

# The Current State of Court-Connected ADR: (Caught In/Living Through/Hoping for the End Of) the Ugly Duckling Phase

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## THE CURRENT TRANSITIONAL STATE OF COURT-CONNECTED ADR

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Obviously, there is much to commend in court-connected mediation and what it offers to people caught up in disputes. With the help of mediators, parties may find it more feasible to reflect on their legal and extra-legal needs, prioritize among these needs, engage in open and thoughtful conversation, develop integrative solutions, and even consider the mediators' dispassionate feedback regarding positions or expectations. Proponents of court-connected mediation can also point to a multitude of accomplishments. For example, and most strikingly, many cases settle in mediation.<sup>1</sup> For the vast majority of those cases, litigants express satisfaction with the process and indicate that they had the opportunity to express themselves, that the other parties heard them, that they had input into the outcome, and that they view the process as fair.<sup>2</sup> Additionally, parties rarely seek to undo the settlements reached in mediation, though this sometimes occurs.<sup>3</sup> Parties generally view mediation as being as satisfactory or fair as trial,<sup>4</sup> and sometimes even more so.<sup>5</sup> Some research indicates that mediation

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1. See JENNIFER E. SHACK, RESOL. SYS. INST., BIBLIOGRAPHIC SUMMARY OF COST, PACE, AND SATISFACTION STUDIES OF COURT-RELATED MEDIATION PROGRAMS 7 (2d ed. 2007) (stating that "58% of unlimited cases and 71% of limited cases settled as a result of mediation"); Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 58 (2004) (reporting that "[m]ost studies reported a settlement rate between 47 and 78 percent").

2. Wissler, *supra* note 1, at 58.

3. See James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 87 (2006); James R. Coben & Peter N. Thompson, *Mediation Litigation Trends: 1999-2007*, 1 WORLD ARB. & MEDIATION REV. 395, 403 (2007).

4. Wissler, *supra* note 1, at 65-66.

5. *Id.* at 66.

saves time and costs for both courts and parties.<sup>6</sup> Occasionally, mediation even achieves communication and outcomes that would be unlikely in other court-connected procedures.<sup>7</sup> This catalogue of achievements clearly affirms the value of mediation.

For well over a decade, however, other evidence has triggered concerns that mediation has strayed from its core mission as a mechanism for the meaningful and voluntary resolution of disputes<sup>8</sup> and that it has become entangled in the contentious game playing and covert manipulation<sup>9</sup> that can occur in litigation. Judicial opinions reveal satellite litigation over (1) lawyers' authority to enter into mediated

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6. See Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 873 n.45 (2008); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. EMPIRICAL LEGAL STUD. 843 *passim* (2004) (citing to studies showing such effects).

7. See Dwight Golann, *How Mediators Can Help with Relationship Repairs*, 19 ALTERNATIVES TO HIGH COST LITIG. 193, 197 (2001); Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 272-77 (observing that when parties attend mediation, many lawyers perceive that the outcomes are changed to reflect the parties' needs and interests); Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401, 429 tbl.10 (2002) (reporting that about 31% of attorneys voluntarily choose mediation to "[i]ncrease potential for creative solutions"); Michael Moffitt, *Three Things To Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203, 1212-14 (2009) (describing the sorts of creative, customized outcomes more likely to be achieved through settlement than litigation); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 21 (2003) (explaining the development of the concept of "problem-definition" to capture "the great virtue of mediation," which "was to help the parties address—in addition to their positional claims—what was really at stake for them" and reach responsive solutions); Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 292-93 (2003); 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, 629-38 (2004) [hereinafter Welsh, *Stepping Back Through*] (describing the communication and outcomes that occurred in special education mediation sessions that were the subject of a small qualitative study). *But see* Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 813 (2001) (citing to research finding that mediation was no more likely than adjudication to produce creative or nonmonetary outcomes) [hereinafter Welsh, *Making Deals*].

8. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1400-04; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1600-10 (1991); see also Eric Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055 (1996) (discussing a lack of scholarly criticism of ADR).

9. See Jim Coben & Lela P. Love, *Trick or Treat: The Ethics of Mediator Manipulation*, ABA DISP. RESOL. MAG., Fall 2010, at 18, 20-21, 25.

settlements on their clients' behalf;<sup>10</sup> (2) lawyers' competence in advising their clients to accept<sup>11</sup> or reject<sup>12</sup> mediated settlement agreements; (3) the influence exercised by mediators;<sup>13</sup> (4) good-faith and fair-dealing violations;<sup>14</sup> (5) the proposed *vacatur* of preliminarily approved mediated class settlements;<sup>15</sup> and (6) imprecise contract formation.<sup>16</sup> The process of mediation was adopted by many courts as a means to *ameliorate* wasteful conflict and reduce the courts' dockets.<sup>17</sup> However, mediation (or more accurately, those participating in mediation) may now be contributing to such conflict and dockets.

More worrisome, though, are the cases suggesting that some repeat users of mediation are exploiting certain aspects of the process, particularly the obligation of confidentiality and the mediation privilege,

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10. See, e.g., *N. Me. Transp., LLC v. OneBeacon Am. Ins. Co.*, No. 1:10-cv-00370-JAW, 2011 WL 5009470 (D. Me. Oct. 19, 2011); *Gatto v. Verizon Pa., Inc.*, Civ. Action No. 08-858, 2009 WL 3062316 (W.D. Pa. Sept. 22, 2009) (stating that lawyers must have "express authority" to bind clients to settlement agreements); *Jordan v. Adventist Health System/Sunbelt Inc.*, 656 So. 2d 200 (Fla. Dist. Ct. App. 1995); *Gordon v. Royal Caribbean Cruises Ltd.*, 641 So. 2d 515 (Fla. Dist. Ct. App. 1994); *Omni Builders Risk, Inc. v. Bennett*, 721 S.E.2d 563 (Ga. Ct. App. 2011).

11. See *Benesch v. Green*, No. C-07-03784 EDL, 2009 WL 4885215 (N.D. Cal. Dec. 17, 2009); *Cassel v. Super. Ct.*, 244 P.3d 1080 (Cal. 2011); *Guido v. Duane Morris LLP*, 995 A.2d 844 (N.J. 2010).

12. See *Fehr v. Kennedy*, 387 F. App'x 789 (9th Cir. 2010).

13. See *Olam v. Congress Mortg. Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999); *Allen v. Leal*, 27 F. Supp. 2d 945 (S.D. Tex. 1998); see also Nancy A. Welsh, *Reconciling Self-Determination, Coercion, and Settlement*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 420, 430 (Jay Folberg et al. eds., 2004); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 9-15 (2001) [hereinafter *Welsh, Thinning Vision*] (describing the allegations in *Allen v. Leal* and other litigated matters, as well as allegations of mediators' violation of ethics rules).

14. See *Doctors Hosp. 1997 LP v. Beazley Ins.*, Civ. Action No. H-08-3340, 2009 WL 3719482, at \*2, \*6 (S.D. Tex. Nov. 3, 2009) (involving an insured and insurer, as well as an alleged Mary Carter agreement).

15. See *Ehrheart v. Verizon Wireless, LLC*, 609 F.3d 590 (3d Cir. 2010).

16. See *Gatto v. Verizon Pa., Inc.*, Civ. Action No. 08-858, 2009 WL 3062316, at \*10 n.1 (W.D. Pa. Sept. 22, 2009) (calling for settlement negotiations to be conducted in writing, rather than orally, to avoid confusion over the terms of the agreement); *Haghighi v. Russian-Am. Broad. Co.*, 577 N.W.2d 927 (Minn. 1998) (deciding the enforceability of a mediated settlement agreement that failed to include statutorily-required terms); *Williams v. Kan. City Title Loan Co.*, 314 S.W.3d 868 (Mo. Ct. App. 2010) (reviewing a decision involving the failure to memorialize mediated settlement agreements, as required by court rules).

17. See generally *CTR. FOR DEMOCRACY & GOVERNANCE, U.S. AGENCY FOR INT'L DEV., ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS' GUIDE 5* (1998) (outlining the forces that led to alternative dispute resolution).

to the detriment of other users of the process.<sup>18</sup> A line of cases has emerged in which lawyers are the key actors in tales of alleged misbehavior and even malpractice. The defendant-lawyers in these cases have then asserted the mediation privilege against their own clients in order to keep the clients from introducing evidence that might help to prove claims of legal malpractice.<sup>19</sup> The upshot is that these lawyers have used mediation as a shield and an impediment to their clients' access to the very forum that lawyers are supposed to hold most dear—the public courtroom.

Though these cases are relatively few in number, they should motivate mediation proponents to develop and implement strategies to counteract such misuse of mediation—through advocacy for measures such as tightening mediation privilege statutes, mediators' insertion of preemptive clauses in mediation agreements,<sup>20</sup> routine reminders to parties during mediation that they *can* go to trial and that this is a civic right that we respect and value,<sup>21</sup> use of caucus as a means to allow parties to rescind or amend tentative settlements,<sup>22</sup> and the inclusion of a short cooling-off period in mediated settlement agreements.<sup>23</sup> But why have mediation proponents not *already* undertaken all of these tasks? What point must we reach before we initiate reform? Must a crisis occur? What sort of a crisis? What counts as a crisis?

Perhaps we as ADR proponents are at one of those uncomfortable “ugly duckling” transition points, as court-connected mediation and

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18. See, e.g., *Cassel v. Super. Ct.*, 244 P.3d 1080, 1094–96 (Cal. 2011) (discussing cases where attorneys used the confidentiality of mediation to keep communications with clients from disclosure).

19. See, e.g., *Fehr v. Kennedy*, 387 F. App'x 789 (9th Cir. 2010); *Benesch v. Green*, No. C-07-03784 EDL, 2009 WL 4885215 (N.D. Cal. Dec. 17, 2009); *Wimsatt v. Super. Ct.*, 61 Cal. Rptr. 3d 200 (Ct. App. 2007).

20. See Nancy A. Welsh, *Musings on Mediation, Kleenex, and (Smudged) White Hats*, 33 U. LA VERNE L. REV. 5, 22–23 (2011) (citing to Justice Ming Chin's reluctant concurrence in *Cassel*, 244 P.3d at 1098 (Chin, J., concurring in the result), and to the UNIFORM MEDIATION ACT § 6 (2003) and urging mediators to include clauses in their mediation agreements that would exempt from the mediation privilege any mediation communications offered to prove or disprove claims of professional misconduct or malpractice).

21. My thanks to Howard Herman, Mediator & Director, United States District Court for the Northern District of California, for the conversation that reinforced the importance of this point.

22. This technique was used by Georgia mediator Edie Primm. For a discussion of post-settlement settlement, see Max H. Bazerman & Katie Shonk, *The Decision Perspective to Negotiation*, in THE HANDBOOK OF DISPUTE RESOLUTION 52, 55 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

23. See Welsh, *Thinning Vision*, *supra* note 13, at 6–7.

other forms of court ADR move toward the next stage of the field's evolution. These transition points are necessary, but as the name I have given them implies, they are neither pretty nor terribly welcome.<sup>24</sup> On the other hand, the discomfort associated with these periods enables us to let go; though we recognize and are grateful for what we have learned, we are ready to bid the past farewell and turn toward the future we must now create.

During Marquette University Law School's recent symposium, participants had the opportunity to take stock of the current state of court ADR, with special emphasis on the family law area. We learned of innovative programs and processes—but we also learned how difficult it has become to describe the status of court ADR in a country as large and decentralized as the United States, with courts and governance traditions that vary dramatically from state to state and even from county to county. We learned that while exciting ADR innovation is occurring in some courts, other courts' ADR programs are under siege and have been forced to retrench and justify themselves as core to the courts' mission. We learned about the many initiatives designed to protect children caught up in the conflict and pain that often accompany divorce; we also became aware of the difficulty of establishing clear professional and normative boundaries among the increasing numbers and types of court-connected third parties in this context—e.g., family mediators, *guardians ad litem*, and lawyers assigned by courts to represent the interests of children.

Thus, we learned that ADR's current interaction with, and patchy integration into, the courts is uneven and messy. We also became aware of messiness within the ranks of those who identify as proponents of mediation and court ADR. At the symposium, the various stakeholders in court ADR—lawyers, judges, mediators, administrators, policymakers, funders, and academics—engaged in impressive dialogue.<sup>25</sup> Representatives of the legal, social, and psychological

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24. I considered naming this a "chrysalis" period, which has much more positive connotations, but our field's transformation is not occurring in private and thus comfortably out of view.

25. These efforts have occurred before, often with Christopher Honeyman serving as a key leader or catalyst. See, e.g., Robert M. Ackerman & Nancy A. Welsh, *Interdisciplinary Collaboration and the Beauty of Surprise: A Symposium Introduction*, 108 PENN ST. L. REV. 1, 1–3 (2003); Christopher Honeyman, Barbara McAdoo & Nancy Welsh, *Here There Be Monsters: At the Edge of the Map of Conflict Resolution*, in *THE CONFLICT RESOLUTION PRACTITIONER: A MONOGRAPH BRIDGING THEORY AND PRACTICE* 1, 15–16 (2001). See generally Christopher Honeyman, *Movable Feast: An Introduction*, 5 CARDOZO J. CONFLICT

professions that populate the field of dispute resolution also sought to reach out to, and learn from, each other. Simultaneously, though, we learned that even within the field of dispute resolution, which espouses and truly values both dialogue and collaboration, we can be insufficiently respectful of the uniqueness and depth of others' experience and knowledge. Like many of the lawyers and disputants we seek to serve, we like to be heard and to be recognized as people with expertise and wisdom. It is hard, and requires tremendous humility and patience, to listen. So, court ADR's internal relations also can be confusing and difficult.

The current ugly duckling phase of ADR's evolution, however, is most obvious in the persistent tension that exists between mediation proponents' strong sense of what makes us special or valuable<sup>26</sup> and our equally strong desire to find a secure and prestigious home within the courts. This ground has been well-plowed,<sup>27</sup> but it still plays a central role in court ADR's internal confusion, as well as its uneven and messy integration with the courts and even some lawyers' apparent temptation to abuse the protections offered by the mediation process, with relative impunity. Like most ugly ducklings (e.g., rebellious teenagers, uninvited newcomers to insular communities, etc.), we are not sure we belong and cannot decide whether the better strategy is to declare ourselves as different or find a way to fit in.

Much of what we learned at the symposium was not new. At this point, we have three decades of experience with the institutionalization of court ADR. Court ADR is no longer an innovation and has existed

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RESOL. 145 (2004); Christopher Honeyman et al., *New York Movable Feast: Boundaries to Practice*, 5 CARDOZO J. CONFLICT RESOL. 147 (2004); Christopher Honeyman et al., *Washington, D.C. Movable Feast: The Odds on Leviathan—Dispute Resolution and Washington, D.C.'s Culture*, 5 CARDOZO J. CONFLICT RESOL. 159 (2004).

26. See JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 1–31 (2d ed. 2006); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 185–88 (2003); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 2, 5 (2000); Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57 (2004); Welsh, *Thinning Vision*, *supra* note 13, at 3; Nancy A. Welsh, *You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 17 AM. BANKR. INST. L. REV. 427, 430 (2009) [hereinafter Welsh, *Mother's Laugh*]; Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929, 930–31 (2004).

27. Robert A. Baruch Bush, "What Do We Need a Mediator For?": *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 1 n.1 (1996).

long enough to develop its own bureaucracy. Over the past ten years, however, court administrators and scholars have repeatedly reported that all was not well. They detailed significant reductions in court ADR staffing and in the amount of time parties are expected to spend in mediation, threats to cut ADR programs unless they could justify themselves as “core” to the mission of the courts, and pressures to produce high settlement rates.<sup>28</sup> Some proponents of family-court ADR have urged a move away from mediation and toward hybrid ADR processes that pair strongly evaluative or adjudicative functions with facilitative or mediative functions, in order to assure finality. Obviously, such developments could threaten the primacy of, and courts’ support for, mediation.<sup>29</sup>

The Marquette symposium therefore offered a particularly good opportunity to assess court ADR proponents’ current understanding of our field, its value, and the implications of this stage of its development.<sup>30</sup> At the symposium’s conclusion, the participants were asked to respond to the following questions: “Based on your experience and what you’ve heard during the symposium, what is the most

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28. See Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, a Time of Change*, 95 MARQ. L. REV. 993 (2012); see also Leonard Edwards, *Comments on the Miller Commission Report: A California Perspective*, 27 PACE L. REV. 627, 628, 656 (2007) (advocating mediation for New York while identifying challenges in California, including one-hour mediations as result of resource and funding issues); Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RESOL. Q. 3, 29 (2004) (acknowledging reduced time for mediation); Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 PENN ST. L. REV. 43, 65–66 (2003) (describing the challenge and opportunity presented when a state office of dispute resolution was required to “justify general revenue funding from the state” and “identify performance measures” without relying solely on “efficiency arguments” (internal quotation marks omitted)). But see Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN ST. L. REV. 327, 339 (2003) (asserting that courts increasingly are focusing on their long-term goals and therefore are “paying attention to the human element of conflict beyond the legal dispute itself[, which] was the impetus for hundreds of state chief judges abandoning short-term efficiency goals and signing a pledge committing the courts to become more ‘problem-solving’” (citing and quoting CONF. OF CHIEF JUSTICES, 52ND ANN. MEETING, RESOLUTION 22 (2000); CONF. OF STATE CT. ADM’RS, RESOLUTION IV (2000))).

29. See Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 379 (2009); Welsh, *Mother’s Laugh*, *supra* note 25, at 429.

30. See generally Robert W. Rack, Jr., *A Letter to My Successor*, 26 OHIO ST. J. ON DISP. RESOL. 429, 430–33 (2011) (reflecting, after nearly twenty-nine years in his position, on his approach to integrating his mediation program with the court); Robert W. Rack, Jr., *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, 17 OHIO ST. J. ON DISP. RESOL. 609 (2002) (analyzing the “institutionalization” of mediation in the federal courts over the twenty-five years following the 1976 Pound Conference).

important ‘value-added’<sup>31</sup> that you believe court ADR brings to the courts?” and “What must occur in order for you to judge current or imminent change [to court ADR] as ‘good?’” My review of the written responses to the first question suggests the following primary sense of our field’s value, especially in the family area, among the colleagues who attended the symposium:

*We offer the added value of allowing disputants to come to their own resolution.* We offer self-determination to parents in family-court ADR; the opportunity to deal with what is really important to them; individual engagement; and the opportunity for parents to take responsibility, work through challenges, and arrive at well thought-out solutions.

*We offer the added value of process choice.* We offer additional dispute resolution options and the opportunity for diversion to processes that will allow divorcing spouses to arrive at the most appropriate dispositions.

*We offer the added value of a dignified role for disputants.* We offer a problem-solving approach (including the inclusion of key stakeholders who would not have legal standing to participate in litigation) and the opportunity for parents to behave decently, handle conflict better, learn how to communicate, and engage constructively.

These responses suggest that a certain sort of faith, grounded in the principle of self-determination, continues to animate the field of ADR.<sup>32</sup> ADR proponents believe in providing people with the opportunity and tools to be their best, enabling them to take responsibility for making serious decisions in a deliberative, thoughtful manner. We believe that deliberation and informed decision-making are possible, especially if people are given the right tools and sufficient time. We believe in the value of making good and customized decisions and arriving at real resolution. And, finally, we believe that people *want* to take responsibility and *want* to make the decisions that will affect their lives.

Admittedly, participants in the Marquette symposium also identified the following effects of mediation as “value-added,” but much less frequently:

- Easing court dockets;
- Providing education and information to parties even if

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31. Questions about the “value-added” benefits of mediation are common. See Baruch Bush, *supra* note 26, at 1.

32. See also Gary L. Gill-Austern, *Faithful*, 2000 J. DISP. RESOL. 343, 361 & n.75 (2000).

- disputed issues were not resolved;
- Providing resource savings in terms of time, money, and life disruption;
  - Increasing compliance with outcomes; and
  - Offering parents a better view of the court system.

It is striking that the more practical advantages of court ADR garnered so many fewer votes. It appears that for those who are in the trenches of court ADR, meeting the institutional, efficiency-and-effectiveness-oriented needs of the courts is much less inspiring than helping people achieve their potential, especially in consensual processes like mediation.<sup>33</sup>

What then of the participants' responses to the second question? Recall that the participants were asked to consider what they had heard over the course of the symposium, often involving current or imminent change, and to determine "[w]hat must occur in order for you to judge current or imminent change [to court ADR] as 'good?'" Overwhelmingly, participants indicated that they would judge current or imminent change as "good" if it involved greater institutional support for court ADR—such as better financing and broader institutional support for ADR innovations, funding or alternative resource expansion, the creation of new opportunities and programs, diversified services for parties, openness to innovation, flexible processes that match the complexity of race and economic differences, the implementation of new court ADR programs, and inclusion of ADR in law school curricula and bar exams. A few participants admitted that they would feel good about change if it involved "mana from heaven," such as an unexpected shift in stimulus funding and a growth in targeted tax revenues, or assurances that everyone involved in court ADR would keep their jobs.<sup>34</sup>

Perhaps this set of responses simply expresses court employees' legitimate fears about job security and their hope for reassurance. But is there also something more here? Those of us who are court ADR

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33. It is important to recall, of course, the setting in which these questions were asked. The respondents were people who had made the choice to attend a symposium focused on the future of court ADR. Perhaps it should not be surprising that this self-selected group would perceive court ADR as having a value separate from the mechanics of judicial administration.

34. Consistent with these sentiments, participants later emphasized the importance of making personal connections with key judges and policymakers in order to increase their understanding and support of court ADR.

proponents often identify ourselves as “different”—in a good way. But ugly ducklings are noticeably “different”—and it is not always advantageous to be identified with such a conspicuous and different group, especially when resources are, or are perceived as, increasingly scarce. Indeed, these sorts of conditions predictably set the stage for conflict between different groups.<sup>35</sup> Nonetheless, we want the courts to accept us for who we are and what we do—and encourage our commitment to serving people’s better natures—even when we have failed to demonstrate how our commitment to this vision assists the courts in justifying their existence or fighting for their share of declining economic resources.<sup>36</sup> Meanwhile, as already noted, we may have allowed some to use our process—and particularly the promise of the

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35. See Ronald J. Fisher, *Intergroup Conflict*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 166, 166–67 (Morton Deutsch & Peter T. Coleman eds., 2000).

36. Professor Bobbi McAdoo and I have previously observed that “[i]f they are honest, courts will clarify that though these objectives [i.e., producing outcomes that respond to litigants’ unique extra-legal needs, represent parties’ self-determination, or maintain or enhance relationships] are laudable, they must yield to the objectives that are more salient to the mission of a public civil litigation system.” 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, 426 (2005). At the same time, there will be some parties who will be likely to refuse to comply with outcomes or will return to court repeatedly with new claims arising out of a continuing conflict. ADR (and especially mediation) proponents may be particularly able to demonstrate the value of mediative functions for these parties. See Riskin & Welsh, *supra* note 6, at 928–29 (suggesting that courts will benefit from offering customized mediation to a subset of disputants, just as courts have chosen to develop specialized courts to meet the needs of certain litigants). But see John Lande, *How Much Justice Can We Afford: Defining the Courts’ Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213 (2006). Professor Lande proposes, in light of reduced trial rates, several alternative strategies to enable federal courts to achieve their mission of providing justice including: giving litigants an array of process options from which to choose; collecting and providing to litigants data regarding negotiated settlement outcomes; designing court facilities to accommodate various dispute resolution processes; re-allocating judicial responsibilities to permit full-time Article III judges to focus on conducting trials; using local advisory groups to make changes in courts’ rules and internal operating procedures; and working with other local entities to respond to problems facing the justice system. Lande, *supra*, at 233–47. Professor Lande also examines options to increase the number of trials. *Id.* at 247–51.

It is important to note that a few symposium participants hinted that they might be willing to perceive current and imminent changes in court ADR as good, even if they involve cutbacks, but only if such change is based on: (1) data showing court ADR’s impact for parties or evaluation of the experience parties have in ADR; (2) demonstration of cost-effectiveness of ADR to courts; (3) honesty and transparency about who is affected by court-ADR changes and how they are affected; and (4) realistic standards of service. I suspect these respondents anticipate that any such assessments will produce positive results for court ADR, but there is no guarantee of this.

mediation privilege—in a manner that is entirely inconsistent with and even harmful to the principle of self-determination that is so precious to us and is *also potentially harmful to the legitimacy of the courts*.

We cannot have it both ways. We must either adapt the mediation process to fit the environment of the courts or move on. I am reminded of visionaries, politicians, and artists, who made their original reputations by invoking particular traditions, but then turned their backs on such traditions when they became too rigid or personally stifling. Singer and songwriter Bob Dylan has gone through more than one such evolution, with certain “ugly duckling” transition albums marking his generally ungracious rejection of his past and an awkward groping toward an uncertain future. At each of these points, he has managed to make many fans and friends unhappy.<sup>37</sup> But he has been true to his inner voice—and has both found new fans and regained many old ones.

One choice for proponents of court ADR is to reject courts’ calls for greater efficiency and settlements, take as much time and care as we need to enable parties to come to their own solutions, and regularly defy expectations for closure by requiring mediated settlement agreements to include cooling-off periods. But that choice will have consequences. One such consequence may be that members of our field will have to leave the courts and instead offer their services through the community mediation programs that have institutionalized facilitative, transformative, and other self-determination-oriented approaches. Alternatively, members of the field may choose to strike out on their own, and offer their services on a for-profit basis.

Another very different approach would involve becoming humbler regarding ADR and its potential and less committed to being “different” from the courts’ generally hierarchical, adjudicative approach. This is especially applicable, of course, to mediation. Hints of the potential fruitfulness of this approach exist in the same responses listed previously.<sup>38</sup> Symposium participants found value in court ADR processes’ ability to facilitate “civility and decision-making” as parties

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37. See ANTHONY SCADUTO, *BOB DYLAN: A BIOGRAPHY* 208–10 (1973) (describing Bob Dylan’s abandonment of folk music and protest songs); ROBERT SHELTON, *NO DIRECTION HOME: THE LIFE AND MUSIC OF BOB DYLAN* 245–52 (1986) (describing Bob Dylan’s *Another Side of Bob Dylan* and fans’ and critics’ reactions to it).

38. See Jennifer Gerarda Brown, *Creativity and Problem-Solving*, in *THE NEGOTIATOR’S FIELDBOOK* 407, 408–10 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) (emphasizing the use of different words as a means to see new possible solutions).

play “dignified role[s],” behave “decently” and “constructively,” and ultimately arrive at solutions that are “well thought-out” and “appropriate.”

Courts are supposed to resolve disputes, of course, but *they are also supposed to provide something special in how they resolve those disputes*. Courts should provide an “experience of justice”<sup>39</sup> for those involved in the dispute. Such an experience involves civil treatment of, and decent behavior by, all of the actors; decision-making that is grounded in reason; and solutions that demonstrate thoughtfulness. Recently, Jeremy Waldron wrote that law (unlike the raw exercise of coercive power) is characterized by its aspiration to treat people as dignified agents.<sup>40</sup> Dignified agents do not have the power of principals. Nonetheless, such agents exercise responsibility, possess areas of discretion, and are deserving of respect as reasoning individuals.

This commitment to an experience of justice—or more formally, “procedural justice”—should characterize *all* of the dispute resolution processes offered by courts. Such an expectation is relatively uncontroversial, as applied to trial and court-connected non-binding arbitration.<sup>41</sup> But expectations of procedural justice can and should also apply to court-connected mediation<sup>42</sup> and judicial settlement

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39. Welsh, *Stepping Back Through*, *supra* note 7, at 671.

40. Jeremy J. Waldron, *How Law Protects Dignity* 8, 21 (N.Y. Univ. Sch. of Law, Working Paper No. 317, 2012).

41. See NAT'L CTR. FOR STATE CRTS., COURTOOLS, TRIAL COURT PERFORMANCE MEASURES: ACCESS AND FAIRNESS (2005), *available at* [http://www.ncsconline.org/D\\_Research/CourTools/Images/courtools\\_measure1.pdf](http://www.ncsconline.org/D_Research/CourTools/Images/courtools_measure1.pdf) (survey tool focusing on litigants' perceptions of access and procedural and substantive fairness); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990) (reporting procedural justice perceptions of litigants whose cases went to trial, non-binding arbitration, judicial settlement conferences, and bilateral negotiation). *But see* Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 829 (2011) (urging that “[d]espite the frequent affirmation of the value of presence in the fact-finding process by legal thinkers, we shall see that live hearings and trials sometimes aid, but often hinder, the fair adjudication of disputes”).

42. See Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 180 (2002) [hereinafter, Welsh, *Hollow Promise*]; Welsh, *Making Deals*, *supra* note 7, at 837; Welsh, *Stepping Back Through*, *supra* note 7, at 619–25, 629–32, 651–57, 663–65 (reporting results of a qualitative empirical research project that suggested that parties value mediation for “the procedural justice it provides and its assistance in helping them achieve resolution—or at least some sort of progress toward resolution”; and also reporting, consistent with prior procedural justice research, that parties value mediation’s ability to provide them with the opportunity to be heard in a dignified and thorough process and, to a lesser extent, the opportunity to hear each other). Joseph B. Stulberg, *Must a Mediator Be Neutral? You'd Better Believe It!*, 95 MATO..

conferences.<sup>43</sup> There is even some suggestion that procedural justice can and should apply to lawyers' unassisted negotiation, particularly when such negotiation occurs during litigation, in the explicit shadow of the courts.<sup>44</sup> Indeed, the procedural justice offered by courts has the potential to extend beyond the public sphere, encouraging greater procedural justice in private pre-litigation consensual processes.<sup>45</sup>

If the court ADR field embraces procedural justice as the common value that binds it to other court processes, we may be more likely to move beyond our current ugly duckling phase. If the court ADR field also embraces hybrid procedures that combine facilitative and mediative functions with evaluative and adjudicative functions in order to enable the invocation of procedural due process jurisprudence,<sup>46</sup> we may move even more quickly into the next phase. Mediation is then likely to

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L. REV. 829 (2012).

43. Indeed, colleagues and I are currently engaged in developing a tool that would provide feedback to judges regarding their management of settlement conferences, including litigants' and lawyers' perceptions of procedural justice. 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, 30–32 (Donna Stienstra & Susan M. Yates eds., 2004).

44. See Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 175 (2011); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 2 (2011) (recommending procedural justice for ADR disputants to ensure the rule of law); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 474 (2008) (discussing how treating parties fairly can improve lawyers' client representation); Nancy A. Welsh, *The Reputational Advantages of Demonstrating Trustworthiness: Using the Reputation Index with Law Students*, 28 NEGOT. J. 117, 136 (2012) (discussing how negotiators who engage in the cooperative aspects of procedural justice are perceived as more trustworthy and effective); Nancy A. Welsh, *Perceptions of Fairness*, in THE NEGOTIATOR'S FIELDBOOK 165 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

45. See Nancy A. Welsh, *I Could Have Been A Contender: Summary Jury Trial as a Means to Overcome Iqbal's Negative Effects Upon Pre-Litigation Communication, Negotiation and Early, Consensual Dispute Resolution*, 114 PENN. ST. L. REV. 1149, 1154–55 (2010).

46. Note that procedural justice is related to, but not synonymous with, the procedural due process jurisprudence. Such jurisprudence has only been found to apply when those deemed to be state actors *make the decision* to deprive individuals of life, liberty, or property. Court-connected mediators who only facilitate the parties' communication and negotiation do not possess such powers. See Welsh, *Hollow Promise*, *supra* note 39, at 187–89. This presumption may not hold, however, for mediators who make binding procedural and evidentiary decisions or provide the court with recommended dispositions. The simple label of "mediator" will not insulate a neutral from this jurisprudence. Its application will depend upon a functional analysis of the mediator's role. See, e.g., *Wash. Cent. R.R. Co., Inc. v. Nat'l Mediation Bd.*, 830 F. Supp. 1343, 1363 (1993).

continue to have a place, but for a smaller set of cases, involving parties who affirmatively prefer a process that facilitates their ability to listen to each other, collaborate as appropriate, and make serious decisions together in a deliberative, thoughtful manner.<sup>47</sup>

I cannot promise, much as I would like, that this next phase will involve becoming the equivalent of the beautiful swan. (And even beautiful swans grow old and must move aside as the next crop of loud and ugly ducklings arrives.) But rather than resisting our field's inevitable evolution, I suggest simply that the proponents of the court ADR field make an explicit choice regarding our route. By making such a choice and embracing our journey, we will model what we ask of the disputants who participate in mediation. We may also hope to move intentionally toward a future that offers us meaning, and perhaps even a measure of beauty and grace.

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47. See Riskin & Welsh, *supra* note 6, at 928–29.