 and accompanying text.

<sup>119</sup> See MAYER, *supra* note 100.

## Problem-Definition Continuum

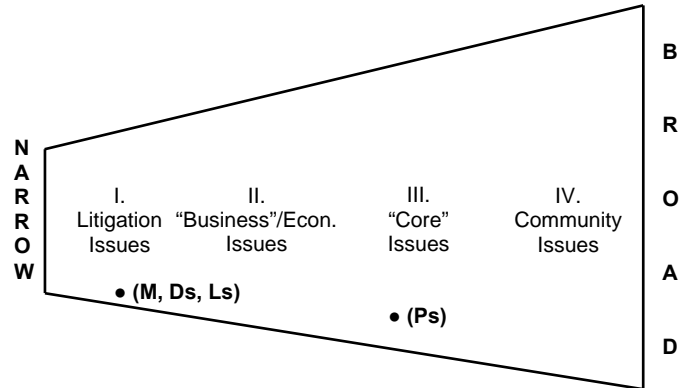


Figure 1.  
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(1) *Litigation Issues*: The principal, explicit focus in the *Sabia* mediations was litigation issues. In the parenthetical accompanying that point within Figure 1 above, the symbols “M, Ds, Ls” indicate that the repeat players—mediators, defendants (particularly the representatives of the insurance company), and lawyers—thought that this was the appropriate focus.<sup>120</sup>

(2) *“Business”/Economic Issues*: Economic impacts influence the development of law in general, the assessment of damages in particular cases, and parties’ negotiating options. Therefore, regardless of the extent to which parties explicitly raised these issues in the mediation sessions, it is very likely that they had a significant indirect influence upon both the hospital’s offers and the *Sabias*’ demands. For example, the *Sabias* were dealing with serious economic needs in order to support Little Tony and maintain a reasonable standard of living for their family.<sup>121</sup> The *Sabias*’ economic instability likely affected their ability to choose freely between settling their lawsuit and waiting for a fully responsive resolution.

Defense attorney Doyle tried to satisfy what he assumed to be the plaintiffs’ interests. His first offer was a structured settlement of \$1.7 million, with an initial payment of \$700,000 and \$1,000,000 invested in annui-

<sup>120</sup> See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC’Y REV.* 631, 645-46 (1980-81) (observing that whatever harm or dispute a party brings to a professional, the professional will transform the harm or dispute so that the professional’s expertise is appropriate for its resolution).

<sup>121</sup> WERTH, *supra* note 56, at 367.

ties that would yield \$60,000 per year for Little Tony's lifetime.<sup>122</sup> In addition, Travelers offered to pay \$12,500 each year for four years for college tuition for the Sabias' other two children (not realizing that they had three other children).<sup>123</sup>

Of course, the hospital and its insurer, Travelers, also sought to protect their own economic and business interests. The hospital's lawyers and other representatives, for example, had to consider the financial, personnel, and future business risks presented by the case, as well as how any resolution would affect their reputation and ability to manage their services and avoid or discourage litigation. Norwalk Hospital had recently opened a state-of-the-art Maternity Center and was promoting high-risk obstetrics as a major attraction and income-producer.<sup>124</sup> It now had the facilities and staff that "almost certainly would have saved"<sup>125</sup> Little Tony. A trial could have generated publicity that would have scared pregnant women away from the hospital.<sup>126</sup> An out of court settlement, in contrast, could be kept private.<sup>127</sup> These issues likely were incorporated, implicitly or explicitly, into the subject matter of the mediation session.

(3) *Personal "Core" Issues*: Core issues, as we use the term, are based on the five "core concerns" that Roger Fisher and Daniel Shapiro tell us are shared by all negotiators.<sup>128</sup> The five "core concerns"—which, for our purposes, are essentially psychological and relational interests<sup>129</sup>—are autonomy, affiliation, appreciation, status, and role.<sup>130</sup> Everyone wants to have

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 318-19.

<sup>124</sup> *Id.* at 368.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> WERTH, *supra* note 56, at 368.

<sup>128</sup> ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 15 (2005).

<sup>129</sup> We must note that Daniel Shapiro is somewhat wary about using the terms interchangeably. He explains:

Some people have described the core concerns as core interests, and I think it could make sense. From my own perspective, however, the word "concerns" calls forth a more emotional sense, whereas "interests" seems a bit more business-like/political in its historical use and nature. . . . An unmet concern . . . can be seen clearly to trigger an action tendency (and concomitant emotion). An interest (at least in terminology) seems to be a bit less intrinsically emotionally charged.

E-mail from Daniel Shapiro, Lecturer on Law, Harvard Law School, to Leonard Riskin (June 10, 2007) (on file with author).

<sup>130</sup> We do not mean to argue that Fisher and Shapiro have exhausted the realm of emotions in negotiation. Other commentators have taken different perspectives on the role of emotions in negotiation. See *infra* note 215 and sources cited therein. We also do not mean to suggest that emotional interests are the only or invariably the most important interests. We use the five core concerns because they help simplify and thus bring a certain clarity to the analysis. As George Box said, "All models are wrong[,] but some are useful." G.E.P. Box, *Robustness in the Strategy of Scientific Model Building*, in ROBUSTNESS IN STATISTICS 201, 202 (Robert L. Launer & Graham N. Wilkinson eds., 1979). We find



freedom to decide matters that are important to them (autonomy), to feel connected to others (affiliation), to have others acknowledge the merit of their thoughts, feelings, and actions (appreciation), to receive full recognition of their standing (status), and to have a fulfilling role.<sup>131</sup> Core concerns and emotions are directly related. Satisfaction of one's core concerns tends to promote positive emotions. Failure to satisfy one's core concerns tends to promote negative emotions. For the many negotiators who find it overwhelming to deal with the multiple, interacting, and constantly-changing emotions that occur during a negotiation, Fisher and Shapiro urge attention to the more limited number of core concerns that give rise to most emotions.<sup>132</sup>

Ideally a skilled and experienced mediator should be able to discern and respond appropriately to parties' emotions. In reality, however, many mediators are either not inclined or not sufficiently skillful to rise to that challenge.<sup>133</sup> If the problem definition of a mediation includes core issues, however, then the process should make explicit room for addressing the parties' core concerns and resulting emotions. This should enable more effective and collaborative negotiation within the mediation and also foster emotional resolution.

For Donna and Tony, core concerns likely arose in connection with both the injury to Little Tony and its effects ("life/dispute-related core concerns"), on the one hand, and the actual mediations ("mediation-related core concerns"), on the other. The life/dispute-related core concerns included *autonomy*, in the sense of their ability to choose how they would function as an independent and self-sufficient family unit, and *affiliation*, their ability to feel connected as a family and as a part of the larger community. They clearly thought that the situation made it extraordinarily difficult to play the *role* of parent and provider and wanted others to *appreciate* the enormity of what they had endured and how valiantly they had performed.<sup>134</sup> They may also have felt that the situation threatened their social *status* as a normal and self-sufficient family. The Sabias' desire to know what actually caused Little Tony's injuries—and whether the tragedy might have been avoided—could have drawn on any number of core concerns, especially autonomy.<sup>135</sup>

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this one especially useful even though it may not readily accommodate all emotions or include certain kinds of interests.

<sup>131</sup> FISHER & SHAPIRO, *supra* note 128, at 16.

<sup>132</sup> *Id.* at 12-14.

<sup>133</sup> *See id.* at 12 (stating that dealing directly with every emotion as it happens is daunting for trained psychologists and psychiatrists).

<sup>134</sup> *See supra* notes 79-80 and accompanying text.

<sup>135</sup> *See* FIELDING, *supra* note 79, at 107-09 (summarizing research that indicates that plaintiffs in medical cases want to learn the truth about what happened and that learning what happened and holding a provider accountable are important steps in the emotional healing process for plaintiffs); Mark S. Umbreit, Robert B. Coates & Betty Vos, *The Impact of Victim-Offender Mediation: Two Decades of*

All of this produced a good deal of anger, despair, fear, and other negative emotions. The Sabias brought these concerns about their life situation, and the accompanying emotions, into the mediations. In addition, the same core concerns arose in connection with the mediation processes themselves. As we will show below, the repeat players largely ignored their concerns for appreciation, affiliation, autonomy, status, and role in the mediation processes.

In both mediations, the operational problem definition focused explicitly on the litigation issues, and implicitly or indirectly on related economic issues. In other words, the mediations reflected a “normative framing”<sup>136</sup> based on the application of litigation standards. This framing certainly met the expectations of the repeat players. And since this was a court-oriented mediation and the courts are responsible for upholding legal standards, one could argue that such a “norm-advocating” mediation<sup>137</sup> was entirely appropriate. But the Sabias—the one-shot players affected most directly and personally by Little Tony’s disability and the parties least able to afford to wait for trial—wanted the mediation to acknowledge their life/dispute-related core concerns as well. This did not happen.

The *outcome* of the settlement, however, did address *some* of their life/dispute-related core concerns. By providing a substantial amount of money, the settlement helped address part of their core concern for autonomy in their lives. It may also have responded to part of their core concerns of role (as parents and providers) and affiliation (having the resources to keep their family together). But the settlement failed to respond to their autonomy-related desire to know what really happened to their son and why they now faced dramatic life changes that they had not chosen.<sup>138</sup>

The mediation processes failed to consider the Sabias’ mediation-related core concerns. The procedural choices made by the lawyers and (apparently) not questioned by the mediators—that Donna and Tony would not attend or speak in most of the joint sessions, and that they would have no role in deciding upon procedures or subjects of discussion for the mediation—ignored their mediation-related core concerns of autonomy, status, and role.<sup>139</sup> This limited participation also restricted their opportunities to receive the appreciation of others, though the defense apparently decided not to make such expressions in any event.<sup>140</sup>

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*Research*, 65 FED. PROBATION 29, 30 (2001) (victim-offender mediation has high satisfaction rates for the victims, partly because of sharing between victim and offender regarding why the crime occurred).

<sup>136</sup> Welsh, *supra* note 80, at 667-69 (contrasting the “different, yet equally legitimate, normative frames” used by parents and school officials in special education mediation).

<sup>137</sup> See Waldman, *supra* note 32, at 742-45 (providing an example of the norm-advocating model).

<sup>138</sup> See *supra* notes 78-79, 98-99 and accompanying text.

<sup>139</sup> See *supra* note 86 and accompanying text.

<sup>140</sup> See *supra* text accompanying notes 92-93. The mediations also did not include other people who suffered as a result of the injuries to Little Tony, such as Dr. Maryellen Humes, whose insurance carrier pushed her into a settlement, and two nurses, Barbara McManamy and Mollie Fortuna, who were

In stark contrast, the mediations were structured to address the core concerns of the repeat players, particularly the lawyers, both within and outside the mediation. Most law students and lawyers prefer to be dominant<sup>141</sup> and naturally tend to make decisions based on the application of rules and standards, rather than values or impacts that are more nebulous.<sup>142</sup> Most lawyers also prefer to avoid emotional issues, their own or others,<sup>143</sup> and place great importance on financial remuneration.<sup>144</sup> The restricted problem definition we have described, therefore, is likely to have matched the lawyers' own psychological and professional tendencies. The lawyers

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involved in the delivery. *See supra* notes 64-67 and accompanying text (discussing Humes). *See also* WERTH, *supra* note 56, at 129-38 (discussing McManamy and Fortuna). They might have benefited emotionally from an opportunity to openly discuss the events with the Sabias.

<sup>141</sup> *See generally* Daicoff, *supra* note 35, at 1407 (observing dominant attributes in law students and lawyers). Research has found that law students tend to come from elite socioeconomic backgrounds, which might explain the need for dominance and expectation/protection of privilege. *Id.* at 1354-55. *See also* Ronit Dinovitzer et al., *After the JD: First Results of a National Study of Legal Careers* 20 (2004), [http://www.nalpfoundation.org/webmodules/articles/articlefiles/87-After\\_JD\\_2004\\_web.pdf](http://www.nalpfoundation.org/webmodules/articles/articlefiles/87-After_JD_2004_web.pdf) (observing that the newly admitted lawyers in its study "come generally from relatively privileged socioeconomic backgrounds" though "[f]ully 21% of respondents' fathers and 28% of respondents' mothers did not attend college; 15% of the fathers had blue-collar occupations, and 15% of respondents' parents were born outside the United States. . . . The more selective the law school, the more likely it is to educate the children of relative privilege, and the less selective schools are notably more accessible to the less privileged students."). Interestingly, research has also shown that high LSAT scores are highly correlated with factors such as socioeconomic status and even zip code. *See* Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 601-02 (2001) (discussing the correlation between standardized test scores and economic status).

<sup>142</sup> *See* Daicoff, *supra* note 35, at 1365-66 (comparing male college students who make decisions based on values to law students who make decisions based on logical thinking); Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63, 92 (1995-1996) (noting that 77.9% of first-year law students surveyed in one study prefer making decisions through thinking rather than feeling); Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC'Y REV. 737, 739-40 (1988) (observing that while clients in their dealings with lawyers interpret events "in terms of their impact on the self," lawyers are more likely to consider "technical rules and a problem-solving orientation . . . [as] more important than emotional reactions and justifications of self"). Recent research also suggests that law students (and perhaps lawyers) rank collaboration, which requires both high empathy and high assertiveness, as their least preferred conflict strategy. Jeffrey H. Goldfien & Jennifer K. Robbennolt, *What If the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles*, 22 OHIO ST. J. ON DISP. RESOL. 277, 306-07 (2007).

<sup>143</sup> *See* Daicoff, *supra* note 35, at 1349. A 1960 study found that law students' early childhoods were characterized by authoritarian male dominance, self-discipline, school achievement, and reading. *Id.* at 1350. *See also* LAWRENCE S. KRIEGER, *THE HIDDEN SOURCES OF LAW SCHOOL STRESS: AVOIDING THE MISTAKES THAT CREATE UNHAPPY AND UNPROFESSIONAL LAWYERS* 9-10 (2006), available at [http://www.law.fsu.edu/academic\\_programs/humanizing\\_lawschool/booklet.html](http://www.law.fsu.edu/academic_programs/humanizing_lawschool/booklet.html).

<sup>144</sup> *See* Daicoff, *supra* note 35, at 1360-62. *But see* Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U. J. GENDER SOC. POL'Y & L. 511 (2005) (reporting a study showing women in law school were more likely to identify altruism as a priority in choosing a career and also more likely to choose public interest jobs).

were able to play dominant *roles* and exercise the *autonomy* to which they were accustomed—and which they apparently preferred.<sup>145</sup> In addition, all concerned had to *appreciate* the lawyers' *status* and expertise in law. This could lead to more legal work for the lawyers, which would foster all of their life-related core concerns. The processes similarly accommodated some of the mediators' core concerns (e.g., status, role, and autonomy). In the first mediation, for example, the mediator had enough autonomy to refuse to make predictions about what would happen in court.<sup>146</sup> Similarly, it seems that the narrow focus of these mediations met many of the core interests of the insurance company and its claims representatives, whose role was to manage the financial and precedential risk posed by the Sabias' lawsuit.<sup>147</sup>

(4) *Community Issues*: Community issues involve the intersection between the individual dispute and the interests of the wider community. Such issues do not generally arise in the court-oriented mediations that are the focus of our article, in part because the persons or entities that would raise them are rarely parties. These individual lawsuits focus on individual rights. Nonetheless, the Sabias *might* have wanted to raise such issues had they understood that they could have done so. For example, medical malpractice plaintiffs will sometimes advocate for changes in health care providers' policies or practices to prevent similar injuries to future patients.<sup>148</sup> The Sabias might have welcomed the opportunity to hear about the changes the hospital had made to provide better pre- and post-natal care.<sup>149</sup> They may have had ideas for changes that would have been especially helpful for families like theirs.

In light of all of the repeat players' important core concerns described above, it should not be surprising that they would expect court-oriented mediation to operate within the procedural and substantive "shadow of the

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<sup>145</sup> See Nancy A. Welsh, *Institutionalization and Professionalization*, in Moffitt & Bordone, *supra* note 44, at 494 & nn.64-68 (citing A. ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988); R. DINGWALL & P. LEWIS, *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* (1983); G.L. GEISON, *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* (1983); M. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977); J. Birkhoff, *Mediators' Perspectives on Power: A Window into a Profession?* (2000) (unpublished doctoral dissertation, George Mason University)).

<sup>146</sup> WERTH, *supra* note 56, at 82, 182.

<sup>147</sup> *Id.* at 126.

<sup>148</sup> Relis, *supra* note 54, at 481.

<sup>149</sup> Generally speaking, if such information was presented at a mediation and the case then failed to settle, the plaintiffs could seek to obtain the same information through pretrial discovery and then have it admitted as supporting the claim of negligence. See UNIF. MEDIATION ACT, § 4(c) and Reporters' Comments, available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/uma2001.pdf>. For this reason, defendants likely would have been unwilling to reveal the information about changes at the hospital.

law,"<sup>150</sup> or that lawyers would seek guidance from the "lawyer's standard philosophical map."<sup>151</sup> Nor should we be surprised that court-oriented mediation exhibits a symbiotic relationship with its repeat players. Indeed, sociological theories and research affirm that social structures—including dispute resolution processes—inevitably influence and are influenced by those who seek access to and, through their actions, recreate the structures.<sup>152</sup>

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<sup>150</sup> See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (explaining how the projected outcome of trial will provide "bargaining chips" in a negotiation).

<sup>151</sup> See Riskin, *supra* note 34, at 44-45. Riskin observes:

What appears on the map is determined largely by the power of two assumptions about matters that lawyers handle: (1) that disputants are adversaries—i.e., if one wins, the other must lose—and (2) that disputes may be resolved through application, by a third party, of some general rule of law. . . .

. . . .

On the lawyer's standard philosophical map . . . the client's situation is seen atomistically; many links are not printed. The duty to represent the client zealously within the bounds of the law discourages concern with both the opponent's situation and the overall social effect of a given result.

Moreover, on the lawyer's standard philosophical map, quantities are bright and large while qualities appear dimly or not at all. When one party wins, in this vision, usually the other party loses, and, most often, the victory is reduced to a money judgment. This "reduction" of nonmaterial values—such as honor, respect, dignity, security and love—to amounts of money, can have one of two effects. In some cases, these values are excluded from the decision maker's considerations, and thus from the consciousness of the lawyers, as irrelevant. In others, they are present but transmuted into something else—a justification for money damages. . . .

. . . .

. . . The lawyer's standard world view is based upon a cognitive and rational outlook.

*Id.* (footnotes omitted).

<sup>152</sup> See ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* 19 (1984) ("[T]he rules and resources drawn upon in the production and reproduction of social action are at the same time the means of system reproduction (the duality of structure.); ANTHONY GIDDENS, *STUDIES IN SOCIAL AND POLITICAL THEORY* 118 (1977) ("[S]tructure is the generative source of social interaction but is reconstituted only in such interaction."), *cited in* Clinton W. Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840*, 80 NW. U. L. REV. 807, 869 (1986).

In mobilizing structure as the medium of social interaction, actors reproduce the structure. The idea that structure helps constitute action and is at the same time reconstituted by action—the notion that it is both the medium and the outcome of action—is expressed in the concept of the "duality of structure." This concept replaces the dualism of subject (the knowledgeable actor) and object (structure) entrenched in traditional social theory, and exemplified in functionalism, structuralism, and economic analysis. Structuration theory opens the way for the development of a theory in which the subject interacts in a reciprocal fashion with structure, without determinatively attaching causal primacy to either.

Francis, *supra* at 869. See also Arthur F. McEvoy, *A New Realism for Legal Studies*, 2005 WIS. L. REV. 433, 434, 437-38 (describing New Legal Realism as assuming the "reciprocal, recursive . . . interaction [among] law, experience, and culture" that is inspired by Giddens' theory of structuration; offering the example of scholarship regarding "'girl watching' in the workplace" which "excuses itself as a kind of harmless masculine play—boys just horsing around—but . . . also ratifies and reproduces a system of social dominance[,]. . . oppresses its subjects, blinds the perpetrators to the harm they do, and enervates potential response on the part of anybody concerned. Entitlement, behavior, and consciousness inter-

We also do not mean to suggest that the operant problem definition in this case was necessarily the wrong one. We do mean to point out that the problem definition was narrow and that the lawyers, claims adjusters, and mediators set that problem definition without giving the Sabias the opportunity to exercise any influence in regard to it. The repeat players assumed the standard problem definition, rather than customizing it to fit the concerns of the actual plaintiffs. Also apparently without consultation with the Sabias, the lawyers and mediator established a mediation procedure that had the effect of excluding the Sabias from the kind of direct participation that would have been meaningful to them. The Sabias' lawyers did this with the best of intentions—to protect their clients' legal and financial interests.<sup>153</sup> And given the realities of the situation, including the potential effect of Tony's strong and unruly emotions,<sup>154</sup> we do not mean to suggest that judgments made by his lawyer and the other professionals were wrong or unwise. We merely mean to highlight the huge gap between the predispositions as to problem definition held by Tony and Donna, on the one hand, and the repeat players, on the other.

The lawyers and mediators in *Sabia* apparently established the problem definition and procedures without any explicit discussion, acknowledgement, or possibly even awareness that the problem definition could be broader. Figure 2 illustrates our assessments of the differences among the *Sabia* participants in their predispositions or aspirations concerning the problem definition and who should exercise influence in determining the problem definition.

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act—reciprocally and recursively.”) (footnotes omitted); Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 *FORDHAM L. REV.* 1367, 1384-85 (2006).

[A]n engagement with the legal process does not just translate or test disputants' claims but fundamentally reconstitutes them, specifically by transforming brute demands into assertions of right, which depend on reasons and therefore by their nature implicitly recognize the conditions of their own failure. . . . [T]he transformative effect on a dispute of the legal process is potentially so powerful . . . that the parties abandon any of their demands that cannot be accommodated within the transformation. When this happens, the legitimacy of the legal process naturally follows, because the reconstructed disputes and the resolutions that the legal process proposes have been tailored to suit each other . . . .

*Id.* at 1385. *See also* GEERT HOFSTEDE, *CULTURE'S CONSEQUENCES* 11-12 (2d ed. 2001) (illustrating how ecological factors lead to societal norms which then lead to societal institutions with particular structures and ways of functioning; further illustrating how these become mutually reinforcing and result in cultural stability; finally illustrating that outside forces (e.g., forces of nature or man) can produce change).

<sup>153</sup> WERTH, *supra* note 56, at 310-311.

<sup>154</sup> *Id.* at 152-53, 310-11.

## Predispositions/Aspirations re: Problem-Definition

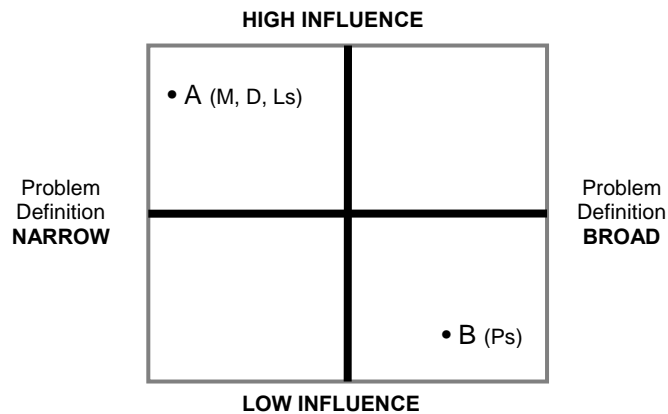


Figure 2.

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The horizontal axis in Figure 2 mimics the horizontal axis in Figure 1, illustrating a narrow problem definition at the left and a broad problem definition at the right. The vertical axis adds a new dimension: who exercises influence in “setting” the problem. Points near the top of this axis show high influence, and points toward the bottom of this axis show low influence.<sup>155</sup> Point A shows the aspirations or predisposition of the mediator (M), representatives of the defendants (D), and the lawyers (Ls): that the problem definition should be narrow, in accordance with their customary practices in negotiation and mediation and that they and the other repeat players would exercise great influence over the problem definition.<sup>156</sup> Point

<sup>155</sup> See Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 885 (2002) (observing how designers of dispute systems can choose how, when, and whom to empower).

<sup>156</sup> Norms and practices are much less likely to diverge between lawyers and their repeat corporate clients. See David B. Wilkins, *Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics*, in *EVERYDAY PRACTICES AND TROUBLE CASES*, *supra* note 52, at 68, 84-85. See also JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 335-36 (1982) (discovering two worlds of lawyers; the group of lawyers that serves higher status and corporate clients has higher status and higher incomes but less autonomy; the group of lawyers that serves individual, “ordinary” clients has lower status and income but greater autonomy); JULIE MACFARLANE, *THE*

B depicts the plaintiffs'<sup>157</sup> predispositions or aspirations, which differed dramatically from those of the repeat players. The plaintiffs wanted a broader problem definition and hoped to exercise influence in establishing it. In fact, Tony tried to exert such influence, but his emotional outburst was ineffective.<sup>158</sup> Thus, Point A also identifies the actual problem definitions in these mediations and the actual influences—the repeat players' preferences—that brought it about.<sup>159</sup>

## 2. Why Problem Definition Matters

We believe that this kind of disparity between the aspirations of the one-shot players and the repeat players is quite common, perhaps even the norm, in mediations of ordinary, non-family civil cases. The repeat players typically assert their influence to impose a narrow problem definition and mediation procedures to support it without giving the one-shot players much opportunity, if any, to influence the problem definition and procedures, or to play a significant role in the mediation.

A recent study of sixty-four court-oriented medical malpractice mediations in Ontario provides empirical support for these propositions.<sup>160</sup> Despite a rule requiring parties to attend court-connected mediation sessions, it was quite rare for physicians actually to attend; their lawyers commonly invoked an opt-out procedure.<sup>161</sup> Using interviews, questionnaires, and observations, Tamara Relis found that the lawyers representing plaintiffs and defendant physicians shared a common set of attitudes and beliefs about the purpose of the mediations and about whether physicians should attend.<sup>162</sup> Their attitudes and beliefs were directly contrary to those held in common by plaintiffs and physician defendants.<sup>163</sup> Lawyers on both sides tended to oppose attendance of physicians despite potential “extra-legal” benefits to both plaintiffs and physicians.<sup>164</sup> The lawyers generally believed that the purpose of the mediations was to try to settle the case through a monetary

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NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 3-5 (2007) (describing the evolution of law firms to accommodate the needs and preferences of corporate clients).

<sup>157</sup> For convenience, we use “plaintiff” to include Tony, though he was not technically a party.

<sup>158</sup> WERTH, *supra* note 56, at 319-20 (shouting during mediation, correcting factual errors entered in the record, and insisting that the offer failed to account for the realities of supporting his handicapped son).

<sup>159</sup> For an explanation of the use of such grids to understand mediation, see Leonard L. Riskin, *Decision-Making in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

<sup>160</sup> Relis, *supra* note 54, at 445, 452-53.

<sup>161</sup> *Id.* at 455-57, 501.

<sup>162</sup> *Id.* at 475.

<sup>163</sup> *Id.* at 461-62.

<sup>164</sup> *Id.* at 457-459.



agreement, or (from defense counsel's perspective) to encourage the plaintiff to abandon the claim.<sup>165</sup> The primary reasons they gave for opposing attendance by physicians was that physicians did not "instruct on money" and that their presence could invite an emotional dimension that might interfere with settlement.<sup>166</sup> Physicians' lawyers also believed that their clients did not want to attend.<sup>167</sup> In stark contrast, *every* plaintiff and *every* physician believed that defendant physicians should attend because this would allow the plaintiff and defendant to communicate, which they thought should be a central aspect of the mediation.<sup>168</sup> Relis concludes that the lawyers saw the mediation as primarily their process; that is, its primary purpose was to help them reach settlement and any attention to emotional or psychological needs of the parties was secondary or incidental.<sup>169</sup>

What consequences follow from the dominance of the repeat players' predispositions in court-oriented mediation? First, the narrow focus preferred by the repeat players can provide certain important protections for clients and useful boundaries for the lawyers and mediator. For example, if parties are uncomfortable or incapable of dealing with personal core issues or cannot use a discussion of such issues to move toward an appropriate resolution, then an exclusive focus on litigation offers a rational, socially-supported, and peaceful mechanism for decision-making.<sup>170</sup> Indeed, in a country that is governed by the rule of law rather than the arbitrary will of men, it is especially valuable for lawyers to anchor dispute resolution in the norms provided by our laws.<sup>171</sup>

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<sup>165</sup> *Id.* at 472-73.

<sup>166</sup> Relis, *supra* note 54, at 461. This analysis is strikingly similar to Michael Koskoff's expressed concerns regarding the potential negative effect of Tony's participation in mediation. *See supra* note 87-89 and accompanying text.

<sup>167</sup> Relis, *supra* note 54, at 464-65.

<sup>168</sup> *Id.* at 481-82. Interestingly, the lawyers who represented hospitals tended to see good reasons for physicians to attend. *Id.* at 463. Perhaps significantly, these lawyers also were more likely to be women than the lawyers representing the plaintiffs or the defendant physicians. However, these lawyers did not want hospital employees, such as nurses, to attend. They supported this attitude with the same sorts of reasons that physicians' lawyers had used to justify excluding their clients: the hospital employees did not "instruct on money" and might bring in emotions that could interfere with settlement. *Id.* at 464-68.

<sup>169</sup> *Id.* at 473.

<sup>170</sup> *See* Ackerman, *supra* note 22, at 55.

<sup>171</sup> *See* Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DEPAUL L. REV. 569, 572 (2007) ("The strength and appeal of the rule of law critique should not be underestimated. In the United States, even many of ADR's staunchest advocates recognize that there are circumstances in which disputes are better resolved publicly, through litigation, rather than through negotiation, mediation, arbitration, or some other private means."); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1662 (2005).

From a rule of law standpoint, we hope that our public litigation system will ensure predictable, fair, and consistent interpretation of the society's laws. The fundamental premises of the "rule of law" are that similarly situated persons should be treated similarly under the law and that persons of privilege or influence should not receive special treatment

Second, though—and this is our main point—the untempered dominance of the repeat players’ predispositions sometimes will deprive clients and lawyers of opportunities for better processes and better outcomes, robbing mediation of its greatest potential for helping parties. Some may question whether it matters that mediation may not be achieving its full potential. When clients bring their disputes to lawyers, lawyers take primary responsibility for the means that will be used to achieve their clients’ objectives.<sup>172</sup> If lawyers exercise that responsibility by invoking a narrow perspective on the problem and choosing mediators who implement that focus, thus determining the preferences of the market, what is the harm?

Our main concern is that the choice to create such a narrowly focused mediation is rarely the result of deliberation or even consultation that includes clients<sup>173</sup>—particularly the one-shot players who are often involved in personal injury, medical malpractice, employment, contract, and administrative cases. Instead, this approach to mediation usually rests on lawyers’ habitual ways of seeing and behaving, and their preference to continue operating in the manner that is most comfortable for them.<sup>174</sup> As we have seen, it sometimes forecloses problem definitions, processes, and outcomes that might better serve the parties, without letting anyone know what they are missing.<sup>175</sup> And it does this in an almost imperceptible fashion. The repeat players tend to assume implicitly that the problem definition is narrow; this leads them to establish procedures that will be limited primarily to the kind of information that is relevant to litigation (and economic) issues.<sup>176</sup> And, once such a mediation commences, information and perspectives that would

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*Id.*; McAdoo & Welsh, *supra* note 22, at 404.; Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 196 (2003).

The public spectacle of civil litigation gives life to the ‘rule of law.’ To demonstrate that the law’s authority can be mobilized by the least powerful as well as the most powerful in society, we need to observe employees and consumers successfully suing large corporations and government agencies, minority group members successfully suing majority group members . . . .

*Id.*; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984) (“Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals.”); IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 3-4, 66-67 (2003) (viewing democracy as “a means of managing power relations so as to minimize domination” arising from “the illegitimate exercise of power” and that the courts’ role is to declare when unacceptable “domination has emerged” from majority rule requiring that “the parties try anew to find an accommodation”).

<sup>172</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2007), available at <http://www.abanet.org/cpr/mrpc/home.html> (“A lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”); *id.* at R. 1.4(a)(2) (2007) (“A lawyer shall . . . reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”).

<sup>173</sup> See *supra* notes 53-55 and accompanying text.

<sup>174</sup> See *supra* notes 48-52 and accompanying text.

<sup>175</sup> See *supra* notes 135-136 and accompanying text.

<sup>176</sup> See *supra* notes 155-159 and accompanying text.

broaden the focus are largely absent, excluded, or marginalized.<sup>177</sup> In other words, the procedures not only rely on the professionals' assumptions about the appropriate problem definition—they also make that definition real.

### 3. A Customized Mediation that Would Have Considered the Sabias' Core Concerns

What might a mediation designed to consider all of the Sabias' core concerns, including their need to understand what happened to Little Tony, have looked like? The mediation could have been different in three ways. A first modification would have allowed Tony and Donna to be present during the joint sessions in the first mediation.<sup>178</sup> It is likely that this simple change would have enhanced their participation. If Tony and Donna had been present, their lawyers likely would have consulted with them beforehand to determine what they thought was most important to say in these sessions in order to educate the defendants and their lawyers and try to reach resolution. The Sabias would have witnessed their story being told by their lawyers. Hopefully, they also would have witnessed the respectful verbal and non-verbal responses of the defendants' representatives. The mediator might have chosen to paraphrase and demonstrate to the Sabias that he had heard and understood their perspective.<sup>179</sup> Simple attendance likely would have increased the Sabias' perception of their control over the process,<sup>180</sup> which seemingly also would have enhanced their sense of process-related autonomy, role, status, and perhaps even appreciation and affiliation.<sup>181</sup>

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<sup>177</sup> See *supra* notes 136-140 and accompanying text.

<sup>178</sup> See Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 339 (1999) (observing that parties' participation in mediation permits them to "overcome problems that are created when they are represented by attorneys or agents in settlement negotiations").

<sup>179</sup> See Gary Friedman & Jack Himmelstein, *Resolving Conflict Together: The Understanding-Based Model of Mediation*, 2006 J. DISP. RESOL. 523, 536.

<sup>180</sup> See Welsh, *supra* note 108, at 820-26, 841-44 (explaining the effect of "voice," "consideration" and "even-handed," "dignified, respectful" treatment on perceptions of procedural justice and describing early studies finding that when parties witnessed their lawyers' presentations, they perceived process control); Tina Nabatchi & Lisa B. Bingham, *Expanding Our Models of Justice in Dispute Resolution: A Field Test of the Contribution of Interactional Justice* 15-20 (2002), available at <http://ssrn.com/abstract=305205> (finding that disputants' satisfaction with mediation in the U.S. Postal Service REDRESS program was best explained by their perceptions of their interactions with each other—and particularly, being empowered (i.e., exercising control over the process) and receiving recognition (i.e., receiving respectful treatment from the other)). See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

<sup>181</sup> See *supra* note 130 and accompanying text.

A second modification would have allowed an even more active role for the Sabias.<sup>182</sup> In both joint session and caucus, the mediator could have invited the Sabias to supplement their lawyers' statements, enabling Tony and Donna to describe their lives and needs in their own words. With their lawyers' assistance, the Sabias might have prepared their own opening statements describing their suffering, success, limited understanding of what led to their son's disability, and hopes and fears about the future.<sup>183</sup> Such statements likely would have required additional time from the Sabias' lawyers in preparing their clients, as well as more time from everyone early in the mediation session.<sup>184</sup> The provision of this opportunity, however, likely would have responded to some of the Sabias' core concerns and resulted in presentations that were less strident and emotionally charged than Tony's actual outburst in the second mediation.

This decision to address the Sabias' core concerns by including them throughout the mediation and increasing their participation also could have changed the substance of what the lawyers chose to say in the mediation. The plaintiffs' lawyers might have included different information or chosen to emphasize different points or potential solutions.<sup>185</sup> The defendants' lawyers might have tailored their presentations to respond to the Sabias' limited familiarity with the law, litigation process, negotiation, and mediation.<sup>186</sup> Members of the defense team might have expressed acknowledgment, appreciation, or empathy. The Sabias' presence and greater participa-

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<sup>182</sup> For a description of the various ways parties can participate in a mediation and their potential advantages and disadvantages, see Leonard L. Riskin, *The Represented Client in A Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U. L.Q. 1059, 1075-87, 1097-1116 (1991). Of course, there are potential risks to the greater participation. We discuss one such risk, the negotiator's dilemma. See *infra* note 234 and accompanying text. In addition, there is the potential that a client will reveal information that later guides opposing counsel's post-mediation discovery and results in damaging evidence presented at trial. Though the original disclosure may be protected from admission, the Uniform Mediation Act provides that "[e]vidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation." UNIF. MEDIATION ACT § 4(c), available at <http://www.law.upenn.edu/bl/archives/ulc/mediat/uma2001.pdf>. See Stuart Widman, *More Mediation Confidentiality Limits: What the Court May Allow in to Establish a Settlement Agreement*, ALTERNATIVES TO THE HIGH COST OF LITIG., Dec. 2006, at 180. See also *Rojas v. Superior Court*, 793 P.3d 260, 266, 271 (Cal. 2004) (holding that pursuant to California statute, only the evidence prepared for a mediation session is protected); Joel M. Grossman, *Clarifying the Confidentiality of Mediation Evidence*, L.A. LAW, Apr. 2004, 14-19 (discussing California Evidence Code Section 1119 and case law).

<sup>183</sup> See Tom Arnold, *20 Common Errors in Mediation Advocacy*, ALTERNATIVES TO THE HIGH COST OF LITIG., May 1995, at 69 (urging lawyers to prepare their clients to make opening statements).

<sup>184</sup> See Welsh, *supra* note 80, at 632 (describing school officials' variable appreciation of the time required to permit parents to make initial presentations in mediation sessions).

<sup>185</sup> See Macfarlane, *supra* note 43, at 270-77 (reporting lawyers' perceptions that their understanding of the dispute and potential resolutions change when their clients attend the mediation session).

<sup>186</sup> See Arnold, *supra* note 183, at 70 (suggesting that presentations in mediation be addressed to the decision makers on the other side of the table, rather than the mediator).

tion might have made it more likely that Doyle would have revealed his family history to his clients or to the mediator.<sup>187</sup> It then may have been easier for him to express the kind of understanding that the Sabias so sorely needed as they dealt with a role, status, and affiliation they never sought.

With the Sabias in attendance, both the lawyers and the mediators would have been more likely to ask questions to elicit the Sabias' core concerns and other interests.<sup>188</sup> If the Sabias revealed any such concerns, the mediators could have been prepared to respond appropriately, with active listening and facilitation of discussion regarding those concerns that the mediation could address. The mediators also could have asked the lawyers to prepare their clients to listen carefully to each other, not only for facts, but also for any core concerns or emotions. Alternatively, during the mediation itself, the mediators could have urged the parties to listen to learn from each other, despite the inevitable difficulty of doing so.

Coupled with their eventual and substantial settlement,<sup>189</sup> Tony's and Donna's enhanced role in the mediation session might have helped them to achieve a cognitive and emotional resolution, as well as an increased level of satisfaction with the process and outcome.<sup>190</sup> Equally important, even partial satisfaction of the Sabias' process-related core interests would have created some positive emotions, or at least decreased some of their negative emotions, making the Sabias better partners in negotiation.<sup>191</sup> Indeed, modifying the mediation process to elicit and respond to Tony's and Donna's core concerns would not have replaced the discussion of the law and its implications. Rather, it may have improved their ability to comprehend and participate in that discussion.

Third, the mediation could have been structured to respond to the Sabias' likely need to know what really caused the damage to Little Tony and his stillborn brother. Both of the actual mediations included much talk about causation.<sup>192</sup> In the second mediation, the mediators considered it "the key issue."<sup>193</sup> But they were talking about legal causation, or the proof of and arguments about causation that could be offered in a court of law. This meant that the lawyers on each side tried to find expert witnesses who

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<sup>187</sup> See *supra* text accompanying notes 92-93.

<sup>188</sup> See *infra* Part II.A.1 for proposed questions.

<sup>189</sup> See *supra* notes 96-97 and accompanying text.

<sup>190</sup> Although disputants generally express satisfaction with mediation, they are even more likely to be satisfied with mediation if their case settles. See Jennifer E. Shack, *Bibliographic Summary of Cost, Pace, and Satisfaction Studies of Court-Related Mediation Programs* (2003), <http://aboutrsi.org/pfimages/MedStudyBiblio2ndEd2.pdf> (listing the methodologies, variables examined, and key findings of more than 50 studies of court-connected mediation). See also Wissler, *supra* note 49, at 661.

<sup>191</sup> Fisher and Shapiro recommend expressing appreciation, building affiliation, respecting autonomy, acknowledging status, and choosing a fulfilling role in order to generate positive emotions. See FISHER & SHAPIRO, *supra* note 128, at 17.

<sup>192</sup> See *supra* notes 75, 91, 95 and sources cited therein.

<sup>193</sup> WERTH, *supra* note 56, at 360.

would support an argument about what happened that was consistent with the legal theory that would help them win. The lawyers' behavior was useful, necessary, and entirely appropriate in this court-oriented mediation. But Tony and Donna wanted to understand what had *really* caused the damage to Little Tony and his stillborn sibling and whether it could have been prevented.<sup>194</sup> For that reason, these adversarial arguments provided no cognitive resolution for the Sabias, and that contributed to their failure to find an emotional resolution.

Would it have been feasible, or appropriate, for a mediation process in a case such as this to accommodate Tony's and Donna's interest in knowing what really happened? As mentioned above, trials, and the mediations that take place in the dark shadows of trials, search for solutions by relying principally on a very limited form of truth-seeking: the presentation of legally relevant factual information in the context of adversarial argumentation and consideration of the realities and risks of litigation.<sup>195</sup> Each of the repeat players seemed to assume that this was the appropriate way to address the causation question. What about other options? Based on Barry Werth's description of the *Sabia* case, it is clear that no one really knew what happened.<sup>196</sup> And in a negotiation or mediation, as opposed to a trial, finding the facts is not essential for resolution. However, if the lawyers had fully accepted the Sabias' "need" to know what really happened, they would have had options. For instance, they could have agreed to hire a neutral expert to examine the facts and make a report.<sup>197</sup> Or they might have decided on a more elaborate, non-adversarial procedure to develop information.

Professor Eric D. Green describes the creation and operation of such a non-adversarial, information-gathering process in connection with a case in Toms River, New Jersey.<sup>198</sup> Residents of Toms River believed that pollutants emitted into the air and water by various corporations caused cancer.<sup>199</sup> Rather than joining others who had filed lawsuits, "the families instead decided it was more important to try to find out what really was happening to their children and why."<sup>200</sup> They hired Green to help them design a process

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<sup>194</sup> See *supra* note 79 and accompanying text. They also wanted an admission that the hospital was at fault, which, of course, the defense would never offer. *Id.*

<sup>195</sup> See *supra* notes 8-10 and accompanying text.

<sup>196</sup> See Stephen D. Easton, *Damages: Expert Witnesses*, 2004 J. DISP. RESOL. 37, 51-54. *But see* Letter from Michael Koskoff to Leonard Riskin, *supra* note 103 and accompanying text.

<sup>197</sup> *But see* Letter from Michael Koskoff to Leonard Riskin, *supra* note 103 (observing that remaining uncertainty made monetary settlement possible and that it would not have been possible to find an unbiased expert).

<sup>198</sup> Eric D. Green, *Re-Examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons from Microsoft and Other Megacases*, 86 B.U. L. REV. 1171, 1196-98 (2006).

<sup>199</sup> *Id.* at 1196.

<sup>200</sup> *Id.*

that might provide such knowledge.<sup>201</sup> It was a non-adversarial, scientific dialogue, over which Green presided not as a mediator, but as a so-called "Institutional Memory."<sup>202</sup> The dialogue produced much of the knowledge the parents sought and led to a mediation, conducted by Green, that produced a settlement. The parents never filed a lawsuit.<sup>203</sup>

In the *Sabia* case, such a procedure probably would not have produced a clear picture of the causes of this tragedy; more likely, it would have revealed that no one could be certain about the causes. Still, recognition of that reality, in itself, could have allowed the Sabias a higher degree of cognitive and emotional resolution than the adversarial argumentation that characterized the mediations. If both sides had conducted a joint and careful investigation that ultimately led to a recognition that causation was uncertain, this might have led to an easier settlement.<sup>204</sup>

It might seem far-fetched to imagine that repeat players such as those in the *Sabia* case would agree to a formal, non-adversarial process; however, a broader focus designed to uncover and respond to the parties' underlying interests is a staple in the mediation literature and characterizes certain models of practice.<sup>205</sup> There is also evidence that repeat mediation players in commercial cases value the understanding and satisfaction of underlying interests.<sup>206</sup> If such a focus had been employed here, it might have led to the inclusion of Dr. Maryellen Humes, the obstetrician, who agreed to settle the claim against her under pressure from her insurance carrier, based largely on the idea that she would not be well-received by a jury.<sup>207</sup> Neither she nor the Sabias thought she had done anything wrong.<sup>208</sup> Direct contact between the Sabias and Dr. Humes, as part of an effort to understand what had happened, might have led to a form of emotional healing for all of them.<sup>209</sup> Other hospital employees who were involved in Little Tony's birth

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 1197.

<sup>203</sup> *Id.* at 1197-98.

<sup>204</sup> Alternatively, Professor Craig McEwen has suggested that the parties could have agreed that the hospital or insurance company would pay for a neutral expert to write a report on the cause of Little Tony's injury *after* the Sabias settled their lawsuit. The hospital and the doctor would be required to participate in the investigation required for the report and would receive a copy for their potential use in making substantive changes. See E-mail from Craig McEwen, Daniel B. Fayerweather Professor of Political Economy and Sociology, Bowdoin College, to Nancy Welsh and Leonard Riskin (Sept. 7, 2007) (on file with authors).

<sup>205</sup> See *supra* note 42 and sources cited therein.

<sup>206</sup> See ABA, Mean Survey Responses, *supra* note 43.

<sup>207</sup> WERTH, *supra* note 56, at 149.

<sup>208</sup> *Id.* at 194.

<sup>209</sup> See Relis, *supra* note 54, at 481-86 (quoting from plaintiffs and defendant physicians who sought emotional healing in mediation).

and who suffered as a result might also have benefited from participating in such a process.<sup>210</sup>

A less adversarial process that fostered understanding might also have promoted attention to business or economic issues, such as funding or administrative considerations that led to what seemed to be shortages in hospital staffing. In addition, it might have prompted a consideration of community issues (e.g., the value of having better pre- and post-natal care for people like the Sabias). Of course, the lawyers, the hospital, and the defendants' insurance carriers likely would have seen risks in any such lines of inquiry. Such a choice also could have required the investment of substantial additional time and resources into the mediation itself.

Unfortunately, the Sabias never had the choice of participating in a more customized mediation session, such as we have described. In Part II, we present a method for customizing mediation and three proposals designed to enable parties in court-connected and private mediations to participate in choosing whether to engage in such a customized process. Our particular concern in developing these proposals is for one-shot players like the Sabias.

## II. RECOMMENDATIONS FOR DETERMINING THE APPROPRIATE PROBLEM DEFINITION IN COURT-ORIENTED MEDIATION

In recent years, law schools, law firms, government agencies, administrators of court-connected ADR programs, dispute resolution trainers, and mediation providers have attempted to broaden lawyers' understanding of the issues that could be relevant for the resolution of disputes. Law schools and CLE providers regularly offer instruction in interest-based negotiation,<sup>211</sup> supported by a rash of excellent books.<sup>212</sup> Courts have produced

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<sup>210</sup> See WERTH, *supra* note 56, at 129-38 (discussing the emotions of nurses Barbara McManamy and Molly Fortuna regarding Little Tony's birth). Considerations of legal risk probably impelled lawyers to exclude them. And that, of course, is the result of an exclusively adversarial focus.

<sup>211</sup> See, e.g., Moritz College of Law of Ohio State University—Academic Programs (Alternative Dispute Resolution), Legal Negotiations, [http://moritzlaw.osu.edu/programs/adr/course\\_descriptions.php#703](http://moritzlaw.osu.edu/programs/adr/course_descriptions.php#703) (last visited Feb. 21, 2008) (“Study of the theory, law, and practice of transactional and settlement negotiations. Selected topics include . . . adversarial versus problem-solving negotiating frameworks; distributive versus integrative negotiating issues . . . .”); HLS: Courses, Negotiation Workshop A, <http://www.law.harvard.edu/academics/courses/2007-08/?id=4120> (last visited Feb. 21, 2008) (“Topics will include . . . integrative and distributive bargaining . . . .”); University of Texas School of Law, Alternative Dispute Resolution, <https://www.utexas.edu/law/academics/curriculum/adr/courses.html> (last visited Feb. 21, 2008) (“The seminar first provides a brief overview of the basic ADR processes and interest-based negotiation theory”); Washburn University School of Law, Continuing Legal Education Program: Collaborative Family Law Workshop, <http://www.washburnlaw.edu/cle/programs/200403/collaborativelaw.php> (last visited Feb. 21, 2008) (Topics include, “The Basic Interest Based Negotiation Model—The foundation of Collaborative Law”).



extensive publications describing dispute resolution options and mediation's potential to deal with a broad set of interests.<sup>213</sup> Mediation skills and mediation advocacy training programs have urged mediators and lawyers to focus on interests.<sup>214</sup> Much writing, teaching, and training on the role of emotions in negotiation have also appeared recently.<sup>215</sup> There is certainly evidence that the books, publications and educational programs have made some difference. They have helped to produce broader perspectives and more attention to the needs of individual parties in some sectors—including substantial commercial cases involving sophisticated parties on both sides and large environmental and other public policy disputes—but not in many of the court-oriented, non-family cases we address. In this context, the lawyers—even those who have been trained in and appreciate interest-based negotiation—tend to employ their habitual lens,<sup>216</sup> and the mediators tend to

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<sup>212</sup> See, e.g., CARRIE J. MENKEL-MEADOW ET AL., *NEGOTIATION: PROCESS FOR PROBLEM-SOLVING* (2006); JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW* (2006); RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* (2002).

<sup>213</sup> See, e.g., U.S. Dist. Court of the N. Dist. of Cal., *Dispute Resolution Procedures in the Northern District of California* 20 (2005), available at <http://www.adr.cand.uscourts.gov/> (follow "Dispute Resolution Procedures" hyperlink). The Northern District of California requires lawyers to certify to the court that they have read this publication. See N.D. CAL. CIV. R. 16-8. Lawyers are also required to review the publication with their clients. *Id.*

<sup>214</sup> See, e.g., Nebraska Mediation Center Association, <http://www.nemediation.org> (last visited Feb. 21, 2008) ("[A] non-profit organization with a primary focus of providing interest-based mediation training."); Northern Virginia Mediation Service, Interest-Based Problem Solving Teams, <http://www.nvms.us/catalog05.htm> (last visited Feb. 21, 2008) ("This is a hands on workshop for those involved in leading and participating in interest-based problem resolution teams."); Dispute Resolution Center, Basic Mediation Course, <http://www.austindrc.org/mediation-training>. (last visited Feb. 21, 2008) (Participants learn "[a] seven-stage mediation process based on the theory of interest-based negotiation."); Connecticut Mediation, ADR/Mediation Training for Collaborative Professionals, <http://www.connecticutmediation.com/training.htm> (last visited Feb. 21, 2008) (Topics include "[i]nterest based conflict resolution, facilitative, narrative and transformative mediation methods.")

<sup>215</sup> See, e.g., FISHER & SHAPIRO, *supra* note 128; Leigh Thompson et al., *The Three Faces of Eve: Strategic Displays of Positive, Negative, and Neutral Emotions in Negotiation*, 99 *ORG'L BEHAV. & HUM. DECISION PROCESSES* 81 (2006); Clark Freshman, *After Basic Mindfulness Meditation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution*, 2006 *J. DISP. RESOL.* 511; Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 *HARV. NEGOT. L. REV.* 231 (2005); Clark Freshman, Adele Hayes & Greg Feldman, *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates to Successful Negotiation*, 2002 *J. DISP. RESOL.* 1.

<sup>216</sup> See Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want,"* 12 *OHIO ST. J. ON DISP. RESOL.* 253, 309-10 (1997)

While 61% of the lawyers would like to see more problem-solving negotiation methods, about 71% of negotiations are carried out with positional methods instead. . . .

. . . .  
[F]urther empirical research that generates even more detail than we have been able to capture . . . may reveal ways in which the structure of negotiation itself plays a more powerful role, or may reveal elements of habitual social practice that stand out as being particularly responsible for the existing state of affairs.

either share the narrow, adversarial perspective or adopt it to accommodate the lawyers who hire them. Indeed, some mediators have told us that, although they would like to encourage the parties to focus more broadly, they ordinarily do not do so because they anticipate that the lawyers, and maybe the clients, will not agree, or that the lawyers might lose enthusiasm for using them in the present case or in the future.

As we argued in Part I, one factor that contributes to the narrowness of the typical problem definitions in the mediations that we have been discussing is that the repeat players tend to adopt procedures based on a narrow problem definition, and these procedures in turn make it difficult to broaden the problem definition. In this Part, we propose mechanisms to encourage and enable mediation participants—actual parties, lawyers, and mediators—to explore problems broadly in a particular case and then to decide what problem definition is most appropriate. First, we offer a systematic way of “setting”<sup>217</sup> the problem in any court-oriented mediation to encourage the most appropriate problem definition in a given case. Then, we propose two variations of a rule that would help lawyers, mediators, and parties implement this systematic way of working with problem definition in court-oriented mediation.<sup>218</sup> Last, we offer a third proposal that encourages courts and private providers to offer to “customize” every mediation to seek an appropriate problem definition.

#### A. *A Three-Step Method for Identifying and Addressing “the Problem”*

Our first recommendation is a distillation of good practices in other mediation arenas.<sup>219</sup> The main idea is to make explicit the process of creating the problem definition for a mediation. The first step is “mapping the problem,”<sup>220</sup> that is, exploring the situation comprehensively, and, to the extent possible, without preconceptions about what is relevant or important.

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*Id.*

<sup>217</sup> See DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* 18 (1983); DONALD SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS* (1987).

<sup>218</sup> *But see* John Lande, *Principles for Policymaking About Collaborative Law and other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 623-24 (2007) (observing that “rather than promoting ‘reflective practice,’ regulation can promote unreflective practice” and recommending that “ADR policymakers should generally begin by considering nonregulatory options and adopt regulatory options only to the extent needed to accomplish desired goals.”) (citations omitted).

<sup>219</sup> We are grateful to mediator Howard Bellman of Madison, Wis. for modeling and discussing such processes at various times. *E.g.*, Interview by Leonard L. Riskin with mediator Howard Bellman, in Dedham, Mass. (June 18, 2006). *See also* Mark S. Umbreit, Robert B. Coates & Betty Vos, *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 FED. PROBATION 29, 29-30 (2001).

<sup>220</sup> The term “mapping” is referenced in MAGGIE HERZIG & LAURA CHASIN, *FOSTERING DIALOGUE ACROSS DIVIDES: A NUTS AND BOLTS GUIDE* 20-23 (2006), *available at* <http://www.publicconversations.org/pcp/page.php?id=414>.

In court-oriented mediation, this step will include the litigation and economic issues, but will also involve looking at potentially relevant personal core and community issues, as well as the behavioral, cognitive, and emotional dimensions of all of these issues. During the second step, “setting the problem,” the parties decide which aspects of the broadly mapped problem the mediation will seek to examine further or address, directly or indirectly. These two steps lead to the third step, “addressing the problem” as it has been defined.<sup>221</sup> We now elaborate on each of these steps.

### 1. Mapping the Problem

To map the problem in the ordinary case, the participants need to reveal to the mediator—and potentially to the other parties—as much as is feasible and appropriate about all of the issues potentially involved in the court-oriented mediation. In this context, for reasons we have already examined, the parties and their lawyers are likely to understand that litigation issues will be relevant.<sup>222</sup> But to get a full picture of the problem, unless the lawyers and parties are unusually forthcoming, the mediator will need to encourage the parties to reveal more information. She will need to plumb for economic issues, personal core issues, and even community issues.<sup>223</sup> She will assume that these issues might exist, rather than assuming that they do not. Further, the mediator will explore all three of the dimensions identified by Mayer—behavioral, cognitive, and emotional<sup>224</sup>—for each issue.

We are aware of some mediators who encourage lawyers and clients to disclose their underlying interests in writing prior to the mediation, but the responses generally represent a rehashing of earlier-stated positions or legal arguments.<sup>225</sup> Clearly, it is not sufficient to rely on the question, “What are your interests?” We propose, therefore, that at the request of the mediator or otherwise, the parties consider questions such as the following:<sup>226</sup>

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<sup>221</sup> We should note, however, that the first steps do not lead inevitably to the third step. Sometimes, just giving witness to a person’s suffering can help. See WILLIAM URY, *THE THIRD SIDE* 170-76 (2000).

<sup>222</sup> See *supra* Part I.B.1(1).

<sup>223</sup> See Richard P. Larrick, *Debiasing*, in *BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING* 316 (Derek J. Koehler & Nigel Harvey eds., 2004) (observing that the strategy of asking about these other issues can help overcome bias, including the *status quo* bias).

<sup>224</sup> See MAYER, *supra* note 100, at 41-16.

<sup>225</sup> For example, lawyer-mediator Sheldon J. Stark of Ann Arbor, Mich. routinely invites the lawyers to elect to send him confidential letters “describing their own underlying needs and interests in the case, and how they size up the underlying needs and interests of the other side.” See Engagement Letter, Sheldon J. Stark (Jan. 4, 2007) (on file with authors). Although many lawyers elect to send such confidential letters, they almost never actually describe their underlying interests, tending instead to restate their positions (which he asks them to include only in other letters that they are to share with each other). Interview by Leonard L. Riskin with Sheldon J. Stark, in Port Huron, Mich. (May 28, 2007).

<sup>226</sup> See *infra* Part II.B (discussing exactly how these questions should be raised and by whom).

(1) What do you hope to accomplish and what problem(s) would you like to address in this mediation? How can the process, the mediator, or both help you accomplish these goals?<sup>227</sup>

(2) If the mediation focuses on the legal strengths and weaknesses of your case and the likely cost of continuing in litigation, will this be sufficient to help you reach a complete resolution of your dispute with the other party? If not, what other non-litigation issues need to be addressed? How could they be addressed?

(3) As you imagine settling this dispute, what are your most important needs or goals? (For example, are you most concerned about compensation for expenses? The availability of future medical coverage for you or your dependents? Training? Assistance in finding a job? An apology? Maintaining your reputation? A change in the other party's behavior or business practice? A change in your relationship with the other party?)

(4) What do you think are the most important needs or goals of the other side?

(5) If not already described, is there anything besides the payment of money that would help to resolve this matter?<sup>228</sup>

(6) If not already described, do the parties need to change any behaviors to resolve this conflict? If yes, what behavioral changes are required?

(7) If not already described, are emotions a significant part of this conflict? If yes, what outcome or procedure could help you (or the other party) to feel at peace about this dispute and its resolution?

(8) How would you describe the communications or negotiations you have had with each other up until now? Why haven't you been able to reach a resolution?<sup>229</sup>

(9) Do you have any questions about how the mediation process works? Do you have any questions or concerns about your role during the presentations or discussions? Do you have any questions or concerns about your role in making a decision about whether to settle your case?

In the *Sabia* case, if the parties and their lawyers had responded to these sorts of questions, Donna and Tony (or their lawyers) might have revealed important clues about their personal core concerns of appreciation,

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<sup>227</sup> These questions can be framed in other ways. See, e.g., Welsh, *supra* note 80, at 673-74 (questions for pre-mediation interview instrument).

<sup>228</sup> Professor Jeanne Brett has found that while some cultural groups tend to ask questions about interests and priorities as a means to develop integrative solutions, other groups are more likely to share a series of proposals and counter-proposals as a means to discern interests and priorities. See JEANNE M. BRETT, *NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES* 61-66 (2001). This question, which focuses on outcomes rather than interests, is meant to engage those who think more like the latter group. *Id.*

<sup>229</sup> Our thanks to Professor Michael Moffitt for proposing this additional question. E-mail from Michael Moffitt to authors (Sept. 10, 2007) (on file with authors).

autonomy, role, status, and affiliation, along with the behavioral, cognitive, and emotional aspects of these needs, especially their need to understand what had happened. The interests and needs of individuals and organizations on the defense side, though less obvious,<sup>230</sup> also could have been discussed with the mediator. Such revelations could have occurred before the mediation or during the mediation in private caucuses or joint session.

## 2. Setting the Problem: Selecting the Issues to be Addressed in the Mediation Process

In this step, the parties and lawyers advise the mediator regarding the aspects of the broadly mapped problem that they wish to include in the mediation, either explicitly or more indirectly. They can respond to questions such as the following:

*Should the mediation address:*

(1) All of your non-litigation issues? If not, which non-litigation issues should be addressed?

(2) All of your underlying needs and goals? If not, which underlying needs and goals should be addressed?

(3) All of the other side's underlying needs and goals? If not, which underlying needs and goals should be addressed?

(4) The needs of individuals or organizations that are not direct parties to this lawsuit or potential lawsuit?

(5) Behavioral changes, if these are an important part of resolving this dispute?

(6) The parties' different understandings of what took place, if these are an important part of resolving this dispute?

(7) The parties' emotions, if these are an important part of resolving this dispute?

(8) All of the above issues explicitly? Alternatively, should the mediation process address certain issues only indirectly? How?

The mediator can also interject her thoughts regarding the utility of incorporating various issues into the discussion, explicitly or implicitly. In the *Sabia* case, step two *might* have led to a request from the Sabias concerning their interest in receiving an acknowledgement of how much they had suffered and how well they had coped. The hospital, its insurer, and its lawyers

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<sup>230</sup> If Dr. Humes had remained in the case, her interests and needs could have been nearly as poignant as those of the Sabias.

then could have made an implicit<sup>231</sup> or explicit decision about whether to venture beyond the standard litigation issues. They could have discussed the potential value—to their case, to their lawyer—of permitting Doyle, the lead defense lawyer, to reveal his familiarity with the difficulty of caring for a disabled child.<sup>232</sup> Engagement in this step also could have led to an explicit decision to use the mediation to provide the Sabias with a cognitive understanding of the events that led to their son's disability—or to make it clear that the achievement of such an understanding was not feasible. In addition, if Tony and Donna had wished to address a community issue (e.g., a strong interest in protecting other similarly situated mothers and newborns), while the hospital also had a similar interest, the problem definition might also have included a focus on potential changes to hospital regulations and procedures.

### 3. Addressing the Problem

In this step, the parties, lawyers, and mediator establish the mediation process and begin to address the problem or problems they have set. If the participants in the *Sabia* case had agreed to address Tony's and Donna's personal core concerns, both Tony's and Donna's participation in the mediation and the examination of the events leading up to Little Tony's birth might have varied quite dramatically from what occurred in the actual mediation sessions.

Similarly, in the mediation of a corporate contract dispute, the corporate representatives may choose to speak with each other about the personal toll that each has borne and will continue to bear if the dispute is not resolved.<sup>233</sup> They may even discuss their organizations' different cultural expectations and their mutual need for recognition of and appreciation for their attempts to accommodate each other. In an employment mediation, the employer and a long-time employee may choose to discuss the health needs of the employee's spouse that have affected the employee's personal core concerns and that also restrict the retirement options available to the employee.

Of course, none of the benefits of mapping and setting the problem will occur if the parties or their lawyers choose not to reveal the other issues that could become part of the mediation. Non-disclosure is a frequent tactic

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<sup>231</sup> Even if they did not make the explicit choice to address this issue, the defendants would now be sensitized to its existence and could then choose whether or not to respond at some point in the mediation.

<sup>232</sup> Their decision, of course, would reflect the tension between empathy and assertiveness. See generally Robert H. Mnookin et al., *The Tension Between Empathy and Assertiveness*, 12 NEGOT. J. 217 (1996).

<sup>233</sup> This example is based on one of the authors' experience in mediating corporate contract disputes, as well as a situation described in FISHER & SHAPIRO, *supra* note 128, at 164-68.

employed by negotiators due to the phenomenon known as the negotiator's dilemma.<sup>234</sup> Negotiators achieve optimal outcomes when they collaborate,<sup>235</sup> but they generally do not know whether they can count on each other to collaborate. And collaboration presents risks. If one negotiator tries to collaborate while the other competes, the competitor gains the advantage. Thus, even if the Sabias had been given the opportunity to reveal their core interests in appreciation and autonomy, it is quite possible that their lawyer would have counseled against revealing this information out of fear that the defendants might use it to fashion a smaller monetary settlement.

It would be magical thinking to believe that steps one and two would prompt all parties to reveal all of the information that is necessary to choose the most appropriate problem definition. However, we believe that explicitly taking the first two steps—mapping the problem and then setting it—will make it likely that the appropriate problem definition will be realized in a larger percentage of court-oriented mediations than under the current system. In order for that to happen, of course, the mediation must employ procedures that will help participants attend to the issues embraced within the problem definition.

In the next section we propose initiatives that courts (and private ADR providers) could use to enhance the likelihood that appropriate problem definitions will develop.

#### B. *Court (and Private) Initiatives to Encourage Establishment of Appropriate Problem Definitions*

The series of steps outlined above is not a radical new idea; rather, it is a distillation of practices commonly taught in many negotiation and mediation courses and employed in the mediation of cases that typically are viewed as worthy of extra care (e.g., environmental cases,<sup>236</sup> public policy disputes involving large numbers of parties,<sup>237</sup> large commercial matters).<sup>238</sup>

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<sup>234</sup> See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 29-45 (1986); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 11-43 (2000).

<sup>235</sup> We have chosen to use the language of "collaboration" rather than "cooperation." See Carrie Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 *UCLA L. REV.* 1613, 1619 (1997) (describing the "collaborative, more integrative process for disputes in which we want to create value before we have to claim it").

<sup>236</sup> See Wayne D. Brazil, *ADR in a Civil Action: What Could Have Been*, *DISP. RESOL. MAG.*, Summer 2007, at 25 (describing how a wise assessment of defendants' interests could have led to an earlier, more responsive resolution).

<sup>237</sup> Brett A. Williams, *Consensual Approaches to Resolving Public Policy Disputes*, 2000 *J. DISP. RESOL.* 135, 135-37 (describing why public policy disputes are better suited for ADR than a judicial remedy).

In the majority of the mediations we are discussing here, however, the lawyers and mediators assume a litigation focus and narrow the issues to make them fit that focus, rather than exploring the entire problem and then determining the appropriate focus for resolving it.<sup>239</sup>

In this section, we propose three court initiatives that—standing alone or together—would make it more likely that court-connected mediations would employ the most appropriate problem definitions. Changes in court rules, coupled with meaningful judicial involvement,<sup>240</sup> have been reasonably effective in motivating lawyers to take the actions needed to overcome some of the excesses of our adversarial litigation system<sup>241</sup> (e.g., conferring with each other about case management issues and potential settlement,<sup>242</sup> attempting to resolve their own disagreements before bringing them to the

<sup>238</sup> See Garth, *supra* note 14, at 930-31 (arguing that large business disputes have their own “elite ADR market”).

<sup>239</sup> See Felstiner, *supra* note 120, at 645 (“[T]he essence of professional jobs is to define the needs of the consumer of professional services. Generally, this leads to a definition that calls for the professional to provide such services . . .”) (footnotes omitted); Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 2 MO. J. DISP. RESOL. 25 (1985); Hensler, *supra* note 52, at 156-63 (contrasting tort plaintiffs’ desire for accountability and vindication of their legal rights with lawyers’ monetary focus in assessing claims). See also Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1367-85 (1992) (describing lawyers’ translation of a clinical client’s racial harassment case into a “stop and frisk” case for purposes of litigation); Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321, 350-53 (1998) (describing a clinical law student’s failure to hear a client’s concern regarding her mental state); Carl J. Hosticka, *We Don’t Care What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599, 600-05 (1979) (describing lawyer-client interviews in which lawyers quickly interrupted client’s narrative and began pursuing a legal pigeonhole for the case); Jean R. Sternlight, *Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 319-21 (1999) (describing monetary, nonmonetary, and psychological divergences between lawyers and clients that result in lawyers blocking settlements or reaching settlements that are inconsistent with clients’ self-defined interests).

<sup>240</sup> See Bobbi McAdoo, *supra* note 49, at 472; McAdoo & Welsh, *supra* note 22, at 408 (reporting that Minnesota judges’ embrace of ADR—and willingness to order its use—increased the likelihood of attorneys’ use of mediation).

<sup>241</sup> ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 229-31 (2001) (“The movement to substitute ADR of various kinds for adversarial litigation in the courts continues to grow in some types of cases.”).

<sup>242</sup> See FED. R. CIV. P. 26(f)(1)-(2).

Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). . . .

....  
In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan.

*Id.*



court,<sup>243</sup> counseling their clients about ADR processes,<sup>244</sup> conferring with each other about ADR,<sup>245</sup> proposing the use of appropriate ADR processes,<sup>246</sup> and actually using ADR processes).<sup>247</sup> Many judges order parties into mediation in part because they believe that the process engages the parties and produces better outcomes.<sup>248</sup> We recommend, and hope, that some judges—particularly those who fear that mediations in their courts are not living up to their promise—will launch one or more of these efforts. The proposals, which we detail below, are: (1) A court rule for existing

<sup>243</sup> See FED. R. CIV. P. 11(c)(2).

A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed with or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.

*Id.*; FED. R. CIV. P. 37(a)(3), d(1)(B).

If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. . . .

....

A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

*Id.*

<sup>244</sup> See, e.g., MINN. GEN. R. PRAC. 114.03; GA. CODE OF PROF'L RESPONSIBILITY CANON 7-5, available at <http://www2.state.ga.us/courts/adr/code.htm> ("When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation."). See also Roselle L. Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 OHIO ST. J. ON DISP. RESOL. 459, 498 (2004) ("Although almost all Georgia attorneys felt they had an obligation to counsel clients about ADR under an ethical code provision, only 27% always told their clients about ADR, and 37% frequently did so.").

<sup>245</sup> See, e.g., MINN. GEN. R. PRAC. 114.04; ALASKA R. CIV. P. 26(c); N.D. IND. R. 16.6(b)(4); D. MASS. R. 16.1(D)(3)(b). See also McAadoo, *supra* note 49, at 416 (reporting an increase in lawyers' use of ADR, particularly mediation, after Rule 114 was adopted); McAadoo & Hinshaw, *supra* note 49, at 525; Wissler, *supra* note 244, at 498.

Under a mandatory advising rule, 32% of Missouri attorneys discussed ADR with clients within the first three months of filing suit, and another 30% did so within the next three months. Under a mandatory conferring rule, 40% of Minnesota attorneys usually or always conferred with opposing counsel about ADR within the time period by which they were required to confer and report to the court. The rate of compliance appeared to be higher (54%) in a county in which the court devoted substantial resources to enforcing the rule.

*Id.* (footnotes omitted); Roselle L. Wissler & Bob Dauber, *Leading Horses to Water: The Impact of an ADR "Confer and Report" Rule*, 26 JUST. SYS. J. 253, 263-5 (2005) (finding that confer and report rules alone did not increase the frequency of lawyers' early ADR discussions, but judicial suggestions regarding use of voluntary ADR did increase the frequency of ADR discussions at some point during litigation).

<sup>246</sup> See, e.g., MINN. GEN. R. PRAC. 114.04.

<sup>247</sup> See McAadoo, *supra* note 49, at 416-17 (reporting an increase in lawyers' use of mediation after Rule 114 was adopted); McAadoo & Hinshaw, *supra* note 49, at 506, 537 (reporting that one third of lawyers not using ADR made that choice because judges were not ordering or encouraging it and therefore encouraging judges to be more proactive).

<sup>248</sup> See McAadoo, *supra* note 54, at 398-99 (judges report that the following are very important factors in ordering parties into mediation: "mediation can provide better, more durable outcome for parties" (56%) and "gets clients directly involved in discussions" (50%)).

mediation programs directed primarily toward lawyers; (2) A court rule for existing programs that is directed primarily toward mediators; and (3) A new court-connected mediation program that offers “customized” mediation. Although these proposals apply particularly to the context of court-connected mediation, we hope that their adoption also would influence practice in the ordinary court-oriented mediations that, for various reasons,<sup>249</sup> are not taking place within court programs.<sup>250</sup> There are reasons for our aspirations: Court-connected mediation has set the standard for many private mediators’ training, understanding of ethical obligations, and practice.<sup>251</sup> Many private mediators also serve as court-connected mediators.<sup>252</sup> Private mediators or ADR organizations that become aware of courts’ successful adoption of any of our proposals may easily incorporate such changes into their own rules or regular practices for competitive or altruistic reasons, or both.

#### 1. A Court Rule for Existing Programs that is Directed Primarily Toward Lawyers

The first approach would focus on affecting the behaviors of lawyers as they prepare their clients for mediation,<sup>253</sup> regardless of whether the

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<sup>249</sup> For example, some mediation sessions are occurring pursuant to provisions in boilerplate contracts; others are occurring in mediation programs sponsored by employers, corporations, associations, agencies, etc.; still others are occurring on an ad hoc basis as a prelude to litigation. See Welsh, *supra* note 145, at 488-89 (describing corporate and agency use of mediation); Financial Industry Regulatory Authority, Mediation: An Alternate Path, <http://www.finra.org/ArbitrationMediation/Mediation/MediationAnAlternatePath/index.htm> (“FINRA Dispute Resolution developed a mediation program to provide additional dispute resolution options for parties. The goal of the mediation program is to provide public customers, member firms, and associated persons with another effective way to resolve their disputes.”).

<sup>250</sup> The spread and success of court-connected mediation programs (as well as the language of courts’ rules and codes of ethics) certainly have helped to trigger state and federal agencies’ adoption of mediation programs, as well as private associations’ and industry groups’ institutionalization of the process. Some now argue, however, that “the multi-door courthouse bureaucracy . . . seriously impairs the development of an independent, private market for” ADR services. Arthur B. Pearlstein, *The Justice Bazaar: Dispute Resolution Through Emergent Private Ordering as a Superior Alternative to Authoritarian Court Bureaucracy*, 22 OHIO ST. J. ON DISP. RESOL. 739, 783 (2007).

<sup>251</sup> Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783, 811-812 (2005).

<sup>252</sup> See Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 255, 271-78 (2006).

<sup>253</sup> Research has shown that both settlement and parties’ perceptions of procedural justice are enhanced when lawyers spend more time preparing their clients for their participation in mediation. See Wissler, *supra* note 49, at 676, 687; Roselle L. Wissler, *Court-Connected Mediation: Process Viewed as Fair and Non-Coercive in Ohio Civil Cases*, DISP. RESOL. MAG., Spring 2002, at 30 (“Parties who had more preparation for mediation by their attorneys felt less pressured to settle by the mediator and felt that the mediation process was more fair than did parties who were less prepared. Interestingly, attorneys who did more to prepare their clients for mediation also felt the mediation process was more fair

process occurs early or late in the life of the lawsuit.<sup>254</sup> This rule would require the lawyers to consult with their clients in the creation of written pre-mediation responses to questions such as those posed in Part II.A<sup>255</sup> and to submit such responses to the mediator on a confidential basis.<sup>256</sup> Although a party's lawyer could sign this document on her client's behalf, we also suggest a requirement that she certify that the responses represent the result of a thorough discussion with her client. This submission would help the mediator facilitate the first and second steps—mapping and setting the problem—of the three-step method we have outlined. Even if the mediator were not following the three-step approach, the submission would help the mediator identify the issues that the mediation process could and should address.

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than did attorneys who did less client preparation.”). Such preparation may enable the parties to achieve cognitive understanding of the process, including its goal and their role. It also may help to moderate their outcome expectations. Roselle L. Wissler, *Which Cases Will Settle?*, DISP. RESOL. MAG., Summer 2002, at 28 (“Cases were more likely to settle when parties reported more rather than less preparation for mediation by their attorneys.”). See Hensler, *supra* note 52, at 162-66; Morton Deutsch, *Justice and Conflict*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 41, 44 (Morton Deutsch & Peter T. Coleman eds., 2000) (explaining the theory of relative deprivation).

<sup>254</sup> Mediation can be required immediately after filing, after basic discovery has been completed, after judicial time or attorneys' fees have reached a certain point, etc. Research has found that early mediation increases settlement and reduces the time required for disposition of cases. See Wissler, *supra* note 49, at 697-98; Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court Connected Mediation*, 2002 J. DISP. RESOL. 241, 289-90 (describing the effects of Ontario's mandatory mediation program in Ottawa). Mediation could even be required as a condition of filing a lawsuit, particularly if the parties are unwilling to attempt to negotiate. See Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727, 749-51 (2005) (proposing that conferences be required as a condition of filing a lawsuit); JOHN PEYSNER & MARY SENEVIRATNE, THE MANAGEMENT OF CIVIL CASES: THE COURTS AND POST-WOOLF LANDSCAPE (2005), [http://www.dca.gov.uk/research/2005/9\\_2005\\_full.pdf](http://www.dca.gov.uk/research/2005/9_2005_full.pdf) (describing the communications and exchanges that are now required in the U.K., pursuant to the Woolf reforms, before a lawsuit may be commenced).

<sup>255</sup> Professor Richard Reuben has suggested that a system of check-offs might be clearer or more efficient. See Richard C. Reuben, *The Pendulum Swings Again: Badie, Wright Decisions Underscore Importance of Actual Assent to Arbitration*, DISP. RESOL. MAG., Fall 1999, at 18.

<sup>256</sup> Obviously, confidentiality would be an important issue and would require the same sort of protection that applies to the pre-mediation statements currently submitted by parties to mediators. See *supra* notes 182, 225 and accompanying text (discussing confidentiality).

Many mediators<sup>257</sup> and court-connected mediation programs<sup>258</sup> already require the submission of confidential pre-mediation statements to mediators.<sup>259</sup> Generally, however, these statements reflect the narrow problem definition that we have described.<sup>260</sup> The mediators request information about the events giving rise to the legal action, the legal theories and defenses relevant to both liability and damages, and the history of settlement demands and offers.<sup>261</sup> Of course, some mediators and court programs go further and ask about non-litigation interests,<sup>262</sup> but many lawyers' re-

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<sup>257</sup> See, e.g., Darren Aitkin, *Winning Mediations: Successful Preparation for Successful Presentation*, ORANGE COUNTY LAW., Nov. 2006, at 32, 32 ("In regard to the mediator, the first step is to know the mediator's 'local rules'. In other words, what does the mediator want by way of a pre-mediation submission, and when does she want that material."); Mark A. Frankel & John Mitby, *Think Like A Negotiator: Effectively Mediating Client Disputes*, WIS. LAW., Dec. 2003, at 11, 13 ("Mediators frequently request premediation submissions from counsel.").

<sup>258</sup> See, e.g., ILL. COOK COUNTY CIR. CT. R. 20.03(c).

At least ten (10) days before the session, each side shall present to the mediator a brief, written summary of the case containing a list of issues as to each party . . . the facts of the occurrence, opinions on liability, all damage and injury information, and any offers or demands regarding settlement. Names of all participants and their relationship to the parties in the mediation shall be disclosed to the mediator in the summary prior to the session.

*Id.*; E.D.N.Y. CIV. R. 83.11(b)(4).

No less than seven days prior to the first mediation session, each party shall submit directly to the mediator a mediation statement . . . outlining the key facts and legal issues in the case. The statement will also include a description of motions filed and their status, and any other information that will advance settlement prospects or make the mediation more productive.

*Id.*

<sup>259</sup> See Schmitz, *supra* note 251, at 800-01 (suggesting that the rule should be revised to provide more discretion to mediators regarding the content of submissions). See also John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 129-30 (2002). Lande proposes that courts require the exchange of position papers which, at a minimum might include:

(1) the legal and factual issues in dispute, (2) the party's position on those issues, (3) the relief sought (including a particularized itemization of all elements of damage claimed), and (4) any offers and counteroffers previously made. In addition, these papers could identify everyone who will attend from each side and identify their roles.

*Id.* (citations omitted).

<sup>260</sup> See *supra* Part I.B.1 (describing the narrow-broad continuum); Riskin, *supra* note 75, at 126-29.

<sup>261</sup> Lande, *supra* note 259, at 129-30. It is worth noting, however, that some lawyers will provide information regarding their clients' needs or their assessments of the other clients' needs in response to a question about obstacles to settlement.

<sup>262</sup> See, e.g., Ron Kelly, Key Questions Before You Meet, <http://www.ronkelly.com/RonKellyTools.html#KeyQuestions> (last visited Feb. 22, 2008). His website includes such questions as:

List your basic interests, and then number their order of importance to you. (For instance: time, money, security, get even, get on with life, minimize risk, fairness, future plans, maintain a working relationship, etc.). To help identify your real interest in each area, ask yourself—"Suppose they agree to what I want—exactly what will that do for me?"

*Id.* See also N.D. CAL. ADR R. 6-7 (c)(4) (stating that the required confidential mediation statement must "[d]escribe the history and current status of any settlement negotiations and provide any other information about any interests or considerations not described elsewhere in the statement that might be pertinent to settlement"). The Northern District also provides a sample letter to its mediators for correspondence with counsel. The letter asks the lawyers to "prepare for the mediation by discussing each of the following items with your clients . . . clients' interests, not just positions, and how these interests

sponses maintain a narrow focus.<sup>263</sup> We suspect that these lawyers do not comprehend what information the mediator or program is requesting. They may understand "interests" as "positions," despite all of the books,<sup>264</sup> court publications,<sup>265</sup> and training<sup>266</sup> available that distinguish between these concepts. Our proposed rule provides more guidance to enable lawyers (along with their clients) to take a detailed look at the the range of issues that could be addressed in mediation.

What might such a rule accomplish? A certain group of lawyers and clients will welcome the opportunity to supply the requested information.<sup>267</sup> This group will include lawyers who believe in and implement a broader approach to client counseling and treat their clients as partners in understanding problems and potential solutions.<sup>268</sup> They will comply with both the letter and the spirit of the questions. Such lawyers and clients, along with their mediators, are likely to come to mediation sessions with a broadened understanding of the situation and the aspects of the situation that the mediation could potentially explore. Their mediations are more likely to include expansive problem definitions.

Inevitably, though, others will not embrace the opportunity to answer the non-traditional questions that we propose. Some lawyers will remain confused by questions asking for something beyond legal positions and arguments. Other lawyers and clients, threatened by or bemused at the notion that the exploration of non-legal issues or the expression or identification of emotions might become part of mediation sessions, are unlikely to

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could be met [and] other side's interests, and how these could be met." ADR Training Handouts, U.S. District Court for the Northern District of California Alternative Dispute Resolution Program, *Mediating with Heart, Soul and Humanity* 8 (2006). See also U.S. District Court for the District of Utah, Primer for Parties and Attorneys Participating in the District of Utah's Mediation Program, Mechanics and Procedures, [http://www.utd.uscourts.gov/forms/med\\_primer.pdf](http://www.utd.uscourts.gov/forms/med_primer.pdf) (last visited Feb. 29, 2008) ("Do We Need to Prepare Anything in Writing? Under the Court's program, each party is required to provide the mediator with a written pre-conference memorandum at least ten days before the mediation conference. The memorandum should . . . (iii) list the party's needs and interests by priority . . .").

<sup>263</sup> See Engagement Letter, *supra* note 225.

<sup>264</sup> See FISHER, *supra* note 3, at 40-42.

<sup>265</sup> Michigan State Court Administrative Office, Community Dispute Resolution Program, available at <http://courts.michigan.gov/scao/dispute/> (last visited Feb. 13, 2008) ("When disputants will be interacting with one another in the future, mediation can help to build a framework for future interaction based upon mutual interests and needs rather than adversarial positions.").

<sup>266</sup> ANTONIA ENGEL AND BENEDIKT KORF, FOOD & AGRIC. ORG. OF THE U.N., NEGOTIATION AND MEDIATION TECHNIQUES FOR NATURAL RESOURCE MANAGEMENT, 109 (2005) ("Mediators need to support conflict stakeholders in identifying and focusing on underlying interests rather than fixed positions."), available at <ftp://ftp.fao.org/docrep/fao/008/a0032e/a0032e00.pdf> (last visited Feb. 13, 2008).

<sup>267</sup> It is possible, for example, that "collaborative" and "cooperative" lawyers already are asking these sorts of questions. See Lande, *supra* note 218, at 626 (describing the collaborative law process, as part of which clients commit to participating in interest-based negotiation).

<sup>268</sup> See ROBERT F. COCHRAN, JR., JOHN M.A. DIPIPPA & MARTHA M. PETERS, THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 6-9 (1999).

take the questions seriously and will give pro forma answers. Still other lawyers and clients might make the strategic choice to submit incomplete answers to certain questions, particularly if they fear that complete answers would undermine their negotiation strategies.<sup>269</sup>

Though any of these latter responses by lawyers will keep the pre-mediation submissions from achieving the potential we have described, we do not suggest punishment for lawyers or clients who submit incomplete answers. Our proposal provides parties with the opportunity to address a broader version of their dispute; parties should also have the power to address only narrow aspects of their dispute in a mediation. We hope, though, that the simple requirement that lawyers and clients *consider and answer* these questions together will have a salutary effect.<sup>270</sup> The attempt to craft responsive answers could inspire useful dialogues between lawyers and clients, which in some cases could even lead to negotiated resolutions outside of mediation. The invitation to develop a heightened awareness of non-litigation issues, underlying interests, and the cognitive or emotional dimensions of conflicts may increase the likelihood that lawyers or clients will see opportunities to use such interests or dimensions after they are in mediation sessions and better able to assess the motives and needs of the other side. The content of the pre-mediation submission may simply give mediators increased confidence in the legitimacy of asking questions regarding interests, emotions, and other non-litigation issues.<sup>271</sup> All of these impacts should increase the number of mediation sessions in which problem definition results from intentional decision-making rather than reflexive mimicry of the narrow framing that characterizes litigation.

The potential benefits of this rule depend on the percentage of parties and lawyers who take it seriously. The history of discovery offers one example of lawyers' values undermining a litigation innovation's lofty goals.<sup>272</sup> Indeed, in order for our proposed court rule to be effective, courts

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<sup>269</sup> See LAX & SEBENIUS, *supra* note 234, at 30-34 (describing the tension between the drive to "create" value and "claim" value in negotiations, which results in parties withholding or concealing information even when disclosure would benefit them both).

<sup>270</sup> See Larrick, *supra* note 223, at 318.

<sup>271</sup> See Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83, 94, 112 (2005) (hypothesizing that as a result of the status quo bias and other psychological and cognitive biases, "the majority of disputes will be dealt with by application of the default" dispute resolution approach). See also Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228-29 (2003) (examining the relationship between the status quo bias and the endowment effect and describing the effect of the status quo bias as "individuals tend[ing] to prefer the present state of the world to alternative states, all other things being equal"); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625-30 (1998) (examining the application of the status quo bias to contract rules).

<sup>272</sup> See Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1304, 1313 (1978).

may also need to commit to significant involvement in oversight and enforcement.<sup>273</sup> It is likely that judicial staff members would need to monitor to ensure that the forms are completed. To give a rule such as this a chance of being effective, the bench and bar would need to collaborate in developing numerous aspects of the rule and its implementation,<sup>274</sup> including the precise wording of particular questions, educational programs for lawyers and mediators, and appropriate monitoring mechanisms. These measures may sound unattractive to courts that hope mediation will *reduce* the need for judicial oversight of lawyers and clients. Yet they may also encourage lawyers, in their roles as counselors and officers of the court, to be more effective in understanding their clients, counseling them, and helping them come to resolutions that respond to their real needs.<sup>275</sup>

## 2. A Court Rule for Existing Programs that is Directed Primarily Toward Mediators

We also offer a second approach to creating a court rule. Courts may require that their *mediators* ask some or all of the mapping and setting questions in pre-mediation conversations or during mediation sessions, and that they be competent to respond appropriately to such answers. Imple-

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In this context, it is indeed naive to expect that discovery, armed only with its own executio-  
 nal rules, could somehow resist the inroads of the adversarial and competitive pressures  
 that dominate its surroundings. . . .

. . . .

[A]dversary litigation and competitive economics offer no institutionalized rewards for dis-  
 closure of potentially relevant data. They instead offer many institutional deterrents to full  
 disclosure.

*Id. But see* Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 958 (2004) (observing that discovery was intended to enable parties to reach their own resolutions and it has had just this effect, due to the information provided, the cost of discovery, and the reconfiguration of the plaintiff's bar and finding that these combine to create "a climate of rational risk aversion and a slight preference for settlement in most cases").

<sup>273</sup> See McAdoo, *supra* note 49, at 405, 472 (noting that lawyers' "voluntary" use of mediation is often a response to their perception that judges will order them into the process anyway); McAdoo & Hinshaw, *supra* note 49, at 535.

<sup>274</sup> See Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES 1, 3 (Donna Stienstra & Susan M. Yates eds., 2004) (describing the value of involving both bench and bar in development or revision of court-connected ADR program).

<sup>275</sup> It may even be possible to be a bit more optimistic about the effects of our proposed rule. ADR administrators in the U.S. District Court of the Northern District of California, for example, perceive that the lawyers who practice frequently in their court have become more responsive to questions regarding interests. The court references interests repeatedly—in its rules, publications, required confidential information statements, and evaluation forms. In addition, mediators raise the parties' needs in pre-mediation conferences with lawyers and mediation sessions. See E-mail from Daniel Bowling & Howard Herman to authors (Jan. 28, 2008) (on file with authors).

mentation of this proposal, like the one explained above, would require some work by the courts. This might include training sessions for mediators as well as lawyers. In the latter sessions, lawyers would learn that they and their clients would be asked some or all of the mapping and setting questions before or during mediation sessions. Indeed, courts that provide educational information to lawyers about mediation<sup>276</sup> for distribution to their clients could include these sorts of questions in their explanation of what to expect in mediation. At the end of each mediation session, courts also could administer evaluation forms that ask litigants and their lawyers whether they had the opportunity to reveal the issues that were relevant to their dispute and to choose—or at least to have input into the choice of<sup>277</sup>—the issues to be addressed in their mediation. Finally, court staff could monitor mediators periodically to ensure that they are asking questions about interests, the non-legal dimensions of conflict, and litigants' preferences regarding the definition of the problems to be addressed in mediation.<sup>278</sup> The information gained through such monitoring could be used to improve the effectiveness of mediators and to make decisions about training, retention, and assignment of mediators.

Though we are not proposing the use of any defined model of mediation, we are inspired by the successful program design used by the U.S. Postal Service ("USPS") to institutionalize its transformative mediation program (i.e., Resolve Employment Disputes, Reach Equitable Solutions Swiftly, or "REDRESS").<sup>279</sup> Consistent with its goals for its program, the USPS decided, after the first year of the program, that its mediators should employ Transformative Mediation.<sup>280</sup> To implement this decision, the program required its mediators to participate in special training sessions,<sup>281</sup>

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<sup>276</sup> See, e.g., American Bar Association, Court ADR Template Forms, Guides, and Reports, <http://www.abanet.org/dispute/forumsguidesreports.html> (last visited Feb. 28, 2008) (website of the American Bar Association Section of Dispute Resolution, which includes brochures used by various courts).

<sup>277</sup> Researchers have used this variation when assessing parties' perceptions of their level of control over mediation outcomes. See Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 181-82; Wissler, *supra* note 49, at 661-62; SCHILDT ET AL., *supra* note 50, at 29-30.

<sup>278</sup> Commentators have proposed various mechanisms to assess mediators' performance. See, e.g., TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT: A METHODOLOGY FOR USE IN SELECTING, TRAINING, AND EVALUATING MEDIATORS 19-28 (1995); Grace E. D'Alo, *Accountability in Special Education Mediation: Many a Slip 'Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201 (2003) (describing results of special education mediation observations using a variation of the evaluation forms developed by Test Design Project).

<sup>279</sup> Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS™ Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 401-02 (2001).

<sup>280</sup> LISA B. BINGHAM, *MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE*, 14-15 (2003), available at [http://www.businessofgovernment.org/pdfs/Bingham\\_Report.pdf](http://www.businessofgovernment.org/pdfs/Bingham_Report.pdf).

<sup>281</sup> See *id.* at 404.



conducted extensive national "stakeholder training" to prepare employees and managers to participate constructively in these mediation sessions,<sup>282</sup> and established a corps of ADR Specialists to observe mediators and ensure the quality of their approach and techniques.<sup>283</sup> The USPS REDRESS program has been very successful. It is credited with reducing the number of EEOC filings<sup>284</sup> and improving managers' handling of conflict outside of mediation sessions,<sup>285</sup> one of the goals of the program. The USPS continues to monitor the REDRESS program for quality, voluntary usage rate, and settlement rate.<sup>286</sup> Ultimately, the USPS can serve as a model of an institution that carefully defined the goals and character of its mediation program, and invested in widespread education and targeted oversight to achieve those goals.

Nonetheless, critics are likely to raise many concerns regarding our second proposal. Training and monitoring can be expensive, and attempts to broaden the problem definition may not seem appropriate, or likely to bear fruit, in every case. In addition, mediators who choose to raise these questions during the mediation session might face rigid time constraints. Many non-family civil mediations involve a single session lasting only two to three hours.<sup>287</sup> Our third proposal responds to such challenges.

### 3. A New Program to Offer "Customized" Court-Connected Mediation

Our third proposal is that courts should offer to "customize" every mediation. "Standard" (or "default")<sup>288</sup> mediation is our term for court-oriented mediation as it is generally practiced.<sup>289</sup> In standard mediation, the presumptive focus is on litigation issues, with indirect reference to economic issues; there is no assumption that core or community issues will be

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<sup>282</sup> See Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375, 381-82 (2001) (describing the importance of training over 20,000 Postal Service employees on "the tenets of transformative mediation").

<sup>283</sup> See Nabatchi & Bingham, *supra* note 279, at 404.

<sup>284</sup> See Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145, 158 (2004); Lisa B. Bingham & Mikaela Cristina Novac, *Mediation's Impact on Formal Discrimination Complaint Filing: Before and After REDRESS™ Program at the U.S. Postal Service*, 21 REV. PUB. PERSONNEL ADMIN. 308, 326 (2001).

<sup>285</sup> See Jonathan F. Anderson & Lisa Bingham, *Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601, 607-08 (1997); Bingham, *supra* note 284, at 158.

<sup>286</sup> Welsh, *supra* note 80, at 592.

<sup>287</sup> See Wissler, *supra* note 49, at 651-56.

<sup>288</sup> See Barendrecht & de Vries, *supra* note 271, at 83 (referring to traditional litigation as a "sticky default").

<sup>289</sup> It would be more accurate, but more awkward, to call this "standard law-focused mediation."

addressed. “Customized” mediation would begin with some form of mapping and would include an explicit process for setting the problem definition. The focus of this forum would be designed to fit the particular fuss that the parties wish to address.<sup>290</sup> We suspect that in court-connected mediation, the fuss almost always will require the discussion of litigation issues, but also will include other issues.<sup>291</sup>

Because there has been so much debate about what should occur in mediation, we want to note that we are *not* proposing that courts offer two mutually-exclusive and rigid categories of mediation. Our proposal would allow parties and lawyers to “customize” their mediation, or, by choosing standard mediation, to avoid all of the time and effort that would be required for such customization. The opportunity to customize is available in other settings (e.g., in the purchase of cars, computers, clothing, even tax advice). It turns out that most people are willing to buy their cars off the lot, their computers at the major retailers, and their clothing off the rack. Standardization offers predictability and efficiency. Perhaps most parties and lawyers will prefer to participate in a standard mediation.<sup>292</sup> Still, under this proposal, parties and lawyers will have the chance to consider whether their disputes are unique or could be handled better if certain non-litigation issues are included. For these parties and lawyers, a “customized” process will be available. To be clear, customization of the problem definition often will result from the customization of mediation procedures.<sup>293</sup>

Some courts already offer such customization on a regular basis.<sup>294</sup> For example, the Circuit Mediation Office of the U.S. Court of Appeals for the Ninth Circuit recognizes that “[e]ach case presents unique circumstances and personalities” and therefore it determines the most appropriate settlement procedures on a “case-by-case basis,” generally after an initial telephone or in-person conference that “provides counsel and the Mediator the opportunity to exchange information and determine a process that might

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<sup>290</sup> See generally Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

<sup>291</sup> Perhaps this option should be described as “litigation-oriented-plus” in the same way that Justice O’Connor’s analysis of minimum contacts in *Asahi* is sometimes described as “stream of commerce plus.” Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution*, 38 JURIMETRICS 575, 585 (1998) (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987)). We are sensitive, however, to the possibility that there may be some rare cases in which the parties choose not to discuss litigation issues.

<sup>292</sup> We recognize that there is a danger that distinguishing “standard” and “customized” mediation will result in the reification of the “standard” model. This is not our intent. Instead, we simply want to recognize the existence of standard mediation and make explicit the opportunity for customization.

<sup>293</sup> See generally Riskin, *supra* note 159.

<sup>294</sup> Some private providers also regularly customize their mediation sessions, generally as a result of pre-mediation discussions. See ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON IMPROVING THE QUALITY OF MEDIATION, FINAL REPORT 12-13 (2008) (describing “case-by-case customization of mediation process”).

provide the greatest opportunity for resolution."<sup>295</sup> Similarly, when parties fail to stipulate a particular ADR process while litigating in the U.S. District Court for the Northern District of California, members of that court's ADR legal staff conduct telephone conferences to help lawyers and parties "choose or customize an ADR process that meets the needs of the parties."<sup>296</sup> For courts such as these, our proposal may be unnecessary. The opportunity for customization is already part of their culture.

For other courts, however, this undertaking will be quite new and will require the education of mediators, lawyers, and citizens. The U.S. District Court for the Northern District of California currently has an extensive publication describing available ADR processes.<sup>297</sup> The court requires lawyers to certify that they have read the publication.<sup>298</sup> Lawyers also must review the publication with their clients.<sup>299</sup> Similarly, courts offering customized mediation could require lawyers and parties to view a short video available online and then show a certificate of completion before scheduling their mediation.<sup>300</sup> Some form of monitoring also may be necessary to maintain a distinction between "standard" and "custom" mediation,<sup>301</sup> but this also may be a self-enforcing initiative due to the parties' involvement in shaping the process.

### C. *Likely Concerns Regarding the Efficacy of the Proposed Court Initiatives*

All of these proposals are likely to encounter resistance. Critics of the three-step method may point to likely difficulties in its implementation. For example, what if one party very much wants to discuss core interests while the other is repelled by that notion, and the parties then disagree on how to "set" the problem? In considering this concern, it is important once again to

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<sup>295</sup> U.S. Court of Appeals for the Ninth Circuit, *supra* note 45, at 2.

<sup>296</sup> U.S. Dist. Court of the N. Dist. of Cal., *supra* note 213, at 20. *See also* N.D. CAL. ADR R. 3-5(c); N.D. CAL. CIV. R. 16-8(c).

<sup>297</sup> U.S. Dist. Court. of the N. Dist. of Cal., *supra* note 213.

<sup>298</sup> N.D. CAL. ADR R. 3-5(b)(1).

<sup>299</sup> *See, e.g., id.* at 18. The Northern District of California requires lawyers to certify to the court that they have read this publication. N.D. CAL. CIV. R. 16-8. Lawyers are also required to review the publication with their clients. *Id.* Other courts have found that a worrisome percentage of parties indicate their lawyers provided them with "almost no information . . . about the mediation process" or "how the process would work," suggesting the need to target education directly at parties. *See* ANDERSON & PI, *supra* note 50, at 61.

<sup>300</sup> Our thanks to Sharon Press for this suggestion. Telephone interview with Sharon Press (Oct. 10, 2007).

<sup>301</sup> We do not suggest a rigid dichotomy. A mediation that begins on the standard mediation track might evolve into a customized mediation, and vice versa. But we hope this rule will encourage conscious decision making about the problem-definition and mediation procedures. Riskin, *supra* note 159, at 13-15.

highlight what we are *not* proposing. We are not suggesting that courts *require* a broad problem definition in their mediation program, or that courts require lawyers to reveal information about their clients' underlying interests that they or the clients wish to keep secret for strategic or personal reasons. We propose only that the parties should have a real opportunity to influence the problem definition by *considering* a series of issues and interests that do not routinely appear in the kinds of mediations we have been discussing and by *considering* whether to make these issues and interests part of their mediation. If the parties disagree about the appropriate breadth of the problem definition, we believe that the mediation must incorporate only those issues all parties accept. In many cases, of course, this will mean reverting to the status quo, "standard" mediation with the narrow but entirely legitimate focus on litigation issues. We believe, however, that mere consideration of these issues and interests will result in a broader problem definition in some cases in which that is appropriate.

A next set of concerns may reflect skepticism regarding the need for "customized" mediation. Judges and lawyers may argue that if courts offer settlement conferences or early neutral evaluation along with mediation,<sup>302</sup> there is no need to distinguish between "standard" and "customized" mediation. These critics may assume that settlement conferences and early neutral evaluation focus on the legal merits of each side's case and that the scope of mediation is necessarily broader. The stereotype regarding judicial settlement conferences has substantial, though dated, empirical support.<sup>303</sup> The character of early neutral evaluation, however, can vary substantially with

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<sup>302</sup> For example, the U.S. District Court for the Northern District of California offers early neutral evaluation, settlement conferences, and non-binding arbitration as well as mediation. Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1489-90 (1994). Virginia offers both facilitative mediation and settlement conferences with retired judges. See Geetha Ravindra, *Virginia's Judicial Settlement Conference Program*, 26 JUST. SYS. J. 293, 295-98, 300-01 (2005). The Court of Queen's Bench of Alberta, Canada similarly offers both interest-based mediation and judicial dispute resolution (JDR), and Civil Practice Note No. 11 specifically provides that interest-based mediation "is not intended to derogate in any way from the JDR program." Court of Queen's Bench of Alberta, Civil Practice Note No. 11, Court-Annexed Mediation, at 1 (2004), available at <http://www.albertacourts.ab.ca/qb/practicenotes/civil/pn11CourtAnnexedMediation.pdf>.

<sup>303</sup> See Heumann & Hyman, *supra* note 216, at 287-89 ("[J]udicial intervention observed in the settlement conferences primarily supported positional bargaining. Very few of the judges strove to create reasonable settlement terms of the problem-solving kind."); James A. Wall, Jr. et al., *Judicial Participation in Settlement*, 1984 MO. J. DISP. RESOL. 25, 29, 32. Meanwhile, research indicates that lawyers are relatively consistent in their preferences regarding judges' behaviors in settlement conferences. See D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 35-36 (1986) (noting that attorneys prefer a settlement judge who points out evidence or law that attorneys misunderstand or are overlooking); Dale E. Rude & James A. Wall, Jr., *Judicial Involvement in Settlement: How Judges and Lawyers View It*, 72 JUDICATURE 175, 176-77 (1988) (reporting that attorneys prefer judges to inform them of how similar cases have settled and to argue logically for concessions, but do not prefer judges to share their evaluations of the case with clients or discuss with the lawyers the high risk of going to trial).

the preferences of the neutral.<sup>304</sup> Most importantly, though, and as we have argued throughout this Article, most court-connected mediation used by most average citizens is "one-size-fits-all," and that size is modeled after the lawsuit.<sup>305</sup> Thus, we believe that such presumed differences between mediation on the one hand, and settlement conferences or early neutral evaluation on the other, do not reflect most actual practice.

For all of our proposed court initiatives, we have indicated that courts will need to invest in training, education, and monitoring. How can already-overtaxed courts afford this? There is no easy answer to this question. We believe, however, that any court that currently sponsors a mediation program should already be investing in training, education, and monitoring so that it can be confident in the services that are being provided in its name.<sup>306</sup> And, as noted above in Part II.B.3, some pioneering courts are making these investments with concrete results.<sup>307</sup>

The most troublesome and systemic objection, however, is the critique that lawyers will resist the opportunity to expand mediation's problem definition for the same reasons that they embrace the focus that currently characterizes court-connected mediation. Primarily, of course, they believe that this narrow focus generally serves their clients' interests. In addition, the narrow problem definition is consistent with most lawyers' core interests in autonomy, a dominant role, and appreciation.<sup>308</sup> To meet these core interests, lawyers' routine practice often involves spending substantial time transforming their clients' unwieldy disputes and expectations into claims and remedies that can be addressed by the law.<sup>309</sup> The focus of most ordinary mediations on knowledge of the law and litigation expertise reinforces lawyers' claims to the privileges of professionalism, including autonomy, status, and substantial fees.<sup>310</sup> For example, a lawyer representing a client on a contingency fee basis might fear that a mediation focused on non-legal

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<sup>304</sup> See Rosenberg & Folberg, *supra* note 302, at 1495-96, 1538 (concluding that, in the Early Neutral Evaluation Program of the U.S. District Court for the Northern District of California, the role of the neutral varied greatly, depending principally on the identity of the neutral, and sometimes included facilitation without any evaluation). As a result of this study, the Northern District of California has educated its neutrals regarding the process differences. See E-mail from Daniel Bowling & Howard Herman to authors (Jan. 28, 2008) (on file with authors).

<sup>305</sup> Pun intended.

<sup>306</sup> McAdoo & Welsh, *supra* note 274, at 1, 12-13.

<sup>307</sup> Brazil, *supra* note 47, at 253.

<sup>308</sup> See *supra* Part I.B.1(3).

<sup>309</sup> See Felstiner, *supra* note 120, at 645-67 (observing that whatever harm or dispute a party brings to a professional, the professional will transform the harm or dispute so that the professional's expertise is appropriate for its resolution). See also Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1367-82 (1992); Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151 (1984).

<sup>310</sup> See note 145 and sources cited therein.

concerns would translate into a largely non-monetary settlement.<sup>311</sup> Finally, a law-and-litigation problem definition matches most lawyers' psychological preferences for the resolution of disputes based on the application of standards and rules and the avoidance of emotional issues.<sup>312</sup> Viewed from this perspective, it may not be in lawyers' own best interests to encourage their clients to venture beyond litigation (and, to a lesser extent, economic) issues. Under this view, our proposals—whether requiring lawyers to consult with their clients regarding the scope of the mediation, requiring mediators to offer the opportunity to broaden the problem definition, or offering “customized” mediation—would be doomed to irrelevance, at best.

This concern is well grounded. There are, however, interesting hints of change in the legal profession<sup>313</sup> that may both encourage and gain support from courts' adoption of our proposals. Many lawyers, for example, express a desire to use a broader problem definition in working with clients to resolve disputes, but perceive insurmountable hurdles to doing so.<sup>314</sup> A growing number of lawyers are overcoming some of the hurdles by forming groups of “collaborative” or “cooperative” lawyers who support each other through their practice protocols.<sup>315</sup> Though practice models started and have blossomed in the family law area, there are now initiatives bringing aspects of the “collaborative” or “cooperative” approaches to other types of disputes,<sup>316</sup> including the “ordinary” matters that have served as the focus of this Article. In addition, certain influential elements of the commercial bar have expressed their appreciation for a mediation process that includes litigation analysis, but also explores the underlying interests that an approach focused primarily on litigation issues might not capture. In a recent survey of lawyers with substantial experience in commercial mediation, a strong majority said that satisfying the parties' underlying interests was one of their goals in “all,” “almost all,” or “most” of the cases that had gone to

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<sup>311</sup> See Sternlight, *supra* note 178, at 320-21, 327-28 (describing lawyers' and clients' potentially diverging monetary incentives).

<sup>312</sup> See Daicoff, *supra* note 35, at 1365-66; Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 157 n.64 (2001) (citing to several studies showing the predominance of a “thinking” orientation among law students and lawyers); Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63, 92-93 (1995-1996).

<sup>313</sup> See MACFARLANE, *supra* note 156.

<sup>314</sup> See Heumann & Hyman, *supra* note 216, at 257 (even though litigators would like the methods used in their negotiations to be more “problem-solving” and less “positional,” this has not happened, perhaps because of a “combination of persistent litigator habits, a limited vocabulary of negotiation, and the time and expense necessary to change established practices”).

<sup>315</sup> See Lande, *supra* note 218, at 689; John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1325 (2003); Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from The Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 186.

<sup>316</sup> See John Lande, *Evading Evasion: How Protocols Can Improve Civil Case Results*, 21 ALTERNATIVES TO HIGH COST LITIG. 149, 163 (2003).

mediation.<sup>317</sup> These respondents also rated "understanding parties' interests" as a very important skill for effective mediators.<sup>318</sup> Another survey yielded strong support among business executives and outside counsel for finding outcomes that satisfy both parties' underlying interests rather than seeking only the largest possible concessions.<sup>319</sup>

Presumably, the lawyers and clients involved in large, well-funded commercial disputes do their best to negotiate a solution before they turn to mediation. For the difficult cases that do not settle through negotiation, these lawyers and clients endeavor to hire the mediators who are prepared to go beyond the litigation risk analysis that is the lawyers' stock-in-trade. Indeed, our three-step method may simply formalize an exploration that many such lawyers and clients expect from good commercial mediators, at least in complex, multi-party cases.<sup>320</sup>

The concern about lawyers' resistance to our proposals also suggests the need to help the lawyers representing clients in ordinary cases see and appreciate the shortcomings of the dominant model of court-oriented mediation for at least some of their clients. Such cases, after all, are "ordinary" only when looked at through a standard "legal" lens. They involve legal issues that are "ordinary" and amounts of money that are "ordinary"—to lawyers and judges. But to the one-shot players, these disputes are typically

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<sup>317</sup> ABA SECTION OF DISPUTE RESOLUTION, FINAL REPORT, *supra* note 43, at 7 (reporting that 81% of mediation users viewed satisfying parties' underlying interests as an important goal in half or more of their cases); ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON IMPROVING MEDIATION QUALITY, Survey Responses, at 5 (Apr. 16, 2007 Draft) (on file with authors) (68.5% of mediation users identified "satisfy parties' underlying interests" as a goal in "all or almost all" cases, with 13% identifying this as a goal in "most cases").

<sup>318</sup> See ABA, Mean Survey Responses, *supra* note 43.

<sup>319</sup> John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 188 (2000). Executives were asked how often "it is appropriate for businesses to try to find outcomes addressing the underlying interests of each party as opposed to seeking the largest possible concessions," when considering "the practical realities of litigation between two businesses[?]" *Id.* Lande reported that:

[M]ore than three-quarters (82%) of each type of respondent said that it would be appropriate to seek outcomes addressing underlying interests in more than half the cases. Although the outside counsel gave significantly higher responses (an average rating of 8.1) than executives (who gave an average rating of 7.2), clearly the vast majority of all three types of respondents said that it is normally appropriate to focus on underlying interests.

*Id.*

<sup>320</sup> As noted above in Part II.B.2, the U.S. Postal Service has institutionalized a mediation program that uses the transformative model, which focuses on facilitating parties' "voice and choice" rather than litigation risk analysis. Aware of the USPS' success with this model in reducing EEOC filings and increasing managers' conflict resolution capacities, other agencies have also chosen to institutionalize it. This may be viewed as another example of sophisticated parties' interest in using a broader focus in mediation in order to achieve meaningful resolution. *But see* Howard Gadlin, *Bargaining in the Shadow of Management: Integrated Conflict Management Systems*, in Moffitt & Bardone, *supra* note 44, at 379-83 (stating that "however well intentioned they are currently, ICMS [integrated conflict management systems] threaten to become another tool by which management wields power" and subverts conflict that should erupt).

extraordinary, once-in-a-lifetime events. And every litigant brings along unique history, circumstances, and interests. Our proposals offer relatively painless ways for lawyers to help some clients find more suitable responses to their unique needs. And we encourage courts to offer to collaborate with members of the bar to improve upon our proposals and make them more effective.<sup>321</sup>

Critics may raise a final set of concerns, which deal with the appropriate role of the courts: should the courts invest in offering to broaden the subject matter of a mediation session when access to this public resource has historically been conditioned upon narrowing the subject matter of a dispute in order to make it manageable and consistent with the unique mission of the courts?<sup>322</sup> We turn to these issues next.

### III. THE COURTS AND FOSTERING APPROPRIATE PROBLEM DEFINITIONS

Though strong psychological, economic, and social forces will always support the maintenance of the status quo, the courts have evolved throughout their history in response to the changing needs of society and the emergence of competing, successful models of dispute resolution.<sup>323</sup> Examples abound. In medieval Europe, which had a patchwork of contradictory local laws and business practices, a private system known as the Law Merchant arose to create and apply commerce-facilitating rules and procedures to the resolution of international merchants' disputes.<sup>324</sup> Over time, ordinary courts throughout Europe incorporated the Law Merchant's principles into commercial law.<sup>325</sup> In England, after an ad hoc and morality-based system of equity arose in response to the rigidity of the writs used by the common law courts, the courts evolved to include a complementary Court of Chancery available to provide relief when the common law courts could not.<sup>326</sup>

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<sup>321</sup> See Lande, *supra* note 259, at 129-30.

<sup>322</sup> Indeed, one of the authors has previously observed that "[f]ew stakeholders in the civil non-family context seem to worry about producing outcomes that respond to litigants' unique extra-legal needs or represent parties' self-determination or maintain or enhance relationships. If they are honest, courts will clarify that though these objectives are laudable, they must yield to the objects that are more salient to the mission of a public civil litigation system." McAdoo & Welsh, *supra* note 22, at 426.

<sup>323</sup> See Pearlstein, *supra* note 250, at 774-80 (describing the adoption of dispute resolution practices in medieval Europe, seventeenth century colonial America, and the 'Wild' West following the California Gold Rush).

<sup>324</sup> *Id.* at 774-75.

<sup>325</sup> *Id.* See also LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 11-16 (1983); Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644, 647 (1989).

<sup>326</sup> See Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 346-51 (2007). A few centuries later, in 1938, the United States continued this particular evolution by merging common law and equity into one system in the Federal Rules of Civil Procedure. See Jacqueline M. Nolan-Haley, *The*



More recently, in the U.S., the congestion and conservatism of the courts, coupled with the profound needs unleashed by the Great Depression and the innovations of the New Deal, led to the creation of administrative adjudication.<sup>327</sup> Though the judiciary initially objected to the usurpation of its role, courts now display substantial deference to administrative decision-making.<sup>328</sup>

As noted in Part II.C, it is increasingly clear that certain elements of the bar, and their clients, see the value in broadening problem definitions in appropriate cases and seek out mediators who will provide such services.<sup>329</sup> Meanwhile, some judges, court administrators, and policymakers may see our proposals as a means to achieve mediation's original promise as a distinctive supplement to the usual practice and focus of litigation—or to reawaken the dream of the multi-door courthouse.<sup>330</sup> Some courts' definitions of mediation are particularly evocative of mediation's original promise.<sup>331</sup> The local rules of the federal district courts for the Eastern District of New York and the Northern District of California, for example, note that "[a] hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy."<sup>332</sup> Some courts have provided the resources and staff needed to promote mediation of a quality that lives up to its "hallmark."<sup>333</sup> Most courts, however, have been either unable or unwilling to do much more than monitor their mediation programs for their settlement rates.<sup>334</sup> We reiterate that we are not proposing that a court require all parties to participate in a mediation that expands traditional settlement discussions. However, our proposal would end the current situation in which most parties' choice is foreordained by the preferences, or habits, of lawyers and insurance claims adjusters, as well as the "one-size-fits-all" demands of mass process-

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*Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57, 62 (2004).

<sup>327</sup> See Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 124-25 (2004) (citing George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1574 (1996)).

<sup>328</sup> See *id.* at 125-26.

<sup>329</sup> See *supra* notes 43-44 and sources cited therein.

<sup>330</sup> See Frank E.A. Sander, *Varieties of Dispute Processing*, in *THE POUND CONFERENCE*, *supra* note 27, at 65, 83-84 (first introducing the concept that was later labeled as the "multi-door courthouse"). Excerpts from the Pound Conference are also found in *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (1976).

<sup>331</sup> See *supra* note 45 and sources cited therein.

<sup>332</sup> E.D.N.Y. CIV. R. 83.11(a); N.D. CAL. ADR R. 6-1.

<sup>333</sup> See *supra* notes 295-302, sources cited therein and accompanying text.

<sup>334</sup> See Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, in *ADR HANDBOOK FOR JUDGES*, *supra* note 274, at 297, 302.

ing. Parties would undertake an informed consideration of their mediation options and have the opportunity to choose the problem definition most responsive to their needs. We view this change as particularly important for the one-shot users, individual citizens who might otherwise never know they could receive the advantages of “custom” mediation.

Our proposal also would not diminish the courts’ focus on dispute resolution pursuant to the rule of law. As any first-year law student quickly learns, the rule of law sounds substantial, but actually is a very slippery concept heavily influenced by context and self-interest.<sup>335</sup> Customized mediations under our proposals would still incorporate a litigation focus and discussions of the applicable substantive law. But they would also offer the opportunity to supplement that focus.<sup>336</sup> We believe that empowering parties to choose whether to grapple with other issues would enhance their sense of being treated fairly by their courts.<sup>337</sup> In other words, this option would influence their perceptions of the procedural justice offered by the courts, and procedural justice has been shown to have a profound influence on parties’ perceptions of substantive fairness and institutional legitimacy.<sup>338</sup> Ultimately, we believe that parties’ judgments regarding both substantive and procedural fairness would be improved by the opportunity to elect the problem definition that they perceive as most appropriate.

It is also possible that our proposal would contribute to courts’ effectiveness in assisting parties who have pressing business interests, as well as parties like the Sabias, whose need for cognitive and emotional resolution is very strong and currently unmet by procedures with a narrow litigation focus. The courts have shown a willingness to adapt in order to respond better to the needs of particular subsets of disputants.<sup>339</sup> For example, there are now business courts, mental health courts, juvenile courts, domestic vio-

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<sup>335</sup> See Nancy A. Welsh, *Perceptions of Fairness*, in *THE NEGOTIATOR’S FIELDBOOK* 165 (Christopher Honeyman & Andrea Schneider eds., 2006); Deutsch, *supra* note 253, at 41, 43-44.

<sup>336</sup> Another useful way to think about this broadened focus is through the idea of using two tables in a negotiation. One would employ a narrow, adversarial perspective (the “net-expected-outcome table”); the other would deal with underlying interests (the “interest-based table”). See ROBERT H. MNOOKIN ET AL., *supra* note 234, at 226-46.

<sup>337</sup> See Keith G. Allred, *Relationship Dynamics in Disputes: Replacing Contention with Cooperation*, in *THE HANDBOOK OF DISPUTE RESOLUTION*, *supra* note 44, at 83, 91 (“If we are in a dispute with someone and he or she asks us what we think the process should be to try to resolve it, we will feel the process is fairer whatever the process turns out to be.”).

<sup>338</sup> Welsh, *supra* note 108, at 820-26.

<sup>339</sup> Greg Berman & Anne Gulick, *Just The (Unwieldy, Hard to Gather but Nonetheless Essential) Facts Ma’am: What We Know and Don’t Know About Problem-Solving Courts*, 30 *Fordham Urb. L.J.* 1027, 1030 (2003) (citing Center for Court Innovation, Problem-Solving Justice, <http://www.courtinnovation.org/> (follow “Problem-Solving Justice” hyperlink) (last visited Feb. 13, 2008) (noting that “there are literally thousands of problem-solving courts that are testing new approaches to difficult cases where social, human and legal problems intersect”)).

lence courts, drug courts, and community courts.<sup>340</sup> In each of these contexts, courts<sup>341</sup> have concluded that their traditional processes and remedies were not sufficiently effective. Domestic violence courts arose, for example, because victims sought orders of protection only as a last resort after long periods of abuse.<sup>342</sup> In order to promote the safety of these victims more effectively, domestic violence courts introduced batterer intervention programs, dramatically expanded judges' responsibility for monitoring, and forged partnerships with other community agencies.<sup>343</sup> Judges in these courts supplemented their traditional tools in order to help people change their lives. Mental health courts similarly respond to the needs of a particular set of litigants.<sup>344</sup> Litigants who meet eligibility requirements are able to choose whether to take part in programs that will require participation in mental health assessments, individualized treatment plans, ongoing judicial monitoring, and the completion of mandated treatment programs.<sup>345</sup> These options are certainly more labor-intensive for the courts, but they also appear to address more effectively the issues that played a significant role in bringing these litigants to the courts.<sup>346</sup> The same philosophy would support offering the opportunities we have proposed.

Finally, though other countries' courts reflect their own procedures, histories, and values, it may be useful for courts in the U.S. to consider<sup>347</sup> some aspects of the mediation program that the courts of the Netherlands recently institutionalized.<sup>348</sup> There, mediating and judging are understood as different roles in terms of process *and* problem definition.<sup>349</sup> Dutch judges,

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<sup>340</sup> See generally Steven Belenko, *Research on Drug Courts: A Critical Review*, 2 NAT'L DRUG CT. INST. REV. 2 (1999); Berman & Gulick, *supra* note 339; Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459 (2004); Donald J. Farole, Jr. et al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 JUST. SYS. J. 57 (2005).

<sup>341</sup> Or sometimes only a few innovative judges. See Farole et al., *supra* note 340, at 68-69.

<sup>342</sup> See Berman & Gulick, *supra* note 339, at 1041 ("The primary stated objective of most domestic violence courts is the enhancement of victim safety.").

<sup>343</sup> See *id.* at 1042-44; Center for Court Intervention, Domestic Violence Courts, <http://www.courtinnovation.org/> (follow "Problem-Solving Justice" hyperlink) (last visited Feb. 13, 2008).

<sup>344</sup> *Id.* at 1036.

<sup>345</sup> See Berman & Gulick, *supra* 339, at 1030.

<sup>346</sup> *Id.* at 1031-34.

<sup>347</sup> Before establishing their program, the Netherlands carefully investigated U.S. courts' experience in institutionalizing mediation. See Annie de Roo & Rob Jagtenberg, *Mediation in the Netherlands: Past—Present—Future*, 6.4 ELECTRONIC J. COMP. L. (2002), <http://www.ejcl.org/64/art64-8.html>.

<sup>348</sup> See Bert Niemeijer & Machteld Pel, *Court-Based Mediation in the Netherlands: Research, Evaluation and Future Expectations*, 110 PENN ST. L. REV. 345, 346-47 (2005).

<sup>349</sup> Judge Machteld Pel, who heads the Netherlands' court mediation program, has identified four categories of disputes that are brought to Dutch courts:

[1] *Pure procedure* (The civil procedures that really are what they seem to be; the parties bring up a legal question in front of the judge and that is really what it is about. The dispute is completely resolved with the court ruling. The interests here are the same as claims.); [2] *Process procedures* (Procedures where the parties actually have a legal dispute but doubt that

who may meet with the parties and lawyers several times to investigate and attempt to resolve the case, are taught to ask, “Will my decision solve your problem?” If the answer is “yes,” then the judge should retain the case, continuing the investigation into its legal merits and issuing a decision.<sup>350</sup> On the other hand, if the parties acknowledge their interest in non-legal issues, the judge urges them to try mediation because it can help them address all the issues that fit within the appropriate definition of their problem.<sup>351</sup> It is possible that only a minority of cases will be resolved by court-connected mediation in the Netherlands,<sup>352</sup> but the country supports many different

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there is a possibility of ‘getting their justice’ on material grounds or in relation to the burden of proof. For that reason, they introduce all sorts of additional (procedural) decision points in order to, at least, get their way on formal points or improper grounds. The court decision on the additional decision points puts no end to the underlying dispute. The claim that contains real interests is overshadowed by improper procedural interests.); 3] *Shadow procedures* (Procedures where the parties wish to achieve something that cannot be accorded by law. They propose therefore something that is the next best. They bring a lawsuit about the ‘shadow’ of their real wishes. The legal decision does not end their dispute but can bring closer one party in the dispute to the desired outcome. The interests and claims differ but the interests do motivate the procedure.); and 4] *Pretence procedures* (Procedures that are initiated or brought only because of the feeling of frustration, impotence or other strong feelings instead of business, logical motives based on objective criteria. The motivation is that ‘those who do not hear must feel.’ The parties climb the ladder of escalation and prefer ‘to go under together’ rather than give in a little to the other party. The court decision cannot bring an end to the conflict. The motivation for bringing a lawsuit is not interests but emotions and miscommunication.)

Machteld Pel, *Doorverwijzing naar mediation in de civiele procedure: extra service of brancheveraging?*, 4 TIJDSCHRIFT VOOR CIVIELE RECHTSPLEGING 78, 81 (2000) (translation on file with authors). See also Wayne D. Brazil, *Hosting Mediations as a Representative of the System of Civil Justice*, 22 OHIO ST. J. ON DISP. RESOL. 227, 235 (2007) (differentiating between court-appointed mediators and judges by observing that mediators will not perform judicial duties such as “considering formally presented evidence and argument, then engaging in thorough research and analysis en route to forming reliable and binding judgments about the merits of parties’ disputes”).

<sup>350</sup> See Nancy A. Welsh, *The Future of Mediation: Court-Connected Mediation in the U.S. and The Netherlands Compared*, 1 FORUM VOOR CONFLICT MANAGEMENT 19, 22 (2007); Nancy A. Welsh, *En vergelijking tussen doorverwijzing naar mediation in civiele zaken: voorspelt de ervaring van de Verenigde Staten (VS) de toekomst van Nederland?*, 7 Trema 310, 312 (Sept. 2006) (translation on file with author). In some ways, the Dutch judges’ question is reminiscent of the original relationship between the courts administering the dual system of equity and law. See Main, *supra* note 326, at 352-53 (observing that “[e]very order or rule administered in Equity was born of some emergency, to meet some new condition that was not otherwise remediable in the Common Law courts”). In contrast, few judges in Minnesota selected “relief is outside the court’s jurisdiction” as a significant factor that they consider when ordering parties to mediation. See McAdoo & Welsh, *supra* note 22, at 414 & n.77 (chosen by 13% of the judges surveyed).

<sup>351</sup> See Welsh, *The Future of Mediation*, *supra* note 350, at 23; Welsh, *En vergelijking*, *supra* note 350, at 312.

<sup>352</sup> The number, however, is growing. See MACHTELD PEL, RESULTS OF THE MEDIATION REFERRAL SYSTEM IN THE NETHERLANDS JUDICIARY 1 (2007), available at <http://cameraarbitrale.odc.mi.it/allegati/utenti/Pel2.pdf>.

“paths to justice”<sup>353</sup> and does not seem to assume that any particular process should be appropriate for all—or even a majority of—disputes.<sup>354</sup>

Through our proposal, courts would give lawyers and their clients the option to participate in a customized forum that includes attention to legal issues *and* the other economic, personal core, and community issues that may play a significant role in achieving real resolution.<sup>355</sup> The courts will be offering a real “value added” for the disputants and disputes that do not quite fit the mold provided by the standard litigation focus. Indeed, in a country where most citizens’ experience with the court system is as one-shot players, it seems quite appropriate that our courts should allow such litigants to provide input into the design of the process that will be most responsive to the needs of their unique situations. Judge Wayne Brazil has written that the primary goal of mediators in court-sponsored programs should be “to promote the participants’ confidence in the integrity of the proceedings.”<sup>356</sup> Transparency and inclusiveness are important attributes of processes designed to earn that respect. In his words:

[T]ransparency, by itself, is not sufficient. . . . [T]ransparency about process can acquire its full constructive power only when we include all the participants in the mediation in the key decisions about which process routes we should follow. In short, inclusiveness is essential to maximizing both the reality and the potential of process transparency.<sup>357</sup>

## CONCLUSION

In one sense, our proposals are quite modest. They simply suggest mechanisms that could help court-connected mediation programs do what

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<sup>353</sup> See BEN C.J. VAN VELTHOVEN & MARIJKE TER VOERT, PATHS OF JUSTICE IN THE NETHERLANDS 23-24 (2005), available at [http://www.justiceinitiative.org/db/resource2/fs/?file\\_id=17771](http://www.justiceinitiative.org/db/resource2/fs/?file_id=17771).

<sup>354</sup> See Welsh, *En vergelijking*, *supra* note 350, at 311. See also Kritzer, *supra* note 26, at 353-56 (observing that other countries do not rely as heavily as the U.S. on private litigation for the resolution of routine disputes or policy implementation).

<sup>355</sup> See Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 802 (2001) (describing what could and should happen in a negotiation grounded in morality); Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971) (describing mediation’s “capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another”); Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 67, 86 (highlighting the connection between mediation, social justice, and procedural justice in urging that disadvantaged people “need, even more so than advantaged group members, a forum in which their authentic voices and experiences can be expressed” and observing that mediation, as a forum fostering the expression of such authentic voices, offers “another locus in American political, social and legal life where ideas about equality are defined and redefined”).

<sup>356</sup> Brazil, *supra* note 47, at 241.

<sup>357</sup> *Id.* at 268.

many have assumed they already were doing. In another sense, however, these proposals represent a significant intrusion into “business as usual” in the mediation of “ordinary” or “routine” cases in court-connected programs. As we have emphasized, a person injured in an accident, terminated from a job, or sued for negligence is unlikely to experience the event as routine. The repeat players can see such matters as routine only through professional or occupational filters, which allow in only certain kinds of information and produce only certain kinds of outcomes through certain kinds of procedures. We hope that inviting the litigants themselves to reflect upon and influence the selection of the issues for discussion in their mediations will enable more one-shot players to get what they need in the procedures and outcomes of their cases. Our proposals may even produce an intriguing by-product—making these cases and the journey toward resolution come alive for at least some of the repeat players. As Marcel Proust wisely wrote, “The real voyage of discovery consists not in seeing new landscapes, but in having new eyes.”<sup>358</sup>

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<sup>358</sup> Marcel Proust, *The Captive*, in 3 REMEMBRANCE OF THINGS PAST 1, 260 (C.K. Scott Moncrieff & Terence Kilmartin trans., Random House 1981) (1934).