A Response to "The Promise of ADR"

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The Symposium brought together a strong mixture of academic and practitioner participants. I am of the latter category, having been a mediator and arbitrator in a broad variety of disputes for nearly fifty years. My invited contribution to the Symposium was a report on a mediation project, conducted with my colleague Susan Podziba under the leadership of Moritz College of Law Professors Edward Foley and Nancy Rogers, which examined the possibility of enhancing the redistricting process in Ohio and Illinois through mediated discussions. I also participated in the general discussion of Professor Joshua Douglas' presentation and have been invited to comment on his article.[1]

The comment that I made at the Symposium, and will repeat here with some greater explanation, may seem ironic. A long-term advocate of "public policy mediation" is an unlikely proponent of restraint in extolling the capacities of that strategy. However, my experience as a practitioner includes many "successful" mediations in which the interactions were hostile and rude throughout. It is true that parties to mediation are often seeking more civil and productive relations and that their relationships are substantially enhanced as an effect of the process. But not all parties to mediated negotiations seek, or achieve, that effect. Mediation often demonstrates the benefits of interest-based, non-adversarial approaches, but not always, if my experience is a sample.

Negotiations, even when mediated, are anxiety-provoking. The stakes are high. The individuals participating are navigating among clients, allies, and adversaries. It is not surprising when "emotions" are in play. The atmosphere can be charged and the serene oasis that may be imagined is not the scene at hand. Members of my age cohort who are musing about becoming mediators after they retire often approach me. I know they contemplate a place of calm and reason where their accumulated skills and wisdom will be gratefully received and they will rescue others from conflict and chaos.

Skillful negotiators do not lose sight of their ultimate objectives or lose touch with their values. Mediators may find it necessary to be aggressive and even a bit brutal in their role as "agents of reality." The atmosphere at the bargaining table and in the caucuses can be tense and unfriendly when

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[1] Joshua A. Douglas, *Election Law and Civil Discourse: The Promise of ADR*, 27 OHIO ST. J. ON DISP. RESOL. 291 (2012).

mediators are doing their job. A mutually beneficial agreement may result—but not an enhanced relationship.

I would not offer mediation as a reliable antidote for pervasive incivility in American politics, especially if doing so implies that parties who enter that process may be overcome by its powers despite their own intentions and contrary behavior. In my judgment, mediation's potential for salutary after-effects, like most of mediation's potential, correlates with the parties' desire to realize such benefits.

Ongoing relationships of the utmost importance to the parties are the most hospitable medium for mediation's "transformational" effects. Thus, mediators in commercial contract litigation may emphasize the wisdom of nurturing post-dispute business to gain greater motivation to settle. Still, some former spouses remain hostile following mediation of their continuing parenting arrangements. Likewise, unions and employers, despite their obvious interdependence, are not inevitably more collaborative after mediated collective bargaining. I would suggest that election-related litigation, linked as it is to winning or losing entirely, may be particularly resistant to the reorienting of the parties by mediation.

I agree with Professor Douglas that negotiations over slightly removed matters of process, including dispute resolution processes, may be a more promising medium for mitigating combativeness. Negotiators are unlikely to put aside their desire for ultimate advantage even when the topic is process, but there are times when a fair and intelligent process is a mutually acceptable outcome as compared to alternatives. I also agree that what may appear to be an agreement on a minor matter may also provide a lesson to the parties regarding the benefits of collaboration.

Moreover, and now I would change my tone from cautionary to reinforcing, I appreciate Professor Douglas' suggestion that negotiated rulemaking seems particularly promising. "Negotiated rulemaking," like "mediation," has proved to be a flexible term that seems to accommodate a variety of processes. What is important to note is that negotiated rulemaking is distinct from the litigation-settlement mediation with which most observers are familiar. It is transactional, legislative, norm creation—not norm enforcing or grounded on predicting litigation outcomes. It requires different mediation tasks, methods, and responsibilities. It is feasible in many cases, but it is not the mediation to which many mediators and advocates are accustomed.

The negotiated rulemaking process to which I refer does not identify the participants as do other mediations. There are no plaintiffs or defendants, no company and union, no husband and wife. When done properly, the process begins with a feasibility assessment that suggests who should participate,

among many other important factors, and where appropriate, a process design. It is very sensitive to the particular political culture in which it is to occur. It reflects realism and sophistication with respect to the time and place. It respects important idiosyncrasies and discounts templates. Should the participants include candidates, party officials, other political influentials,[2] and advocacy organizations?

Often, it is necessary to negotiate ground rules before proceeding to substantive negotiations. Negotiated rulemaking mediators should conduct the assessment and facilitate the negotiations. But assisting the negotiators in this creative process does not draw on the mediators' substantive expertise so much as their ability to interest, organize, and then elicit invention from the parties. These mediators have responsibilities as catalysts and organizers that are generally not placed on mediators in other types of cases.

Negotiated rulemaking is not always carried out ideally, but in my experience, its ad hoc improvisational nature provides a medium for creativity; and inasmuch as that creativity is a joint enterprise of the negotiators, their interactions thereafter are positively affected. That is not to say that the participants leave behind their diverse and conflicted perspectives, but that they do not forget that they have the capacity to collaborate and that they value that capacity. I would suggest that negotiated rulemaking in particular warrants further consideration and experimentation as a moderating influence on our current political style.

Although the foregoing is mainly focused on mediation as a means of avoiding or settling election-related litigation, Professor Douglas' concerns also include the contribution that courts and judicial decision writing have made to the belligerent tone of political conflict. He observes that over-heated rhetoric in decisions, particularly as reported in the media, adds yet another negative factor to the political climate.

These days, candidates for judicial positions themselves engage in election campaigns that are advised, managed, and funded by the same organizations and individuals that support non-judicial campaigns. Even where such candidates are officially nonpartisan they are often broadly associated with a political party. The very tactics that concern us in general are increasingly present in races for judgeships.

It is little wonder that the style of expression that pervades in election campaigns persists when the candidate is in office. I am less certain that campaign tacticians draw upon the negative expressions to be found in

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[2] "Other political influentials" refer to entities that are persuasive among frontline actors but do not fit within the other listed categories. Examples might include certain local government and business organizations.

judicial decisions; but if ADR might provide some mitigation of the pervasiveness of that tone, it should be promoted as an alternative.

It is a concern when advocates of mediation seem to undervalue the frustrating orthodoxies that conceive of mediation as an alternative, and that require that participation in mediation be voluntary. I would acknowledge that in many instances in election disputes, litigation is the wiser course. It provides public findings of wrongdoing, public vindication, and precedent to govern future decisions. In my view, mediation is to be selected by those who find it preferable in consideration of their own interests.

It seems that we must convince those who, with some substantiation, already attribute success in political advocacy to combativeness when, in some cases, moderately-toned "problem-solving" will be to their advantage. As Professor Douglas suggests, we must understand the "realities" of the contemporary political campaign and identify where mediation may be consistent with the parties' interests. That is a particular version of the challenge that has been confronted throughout the growth of mediation in general. Persistence has been rewarded, albeit too slowly for some of us. It seems reasonable to continue to be patient and optimistic.