

Mediation: The “New Arbitration”

Jacqueline Nolan-Haley*

ABSTRACT

Mediation once offered disputing parties a refuge from the courts. Today it offers them a surrogate for arbitration. As lawyers become increasingly involved representing parties in mediation, the boundaries between mediation and arbitration are blurring. Lawyers generally control the mediation process, considering it the functional equivalent of a private judicial settlement conference. Legal mediation has taken on many of the features traditionally associated with arbitration: adversarial posturing by attorneys in the name of zealous advocacy, adjudication by third party neutrals, and the practice of mediator evaluation. While mediation advances toward an arbitration model, arbitration is becoming the “new litigation.” I argue that mediation’s move to the zone of arbitration practice is problematic because it clashes with mediation’s core values of self-determination and participation. This directional shift limits the spectrum of options available to disputing parties, depriving them of mediation’s benefits: the opportunity to experience individualized justice as a relief from the rigidity of the formal justice system. Mediation stands at a crossroads and it is worth reflecting on whether the time has come to pull in the reins.

Part I of this Article discusses the fading popularity of arbitration and the rise of mediation as an alternative to the court adjudication of disputes. Part II describes three dimensions of legal mediation’s advance toward the arbitration zone: the aggressive behaviors of lawyers as mediation advocates, operating in a weak ethical regime that

* Professor of Law, Fordham University School of Law. I thank Cathy Cronin-Harris, Dwight Golann, Mariana Hernandez-Crespo, Jonathan Hyman, Caroline Wilkes Kaas, Catherine McCauliff, Jim McFarlane, Gregg Relyea, Kathleen Scanlon, Edna Sussman, Harry Mazadoorian and participants at the Quinnipiac/Yale Dispute Resolution Workshop for their helpful feedback on earlier drafts. Erin Forst, Elliott Nathanson, Natasha Petrukhin and Damien Weinstein provided excellent research assistance.

permits some forms of deception; the practice of mediation evaluation; and the use of hybrid processes blending mediation with arbitration. Part II also discusses selected aspects of an empirical study of lawyers' behaviors in mediation conducted by the author, and ends with a cautionary tale about compliance problems in mediation and arbitration. Part III explores why mediation is moving in the direction of arbitration and what implications flow from this phenomenon. The Conclusion raises pedagogical and policy concerns as mediation stands at the crossroads.

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INTRODUCTION: MEDIATION'S LOSS OF IDENTITY

American mediation practice is advancing steadily towards the practice zone of arbitration. Not only is it challenged by some of the

same non-compliance problems that arbitration once faced,¹ but it confronts a professional identity crisis caused in large measure by lawyers. As lawyers become increasingly visible representing parties in mediation, a phenomenon referred to in this Article as “legal mediation,”² the boundaries between mediation and arbitration are blurring. Whereas mediation once offered disputing parties a refuge from the courts,³ it now offers them a surrogate for arbitration. While mediation advances toward an arbitration model,⁴ arbitration, in the view of some scholars, is becoming the “new litigation.”⁵

Legal mediation has taken on many of the features traditionally associated with arbitration: adversarial posturing by attorneys in the name of zealous advocacy,⁶ adjudication by third party neutrals, whether implicitly through mediator evaluations⁷ or explicitly in the med-arb process,⁸ and the practice of mediator “spinning.” Instead of trying to persuade an arbitrator to rule in her client’s favor, the mediation advocate tries to “spin” the mediator in the hope of influencing the outcome of mediation.⁹ In doing so, the mediation advocate is free

1. See *infra* text accompanying notes 146-150.

2. Legal mediation in this article includes any mediation where lawyers are involved as advocates for parties. It is not attached to any particular model of mediation but is most frequently visible in the evaluative model. See *infra* text accompanying notes 6-14. In general, it is not clear to what extent lawyers represent parties in mediation. See Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 385-86 (2010)[hereinafter Sternlight, *Lawyerless Dispute Resolution*].

3. See generally JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* (1982).

4. For earlier predictions that mediation would become like arbitration see Robert Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111, 122 (2002) (arguing that evaluative mediation is similar to arbitration); Kimberlee Kovach, *The Vanishing Trial: Land Mine on the Mediation Landscape or Opportunity for Evolution: Ruminations on the Future of Mediation Practice*, 7 CARDOZO J. CONFLICT RESOL. 27, 60-61 (2005) (predicting that the vanishing trial will lead to mediation becoming like arbitration); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71, 92-93 (1998) (arguing that evaluation in mediation raises some of the same concerns faced in arbitration).

5. See e.g., Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 8 (2010) (citing to literature discussing similarities between commercial arbitration and litigation) [hereinafter Stipanowich, *Arbitration*]. I owe much of the inspiration for this article from the reflections offered by Stipanowich in *Arbitration*.

6. See *infra* text accompanying notes 83-93.

7. See *infra* text accompanying notes 118-125.

8. See *infra* text accompanying notes 128-136.

9. John T. Blankenship, *The Vitality of the Opening Statement in Mediation: A Jumping-Off Point to Consider*, 9 APPALACHIAN J.L. 165, 178 (2010) (suggesting that

to engage in deceptive behaviors that would be considered unethical for lawyers in arbitration.¹⁰ Lawyers generally control the mediation process, often preferring evaluative¹¹ rather than facilitative models.¹² They often consider mediation as the functional equivalent of a private judicial settlement conference,¹³ and act accordingly in an adversarial fashion.¹⁴

The pragmatist might argue that all of this is for the good. We should celebrate the diversity of multiple models of mediation and embrace its divergent cultures.¹⁵ The pessimist might respond that mediation has lost its way as it slouches toward arbitration,¹⁶ while

it may be easier to spin the mediator when the parties are in different rooms); Joseph P. McMahon, Jr., *Moving Mediation Back Towards its Historic Roots-Suggested Changes*, 37 COLO. LAW. 23, 23-24 (2008) (noting that it is easier to exaggerate, embellish, or spin a mediator when an opponent is not present); Joan Stearns Johnsen, *Mediator-Friend or Foe? Using the Mediator to Your Best Advantage*, SF16 A.L.L., A.B.A. Continuing Legal Education 415 (2000) (criticizing the spin process as slowing down mediation).

10. See *infra* text accompanying notes 105-109, 127.

11. In an evaluative mediation process, the mediator offers some form of opinion on the case. See *infra* Section II.B. See also Jonathan M. Hyman, *Slip-Sliding Into Mediation: Can Lawyers Mediate Their Clients' Problems?*, 5 CLINICAL L. REV. 47, 87 (1998) ("Many lawyers will feel comfortable with a narrow, evaluative approach to mediation."); Kovach & Love, *supra* note 4 (noting that lawyers are often taught and trained to approach mediation with an evaluative focus).

12. In a facilitative mediation process, the role of the mediator is to assist the parties in their negotiations without directing them towards a particular outcome.

13. See, e.g., Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 23, 25-27, 57-58 (2001) (noting the increasingly adversarial nature of mediations and an "uncanny resemblance" to judicial settlement conference); Stacy Burns, *The Name of the Game is Movement: Concession Seeking in Judicial Mediation of Large Money Damage Cases*, 15 MEDIATION Q. 359, 368-70 (1998) (commentary by Sharon Press); Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems and Possibilities*, 108 PENN. ST. L. REV. 327, 335 (2003) (explaining that mediation has started "to look more like the traditional pretrial settlement conference, and less like the alternative process originally intended by its proponents"). For a general discussion of lawyers' views of several models of judicial settlement conferences and mediation see Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271 (2011).

14. See, e.g., Kovach & Love, *supra* note 4 at 93-94 (describing how lawyers behave in mediation).

15. See Michal Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, 22 OHIO ST. J. ON DISP. RESOL. 321, 374 (2007) (advocating for "cultural relativism" in evaluating models of mediation); Michal Alberstein, *The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations*, 11 CARDOZO J. CONFLICT RESOL. 1, 5 (2009) (discussing the pragmatic, transformative and narrative mediation models).

16. Cf. ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 2 (1993) ("This crisis has been brought about by the demise of an older set

the realist might simply say that for better or worse, we are witnessing mediation’s advance toward the zone of arbitration.

In my view, mediation’s directional shift toward the arbitration practice zone is for the worse. It limits the spectrum of options available to disputing parties, leaving them a single forum with variations of adjudication. This deprives parties of the primary benefit of mediation – a type of mercy, which provides relief from the rigidity of the formal justice system,¹⁷ with its adversarial orientation.¹⁸ In the mediation process, parties have the opportunity to experience individualized justice¹⁹ through the exercise of self-determination and the expression of participatory values.²⁰ Mediation’s shift toward arbitration practice clashes with these core values. It also diminishes the development of parties’ problem-solving capacities and the relational benefits identified by Lon Fuller in his oft-cited reflection of mediation’s “capacity to reorient parties toward each other not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.”²¹

The evolution of mediation toward an arbitration model represents a radical change from America’s early experiences with mediation. Mediation in the colonial era,²² the management of railway labor disputes,²³ the collective bargaining regime of the 1940s,²⁴ and the community dispute resolution centers of the 1970s²⁵ was essentially communitarian in nature, practiced between religious and ethnic groups, employers and employees, and neighborhood residents.

of values that until quite recently played a vital role in defining the aspirations of American lawyers.”).

17. See Jacqueline Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 *CARDOZO J. CONFLICT RESOL.* 57, 58-59 (2004) (discussing the similarity between equity and mediation as alternatives that offer individualized justice and mercy in the justice system).

18. See Leonard L. Riskin, *Mediation and Lawyers*, 43 *OHIO ST. L.J.* 29 (1982).

19. Nolan-Haley, *The Merger of Law and Mediation*, *supra* note 17 at 64-65.

20. See *infra* Section I.B.

21. Lon L. Fuller, *Mediation: Its Forms and Functions*, 44 *S. CAL. L. REV.* 305, 325 (1971). While Fuller wrote in the context of labor relations, his understanding of mediation as a relational process has meaning in many contexts where mediation is practiced.

22. See CHRISTOPHER MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 22 (3d ed. 2003).

23. See Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 *OHIO ST. J. ON DISP. RESOL.* 669, 678 n. 17 (2003).

24. See WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* (2d ed. 1986). See also Moore, *supra* note 22, at 23.

25. See Edith Primm, *The Neighborhood Justice Center Movement*, 8 *KY. L.J.* 1067 (1992–93).

During this period, mediation was an alternative to the judicial system. With the advent of court-connected mediation, mediation has developed a different persona with adjudication trappings.

Part I of this Article discusses the fading popularity of arbitration and the rise of mediation as an alternative to the court adjudication of disputes. Part II describes legal mediation's advance toward the arbitration practice zone with a specific focus on three dimensions: (1) the behavior of mediation advocates; (2) the practice of mediator evaluation; and (3) the use of hybrid processes blending mediation with arbitration. It discusses selected aspects of an empirical study conducted by the author and concludes with a cautionary tale about the similarity between mediation and arbitration regarding non-compliance problems. Part III considers why mediation is moving in the direction of arbitration and what implications flow from this phenomenon. The Conclusion raises policy and pedagogical questions about mediation's future direction as it stands poised at the crossroads.

I. THE MEDIATION PREFERENCE

Historically, arbitration has been the most popular alternative to the court adjudication of disputes. Many parties seeking finality, privacy, informality, speed, low cost and decision-making expertise gravitate to the arbitration process.²⁶ Arbitration's fading popularity over the last two decades²⁷ has energized mediation's growth and has helped it to displace arbitration as the ADR process of choice.²⁸

A. Arbitration's Demise

Arbitration is, in many respects, in crisis mode. U.S. practitioners complain that business arbitration has become as slow and costly

26. See STEPHEN B. GOLDBERG, FRANK E. A. SANDER, NANCY H. ROGERS & SARAH R. COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES*, ch. 1 (5th ed. 2007).

27. Some scholars have attributed this decline to the court decisions of the 1990s that made arbitration a riskier enterprise for parties and to the failure of arbitration to provide more than limited, distributive outcomes. See Deborah Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 183 (2003) (noting that court-created "rigid" policies deterred parties from engaging in arbitration).

28. Lisa Brennan, *What Lawyers Like: Mediation*, NAT'L L.J., Nov. 15, 1999 at 4 (citing preference for mediation); Bush, *supra* note 4 (noting that the recent popularity of mediation has made it the "process of choice" over arbitration).

as litigation.²⁹ In some states, the finality of arbitration awards has been affected adversely by a high success rate with motions to vacate and by contractual agreements to expand judicial review of awards.³⁰ Consumers protest arbitration’s inequities with businesses’ widespread use of adhesion contracts and attempts to prohibit class action arbitrations.³¹ Scholars have been critical of the Supreme Court’s favorable attitudes toward binding arbitration in the consumer and employment settings³² and have offered proposals for reform.³³ Legislation mandating fairness in employment and consumer arbitration is pending before Congress.³⁴ Thomas Stipanowich describes contemporary arbitration as the “new litigation,”³⁵ and labels mediation as the most popular and “thin-slicing”³⁶ dispute resolution method that now provides the values traditionally associated with arbitration.³⁷

29. See, e.g., Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58 DISP. RESOL. J. Feb./Apr. 2003, at 38 (noting that “creeping legalism” has made arbitration more costly and a less attractive alternative to litigation); Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN. ST. L. REV. 929, 962 (2004) (noting that “pseudo-adjudicative arbitration has operated under the shadow of the law”).

30. Stipanowich, *Arbitration*, *supra* note 5 at 16, 17.

31. Recent Supreme Court decisions have drastically limited the use of class action arbitration. See *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) (upholding the use of arbitration clauses to exempt companies from class actions); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010) (holding that where an arbitration clause is silent with respect to class arbitration, an arbitration panel cannot impose class arbitration on parties).

32. See e.g., Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996). Jean R. Sternlight, *Tsunami: AT & T Mobility v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. (forthcoming 2012). See also Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998).

33. See, e.g., Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77 (2003) (proposing that employees should become involved with unions in order to deal with power imbalances). See also Peter B. Rutledge, *Whither Arbitration*, 6 GEO. J.L. & PUB. POL’Y 549 (2008); Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115 (2010).

34. See Arbitration Fairness Act of 2009, H. R. 1020, S. 931, 111th Cong. (2009) (applying to consumer and employment disputes).

35. Stipanowich, *Arbitration*, *supra* note 5 at 8.

36. Stipanowich refers to Malcolm Gladwell’s *Blink*, which describes the term “thin-slicing” as “the ability of the human subconscious to identify patterns in situations and to make responses based on very quick or short ‘slices of experience.’” Stipanowich, *Arbitration*, *supra* note 5, at 25-26 (quoting MALCOLM GLADWELL, *BLINK* 22-23 (2005)).

37. See JAY FOLBERG, DWIGHT GOLANN, LISA KLOPPENBERG & THOMAS STIPANOWICH, *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 540-44 (2d ed. 2010)

Outside the United States, the increasingly adversarial character of contemporary arbitration practice is a growing concern.³⁸ Practitioners reject the American habits of cloaking arbitration in U.S.-style litigation apparatuses such as discovery, expert witnesses, etc.,³⁹ as well as the increased costs that accompany these elements.⁴⁰ One reaction to the costs problem has been a greater interest in resolving commercial disputes in court rather than in arbitration.⁴¹

B. *Mediation's Ascendancy as a Problem-Solving Process*

Mediation's core values of self-determination and party participation have been its traditional and essential selling points.⁴² Most ethical codes and practice standards define mediation as a voluntary process grounded in party self-determination.⁴³ In fact, it is the notion of self-determination and party control of the outcome that distinguishes mediation from arbitration. This aspect of mediation is

(claiming that the advantages of arbitration include efficiency, speed, low cost, avoidance of precedent, expertise of the decision maker, informality, flexibility and finality).

38. *E.g.*, consider a recent advertisement for an Arbitration Conference in Vienna-Vienna Arbitration Days 2010. One of the topics for the conference included "Guerrilla Tactics in Arbitration." See *Vienna Arbitration Days 2010 Flyer*, AUSTRIA INTERNATIONAL CHAMBER OF COMMERCE, http://iccwbo.org/uploadedFiles/Events/Other_brochures/HQ1ViennaArbitrationDays2010.pdf (last visited February 19, 2012). See also Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 96 (2000) (observing that international commercial arbitration is becoming similar to U.S.-style litigation).

39. See Steven Seidenberg, *International Arbitration Loses Its Grip: Are U.S. Lawyers to Blame?*, 96 A.B.A. J. 50, 54 (Apr. 2010) (discussing the backlash to the "Americanization" of arbitration and various steps taken to curb the process' resemblance to litigation); see also YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 55 (1996) ("The large American law firms continue to consider international arbitration as but one kind of 'litigation' . . . among others.").

40. See, *e.g.*, Loukas Mistelis, *International Arbitration - Corporate Attitudes and Practices*, 15 AM. REV. INT'L ARB. 525, 539 (2004).

41. See Jane Spencer, *Companies Ask People To Waive Right to Jury Trial*, WALL ST. J., Aug. 17, 2004 at D1 (finding that companies turning from arbitration to court are asking parties to sign jury-waivers).

42. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS § I (Am. Arbitration Ass'n 2005) [hereinafter MODEL STANDARDS OF CONDUCT], http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf (last visited February 22, 2012).

43. See *id.* Standard I provides: "A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a

part of the democratic decision-making process where the participants themselves decide the outcome, in contrast to the arbitration process where the neutral third party decides the outcome.⁴⁴ Self-determination enhances the development of parties’ problem-solving capacities, their ability to craft individualized justice⁴⁵ on their own terms based on their own interests and values. It is what helps parties move beyond mere justice to achieving a sense of peace in resolving their disputes.⁴⁶ Peace in mediation includes interior peace, offering opportunities for apologies, forgiveness and reconciliation. For these reasons, mediation is a way out of a rule-bound, formal justice system.

The central ideology and distinguishing feature of mediation is its voluntariness, as reflected in mediation rhetoric that focuses on empowerment and recognition.⁴⁷ In contrast to arbitration, voluntariness in mediation is pervasive. It operates from the very beginning of the process, when the parties agree to mediate, and continues until the end of the process, when the parties decide whether or not to resolve their dispute, and the terms upon which it will be resolved. The Model Standards of Conduct for Mediators emphasize the importance of the parties’ informed consent to ensure voluntary participation⁴⁸ and mediator impartiality to establish fairness.⁴⁹

Mediation also offers protection from exposure in public forums. Confidentiality, an almost sacred canon in the mediation process,⁵⁰ is

mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.”

44. See Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 44-45 (2005).

45. See Nolan-Haley, *The Merger of Law and Mediation*, *supra* note 17, at 64-65.

46. But see Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (criticizing ADR as offering peace but not justice—“Parties might settle while leaving justice undone.”).

47. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2005) [hereinafter BUSH & FOLGER, *THE PROMISE OF MEDIATION*].

48. See MODEL STANDARDS OF CONDUCT, *supra* note 42, at § I (2), which provides: “A Mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.” See also Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999).

49. See MODEL STANDARDS OF CONDUCT, *supra* note 42, at § II, which provides: “Impartiality means freedom from favoritism, bias or prejudice.”

50. Frank E. A. Sander, *Some Concluding Thoughts*, 17 OHIO ST. J. ON DISP. RESOL. 705, 708 (2002). See also SARAH R. COLE, CRAIG A. McEWEN & NANCY H. ROGERS, *MEDIATION: LAW, POLICY & PRACTICE* ch. 8 (3d ed. 2011).

protected by statutes, ethical codes and agreements between the parties. Finally, the mediation preference can be attributed to its compliance effects, cost efficiency, and therapeutic benefits.⁵¹ In this regard, mediation's "voice" and participation features⁵² provide a welcome antidote to the American civil justice system where litigants are provided little opportunity for personal expression.⁵³ Unlike the adjudication process, mediation is not bound by evidentiary and procedural rules. Parties' narratives are honored and their interests are valued. Finally, with open communication, mediation offers possibilities for cooperation and creative problem-solving. Parties are oriented towards a collaborative search for mutually agreeable solutions.

Today, mediation has expanded well beyond the relational model imagined by Lon Fuller; several indicia point towards its growing appeal in both U.S. and international settings. In the U.S., mediation is the most frequently used process in both state and federal courts.⁵⁴

51. For a discussion of the connection between mediation and therapeutic jurisprudence see Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 159-60 (1998) (noting that "[t]he mediation movement, in large measure, represents a reaction to the psychological brutality of the adversary system"); Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1, 11 (2006); Omer Shapira, *Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics*, 8 PEPP. DISP. RESOL. L.J. 243 (2008) (describing the "striking" similarity between therapeutic justice and mediation).

52. Dwight Golann articulates the ideal: "The more likely source of disputants' satisfaction with mediation is that it provides a fundamentally different kind of settlement process. Parties gain several benefits from participating in mediation that are independent of the ultimate terms of the agreement. These include the opportunity to tell their story directly to the other side, express painful emotions and perhaps receive an acknowledgement, negotiate in a civil manner, hear clearly the reasons why compromise is necessary, and reconcile themselves gradually to outcomes short of victory." Dwight Golann, *Is Legal Mediation A Process of Repair-or Separation? An Empirical Study, and Its Implications*, 7 HARV. NEGOT. L. REV. 301, 335 (2002) [hereinafter Golann, *Process*]. His findings are consistent with procedural justice literature. See, e.g., E. Allan Lind & Tom R. Tyler, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 104, 214 (1988); Roselle L. Wissler, *Representation in Mediation: What We Know From Empirical Research*, 37 FORDHAM URB. L.J. 419, 442 n.81 (2010).

53. See JAMES R. MAXEINER, PHILIP K. HOWARD, GYOOHO LEE & ARMIN WEBER, *FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE* ch. 6 (2011) (describing how little opportunity litigants have to be heard by judge or by jury in the American civil justice system).

54. *In Resolving Disputes, Mediation Most Favored Option in District Courts*, 38 THE THIRD BRANCH: NEWSL. OF THE FED. CTS. 7, at 6 (July 2006); Donna Stienstra, *Summary of Selected Features of ADR Procedures in Federal Courts*, Conference on Court ADR Research at the Federal Judicial Center (Nov. 17-18, 2005) (on file with author). The increased use of mediation in court can be attributed in part to the number of mandatory court mediation programs.

Studies of corporate use of ADR show a distinct preference for mediation over arbitration because of the cost savings involved.⁵⁵

Beyond U.S. borders, there are multiple examples of mediation’s ascendancy. The United Nations Committee on International Trade has adopted a Model Law on International Commercial Conciliation.⁵⁶ The World Trade Organization’s (WTO) dispute settlement system offers mediation as one method of resolving disputes between members.⁵⁷ The World Intellectual Property Organization (WIPO) has a mediation component,⁵⁸ and on the legislative front, the European Union issued a Mediation Directive requiring that member states implement mediation programs to resolve cross-border commercial disputes by May 2011.⁵⁹

There has also been increased international activity in developing mediation ethics codes and practice rules. In 1996, the International Institute for Conflict Prevention and Resolution (CPR) issued mediation rules for Europe.⁶⁰ The European Commission developed the European Mediator Code of Conduct in 2004.⁶¹ In recent years,

55. Fulbright & Jaworski LLP, *2004 U.S. Corporate Counsel Litigation Trends Survey Findings* (2004). The survey was conducted in 1996 by the Cornell/PERC Institute on Conflict Resolution. In that study, seventy-eight percent of the respondent reported having used arbitration while eighty-seven percent reported having used mediation. Additionally, a meeting survey conducted by the CPR International Institute for Conflict Prevention found that mediation is the top ADR choice. Russ Bleemer, *CPR Meeting Survey Finds Mediation is Top ADR Choice*, 25 ALTERNATIVES TO THE HIGH COST OF LITIGATION 98-111 (Jun. 2007).

56. U.N. COMM. ON INT’L TRADE L., MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION WITH GUIDE TO ENACTMENT AND USE, U.N. Sales No. E.05.V.4 (2002). The term “conciliation” is used interchangeably with mediation. *See id.* at Art. 1.3: “For the purposes of this Law, “conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons. . .to assist them in their attempt to reach an amicable settlement of their dispute”.

57. *SEE* World Trade Org., Dispute Resolution System Training Module ch. 8, http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c8s1p2_e.htm (last visited Feb. 18, 2012).

58. *SEE* WORLD INTELL. PROP. ORG., MEDIATION, <http://www.wipo.int/amc/en/mediation/> (last visited Feb. 18, 2012).

59. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3 [hereinafter EU Directive]. *See* Jacqueline Nolan-Haley, *Evolving Paths to Justice: Assessing the EU Mediation Directive*, 6 PROC. ANN. CONF. ON INT’L ARB. & MEDIATION (forthcoming 2012).

60. *CPR European Mediation Procedures*, INT’L INST. FOR CONFLICT PREVENTION & RESOL. (1996), available at <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/627/CPR-EuropeanMediation-Procedure-1996.aspx> (last visited Feb. 22, 2012).

61. *European Code of Conduct for Mediators* (July 2, 2004), available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf. *See also* JAYNE SINGER ET AL.,

new international mediation organizations have been developed⁶² and practice rules established.⁶³ Faced with criticism that international commercial arbitration is expensive⁶⁴ and slow, with low settlement rates,⁶⁵ traditional arbitration provider organizations have added mediation to their offerings.⁶⁶ Significantly, the dispute resolution rules of the International Chamber of Commerce (ICC), a major arbitration provider, preference mediation in the absence of a specified settlement technique.⁶⁷ The Center for Effective Dispute Resolution (CEDR) has developed rules providing for a “mediation window,” where parties can interrupt an arbitration and try to settle

THE EU MEDIATION ATLAS: PRACTICE AND REGULATION (Karl J. Mackie et al. eds., 2004) (discussing mediation developments in several European countries); NANCY NELSON, COMMERCIAL MEDIATION IN EUROPE: BETTER SOLUTIONS FOR BUSINESS (2004).

62. See, e.g., Michael Leathes, *International Mediator Certification and Expanding the Mediation Pie*, 2 N.Y. ST. B.A. N.Y. DISP. RESOL. LAW. 52 (Fall 2009) (discussing the newly formed International Mediation Institute). For an extensive list of organizations now providing mediation services and rules, see MANON SCHONEWILLE, TOOLKIT GENERATING OUTCOMES: MAKING & SAVING DEALS: MEDIATION - NEGOTIATION 221-35 (2009).

63. See *IMI Code of Professional Conduct*, INT'L MED. INST., <http://imimediation.org/imi-code-of-professional-conduct> (last visited Feb. 18, 2012).

64. A study of international corporate counsel conducted by Queen Mary University and PricewaterhouseCoopers showed concern with the increased costs of arbitration. See SCH. INT'L ARB., QUEEN MARY, UNIV. LONDON & PRICEWATERHOUSECOOPERS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES (2006).

65. See John Barkett, *Arbitration Cost Avoidance: Is International Mediation the Solution?*, 5 PROC. ANN. CONF. ON INT'L ARB. & MEDIATION (2011).

66. See, e.g., *International Dispute Resolution Procedure (Including Mediation and Arbitration Rules)*, INT'L CENTRE FOR DISP. RESOL. & AM. ARB. ASS'N, [http://www.adr.org/sp.asp?id=33994#International Mediation Rules](http://www.adr.org/sp.asp?id=33994#International%20Mediation%20Rules) (last visited Feb. 18, 2012); *Mediation*, LONDON CT. OF INT'L ARB., available at http://www.lcia.org/Dispute_Resolution_Services/Mediation.aspx (last visited Feb. 18, 2012); *Consensual Methods*, CHARTERED INST. OF ARBS., available at <http://www.ciarb.org/dispute-resolution/resolving-a-dispute/consensual-methods/> (last visited Feb. 18, 2012); *Arbitration and ADR Rules*, INT'L CHAMBER OF COM. (2011) [hereinafter *ICC ADR Rules*]; *Mediation in Hong Kong*, HONG KONG INT'L ARB. CTR., available at <http://www.hkiac.org/index.php/en/mediation> (last visited Feb. 18, 2012); *Rules of the Mediation Institute of the Stockholm Chamber of Commerce*, MEDIATION INST. OF THE STOCKHOLM CHAMBER OF COM., available at http://www.sccinstitute.com/filearchive/1/12753/web_A4_Medling_eng.pdf (last visited Feb. 18, 2012); *WIPO Arbitration, Mediation, and Expert Determination Rules and Clauses*, WORLD INTELL. PROP. ORG. (2009), available at http://www.wipo.int/freepublications/en/arbitration/446/wipo_pub_446.pdf.

67. Article 5(2) of the ICC ADR Rules provides that in the absence of an agreement between the parties on a particular settlement technique, the third party neutral is to act as a mediator. See ICC ADR Rules, *supra* note 66, at art. 5(2).

their dispute through mediation.⁶⁸ In assessing costs, the arbitral tribunal may take into consideration a party’s unreasonable refusal to take advantage of a “mediation window.”⁶⁹

II. LEGAL MEDIATION MOVES TOWARD AN ARBITRATION MODEL

Mediation has been traditionally understood as a consensual, confidential, and problem-solving process.⁷⁰ The reality is different today. Despite considerable discussion about the boundaries and definitions of mediation,⁷¹ multiple mediation cultures and models have created abundant diversity in practice.⁷² Mediation is no longer tethered to Fuller’s conception of a relational process.⁷³ Legal mediation is often delivered as a less-than-voluntary, not-so-confidential, and adversarial process. This is particularly evident with non-family cases in court-connected mediation programs where mediation may be a one-shot deal with no potential for continuing relationships.⁷⁴

68. The Rules were established by the CEDR Commission on Settlement in International Arbitration. See *CEDR Rules for the Facilitation of Settlement in International Arbitration*, CENTRE FOR EFFECTIVE DISP. RESOL. (Nov. 2009) [hereinafter *CEDR Rules*]. Article 5, entitled “Facilitation of Settlement by Arbitral Tribunal”, provides in relevant part that the Arbitral Tribunal should “insert a Mediation Window in the arbitral proceedings when requested to do so by all Parties in order to enable settlement discussions, through mediation or otherwise, to take place”. *Id.* at 7. While CEDR is a London-based organization, commission members included personnel from 45 consulting organizations throughout the world.

69. See *CEDR Rules*, *supra* note 68, at 8. Article 6, entitled “Costs”, provides in relevant part: “When considering the allocation between the Parties of the costs of the arbitration (including the Parties own legal and other costs) the Arbitral Tribunal may take into account . . . any unreasonable refusal by a party to make use of a Mediation Window.”

70. See *supra* Section I.B.

71. See e.g., Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69, 78 (2005) (noting that all types of individuals, such as students and therapists, can be considered mediators because “the specter of state sanctions” does not inhibit the definition of the term); Leonard L. Riskin, *Decision-making in Mediation: The New Old Grid and the New Grid System*, 79 NOTRE DAME L. REV. 1 (2003) [hereinafter Riskin, *Decisionmaking*]; Kovach & Love, *supra* note 4.

72. The most well-known models are: evaluative and facilitative (described in Riskin, *Decisionmaking*, *supra* note 71); transformative (described in BUSH & FOLGER, *THE PROMISE OF MEDIATION*, *supra* note 47), narrative (described in JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2000)), and understanding-based (described in GARY FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* (2008)). See also Alberstein, *Forms of Mediation and Law*, *supra* note 15.

73. See *infra* text accompanying notes 81-93.

74. See e.g., Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is? “The Problem” in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 874 (2008).

In the following section, I discuss three dimensions of legal mediation's movement toward the arbitration zone: (A) approaches to mediation advocacy that are increasingly adversarial and sometimes unethical; (B) the practice of mediator evaluation; (C) explicit blending of mediation and arbitration processes. I discuss as a separate development compliance problems in mediation, as evidenced by the high number of litigated cases challenging the enforceability of mediated agreements, then offer a cautionary tale about mediation's similarity to arbitration on the issue of compliance.

A. *Zealous Advocacy in Mediation*

Lawyers, as the dominant players in the adversary system, have been a popular subject of commentary, particularly regarding their involvement with litigation. More recently, scholars have focused on lawyers' experience with mediation, examining a wide range of topics including the benefits of lawyers' participation,⁷⁵ how lawyers define the problem in mediation,⁷⁶ what lawyers think about mediators and mediation,⁷⁷ the effect of mediation on lawyers' litigation practices,⁷⁸

75. Several studies have examined various aspects of lawyers' involvement in and the impact they have in mediation. See Jean R. Sternlight, *Lawyerless Dispute Resolution*, *supra* note 2; Wissler, *Representation in Mediation*, *supra* note 52 (noting research that shows lawyers' mode of representation in mediation affects parties' assessments of mediation and settlement); Craig A. McEwen, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST J. ON DISP. RESOL. 641 (2002).

76. Riskin & Welsh, *supra* note 74 (finding that lawyers define the problem in mediation with a narrow perspective).

77. TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES ch. 7 (2009). See generally Richard S. Weil, *Mediation: Through the Eyes of New York Litigators*, N.Y. ST. BAR ASS'N (Mediation Comm. of the Disp. Resol. Section & Alt. Disp. Resol. Comm. of the N.Y.C. Bar Ass'n), February 17, 2011, <http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=47291&Template=/CM/ContentDisplay.cfm>.

78. Julie Macfarlane examined lawyers' behaviors in two court-connected programs in Canada, one voluntary, one mandatory. Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241 (examining how the introduction of a new rule of civil procedure mandating early mediation in Toronto and Ottawa has affected commercial litigators). See also Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473 (2002) (evaluating ADR programs by examining how practicing litigation attorneys use ADR in the litigation process.).

how lawyers’ attitudes influence whether relationship repairs occur in legal mediation,⁷⁹ and how lawyers select mediators.⁸⁰

Despite the claims of mediation’s general palliative and restorative effects and its ability to repair relationships, some of the empirical data on legal mediation suggests otherwise.⁸¹ Lawyers are not necessarily interested in sustaining or improving relationships, but in efficient dispute resolution.⁸² They often treat mediation with the same formality as arbitration, submitting positional briefs based on the law.⁸³ Frequently, they focus more attention on their positions than on either their interests or their opponent’s interests.⁸⁴

a. *Survey of Mediators from the New York Regional Area*

The author conducted a survey of mediators in the greater New York region to learn more about how lawyers behaved in mediation.⁸⁵ Two aspects of the survey relevant to this article are the descriptions of how lawyers prepared mediation submissions, and the mediators’ perceptions of how lawyers behaved in the mediation process.

My particular concern in the survey was with lawyers’ preparation for mediation. This is an important ingredient of mediation quality but an area to which little attention has been focused.⁸⁶ I explored

79. Golann, *supra* note 52 (finding that relationship repairs appear to be uncommon events).

80. Jeffery H. Goldfien & Jennifer K. Robbennolt, *What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles*, 22 OHIO ST. J. ON DISP. RESOL. 277, 278 (2007) (discussing how attorneys often “shape” mediation by selecting mediators with particular predispositions).

81. Golann, *supra* note 52, at 330. The author conducted an empirical study of mediators in legal mediation settings. One of his conclusions was that “relationship repairs in legal mediation appear to be uncommon events.” Mediators in the study reported a wide range of attitudes among lawyers, some of whom focus only on monetary issues, discourage their clients from speaking and refuse to explore relationship based solutions”.

82. Thomas Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 368 (1998) (highlighting the ways in which litigators and non-lawyers are departing from tradition by embracing various methods of ADR; focus mediation in the construction industry).

83. Goldfien & Robbennolt, *supra* note 80, at 287.

84. See *infra* text accompanying notes 85-93 discussing survey conducted by the author.

85. The survey was conducted in the spring of 2010. A copy of the survey appears in the Appendix.

86. Preparation for mediation is identified by the ABA Task Force on Improving Mediation Quality as an important aspect of mediation quality. *Task Force on Improving Mediation Quality Final Report*, A.B.A. SEC. DISP. RESOL. REP. (2008) at 3

several questions: How do lawyers prepare for mediation?⁸⁷ To what extent do they conceptualize mediation as a problem-solving process? How do they think about the legal positions and underlying interests in a case?⁸⁸

The survey asked mediators to describe how often lawyers identified the following information in their pre-mediation submissions:⁸⁹ A) the clients' interests and needs; B) the opponent's interests and needs; C) potential solutions other than money; D) submitter's perceptions of their litigation strengths and weaknesses and E) barriers to settlement.

FIGURE 1

QUESTION 3: Do you require parties to exchange pre-mediation memos and briefs to the other side?

QUESTION 4: When you do have counsel exchange pre-mediation submissions, please identify whether the submissions address:

The client's interests and needs?

The opponent's interests and needs?

Potential solutions other than money?

("Focus group participants, questionnaire respondents, and parties who were interviewed consistently identified the same four issues as important to mediation quality. . ." The first issue listed was "Preparation for mediation by the mediator, parties, and counsel.").

87. Survey participants included mediators from the following organizations: New York State Bar Association Dispute Resolution Section; New York City Bar Association, ADR Committee; the New Jersey Association of Professional Mediators; the New Jersey State Bar Association Section on Dispute Resolution; JAMS. The mediators' observations are based on both private and court-connected mediations.

88. It could well be that lawyers do care about identifying interests and problem-solving strategies, but they revert to the default position of positional bargaining because that is how they have been trained. See Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253 (1997). Some scholars have criticized legal education for the lack of attention focused on understanding parties' interests. See John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 263-64 (2010) [hereinafter Lande & Sternlight, *Potential Contribution*] (arguing for the importance of integrating ADR in the law school curriculum). For a proposal that requires lawyers to identify clients' interests in court-connected mediation, see Riskin and Welsh, *supra* note 74, at 902-26.

89. See *CPR European Mediation Procedures*, *supra* note 60. Rule 5, entitled "Presentation to the Mediator," provides in part: "It is desirable for the submission to include an analysis of the party's real interests and needs and of its litigation risks. . . The parties are encouraged to discuss the exchange of all or certain materials they submit to the mediator to further each party's understanding of the other party's viewpoints."

Submitter’s perceptions of their litigation strengths and weaknesses?

Barriers to settlement?

RESPONSES

- 3. Pre-mediation memo/brief required 49%
- 4a. The client’s interests and needs 61%
- 4b. The opponent’s interest and needs 29%
- 4c. Potential solutions other than money 49%
- 4d. Perceptions of their litigation strengths and weaknesses 58%
- 4e. Barriers to settlement 56%

The results as shown in Figure 1 show that in a majority of cases, lawyers’ submissions had a problem-solving orientation, except for one category: identification of the opponents’ interests and needs. In less than one third-of the cases (29%), lawyers identified their opponents’ needs and interests in pre-mediation submissions. Given the importance of understanding *both* parties’ underlying needs and interests to achieve optimal negotiated agreements, this omission could have negative implications for problem-solving and integrative bargaining.⁹⁰

I was also interested in learning what effect pre-mediation submissions might have on lawyers’ behavior in the actual mediation process. Thus, mediators were asked to describe the frequency of apologies, and also to describe the ways in which lawyers behaved in an adversarial manner. The use of a full apology was minimal.⁹¹ In response to the question, “During the Mediation Session, how common is the use of genuine apology with admission of fault?” 92% of the mediators in the survey responded that this occurred in only 1-10% of their cases.

90. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984) (contrasting the problem-solving model of negotiation with the adversarial model and arguing how the problem-solving approach might better serve the purpose of negotiation); RUSSELL KOROBKIN, *NEGOTIATION: THEORY AND STRATEGY* 91-94 (2d ed. 2009).

91. This is consistent with other findings on the effect of an attorney’s presence on the reconciliation process. See Jean Poitras, Arnaud Stimec & Jean-Francois Roberge, *The Negative Impact of Attorneys on Mediation Outcomes: A Myth or a Reality?* 26 NEG. J. 9 (Jan. 2010) (arguing that the presence of attorneys diminishes the parties’ level of reconciliation). For discussions on the value and effectiveness of apologies, see Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 201 (2003) (finding that a party’s acceptance of full responsibility in an apology makes the other party more willing to settle than a partial apology where a party simply communicates sympathy).

Finally, despite the problem-solving orientation of lawyers described in the pre-mediation submissions, some of the behaviors described in the actual mediation sessions were just the opposite. Zealous advocacy in mediation often translated into aggressive advocacy. In response to the question, "When lawyers are adversarial, can you describe in a few words or sentences the ways in which their behaviors are adversarial?" mediators responded:

#1 "Inflammatory language expressing take no prisoners approach to litigation; generally acting like they are in a courtroom."

#3 "Loud, aggressive language and behavior; uncooperative."

#5 "They repeat their argument, do not listen to opposing counsel. Often doing it for the client who is present."

#8 "Not respectful when dealing with the other party; refuse to acknowledge the strengths of the other party's case, or willing to admit problems with their case."

#11 "Too much reliance on narrow legal issues rather than on total interests of parties."

#12 "Criticize and devalue the adversary's position in litigation. Behavior as if we are in the courtroom engaged in the adversary system."

#19 "They see the case from their client's viewpoint only and disagree on the outcome greatly."

#21 "Arguing as if a motion or trial."

#13 "Attorneys have difficulty, particularly in the presence of clients, to abandon an adversarial demeanor, and often reject outright solutions which are reasonable but which compromise their adversarial position."

#29 "They blame the adversary for every obstacle to settlement rather than considering the adversary's needs. They do not attempt serious evaluation of their own weaknesses. They question the good faith of their adversary unnecessarily."

#37 "They argue their positions and contest the adversaries' positions."

#54 "Despite my standard introduction that I do not resolve factual disputes or make legal decisions, they often present the facts and legal arguments to me as if I were the fact finder/adjudicator."

#66 "Expressions of case strengths and favorable expectations at outset to set a tone which they believe will be favorable to their client and sway the mediator."

While it is unclear the extent to which local legal culture impacts the survey results,⁹² the mediators’ perceptions certainly support the literature showing that some lawyers behave in an adversarial fashion in mediation.⁹³ Several comments describe behavior that is more indicative of participating in arbitration than in mediation, i.e., arguing positions and contesting adversaries’ positions, presenting legal facts and arguments as if the mediator were the fact finder, or arguing as if presenting a motion or participating in a trial.

b. *Disconnect Between Theory and Practice in Mediation Advocacy*

Over the last decade, mediation advocacy has blossomed into a growth industry. An emerging literature,⁹⁴ numerous continuing legal education programs, corporate in-house training programs, law school courses, and domestic and international law student competitions all focus on the role of the lawyer representing parties in mediation.⁹⁵ But there are inconsistent messages in the advocacy

92. See Julie Macfarlane, *supra* note 78, at 250-51 (discussing the influence of local legal culture on mediation practice norms in a study of mandatory mediation in two different local legal cultures).

93. See, e.g., Kimberlee K. Kovach, *The Vanishing Trial*, *supra* note 4, at 54-6 (noting that as the use of mediation and other ADR processes has increased, there has been a decrease in trials, and examining what impact this phenomenon may have on the use and practice of mediation); Riskin & Welsh, *supra* note 74, at 864. In reflecting on some of the mediators’ comments, my colleague Jon Hyman observed that the lawyers were not merely doing ineffective mediation, but they were also negotiating ineffectively. He asked whether better negotiators would build better mediation. E-mail from Jon Hyman, Professor of Law at Rutgers Sch. L.-Newark, to author (Dec. 9, 2010) (on file with author).

94. See, e.g., Jean R. Sternlight, *Lawyer’s Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 269-270 (1999) (discussing ways in which attorneys can advocate for their clients in mediation and how attorneys should redefine their method of advocacy to fit the mediation process); Peter Robinson, *Contending With Wolves in Sheep’s Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963 (1998) (acknowledging the challenges faced by the mediation advocate in fighting for a client’s best interests within a process designed to conciliate and peacefully resolve conflicts); DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR NEUTRALS AND ADVOCATES* (2009); ERIC GALTON, *REPRESENTING CLIENTS IN MEDIATION* (1994); JOHN W. COOLEY, *MEDIATION ADVOCACY* (1996).

95. See *Representation in Mediation Competition*, A.B.A. SEC. DISP. RESOL., <http://www.abanet.org/dispute/mediation/home.html> (last visited Feb. 22, 2012); *Mediation Representation Competition*, INT’L CHAMBER COM., <http://www.iccwbo.org/court/adr/id24376/index.html> (last visited Feb. 22, 2012). The criteria for judges in the two competitions include: (1) presentation of case in opening statements; (2) teamwork between attorney and client; (3) problem-solving relationship building; (4) information

literature. Some scholars stress the problem-solving role of the lawyer⁹⁶ while others discuss ways to “win”⁹⁷ and “spin” in mediation.⁹⁸

Flowing from inconsistent themes in the literature is a disconnect between the theory of problem-solving mediation advocacy and the actual practice of legal mediation. This dichotomy is sadly evident in lawyers’ behaviors that strain the bounds of zealous advocacy.⁹⁹ Despite numerous articles and mandates urging good faith participation in mediation,¹⁰⁰ and literature calling for stronger ethical rules,¹⁰¹ bad faith tactics still persist. Some attorneys mislead, delay,

gathering and communication with the other side; (5) generating and selecting creative options; (6) using opportunities in the mediation process; and (7) advocating for client’s interests. *See Representation in Mediation Competition: Rules and Instructions*, A.B.A. SEC. DISP. RESOL. (Aug. 2009) (on file with author).

96. *See, e.g.*, Jacqueline M. Nolan-Haley, *Propter Honoris Respectum: Lawyers, Clients and Mediation*, 73 NOTRE DAME L. REV. 1369 (1998) (advocating a theory of representational mediation practice grounded in deliberative client counseling); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235 (2002); Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEGOT. L. REV. 103 (2005) (suggesting a model of client representation suitable to a problem-solving approach); James K. L. Lawrence, *Mediation Advocacy: Partnering with the Mediator*, 15 OHIO ST. J. ON DISP. RESOL. 425 (2000) (arguing for letting go of adversarial tactics in mediation); HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM-SOLVER IN ANY COUNTRY OR CULTURE* (2010); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839 (1997) (examining how mediation has become integrated into litigation practice and how different aspects of litigation and mediation have been affected); Kimberlee Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem-Solving: Mediation*, 28 FORDHAM URB. L.J. 935 (2001); CARRIE MENKEL MEADOW, LELA LOVE, ANDREA SCHNEIDER, *MEDIATION: PRACTICE, POLICY, AND ETHICS* 196-216 (2006).

97. *See* Robert E. Margulies, *How to Win in Mediation*, 218 N. J. LAW. 66 (Dec. 2002).

98. *See supra* text accompanying note 9.

99. Dwight Golann has described this disconnect as a dichotomy between what is taught in law school and how litigators practice mediation. Golann, *Process, supra* note 52.

100. Research by John Lande indicates that at least twenty-two states have “good faith” bargaining requirements for mediation. John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 78 n.32 (2002) (describing policies that would better enhance the integrity of mediation than good-faith requirements). *See also Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs*, A.B.A. SEC. DISP. RESOL. (Aug. 7, 2004). *See generally* Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575 (1997).

101. Several scholars have called for improvements. *See, e.g.*, James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 ILL. U. L. REV. 255 (1999); Kovach, *New Wine Requires New Wineskins, supra* note 96;

increase litigation costs, try to wear down their opponents,¹⁰² or claim only limited authority to negotiate.¹⁰³ Attorney lying and deception continue,¹⁰⁴ and to a limited degree, are permissible under the rules governing the legal profession. Presented with an ethics inquiry about a lawyer’s obligation of truthfulness when representing a client in a caucused mediation, the ABA Standing Committee on Ethics and Professional Responsibility rejected arguments calling for a higher degree of truthfulness in mediation. The Committee decided that the minimalist approach of Rule 4.1 of the Model Rules of Professional Conduct¹⁰⁵ (governing attorneys’ behaviors in negotiation) should be applied.¹⁰⁶ The reality of legal mediation’s movement towards and similarity to arbitration was not considered, as the Committee defined mediation in its traditional form, as “a consensual process in which a neutral third party, without any power to impose a

Nolan-Haley, *Lawyers, Clients, and Mediation*, *supra* note 96 (discussing how principles of civility and deliberation can help develop a theory of representational mediation practice); Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153 (1999) (arguing that current conceptions of ethics do not provide for the wide variety of roles that lawyers adopt, especially in non-adversarial settings); Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63 (2002). *See also* Scott R. Peppet, *Lawyers’ Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475 (2005) (arguing for a radical revision of the legal profession’s code to allow lawyers and clients to contractually choose the ethical obligations under which they wanted to operate).

102. *See* Macfarlane, *supra* note 78, at 253-60.

103. *See, e.g.*, Don Peters, *Just Say No: Minimizing Limited Authority Negotiating in Court-Mandated Mediation*, 8 PEPP. DISP. RESOL. L.J. 273, 273 (2008).

104. *See, e.g.*, Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481 (2009); Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119 (2007).

105. Rule 4.1 of the Model Rules of Professional Conduct is considered the primary ethics provision that governs attorneys’ behavior in negotiation. It provides that “a lawyer shall not knowingly make a false statement of material fact or law to a third person, [nor] fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a [client’s] criminal or fraudulent act. . . .” MODEL RULES OF PROF’L CONDUCT R. 4.1 (1983). Comment 2 of the Rule states that “Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intention as to the acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.” *Id.* at cmt. 2.

106. In reaching its conclusion, the committee observed that there were competing claims: first, in a caucused mediation, “consensual deception is intrinsic to the process,” and second, that lawyers involved in caucused mediation should be held to a more stringent standards of truthfulness because a neutral was involved. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 439 (2006).

resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy.”¹⁰⁷ As a result of the Committee’s opinion, legal mediation’s move towards the arbitration zone continues to take place in a weak ethical regulatory regime. The same puffing, bluffing and “white lies” that are permissible in traditional adversarial negotiations are allowed in a caucused mediation.¹⁰⁸

A further example of lawyers’ negative behaviors in mediation is the abuse of confidentiality in mediation. A hallmark of the mediation process, confidentiality is protected by multiple statutes and court rules and more comprehensively in the Uniform Mediation Act.¹⁰⁹ The assumption is that when parties’ communications are protected from public disclosure, they are more willing to engage in open discussions that will lead to the settlement of their disputes. However, for some attorneys, mediation is an opportunity to gain tactical insight into how opponents will behave at trial;¹¹⁰ for others, it is an opportunity to exploit their adversaries. One of the attorneys interviewed in Julie MacFarlane’s study of lawyers in mandatory court mediation programs in two Canadian provinces frankly admitted, “This mediation is a perfect opportunity for the fishing expedition, which prior to this was not available to counsel.”¹¹¹

Beyond the problems of fishing expeditions, a more serious concern is lawyers’ deliberate misuse of confidential communications. This is a highly litigated area in mediation.¹¹² Sarah Cole has demonstrated that much of the misuse of confidential communications is intentional on the part of litigators. Worse still, courts do not

107. *Id.* at 7.

108. These statements are not considered “false statements of material fact” within the meaning of Model Rule 4.1. For a classic defense of the permissibility of these behaviors in negotiation see James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 5 AM. B. FOUND. RES. J. 926 (1980).

109. UNF. MEDIATION ACT (2001). See generally COLE, McEWEN & ROGERS, *supra* note 50, at ch. 8.

110. See RELIS, *supra* note 77, at 232.

111. Macfarlane, *supra* note 78, at 267 (brackets and parentheses omitted).

112. See James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006). The authors conducted a study of litigated mediation cases from the period 1999 through 2003 and found that confidentiality cases represented 1/3 of the litigated cases. Confidentiality cases continue in the high numbers today. For examples, see cases collected in COLE, ROGERS & McEWEN, *supra* note 50.

regularly sanction this behavior and sometimes even ignore it, allowing abuse of confidentiality to creep into standard mediation lawyering.¹¹³

These examples of the disconnectedness between problem-solving theories of mediation advocacy and legal mediation practice are hardly surprising. There is, quite simply, a clash of cultures. Problem-solving and peacemaking are up against the adversary system. The legalization of mediation by lawyers who bring arbitration and litigation skills into the process has been predicted for several years. Over twenty-five years ago, Leonard Riskin acknowledged the pervasiveness of the adversarial legal culture and observed that “most lawyers, most of the time” act in accordance with the lawyer’s standard philosophical map rather than the mediator’s philosophical map.¹¹⁴ In describing a “liti-mediation culture” John Lande noted over ten years ago that “[w]here mediation becomes routinely integrated into litigation practice, we can expect that this will significantly alter both lawyers’ practices in legal representation and mediators’ practices in offering and providing mediation services.”¹¹⁵ These words, and similar sentiments of other scholars, have proved prescient.¹¹⁶

B. *Mediator Evaluation Becoming a Substitute for Arbitration*

A second dimension of mediation’s evolution toward the zone of arbitration practice is the growing custom of mediator evaluation, a practice in which the mediator offers some type of opinion about the case. One scholar has explicitly labeled this practice “an arbitration substitute.”¹¹⁷ Mediator evaluation operates on a continuum that includes a wide range of mediator opinions such as case analysis with assessment of strengths and weaknesses, predictions about likely court results, and recommendation of specific proposals or options for

113. Sarah Rudolph Cole, *Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 U. KAN. L. REV. 1419, 1424-25 (2006) (“The constant misuse of mediation communications seems surprising in light of the importance parties, mediators, attorneys, courts, and legislatures place on protecting mediation confidentiality.”).

114. Riskin, *supra* note 18, at 46. See also Chris Guthrie, *The Lawyer’s Philosophical Map and the Disputants Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 180 (2001) (“[L]awyers operate according to a standard philosophical map that predisposes them to practice law and mediation in an evaluative rather than a facilitative way.”).

115. Lande, *supra* note 96, at 841.

116. See, e.g., Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1 (1991); Kovach & Love, *supra* note 4.

117. Bush, *supra* note 4, at 125.

settlement.¹¹⁸ In some respects, evaluative mediation becomes an almost inevitable phenomenon when lawyers act as mediators, even when they are trained in a facilitative model.¹¹⁹ According to Kovach and Love, lawyers “revert to their default adversarial mode, analyzing the legal merits of the case in order to move towards settlement.”¹²⁰

As more lawyers become involved in representing parties in mediation, they influence the mediator selection process and have a tendency to gravitate toward evaluative mediators, particularly in court-connected programs.¹²¹ This is not an unexpected development given the empirical findings that cases are more likely to settle when mediators offer their views regarding the merits of a case.¹²² But evaluative mediation is, in effect, a watered down version of adjudication. Lawyers know this and prepare accordingly. A leading mediation advocacy text advises lawyers: “If you know in advance that your mediator will evaluate, you should develop a plan for securing a favorable evaluation.”¹²³ The most likely scenario is that lawyers’ plans will include the usual strategic tactics associated with adjudication such as holding back information, appearing inflexible, or presenting positional arguments intended to influence the mediator.¹²⁴ In a very real sense then, evaluative mediation becomes a

118. See *Task Force on Improving Mediation Quality Final Report*, *supra* note 86, at 34.

119. McAdoo & Henshaw, *supra* note 78, at 524.

120. Kovach & Love, *supra* note 4.

121. See Nancy Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 805 (2001); Riskin, *Decisionmaking*, *supra* note 71 (lawyers want evaluation as part of mediation process); Bobbi McAdoo & Art Hinshaw, *supra* note 78; Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 145 (1997) (majority of attorneys thought that mediators should give evaluations in medical malpractice cases). Cf. Deborah R. Hensler, *In Search of “Good” Mediation*, HANDBOOK OF JUSTICE RESEARCH IN LAW 231, 239-45 (Joseph Sanders & V. Lee Hamilton eds., 2001).

122. Bobbi McAdoo, Nancy A. Welsh & Roselle L. Wissler, *Institutionalization: What Do Empirical Studies Tell Us About Court Mediation?*, 9(2) DISP. RESOL. MAG. 8, 8-9 (2003) (discussing the effect of different mediation approaches on the outcome of a case).

123. ABRAMSON, MEDIATION REPRESENTATION, *supra* note 96, at 203.

124. ABRAMSON, MEDIATION REPRESENTATION, *supra* note 96, at 203, 204 (Knowing that the mediator may evaluate can transform the mediation into an adjudicatory process). The author urges lawyers to engage in problem-solving in a constricted fashion when the mediator will offer an evaluation. He describes it as follows: “This blended strategy of problem-solving advocacy tempered by a narrowly focused positional plan and presentation plan requires a nuanced form of advocacy. You need to carefully identify and segregate risk from safe information and then artfully disclose the safe information.” *Id.* at 204.

troublesome surrogate for arbitration because it lacks the ethical requirements for truthfulness imposed on arbitration advocates. Lawyers who represent clients in arbitration have a duty of candor towards the tribunal, which prohibits them from making false statements of fact.¹²⁵ Because mediation is not considered a “tribunal,” mediation advocates are free to engage in bluffing, puffing and “little white lies.”¹²⁶

C. *Explicit Blending of Mediation with Arbitration*

A third dimension of mediation’s shift toward arbitration is the integration of mediation and arbitration procedures, a practice which has ancient roots.¹²⁷ In addition to the traditional blending process of

125. Rule 3.3 of the Model Rules of Professional Conduct provides: “(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.” A.B.A. MODEL RULES PROF’L CONDUCT (2010). The ABA has, in a formal opinion, made it clear that this provision does not apply to mediation. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 439 (2006) at 2 n.2 (“This provision does not apply to mediation because mediation is not defined as a “tribunal” in Rule 1.0(m) of the Model Rules. Comment 5 to Model Rule 2.4 makes this clear: “Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration. . . the lawyer’s duty of candor is governed by Rule 3.3. Otherwise, the lawyer’s duty of candor toward both the third party-neutral and other parties is governed by Rule 4.1. Rule 3.3 does apply, however, to statements made to a tribunal when the tribunal itself is participating in settlement negotiations, including court-sponsored mediation in which a judge participates.”).

126. See *supra* text accompanying notes 104-108.

127. One scholar has traced this procedure to ancient times: “Everywhere in the Ancient Greek World, including Ptolemaic Egypt, arbitration was normal and the mediation element was primary.” Alan L. Limbury, *Making Med-Arb Work in Australia*, 2(1) N.Y. ST. B.A. N. Y. DISP. RESOL. LAW. 84 (2009) (quoting Derek Roebuck, *The Myth of Modern Mediation*, 73 ARB. 105, 106 (2007)). See, e.g., Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 AM. REV. INT’L ARB. 1, 1-17 (1999) (proposing protocols for arbitrator involvement in settlement talks); Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661, 669-70 (1991) (observing that early labor arbitration procedures were dominated by mediation and voluntary arbitration); Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2(1) N.Y. ST. B.A. N. Y. DISP. RESOL. LAW. 71 (2009); Gerald F. Phillips, *Same-Neutral Med-Arb: What Does the Future Hold?* 2(1) N.Y. ST. B.A. N. Y. DISP. RESOL. LAW. 75 (2009);

med-arb¹²⁸ which offers the advantage of ensuring a final resolution, other hybrids include: arb-med,¹²⁹ a consensus based model of arbitration blending facilitation with decision-making,¹³⁰ and an arbitration process that provides a “mediation window” upon the parties’ request.¹³¹ Not all commentators are enthusiastic about these hybrid combinations.¹³² For Fuller, who argued that “mediation and arbitration have distinct purposes and hence distinct moralities,”¹³³ mediation’s deliberate slide into the arbitration zone would probably be an unacceptable blurring of boundaries. However, blended processes are gaining support internationally,¹³⁴ and in many non-Western countries the practices of mediation and arbitration are fully integrated. One scholar from a non-Western tradition has even suggested that the integration of both approaches may be more appropriate than the western distinction in which mediation and arbitration are “hermetically separated by a high and thick Chinese Wall.”¹³⁵

Andreas Reiner, *Arbitration and Mediation: Bridges Between Mediation and Arbitration*, 10 CROATIAN ARB. Y.B. 231 (2003) (discussing ways of combining mediation with arbitration).

128. This process begins as mediation and if the parties do not settle, they go on to arbitration. The arbitration may be conducted by the same mediator or a new neutral. See LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 15 (4th ed. 2009).

129. Arb-med begins as arbitration but becomes an arbitration after the parties have presented their evidence to the arbitrator. The arbitrator makes a decision but does not inform the parties until after they attempt mediation. If the parties do not settle, the arbitrator’s award is disclosed. Riskin et al, *supra* note 128 at 15.

130. See Nathan Witkin, *Consensus Arbitration: A Negotiation-Based Decision-Making Process for Arbitrators*, 26 NEGOT. J. 309 (2010).

131. See *CEDR Rules*, *supra* note 68, at art. 5.

132. See, e.g., Jeff Kichaven, *Med-Arb Should Be Dead*, 2(1) N.Y. ST. B.A. N. Y. DISP. RESOL. LAW. 80 (2009).

133. Bartel, *supra* note 127, at 673 n.65 (quoting Lon Fuller, who stated that “[t]he morality of mediation lies in optimum settlement, a settlement in which each party gives up what he values less, in return for what he values more. The morality of arbitration lies in a decision according to the law of contract.”).

134. See, e.g., Pedro Costa Braga de Oliveira, *Designing Effective Med-Arb and Arb-Med Processes in Brazil*, 2(1) N.Y. ST. B.A. N. Y. DISP. RESOL. LAW. 89 (2009); Siram Panchu, *Arb-Med and Med-Arb Are Well-Suited to Meeting India’s ADR Needs*, 2(1) N.Y. ST. B.A. N. Y. DISP. RESOL. LAW. 103 (2009). For a discussion of the use of med-arb in China, which has a history of usage, see Tai-Heng Cheng & Anthony Koh-tio, *Some Limits to Applying Chinese Med-Arb Internationally*, 2(1) N.Y. ST. B.A. N. Y. DISP. RESOL. LAW. 95 (2009).

135. Nabil N. Antaki, *Muslims’ and Arabs’ Practice of ADR*, 2(1) N.Y. ST. B.A. N. Y. DISP. RESOL. LAW. 113 (2009).

D. *Mediation and Arbitration: A Cautionary Tale about Compliance Problems*

As mediation practices converge with arbitration practices, mediated agreements also become prone to non-compliance issues common in arbitration. Mediation has traditionally been considered a consensual process wherein parties decide the outcome of their dispute. The theory is that if parties consent to a process, there will be compliance with agreements made in the process. The theory here points to the value of consent.¹³⁶ When parties agree to an outcome, they are more likely to honor that outcome. Studies have demonstrated that in addition to its other virtues of speed, low cost and party satisfaction,¹³⁷ mediation results in greater compliance with agreements.¹³⁸ However, as mediation has become a less voluntary process mandated by the courts, parties have been more likely to challenge the enforceability of their mediated agreements.¹³⁹ Thus, mediation confronts the same need for mechanisms to enforce compliance that arbitration once experienced with arbitral awards.

a. *Historical Compliance with Mediation and Arbitration*

In the early history of the United States when mediation and arbitration practices were linked to the community and its values, there was little concern about issues of enforcement of arbitration awards or compliance with mediated agreements. During the colonial era, arbitration was a powerful force in resolving disputes, as there was a common understanding of community norms between merchants and arbitrators.¹⁴⁰ It was unnecessary to employ legal sanctions for compliance with arbitral awards because community members relied on each other’s good faith.¹⁴¹ As community bonds weakened, so too did the voluntary nature of arbitration. Ultimately,

136. See Nolan-Haley, *Informed Consent in Mediation*, *supra* note 48.

137. See sources collected in Stipanowich, *Arbitration*, *supra* note 5, at 26-28.

138. Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 65-68 (2004). The EU Directive on Mediation adopts the compliance assumption—“Agreements resulting from mediation are more likely to be complied with voluntarily.” EU Directive, *supra* note 59, at 3.

139. Coben & Thompson, *supra* note 112.

140. See Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 81-84 (1999) (discussing the legislative history of the Federal Arbitration Act and the successful use of arbitration by merchants since the nation’s founding).

141. Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984).

arbitration was transformed into a more coercive and legalistic process.¹⁴² The Federal Arbitration Act (FAA), passed in 1925, established mechanisms to provide for compliance with arbitration awards; Section 9 of the FAA permits the arbitrator's award to be entered as a judgment of the court.¹⁴³

A similar story can be told of the early mediation experience in the United States, which was likewise linked to the community. Jerald Auerbach has written of the Quaker, Chinese and Jewish communities' reliance on mediation because of their distrust of alien legal culture.¹⁴⁴ As mediation branched out from the community and labor relations regimes and became institutionalized in the judicial system, it assumed a different, more legalized persona.¹⁴⁵ Mediation's communitarian impulses lessened, its voluntary nature diminished,¹⁴⁶ and with these changes came compliance problems.¹⁴⁷

b. *Contemporary Compliance Issues in Mediation*

In the United States, there has been a large volume of cases contesting the enforceability of mediated agreements.¹⁴⁸ In their comprehensive study of mediation-related litigation between 1999 and 2003, Coben and Thompson found that the highest number of litigated mediation cases concerned challenges to the enforceability of mediated agreements.¹⁴⁹ A follow-up study for the period 2004-2005 again found that enforceability was the most highly litigated area in

142. *Id.* at 445 (social and economic changes in Connecticut led to a more "technical legal form" of arbitration).

143. Arbitration awards are not self-executing. A successful party may petition a court under Section 9 of the FAA to enter the arbitration award as a court judgment: "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of the Act." 9 U.S.C. § 9 (1925).

144. See AUERBACH, *supra* note 3.

145. See Jacqueline Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L. Q. 47 (1996).

146. See, e.g., Timothy Hedeem, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, but Some Are More Voluntary than Others*, 26 JUST. SYS. J. 273 (2005) (analyzing coercion in mediation).

147. Coben & Thompson, *supra* note 112.

148. For a discussion of mediation litigation in England, see Jacqueline M. Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247 (2009) (discussing litigation flowing from the English courts' practice of strongly encouraging mediation and imposing costs on parties who unreasonably refuse to mediate).

149. Coben & Thompson, *supra* note 112, at 47-48.

mediation.¹⁵⁰ Courts generally apply contract law principles when deciding these cases. But just as courts have been reluctant to vacate arbitral awards,¹⁵¹ they have also been reluctant to declare mediation agreements unenforceable.¹⁵² Thus, compliance problems have generated a renewed interest in seeking ways to enforce mediated agreements.¹⁵³ Likewise, in the international setting, there has been much discussion about enforcement of mediated agreements. Some scholars have proposed that the New York Convention under which arbitration awards are enforced¹⁵⁴ should also apply to mediation.¹⁵⁵ Under this approach, the mediation agreement would be converted into an arbitral award for the purposes of judicial enforcement.

III. WHY MEDIATION IS SHIFTING TOWARD AN ARBITRATION ZONE

In his seminal study of cross-cultural disputing systems, Oscar Chase discusses the reflexive nature of culture and disputing.¹⁵⁶ He

150. See James R. Coben & Peter N. Thompson, *Mediation Litigation Trends: 1999-2007*, 1 *WORLD ARB. & MED. REV.* 395 (2007). More recent enforceability cases are collected in COLE, ROGERS & MCEWEN, *supra* note 50, at section 4.13.

151. The FAA has limited grounds for vacating an arbitral award. Section 10 of the FAA provides that vacatur is available where the arbitral award “was procured by corruption, fraud, or undue means”; where one or more arbitrators showed “evident partiality or corruption”; where “the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced”; “[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made”; and where “an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.” 9 U.S.C. § 10 (1925).

152. See Coben & Thompson, *supra* note 112.

153. See Edna Sussman, *A Brief Survey of US Case Law on Enforcing Mediation Settlement Agreements Over Objections to the Existence or Validity of Such Agreements and Implications for Mediation Confidentiality and Mediator Testimony*, IBA LEGAL PRAC. DIVISION, MEDIATION COMMITTEE NEWSL. 32 (Apr. 2006), available at www.arbitralwomen.org/files/publication/5809170924333.pdf (last visited Feb. 22, 2012).

154. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 84 Stat. 692, 330 U.N.T.S. 3.

155. See e.g., Brette L. Steele, *Enforcing International Commercial Mediation Agreements as Arbitral Awards Under the New York Convention*, 54 *UCLA L. REV.* 1385 (2007) (considering “the potential for enforcing mediated agreements as arbitral awards under the New York Convention”); Edna Sussman, *The New York Convention Through a Mediation Prism*, 15(4) *DISP. RESOL. MAG.* 10 (2009).

156. OSCAR CHASE, *LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT* 71 (2005).

observes that in a reciprocal relationship between culture and dispute processing, institutionalized disputing practices not only express the culture in which they are located, but also help construct or influence culture.¹⁵⁷ Chase feared that mediation's de-emphasis on rights would influence culture in ways that would make Americans less rights conscious. But this has not happened with legal mediation. Despite the emergence of new conceptions of lawyering committed to problem-solving, peacemaking and collaboration,¹⁵⁸ a pervasive culture of adversariness remains.

How should we understand legal mediation's advance towards the arbitration zone and into the adversarial culture in which it is embedded? Some scholars have suggested an understanding based on an assimilation theory where the dominant model swallows the marginal one.¹⁵⁹ Under this view, mediation is no longer a separate "alternative" to the judicial system, but a part of it.¹⁶⁰ Others attribute mediation's directional shift toward arbitration practice to the expansion of court-connected and lawyer dominated programs, and courts' failures to distinguish between different types of ADR in designing programs.¹⁶¹ These understandings provide a partial answer. But

157. *Id.* at 136. With respect to the growth of ADR in the U.S. and how that affects culture, Chase makes several arguments about mediation's influence. Two targets for his critique are the traditional ones, namely that mediation neutrality which may actually strengthen the bargaining power of the more powerful party and mediation's de-emphasis on rights. "By ignoring these rights in order to emphasize bargaining, ADR may be influencing culture in a way that makes Americans less rights driven and in turn harms the least powerful citizen."

158. See, e.g., JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* (2008); John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003).

159. Julia Macfarlane states that "[t]he most common outcome where an established culture meets a marginal or less powerful one is the assimilation of the latter by the dominant tradition. The hypothesis here is that adjudication will simply swallow, subvert, or assimilate the different goals of the mediation profession, and turn it into a traditional exercise in positional bargaining." Macfarlane, *supra* note 78, at 309. See also Welsh, *The Thinning Vision of Self-Determination*, *supra* note 13 (arguing that the institutionalization of mediation has led to a shift away from the original idea of the parties as the principal players).

160. Judith Resnik observes that as ADR "increasingly dominates the landscape of procedure. . . judges are charged with encouraging litigants to end their disputes through contracts for dismissal or judgment. . . . Processes of mediation and arbitration that rulemakers described as "extrajudicial" only two decades ago have been brought inside courts, thereby changing that which is judicial." Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005).

161. Kovach & Love, *supra* note 4, at 93.

there are also strong cultural currents at work here, adversarial currents flowing more towards ideas about justice than about peace.¹⁶² These cultural currents limit the possibilities for reciprocity imagined by Chase, and make mediation less interest-based, less problem-solving-oriented, more rights-based and more adversarial.

CONCLUSION: MEDIATION AT THE CROSSROADS

Mediation's advance toward the zone of arbitration also shapes the culture of disputing. In the past, mediation has enriched our disputing practices as a participatory process that honors the core value of party self-determination. Its current shift toward an arbitration model is problematic. Consider the consequences to the justice system. Mediation's move to the arbitration zone means that parties' disputing options are essentially limited to variations of adjudication. To the extent that court-connected referral programs divert parties to mediation based on the premise that mediation is different from the adjudication process, parties are diverted by myths. The real story is that many lawyers will act as if mediation were an arbitration process¹⁶³ but they will be permitted to act under much weaker ethical restraints than those that apply to arbitration.¹⁶⁴ Mediators who evaluate will contribute to the shaping of mediation as an arbitration process; and, satellite litigation challenging the enforceability of mediated agreements¹⁶⁵ will be yet another reminder that mediation is like arbitration.¹⁶⁶

Mediation's advance toward the zone of arbitration also shapes the culture of dispute. Important values associated with mediation, such as party self-determination and interest-based bargaining, are

162. See *supra* text accompanying notes 45, 46.

163. Arbitration advocacy should be understood as different from mediation advocacy. See, e.g., Kevin R. Casey & Marissa Parker, *Strategies for Achieving an Arbitration Advantage Require Early Analysis, Pre-Hearing Strategies, and Award Scrutiny*, 26 ALTERNATIVES TO HIGH COST LITIG., Oct. 2008, at 167 (arguing that arbitration advocacy is similar to advocacy in court).

164. See *supra* text accompanying notes 81-93.

165. See Coben & Thompson, *supra* note 112.

166. It is also worth noting that to the extent that mediation acts as a filter for the "right" cases, so that those that should be litigated go to court, this is less likely to happen when boundaries are blurred. See Michael Moffitt, *Three Things To Be Against ("Settlement Not Included")*, 78 FORDHAM L. REV. 1203, 1211 (2009) (responding to Owen Fiss).

marginalized. Dignity and participatory values are stifled. Court mediation becomes much more like a lawyer-controlled settlement conference.¹⁶⁷ Contrary to Chase's fears that ADR would make Americans less rights-driven,¹⁶⁸ the converse has been true with legal mediation.

Whether legal mediation's move toward an arbitration model is simply an example of process pluralism within the mediation process¹⁶⁹ or a leap beyond mediation boundaries is unclear. But it does raise ethical, pedagogical and public policy concerns that should be addressed as mediation stands at the crossroads.¹⁷⁰ How should we train law students as mediation advocates when in all likelihood they will engage with opponents who will act as arbitration advocates in mediation? When they will work in law firms where senior partners expect them to perform as arbitration advocates in mediation? When their senior partners may have different expectations on truth-telling and deception in mediation?¹⁷¹ On the international front, will American litigators who have shaped the practice of international arbitration¹⁷² repeat the same behaviors with mediation?¹⁷³ If arbitration is now becoming the "new litigation,"¹⁷⁴ and legal mediation is the "new arbitration," what will replace mediation?

As mediation stands at the crossroads, it is worth reflecting on whether it is time to pull in the reins. In my view, that time has

167. In this regard, there is a need for greater transparency in labeling certain processes as "mediation." See *supra* text accompanying notes 11-13.

168. CHASE, *supra* note 156.

169. Cf. Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 468 n.16 (2007). The term "process pluralism" been attributed to Marc Galanter. Kovach & Love, *supra* note 4, at 89 n.100.

170. See Golann, *Process*, *supra* note 52 (observing the dichotomy between what law schools teach about mediation and what litigators really do in mediation).

171. Some modest proposals for curricula change include: (1) Give mediation advocacy courses the same attention we give to courses in trial advocacy. This fits more with the reality that students will settle far more cases than they will ever bring to trial; (2) Pay attention to arbitration advocacy in separate courses; (3) Pay attention to the study of interests. See Lande & Sternlight, *supra* note 88.

172. Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition fort Transnational Business Disputes*, 29 LAW & SOC'Y REV. 27 (1995).

173. See Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319 (2003) (arguing for cultural sensitivity to host nations when exporting ADR processes.).

174. See Stipanowich, *Arbitration*, *supra* note 5.

come, and there is still room for hope. Thoughtful practitioners, mediation teachers and policy makers can reclaim the integrity of mediation by taking some corrective measures. We need more skilled and better trained and equipped mediators to reign in the unbounded and overly zealous advocacy displayed at mediation. We also need better enunciated standards of practice for mediators so that evaluations are restrained and given only with agreement by both sides. On the ethical front, we should consider revisiting ABA Model Rule of Professional Conduct, Rule 3.3, to make it clear that a mediation caucus session requires the same candor from advocates that is expected of them in a tribunal. Finally, there should be better collaboration among counsel and the mediator to establish well-understood rules and guidelines. They should make clear, in particular, that the mediator, not the advocates, is in control of the process.

APPENDIX

MEDIATOR SURVEY OF LAWYERS' BEHAVIORS REPRESENTING
CLIENTS IN MEDIATION

1. How long have you been mediating? ___ Years
2. What is your specialty in mediation: ___ Employment; ___ Contract Disputes(non-employment); ___ Torts, ___ Bankruptcy, ___ Environmental, ___ IP ___ Other?
3. Do you require parties to exchange pre-mediation memos and briefs to the other side? Yes___ No__
4. When you do have counsel exchange pre-mediation submissions, please identify whether the submissions address:
 - The clients' interests and needs? Yes__ No__
 - The opponent's interests and needs? Yes__ No__
 - Potential solutions other than money? Yes__ No__
 - Submitter's perceptions of their litigation strengths and weaknesses? Yes__ No__
 - Barriers to settlement? Yes __ No__
5. During the Mediation Session, how common is the use of a genuine apology with admission of fault?
1-10% 10-24% 25-50% 50-75% 75-100%
6. What percentage of settlement is based on litigation expectation and money exchange rather than creative interest based solutions?
1-10% 10-24% 25-50% 50-75% 75-100%
7. What is the primary focus of counsel presentation in the opening joint session?
 - Focus on litigation expectations and case strengths:
1-10% 10-24% 25-50% 50-75% 75-100%
 - Focus on client interests including business interests:
1-10% 10-24% 25-50% 50-75% 75-100%
 - Focus on equal parts legal expectations and client interests:
1-10% 10-24% 25-50% 50-075% 75-100%
8. How frequently are you asked for a legal evaluation?
1-10% 10-24% 25-50% 50-75% 75-100%
9. How frequently do clients speak in the opening session (more than in a perfunctory manner)?
1-10% 10-24% 25-50% 50-75% 75-100%

10. How frequently do clients speak in the caucus (more than in a perfunctory manner)?
1-10% 10-24% 25-50% 50-75% 75-100%
11. When lawyers are adversarial, can you describe in a few words or sentences the ways in which their behaviors are adversarial?

