

1994

## What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions

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### Recommended Citation

James J. Alfini, John Barkai, Robert B. Bush, Michele Hermann, Jonathan Hyman, Kimberlee Kovach, Carol B. Liebman, Sharon Press & Leonard Riskin, *What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307 (1994).  
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## What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions

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The Alternative Dispute Resolution Section of the Association of American Law Schools presented a program, at the 1994 AALS Conference, on the institutionalization of mediation -- through court-connected programs and otherwise. The topic is an important one, because this phenomenon has become increasingly common in recent years. Moreover, the topic seemed especially appropriate for the 1994 program, since Florida -- the host state for the conference -- was one of the first states to adopt a comprehensive statute providing for court-ordered mediation (at the trial judge's option) in civil disputes of all kinds. The move toward institutionalizing mediation has raised many questions, and this program was designed to highlight those questions, and provoke this discussion about them. The panel for the program was composed of mediation scholars, teachers and practitioners, from eight diverse jurisdictions around the country, with expertise on many different aspects of the institutionalization issue. The program was organized by Professor Baruch Bush (Program Chair), together with Professor Carol Liebman (Section Chair) and Dean James Alfini (Panel Moderator). This article presents an edited transcript of the panelists' comments.

DEAN JAMES ALFINI: As you know, mediation has captured the interest of lawyers and judges. And, as a consequence, we are seeing the growth of court-sponsored mediation programs. The general question we'll be addressing today is: What are the real and potential effects of this institutionalization of mediation? In particular, we'll concern ourselves with the impact of institutionalization on: First, the mediation process. Second, the parties to the dispute, or the case in court. Third, the lawyers

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and the legal profession generally. Fourth will be the courts. Our broader purpose is to begin to assist in constructing both a research agenda and a policy agenda for this important area. So as we discuss what we know about mediation and its institutionalization, I hope we'll keep in mind that we should be also identifying what we need to know in order to make better policy decisions. Our method will be a hybrid of sorts that will consist of the somewhat traditional scholarly panel presentation along with aspects of a socratic dialogue. My role will be that of a traffic cop -- to keep things moving along, to permit the airing of all issues and to give everybody their due.

Let's put the discussion in a hypothetical context; you need one of those for a socratic dialogue. Because you are all familiar with that form of pedagogical abuse, this should be a relatively easy group to deal with on that score.

The Chief Justice of the State of Fiss [laughter] -- glad that reference is not lost on some of you -- is very interested in bringing mediation into the court system, particularly into the trial court system. Specifically, the State of Fiss is interested in using mediation to deal with small claims disputes, family matters, divorce cases, and, ultimately, with larger stakes civil cases. A number of policy making groups within the state -- the state legislature, judges, lawyers, and citizens groups such as the League of Women Voters -- are very concerned about bringing this new dispute resolution process into the judicial system. There is also a strong group of private mediators who have organized themselves into an association of real mediators within the State of Fiss. They are also concerned about what might happen to mediation as it is brought into the court system. Our panel is a consulting team that has been brought into the State of Fiss with the purpose of advising these policy makers on these important matters. As the embodiment of the interests of these policy making groups, I will be asking each member of the panel questions relating to the impact of institutionalization on the mediation process and the parties, on the legal profession and on the courts. We'll give each panel member a certain amount of time -- this is where it becomes a bit more traditional, we won't be moving along quite as quickly as some of these socratic dialogues do -- but if they get bogged down, we'll try to get them unplugged.

Let's start with the concerns of the professional mediator in the State of Fiss. As you can imagine, their general concern is whether, once the court system -- particularly lawyers and judges -- get their mitts on this new process, mediation as they know it -- good mediation -- will come to an end. Whether lawyers and judges will, in fact, bastardize the process.

Now, Professor Bush, I know you have thought long and hard about this, and you've written quite a bit on it. What's your advice to us?

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Is that likely to happen? Is it likely that there would be negative effects if mediation becomes institutionalized?

**PROFESSOR BARUCH BUSH:** The first thing that I'd say, if I were talking to the private mediators, is that perhaps you ought to be concerned not just about what lawyers and judges will do to the process, but what mediators themselves sometimes do to the process. Perhaps the best way to put it is like this: We've learned a number of things over the years. One important thing we've learned is that mediation is malleable. There are different ways to do it, different approaches and different versions of the process. It's quite fluid. So there always have been different approaches to the process and, if you want to call it a mediation movement that we're involved in, different faces to the movement. I might distinguish them as, on the one hand, a kind of "technocratic" face to the movement, in which mediation is basically used and seen as a faster, cheaper way to resolve disputes, to produce certain kinds of outcomes that are considered better substantive outcomes -- in short, a good technology for solving problems. And, on the other hand, there is what we might call a "humanistic" face to the movement in which mediation is seen as a way of helping parties to strengthen themselves and relate to each other as they work through conflict. The thing to be concerned about as mediation becomes institutionalized -- not just through connections with courts, but in other ways, which I'll mention in a minute -- is that what tends to happen is the hardening of mediation practice into one of those images rather than the other, and the version that tends to get crystallized is the technocratic face rather than the humanistic face.

Let me be a little more specific, because there are a number of different things that we can consider institutionalization. Courts' and lawyers' involvement is one. This tends to mean that the advancement of settlement and agreement is set up as an all important goal of mediation because disposition of cases matters very much to courts. Also, legal standards become imported into the definition of what constitutes a good agreement in mediation, as opposed to purely the parties' preferences. In some of the research that I did several years ago on mediators' perceptions of ethical conflicts in mediation, there was evidence of mediators feeling the pull of the pressure to get settlements, and the pressure to shape outcomes in a certain direction that would conform to legal standards and fairness ideas in legal terms, rather than being non-directive and allowing more party self-determination. Standardized mediator training that courts accept -- which tends to focus in the direction of a settlement-driven model -- is another influence in that direction.

On the other hand, there are forces of institutionalization within the profession itself that tend to move the field toward the technocratic

model. Professor Austin Sarat, who's been a critical observer of this field for many years, said at a conference last year that mediators should forget about being a social movement and realize that they really are simply practitioners of a useful skill which ought to be sold to parties like other useful skills. Again, this suggests the technocratic model. The growth of a number of professional organizations of mediators might be seen as an institutional force working in this direction.

DEAN ALFINI: Well I wouldn't say that we private mediators aren't concerned about our batting averages, but they're not public record as they are, to some extent, with these court-appointed mediators. The judges, at least, know what their batting averages are. And there are all sorts of pressure on them to push, coerce, cajole, what have you.

PROFESSOR BUSH: Well once you private mediators begin working with judges, your batting averages also become known. Because that's one of the effects of that connection. And, therefore, batting averages become more important, even for private mediators. The general point is that the effect of all these kinds of institutional forces is that practice hardens in a certain image. A growing body of research on practice suggests, that despite the image of mediation as reflecting self-determination and a more humanistic face, actual practice follows more of a problem-solving or technocratic approach, a directive approach to the process. In this approach, mediators commonly hear the parties' stories, diagnose what the problem is, suggest or prescribe a solution to it in the form of a suggestion or a recommendation -- however indirectly framed -- and then essentially try to persuade the parties to accept that suggestion. Sometimes this is less heavy-handed and more nicely done -- and other times it is less nicely done and more heavy-handed. But that kind of directive model of practice seems to be quite predominant, as opposed to an approach that focuses more on self-determination, choice-making, communication, perspective-talking -- concepts that originated the field of mediation. People like Jay Folberg, Josh Stulberg, Lon Fuller and others talked about re-orienting parties to one another, helping them make decisions -- not directing to problem solving, but assisting in decision-making and communication. But this dimension has tended to get less emphasis the more the process crystallizes.

So what I would tell mediators is, not only because of connections with the courts, but in general, watch out for that. Watch out for that trend and for that influence in institutionalization. Particularly because it seems to me that, in the larger sense, this trend essentially means that rather than being *alternative* dispute resolution, mediation will wind up -- if that's the direction it goes in -- as adjunct or *supplementary* dispute

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resolution. It will not be so much an alternative to the kind of justice and dispute resolution done by courts and other authoritative decision makers, but, essentially, old wine in new bottles. Mediation had, and has, the potential to offer something truly different -- something truly alternative. However, if that's going to happen, this trend towards crystallization into the technocratic model must be avoided.

Finally, I think that mediators themselves are the best source of control on this trend. My research on ethical dilemmas suggested that mediators are quite hesitant about this trend towards crystallization in the technocratic model. At least, they're confused about it. They seem to still think that they ought to be doing something other than simply producing settlements and solving problems, and that there is an importance to focusing on a more self-determining, communicative model of mediation. They're confused about how to do that -- with all these pressures in the opposite direction -- but at least one could regard that hesitancy itself as a positive thing. Therefore, I'd encourage mediators to be hesitant and to take time to reflect before the field moves too fast in this direction.

DEAN ALFINI: Thank you Professor Bush. Professor Liebman do you have anything to add to that?

PROFESSOR CAROL LIEBMAN: A few points; some additions to the watch-out-for list. In the two states that I'm familiar with that have high volume, routinized mediation -- there are real problems which professional mediators have to watch out for. The experience of many parties in those systems could discredit the whole process. Trina Grillo, whose chair I'm humbled to sit in and can by no means fill, has detailed some of the abuses that take place in California, where custody mediation is mandatory. California uses a mediation-arbitration model where, if the parties don't reach an agreement, the mediator makes a recommendation to the court -- and experience has been that those recommendations are almost always followed by the court. In New York, my clinic students are mediating citizen-initiated complaints diverted from the criminal courts. The N.Y. statute allows neighborhood justice centers to use either mediation or med-arb to resolve cases. Happily the use of med-arb model seems to be declining, but a problem remains. While, in theory, the parties' participation in ADR is voluntary, in practice either the case is resolved through mediation, or the parties are sent away until something more serious happens.

The California and New York experiences teach critical lessons about institutionalizing ADR. The higher the volume, the more routinized and de-humanized the process is likely to become, the more important the

doorkeeper to the multi-door courthouse becomes and the harder that door keeping job is. In New York, many citizen-initiated criminal complaints are diverted to mediation: People come to the courthouse saying, "I want an order of protection," often having been told by the police, "We can't help you, go get an order of protection." Then they are sent into the mediation screening process and told, "Hi, too bad you don't have enough bruises, where are your hospital records? You can't have an order of protection, but we've got a wonderful thing for you. We'll set up a hearing and you'll go in front of a hearing officer." Here's the actual language of a recent screening and referral of a case for mediation "OK, what we're going to do is send you to a hearing," not mediation, but a hearing. "We'll issue a summons which you can serve on the person complained against." (And actually half the time the form says SUMMONS, although it is supposed to say REQUEST TO APPEAR. And that summons, or that request to appear, gets served by a police officer. This is all "voluntary.") And then the screener went on to say: "At the hearing you will be able to explain what you have put on this complaint to a hearing officer who will hear both sides and then he'll try to reach an agreement which you can use to control your future behavior." I think that's not atypical of what happens in the high volume mediation programs. And if that's what happens at the intake process, one has to worry about what happens during the mediation.

It is difficult to maintain quality when you get mediators -- sometimes paid, sometimes getting expenses, sometimes volunteers -- who are doing a number of these every day, with little or no supervision. Because they usually do solo mediations, there's not even the input and the check of a co-mediator. What happens to the parties in that mediation room is something about which you professional mediators would be right to be concerned. My students were recently co-mediating with an experienced mediator. The case involved two women who were having a fight over the same man -- he was married to one of them, had given her several children over seven or eight years, and was actively involved with the other. Before the second woman even began telling her story, the mediator turned to her and said: "Well you knew he was married, didn't you?" I think concerns raised by the opponents of mediation become more powerful as mediation becomes institutionalized, gets into the court system, and becomes high volume. So I think that these concerns are very real, but the solution *isn't* to say "don't go into the courts." The solution *is* to be very clear with the courts about, as Baruch said, what the limits of the process are, what the rules of the process are. If what you want is a quick fix, faster/cheaper mediation and that's all you want, mediation can be a very serious problem in terms of cutting off peoples' rights and pushing them out of the system without their getting a fair process --



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whether it's a fair hearing or fair mediation.

**DEAN ALFINI:** Would you agree with Professor Bush that the existing private mediation group, so to speak, could have a significant influence on the growth of mediation within the judicial system?

**PROFESSOR LIEBMAN:** Oh, I think so. And I think that if the private mediators don't take a role there, they're going to give up both the future credibility of the process and also a lot of the action.

**DEAN ALFINI:** I shouldn't do this as the moderator, but there's an anecdote jumping out here in my mind. When I was down here at Florida State and they were forming the first mediation and arbitration rules committee of the Supreme Court, the Chief Justice called me and asked if I would sit on that committee, and I said that "I would be honored." Then he said, "Who else should sit on there?" So I started giving him the names of people who had been mediators -- not only private mediators, but mediators from informal, court-sponsored programs before the advent of real institutionalization. Most of them were not lawyers. And he said: "Non-lawyers on a rules committee?" and I said, "But Chief, these are the people in the trenches, laboring in the trenches." He repeated: "Non-lawyers on a rules committee?" Needless to say, there weren't any real, pre-existing private mediators on that rules committee. So I think that is a problem. The judicial system isn't likely to want to establish a dialogue with this group, particularly since many of them are mental health professionals rather than lawyers. Michele Hermann, do you have some thoughts on how this might affect the process?

**PROFESSOR MICHELE HERMANN:** The worst way to institutionalize mediation is when the court comes in, in a state of crisis, and says: "We've got too many cases and we can't keep up. We're lagging years behind and, therefore, we will turn to mediation for a quick fix." That means that the court is looking to only one part of mediation, and will probably get its quick fix, but will lose all the richness and the variation that could have been present in mediation. So the first thing I'd say to the Chief Justice is: "Look at what mediation might do for you." Actually, in New Mexico we do mediation training partly for law students and partly for people who come and pay to take it, some of whom are lawyers, and one of whom was the Chief Justice of the New Mexico Supreme Court. He said he came to the training because he was looking for tools in court and case management. He said he left the training realizing that for some kinds of disputes, whether or not you have a court in crisis, this might be a better way for people to explore resolutions to the conflict. So my first

thought is that the impact of institutionalization is going to be driven in part by the motivation of the courts that institutionalize.

My second thought picks up on something that both Baruch and Carol mentioned, and that is that we seem to be assuming that this is going to happen in the context of the multi-door courthouse. What is most important in structuring the institutionalization of ADR in general is an appropriate dispute diagnosis system at the beginning. There are lots of cases, Baruch, that are just fine with technocratic, distributive, directive sorts of settlement processes. Those are disputes where exclusively money is an issue, where there is no prior relationship or post relationship between or among the parties – a classic example is personal injury automobile cases. These are cases that are going to settle anyway. Folks get stuck in settlement. You don't really need that full rich . . .

DEAN ALFINI: . . . empowerment and recognition model . . .

PROFESSOR HERMANN: . . . exactly. So if you have good dispute diagnosis then you can offer different choices to different kinds of cases.

DEAN ALFINI: Len Riskin, do you have some thoughts?

PROFESSOR LEONARD RISKIN: Well, I'd like to examine Michele's assertion that there are certain kinds of cases in which distributive bargaining is just fine, and that personal injury cases are a good example. I think that is probably true of the vast majority of personal injury cases. But I always try to structure my mediations to *allow* the participants to discuss non-monetary concerns. This is not simple. On Monday, for instance, I mediated a personal injury claim against a nursing home by the survivors of an elderly woman who was injured and ultimately died because of the negligence of a nursing home employee. They were asking for a great deal of money, and in the middle of this mediation, one of the plaintiffs said, "Look, I don't care about the money. All I care about is that no one should have to go through what my grandmother went through. And the only way that I can have an impact on the nursing homes is to get a lot of money from them, and then they'll start paying attention."

So in my private caucus with the defense lawyers and the claims adjuster, I asked, "Can you do anything to respond to her interests in getting the nursing homes to change their practices?" We then spent much of the caucus talking about what they could do; they made phone calls to executives in the insurance company and in the nursing home. These executives agreed in principle to take certain corrective actions, and the plaintiffs were pleased about that. But the plaintiffs faced the tension that

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Lax and Sebenius described, in *The Manager as Negotiator*, between value-claiming and value-creating. In my caucus with them, I learned that the plaintiffs really did care about getting as much money as possible -- and so did their lawyer. And, of course, the defense expected to pay less if they promised to improve conditions in nursing homes. When we ended that day's session, the parties were still \$200,000 apart.

On the general problem of institutionalization, what I wanted to say is that we have to be really careful about the terminology we use. Baruch was putting problem-solving mediation and adversarial mediation in one cluster, which may cause confusion. I like to distinguish between mediation that facilitates an adversarial negotiation and mediation that allows for problem-solving (or interest-based) negotiation, which could include opportunities for transformation.

In Baruch's work, there is a strong focus on mediation's potential for transformation, for actually changing people. That's what pulled me, and lots of others in this room, into this field. I think we need to recognize, however, that talking in those terms will dissuade a lot of people from taking part in mediation and, moreover, that instances in which mediation produces significant change in people may be rare. Transformation is a wonderful, but occasional, side-effect. On the other hand, a mediator can, and I believe should, structure the mediation -- even in a personal injury claim -- to allow for the human dimension, if the participants wish to pursue that dimension. Thus, for instance, the mediator might encourage the plaintiff and defendant (not just the insurance company representative) to attend and participate in the mediation. I also think, however, that very few people who are in the litigation process will be enticed into an alternative process that promises personal transformation, rather than emphasizes settlement. I regret to say all this, and I wouldn't have said it twelve years ago.

**DEAN ALFINI:** But in a way though, your remarks go to mediation generally and not just institutionalized mediation. Is that correct? Whether it comes to a private person before its filed in court, or whether it's in an institutionalized setting there's nothing about its occurring in the context of the judicial system that makes it less inclined or useful in terms of personal transformation.

**PROFESSOR RISKIN:** I think the fact that people have gone to lawyers and are in a judicial process means that, for most of them, the dispute has been transformed from a human problem into a legal problem and into the question of how much money they can get or protect. It's possible, and often desirable, to use mediation to transform the dispute back into a complex, human problem. But this appears more difficult, typically, the

farther the dispute has proceeded in litigation. It may be easier to do this at an earlier stage in the dispute, before the matter has crystallized into a legal issue. Still, many interest-based mediators function very effectively with cases that are in the litigation process.

DEAN ALFINI: Okay. I know that some of you, particularly Baruch Bush, would like to respond to some of what's been said. But I am assuming that you would know how to work your remarks into other portions of the discussion. I'd like to move away from the problems of the process and towards the impact on parties. We in the State of Fiss -- particularly the lawyers, because they are so client oriented and protective of client's rights, as well as some of the private groups, including the League of Women Voters -- are concerned about peoples' rights: how people are going to be treated, justice in a general sense, what might happen to the parties, particularly what might happen to parties who are more likely to be vulnerable in the more informal setting of the mediation session. That is, outside the court and unprotected by the procedural safeguards that they would normally expect in court, what's going to happen to the parties? What's going to be the impact of institutionalized mediation on the parties themselves? Now, Professor Hermann, we know that you've been doing some research on this topic. Could you tell us what we are likely to experience here?

PROFESSOR HERMANN: Well, I think that you have to distinguish between mediations in which parties are represented, and mediations in which they're unrepresented. The research that we did went to the latter. Specifically, we took a total of six hundred cases filed in our small claims court in Albuquerque, New Mexico. With the cooperation of the court and our local mediation program, we were able to assign these six hundred cases randomly to mediation or adjudication so as to compare outcomes. We wanted to look at objective outcomes and subjective satisfaction. Hopefully many of you have read the work of Vidmar who has devised a formula by which you can compare outcomes, rather than using dollar amounts. We used Vidmar's formula as our objective measure, and then we did lots of interviews to get a sense of subjective satisfaction. What we were looking at was whether women and disputants of color fared differently than men and Eurocentric disputants in adjudication and in mediation.

In the mediation literature, women have been predicted to do worse in mediation. Now those predictions come in the divorce area, and is important to recognize that being a mom, mediating about the parenting of your kids and the support you're going to receive to help pay for the needs of those kids, is really different from coming in to small claims

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court and mediating that this guy didn't change your tire right or that you haven't been able to keep up your payments on your TV set. Keeping this distinction in mind, our study in mediation found that women did better in mediation than they did in adjudication. And women did better than men. The flip side in terms of satisfaction was that women liked mediation less than they liked adjudication and were most likely to describe the mediation process as being unfair when their case was co-mediated by two women. So that's how women do.

In terms of disputants of color, who in our sample were eighty-seven percent self-described Hispanic, the minority disputants did somewhat worse in adjudication than did white disputants, but not enough to be really statistically significant. In mediation they did dramatically worse than did white disputants. What I mean by dramatically worse is: If you were a claimant, a plaintiff of color, you would get eighteen cents on the dollar less than if you were white, and if you were a respondent of color you'd pay twenty cents on the dollar more than if you were white. The thing that was perhaps the most startling of all our results was that those objective outcome differences disappeared when the mediators were also mediators of color. That was not true if the case was co-mediated by a white mediator and a mediator of color; that didn't make a difference. But if both of the mediators were mediators of color then the outcome was no longer distinguishable from the outcome of white disputants. Then, lastly, in terms of satisfaction, both claimants and respondents of color were more enthusiastic about mediation than they were about adjudication, and were more enthusiastic -- I mean just dramatically more enthusiastic -- then were white people in mediation.

DEAN ALFINI: Thank you, Professor Hermann. Ms. Press, your state has perhaps been institutionalized the longest -- and there is nothing like institutionalizing a state. Would you give us your sense of what the impact's been on the disputing public, on the parties themselves?

MS. SHARON PRESS: Well I think that it's had a significant impact. Mediation in Florida has been institutionalized in a major way since 1988. And I think that right now it has fundamentally changed the way business is done in the courts in Florida. What we knew before we started was that approximately ninety-six percent of all cases settled and did not go on to trial. And I think that's fairly universal; it's not only in Florida. What the difference, then, has been is not a dramatic rise in the number of cases that are settling and are not going to trial, but, in my view, what we've seen is a difference in *how* those cases settle. Traditionally the way cases settled -- those ninety-six percent -- is that the two or more lawyers who are representing the parties get together outside of their clients and discuss

settlement, and they come up with a settlement and that settlement is then presented to the clients. The clients don't have as much input or as much understanding as to why the case is settled the way it is settled. The difference in an institutionalized system like Florida is that the parties are mandated to participate in those settlement discussions. And that, to me, is very significant because now instead of lawyers going behind closed doors and working out some kind of agreement, parties are actually involved in the settlement discussions. I think this helps people to understand what's going on and I think it leads to better settlements as well.

We also know that people didn't choose to go to mediation, at least initially, when they didn't understand what the process was about; they weren't signing up and running out to do pre-suit mediation. They weren't thinking, once they had lawyers, that they should ask to go to mediation. Now that we have five or six years of institutionalized mediation experience, the courts need to mandate mediation in fewer cases. In more and more cases, the parties are saying to their lawyers they would like to use mediation. More and more times the lawyers are coming in and telling the judge "we want to go to mediation" and "this is when we want to go to mediation." So in that way, having an institutionalized system -- at least initially in mandating it -- you educate the parties and spread mediation in a way that is much faster than if you went through a slow learning curve of just letting people seep through the system.

If you really want to jump-start institutionalized mediation, then it has to be something like what Florida did -- which was to do it in a major way, not in a pilot, but state-wide, and most cases are eligible to be mandated to mediation. What's been interesting to note is that in Florida's system, the parties in our larger circuit-level cases -- (civil cases over \$15,000) -- traditionally pay for mediation. It's not court-staffed and mediation is not provided free of charge. With that as an underlying premise, one would have expected that there would have been a lot of lawsuits filed questioning 1) whether this was appropriate to mandate, and 2) whether it was appropriate to have people pay for this. They've already paid their filing fees. They're in court already. What's been interesting is that there have been no law suits filed that have even questioned whether this is constitutional, appropriate, or anything. And that, to me, was one of the very surprising but also one of the telling things that said that this works -- the parties are satisfied with the process even if it doesn't result in a settlement.

The other thing to point to in that regard is that in 1992 Florida instituted standards of conduct for mediators and a grievance procedure for parties, attorneys, and anyone actually involved in the mediation process to

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file a grievance against a mediator for violation of the standards of practice. That was instituted in May of 1992. To date we have had only seven grievances filed. That is another measure, I think, of the fact that what's going on out there in an institutionalized system is working and that people are satisfied with it. There is a method for them to articulate what their dissatisfaction might be.

The final point that I have is slightly outside of the court system, although I think it has some possible ramifications for it. By participating in a mediation -- whether it be mandated or not -- I think that there is a spillover effect to people involved in it, that they learn that there are ways to resolve disputes. This was dramatically shown to me when I worked in a high school mediation program -- a different kind of institution but an institution nonetheless. The students that came in as the disputants learned a process, learned a way of thinking about disputes that they may not have thought about before. And what we saw was that many of them wanted to become mediators. Many of them used those skills and those ideas in future disputes they had. So I think that, again, unless you have widespread institutionalization or the placing of this process in institutions, you don't have that kind of spillover. If you accept mediation as being a "good thing," then it seems as though institutionalization and putting it into institutions makes it possible to spread that "good thing."

There is a downside. I know that I have been concerned and that there are many people in Florida that are concerned about what happens when you rigidify a flexible process. Mediation is by nature supposed to be a flexible process, and what we have seen over the course of institutionalization is that every year there are more procedures, more rules, more standards, more grievance procedures, more laws. There are more and more layers, and with each layer we add we know why we're adding it, we think that it's important to add it because there are further protections that are needed. And yet when all is said and done, is it overly rigidifying a process that was meant to be flexible?

DEAN ALFINI: Professor Liebman, do you have some thoughts on the institutionalization's impact on the parties?

PROFESSOR LIEBMAN: My thoughts on that were implied in what I said before. I have one other set of comments. When we have a well worked out system and, when lawyers are present, I have far fewer concerns than in the small claims setting or in the citizen-initiated criminal complaint setting, where parties are typically unrepresented and are not well informed about their rights. There the process may be called voluntary, but it is in effect, mandatory because people say "I'll try it" without understanding what their other options are.

I have another real concern that we seem to be making decisions to cut out whole categories of cases from consideration by the courts. Many cases that are sent to mediation in New York City would be taken seriously by neighborhood courts in other communities: somebody waving a gun in somebody's face. We're saying that in the big cities, we don't have the time, we don't have the resources to deal with these cases, we're going to send these people to mediation. We're cutting people out of the court process without the kind of public debate and thought which that kind of decision requires.

DEAN ALFINI: Well, indeed, I think that Professor Hermann was addressing a different subset of court cases than Ms. Press. Ms. Press was largely looking at the cases where the parties are represented by attorneys as well as high stakes civil cases, where Michele was talking about largely the small claims, the cases where parties are unrepresented. Putting those two together, and knowing what I know about Florida -- and knowing the answer to this question -- there is one thing we should probably ask, since my sense is that Michele was pointing to some evils and then said "but they can be mitigated if you have a mediator of color." Ms. Press, how many certified mediators do you have in this state system now? A couple of thousand?

MS. PRESS: Correct, a couple of thousand.

DEAN ALFINI: How many mediators of color -- percentage?

MS. PRESS: Percentage wise, a very, very low percentage -- less than five percent.

DEAN ALFINI: So, is there a way for the State of Fiss to avoid or improve upon that track record? Is there a way of recruiting more mediators from more diverse populations?

MS. PRESS: It's a question that we are struggling with right now, and if the State of Fiss figures it out, I hope they let the State of Florida know. We'd like to know how to do it. We don't know what the problem is -- whether its a recruitment problem, whether its a cultural problem or some other problem. It is, however, an issue that is on our agenda for this year to look at. How we can rectify that situation?

DEAN ALFINI: Right. John Barkai, do you have any thoughts on this issue?



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**PROFESSOR JOHN BARKAI:** I would like to comment on subjects raised by Michele and Sharon. Michele's impressive and useful research raises the question, "What is 'culturally appropriate' mediation?" I work in Hawaii, probably the most culturally diverse state, and do trainings in the Pacific Islands and the Asia/Pacific rim countries. My experience is that different cultures use different forms of mediation. In Asia, mediation is often referred to as "conciliation." Asian conciliation, in either a business or personal setting, typically includes the seeking of an opinion from a wise and respected person within the community whom Westerners might call a mediator. However, this Asian mediator/conciliator would not have had any special training in mediation. ADR training is a Western process. The Asian mediator's input is what Westerners would consider a non-binding arbitration opinion. Asians expect opinions from mediators. They do not seek or expect something that looks like American community mediation which seeks to enhance communication, empower the parties, and uncover underlying interests. The cross-cultural counseling literature supports a similar view; Asians typically prefer more directive counseling. All of this leads me to the conclusion that if a mediator is working with disputants from other cultures, the mediator might want to ask, "What kind of mediation assistance would you like to have?"

Sharon talked about mediation in which parties are represented by lawyers. I think that mediation is different when lawyers come to the mediation table without their clients. In civil litigation, parties often do not appear at the mediation, only the lawyers appear. Lawyers are used to engaging in the settlement process without clients present. Clients are usually not brought to judicial settlement conferences. Even when parties do appear at mediation sessions or settlement conferences, the client appearing as the "defendant" is frequently an insurance company. The real defendant in a tort suit often has no input into the settlement process. Mediation between parties, but without the actual defendant present, raises the interesting questions of whose interests are being represented in mediation and how do frequent, repeat players like insurance companies, impact the process. The same insurance company representatives might frequently attend mediations, and become very sophisticated about mediating law suits.

**DEAN ALFINI:** Professor Bush, I knew I'd see your hand go up. Let me ask you a direct question. Can we empower insurance adjusters?

**PROFESSOR BUSH:** I actually want to comment on something else, but I'll briefly answer that question by an anecdote similar to the one that Len Riskin told. It concerns a mediation that I observed here in Florida, by a very astute mediator, between a personal injury victim and an insurance

adjuster. And it was actually a textbook example of how you could indeed empower an insurance adjuster and indeed evoke some human understanding between the adjuster and the victim. So, yes, I think you can. And I think that, again, our imaginations tend to be constrained by the frameworks out of which we operate and perhaps some of the bitter experiences that we suffer through, but that we ought to resist the temptation to abandon ship too early.

I wanted to comment, actually, on one thought about Michele's research, which is fascinating -- going to the question of whether people care about things other than money, and how widely? In other words, is it only in a very few cases or is it a lot of cases? One possible explanation for some of the sort of paradoxical results that Michele got -- and there could be many others -- is that perhaps people *don't* care mostly about money. One way of reading Michele's results, is that one group got more in the material sense -- did better -- but liked it less. The other group got less, but liked it more.

DEAN ALFINI: It's sort of the flip side of Lind *et al's* research on court-sponsored arbitration programs. That is, outcome is less important than process. They're finding that people are less concerned about outcome and much more concerned about. . .

PROFESSOR BUSH: . . . I don't think it's the flip side, I think it could be read as entirely consistent with that research. It could be that the reason why women liked mediation less was that it wasn't outcome that mattered to them most, it was how the process worked, how they were treated. So even though they got favorable outcomes, they *disliked* mediation because something else mattered more to them. And for the disputants of color, it was the same thing. Even though they got unfavorable outcomes, they *liked* mediation because something else mattered more.

DEAN ALFINI: I mean flip side in the sense that their findings generally find high satisfaction with the process, as opposed to Michele's findings -- low satisfaction with the process, even though they did well.

PROFESSOR BUSH: Again, the point is, these results raise questions about the assumption that people care mostly about outcome the vast majority of the time, and care much less about other more humanistic dimensions. Maybe this just isn't the case.

DEAN ALFINI: Let's turn to the legal profession. We are all very interested in that topic since we are the ones that supply that profession. Professor Hyman, you've been doing some research on settlement

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conferences recently. Does that research suggest how mediation or its institutionalization might have an impact on lawyers and the legal profession generally?

PROFESSOR JONATHAN HYMAN: Well, first, I should say that there are going to be no changes of any meaningful kind -- the kind that we're talking about here -- unless the lawyers are fully involved in the changes. And, even then, it's a high risk proposition and the probabilities are that you're not going to see much change in the situation. One piece of advice that I have for the State of Fiss is that if you want to get the lawyers involved you might try the strategy that New Jersey has recently tried, where I've done my research, and that is to call it "complementary dispute resolution" rather than "alternative dispute resolution." That's what the New Jersey court rules now call it. But it still remains an open question as to whether that approach to lawyers -- telling them that they still count and what they do is still important -- will have any long term effect.

I think the key to a lot of these questions is the depth and sophistication of the understanding of lawyers, themselves, about the mediation process. If they see mediation in a kind of mechanical light -- trying to speed up a series of offers and demands and exchange of concessions -- if they see mediation as the way to advance that kind of dispute resolution process, which is the one they're mostly familiar with, then I don't think that institutionalizing mediation is going to have much effect for things other than small claims. I can't speak to matrimonial cases, because I haven't looked at that. But in terms of most civil litigation -- over claims the size of the dollar amount necessary to get a lawyer involved -- it's not going to have much effect. The dynamics of that kind of bargaining process, which delay cases because everyone is afraid to make that last concession, is going to take over the process.

But I think there are terrific opportunities for change. When we did a survey of civil litigators in New Jersey -- these are non-matrimonial civil cases claiming over \$5,000 -- we asked them about two kinds of settlement practices. These questions were not directed at mediation, but I think they relate to it. One we called positional and one we called problem-solving. This is sort of making a distinction that Len was talking about before. The problem-solving method was characterized by a mutual discussion of the underlying needs and interests of each side. Agreement results not as much from an exchange of concessions as from new proposals that both parties think meet their needs. Settlement proposals can involve the exchange of goods or services in addition to or instead of money, or they can tailor the terms and conditions of monetary payments to the unique needs of the parties. We received five hundred responses to our questionnaire, and surveyed most of the lawyers who were on the trial

lists over a period of time throughout New Jersey. They reported to us that at least seventy percent of the cases that they knew about in their experience were settled by the positional method, not by the problem-solving method. But sixty percent of the respondents wanted more of the problem-solving method. And almost half wanted less of the positional method.

Problem-solving is a method that lawyers can sometimes implement. We saw a number of interesting examples of settlement that left everyone better off. So this settlement approach is something that lawyers can recognize, however dimly, and something that they would like to have. This would tie in closely with what mediation can do; it's this kind of situation in which a mediator can be very helpful.

But, by and large, the lawyers we surveyed were not able to do it. Problem-solving settlements were not happening. I think one of the unanswered questions is, why were lawyers not making the process become more like they wanted it to be?

I think that there is a substantial risk that if you institutionalize the process of mediation, you're going to have what happened in New Jersey with its mandatory non-binding arbitration for automobile cases. Initially when mandatory non-binding arbitration for automobile cases was implemented, according to the Rand study that was done, it slowed down the disposition of cases, because all the lawyers were waiting for the arbitration hearing before they sat down to settle the case. And now, even though auto arbitration is widespread, more than half of the cases result in a request for trial *de novo*. Of course, most of those don't go to trial. They are settled sometime between the arbitration and the trials, usually towards the last minute I think.

So, there's a substantial risk that the lawyers are going to swallow whatever system you adopt. They're going to keep replicating the same things they do now, and they'll take control of it. But there's an opportunity for letting lawyers participate in expanding the use of problem-solving methods and finding ways that they can do that. That might be a substantial change in your system.

**DEAN ALFINI:** It's interesting that your research is taking place in the state of New Jersey about thirty years after Maurice Rosenberg's classic pre-trial conference study. Professor Riskin, do you have some thoughts on the effect on lawyers and the legal profession?

**PROFESSOR RISKIN:** I do, and I think Jon Hyman's findings, which I heard about for the first time only a few minutes ago, are very encouraging in the sense that they show that a lot of lawyers aspire toward more problem-solving or interest-based approaches to settlement. Such

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approaches to mediation have great potential for changing the way lawyers practice outside of mediation. The whole idea is to encourage lawyers to think broadly and to think in terms of underlying interests. Much depends on how court-connected mediation programs are designed, what kind of training the mediators get, who the mediators are, and so forth. The situation is not as uniformly gloomy as some of us imagine. For example, Bob Ackerman, who's here from the Dickinson School of Law, was telling me this morning about a new mediation program in the U.S. District Court for the Middle District of Pennsylvania. The planners decided that this program would not be about clearing dockets principally, but about getting better resolutions.

The question is: How does that sort of goal translate into an actual mediation, or into actual law practice -- for instance in interviewing, counseling or negotiation? Even if the training emphasizes interest-based approaches, some lawyers resist understanding such approaches or internalizing or operationalizing the values associated with such approaches. An illustration of this arose during a training I conducted for a bar association program for mediation of fee disputes between lawyers and clients. One of the participants in this workshop was the most ferociously adversarial lawyer I've ever known. I was frightened when I saw his name on the attendee's list. During the training, he continually questioned our basic assumptions, although he seemed to be fully engaged in the role plays. When the workshop ended, he came up to me and said, "I want you to know that I really enjoyed this training. I don't see any practical use for mediation, but the training was really fun."

So even if training programs emphasize interest-based approaches, there is still a question of whether lawyers will see practical uses for such approaches. It is easy to forget that there are things besides money that count. I've started to observe my own negotiations and I've determined that sometimes I am not faithful to what I preach. Perhaps this is true of others as well.

And I think that what we need to do is to go on a campaign simply to make the bar and bench aware that there are different kinds of mediation. Thus, if the Chief Justice wants to have narrow, adversarial mediation, that's okay, but he or she should understand that that's a decision, and that by making that choice the program not only gains something, but also gives something up. Still, I think we should seize opportunities -- when we teach, when we mediate, and when we serve on committees with lawyers and judges -- to remind people that mediation can do more than simply settle cases.

DEAN ALFINI: Let's turn to a couple of other people here and see whether there's been in the two states that I guess have the most experience with

court-sponsored mediation programs, Florida and Texas, a noticeable impact on the bar. Ms. Press, here in Florida?

Ms. PRESS: Yes I think there has been.

DEAN ALFINI: It's a kinder, gentler profession?

Ms. PRESS: Well, there certainly are more and more lawyers who are participating in mediation training. We keep track of all the people who take the training, who go on to get certified. Only about fifty percent of those people who complete mediation training actually go on to become certified. I think many of them fall into the category of people who think it's very interesting, they'd like to know what it is that the mediators are going to do to when they go to mediation. But, its not quite for them to do. I think this is also a very good thing for people, to be able to sort themselves out and decide, "No, this isn't quite for me."

But I think that the lawyers report that they really like the process for a variety of reasons -- even though in reality it does cut into fees. There are many lawyers whose practice is as trial advocates and will say that they have seen a significant drop off. But they still think that the process is very worthwhile, because they like the idea of having their clients present during settlement discussions. And they like the idea of not having to be in this awkward position of having to first, convince clients that they have this wonderful case, that they should pursue it and how good their case is and then, having to go back and say, "Well you know your case really isn't that good." This way, with mediation, they can stay with the position of what a great case you have, go to a mediation, and the party can hear for themselves that it isn't such a great case, and they can hear from the mediator, they can hear from the other side, and it becomes a much easier process for the lawyers to deal with. The reports are, that lawyers actually like the way mediation fits in with the whole scheme of litigation in the state of Florida.

DEAN ALFINI: Professor Kovach, what's happening in Texas?

PROFESSOR KIMBERLEE KOVACH: Well, about the same thing. I also train lawyers and about fifty percent of those who take the forty-hour training do so to become mediators. The others do it to learn about the process. And I think in doing so they are getting back to perhaps what we lost in the monetary driven 1980s, and that is the more human side of law practice: the counselling, if you will, side of law practice. Several practicing mediators report to me that many times they'll ask the client in the mediation: "What do you really want out of this?" And the client's

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immediate response is: "Gee, no one ever asked me that before." At this point, however, lawyers are becoming more aware that: "Well, maybe I ought to counsel a little bit more with my client." Learning mediation skills I think is really bringing that back. And so I think we are seeing a more cooperative bar. Those lawyers that are familiar with the process -- instead of what was commonplace in the mid to late 1980s in Texas, the Rambo litigator, which was file the motion, send the paper over, messenger it over and we'll talk later -- really pick up the telephone again and start by talking voluntarily. And I would advise the State of Fiss that, if you do it right, you might even be able to turn this into a way, perhaps, of improving the public's image of lawyers. In doing some volunteer work, etc., that our local bars are doing.

DEAN ALFINI: Let's stay with you for a moment. Texas, again, has been introducing more and more court-sponsored programs into their judicial system. The final set of concerns that we have, have to do with the impact on the courts. Many of our legislatures think this means that we won't need as many judges. And they're real happy about that. Are we going to need more resources? Less resources? Is it going to make for a more efficient court system? Less efficient? But will it be more just? Or less just? What's the likelihood of the impact on the courts?

PROFESSOR KOVACH: It depends. It depends on what I think the state is willing to do on the front end. I think it also depends on identifying the specific goals, which was brought out earlier. If you're really looking at reduction of case load, we have that already. Only four percent -- and that's true in Texas as well -- of cases go to trial. You're not going to see a significant change in that. In fact, it backfired in some courts in that -- and this is small but I think worth thinking about -- the courts that did not take the time at the front end to become educated about the mediation process, educated about referral, and things like that, ended up spending more time on a case because of objections on the referral process, on the selection of the mediator, or fee issues, etc. So, unlike Florida, we've only had three or four cases reach the appellate level. But I get, for instance, a couple of calls a month saying: "I've got this motion for sanctions because somebody didn't show up or bring the client to mediation." And so, I think unless the judges are willing to be educated and involved in the process early, they may end up causing more work for themselves. And it also then depends on what kind of program you want to implement. And if you have the resources. Under the Civil Justice and Reform Act, I think many of the courts initially thought there were going to be additional resources to implement many of these programs, both in terms of staff and staff mediators. What has turned out in the latest round

of plans is that once the resources dried up, ADR plans and mediation plans have been the first to be dropped out of those plans.

So I think the State of Fiss really needs to look at its budget and specific goals and do the work on the front end, rather than rushing into it and implementing it right away.

**DEAN ALFINI:** Thank you Professor Kovach. Professor Barkai, your state of Hawaii has had a relatively long history with court sponsored arbitration program. But you also have a number of mediation programs throughout the islands. Do you have a sense of what the impact of institutionalization will be on the court system itself?

**PROFESSOR BARKAI:** I can't use the words "it depends," but I'm not sure. I'm optimistic. We have mediation programs in most every form of dispute resolution, except for criminal. We have mandatory small claims mediations on Ohau, we have large civil claims. We have divorce mediation. We have a wide variety. What I'm afraid of is that the courts are beginning to lose sight of the goals; the judges are beginning to take, to some degree, the attitude that maybe somehow mediation and other forms of ADR can keep it out of my court.

**DEAN ALFINI:** Did they have a sort of a consensus of the goals up front, because it has been my experience, particularly in Florida, that this was the case. Did they confer initially and was there a consensus that "these are our goals"?

**PROFESSOR BARKAI:** In court-annexed arbitration they did have initial, explicit goals -- reducing costs and increasing the pace of litigation. Progress towards those goals could be empirically measured. In other forms of ADR, the goals are less explicit and more difficult to measure. For example in divorce mediation, the explicit goals of reducing parental conflict and having the settlements be more in the best interest of the children are very difficult to quantify and measure.

In Hawaii and across the country, we now are beginning to see people look back at the earlier goals of ADR programs, and in my opinion, rewrite the history of these programs by changing the goals. They are changing the original goals because empirical evidence does not indicate that the original goals of these ADR programs were met. Available research seldom shows that trials were reduced, costs decreased, or pace increased. People who manage ADR programs are now saying, "Actually, our goals are to increase the ways of settling cases that we have been settling before." I do not think that is why courts instituted ADR program -- not to settle cases that were already being settled. Originators



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of this believed that ADR would reduce the number of cases going to trial and thereby reduce costs. However, the evidence just does not show that.

Effective institutionalization of mediation will require that people who are interested in the management and evaluation of mediation programs keep a watchful eye. My sense is that many judges are not very interested in evaluation. They are not very concerned with whether mediation actually reduces costs and delay. Judges are mainly interested in removing cases from their dockets.

**DEAN ALFINI:** They see these programs as diversion programs?

**PROFESSOR BARKAI:** They hope mediation diverts cases from the trial track, but the court may not know whether the diversion effort is being successful. I know that might sound hard to believe, but it certainly is true in Hawaii. Our state has very poor statistics on trial rates. We know the number of cases filed and the number of cases terminated, but we know little more than that.

For five years, colleagues and I did an evaluation of the Hawaii Court-Annexed Arbitration Program. As part of the evaluation, we collected the trial rates reported in the court statistics. Our evaluation concluded that there seemed to be some reduction (although not a statistically significant reduction) in the trial rates since the introduction of the arbitration program. Later we compared the court's statistics to the statistics collected by a commercial, civil jury verdict reporting service and found that the jury reporting service found two and one-half times more trials than the courts reported. We were shocked that the court's statistics were so inaccurate.

As we try to forecast the future of mediation in the courts, I think that we are failing to look at the incentives and disincentives ADR holds for lawyers. The practice of law is a business, and lawyers are trying to figure out how ADR will impact their practice. The fee structure significantly impacts incentives for using ADR. There is not much economic incentive for a lawyer on an hourly-fee to engage in mediation, court-annexed arbitration, or any form of ADR before almost all pretrial discovery is complete. Although ADR may mean reducing costs for clients, it also means reducing income for lawyers. There is an obvious conflict of interest there.

However, ADR is becoming more pervasive in our culture, and lawyers and clients are being drawn to increased use of mediation. Today most law schools offer at least one ADR class. In a few years, almost every lawyer will have had some form of ADR training. And clients also will become more knowledgeable about ADR. In fact, the future growth of client requests for mediation is currently being sown in elementary and

secondary schools in this country. Students at every educational level are taking mediation classes and being trained to become mediators. When today's child mediators become parties to tomorrow's lawsuits, they may demand mediation for their cases.

But coming back to the question, "What's in it for the lawyers?" - I do not think that lawyers see a satisfactory answer to that question today. So I think it is really important that researchers and theorists focus more on questions like "What's in it for the lawyers?" and "What incentives will encourage clients into mediation?" "Can mediation really reduce delay and costs, improve access to justice, and result in higher quality settlements?" "Can we structure the process so that it creates greater incentives for lawyers to use ADR?"

DEAN ALFINI: Professor Bush, I'll be a little more liberal with you on this go around.

PROFESSOR BUSH: There is a wide range of what's being talked about here today. On one end, the discussion is about adversarial mediation for certain kinds of very instrumental purposes, and what's in it for lawyers, and for courts interested in settlement rates. On the other end there is, talk about the transformational, humanistic dimensions of mediation. I want to comment on the connections between one end of this range and the other. For example, regarding John's questions about what's in it for lawyers and courts: One answer to what's in it for lawyers is that, if there are effects available in mediation that constitute a better service to clients, in the client's own self-defined terms, then it ought not to matter to lawyers whether it fits into their pre-existing legal-cultural concepts of what they're supposed to be doing. They ought to learn how to do something new. If we have an ethic of professional responsibility, then representing the client's interests has to be read somewhat broadly, more broadly than the context of the adversarial process alone.

That raises the question of what's in it for the parties or courts. In this regard, I want to echo Len Riskin's suggestion, that even the courts are interested in something other than settlement and outcome. One court administrator recently said to a colleague of mine: "We've come to the conclusion that mediation doesn't improve settlement rates, and it doesn't save time, and it doesn't save us a lot of money either; but we think there is still something important about providing this alternative to the community, because people seem to regard it as having greater value. And perhaps our job ought to be to provide that kind of satisfaction, even if we don't know exactly what it is, and it doesn't relate to settlement rates, and speed, and costs and the like." In other words, there is something else that mediation provides, the undefined value, and both

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parties and courts are interested in it.

What I want to suggest is that this undefined value may well be not simply better problem-solving, or better solutions to problems, but it may indeed be "transformation." And I want to urge people in the State of Fiss, and elsewhere, not to be afraid to talk about transformation, *even* to lawyers, but instead to de-mystify this term into something that people can understand and relate to. If achieving transformation means changing people -- not just changing the situation, but changing the people -- it can be understood in a modest rather than a grandiose sense. When parties to conflict are helped to gain clarity about their goals and options, and to make decisions for themselves about what to do, they grow stronger in the process. When they are helped to gain awareness and appreciation of the other party's perspective and situation, they grow more considerate in the process. These kinds of incremental growth *are* transformative. To put it in even simpler terms, if people are able to find ways of working through conflict that involve acting with somewhat greater strength and compassion, and with somewhat less weakness and self-absorption, this is transformation. Perhaps this is possible at least to some degree much more often than we think; and perhaps this is what people want -- at least some dimension of what they want -- much more often than we think.

Maybe lawyers are even interested in providing or helping people to achieve this much more often than we think. A lot of lawyers are interested in mediation and mediation training, not for economic reasons, but because of the way in which the adversary process affects them and the people that they work for. In short, as "institutionalization" proceeds, I would argue for not placing transformation off the end of the spectrum. Instead, I think we need to de-mystify that term, and talk about the possibility, and value, of change on a much more incremental, much more "micro" level. It's too soon to rigidify things and say, "this is possible and this is not," even when we're talking about courts, lawyers and "purely monetary disputes." It is certainly true, there are cases where people don't want to have somebody assist them in approaching conflict as a sort of change process. If so, then that shouldn't happen; that should be clearly a choice of the parties. On the other hand, if this kind of approach is not even available, because institutionalization has made it difficult or impossible for this to occur in mediation, then that's a limitation of choice of a different kind. And I don't think that's a wise idea to do that at this stage of our development.

DEAN ALFINI: Jon, you have some comment about the impact on the courts?

PROFESSOR HYMAN: Well it seems from what we've been talking about

here that you shouldn't rely on any institutions to make changes; that changes have to come from the bottom up -- from the people on a more micro level. The proper role of the courts seems to be more in making those kinds of changes possible, understanding them, welcoming them, providing room for them, encouraging them, but not trying to institutionalize them. Now if the courts go too fast in trying to institutionalize these programs, then the iron laws of the bureaucracy begin to take over and the bureaucracy has to perpetuate itself and it has to have its own forms and rules and the work has to get done by the bureaucrats in a certain way. So I think that you can't get any expert advice here about what the courts should do, other than encourage change and remain flexible and keep avenues of communication as open as possible. And maybe -- since the courts are often driven by a crisis mentality, we're so inundated we have to do something that will be the quick fix -- they should understand that things are going to change every five years or so. Whatever they do now, in five years from now, things might look quite different, and they should be working on trying to maintain the values of open access, procedural regularity, and fair decision making, in the context of a lot of change going on in the administrative and bureaucratic part of their operation. So we come down with very little specific advice on what the State of Fiss can do.

DEAN ALFINI: Right, well we people of the State of Fiss thank you very much. Let's give our panel a hand.