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## Eviction Mediation: An Intentional Conversation Followed by Five More

Noam Ebner

Sharon Press

*Mitchell Hamline School of Law*, [sharon.press@mitchellhamline.edu](mailto:sharon.press@mitchellhamline.edu)

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EVICTIION MEDIATION: AN INTENTIONAL  
CONVERSATION FOLLOWED BY FIVE MORE

*Noam Ebner and Sharon Press*

I. ONE WEEK BEFORE THE DISPUTE RESOLUTION INSTITUTE  
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I. ONE WEEK BEFORE THE DISPUTE RESOLUTION INSTITUTE (DRI)  
SYMPOSIUM: AN INTENTIONAL CONVERSATION ABOUT ADR  
INTERVENTIONS: EVICTION, POVERTY AND OTHER COLLATERAL  
CONSEQUENCES

Noam: ... I guess that's it. I'll see you next week!

Sharon: Are you excited?

Noam: You know I'm always excited when I pack for a visit to DRI. Specifically, for this symposium, I have mixed emotions, but I'm always excited to explore a new category of situations where ADR can be helpful. It creates that same old sense of optimism: one more troubled area we can help to clear up. On the other hand, . . . well, I know so little about eviction that it's hard for me to say or feel anything clearly, but there's a voice in my mind telling me to tread very cautiously in this area. I think it's specifically trying to counterbalance that first sense of optimism, warning me that we need to go beyond our old 'Got disputes? We can help!' mindset. Applying ADR in eviction cases might open up all sorts of cans of worms, and this might be justified only if there are specific, unique, benefits that ADR can bring to a particular context.

Sharon: That ambivalence sounds like a great mindset to bring to the symposium. And it's exactly the reason that we're inviting people with all sorts of expertise, experience, and attitudes to weigh in and consider these issues. As you know, we frame DRI symposia as "intentional conversations" and Kitty and I have spent months identifying people who bring a range of perspectives to join us. Among the perspectives I wanted present were those of you who know and understand both the benefits and critiques of dispute resolution programs – even if you don't know much about this specific content area. We will have other people in the room who were invited because of their deep knowledge and understanding of landlord/tenant law and the eviction crisis.

Noam: How about you? Are you optimistic that this area could benefit from ADR?

Sharon: I would say that I am cautiously optimistic. I've seen firsthand how a well-designed mediation program can help many people. I am excited to share with everyone the pilot project that has been operating in the Ramsey County (Saint Paul) courthouse where I have been mediating. Mediation had been utilized for decades there and from my perspective, has been problematic owing primarily to the power imbalance created by housing laws. As a result, mediation didn't have much to offer—the landlords held all the cards. In the pilot, I saw how system design can change this dynamic, and now the mediations provide and create value, and parties benefit. So, having seen it with my own eyes, I think the best way to put it is that I'm optimistic that dispute resolution can provide *an* answer (but not the only answer) to this crisis. I'm also hoping this symposium provides me with ways to support my optimism!

Noam: And still, you've also intentionally invited people who might be less optimistic. I like that!

Sharon: Yup! We'll all bring our butterflies of optimism, and I hope we'll open that can of worms you're bringing. If you can get it through the TSA check, of course.

Noam: Off to update my packing list!

## II. POST-SYMPOSIUM, AT THE DOOR

Sharon: So?

Noam: Well, my taxi should be outside waiting, and my head is still spinning from everything I've learned—and from realizing there's so much I still don't know.

Sharon: I wonder what you'll make of it, when the dust settles.

Noam: Well, if nothing else, I think I've named some of the worms in that can.

Sharon: Me too. And, they are not cute little inchworms.

Noam: Nope. They're . . . well, I'll spare us the detailed description. But on the other hand . . .

Sharon: The butterflies.

Noam: Wow. So much good that can be done, and so many people needing this kind of assistance. But I can't think of the butterflies without the worms rearing their head, and vice versa.

Sharon: There always are worms, but as I think about the development of ADR programs, we usually don't figure them out until after a program is up and running, in other words, after the fact. For many of us, myself included, when we start, all we see are the butterflies. I still believe that since conflict is in large measure about individuals, the unique benefit of mediation is, the ability for people to change how they see each other by providing a forum for them to exercise self-determination<sup>1</sup> to figure out what makes sense to them in their individual circumstance.<sup>2</sup> This optimism leads to things happening on the ground, gaining traction and excitement, and only *then* is there a pause to critique.

Noam: Right. This definitely holds for the big discussions: Owen Fiss' reaction to settlement,<sup>3</sup> and Trina Grillo's cautioning about gender-based process dangers in mediation.<sup>4</sup>

Sharon: Another example is Delgado's critique of ADR incorporating prejudice built on race and class<sup>5</sup> which is definitely

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1. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (Jossey-Bass, 2004); *Institute for the Study of Conflict Transformation*, <http://www.transformativemediation.org/> (last visited Mar. 24, 2020).

2. This is not an original thought. See, Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971) (“ . . . [t]he central quality of mediation . . . [is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.”).

3. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

4. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1990).

5. Richard Delgado, et. al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

relevant to this situation, which has huge overtones of racial disparities.<sup>6</sup>

Noam: Yup. All of them, post-implementation. Practice, then critique. And then, hopefully, improved practice, I suppose. Critique never led to fully stopping the train or uprooting the tracks, though. I can't point to any critique – no matter how well grounded - that stopped ADR in its tracks or even dislodged it from a particular context in which it had become embedded. That's probably a structural problem in our field's work, which I suffer from just as much as anyone else. We got into this field to help people, and we're so excited by every opportunity we have to do so that we don't always consider big-picture issues at the front end.

Sharon: I think you are correct about there not being a critique that served to upend the use of ADR in a particular context, but the work of Grillo and others around domestic violence concerns had a big impact on the development and refinement of mediation practices in really important and powerful ways.<sup>7</sup> I wonder if it is possible to flip that model and get ahead of the game, or whether we need to have a lot of experience in an area in order to really understand the pitfalls. I don't want to distract us, but I want to point out that we are flipping between talking about ADR in general and mediation specifically. It's really important to me that we don't conflate the two. ADR is the umbrella of which mediation is *one* possible option, albeit for me, a really compelling option because of its unique ability to focus on self-determination. Not all ADR processes are the same and most do not involve this degree of self-determination, so I'd like for us to be intentional about what process we are discussing.

Noam: Agreed! Let's focus ourselves on mediation. And, I think there is value in at least *attempting* to conduct a mediation-suitability critique before things get too far on the ground.

Sharon: That's about where we are now. Landlord/tenant eviction cases are mediated across the country and have been probably for decades. Some of them are part of specific programs like what's happening in Minnesota, and we're working on developing more activity here. But all that is a drop in the bucket, compared to the scale of the eviction crisis; mediation has not yet scaled up to handle

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6. See *Why Eviction Matters*, <https://evictionlab.org/> (last visited Mar. 24, 2020).

7. See Nancy Ver Steegh, *Yes, No and Maybe: Informed Decision-Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. OF WOMEN & L. 145 (2003); Nancy Ver Steegh, Gabrielle Davis & Loretta Frederick, *Look Before You Leap: Court System Triage of Family Law Cases Involving Intimate Partner Violence*, 95 MARQ. L. REV. 955 (2012).

significant chunks of the mind-blowing volume of eviction cases we discussed.

Noam: As opposed to, say, foreclosure mediation,<sup>8</sup> perhaps the last comparable example of mediation scaling up in response to a crisis or a conflict epidemic, so to speak. Foreclosure mediation scaled up in the blink of an eye, all across the country, delivering comparable help in a similar context: housing, people losing their housing stability, power imbalances . . . There's a lot in common, but eviction is a far larger epidemic. You were involved in developing one of the rapid-response efforts in Florida for foreclosure, weren't you?

Sharon: Yes, but the fact that Florida had a complex institutionalized mediation program already in place required careful consideration of how to utilize mediation consistent with protections that were already established<sup>9</sup> and interestingly, foreclosure cases, while not specifically excluded from mediation prior to the crisis, were effectively excluded because trial judges did not refer mortgage foreclosure cases to mediation.<sup>10</sup> To use our insect-jargon, it was a very messy area in which we managed to release some butterflies, or maybe I'd say keep some caterpillars (if I can change our insect metaphor) safe in their cocoons.

Noam: Even the comparison to foreclosure seems to me to shake the can of worms. Why was there such a sharp, rapid response by the courts and mediation field on foreclosure? Whereas, there has been so little response on eviction.

Sharon: I can think of several reasons. In the foreclosure context, often the banks didn't want to repossess the homes. It actually *was* better for everyone if homeowners could stay in their homes because the high volume of foreclosed homes was creating a housing glut. This depressed the housing market, creating a vicious cycle whereby the more homes that fell into foreclosure caused additional homeowners to become upside down in their mortgages and decide that it made more economic sense to default on their mortgage than to continue to pay. In eviction cases, one part of the problem is that there is a housing shortage and landlords believe that it is better to

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8. Another example is the use of "disaster" mediation—like after hurricane Andrew and repeated in other hurricane situations. See Robert H. Jerry II, *Dispute Resolution, Insurance, and Points of Convergence*, 2015 J. DISP. RESOL. 255, 260 (2015).

9. Sharon Press, *Mortgage Foreclosure Mediation in Florida—Implementation Challenges for an Institutionalized Program*, 11 NEV. L. J. 306 (2011).

10. *Id.* at 310.

evict and get a new tenant than work with a tenant who has gotten behind in rent. Another difference is that mass eviction was not triggered by a sharp change in economic conditions the way mass foreclosure was by the recession of 2008 – 2009. Lastly, it pains me to point this out, but there also are differences as to who is being impacted. The foreclosure crisis impacted people across the economic spectrum while the eviction crisis primarily hit those who were in or on the borderline of poverty. For all of these reasons, the dispute resolution field scrambled to respond in foreclosure cases in ways that we haven't seen for evictions.<sup>11</sup>

Noam: . . .

Sharon: . . .

Noam: Huh. I think I like the idea of capturing a moment to discuss this before it gets swept away by action—action generated, in part, by this successful symposium.

Sharon: Well, I did tell you that we'd need to write something coming out of the symposium.

Noam: Want to get started?

Sharon: Don't you remember that your taxi is waiting? Let's talk soon!

### III. ONE WEEK LATER

Noam: I'm very happy we took this on, Sharon. Since the Symposium and our parting conversation, I've had some issues weighing heavily on my heart. Let me suggest we approach this from the widest framing possible and then zoom down into its details. I think that's the best way to get to the kind of pre-emptive critique we're aiming for. What do you think?

Sharon: Go wide! Take a bird's-eye view and give it your best.

Noam: The widest framing I can think of, is that we want mediation to be on the right side of history. We've seen, increasingly, how arbitration, settlement, and most recently mediation have lent a hand to questionable, shady, morally iffy, and downright bad outcomes. I worry that the ice is growing thinner beneath our feet. I don't feel as

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11. See, e.g., Alan M. White, *Foreclosure Diversion and Mediation in the States*, 33 GA. ST. U. L. REV. 411 (2017); Andrea Kupfer Schneider & Natalie C. Fleury, *There's No Place Like Home: Applying Dispute System Design Theory to Create a Foreclosure Mediation System*, 11 NEV. L.J. 368 (2011).

confident as I once was, that we can generally count on every apple in our barrel to be a good one. As a result, we need meaningful fieldwide consideration of what mediation will or will not be a part of, rather than leave that up to parties' willingness to hire us. I know you've had a lot of experience in convening these fieldwide conversations, participating in the formation of the Model Standards of Conduct,<sup>12</sup> and I know that governance is complex. Still, it is precisely that experience that can simplify some of this, and in addition—there are trickier fields in the ADR world, when it comes to governance.<sup>13</sup> I'm not saying we can or should police individual mediators, but there is power in fieldwide statements, actions, and governance mechanisms. Similarly, there is power in saying “no” on a systemic level and turning away from an opportunity to expand mediation when this comes at unacceptable ethical and reputational risk.

Sharon: I don't want to interrupt your train of thought but, as someone who has thought a lot about mediator ethics, I want to be on record as not shying away from “policing individual mediators.” It is challenging to accomplish, but I think adherence to standards of ethical practice is important.

Noam: And I'm not saying we should not police; I was just trying to stay as focused as we can on the bigger picture issues. Specifically, against the background of wanting mediation to be used appropriately, let me ask you bluntly: Why *would* we, as proponents of this field, want to be involved in the field of eviction? Everything we've learned at the symposium points to the current ills of eviction stemming from deeply rooted systemic evils and injustices. Sure, we might be able to bring value—we're always able to bring value, aren't we? But that could come at a cost. I worry that mediation will be used as a band-aid, or a fig leaf, enabling courts and legislatures to *avoid* systemic change. If they can point to the use of mediation and say, “We are addressing the problem and managing the caseload, so we don't need systemic change in eviction” then we are propping up a system that should not be allowed to perpetuate. And, if they also comment publicly that mediators and mediation experts *support* this effort, the field's reputation is entwined with the system. The realist in me knows that you can't control how external systems will use, portray, or manipulate the use of mediation. Do we want to be that fig leaf?

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12. Am. Arbitration Ass'n, et al., Model Standards of Conduct for Mediators (2005).

13. Noam Ebner & John Zeleznikow, *No Sheriff in Town: Governance for Online Dispute Resolution*, 32 NEGOT. J. 297 (2016).



There, I've said my piece. Thanks for letting me get that off my chest, I've been holding it in since the plane ride home.

Sharon: What you've articulated is extremely compelling and, as you would expect, I share many of the same concerns you raised. And, I see this as the proverbial two-sides of the same coin we in the field have been debating for years. We don't want to be used for anyone else's agenda—continuing the status quo of inequities, but on the flip side, there are people who need help and we might be able to provide assistance in individual situations. If we have the capacity to help someone, shouldn't we do so?<sup>14</sup>

Noam: That's just the dilemma. I think the reason I'm so worked up is that my "Let's mediate everything!" spirit runs straight into a brick wall formed of what is at stake each time we roll mediation's reputational dice in some new area, lined with the spikes of what we've learned about the eviction crisis.

Sharon: Maybe we should break this down, sorting out the different systemic issues that came out very clearly in the Symposium, and then talk about the good we can do in the room. The systemic issues I see include: (1) systemic racism that underpins the current housing crisis; (2) the collateral consequences of eviction in terms of achievement disparity in schools and health issues; and (3) the overall criminalization of eviction.

So, let's start with the troubling systemic racism that underpins the current housing crisis. I certainly was aware of the racial divide in housing court—if you attend housing (eviction) court you can't miss it. What for me was brought into sharper focus at the Symposium was the *systemic* nature of this issue.<sup>15</sup> I was really distressed to learn about the large number of African American women with children who are impacted by eviction. I had been thinking about the collateral consequences of eviction, but these too were brought into sharper focus. Obviously, when someone (or some family) is evicted, they need to find alternative housing which is made more difficult because they have an eviction on their record. They may also have a civil judgment entered against them for the past due rent along with the filing fee for the eviction. If they find a

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14. Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029 (1992-93) (describing the development of court ADR programs).

15. Benjamin F. Teresa, *The Geography of Eviction in Richmond: Beyond Poverty*, RVA EVICTION LAB, <https://cura.vcu.edu/media/cura/pdfs/cura-documents/GeographiesofEviction.pdf> (Found that neighborhood racial composition is a significant factor in determining eviction rates, even after controlling for income, property value, and other characteristics; as the share of African American population increases, the eviction rate increases; as the share of non-Hispanic Whites increases, the eviction rate decreases).

place to stay, perhaps with a friend or family, the children will likely need to transfer schools, or the family needs to figure out transportation to the original school. They may also find themselves at a distance from their job and challenged to arrive on time while dealing with the changes in circumstance. There is no question that the stress of this situation impacts the individual's and the family's health—both physical and mental.

The way that Housing Court traditionally works in Minnesota is that the tenants are summoned to court.<sup>16</sup> They generally have not met with a lawyer and have no idea what their legal rights or responsibilities are. When the case is called, the Judge or Referee will ask the tenant if the rent has been paid. If the tenant says that the rent has not been paid and does not raise any defenses, the court will typically issue a Writ of Recovery requiring the tenant to vacate within 24 hours.<sup>17</sup> Pursuant to state statute, the court can extend this period for up to seven days and this typically is utilized when the tenant has children living in the property. During this time, the tenants must either pay the back rent (redeem),<sup>18</sup> appeal (within fifteen days and along with the posting of an appeal bond)<sup>20</sup> or vacate the premises. If the tenant does not redeem, appeal or vacate, the landlord can request a sheriff to remove them from the property. Typically, there is no trial and no extenuating circumstances considered. One can't help but feel that the eviction process and the law are part of the machine that generate the inequality in the first place. This inequality is both race and gender based, and the combination is crippling.

Noam: I'm really glad you kicked off the discussion from this point. Previous discussions of eviction in mediation and the dangers of engaging in it warned against the tendency to contrast mediation

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16. MINN. STAT. § 504B.321 subdiv. 1(c) (2019).

17. *Id.* § 504B.365 subdiv. 1(a).

18. MINN. STAT. § 504B.371 subdiv. 1 stipulates, “[i]f the court renders judgment against the defendant and the defendant or defendant’s attorney informs the court the defendant intends to appeal, the court shall issue an order staying the writ for recovery of premises and order to vacate for at least 24 hours after judgment . . . .”

19. Redemption can only happen before a writ of recovery is issued, and it is generally raised at the time a tenant is allowed to raise defenses. If a writ is issued, it is too late to ask to “pay and stay” although a landlord can always agree to take the rent and forego eviction.

20. MINN. STAT. § 504B.371 subdiv. 3 states that “[i]f the party appealing remains in possession of the property, that party must give a bond that provides that: (1) all costs of the appeal will be paid; (2) the party will comply with the court’s order; and (3) all rent and other damage due to the party excluded from possession during the pendency of the appeal will be paid.”

with a romanticized version of the judicial process.<sup>21</sup> I think this is a very important guidance, and beginning the conversation as you did paints anything but a romanticized picture of eviction policy, legislation, adjudication, and execution.

I'll take this further, by sharing something that has weighed heavily on my heart since the Symposium. As horrible as it sounds, what we heard about the historical context and the development of eviction laws, coupled with the ongoing racial disparity in their application, gives me the sense that the eviction system is a continuation, or an echo of, enslavement by other means. Others in the Symposium were far less reticent than me to identify this. I've spent about 35 years of my life outside of the U.S. and I know that I don't necessarily recognize all of the conversational, linguistic, and social cues around this topic, nor do I know how to discuss it in a way that is in perfect sync with social acceptability, so my apologies if I use any imprecise terms or miss connotations. Still, here is what I heard the essence of the eviction system to be: work to your employer's satisfaction, and you will be able to pay your rent. If you don't pay your rent due to anything less than perfect satisfaction of your employer (e.g., because you get sick, or were fired for speaking out against an unfair employment practice, or fired for refusing a demand that went beyond the scope of your contract) you will not make rent, and you will lose your home. If you lose your home, your employment stability will deteriorate even further, as will your negotiating power or basic agency vis-à-vis employer demands in the future. Beyond that employment-housing cycle, once evicted from your home, you will suffer a host of those "collateral consequences" you mentioned earlier: your family life being disrupted, your health suffering, and your children's odds at completing their education diminishing. If that happens, what hope does the next generation have for a better shot than their parents had? They will continue to rent homes, one paycheck away from eviction—and to be bound, like their parents, by fear of the consequences of not being able to make rent. Don't hear me wrong: I *don't* mean to call landlords *or* employers enslavers. One essential difference from slavery is that the tenant does not work for the landlord *per se*. Rather, I mean that the system as a whole serves the haves at the expense of the have nots in a way that evokes uncomfortable echoes of enslavement. The original evil role of the enslaver is distributed between two legitimate functions of employer and landlord, but the effect of the circle of interaction between them and the worker/tenant is ultimately similar: You must satisfy your employer, or you will not be able to pay your debt at the company

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21. See Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. OF DISP. RESOL. 53 (1997).

store. The company store has its enforcement methods backed by the law, and they will take away your home and health and children's future.

Sharon: That's an interesting analogy. I entered the Symposium discussion concerned about collateral consequences and included them in the title of the Symposium. The piece that was added for me in the Symposium was the notion that the collateral consequences are not just *outcomes*. It would be naïve and problematic for us to look at the eviction crisis as anything but an intentional or engineered outcome. Each collateral consequence—health, education, family issues, employment—relates the eviction system to other large systems, each with their own deeply rooted ills. So, I share that same initial space of reticence: why would we want mediation to be involved in this sick system? Our participation could be used to show why the system is fine when it is actually still sick by an overwhelming margin—1% help; 99% abuse.

But here's the thing, I am deeply concerned that this level of dysfunction is not going to be fixed overnight. We, as dispute resolution professionals, *need* to be in those places where conflict causes suffering and damage in order to be part of the solution. I still believe that mediation has something to offer in these situations and if we were to opt out of every system that smacks of racism and maintaining gender inequality, we would need to go a lot further than just housing, and it strikes me as giving up too easily. In light of what is happening, how do we *not* do something?

Noam: Yes, that's true. And, sure, I've had my doubts about mediation in other areas as well, but never had as strong a reaction as I did to eviction. I think the reason was that this was a case in which I saw the systemic racism so clearly exposed, the enslavement associations were so close to the surface, the direct and indirect exacerbated effects on women and children, and the blatant, absolute, and unapologetic preference the law gives to those who have over those who have not. This preference not only includes legally protecting the property rights of the haves (which I am certainly not opposed to in general, of course!), but extends to castigating the have-nots for not having, and going an extra mile to perpetuate that status. This last piece fell into place, maybe breaking the camel's back, sometime in the middle of the Symposium's first day, as the eviction-related terminology I had learned that day aggregated and reached a tipping point.

You know that I've done only a little work in criminal law, but my wife practiced as a criminal defense lawyer for about fifteen years . . . and I listened. One area that always interested me was the significantly different language used in her criminal law work, compared to my own civil and family area—and the mindsets and

worldviews that these terminological differences generated. Listening to the language of eviction at the Symposium tipped me off that this seemingly civil area of the law was viewed and treated as a criminal area. And indeed, the state gets involved in ways that are more similar to criminal than civil law, for example, when the sheriff knocks on the door to carry out the eviction. Even worse, though, is that even as evictions are essentially structured as quasi-criminal processes, they are disguised as civil proceedings—denying the protections afforded to defendants in criminal proceedings. The evidentiary burden is civil law's simple preponderance of evidence, and there is no requirement of proving intent (*mens rea*) as required in criminal cases. And, of course, in eviction you have no right to be provided an attorney if you cannot afford one, so in most of these cases tenants are unrepresented. While the acceptable defenses to an eviction claim differ from jurisdiction to jurisdiction, they are generally defined by statute and very limited.<sup>22</sup> Most telling, in the criminalization of this legal area, is the maintenance of lists and records of evictions. If you have been evicted, this remains on your record. It remains on your record, in fact, even if you were *not* evicted, having successfully defended yourself from eviction—and the long-term effects of non-eviction are the same as eviction! The record, as we learned, forever affects your desirability as a tenant; accordingly, it affects your odds of being accepted as a tenant and the rent you pay. It even lowers your overall credit score, which can have devastating effects of its own, given how many systems in the U.S. consider this marker a relevant indicator of dependability and worth. The only way to relieve the crippling burden of an eviction claim record, is having that record expunged.

Sharon: It might be helpful for you to know more about how I developed the focus of the Symposium. For years, the Dispute Resolution Center,<sup>23</sup> where I do my volunteer mediation, has provided mediation services in housing court in Ramsey County. I rarely, if ever, served as a mediator in housing court because, from my perspective, mediation was not providing any useful service. The tenants were generally unrepresented and even though some had legitimate legal claims, they didn't know how to raise these issues. In addition, even when the eviction was legitimate, the tenants did not know they could request that the eviction be expunged. A couple of years ago, Family Housing Fund and the

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22. Common eviction defenses in Minnesota include improper service, retaliation, repair problems, and proof that rent had been paid and the lease had not been broken. Evictions, LawHelpMN, <https://www.lawhelpmn.org/self-help-library/fact-sheet/evictions>.

23. DISPUTE RESOLUTION CENTER, <http://disputeresolutioncenter.org/>.

McKnight Foundation convened a group of stakeholders to develop a pilot in Ramsey County Housing Court,<sup>24</sup> and it has completely changed the dynamic. Now, when tenants arrive at housing (eviction) court, they can sign up and receive legal advice and speak with a representative about receiving emergency assistance.<sup>25</sup> Mediators are also available to assist landlords and tenants in talking to each other after the tenant has received legal and other resources information. This has been a game changer. Landlords now come up with interesting deals and are willing to negotiate with the tenants—and now they *often* discuss expungement options. One critical difference has been the tenants' access to legal advice and legal information about rights and responsibilities.

Another benefit of the pilot project is that the court forms were changed, including the agreement forms used in mediation, to include check off boxes as to how the issue of expungement will be handled, including the option of an expedited expungement ruling. This means that *in every mediated case*, the landlord and the tenant discuss expungement. This, alone, makes a huge difference for the tenant's future. And, once the Ramsey County (Saint Paul) judiciary was willing to do so, the Hennepin County (Minneapolis) judiciary followed suit.

Noam: But why is this a thing in the first place? Is there any other area in civil law where such records are maintained and require such expungement? So far as I understand, eviction is even more severe than bankruptcy in this regard—and, let's not forget, that in bankruptcy proceedings, future ramifications are assumed voluntarily, at least in some senses of the word, in return for protection from creditors. An evictee agrees to nothing, is forgiven nothing, gains nothing, and is only rendered more vulnerable. Which is why I see the eviction record system to be part of the criminalization of the tenant.

When you think of it, what is being criminalized? Ostensibly it is the act of staying in a home when you are no longer paying for it. But by that measure, you could criminalize *any* act of contract breach, and the law decidedly does not do that. So, it seems that what is really being deemed criminal is *poverty*—the *inability* to pay,

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24. See *Eviction Prevention*, FAMILY HOUSING FUND, <https://www.fhfund.org/eviction-prevention/>.

25. Short term emergency assistance is available through each county in Minnesota. While the type of assistance varies, it often can be used for housing costs like rent payments, damage deposits, home repairs and utility bills. In Ramsey County, it is only available if someone will remain housed. In other words, it cannot be used to pay back rent, if the tenant is moving out of the property. Given the high demand and limited resources, it also is often only available after a tenant receives an eviction notice. Reforms to this system are needed as well.

which is somehow seen as worse than voluntarily withholding contractually owed payment when you do have the money). And, along the way, the system criminalizes gender and race (at least statistically).

If the eviction system is essentially a criminalization of race, gender, and poverty, what is ADR doing in the mix of this? What ADR or mediation goals could possibly line up with this criminal or quasi-criminal situation?

Sharon: I share your angst about the apparent criminalization of race, gender, and poverty in evictions but find myself coming to a different conclusion in terms of the role of mediation (and potentially some other ADR processes). Specifically, I believe that one way to have an impact on systems is to focus on individuals and improving an individual's circumstance one case at a time. The entire system of eviction will not change overnight, but in the meantime, we can work with individuals to make their lives better (or not as bad). For the sake of breaking this cycle, we can't afford to wait until the whole system is changed. Too many lives will be impacted. We need to break the cycle now. And I want to be clear, I believe that when we do this individual work, we will have an impact on the system as a whole *and* that we must do it in the context of *also* working on systemic change.

Noam: I hear that. And, of course, I feel that call myself. We got into this work to be helpers. Still, self-reflecting on my reflexive reaction to your frame of "helping people," I'd like to raise one additional challenge for utilizing mediation in this space. In the Symposium, as well as in our previous conversations, we've spent a lot of time discussing how mediation could help the needy, support people in their hour of distress, and assist them to remain in their homes or transition out of them more smoothly. These are the pain points that spoke to us, in considering why mediation should be implemented. We can't ignore, however, that these considerations *all* pertain to the needs of the tenant. This mindset is practically inevitable for mediators, which would suggest that there is an inherent challenge to neutrality in all such mediations. Of course, in designing such systems, we can balance this by dedicating thought to commonly encountered ways in which mediation can provide value to landlords. Still, I think that the challenge endures at the mediator level, in terms of their sympathy or bias. And, perhaps, setting up programs with such built-in bias is problematic.

Sharon: Let me clarify my previous comment, I believe that it is possible to consider the difference between individual mediators who need to maintain some sense of impartiality and community dispute resolution organizations that have a commitment to

communities as a whole—being an advocate for social change. I believe it is possible to use mediation in the here and now *and* work on the bigger picture change that is needed. After all, there needs to be a system that protects landlords. People who own property and lease it to someone else are entitled to collect rent and to remove someone who is not paying or is otherwise damaging their property. There needs to be a system that allows for these issues to be addressed *and* the system needs to be built on a fairer platform than is currently the case. It needs to be said that not all landlords are “bad” or unreasonable and not all tenants are blameless. I think it is important to remember the response when I asked the Symposium participants how many of them have been tenants and how many have been landlords. Almost everyone had been a tenant at some point in their life and surprisingly, a large percentage have also been or are currently landlords.

One of the lessons we learned in the foreclosure crisis is that home ownership does not make sense for everyone. There will always be a need for rental property and for owners of that property to make it available to people who want to rent. This means we need to develop a better system for handling rental property disputes and I believe that mediation can and should be a part of that system.

Noam: When you look at this at the level of system design, it becomes more interesting (and less distressing). Rather than considering last-ditch mediation on the courthouse steps, you can begin to imagine how you might create a more holistic and caring system that would *supplant* the broken system in many cases—if someone would only hand you the keys.

Sharon: Right. That’s where my own concerns about all of the big picture issues we’ve discussed begin to recede, and instead I begin to think about the opportunities.

Noam: So, you’re saying that if you could design a system, it must create and provide real value; value potentially serving as a counterbalance to all the big-picture issues we’ve mentioned. This value emerges the more there are structural elements incorporated into the system designed to shift the balance of power. These can include providing parties with information, explaining their alternatives, helping them to create opportunities and shifting the focus from the present to the future. These changes certainly make it a more familiar playing field for mediation.

Sharon: And I would add another dimension: eviction cases are not all the same. The volume suggests similarities, but mediation has the unique capacity to recognize that individuals are individuals and they get to express for themselves how they prioritize different



things. Mediation is more able to recognize those differences than a court can. In contrast, the way that housing court is set up, tenants usually do not get trials (their day in court) because they are called for a pre-trial where if there is not a “legitimate” defense, the decision to evict is made right then, without a trial.<sup>26</sup> And if the tenant is “fortunate” enough to get the case set for trial, the tenant generally is required to post the rent in dispute and if they can’t, the tenant loses the trial date, and the landlord obtains the unlawful detainer (eviction).<sup>27</sup> This means that even when tenants receive legal advice, it sits within the broader context of landlord-tenant laws and a system which is feudal, and unfair. Right now, landlord tenant law is stacked against the tenant.

Noam: Wow. That doesn’t even sound like a court. It sounds like a very sophisticated collection agency at work, posing as a benevolent, unbiased system: The system makes you fight for your right to trial, dangling the option of vindication and staying in your home. To win this right, you need to beg, borrow, or steal the amount in dispute, which the court then holds on to for you. Then, you are granted a trial in which you will lose a disturbingly large percent of the time.<sup>28</sup> And only then will you realize that by fighting for a trial and posting the rent money, you were only duped into making the landlord’s collection work easier. Perhaps you took a loan you can’t afford. Perhaps you begged on the street in a way the court would never compel you to do by writ. The court hands the money to the landlord, and if you’ve taken on any crippling, demeaning, or inappropriate steps to obtain the money, that’s on you. Not to put blame on any judges doing this work, but systemically speaking . . . Ok, I’ll come out and say it: if it weren’t a court, it would be a scam!

Sharon: Sometimes the game is rigged so badly that it does feel that way. Other times it is less of a scam and more of an imbalanced system. But I think this clarifies why, given this familiarity with the reality of housing courts, I balance the big picture concerns that we discussed, and the immediate ability and urgency to help, differently than you.

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26. MINN. STAT. § 504B.335(a) (2019).

27. See e.g., *Pass v. Seifert*, A18-1555, 2019 WL 3000734, at 1 (Minn. Ct. App. July 1, 2019).

28. Michelle Bruch, *Mediators Tackle Fast-Paced Evictions*, SW.J. (Apr. 3, 2018), <https://www.southwestjournal.com/news/2018/04/mediators-tackle-fast-paced-evictions/> (“A 2016 city report found that out of more than 3,000 evictions filed in Minneapolis each year, 93 percent are filed for nonpayment of rent. Those tenants are behind two months and \$2,000 on average. Two-thirds of the cases end in displacement.”).

Noam: It sure does. And, having both of those sets of concerns in place makes identifying “the right thing to do” a tightrope walk. Perhaps this shows the value of a good solid preliminary worm can-shaking—one that includes two cans: one associated with applying mediation in this area, and the other associated with avoiding involvement.

Sharon: Yup. I think it also offers a way forward. Finding that tightrope, building it as sturdy and as wide as possible through contextual and deliberate system design, and evaluating it thoroughly and often, rather than rushing to declare another victory for mediation.

Noam: You’re right. But my mind is all frazzled and jumpy from everything we’ve discussed today. How about we sleep on it, and reconvene soon to revisit some of the points we made today with a fresh perspective, and then move on to exploring your notion of excellent system design for an eviction mediation program?

Sharon: You realize, it’s about 11:30 in the morning where you are, Mr. Sleep-on-it?

Noam: Nap time! I won’t tell if you won’t.

#### IV. TWO WEEKS LATER (THREE WEEKS AFTER DRI SYMPOSIUM)

Sharon: I’d like to catch you up on a couple of things that have developed since the Symposium. Community Mediation Minnesota (CMM),<sup>29</sup> the umbrella organization of the Community Dispute Resolution Programs in Minnesota, decided to move ahead with pursuing legislation<sup>30</sup> in support of mediation in housing stability (eviction) cases and we are seeking support from Homes for All, “a statewide coalition that advances shared policy initiatives that lead to housing stability for all Minnesotans.”<sup>31</sup> As co-president of

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29. COMMUNITY MEDIATION MINNESOTA, <https://communitymediationmn.org/> (last visited Feb. 25, 2020).

30. About two months after this conversation, CMM proposed such legislation during the 2020 Legislative Session. The proposal (which appears in an Appendix to this Article) enjoyed bi-partisan support and was scheduled for a Senate hearing when the Covid-19 pandemic caused the abrupt cessation of regular work by the Legislature. CMM hopes to pursue this again next year.

31. Homes for All has over 250 “endorsing organizations” that include culturally specific housing organizations, organizations that serve the homeless, charitable organizations, cities, public housing providers, religious organizations, and community dispute resolution programs. *Endorsing Organizations*, HOMES FOR ALL, <http://homesforallmn.org/endorsing-organizations> (last visited Feb. 25, 2020).

CMM (and given my interest in this topic), I am involved in trying to secure Homes for All support. This has raised a lot of important questions for me.

Noam: And, in the context of our conversation, it shows how you might be able to provide case-by-case help without abandoning the struggle for big-picture policy change. Good for you. I imagine that empowers you to continue looking for ways to help individuals involved in eviction through mediation, knowing you are not dropping the ball on changing the overall playing field.

Sharon: Exactly. It allows me to set the “band-aid” concern aside. In looking for balance, now I can focus on other mediation core concerns.

Noam: Well, unsurprisingly, ever since our conversation, I’ve also been stirred up around that same issue. I’ve been thinking about the implications of what it means for ADR, or more specifically mediation, to enter into this work taking into account something we didn’t discuss the other day. You know far better than others that as a field we have been down the court-connected mediation path before in areas that were neither as urgent nor as fraught with ethical and process concerns as eviction mediation, and in my view, this did not go well for our field.

Sharon: I share your skepticism about what happens when mediation is introduced into the courts. While we hoped back in the day that mediation would somehow change courts,<sup>32</sup> we have lots of examples of how mediation has become bastardized by the courts and changed into part of the efficiency mechanism.<sup>33</sup> That being said, we both know that even in court-connected mediation, mediation can help individuals. Specifically, to the eviction processes I’ve conducted, this help is real. Mediation helps the tenant and landlord each have the ability to speak their voice and see each other,<sup>34</sup> to quote language from transformative theory, “to

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32. Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903 (1997); Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 PENN ST. L. REV. 43 (2003).

33. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR”*, 19 FLA. ST. U. L. REV. 1 (1991); Nancy A. Welsh, *Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179 (2002); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

34. Md. Cts., Maryland Judiciary Statewide Evaluation of Alternative Dispute Resolution: Impacts of ADR on Responsibility, Empowerment, and

experience empowerment and recognition opportunities.”<sup>35</sup> That’s what makes a difference. In my experience, it almost never is “just” the money. And that’s why I mediate. Thus, for me, it is a process design question so that we do a better job figuring out the cases where this is appropriate.

Noam: Well, before we get to that, I think I’ll clarify my worry here. It’s not that I disagree that we can add value, help, and transform. It’s more that I’m concerned about mediation’s *primary* function here. Even setting aside the issues of race, power and gender that we’ve discussed, eviction is a very narrow topic from the court’s perspective. It is designed exclusively, or at best, primarily to collect money from one person on behalf of another person or entity mediation. Should we voluntarily step in to be a cog in that system? And, our initial intentions notwithstanding, will having this primary function set as our frame not somehow affect how we act in the room, and what we provide disputants?

Sharon: If I thought that was all that mediation was doing, I wouldn’t be in favor of getting involved so I do believe that there is more that can be accomplished. Again, it is more about a program’s design than about any top-level framing. I think it is worth exploring process design of a system to make sure that good things rather than bad things happen as a result of mediation.

Noam: Ok, so I hear a couple of mediation reasons to get involved— (1) anecdotally speaking, this is more than debt collection and mediation provides people opportunities to discuss other things; and (2) as we both certainly believe, anytime you get people in the room, transformation is possible—something beyond outcomes. Still, at the risk of being a broken record, I worry that we’ve used this cover story in the past, for benevolent reasons, and haven’t really owned up to or even assessed the outcomes. My (nagging) concern is that if the process is run for satisfying the efficiency needs of the court, we will run into problems small and large. By small, I mean mediator process traps resulting in mediation that you and I, for what it matters, would not be happy with. By large, I mean a further diminishment of what the mediation field is and what it can achieve.

Sharon: But just because there is the potential for bad mediation, does that mean no one should have access to mediation? I agree, of course, that if we were to suggest the use of mediation it has to be done in a quality way—assuming we can identify what that is.

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Resolution (last updated June 2017), <https://www.courts.state.md.us/sites/default/files/import/courtoperations/pdfs/districtcourtcomparisonwopagesummary.pdf>.

35. Baruch Bush & Folger, *supra* note 1.

Again, we return to system design. I think part of this design has to do with defining the underlying philosophy of the program and the mediator's role. For example, if we declare that efficiency was not a programmatic goal, we can stress that there can't be a mediator push for making agreements.

Noam: Ok, let me roll with you in assuming that we can design away many of those process-level challenges through mediator selection, training, etc. Still, we need to face up to the big picture. I think that the problem with court-connected mediation is not only the process issues involved in each case, but far beyond that: what it has done to mediation, in general, over the course of the past three decades. We're both optimists by nature, but we've gained some experience over the years, no longer look good in rose-colored glasses, and don't simplistically believe that if we can just get our foot in the door, we can transform the courts from within. Tell me I'm wrong.

Sharon: You're not wrong. Although, I still keep those glasses in a drawer.

Noam: I do too. But, given our more realistic sense of how these things play out, I'd suggest, to frame things positively, that justification for mediation lending itself to be part of a stopgap measure in an unjust system requiring great effort in program design to achieve any results at all, *only* if this would serve a *greater mediation purpose*. So, my question or challenge to you is, do you think that eviction mediation offers the mediation field an opportunity for redemption in the sense of rebooting the court-connected experience and doing it "right" this time?

Sharon: I'd like to think so. A really careful and well-thought out system design needs to be in place in order for this to be truly different, and helpful. Individuals need access to legal information and legal advice. Parties require opportunity to talk about *all* of the issues that are important to them beyond the narrow scope of reference provided by eviction courts and including expungement. Moreover, the system design needs to start with identifying the policy and process values of the program and embedding these into each element of the program. While I won't name the blend and balance of values off the cuff, we both know some of what will be involved and most importantly, we know that the core values will not include efficiency in any sense of the word that a court would recognize. Participants need to be able to exercise self-determination in the full sense of the word. This also means that if external mediators or mediation centers provide services within the framework of the program we design, they must fully adhere to these principles and values just as any program-internal mediator would.

I worry whether this is too dependent on a collection of individuals who are really clear and focused. Could this really be scaled up everywhere? Wow, I didn't even stop for a breath there! This rush of design considerations is all reactive to some of the things that we didn't set in place strongly enough in our initial foray into the courts. I think we get to try again, and this time put all those lessons to work for us.

Noam: I can imagine what such program design would look like, and I agree that it would certainly be revolutionary and heartening in the grand scheme of things. But, do you think that a court system would ever cede that much latitude in system design, for real? Or, would it pay lots of lip-service to autonomy and party decision-making, with efficiency still being king?

Sharon: Well that's the question, isn't it? Can we create something fundamentally different? You know, the reason I left Florida<sup>36</sup> was because of my ambivalence about court-connected mediation. I didn't want my only legacy to be court-connected mediation and the institutionalization of mediation. I am so passionate about my work with community dispute resolution because I believe that it is in the community that mediation makes the most sense—not in the courts. I think that it is possible to build a court-connected system that honors mediation values even though ultimately, I would love for it all to be moved out of the court system and into the community.

Noam: Well, before ducking back into the court system, that's an interesting end of this ball of yarn to pull on. During the Symposium, it occurred to me more than once that housing issues really are community issues in one of their most tangible forms and therefore mediation programs dealing with them should be informed by community mediation values and approaches rather than the more top-down, narrow, and formalistic approaches predominant in court-connected mediation. Tie that into this notion of doing things over. If we could re-establish a community mediation-informed foothold in the court, only this time, hold onto its worldview and processes and goals rather than allowing it to be subsumed by the court's wider operations, that would be the big do-over opportunity we discussed.<sup>37</sup> What do you think of looking at this whole operation through community mediation glasses?

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36. Before DRI, Sharon served as the Director of the Dispute Resolution Center which, in essence, was the arm of the Florida Supreme Court responsible for developing the rules, procedures and guidelines for the mediation and arbitration programs for the Florida state courts.

37. See generally Press, *supra* note 31, at 64-65 nn.131-39 (discussing different ways mediation programs can connect to the court).

Sharon: Exactly. That could be a significant design feature; the program would be community dispute resolution program run (mindset, training) as opposed to “mediators embedded in the courts.”

Noam: While we’re riffing on this, another program design element that could be impacted by this is timing of intervention. One of the other themes that came out of the Symposium was the whole idea of moving services upstream, including mediation.<sup>38</sup> It seems to me that the partnering which you discussed in your local context, with different social groups and agencies and the Homes for All coalition, gives you access to a range of upstream partners. In how many other dispute contexts are we able to identify potential disputants so far in advance? Motor vehicle accident parties, for example, have no idea they’re facing a dispute until they run into each other.

Sharon: Right. In eviction, on the other hand, as many participants in the Symposium stressed, before reaching the point of a landlord filing an eviction claim, there are many signals indicating that one might be waiting down the road: Someone loses their job; Someone requires unexpected and expensive medical treatment; Someone suffers a death in the family. Upstream community partners could identify those signals and refer the situation to mediation in one way or another. I know we’re looking at the tail end now in the sense that most eviction mediation programs that exist today are courthouse programs that only deal with eviction claims that have been filed. However, if we maintain a community mediation perspective on this, the real opportunity is to build referral partnerships.

Noam: In that sense, even as an in-court program designer and leader, you could maintain a covert perspective that the court is just one more referral source that can provide a mediation program access to people who need services, and start building upstream from that through partnerships, outreach to community mediation, advertisements, and more!

Sharon: Wouldn’t it be wonderful if the result of all of this work is that the *primary* way that these cases get resolved is through early intervention mediation and the only cases that actually get filed are the ones that are not appropriate for mediation?

Noam: Yup! And the court would then look at those cases closely. There will certainly be some mediation-appropriate cases that fell

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38. See Deborah Thompson Eisenberg & Noam Ebner, *Disrupting the Eviction Crisis with Conflict Resolution Strategies*, 41 MITCHELL HAMLINE L.J. OF PUB. POL’Y & PRAC. (SYMPOSIUM ISSUE) (2020).

through the early-intervention system and were filed anyway. They would be referred to mediation internally when they hit the court.

Sharon: And, overall, we could present detailed data on disputes that were identified upstream, prevented, preempted, resolved outside the courthouse, filed, diverted internally and resolved internally to court and/or government funding agencies involved, all neatly tied up in a binder with an “Efficiency” sticker slapped on it.

Noam: My daughter has these cool unicorn stickers, let’s use those! And, speaking of my daughter, I’ve got to scoot and pick her up from school, or I won’t be allowed to come to Minnesota ever again. I know we’re in the middle . . .

Sharon: But we’re always going to be in the middle of these discussions. Go!

#### V. THREE WEEKS LATER (SIX WEEKS AFTER DRI SYMPOSIUM)

Sharon: Thanks so much Noam for having these conversations with me. You know it exemplifies what I love about mediation—that through conversation, things become clearer—and I definitely feel that way about my thinking on this topic.

Noam: Tell me about it! And, I know we could continue this for a long time. But at some point, the journal editors are going to come “a-knocking at our door” asking when our article will be ready, and the clock is ticking. What would you like to focus on today?

Sharon: I came prepared for just that question! Here it is: I noticed that a recurring theme in our conversation has been the design features of an ADR system that could handle eviction cases well. Every time we ran into trouble—with big-picture questions, field-wide concerns, ethical challenges or process consideration—we shifted to “design” for help.

Noam: That’s right, that certainly was our go-to mechanism. Things get too challenging? Design a better mousetrap!

Sharon: And, we came up with some really useful ideas for that mousetrap! So, I thought we might spend our last bit of conversation gathering some of those bits and fleshing out the design features that are important for ensuring what we might consider as healthy, constructive, helpful and ethical mediation in eviction cases. Some of these I know already exist in pilot sites (like Ramsey County), and I’d like to create a full wish-list.



Noam: Perfect. Suggestion for structuring this conversation? Imagine me standing at a whiteboard.

Sharon: Right. You teach online, when was the last time you saw a whiteboard, anyway? But I'll play along: uncap that marker!

I think it would be helpful to break this down into design issues that are internal to the mediation program, and those that are external to the mediation program. I'll explain what I mean and give some examples.

External design features are aspects of a program that are outside of the actual mediation but have an important impact on what happens in a mediation. Some external features that I view as critical to a program's operation (and success) include early access to legal advice for the participants (both landlords and tenants) and early access to financial resources for tenants. To put an even finer point on this, an eviction mediation program cannot exist in an environment in which the power and information imbalances imposed by eviction's legal regulation are considered to be acceptable and reasonable conditions of the playing field. It is critical that mediation is *one* of the services available, not the *only* service available.

Noam: So, a system such as a court implementing eviction mediation would actually need to set up more than one program.

Sharon: That's one possibility. But my main point is that an eviction mediation program should be part of a collaborative process that operates alongside coalition partners—not only on the individual program, but also on working for systemic change.

Noam: Oh, tell me more about that. Or, better, I'll put a pin in that and ask you about it soon. What do you consider to be internal design aspects?

Sharon: I'd define internal design features as aspects of the actual mediation including mediation process and individual mediator issues. From an internal perspective, probably the single most important design feature has to do with the underlying philosophy of the program (an issue that we surfaced in our earlier conversations).<sup>39</sup> The program must be imbued with the spirit that mediation is about creating space for people to have the conversation they wish to have. It is not about coercion nor evaluating a claim. Mediation must be voluntary and not settlement driven. Here, I rely on my transformative colleagues who have been very clear that when mediation doesn't focus on settlement, it still

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39. Reference earlier footnotes 31–34.

may happen but when one exclusively focuses on settlement, bad outcomes emerge.

Noam: Well, just as that might be the most important internal design feature . . . it will be the hardest one to sell courts on.

Sharon: Absolutely. We have seen the challenges that arise when courts “own” the alternative dispute resolution processes because courts need to be concerned with efficiency. So ideally, the mediation programs I am thinking about would be run by community dispute resolution programs that have a clear ideology about mediation that conforms with the goals we have been articulating.

Noam: Or, if courts clamor at some point for assistance in setting up internal mediation programs, this provides a good litmus test for court-partnership suitability. If courts don’t commit to the mindset—and I mean full, informed consent—not ‘We’ll see how that goes,’ and not ‘Sure, sure, when can you get started?’—before being fully educated on what the mindset involves, and not another lip-service cover-up for the same old primacy of efficiency, it’s a no-go.

Sharon: Exactly. And I think we’ll be better judges of their commitment to this than we were a couple of decades ago. Partly, because we’ve learned a lot about how they operate, the pressures they face, and their internal politics. And also because we understand the implications of whether this commitment is real or feigned.

Noam: Well, *you* certainly have learned, and understand all that . . . maybe you should write the book on that. One last time, y’know.

Thinking further about internal design features, I think that in addition to addressing program worldview, the design lens must extend to the individual mediators selected to participate in the program. It’s not enough to assume that if someone has signed up to participate, or if you’ve brought someone on board because they have a generally good reputation as a mediator, that they will automatically be ambassadors or executors of the program’s worldview. Special care needs to be given to the training these mediators receive up-front and in an ongoing manner. One component of this training needs to be the ethical issues that arise in these conflicts and how to address them. In our conversation we’ve noted issues of self-determination and mediator impartiality that are likely to come up. Because eviction is so rampant, and its effects so acute, there is an understandable pull towards the tenant, but for the

mediation program to be appropriate, one needs to be aware of the legitimate rights of the landlord as well.

Sharon: I agree. I'd add that this work is probably not for inexperienced mediators. There will be quite a bit of skill needed to navigate the ethical waters, even after we've provided specific and ongoing ethical training.

There's another design element that I've been thinking about, which is being piloted by my community dispute resolution program colleagues who serve Hennepin County. They have been working in collaboration with several other organizations to open a Tenant Resource Center.<sup>40</sup> One service that will be available is mediation but the innovation I am really excited about is the creation of a navigator role. These "navigators" will assist individuals (primarily tenants) by providing a triage function and assisting with access to resources. To be effective, navigators would need to have access to a wide range of possible resources and also be knowledgeable about options including mediation. It is clear to me that while I believe that mediation can be useful and helpful in lots of situations, it is not appropriate for *every* situation. For example, mediation should not be used as a tactic for the landlord to postpone making necessary repairs or address habitability concerns or a tenant to merely put off paying rent. It also should not be used as a tool of intimidation. A well-trained navigator could assist with all of this. I believe that mediation will be most effective if used appropriately—both at the right time and with the "right" participants—and in the context of individuals having access to information and resources. Having trained navigators guide participants (landlords and tenants) through making these decisions, will go a long way to improve the programs.

Noam: That sounds good in the abstract, but it would not take the place of the mediator needing to be aware of these issues as well. They will still crop up in the room, when they are least expected. I would go so far as to include a CEthO position in the organizational framework of this program, as an external design feature.

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40. "The Tenant Resource Center supports Hennepin County residents who are at risk of eviction or homelessness through a collaborative partnership between community, non-profits, government, and higher education. The goal of the resource center is to help people maintain stability in their housing situation and avoid the "service run around" that sometimes comes with the need to access multiple community resources to ensure stability in housing." Services include: eviction and homelessness prevention, emergency assistance, mediation, workforce and legal assistance. *About, TENANT RESOURCE CENTER*, <http://www.trc2020.com> (last visited Feb. 23, 2020).

Sharon: Chief Ethics Officer? Absolutely. But, could we call it something else?

Noam: Name it! But this person would be in charge of ethics training, consultation mid- or post-process, documenting borderline or over-the-line situations, reviewing program policies and recommending changes, and more.

Sharon: Done.

I want to raise one other longer-term design feature and that is changing who shows up at court and for mediation. Anecdotally, the greatest opportunities for success in these kinds of cases are when individual landlords meet with their individual tenants and they have the opportunity to see the humanity in each other.

Noam: Sure. But we won't romanticize eviction or eviction mediation. Often tenants rent from faceless corporations. What do we do about that? Can design come to the rescue once again?

Sharon: Yes, you are correct. A significant percentage of eviction court cases do not involve individual landlords confronting their tenants—they involve large corporations or landlords with multiple holdings that appear via counsel. My pie-in-the-sky wish would be for there to be a requirement for the actual landlords to appear. I think this would accomplish at least two things: First, there would be a greater likelihood for people to be able to really see and hear each other and second, landlords—knowing they would be facing the tenant later on—might think twice about filing for eviction without first making the attempt to reach out to the tenant and have a conversation (or a mediation). I alluded to this above by the insertion of “early” in access to resources and legal advice, but it really needs to be stated more clearly. It is vitally important that conversations between landlords and tenants happen prior to the filing for an eviction. I have been in enough mediations that happen at the eviction to know that too often, there is information that the landlord or the tenant did not know and if they did, they likely would not have been meeting in eviction court.

Noam: Absolutely. I've also been thinking about that ever since the Symposium: How much more helpful conflict interventions could be if they happened before filing or even further upstream.<sup>41</sup> So, I share your pie-in-the-sky wish for actual landlord presence . . . but you specifically wished for a *requirement* that they appear. Are you saying the M word? Would you design this into your system

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41. Eisenberg & Ebner, *supra* note 37.

somehow? Because, if so, that's where we would probably part ways. Which is fine, of course.

Sharon: No, I am not suggesting that mediation be mandatory. I am enough of a mediation purist to believe that voluntariness is a necessary component for all mediation programs. I support providing information about and incentives for using early mediation, but I would stop short of mandating mediation such that it becomes a bar to people accessing the court or some other process. If people don't enter into the mediation process voluntarily, it undermines the whole process.

Noam: That's what I figured you'd say, based on your position on this in the past. Still, I wondered whether there was anything about eviction mediation that had caused you to cross that line. OK—you had wanted to return to 'systemic change?'

Sharon: I said I wanted to mention this before circling back to the systemic changes needed, but I now realize that this is all part of the systemic change conversation. While individual mediators need to be mindful of impartiality, community dispute resolution programs can work for systemic change. I am proud of the work that Community Mediation Minnesota is doing in partnership with a coalition of organizations under the umbrella Homes for All. If mediation is to be part of this extremely challenged system in order to help individuals, we should only do so if we are simultaneously working for systemic change.

Noam: Which ties back to your earlier point about working with a coalition of partners rather than operating as a standalone mediation service. You're saying this is necessary at the operational level to make sure the services a mediation program provides support other programs and are supported by them. And, that this holds true on the policy level as well; this coalition of like-minded organizations can take on eviction policy at the societal and political levels and seek to effect fundamental change.

Sharon: Exactly. I think it is possible to do both and I hope to report back to you after this legislative session how much we accomplished.

Noam: While we're on 'reporting back,' I have one last external design feature to plug in, right at the start: evaluation.

Evaluation is, of course, a necessary feature of any program. In our conversation, it seems to me to serve a bigger purpose. We both agree that there is great potential to help individuals and perhaps even to rehabilitate a system. We also both agree that there is an

undeniable potential to cause harm, in terms of individuals, eviction policy, and mediation reputation. We both hope that only good would come out of such a program, and our differences are but a matter of degree; I'm a bit more of a worrier than you are.

Designing the program with its evaluation in mind and creating an evaluation scheme that touches on every aspect of the program and its effects, would provide us with data to assess, replacing concerns, and best intentions.

Sharon: Thanks for remembering that critical piece. I think it is really important that as we set this up, we have the mindset that this can't be a static program—we need to learn from experience and then be able to make changes to the program. So, I completely agree, we need to include program evaluation right from the start and then be sure to pay attention to what the data is telling us.

Noam: I think this would require an unusually robust, creative, and courageous evaluation plan. Beyond the usual questions of agreement rates or comparing agreements to judicial outcomes, let me give some examples of questions that could be evaluated:

Have there been any advancements in eviction policy change in the evaluated period? Have any initiatives already in motion been dropped, slowed down, or sped up? Is there any apparent correlation or causation with the program's activity?

At what rate do parties to judicial outcomes return to essentially retry the case within twelve months of a decision? How does this compare to parties refiling complaints or eviction pleas within twelve months of a mediated agreement?

What are the rates of ethical flags being raised by mediators? What are the rates of ethical complaints being made against mediators? Are mediator actions, reviewed after the fact, in line with the program's ethical decision-making policies? What actions are taken to improve, and are they having any effect?

Sharon: I always get nervous when there is too much focus on number of settlements in mediation because that's when more evaluative practices creep in, so I'd suggest that evaluation includes in-depth, qualitative follow-up with parties, of the type we rarely do in mediation: a year, two, three into the future. How are you doing? How do you feel the mediation you participated in, and the agreement you reached, has affected your life? Overall, are you better off as a result of the process? Worse off? We need to know the answers to these questions, to learn whether programs are doing good in the world or only seem to be.

Noam: Additionally, if there is any type of objective data that could shed light on parties' situations pre- and post- mediation, gathering

it might be very instructive. For example, what if we could look at tenants' employment status in the first three years after a mediated process, contrasted with tenants' employment status after a judicial decision? Ditto for income, incidents of other eviction filings, children's educational stability, health, and any other formulation of collateral consequences. We might not always be able to show causation, but if we notice any significant correlations in one direction or another, that could be an indicator of a program's overall positive or negative impact on its client's lives. Typical mediation programs that I am aware of never go that far in exploring their impact. I think that in this fraught area of intervention, it is certainly warranted. And, the data could be fascinating.

Sharon: The kind of data collection you are talking about is expensive to gather. I better go back to our proposed bill and increase the amount we are requesting!

APPENDIX

02/10/20 01:42 pm HOUSE RESEARCH MM/JF H2526DE1

1.1 ..... moves to amend H.F. No. 2526 as follows:

1.2 Delete everything after the enacting clause and insert:

1.3 "Section 1. **MINNESOTA STABLE HOUSING MEDIATION GRANT PROGRAM.**

1.4 The commissioner of the Housing Finance Agency shall establish a housing mediation

1.5 grant program to increase access to voluntary housing mediation services. The grant program

1.6 shall provide funding to mediation facilities certified by that state under section 494.015

1.7 that can increase access to housing mediation throughout the state, increase the availability

1.8 of culturally specific dispute resolution programs, reduce the need for court actions, and

1.9 bring stability in housing. The grant funding must be used to:

1.10 (1) provide mediation services to benefit landlords and tenants statewide and increase

1.11 awareness of access to mediation services;

1.12 (2) provide eviction prevention services including access to mediation services that

1.13 prevent eviction court costs and reduce negative consequences to families, schools,

1.14 employers, neighborhoods, and communities;

1.15 (3) partner with culturally specific dispute resolution programs to provide training and

1.16 assist in providing mediation services;

1.17 (4) increase mediation services for seniors and tenants with disabilities and illnesses that

1.18 face housing instability;

1.19 (5) increase the diversity of the housing mediator roster;

1.20 (6) integrate existing and future housing mediation services with legal assistance and

1.21 court services programs; and

1.22 (7) develop and administer evaluation tools in order to design, modify, and replicate

1.23 effective program outcomes.

Section 1. 1



02/10/20 01:42 pm

HOUSE RESEARCH

MM/JF

H2526DE1

2.1 Sec. 2. **APPROPRIATION.**

2.2 \$450,000 in fiscal year 2021 is appropriated from the general fund to the commissioner

2.3 of the Housing Finance Agency for the Minnesota housing mediation grant program."

2.4 Delete the title and insert:

2.5 "A bill for an act

2.6 relating to housing; requiring the establishment of a stable housing mediation grant  
2.7 program; appropriating money for the stable housing mediation grant program."

Sec. 2.

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