

Panel Discussion - Core Values of Dispute Resolution: Is Neutrality Necessary?

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PANEL DISCUSSION

**CORE VALUES OF DISPUTE
RESOLUTION: IS NEUTRALITY
NECESSARY?***

PANELISTS

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* The following discussion is an edited version of a panel discussion that occurred at Marquette University Law School on September 23, 2011.

JOHN LANDE: We have with us today Larry Susskind, Josh Stulberg, and Bernie Mayer, true pioneers in the field. I assume that most of you know who they are. If you don't, look it up. It's in the book.

Basically, our session is about *Core Values of Dispute Resolution: Is Neutrality Really Necessary?* We are going to focus on the issue of neutrality in terms of concerns about autonomy and substantive fairness. These goals may be implicit in neutrality, though not necessarily.

Josh and Larry had a debate about this in print thirty years ago, 1981, in the *Vermont Law Review*.¹ Part of the idea behind this panel was that we're going to revisit that debate. One thought was to have them each summarize what they said and they decided that what I should do as the moderator is read a summary from Ellen Waldman's new book: *Mediation Ethics*,² which I haven't read—it's hot off the press—so hot that I haven't gotten it yet, but Larry got it—it's Josh's copy. It's very slow to get to Missouri.

What they have asked me to do is that, and in the interests of time, I will read a summary from Ellen's book. Although I normally don't like to read things, they held a gun to my head. Here's a summary, we're going to start with this, and we are just going to have a conversation among the three of them. If there's too much agreement, I will jump in and try to fix that. We will have a conversation and engage all of you, as well, after a little bit.

Waldman summarized the debate as follows:

In the early 1980s, a celebrated exploration of these issues took place in the *Vermont Law Review* in which scholars Lawrence Susskind and Josh Stulberg battled over the question of mediator accountability. Pursuing the question in the context of environmental mediation, Susskind argued that it is not enough for mediators to guarantee full party participation, capacity, and balanced exchange. Susskind claimed that "the success of a mediation effort must also be judged in terms of fairness and stability of agreements that are reached." Environmental mediation treats resources—air, water, land—that affect

1. See Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981).

2. ELLEN WALDMAN, *MEDIATION ETHICS: CASES AND COMMENTARIES* (2011).

communities at large, not simply the parties at the table. Susskind was concerned that private negotiations over these public goods might yield wasteful and damaging outcomes. What if a powerful development company were able to bulldoze its way over representatives from an agency charged with protecting endangered animals, fragile ecosystems, or precious river rights? Valuable public spaces might be lost or compromised. To prevent this, Susskind asserted, environmental mediation needed to accept responsibility for ensuring “(1) that the interests of parties not directly involved in negotiations, but with a stake in the outcome, are adequately represented and protected; (2) that agreements are as fair and stable as possible; and (3) that agreements reached are interpreted as intended by the community-at-large and set constructive precedents.”

Stulberg forcefully demurred, objecting that nothing in the mediator’s “obligations of office” equips or entitles him to assume the role of “social conscience, environmental policeman or social critic.” Stulberg argued that parties will reveal deal-enabling information—“statement[s] of . . . priorities, acceptable trade-offs . . . desired timing for demonstrating movement and flexibility”—only if they know that the mediator has no stake in the outcome. Mediators can choose to end their involvement in a negotiation that they feel is leading to an unfair outcome, but “that judgment is one for the mediator qua moral agent, not mediator [qua mediator] to make.” In other words, for Stulberg, assuming responsibility for the fairness of the agreement represents a tragic abandonment of the neutral stance and an unwarranted expansion of the mediator’s proper role.

Following Stulberg and Susskind’s debate, the rest of the 1980s witnessed a flowering of criticism centered on the dangers of mediation’s legal and narrative agnosticism. Commentators ranging from Yale Law School professor Owen Fiss to anthropologist and social critic Laura Nader pointed to the alternative dispute resolution movement as a threat to public values such as equality and due process.

Critical-race theorists and feminists worried that mediation’s neglect of social norms meant that women and minorities would be denied the benefits that newly enacted civil rights legislation sought to confer. How ironic, they noted, that progress toward gender- and racially sensitive laws in the formal adversarial system would be accompanied by a move to push cases out of that venue and toward more informal, less protective settings.

More than twenty years later, the ranks of mediation's critics have thinned. Commentators today are more likely to lament that mediation looks too much like the judicial hearing, not too little. Warnings that mediation delivers "second-class justice" to those who can't afford the price of entry to court have been supplanted by those who complain that it's now hard to tell the difference.

Still, Susskind's worry that private negotiations over public goods threaten important societal values continues to resonate. The call for mediators to pay attention to the ripple effects of what they do can be seen in a number of state ethics codes that support the notion that mediators may need to intervene, or at the least withdraw, when private party negotiations threaten to yield patently unfair outcomes.³

JOHN LANDE: So that was Ellen Waldman's very excellent summary about the debate and the issues. So I'm going to turn first to Larry, then to Josh, and then finally to Bernie to comment on, looking back thirty years, what they think about these issues? Larry, why don't you start off.

LARRY SUSSKIND: Thanks, and thanks for the invitation. It's fun to be in this kind of setting. I'm going to take seriously the idea that—as we begin to talk and as the conversation goes throughout the next couple days—I can get you not to just think about mediation in the form that you do it all the time but about other forms of mediation as well. There are those of us who do mediation that is not court-connected or mediation that isn't teed up for us by a conveyor belt of institutional rules. We have to make the occasions happen. We have to help the parties identify each other, and then we need to figure out how to run an informal problem-solving process when litigation is going on amongst the same people simultaneously in other contexts. I'm going to take seriously the idea that I can get you to step out of the context of family court-connected mediation as we talk about a concept like neutrality. So I'm challenging you to hear other dimensions in the discussion.

3. This excerpt was reprinted from *MEDIATION ETHICS: CASES AND COMMENTARIES*. *Id.* at 117–18 (footnotes omitted) (citing and quoting Stulberg, *supra* note 1; Susskind, *supra* note 1; Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984); *NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM* (Laura Nader ed., 1980); and Laura Nader, *The ADR Explosion—The Implications of Rhetoric in Legal Reform*, 8 *WINDSOR Y.B. ACCESS TO JUST.* 269 (1988)).

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I just raised two ideas to bring the argument to the present. I'm involved with various types of mediation—human rights cases, environmental cases, cases between two companies that don't want to go to court because they are desperately trying to protect their intellectual property and yet they need to work something out—all kinds of conflicts where going to court is not relevant, not what the parties want to do. And so, now, all the questions that you just heard John read about take on a different meaning. If the institutional context that tees up the mediation doesn't define who is or who isn't a party, whether they come with advocates, what the responsibilities of those advocates might be, whether the product of the discussion is binding, whether it sets a precedent, etc.—if all these things aren't defined by the system you're in, what are the mediator's responsibilities?

Don't look to me if the parties don't show up; don't look to me to be responsible if there are enormous inequalities among the parties; don't look to me to be responsible if the parties have a hard time representing themselves or the category of stakeholders they're supposed to represent; don't look to me if the parties don't understand the scientific, technical, or other complexities surrounding the decisions they're making; I'M NEUTRAL!

In my world, you must be responsible, or at least accountable, for how these considerations get addressed. If the parties start to talk, and it's clear from the way they're talking that someone not present is going to be adversely affected, I would say, *Gee don't you think that group should be represented at the table?* And for each of the points I'm raising, I'm interested in what it means to have a theory of practice—a way of answering these different questions on a case-by-case basis.

To bring it back to today's discussion, maybe the system that you're mediating in, which has taken care of all this for you, ought to be questioned. Maybe it's not doing what it should do relative to who gets to the table, what their negotiating capacities are, whether they are prepared to pursue their own interests effectively, what other parties should be there, what other information they might need, what kind of accountability they ought to have to the community at large, whether an informal precedent is being set, etc. Maybe you should be asking yourself these questions. Maybe it is the mediator's responsibility to be highly attentive in every case to issues like these and not just say, *I'm in a court-connected context, the system is the way it is, it just tees up the cases for me, and I don't have to worry about any of that.*

JOHN LANDE: Obviously, in the last thirty years you've seen the

error of your ways. Josh, what about you? Have you come to change your view on things?

JOSH STULBERG: Let me just quickly say thanks to Andrea and Peter for inviting us to do this.

Actually, I would like to take this opportunity, because it doesn't happen frequently, to publicly state what a privilege it is for me to be on this panel with Larry. Larry and I have been friends for thirty years. He is one of the builders and leaders in our field. We disagree on some matters—some significant matters—but that's because we care about this whole field.

Larry challenges us to think in a context other than the family dispute arena, and I would like to join him on that. But let me just bow to all of you who work and toil in the family area. I'm not sure there's a more important, challenging arena in our society that requires more work, thought, and talent, and it is reassuring to know that persons like yourselves have dedicated your talents to this area.

Let me try to come at the question John has posed in a slightly different way than the way in which Larry has set it up. At a conceptual level, I think of mediation as embracing the following elements. First, mediating is a justice event. It is not a casual conversation; it is not a conversation to create a business deal. It is a justice event, and so needs to be conducted with those values in mind. Second, participants are members of the political community. While I certainly want to support the central value of personal autonomy, that value cannot skew or escape the fundamental fact that we are all members, in an important sense, of a political community. How I want and choose to live my life is, to some extent, clearly and appropriately shaped and constrained by how others want to live their lives. It is simply not true that one's "self-determination" licenses him or her to do whatever she wants. Third, at least at a conceptual level, there is an important difference between concepts of impartiality, objectivity, and neutrality. My argument years ago—and I still believe it—is that neutrality is distinctive. It is neutrality with respect to outcome, not process. Being neutral means adopting an unswerving commitment to structure and guide a conversation that simultaneously embraces the values of a justice event and that encourages and cultivates disputing parties to work out matters in a way that they want to live their lives as members of a political community. That may sound like an abstract or "highfalutin" theory, but I am confident that it plays out in practice. I think if I were rewriting what I wrote thirty years ago, I would emphasize more strongly that

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mediation's central values systematically support not only party self-determination, but also, crucially, party responsibility.

The mediator's posture, then, must be congruent with promoting each of those central values. Let me end this way. With characteristic elegance, Larry talks about mediators who are working in public policy contexts. The image portrayed there, of course, is that parties are making decisions that foreclose options both for people not at the table and as well as for members belonging to future generations. If someone bulldozes a particular plot of land, it is hard, if not impossible, to recapture it. Given that substantive context, Larry argues in our *Vermont Law Review* exchange that a mediator should be held accountable for the negotiated outcomes in the ways that he prescribes. But he also claimed that mediators working in other contexts, particularly those who mediated labor-management collective bargaining impasses, did not confront that same challenge. I tried to argue that he was incorrect factually about that claim; I believe that disputes involving labor-management collective bargaining matters, as well as other explosive community disputes, share the feature that the parties' collective decision at a particular moment in time significantly forecloses some (though not all) future possibilities. But that fact, I argued, does not change the core values of the mediator's role, including the duty to be neutral.

Let me support that perspective by reminding all of us of what GM and UAW negotiators agreed to just last week. Among many negotiating items, the negotiating representatives agreed to an arrangement for a two-tiered wage system. Presume that we are mediating those negotiations. The union representatives state that they refuse to accept a two-tiered wage system, claiming that, among other things, it is bad for morale. The company representatives explode. Their final comments: "You (the union) will either accept our proposal for a two-tiered wage system with our current staffing size or we will accept your proposal to continue our current wage system but we will significantly reduce the size of our work force in Michigan by relocating targeted operations to Brazil." Taking this example, where I have differed from Larry can be identified in these two ways: first, I believe that the decision to close a plant and relocate reflects the reality of a current decision that forecloses significant future possibilities; second, I certainly believe that, for this "negotiation," there are many stakeholders who will be significantly affected by the negotiating parties' decision but who are "not at the table." But I differ from Larry

in concluding that these features impose on the mediator a duty to represent those stakeholders who are not at the table or to insure that their interests are protected. Within the context of a publicly adopted statutory framework for resolving workplace issues, those parties have selected their own bargaining representatives, examined their interests, and established their distinctive priorities. The mediator's duty is to respect their dignity and promote their autonomy, not tell them what they are supposed to do.

JOHN LANDE: Batting clean-up is Bernie Mayer who was brought onto this panel to represent the "pox on both your houses" perspective.

BERNIE MAYER: I'm going to try and remember what I thought about this debate thirty years ago. Probably I thought one of two things: either you were both right or you were both wrong. I think I will stick with both wrong for the moment because it's more fun. Let me just say a couple of things about the concept of neutrality. I don't think it's a meaningful concept, at least not to me. Why not? Read Gibson's writing on this; he's sitting right up there.⁴ I think focusing on neutrality is a misleading way of looking at what we do. There are many different ways we can enter into our work as conflict interveners. We can play all sorts of roles if we are transparent about what we are doing. But the idea that we are not going to take any action that will alter the outcome based on our values or our knowledge is unrealistic. It's impossible not to affect the outcome because we inevitably will, no matter what our values or beliefs about neutrality. I think the real question here is about what our intentionality is and what our social responsibility is. In whatever role we play, we have to be clear about our intentions and how we see our responsibilities. And in most mediation structures I've seen, there is room for a lot of variation in how people view their role and responsibility. The key is that mediators are clear and transparent about this.

My specific concern about the way this debate has been framed is two-fold. First, I don't think mediators have the power to affect the outcome in the way you talk about, Larry. It's fine to say we should, but it's unrealistic. What we can do is help design the structure of the

4. See generally Kevin Gibson, *Harmony, Hobbes & Rational Negotiation: A Reply to Dees and Cramton's "Promoting Honesty in Negotiation,"* 4 BUS. ETHICS Q. 373 (1994); Kevin Gibson, Leigh Thompson & Max H. Bazerman, *Shortcomings of Neutrality in Mediation: Solutions Based on Rationality,* 12 NEGOT. J. 69 (1996).

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interaction. That structure for interaction can have a number of safeguards built in, and then we can implement that structure in a number of ways. Larry talks about the system teeing things up. Well, I think that's exactly the relevance of how the system tees things up—it determines in many ways whether what we are engaged in is a responsible approach to dealing with cases or not. I think some of the most important things we do are not what we do when we are sitting at the table. I think the most important thing that we do to insure a socially responsible outcome is how we design the system to make that happen and to insure that the right parties are at the table and that process is structured so as to give them a meaningful voice.

Second, when we are sitting at the table and we see the system hasn't worked right, then we can intervene in many ways, from within a neutral stance—in other words, we can insure that participants are provided an effective voice and that important issues are not avoided without intentionally trying to benefit one side at the expense of the other.

To reiterate, I think that most of the important responsibility for insuring a socially responsible process is not in the mediator's role but in the system's role—how we design the system, how we manage the system, how we train people to work within in the system, and what we do when we see the system isn't working the way we intended it to. The second challenge occurs when we are in the middle of a mediation session and are trying to insure that the process goes forward with integrity. I don't think that in either of those contexts there is a definition of neutrality that defines our role or obligations in a very clear and consistent way.

Now let me try to put this into a family context—not divorce, but child protection because this is the court-based mediation context that I am most familiar with. Child protection mediation has been very successful—it hasn't gotten the institutional support it needs, but when it's been instituted, it's actually made a big difference. There are all sorts of studies and statistics that show it actually changes the nature of the relationship between and among family members and system players (child protection workers, lawyers, etc.). I have been part of an effort—as have several other people in this room—to pull together child protection mediation practitioners and administrators from throughout the United States and Canada to identify what really has made it work well.

There are several things characteristic of successful child protection mediation programs. One, you have somebody who is assigned a

systems role to nurture the system, to manage the system, to train the system, to advocate for the system, to make sure there's enough funding, etc. Two, support of the courts for doing it. Having the courts on your side so that you're not implementing this approach in opposition to the courts is essential. Three, taking active steps in how you design and conduct the system so that parents and families aren't overwhelmed by the power of the system. For example, in a study in Alaska, it was found that if mediators were provided the opportunity to work with the families for three hours before the actual mediation session to help insure that families understood what was going to occur and were more prepared, the mediation would then be characterized by better discussions, agreements that were richer, more satisfaction with the agreements, and agreements that were more durable. In this study, families were randomly assigned to a process that granted this preparation time and those that employed the more traditional approach that did not provide this up-front time. The differences were remarkable. Basically, if you design the system to allow for this advance work, you are going to have better outcomes—no matter how the mediation process itself is conducted.

You have to make sure, particularly where dealing with significant cultural differences, that families have support systems when they enter into that mediation—so they aren't overwhelmed by professionals who know each other, work with each other all the time, talk with each other, etc.

This is all about design. If you walked into the room without this kind of thoughtful design, you would be dealing with a profoundly unfair interaction. The other important design element, of course, is that you are not trying to do all this in forty-five minutes; you have to have enough time devoted to mediation for the process to have any chance of being fair and having integrity. All of this has nothing to do with whether the mediator is acting in a neutral—*whatever that means*—role. It has to do with how you structure the whole setup. If, then, when you get into the room as a mediator and you don't take further steps to make sure that the parents and families aren't blown away by the system, then you are contributing to an unfair interaction, as well. So what do child-protection mediators do to insure that families are empowered? They start with parents, asking them to speak first. They take steps to avoid discussions that are exclusively between lawyer and lawyer or social worker and lawyer, with the parents reduced to passive observers—they do things to interfere with those kinds of interactions.

Why? Not because they are trying to be neutral or not, but because if they don't, the kind of discussion that needs to occur will be less likely.

In the environmental arena, I think the "teeing up" process Larry talks about is essential, but most of this, in my experience at least, is not something that occurs at the table or by the mediator. It occurs by creating the structure within the system of interaction of environmental mediation. In environmental consensus-building processes, there is usually a steering committee, a key group of stakeholders who plan the process. In that forum, the discussions occur about who are the right groups to participate, how should the issues be framed, how should the process be structured. The conflict intervener plays a significant role in this by helping to create this committee, by working with it, by asking questions, and by helping participants think through the consequences of different approaches. Occasionally, we put conditions on our own participation related to the integrity of the process. If we don't do that, we may contribute to an unfair process. But is taking the responsibility for insuring a fair process tantamount to insuring a good outcome? I don't think so. I think it is creating the structure or implementing the structure, or making sure that a structure is in place, so that the parties themselves make sure that the process has integrity.

So to summarize what I'm trying to say, I think there are five things that are really important to look at.

First, no matter what role we take or how we see it, the key is that we are transparent about how we understand our role, as best we can. And within that there are a lot of other things we can do.

Second, we have to be realistic about our capacity—if people are relying on us as mediators to make sure that there is a fair process and a fair outcome, they are out of luck because we have very little capacity to make that happen unless we work through the overall structure. And that's the third thing.

This is as much about the structure within which we work. I have worked with many court mediation programs and court dispute intervention programs around the country, and the biggest problem is not how the mediator behaves, but how the structure is set up. The biggest ethical challenge we have is when we are asked to work within structures that we ought not to agree to work with—for example, working with a mediation structure that asks us to mediate a divorce in forty-five minutes. This is a serious ethical challenge.

Fourth, it's not just about mediation. I think we are far too occupied with our role as mediators. I think we have to look at the broader role

of dispute interveners: structural roles, third party roles, and allied roles.

And the fifth thing we have to look at is our fundamental purpose. To use child protection mediation as an example—in the studies and the surveys we've done, most program administrators would say the best outcomes in these cases occur when you get people talking to each other in a new way. The problem is judges are not so pleased if we report to them that we had a great conversation but didn't get an agreement and the case will have to be tried. So we are under pressure to get agreements, even when we know that the most important challenge in child protection is to change the nature of the dialogue. But at least we have to be sure that we're clear that our purpose is something other than simply serving what a court wants, and our purpose has to be to serve everyone in the process in some way, particularly families and children.

JOHN LANDE: Larry, I know you wanted to comment, and Josh as well.

LARRY: Let me put a finer point on the kinds of choices that I think mediators have to make, whether in well-structured processes or less well-structured processes. I think most mediators believe that a good process almost always yields a good outcome. At the heart of what we do as mediators is trying to structure a good process—whether we gin it up ourselves or let the system tee it up. But notice, that means we are taking responsibility for a good outcome by ensuring that the process is organized and managed properly. So, if a good process yields a good outcome—if we believe that—then we are obligated to say what we mean by a good outcome.

So, what would a good outcome be in a mediated case? I argue that (1) the outcome must be viewed as fair by the parties; and (2) the process and outcome ought to be as *efficient as possible*—that is the parties ought to think that whatever time and money was spent, was well-spent. Now, I'm not sure that the parties are the only ones who have a right to assess the outcome. The system managers might want to say something about that as well. So a good outcome is fair and efficient, and then Bernie mentions that the result should be stable—we don't want unhappy participants to shun their their negotiated commitments. This doesn't mean results can't be revised, but if an outcome is not stable, it probably wasn't a good process because the outcome wasn't one that people were willing to abide by.

Fair, efficient, stable, and now I would suggest a fourth indicator of the quality of a mediated outcome—and that is, it ought to be *wise*.

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Now what is a wise outcome? In retrospect, you could say that if the parties used the information available to them they probably reached as wise an outcome as they could. What a pity if they reached an outcome that didn't work well because they didn't bother to take account of the information or resources available to them. Fair, efficient, stable, wise—for me, these are the four qualities of a good mediated outcome.

As mediators, we need to be prepared to say what we think a good outcome is. If I take responsibility for a good outcome—or these four qualities of an agreement—then I've got to do something during the process to try to help the parties produce such outcomes. I have to remain impartial, but I can take responsibility in various ways for the management of the process. I can do this without taking sides, but I can make clear my commitment to helping the parties reach a high-quality outcome. I don't think that's a contradiction. I think I can ask questions that cause participants to think about choices they are making and whether those choices will lead to a "high quality" outcome. Here is an example:

OMG, that's gonna change the outcome!

Yes

Why?

'Cause I want to affect the quality of the outcome!

Why?

Because my whole reason for being involved is to try to help the parties reach a good outcome!

Am I trying to steer the outcome to a particular result because I favor one side or the other?

No. But in a societal sense, how can I justify people participating in a mediation process unless I can make a case that the process I am suggesting has a chance of producing good outcome? And so, by asking questions, I can make a difference.

JOSH (interrupting Larry): But, Larry, there is no requirement to be impartial in order for someone to help disputing parties promote a fair outcome that is efficient and wise.

LARRY: Good.

JOSH: So when you say that you, the intervener, need to remain impartial in order to promote "the good outcome," I can challenge that by saying, "no, you, the intervener, do not need to be impartial. You need to be really smart; you need to be savvy in terms of how to

facilitate a conversation that yields a good outcome.” We don’t disagree that a good process generates a good outcome.

LARRY: Phew.

JOSH: Let me restate my point. On those criteria you cite—fair, efficient, stable, wise—I don’t think the intervener being impartial is a necessary condition for effectively serving the parties’ goals that fare well on those standards. As a practical matter, it might be prudent to be impartial so people work with you, but there is nothing in principle that requires the mediator, the intervener, to be, in your words, “impartial,” and in mine, “neutral,” in order to help them reach such outcomes. You and I agree that good process generates good outcomes, where good process reflects just that—it is fair, efficient, and stable; but the standard of “wise” introduces a substantive, not process, criterion—you accept it but I reject it.

Just one final point before Bernie gets in. I understood your earlier comments—both those in the Vermont article⁵ and what you said today—to be that one of the real challenges is who the parties are. And if not all the parties—people affected by the outcome—are in the room, you don’t have a good process, even though everybody who actually is there does view it as “fair.” I’m not sure how—

LARRY (interrupts): Substitute “stakeholders” for “parties.”

JOSH: Okay. My question can be stated: *If all the stakeholders are not in the conversation, then is it the mediator’s duty—in terms of being responsible for the outcome, accountable for the outcome—that the intervener in some sense represents those interests?*

LARRY: I don’t think the neutral can represent those interests. I think that the neutral, in an effort to take responsibility for the quality of the outcome, can do a number of things to help ensure that all the appropriate stakeholding interests are represented, not by representing them but by saying, *Do you think a draft of this agreement ought to be reviewed before it’s finalized by a group that hasn’t been at the table? Aren’t you worried that those groups that have been left at the sidelines might try to block implementation of the agreement? Let’s at least give them a chance to review it before you finalize it. Maybe you want someone else sitting in, not in the same role as everyone else, but in some other related role. Maybe you want to make transparent what it is you’re*

5. Susskind, *supra* note 1.

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doing while you're doing it, so those groups can at least have a say.

I never imagined the mediator saying: *For the next half hour I'm going to represent a hard-to-represent group that isn't here. Watch me transform myself chameleon-like into that group and speak for them.* That's not what I'm saying. But there are a whole variety of ways in which I can take responsibility for the quality of an outcome without speaking for a missing group: a mediator can ask leading questions, suggest ideas and options, or offer to carry a draft of an agreement to others who are not present and try to incorporate their reactions into a final version of the agreement.

JOSH: So what should a mediator do if a fourteen-year-old single child doesn't want to participate in the mediation of a divorce between her parents, though she will clearly be affected by the outcome?

LARRY: I can suggest that a GAL⁶ be appointed for them and I could say to the parents, "Don't you think the interest of your child should at least be discussed here, through eyes other than yours and you have the option of a proxy to represent your child?"

JOSH: And the mother says, "No, I know exactly how my daughter feels."

LARRY: If both of them say that and I say, "Well it's my obligation to try and point this out to you, and if I can't convince you, then I can't convince you." But my responsibility for trying to ensure a fair outcome goes as far as aggressively trying to think of ways to suggest that interests not represented at the table could be represented—not to represent them myself.

JOHN LANDE: Or even insist that they are at the table?

LARRY: I could leave. That's the only form of insisting that I can think of.

JOHN LANDE: Bernie, do you want to straighten these guys out?

BERNIE: I would like to go back to something discussed earlier. I think it's misleading to say good process equals good outcome, especially in the family law area. I think that idea guides us down the wrong road all the time. I mean—people in this room can help me with this—there's a fair amount of data that shows that mediated outcomes, for example, don't necessarily differ in great degree from non-mediated outcomes in divorce. There may be more buy-in and greater nuance in

6. GAL is an acronym for "guardian ad litem."

the agreements; but it's not that the outcome itself is what's so different, it is the sense people have of ownership of the outcome and, maybe, the sense people have of putting some of their individual stamps on it. I also think we've been far too focused on outcomes. I think we have not delivered on this, and that's one of the problems we face with our credibility. We've said, *Hey we've got a process for you: we're going to get everybody together, we're going to come up with terrific outcomes that are going to be fair, efficient, stable, and wise, and we will all be happy about that*—and we haven't delivered. But I think what we can offer is a process that promotes a constructive engagement about key issues. A good process maximizes the chance that we will have different people coming together, involved in a constructive engagement about whatever the issue is—whether it is parenting or labor relations. And of course if we never get outcomes, that's also a problem.

Instead, I think we should view and articulate our primary purpose in bringing people together as being about helping them have the conversation that they need to have at that time, and to have that conversation go where it has the potential to go. And that's what I want, and my assumption is—and this actually works across many different kinds of disputes that I have been involved with—that if I am so focused on trying to get a good outcome, I will ultimately lose my capacity to help disputants have the kind of engagement they need to have and the result will not be a good outcome. The results of that will be that I will become an officer of the court trying to force an agreement on people that is not necessarily what they think is fair, efficient, stable, and wise—but what the court is advocating for. What really protects us against falling into this trap is remaining clear about what our fundamental ethical obligations are, regardless of the court's desire for us to come up with agreements and outcomes.

JOHN LANDE: Did I hear you correctly that you said there's no such thing as a good process?

BERNIE: No, you did not hear me say that. I think there's such thing as a good process, but I don't think that a good process should be equated to a good outcome.

JOHN LANDE: I'm going to make a brief comment and then open it up to the group because one of the things that is so wonderful about this conference is what a great job the organizers did in inviting fantastic people, most of whom could be up here on this stage themselves. So we want to get you engaged.

As I listen to this discussion, to me, a lot of it has to do with the

question of who makes the decisions and what are those decisions. Part of it, in the theory of mediation, is that the parties make the decisions. That's the underlying rubric of self-determination. And then we get in a whole cast of characters. You have the mediators, and what is their role? I think that might be part of the issues that we've been talking about. Bernie is talking about the designer and obviously that makes a difference. When you're in the court context, the court has some responsibility if this is a justice event, as well. If they are forcing people to go into this process to some extent, maybe the court has some responsibility. Lawyers have a responsibility as well, if there are lawyers involved. So, to me, a lot of the question is, "Who decides?" And I suspect that part of the issue—and I know in looking at the survey results—is that we're leaving the parties behind. We have this whole panoply of experts and professionals, and the parties aren't making the decisions, which may be underlying some of Josh's concerns.

With that, I'm going to turn to the audience unless there's anything else that any one of the panelists would like to jump in on. Who would like to straighten them out?

AUDIENCE: My name is Kent Lawrence. I'm from Chicago and I'm an attorney, and I'm also with a foundation that has funded and is particularly interested in systemic improvement rather than direct service delivery. What I'm detecting is—and which is not unusual—is a semantic discussion. And I would challenge the use of the word "justice" or what the "justice system" is about, which, in my view, is really to get a conclusion, not to get justice—even if there's a perception by all the players that if it's a good result, it's just. And that ADR—whether it's mediation or otherwise—is attempting to short-circuit that by having a less-resource-intensive, faster process. And there's probably a likelihood that people would prefer ADR because then people are really a part of getting that result and it's more flexible than any kind of a formal judicial process. So what I'm really asking is, don't you just go around and around when you throw out words like justice system and justice and do not look at what really is being done?

LARRY: Again, if we can talk about your question in more than the family and court-annexed context, there are all kinds of situations in the public arena where we just have a stalemate, and there is no way to force an outcome because a stalemate is okay for one side. I mean, we don't have to get into a discussion of the larger political debate in the United States at the present time, but one view of why we are where we are is that no result is fine—some of us think—for at least one side.

Now, if we say in the court context that ADR saves time and saves money, if that's all we say—saves time, saves money—is that a good enough reason for the parties to want to use it? Maybe for some, but not necessarily for all. If we say it saves time, saves money, and gives the parties more control over the outcome, is that enough of a reason for the parties to want to use mediation rather than rely on the formal court system? I'm not talking about a context where you don't have the court system as a fallback. In the court system, if you say ADR saves time, saves money, and gives parties more control over the substance of the outcome, you'd think that a vast number of people would prefer that. If that were the case, though, ADR systems would be overwhelmed. And they aren't. My sense is that you have to promise something else about the quality of the outcome besides saves time, saves money, and gives the parties more control, in order to get people to say I want to do it this way, rather than the other way. And so, merely being definitive is not much of a selling point, especially because the other options can be definitive, too—the other options may take longer, cost more, and not give the parties as much control. We have to make a stronger case for why people should use the ADR alternative. Those of us who advocate for ADR have to make the case—and my argument is—and for me, “saves time, saves money”—that's not enough. “Saves time, saves money, gives the parties more control”—that's not enough. Results are “fairer, more efficient, more stable, and wiser”—oh, that's a different story. That is what we should be selling.

JOSH: To pick up on that—I think we may all agree on this point. To promote the use of mediation because it saves the parties time and money and provides them some control over the outcome really isn't enough. There is a dynamic and quality about that conversation that must be structured and present. We've all experienced it. I'm not a big fan of the phrase, the “magic of mediation,” but it is reaffirming to see people interact with each other and carry on a conversation in a constructive manner. I think that, to some degree, Bush and Folger⁷ have it right: when the discussion is conducted in a thoughtful, constructive way, a dynamic occurs that generates an important social benefit that is neither time related, money related, nor in a sense,

7. See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

controls over the outcome.⁸ There's an engagement as members of a democratic society that is being facilitated that is its own value that should be supported.

BERNIE: It strikes me that the problem that we have here with the use of mediation is that people don't naturally see third parties as something they want to use. I ask all of you to think about when you use third parties in your own lives—it isn't the first, second, third, or fourth thing people turn to in a conflict—it's hard to get their heads around what using a third party means; it's hard for people to understand how it's going to give them the power, and the voice, and the outcomes they're hoping for—other systems give much more straightforward answers to them, even if they're bad answers. We need to understand this if we really want to grasp the problems in the utilization of the system. Studies on mediation show that people are very happy about the use of a third party in retrospect, but prospectively, they are not so eager to enter into mediation. And so, no matter what context we are working in, we need to consider how we address the needs people seem to have that they don't see third parties as meeting, if we really want to change the dynamic of how much our services are going to be used.

JOHN LANDE: For me, it's a question again of who decides. What should the criteria be? I think about a case I mediated a long time ago. A couple divorced. They were not very happy at the end of the process, but they reached an agreement. It was as good as they could get under the circumstances. I don't think that they would have said it was fair, efficient, stable, or wise. But they reached an agreement and they went on with their lives. Is it for me as a mediator to say, "Well, I'm sorry to say that it wasn't a good enough process"—or is that for them, or the courts, or whomever? So, for me, even the question of what the criteria should be is a question about who should be deciding about that.

AUDIENCE: One point from my own research—what I found—that people weren't keen on mediating because their lawyers had portrayed court-connected mediation, for example, as a process we have to go through because the court mandates it, nothing much is going to be accomplished there. On both sides—for plaintiffs and defendants—people are very, very much affected by (particularly one-shot plaintiffs

8. *Id.* at 81–112.

and defendants) how the lawyer portrays various processes within litigation or mediation, so something maybe needs to be done at that juncture, in terms of getting people more interested and saying that this is something more justified and perhaps can even be better. But, of course, there are various conflicting interests involved that feed into that.

JOHN LANDE: So the first thing we should do is kill all the lawyers?

LARRY: No, no, no. Forgive me, because I'm about to say something I know that a majority of you won't agree with. I think "mandatory mediation" is a contradiction in terms. I've never understood how you can put mandatory before mediation and call it the same thing *because* you want people to make the choice and the effort and to put the energy in on some grounds other than "you gotta." And that's the justification when it's mandatory and so people say, *is it over yet so we can move onto the real thing?* Not just the lawyers, everybody—if you don't make the case there's an advantage, then I don't see how you can expect people to choose ADR.

JOSH: We disagree. And our good friend Frank Sander made the distinction a long time ago—being coerced into mediation is not the same thing as being coerced in mediation.⁹ And the presumption that one process, namely the litigation process, is the primary one, and that everything else should be voluntary is a design feature that I don't think we need to embrace. I do want to respond, though, to lawyers who might be saying that going to mediation is a waste of time—for those teaching in a law school environment, I think we're doing better in how we are training people to participate constructively, so that it is not a waste of time or resources. But, having acknowledged that, I've got to say that, from my own experience and observations, there may be some truth to the claim that some lawyers and parties have been in mediations where it has been a complete waste of time because of the manner in which the mediator conducted himself or herself.

AUDIENCE: My name is Grace Hawkins, and I'm the director of a conciliations court in Tucson, Arizona. And we do have mandatory mediation, but what we've always told people is that it's mandatory that you attend, but it's not mandatory that you have to reach an agreement;

9. Frank E. Sander, H. William Allen & Debra Hensler, *Judicial (Mis)Use of ADR? A Debate*, 27 U. TOL. L. REV. 885, 886 (1996).

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we just structure the process. So I think that's kind of where the discussion about mandatory needs to come from—mediating isn't mandatory, but attending is mandatory and whether they can reach an agreement or not depends on the process.

AUDIENCE: Debra Browyard, office of DR in Nebraska. Thanks for the panel. Sitting here, we have so much power, vision, intelligence, and experience. I think about the year 2050—two zero five zero—and what is our, as mediators, core vision of our values as mediators playing out in 2050? I think about, as Josh just said, how the design of the justice system is channeling all toward litigation now. I'd love to revisit and rediscover what the multi-door courthouse is, and see that the public would say, *Oh I have this issue, I can go through and have constructive engagement—this is a value set with the mediators.* I would love to hear what the panelists think about the specter of the future without mediation at all in the justice system versus how can the formal justice system provide a forum for what we all believe in and work in.

BERNIE: I don't think there's going to be a future without mediation in the justice system—I think it's here, in one form or another. I think we get stuck on words—I'm with you on that—so saying “mandatory” in front of “mediation” may be misleading. Try putting some other word in there. You have a mandatory process where people have to get parent education in a lot of court systems; you have a mandatory process in which parents have to be screened for a variety of different services they might use.

As we go towards the future, the courts have to have a much more multifaceted, nuanced way of providing services to people. Peter Salem's article that was so controversial on instituting a triage process as opposed to mandatory mediation,¹⁰ while we have to think this through a lot more practically, is right on track with where we're going to be going in the future. Families need lots of different things when they go to court, and court itself seldom meets those needs. Court hearings create the illusion of finality, but they don't really create finality because people keep coming back. Courts create a final decision for the moment. I think as we look to the future we are going to have to promote a much more multifaceted approach to helping families engage about the issues that they really need to face. One element of it will

10. See Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371 (2009).

always be providing services to help people talk to each other—you can call it whatever you want. I don't think that's going away; it may be under a lot of stress, we'll see programs cut out, and we'll see programs reinstated elsewhere—that's just going to be part of what we have to face. My concern is if that's the whole range of services—that is, if the choice for families is that they either go to court, enter into mediation, or some variation on that—then we are missing out on a lot of potentially valuable services. Families need a broader range of services than that. And if we're so tied into mediation that we're unable to see the larger picture or relate to some of those other needs, I think that we will tend to lose credibility over time.

JOSH: I love this; this does take me back thirty years. At least at that historical moment, “the justice system,” to which I am wedded and love, failed our citizens in important ways. When people occupied a University's president's office, law enforcement officers came in and beat people over the heads with billy clubs—and then those charges and countercharges went into the court systems as criminal and civil charges. But what people wanted to talk about were faculty recruiting procedures that would lead to a more diverse faculty profile, and, of course, those things couldn't be addressed in their litigation. I think that the energizing dimension of being involved in this work is the possibility—I would argue, the necessity—for mediators to move from viewing themselves on the Riskin grid¹¹ as being “facilitative narrow” or “evaluative narrow” to embracing the “broad” view of disputes—that is where opportunities lie for people talking about things that matter to them. I do believe that the legal system can only do so much—I do embrace this notion of institutional integrity. But to me, in 2050 there will be multiple challenges confronting our citizens—and multiple occasions for helping to do justice. I presume that the courts will remain a primary dispute resolution institution, but certainly that is not now nor will it be the only place where solving problems will take place in robust, engaging ways. I think the future for both systems—adjudicative and mediatory—can be bright.

LARRY: I teach not only in law school but also in an urban planning department. We teach a method called “scenario planning.” The idea is to postulate multiple, plausible scenarios as a way of thinking about the

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

appropriateness of actions you are thinking about taking now. If you judge them against multiple possible futures, you can pick a way of proceeding that's likely to work regardless of which future actually occurs.

So, here's Scenario One: Imagine it's 2050 and online justice and dispute resolution have pretty much taken over. The automated dispute resolution support system is going to ask what your complaint/problem/dispute is. Then, it is going to ask you to write down your last best offer. The computer will collect that information from all the parties. There will be an algorithm built into the computing system that typically splits the difference—although it can be any algorithm you want. The result will be emailed to you. This will save even more time and even more money. The parties will feel that they are in control, but really, no problem-solving will take place. That's Scenario One. No more face-to-face interaction. They won't need us or anybody like us. I'm sure some of you have purchased stuff online and had a problem with delivery. You've already bought into an impersonal online dispute resolution system.

The alternative scenario, Scenario Two, is real problem-solving. That is, mediation on a case-by-case basis that doesn't rely on general rules or formulas. Scenario Two will provide real problem-solving in each separate case. Read the new book called *Practical Wisdom* by Barry Schwartz and Kenneth Sharpe.¹² It's a brilliant book. It says that general rules for handling difficult situations are not what we need. Instead, we need the ability to make wise decisions in particular cases.¹³ How do we train people to do that? How can we assist in that process? Mediators do case-by-case problem-solving. You can't get that from an automated system. And if we can't make the case for Scenario Two, then we are likely to end up with Scenario One in 2050. People like us won't be in the story at all. Because if all we argue is that ADR saves time and saves money, we can probably do that in an even more efficient fashion online, using a fully automated system. ADR has to offer something substantial: problem-solving in which the details of a particular case decide the outcome.

JOHN LANDE: With that, we are going to bring this to a close. As

12. BARRY SCHWARTZ & KENNETH SHARPE, *PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING* (2010).

13. *Id.* at 5–6.

I look at the title of this conference, *The Future of Court ADR: Mediation and Beyond*, I think about Buzz Lightyear and his saying, “To infinity and beyond.” We may not have gotten to infinity yet, but hopefully this has been a useful beginning for this conference. If you look at the subtitle, *Mediation and Beyond*, obviously mediation is a central part of the court ADR process, as we have started to talk about here, but there are also other things. Peter Salem, in his infamous article, has suggested that mediation is not necessarily the first, only, or necessary process for everyone going through the court ADR process.¹⁴ Hopefully, this has been a useful way to begin this conference. And with that, let me say thank you.

14. Salem, *supra* note 10.