

# Remodeling the Multi-Door Courthouse To "Fit the Forum to the Folks": How Screening and Preparation Will Enhance ADR

Timothy Hedeem

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# REMODELING THE MULTI-DOOR COURTHOUSE TO “FIT THE FORUM TO THE FOLKS”: HOW SCREENING AND PREPARATION WILL ENHANCE ADR

TIMOTHY HEDEEN\*

## I. INTRODUCTION

At the September 2011 symposium *The Future of Court ADR: Mediation and Beyond*, scholars and practitioners gathered to consider the contemporary state of ADR through discussion of the past and speculation of the future. Thoughtful deliberations about the successes and challenges of court-provided or court-coordinated services led to plans both principled and pragmatic. Building on Frank Sander's proposals to screen disputes for dispute resolution, this Article proposes a significant structural change in the delivery of ADR services through courts and other resources: providers should develop a thorough pre-mediation consultation process of screening and preparation that not only focuses on disputes, but disputants as well. Specifically, this proposal asserts that Room 1 should include more than the Screening Clerk and should be reformed to facilitate pre-mediation caucusing and process-design by the participants themselves.

## II. A HISTORICAL MOMENT IN COURT ADR: FITTING THE FORUM TO THE FUSS

In the mid-1970s, Chief Justice Warren Burger called attention to the need for “a better way” to resolve disputes, noting that litigation is stressful, expensive, and frustrating.<sup>1</sup> Professor Frank Sander

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\* Associate Professor of Conflict Management, Kennesaw State University; Liaison to Associates, American Bar Association Section of Dispute Resolution; Ph.D., M.A., B.A., Syracuse University Maxwell School of Citizenship and Public Affairs. The author thanks Theodore Greeley and colleagues for their editorial assistance in preparing this Article.

1. Justice Burger spoke of “a better way” for many years. Warren E. Burger, *Isn't There A Better Way?*, A.B.A. J., Mar. 1982, at 274, 274–76; see also Warren E. Burger, Keynote Address, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 79, 92–96 (1976) (addressing the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (The Pound Conference)).

researched the “varieties of dispute processing” and rough-sketched the design of a “Dispute Resolution Center,” where a screening clerk would “direct [a grievant] to the process (or sequence of processes) most appropriate to his type of case.”<sup>2</sup> The Screening Clerk would consider five criteria in determining which processes might be fitting: the nature of the dispute, the parties’ relationship, the amount in dispute, the cost of each process, and the speed of each process.<sup>3</sup> Sander went so far as to describe the directory of such a center:

Screening Clerk	Room 1
Mediation	Room 2
Arbitration	Room 3
Fact Finding	Room 4
Malpractice Screening Panel	Room 5
Superior Court	Room 6
Ombudsman	Room 7 <sup>4</sup>

With his colleague Stephen Goldberg, Sander would later offer guidance on process selection in the form of two-dimensional tables: dispute resolution procedures were first compared based on the likelihood they would satisfy each of eight disputant objectives,<sup>5</sup> and then the four nonbinding procedures were evaluated on their likely effect on ten common impediments to settlement.<sup>6</sup> Through these charts, would-be litigants and their counsel were invited to think strategically about “fitting the forum to the fuss.”<sup>7</sup> Scholars and practitioners have taken up this strand and woven it into larger tapestries, including the fields of dispute system design, collaborative law, and differentiated case management (known as “triage”).<sup>8</sup> Courts

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2. Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 131 (1976) (addressing The Pound Conference).

3. *Id.* at 118–26.

4. *Id.* at 131.

5. Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 53 tbl.1 (1994).

6. *Id.* at 55 & tbl.2.

7. *Id.* at 51–55, 66.

8. See, e.g., John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 282–85 (2004) (discussing collaborative law); Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory*

have implemented programs and policies to realize the benefits of fitting the forum to the fuss, including “multi-door” programs in Washington, D.C., and Dekalb County, Georgia, and a system in Minnesota that requires attorneys to review possible dispute resolution processes with their clients for every civil claim.<sup>9</sup>

More recently, Sander and Rozdeiczer compared different approaches to process selection, including approaches outlined in legal scholarship and in guides published for judges or corporate counsel.<sup>10</sup> Their article expands the list of disputant objectives,<sup>11</sup> describes a process for prioritizing among them<sup>12</sup> and revises the “impediments” table to account for difficult dynamics (such as psychological barriers, unrealistic expectations, and power imbalances).<sup>13</sup> The authors conclude, however, that mediation confers so many benefits that it should be the process of first resort for most disputes.<sup>14</sup> Their attention to personal and relational aspects mirrors research on disputant capacity and parties’ relationships, and together these suggest a need to revisit the courthouse design.

A light remodeling job, focusing on the area nearest the entryway, could return tremendous value on the investment. An enhanced screening process will lead to earlier, more appropriate process selection and a structured mediation-preparation process should lead to more efficient, more appropriate, and more durable outcomes.

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*Mediation?*, 47 FAM. CT. REV. 371, 380 (2009) (discussing triage); Hallie Fader, Note, *Designing the Forum to Fit the Fuss: Dispute System Design for the State Trial Courts*, 13 HARV. NEGOT. L. REV. 481, 485–89 (2008) (discussing dispute system design). See generally Andrea Kupfer Schneider, *Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113 (2000).

9. See Robert Benham & Ansley Boyd Barton, *Alternative Dispute Resolution: Ancient Models Provide Modern Inspiration*, 12 GA. ST. U. L. REV. 623, 642 (1996) (discussing DeKalb’s multi-door program); Fader, *supra* note 8, at 493 (stating that Washington, D.C., has a multi-door program); see also MINN. GEN. R. PRAC. 114.03(b) (stating that attorneys have a duty to “provide clients with the ADR information”).

10. See Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 6, 8–9 tbl.1 (2006) (referring to ROBERT J. NIEMIC ET AL., FEDERAL JUDICIAL CENTER, GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR (2001); and INT’L INST. FOR CONFLICT PREVENTION AND RESOL., ADR SUITABILITY GUIDE (2001)).

11. Sander & Rozdeiczer, *supra* note 10, at 12 tbl.2.

12. *Id.* at 17–19. Somewhat remarkable in its ambition, this process of prioritization includes multiplication. *Id.*

13. *Id.* at 28–29 & tbl.4.

14. *Id.* at 32–35.

### III. FORGET THE FUSS FOR A MOMENT: DOES THE FORUM FIT THE FOLKS?

An important aspect to enhancing the screening process is focusing on whether the forum fits the disputants, rather than focusing only on the dispute itself. Among the impediments to effective mediation that Sander and Rozdeiczer identify is a party's "inability to negotiate effectively," which they attribute to a disputant's style,<sup>15</sup> or to the parties' relationship.<sup>16</sup> Additionally, as noted earlier, many other dynamics may compromise a disputant's capability to participate in a consensual process like negotiation or mediation.

The dispute resolution community has long recognized that while mediation is a fitting process for many, it is not the best fit for all disputes or disputants.<sup>17</sup> For example, mediation is often inappropriate for disputes within relationships marked by incidents of violence or threats of harm, or by intimidation, fear, coercion, or control.<sup>18</sup> Further, mediation may not fit disputes involving individuals (1) who are emotionally unprepared to discuss the conflict or negotiate consistent with their interests, (2) who are cognitively unprepared to represent their interests, take responsibility for actions, or make behavioral commitments, or (3) who are physically unprepared to participate in a sit-down, business-style meeting for an extended period.<sup>19</sup> For example, the "triage approach," especially as implemented within family courts, specifically addresses the concern of whether the disputants are able to participate in a given forum.<sup>20</sup>

The fact that a range of traits, circumstances, and other factors may compromise a party's ability to negotiate or mediate, however, should not be a basis for directing the party to another process at the earliest opportunity. As detailed in the following pages, ADR providers should be encouraged and empowered to meet with clients in advance of any joint sessions, to clarify their client's expectations and prepare them for negotiations, and to consider whether modifications to standard mediation processes are needed. In short, they should seek ways to fit

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15. *Id.* at 28–29 tbl.4 (explaining that the disputant may be too hostile or too yielding).

16. *Id.* (providing the example that, in a divorce dispute, "each spouse should carefully consider the past patterns of decision-making of the divorcing parties").

17. *See id.* at 36–38.

18. *See* Aimee Davis, Note, *Mediating Cases Involving Domestic Violence: Solution or Setback?*, 8 CARDOZO J. CONFLICT RESOL. 253, 253, 275 (2006).

19. *See* Sander & Rozdeiczer, *supra* note 10, at 28–29 & tbl.4.

20. *See* Salem, *supra* note 8, at 380.

the forum to the folks.

#### IV. SCREENING CLIENTS AS WELL AS CASES

The previous discussion shows that successful mediation will depend on the proper screening of the disputants as well as the disputes. The question then becomes: What is the best way to screen disputants? The following material will show that the answer largely depends on various characteristics of the disputant. One such characteristic is often framed in the language of “capacity” and “competence,” and includes screening guidance or protocols.<sup>21</sup>

Research and practice in mediation, as well as collaboration with professionals across the social services, have deepened our understanding of how providers might engage prospective clients. In the 1990s, scholars began to write articles on negotiation competence and “mediation readiness,”<sup>22</sup> which were followed shortly by the *Model Standards of Conduct for Mediators*, the *Model Standards of Practice for Family and Divorce Mediation*, and the *Americans with Disabilities Act Mediation Guidelines*.<sup>23</sup> These informed a proposal that mediators might use as a competence threshold for clients participating in family mediation:

A person is incompetent to participate in mediation if he or she cannot meet the demands of a specific mediation situation because of functional impairments that severely limit

1. A rational and factual understanding of the situation;
2. An ability to consider options, appreciate the impact of decisions, and make decisions consistent with his or her own priorities; or
3. An ability to conform his or her behavior to the

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21. See, e.g., Connie J.A. Beck & Lynda E. Frost, *Defining a Threshold for Client Competence to Participate in Divorce Mediation*, 12 PSYCHOL. PUB. POL’Y & L. 1, 25 (2006); Patrick G. Coy & Timothy M. Hedeem, *Disabilities and Mediation Readiness in Court-Referred Cases: Developing Screening Criteria and Service Networks*, 16 MEDIATION Q. 113, 118 (1998) (discussing mediation readiness).

22. See, e.g., Coy & Hedeem, *supra* note 21, at 114–20 (discussing mediation readiness); Edwin H. Greenebaum, *On Teaching Mediation*, 1999 J. DISPUTE RESOL. 115, 121–22, 131 (discussing competence); .

23. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005); MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION (Symp. on Standards of Prac. 2000); ADA MEDIATION GUIDELINES (Cardozo J. Conflict Resol. 2000).

ground rules of mediation.<sup>24</sup>

While such a policy may protect those for whom mediation poses insurmountable hurdles, many practitioners believe that mediation may be tailored to accommodate and better serve a broader population.<sup>25</sup> Placing emphasis on the reciprocal relationship concerning mediation fitness, scholars have encouraged mediators to engage in self-assessment: “Just as mediation [providers] ought to ask whether specific disputants have the social skills and cognitive abilities that make them ready for mediation, so should [dispute resolvers] ask themselves whether they are ready to meet the needs of various segments of the disability community” or any other challenges.<sup>26</sup>

Discussions of incompetence may suggest a permanent or sustained condition, although observers have challenged this as giving rise to exclusion on many fronts.<sup>27</sup> Some have reconceptualized “competence” in terms of specific abilities, and they argue that mediation providers might facilitate a client’s “competencies.”<sup>28</sup> They describe competencies as proficiencies that may shift over time and suggest that mediators should not act as an authority or an equal partner, but as “a catalyst for the parties to actuate their self-determination and collaboration competencies.”<sup>29</sup>

Support for the contention that a client’s proficiencies may change comes from many quarters, including anecdote and neuroscience. The mediation literature includes accounts of (1) a divorce mediation client whose disposition, and capacity to participate effectively, changed markedly between sessions,<sup>30</sup> (2) disputants who experienced short-term “acute” periods of limited capacity,<sup>31</sup> and (3) disputants whose autonomy may be undermined by the “thrall of intense emotion.”<sup>32</sup>

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24. Beck & Frost, *supra* note 21, at 25.

25. *See, e.g.*, Coy & Hedeem, *supra* note 21, at 126 (mentioning the disability community).

26. *Id.*

27. Susan H. Crawford et al., *From Determining Capacity to Facilitating Competencies: A New Mediation Framework*, 20 CONFLICT RESOL. Q. 385, 393 (2003).

28. *Id.*

29. *Id.*

30. Sarah Childs Grebe, *Ethical Issues in Conflict Resolution: Divorce Mediation*, 5 NEGOT. J. 179, 187 (1989).

31. Coy & Hedeem, *supra* note 21, at 118.

32. ELLEN WALDMAN, *MEDIATION ETHICS: CASES AND COMMENTARIES* 55 (2011).

Emerging research in neuroscience also appears to confirm that a disputant may be more or less resourceful—that is, able to engage in thoughtful, organized conversations about conflict—at varying times.<sup>33</sup> Brain imaging studies have found that stressful conditions can lead one’s nervous system to set aside executive function in the prefrontal cortex while prioritizing self-preservation instincts through the amygdala.<sup>34</sup> Birke observes that the common mediation stage of “telling [one’s] story,” during which a disputant recapitulates perhaps distressing events within the conflict, may lead parties to an unresourceful state; thus, he recommends a “substantial cool-down period” before moving on to problem solving.<sup>35</sup>

Another characteristic important to process and party “fit” is fitness. Mediations in some contexts are practiced as endurance events.<sup>36</sup> The long hours typical of labor-management negotiations and mediations are sometimes replicated in other civil matters, but a crucial difference lies in the parties’ expectations: first-time mediation participants may have no basis to anticipate the duration of mediation.<sup>37</sup> A recent ABA report on mediation quality attempts to provide some specificity: “Mediators need to know when to keep the mediation going and when to stop it. They should be prepared to stay late—and as long as it takes to finish the mediation.”<sup>38</sup> Nonetheless, when Coben asked whether it is appropriate to encourage parties to skip meals as a way to build pressure toward agreement, he was surprised by the majority who responded affirmatively: “Acquiescence through exhaustion—now that’s an ethically healthy approach to dispute resolution designed to make us all proud,” he reflected.<sup>39</sup> This report shows that mediator persistence (or appropriate “pressure” toward settlement) is held by many to be a virtue, even while it eludes strict definition.<sup>40</sup>

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33. Richard Birke, *Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications*, 25 OHIO ST. J. ON DISP. RESOL. 477, 511 (2010).

34. *See id.* at 510–11.

35. *Id.* at 511.

36. Timothy Hedeem, *Mediation as Contact Sport? Issues of Fitness and Fit Arising from Georgia’s Wilson v Wilson*, DISP. RESOL. MAG., Winter 2009, at 24, 24.

37. *See id.* at 25–26.

38. ABA SECTION OF DISPUTE RESOLUTION, TASK FORCE ON IMPROVING MEDIATION QUALITY, FINAL REPORT app. D, at 35 (2008) [hereinafter MEDIATION QUALITY FINAL REPORT].

39. James R. Coben, *Mediation’s Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, JUST RESOL.’S (ABA Sec. of Disp. Resol.), Nov. 2004, at 9, 9.

40. *See, e.g.*, GA. ALT. DISP. RESOL. RULES app. C, at 26 (1995) (“At some point . . .

While an experienced labor negotiator knows to bring her toothbrush in anticipation of prolonged meetings, individuals unfamiliar with such settings may be caught unaware. This assertion is evidenced through a number of suits or petitions brought by mediation participants to modify or vacate settlements reached after long sessions,<sup>41</sup> and one wonders if mediation requires the following form of advisory packaging: “Warning: this dispute resolution process may involve long hours, many in small rooms alone (while the mediator meets in caucus with other parties) and without obvious opportunity to obtain food, drink, or even necessary medications.”<sup>42</sup> Mediation providers would do well to advise clients of the likely length of a mediation session’s duration and to invite clients to consider their own limitations and preferences. The following discussion highlights the value of a mediator’s consideration of each party’s disposition and apparent ability to use mediation.

There are multiple ways to provide support to both parties during mediation. One way is through direct communication and consultation before the first joint session of mediation. Such an approach is commonplace in some mediation contexts, especially those involving the Americans with Disabilities Act and those operating within a restorative justice framework. The model of “disability access planning” may be

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persistence becomes coercion.”); MEDIATION QUALITY FINAL REPORT, *supra* note 38, app. D, at 35 (“Follow-through is patience and persistence but not stubbornness.”); 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, 285 (2005) (“[It is suggested] that some parties seek . . . mediators to apply pressure toward settlement.”). This dynamic, described as “party-as-piñata,” calls forth the need of a new model of mediation communication: a signal from parties to the mediator that they desire more or less pressure. Hedeem, *supra*, at 284–85. Development and marketing of the “mediatrix” approach, based on the dominatrix’s role in delivering desired pressure up to a point, may not be far off. For a discussion of the origin of the term mediatrix, see Timothy Hedeem, “*The Mediatrix*,” *A New Mediator Orientation*, ALT. DISP. RESOL. GA. (Mar. 8, 2012), <http://georgiaadr.wordpress.com/2012/03/08/the-mediatrix/>.

41. See *Olam v. Cong. Mortg. Co.*, 68 F. Supp. 2d 1110, 1116–18 (N.D. Cal. 1999) (noting that the settlement was challenged after the parties entered various settlement attempts and the successful mediation lasted two days); *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094, 1096 (Fla. Dist. Ct. App. 2001) (discussing that the plaintiff attempted to vacate the settlement on the grounds that she signed the agreement under coercion, following a mediation that lasted for seven to eight hours); *Wilson v. Wilson*, 653 S.E.2d 702, 704 (Ga. 2007) (discussing the plaintiff’s attempt to vacate the settlement after the parties attempted to settle the case over a period of three months); *Randle v. Mid Gulf, Inc.*, No. 14-95-01292-CV, 1996 WL 447954, at \*1 (Tex. App. Aug. 8, 1996) (discussing the plaintiff’s attempt to vacate the settlement on the grounds that he signed the agreement under duress).

42. Hedeem, *supra* note 36, at 25.

applied to mediation, with a “convener” who works with parties prior to mediation:

Disability access planning is oriented around the mediators’ non-judgmental acceptance and understanding of the obstacles faced by the person with a disability. The approach in access planning is on modification of the process—not on changing the person with a disability—to enable his effective participation.<sup>43</sup>

A second way is through restorative justice processes, which play a similar role, even if for reasons quite distinct. Restorative processes—like victim–offender mediation, community conferencing, and peacemaking circles—involve at least two parties of very different stature: a victim and an offender.<sup>44</sup> In such cases, the convener meets with each party separately in advance of scheduling any joint session, thereby seeking to prevent re-traumatization of the victim and ensure the offender’s acceptance of accountability as primary tasks.<sup>45</sup> These goals are in concert with other aims, too:

It is the mediator’s task, during separate premediation sessions, to learn the communication style of each party and identify specific strengths that may directly assist in the mediation or dialogue process and to encourage the expression of those strengths in mediation.<sup>46</sup>

Importantly, family law matters often involve a related dynamic to

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43. Judy Cohen, *Convening for Enhanced Self-Determination and Access to the Process*, *MEDIATE.COM* (July 2003), <http://www.mediate.com/articles/cohen6.cfm>.

44. See John Harding, *Reconciling Mediation with Criminal Justice*, in *MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY* 27–42 (Martin Wright & Burt Galaway eds., 1989) (giving an overview of the development of victim–offender mediation); Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, *JUVENILE JUSTICE BULL.* (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t J.), Feb. 2001, at 1, 1–4, 6 (discussing the background, procedure, and goals of victim–offender mediation, community reparative boards, and circle sentencing, also known as peacemaking circles).

45. See MARK S. UMBREIT & JEAN GREENWOOD, U.S. DEP’T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, *GUIDELINES FOR VICTIM-SENSITIVE VICTIM-OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE* 2, 9 (2000).

46. MARK S. UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH* 13 (2001).

these restorative justice programs—intimate partner violence and/or abuse (IPV/A).<sup>47</sup> Through collaborations across court program administrators, dispute resolution providers, and advocates and counselors for victims of IPV/A, many jurisdictions employ effective, respectful screening tools and protocols. Maryland and Michigan are among states in which courts have developed screening instruments specifically for cases referred to mediation, and a New York community mediation center has partnered with a battered women's project to initiate a screening and safety protocol.<sup>48</sup> The Mediator's Assessment of Safety Issues and Concerns (MASIC) is designed to be administered through interviews with prospective mediation clients.<sup>49</sup> Following specific attention to abuse, control, violence, and stalking, MASIC concludes with an invitation to consider alternatives or enhancements to face-to-face mediation. These alternatives include, among others, shuttle mediation (in separate rooms, online, or by phone), staggered arrival and departure times, the presence of support persons, and convening at a secure facility.<sup>50</sup>

The overarching theme of the discussion above is to recommend that mediation providers assess every disputant's ability to participate in mediation and broaden access to mediation to the largest extent possible. The dimensions addressed here—of disputants' cognitive, emotional, and physical capacities, as well as their degree of unconstrained autonomy—are not easily assessed. And yet the ethics of mediation, especially court-annexed mediation, demand that

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47. Amy Holtzworth-Munroe et al., *The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain*, 48 FAM. CT. REV. 646, 646 (2010).

48. See, e.g., MD. JUDICIARY, DOMESTIC VIOLENCE AND MEDIATION WORKGROUP, SCREENING CASES FOR FAMILY VIOLENCE ISSUES TO DETERMINE SUITABILITY FOR MEDIATION AND OTHER FORMS OF ADR: SCREENING PROTOCOLS AND TOOLS FOR MARYLAND CIRCUIT COURTS 5–6 (2005), available at <http://www.courts.state.md.us/family/pdf/screening.pdf>; MICH. SUPREME COURT STATE COURT ADMIN. OFFICE, OFFICE OF DISP. RESOL., DOMESTIC VIOLENCE AND CHILD ABUSE/NEGLECT SCREENING FOR DOMESTIC RELATIONS MEDIATION: MODEL SCREENING PROTOCOL (2006), available at <http://courts.michigan.gov/scao/resources/standards/odr/dvprotocol.pdf>. The partnership between the Mediation Center of Dutchess County and Battered Women's Services of Family Services, Inc., is detailed in Dee DePorto & Jody B. Miller, *Honoring the Victim's Voice: The Domestic Violence and Mediation Safety Project*, ACRESOLUTION, Summer 2005, at 22, 22–27.

49. Holtzworth-Munroe et al., *supra* note 47, at 649.

50. *Id.* app. at 661.

practitioners make reasonable efforts to do so. A consultation prior to any joint session provides such an opportunity to assess every disputant's ability, as well as providing a second, broader opportunity.

#### V. A RELATED OPPORTUNITY: CLIENT PREPARATION

Dispute resolvers have come to recognize the value of planning for settlement. It is evident that mediators, attorneys, and judges appreciate the utility of setting the table before sitting down based on the creation of settlement counsel branches by law firms, the creation of the field of collaborative law, the creation of conflict coaching, and the creation of the recent American Bar Association book on planned early negotiation.<sup>51</sup>

Scholars and practitioners have observed that disputants often arrive at mediation without a full picture of either the mediation process or their approach to participating in it, a reality articulated by Nolan-Haley in her call for "informed consent" to facilitate "truly educated decision-making."<sup>52</sup> Building on dispute system design and its applications in organizations and governments, conflict "coaches" can help disputants consider their options and choose the best strategies.<sup>53</sup>

Researchers have found that convening parties in advance of

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51. See generally JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY* (2011).

52. See Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 775-76 (1999).

53. See CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* 44-45, 48, 50 (1996); Edward Feinberg et al., *Beyond Mediation: Strategies for Appropriate Early Dispute Resolution in Special Education* 20-26 (CADRE Consortium for Appropriate Disp. Resol. in Special Educ. Paper 2002), available at <http://www.directionservice.org/cadre/pdf/Beyond%20Mediation.pdf> (discussing early dispute resolution options in the context of special education disputes). Organizations and government agencies often share an emphasis on prevention and "upstream" processes to complement mediation and other responses to manifest conflict. See Lisa Blomgren Bingham et al., *The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government*, 65 PUB. ADMIN. REV. 547, 552-53 (2005) (explaining that "upstream" processes can occur at the "policy making" stage, and can include incorporating "citizen and stakeholder engagement, deliberation, collaboration, and consensus building"). Conflict coaching is an emerging form of dispute-related practice similar to professional coaching. See Ross Brinkert, *Conflict Coaching: Advancing the Conflict Resolution Field by Developing an Individual Disputant Process*, 23 CONF. RES. Q. 517, 517-18 (2006) (defining conflict coaching).

mediation builds rapport between the disputants and the mediator.<sup>54</sup> Using caucuses prior to mediations may be a helpful tool.<sup>55</sup> Indeed, studies have shown that “within the context of labor and family mediations, mediators should consider using caucuses prior to mediation to build a trustworthy relationship with both parties.”<sup>56</sup> Further research may help mediators understand the functional benefits of pre-mediation caucuses, including the opportunities to invite disputants to engage in pre-negotiation planning and to co-design the process ahead.

Co-designing the eventual mediation process aligns closely with the principal findings of the ABA Task Force on Improving Mediation Quality, which conducted focus groups and interviews with a range of mediation users.<sup>57</sup> The report summarized that an overwhelming majority of respondents believed mediator preparation to be important and noted that “sophisticated repeat mediation users wanted to have substantive input into the mediation process itself.”<sup>58</sup> Further, a second finding of the study related to customization and revealed that participants in the mediation process “praised flexibility as a quality desirable in mediators” and suggested that mediators should tailor the mediation process on a case-by-case basis.<sup>59</sup> Given these findings, one wonders why less sophisticated, first-time users would not wish to help shape their mediation processes to fit their needs and interests. The opportunity to jointly design the mediation process aligns well with research on procedural justice, which consistently demonstrates that individuals are more likely to adhere to policies and agreements developed through processes they consider fair and appropriate.<sup>60</sup> Thus, the opportunity for a disputant to help develop his particular dispute resolution process could make disputants more likely to adhere to the process’s outcome.<sup>61</sup>

The perceived value of pre-negotiation planning among scholars is

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54. Roderick Swaab & Jeanne Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* 9, 12 (IACM 2007 Meetings Paper Jan. 6, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1080622](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1080622).

55. *Id.*

56. *Id.* at 12.

57. MEDIATION QUALITY FINAL REPORT, *supra* note 38, at 4–5.

58. *Id.* at 7.

59. *Id.* at 3, 12–13.

60. *See, e.g.*, TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 7 (2002).

61. *See id.*

reflected in its ubiquity across the negotiation literature—so much so that there is a book that includes the term in its title.<sup>62</sup> Attorneys and mediators are trained to consider issue-specific matters, positions and interests, aspirations and alternatives, framing and sequencing, concessions and tradeoffs, and authority and contingent terms prior to negotiation.<sup>63</sup> Unfortunately, many mediation participants are unlikely to know (and thus unlikely to appreciate the value of) many of these concepts.

Similarly, the counterintuitive step of assessing all of the above from the counterpart's perspective is likely unapparent to many casual negotiators, even while researchers and practitioners have counseled to do so.<sup>64</sup> Resources that counsel participants on topics to consider prior to mediation can only improve mediation efficiency and outcome durability. That is why programs implementing pre-mediation caucusing or something along the lines of Sander's Screening Clerk *plus* a convener, would be great facilitators in increasing mediation participants' knowledge and confidence in the process.

## VI. CONCLUSION AND IMPLICATIONS

Remodeling the multi-door courthouse, like remodeling any structure, demands a combination of resolve and resources. While it has long been recognized that “form follows function,” a quarter-century

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62. WILLIAM F. MORRISON, *THE PRENEGOTIATION PLANNING BOOK* (1985). Indeed, the negotiation literature—which fits mediation well, since many consider mediation to be a facilitated negotiation—places tremendous emphasis on the value of preparation. See, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 45, 48, 51, 102–11 (Bruce Patton ed., 1981) (discussing various considerations and questions one might want to consider before entering negotiation); ROY J. LEWICKI ET AL., *THINK BEFORE YOU SPEAK: THE COMPLETE GUIDE TO STRATEGIC NEGOTIATION* 22–24 (1996).

63. See FISHER & URY, *supra* note 62, at 41–57, 101–11 (noting differences between interests and positions and discussing the importance of a party knowing his “Best Alternative to a Negotiated Agreement”); LEWICKI ET AL., *supra* note 62, at 19–20, 22–23, 101, 120–21 (discussing authority, concessions, and the importance of considering alternative strategies); Harold H. Saunders, *We Need a Larger Theory of Negotiation: The Importance of Pre-Negotiating Phases*, 1 *NEGOT. J.* 249, 257 (1985) (discussing the various concerns that individuals must consider before negotiating).

64. See LEWICKI ET AL., *supra* note 62, at 25; Neil Rackham, *The Behavior of Successful Negotiators*, in *NEGOTIATION: READINGS, EXERCISES, AND CASES* 393, 393, 395–98 (Roy J. Lewicki et al. eds., 1993); Ron Kelly, *20 Key Questions Before You Meet*, RON KELLY, <http://www.ronkelly.com/RonKellyTools.html> (last visited May 14, 2012).

ago a mediator observed that “form follows funding.”<sup>65</sup> Court ADR champions can surely recognize the functional and financial value of widening the doorway and expanding the meeting space in Sander’s Room 1, formerly dominated by the Screening Clerk. With only a few additional resources, the clerk can partner with (or perhaps embody) the convener. Working with clients, they can select and prepare to engage in the appropriate mode of dispute resolution.

Investments at the front end can lead to a more efficient, effective, and responsive system of justice. Given the marked growth in the proportion of self-represented disputants in court cases, the opportunity—and need—to engage parties before mediation should return many benefits to the courts, mediators, and the parties themselves. Financial pressures on courts may constrain opportunities to develop screening and preparation resources. The returns on investment could include earlier referral to more appropriate services, shorter mediations, and more durable (and thus less-appealed) settlements. Such an investment need not be extravagant; if the courts can focus on the disputant, as well as the dispute, the system can better meet every party’s needs.

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65. Albie M. Davis, *Community Mediation in Massachusetts: Lessons from a Decade of Development*, 69 J. AM. JUDICATURE SOC’Y 307, 308 (1986).