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# Mediation by Judges: A New Phenomenon in the Transformation of Justice

Louise Otis\*  
Eric H. Reiter\*\*

## INTRODUCTION<sup>+</sup>

For decades different forms of alternative dispute resolution (ADR) have been proposed, developed, critiqued, modified, renamed, redefined, and slowly brought within the usually suspicious, and sometimes hostile, edifice of state-based normative ordering. Some see this as the vindication of the “multi-doored courthouse,”<sup>1</sup> a democratic storming of the Kafkaesque citadel of the law, which gives a more human face to the law and its institutions.<sup>2</sup> Others see it as a dangerous dilution or even undermining of justice, a faddish striving for speed, flexibility, and efficiency at the expense of principle and accountability.<sup>3</sup> What is clear is that the institutionalization

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1. See Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 216-18 (1995) [hereinafter Resnik, *Many Doors?*]. The image of the “multi-doored courthouse” comes from Frank Sandar’s work in the 1970s. See *id.* at 216 n.19. Resnik argues, however, that the dream of access is increasingly giving way to formalism and rigidity. See *id.*

2. The literature on ADR is vast. See generally Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663 (1995) [hereinafter Menkel-Meadow, *Whose Dispute?*]; Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289 (2003) [hereinafter Sternlight, *ADR Is Here*] (providing particularly useful overviews with bibliographical orientation).

3. Authors from a variety of perspectives have voiced reservations and criticisms of ADR with differing degrees of concern regarding its challenges to classical adjudication. See generally

of ADR is an indication of fundamental changes at work in our legal system and in our concepts of justice and law.

In this article, we discuss one such form of institutionalized ADR—judicial mediation, where sitting judges themselves act as mediators in programs closely integrated with the traditional adjudicative system.<sup>4</sup> We draw on the experience of Quebec's voluntary judicial mediation program, which the court of appeal first instituted in 1997 and which has since expanded to include almost all courts and administrative tribunals, to assess some of the ways in which judicial mediation challenges and complements traditional notions of adjudicative justice.<sup>5</sup>

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Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) [hereinafter Resnik, *Managerial Judges*]; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) [hereinafter Fiss, *Against Settlement*]; Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985) [hereinafter Fiss, *Out of Eden*]; Yves-Marie Morissette, *(Dé)judiciarisation, (dé)juridicisation et accès à la justice*, 51 R. DU B. 585 (1991); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996). See also David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (responding to some of these arguments).

4. Not surprisingly, given its novelty, there has been little discussion of judicial mediation as a totally integrated part of a hybrid system of justice (including all courts and tribunals), as opposed to mediation that court-based but non-judicial mediators perform, on the one hand, or to judicial settlement conferences on the other. See Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1985-1986); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Hugh F. Landerkin & Andrew J. Pirie, *Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?*, 82 CAN. BAR REV. 249 (2003); Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232 (2003); Laurence Boule, *Judicial Policies on Mediation and ADR: Australian Trends*, 15 WORLD ARB. & MEDIATION REP. 194 (2004).

5. The system at the Quebec Court of Appeal works on the basis of a Joint Request for Mediation that the parties present to the court by which they agree to mediate their dispute before a judge and to keep the proceedings confidential. The initiative can come from the parties themselves (or their lawyers) or from a suggestion by a judge that the case is amenable to mediation, but at all times the process is voluntary. In addition, either party can abandon mediation at any time and return to the adjudicative stream. See QUE. CODE CIV. PROC., R.S.Q. c. C-25, art. 508.1 for a basic overview of the program:

A judge may at any time preside a settlement conference to assist the parties in resolving their dispute. The judge enjoys judicial immunity while presiding such a conference. The conference is held in private, at no cost to the parties and without formality.

A settlement conference may only be held at the written joint request of the parties. The filing of such a request suspends the running of the time limits prescribed by this Title.

A settlement conference is confidential and is governed by the rules defined by the judge and the parties. The judge who presides at the conference cannot take part in any hearing relating to the matter.

Any transaction resolving the matter is sent by the clerk to a panel of the court so that it may be homologated and rendered enforceable.

See also Suzanne Courteau, *La conciliation judiciaire à la Cour supérieure*, 3 REVUE DE PRÉVENTION ET RÈGLEMENT DES DIFFÉRENDS 51 (2005); Louise Otis, *The Conciliation Service Program of the Court of Appeal of Québec*, 11 WORLD ARB. & MEDIATION REP. 80 (2000) [hereinafter Otis, *Conciliation Service Program*]; Louise Otis, *La justice conciliatoire: l'envers*

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The Quebec model is particularly important, because unlike the various experiments with pilot projects or limited initiatives in mediation that other jurisdictions have tried, the Quebec justice system now integrates adjudicative and mediational justice at every level and in virtually every area of law, including family matters, civil and commercial law, administrative matters, and, recently, criminal law.<sup>6</sup> It is a unified and integrated hybrid system of justice, unique in the world in its longevity and its comprehensiveness.<sup>7</sup> As a result, it provides a vivid illustration of the fundamental changes that can result from a radical reorientation of how justice is rendered.<sup>8</sup> We argue that judicial mediation heralds a new, participant-centered normative order, one that conceptualizes litigation more

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*du lent droit*, 3 ÉTHIQUE PUBLIQUE: REVUE INTERNATIONALE D'ÉTHIQUE SOCIÉTALE ET GOUVERNEMENTALE 63 (2001) [hereinafter Otis, *L'envers du lent droit*] (introducing the systems, goals, and safeguards of judicial mediation in Quebec); Louise Otis, *La conciliation judiciaire à la Cour d'appel du Québec*, 1 REVUE DE PRÉVENTION ET RÉGLEMENT DES DIFFÉRENDS 1 (2003) [hereinafter Otis, *La conciliation judiciaire*]; Louise Otis & Eric H. Reiter, *Judicial Mediation in Quebec*, in GLOBAL TRENDS IN MEDIATION (Nadja Alexander ed., 2d ed. forthcoming).

6. Otis, *Conciliation Service Program*, *supra* note 5, at 81. In 2004, the Quebec justice system made available a pilot project in "facilitation" in criminal matters, both at first instance and on appeal. The program allows judges and lawyers to meet to seek agreement on any issue relating to the case, including sentencing. Like civil mediation, the process remains confidential; but unlike civil mediation the parties (the victim and the accused) are not present, and the judge must provide reasons for accepting, rejecting, or modifying the joint proposal reached during negotiations. See *Lefebvre v. R.*, 2005 QCCA 56, J.E. 2005-487 (Que.) (providing an example of the results of the system in practice), <http://www.jugements.qc.ca/php/decision.php?liste=15269528&doc=41005555005D1900> (with a link to an unofficial English translation).

7. Systems presenting analogies to the Quebec model have been in place for some time in Norway and Denmark and were introduced in Finland as of January 1, 2006. Email from Judge Kristen Kjelland-Mørdre, Oslo District Court, Norway (Nov. 25, 2005) (providing information on these developments). See Béatrice Blohorn-Brenneur, *Visage de la médiation judiciaire en France*, 3 REVUE DE PRÉVENTION ET RÉGLEMENT DES DIFFÉRENDS 65 (2005) (providing a survey of judicial mediation in France).

8. The judicial mediation program at the Quebec Court of Appeal, which will serve as a recurring example in this article, has, since its inauguration in 1998, conducted around five hundred mediations in family, civil, commercial, and administrative matters. See Otis, *Conciliation Service Program*, *supra* note 5. Similar programs—adapted to the needs of first-instance tribunals—are in place at the Quebec Superior Court, the Court of Québec, and the Tribunal Administratif du Québec. See, e.g., *Une Alternative: La Conciliation*, Tribunal Administratif du Québec, at <http://www.ta.q.gouv.qc.ca/recours-taq/alternative.jsp> (last visited Mar. 4, 2006) (describing the court's conciliation program). Among other Canadian appellate courts, judicial mediation programs of varying scope are now in place in Ontario, British Columbia and the Yukon (pilot projects), and the Federal Court of Appeal. See JULIA MACFARLANE, LAW COMMISSION OF CANADA, *TRANSFORMING RELATIONSHIPS THROUGH PARTICIPATORY JUSTICE* 4-5 (2003); see also Joan I. McEwen, *JDR: Judicial Dispute Resolution*, 8 NAT'L 36 (1999) (The survey is now somewhat dated.).

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broadly and holistically and, thus, offers justice that is fuller and better adapted to the needs of parties with a variety of conflicts.

It is increasingly apparent that “alternative” dispute resolution is becoming part of the mainstream, a part of the legal landscape accepted—sometimes grudgingly, sometimes enthusiastically—by litigants, lawyers, and courts alike.<sup>9</sup> In Canada, for example, at least eight of the provinces, all three territories, and the Federal Court have some form of ADR attached to the court system.<sup>10</sup> This is an ongoing project, but in our opinion, the operative question is now no longer whether ADR has a place in the justice system, but rather how, where, and who should do it. It is now time to begin assessing the integration of ADR in our legal system, not so much its

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9. See Sternlight, *ADR Is Here*, *supra* note 2 (surveying reception in the United States).

10. The various approaches include mediation conducted by judges (Quebec and Ontario at the appellate level and the Federal Court), judicial settlement conferences (British Columbia, Yukon, Northwest Territories, and Nunavut), and court-ordered or court-sanctioned mediation by professional mediators (Newfoundland and Labrador; Nova Scotia in family matters; New Brunswick in family matters; Ontario at first instance; Manitoba in family matters; and Alberta). For examples of judicial mediation, see *The Conciliation Service Program of the Court of Appeal of Quebec*, [http://www.tribunaux.qc.ca/mjq\\_en/c-appel/about/fs\\_creation.html](http://www.tribunaux.qc.ca/mjq_en/c-appel/about/fs_creation.html) (last visited Apr. 1, 2006); Andrew C. Dekany, *Focus on Alternative Dispute Resolution: Judges Increasingly Mediating in Ontario and Quebec*, LAW. WKLY., Jan. 21, 2005 (describing judicial mediation at the Ontario Court of Appeal); and Federal Court Rules, 1998, C.R.C., SOR/98-106, s. 387 (providing for dispute resolution conferences with a case management judge or prothonotary in Canada’s Federal Court), <http://www.canlii.org/ca/regu/sor98-106/whole.html>. For examples of judicial settlement conferences, see *British Columbia Court of Appeal Practice Directive: Judicial Settlement Conferences* (Oct. 15, 2004), <http://www.courts.gov.bc.ca/ca/whats%20new/SETTLEMENT%20Final%20PD.htm>; *Government of Yukon Department of Justice: Supreme Court* (“The [Yukon] Supreme Court follows the Rules of the Supreme Court of British Columbia[,]” including its rules for judicial settlement conferences.), <http://www.justice.gov.yk.ca/prog/cs/supr/supremecrt.html> (2001); Rules of the Supreme Court of the Northwest Territories, N.W.T. Reg. 010-96, s.283 (2005) (providing the rules for judicial settlement conferences for the Northwest Territories and Nunavut), <http://www.canlii.org/g/nt/laws/regu/1996r.010/20050211/part1.html>. For examples of court-ordered or court-sanctioned mediation by professional mediators, see Rules of the Supreme Court, S.N.L. 1986, c. 42, Sch. D, r. 37A (providing for Newfoundland and Labrador’s court-ordered mediation program), <http://www.canlii.org/nl/laws/regu/1942c.42sch.d/20051121/part45.html> (Nov. 18, 2005); *Services: Mediation*, The Courts of Nova Scotia (describing the Supreme Court’s Family Division conciliation and mediation programs), [http://www.courts.ns.ca/supreme/sc\\_family6.htm](http://www.courts.ns.ca/supreme/sc_family6.htm) (2006); *Mediation Services*, Court of Queen’s Bench of New Brunswick (providing for mediation in matters before the Family Division of New Brunswick’s Court of Queen’s Bench), <http://www.gnb.ca/cour/04CQB/Mediation-e.asp> (2004); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 24.1 (establishing a pilot project in mandatory mediation for case-managed actions in Ontario’s Superior Court of Justice), <http://www.canlii.org/on/laws/regu/1990r.194/20050211/part1.html>; Court of Queen’s Bench Rules, C.C.S.M. c. C280, Manitoba Reg. 553/88, r. 70.16 (Oct. 31, 2005) (providing for mediation in family matters before Manitoba’s Court of Queen’s Bench), <http://web2.gov.mb.ca/laws/rules/qbr2e.php#70.16>; and *Civil Mediation Program*, Court of Queen’s Bench of Alberta (describing a two-year pilot project in civil mediation at Alberta’s Court of Queen’s Bench), <http://www.albertacourts.ab.ca/go/CourtofQueensBench/CivilMediationProgram/tabid/74/Default.aspx> (Apr. 1, 2006).

practical impact (which has been the object of research already)<sup>11</sup> but its normative impact (which remains largely still to be examined).<sup>12</sup>

Towards this end, we discuss in this article how judicial mediation in particular, which brings ADR into the very heart of state-run legal institutions, affects both classical adjudication and also mediation itself. At the same time, we address what we perceive to be the key advantages of mediation by judges, as well as some of the potential concerns about it.

Judicial mediation brings into sharp relief the issue of the relationship between state-sanctioned and private forms of normative ordering. It raises a host of interesting questions that we will address in what follows, including: What are the implications of this trend for a legal system still primarily based on the paradigm of adjudication of adversarial disputes? What limits (practical, normative, or ethical) does the dominant model place on judicial mediation? What challenges does judicial mediation present for the dominant model? How can the sometimes conflicting needs of disputing parties and justice best be reconciled? And, how can the judge-mediator best manage the sometimes conflicting ethical obligations of the participants?

This article has three principal parts. In the first, we present an overview of judicial mediation and how it responds to some of the perceived problems with the classical model of adjudication.<sup>13</sup> In this analysis, we

11. See Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49 (1994); Michaela Keet & Teresa B. Salamone, *From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation*, 64 SASK. L. REV. 57 (2001); Julie Macfarlane, *Why Do People Settle?*, 46 MCGILL L.J. 663 (2001) [hereinafter Macfarlane, *Why Do People Settle?*]; GEORGE W. ADAMS, *MEDIATING JUSTICE: LEGAL DISPUTE NEGOTIATIONS* (2003); Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55 (2004); and Timothy K. Kuhner, *Court-Connected Mediation Compared: The Cases of Argentina and the United States*, 11 ILSA J. INT'L & COMP. L. 519 (2005) for some examples among many.

12. Some interesting work has been done on this issue. See, e.g., Sternlight, *ADR Is Here*, *supra* note 2; Louise Lalonde, *La médiation, une approche 'internormative' des différends? Analyse comparative des approches de G.A. Legault et de R.A. Macdonald*, 33 R.D.U.S. 97 (2002-2003); Louise Lalonde, *Les modes de PRD: vers une nouvelle conception de la justice?*, 1 REVUE DE PRÉVENTION ET DE RÈGLEMENT DES DIFFÉRENDS 17 (2003); Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117 (2004). See also LOUISE OTIS, *LA TRANSFORMATION DE NOTRE RAPPORT AU DROIT PAR LA MÉDIATION JUDICIAIRE* (2005) [hereinafter OTIS, *LA TRANSFORMATION*] (discussing judicial mediation as an answer to conflict and problems within the traditional justice system); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000) (presenting the intellectual genealogy of ADR).

13. See *infra* Part A.

draw especially on the experience with judicial mediation at the appellate level at the Quebec Court of Appeal. In the second part, we examine the unfolding of the mediation process itself, using an annotated guide to judicial mediation to address broader issues of both practical and theoretical concern.<sup>14</sup> In the third part, we consider the crucial question of ethics in mediation, signaling some of the problems in applying ethical models developed in the context of classical adversarial litigation and advocacy to mediation.<sup>15</sup> Finally, we conclude by suggesting some continuing challenges and subjects for further study.<sup>16</sup>

### A. From Classical Adjudication to Judicial Mediation

“Alternative” dispute resolution suggests the existence of a dispute-resolution norm—perhaps even a default choice—in comparison to which other forms like mediation, conciliation, settlement conferences, sentencing circles, med-arb, and the rest are imperfect reflections, even second-best choices. In modern western society that norm remains adjudication or court-based resolution of adversarial disputes between parties who bring a specifically-focused and legally-defined problem before a judge. But was adjudication ever really the norm? Though the image of a state monopoly on dispute resolution is strongly fixed in the popular imagination, reinforced by movies and television, other forms of extrajudicial dispute resolution have a long history alongside adjudication.<sup>17</sup> More importantly for our purposes, the state-monopoly view rests on an overly narrow conceptualization of both disputes and their resolution.<sup>18</sup>

If we look at all kinds of disputes, we realize that the vast majority of conflicts arise and are resolved far from state institutions. Without recourse to courts, mediators, arbitrators, or other formal mechanisms, individuals

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14. See *infra* Part B.

15. See *infra* Part C.

16. See *infra* Part D.

17. Disputing parties in medieval England, for example, regularly resorted to a variety of non-litigious dispute-resolution techniques, such as direct negotiation, mediation, and arbitration. See Edward Powell, *Arbitration and the Law in England in the Late Middle Ages*, 33 TRANSACTIONS ROYAL HIST. SOC'Y 49 (5th ser. 1983). More recently, Quebec toyed with a formal mediation program from 1899-1920 for “matters purely personal affecting moveables and when the amount claimed does not exceed twenty-five dollars.” An Act respecting conciliation, S.Q. 1899, c. 54 (Que.) (quotation at s. 1). The parties were obliged to submit to “conciliation” before inscribing their case for adjudication. The program was abolished in 1920 by An Act to amend the Revised Statutes, 1909, respecting conciliation, S.Q. 1920, c. 76 (Que.).

18. Cf. Galanter & Cahill, *supra* note 4, at 1390 (arguing that settlement has always been part of even classical adjudication). “Once we see settlements not as a stray byproduct of the judicial process, but as part of the essential core, the responsibilities of courts can no longer be defined as coextensive with adjudication.” *Id.*

effectively and usually painlessly resolve thousands of minor—sometimes even major—daily problems, such as arguments among family or friends, disagreements between neighbors about snow removal or barking dogs, and conflicts between parents and teachers over teaching methods. Life in society would be impossible if it were otherwise.

The work of both Stewart Macaulay on informal dispute resolution techniques among American businesspeople in the 1950s<sup>19</sup> and of Robert Ellickson on private normative ordering among California ranchers in the 1980s<sup>20</sup> shows that state institutions for resolving disputes are merely the most recognizable or visible of dispute resolution mechanisms and that we should see a dispute-resolution continuum rather than a stark division between state institutions on the one hand and “informal” methods on the other. If we stop viewing state-based law and its institutions as effectively having a monopoly on dispute resolution, from which any “alternative” forms need to be chipped away and justified, we make room for other forms of normative ordering on an equal footing with traditional adjudication.<sup>21</sup> Put another way, the issue becomes whether we wish to view the law as a monolithic edifice or as something more open and flexible, which a society in constant movement continually reshapes and reinvents.

What ADR, in general, and judicial mediation, in particular, represent are the institutionalization of some of these informal ways of normative ordering, bringing the power of informal justice within the purview of state legal systems.<sup>22</sup> In what follows, we do not argue for replacing traditional adjudication, nor for juridicizing the vast numbers of everyday conflicts that are already satisfactorily dealt with outside the courts, whether by the parties themselves or by professional mediators. Rather, we argue that complementing traditional adjudication with judicial mediation allows state dispute-resolution institutions to reflect new exigencies better, which helps them provide better justice for those who bring their disputes to the justice system for resolution. Before we begin examining this process and its

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19. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

20. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

21. This idea is explored in RODERICK A. MACDONALD, *LESSONS OF EVERYDAY LAW* 38-42 (2002).

22. See Jean-Pierre Bonafé-Schmitt, *La médiation: une alternative à la justice?*, in *SOURCES ET INSTRUMENTS DE JUSTICE EN DROIT PRIVÉ* 141 (Nicholas Kasirer & Pierre Noreau eds., 2002) (suggesting that the development of mediation is evidence of increasing decentralization and pluralism in justice systems).



effects, a brief overview of both classical adjudication and judicial mediation is in order.

### 1. The Classical System

As western societies have evolved, their state justice institutions have increasingly become the principal locus for the formal expression and resolution of conflicts. This is partly due to the imperialism implicit in the law, which colonizes ever more areas of human activity to bring them within its discourse, and partly due to the decline of parallel normative orders, notably religion.<sup>23</sup> Though the hegemony of law is far from complete—science, for example, provides a powerful foil to law’s ambitions—western society in the early twenty-first century is highly legalized.

More specifically, however, these formal state justice institutions embody law of a particular kind, with characteristic dispute-resolution mechanisms that reflect the law they apply. The principal formal mechanism for resolving legal disputes remains the trial, which employs an adversarial and contradictory procedure that has the effect of juridicizing the conflict. The power of the adjudicative paradigm is such that even other “alternative” modes of dispute resolution draw strength from their position in “the shadow of the law,”<sup>24</sup> and the adjudicative norm still colors their disputes, gives urgency to their resolution, and provides at least an implicit threat to keep them on track. The norm, in short, is a state-controlled justice system whose essential purpose is to balance the parties’ opposing interests or subjective rights by means of a judicial decision.<sup>25</sup>

The classical adversarial system has several principal characteristics that work towards shaping the dispute and determining how it is to be resolved.<sup>26</sup> The trial (or the appellate hearing) works by the polarization of the parties’ roles (plaintiff-defendant, appellant-respondent), by the opposition of legal representatives for each side, and by the exacerbation of the antagonism at the source of the conflict.<sup>27</sup> In short, the adversarial system takes a conflict and makes it into a dispute—a narrowly-focused, legally-defined event with which the court can deal.<sup>28</sup>

These characteristics of the adversarial system also combine to make contradictory debate procedurally intensive and, many would say, unwieldy,

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23. Morissette, *supra* note 3, at 596-97.

24. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

25. See generally GERALD L. GALL, *THE CANADIAN LEGAL SYSTEM* 333-34 (5th ed. 2004).

26. OTIS, *LA TRANSFORMATION*, *supra* note 12, at 12.

27. See *id.*

28. See *id.* at 12-13.

since discovery, preliminary exceptions, incidental proceedings, expert reports, and other procedural steps weigh it down.<sup>29</sup> On a substantive level, the cornerstone of contradictory justice is the judicial determination of those respective rights and obligations of the parties that are engaged by the complaint giving rise to the action.<sup>30</sup> The cause and the resolution of the broader conflict behind the legal dispute are, at best, only incidentally the object of the judicial contract; the judge can safely ignore this wider conflict as long as he or she handles the dispute, as defined by the parties.<sup>31</sup>

Many factors have contributed to ensuring the longevity of the contradictory justice system, which today remains the *via regia* of legal conflict resolution. These include the independence and impartiality of the decision-maker; the application of a uniform and neutral procedural code; the assurance of a judicial decision based in its essentials on the evidence produced by the parties; and the resolution of disputes with regard for the rule of law and for juridical stability, as assured by judicial precedents.<sup>32</sup>

On a deeper level, however, the judiciary's role in social regulation itself works to bolster the classical system. As judges are increasingly asked to pronounce on ever more highly-charged social questions,<sup>33</sup> they are implicitly asked to define the terms of the evolution of the relationship between the individual and society. The classical adjudicative system, therefore, with its procedural guarantees of fundamental justice and fairness, becomes a crucial arbiter of change.<sup>34</sup> By virtue of its role in translating the relativity and specificity of the juridical norm into general principles for social ordering, the judiciary bears witness to the degree of risk that a

29. See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29, 34 (1982).

30. See generally Paul Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. BAR REV. 406, 408-37 (1968) (describing the adjudicatory model of judicial decision-making).

31. See *id.*; Alexander J. Black, *Separated by a Common Law: American and Scottish Legal Education*, 4 IND. INT'L & COMP. L. REV. 15, 31 (1993); Kenneth J. Rigby, *Alternative Dispute Resolution*, 44 LA. L. REV. 1725, 1727 (1984).

32. See GALL, *supra* note 25, at 209-10. Many other factors play a role, of course. In particular we might mention the inertia of the professional practice of lawyers, whose training and institutional culture have long privileged the adversarial system, and the preferences of parties to litigation, many of whom desire for various reasons to have their day in court.

33. One thinks, for example, of abortion, assisted suicide, or the definition of marriage.

34. See, e.g., Beverley McLachlin, *The Supreme Court and the Public Interest*, 64 SASK. L. REV. 309, 311 (2001) ("So the primary task—indeed the only task—of judges is to resolve disputes between members of society or between members of society and the state. Yet in performing this function, judges inevitably are expected to perform a second function, namely, to ensure that the law develops in a way that is good for society and the men, women and children who are its members.").

pluralistic western society is willing to take regarding the common values that mold it.

These characteristics make the classical system highly suited to certain tasks, but, for others, it has serious shortcomings.<sup>35</sup> Scholars have discussed the limitations of the classical system time and again.<sup>36</sup> Of particular importance for a discussion of judicial mediation, we might mention long delays (administrative and procedural);<sup>37</sup> judicial and extrajudicial costs related to adversarial debate;<sup>38</sup> agency costs resulting, at times, from overlapping interests;<sup>39</sup> the physical and psychological trauma associated with long judicial conflicts;<sup>40</sup> and the inherent limits of contradictory debate for finding the best solution that would, in real terms, put an end to the dispute.<sup>41</sup>

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35. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 370-71, 397-99 (1978) [hereinafter Fuller, *Adjudication*] (noting in particular that adjudication is ill-suited to dealing effectively with “polycentric” problems); see also Otis, *L’envers du lent droit*, *supra* note 5, at 64.

36. Good recent general overviews (from different sides of the debate, to be sure) are Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173 (2003) [hereinafter Resnik, *For Owen M. Fiss*] and Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7 (2004) [hereinafter Menkel-Meadow, *From Legal Disputes*].

37. At the appellate level in Quebec, the procedural time limits (inscription in appeal, appearance, factum preparation, incidental proceedings, etc.) inherent in any ordinary civil case vary between eight and ten months. It is only once these time limits have expired that the appeal is deemed ready and can be put on the roll for hearing. It then takes on average another eighteen months for the appeal to be heard.

38. A 1996 study, led by the Ontario Commission of Revision of Civil Justice, established the fees related to a typical civil case at over \$38,000 CDN, with parties applying seventy-five percent of the amount awarded towards fees and legal costs. See CAN. BAR ASS’N, REPORT OF THE CAN. BAR ASS’N TASK FORCE ON SYS. OF CIVIL JUSTICE 15-16 (1996) (Chair: Eleanor Cronk).

39. The term “agency costs” refers to situations in which a party having authority to make decisions for another has incentives to favor his or her own interest over that of the other. The term is most often used in economic analyses of corporate law, but agency costs can arise in litigation as well. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FINANCIAL ECON. 305, 308 (1976).

40. During the course of appellate judicial mediation sessions, parties consistently and spontaneously mention the physical and psychological effects of enduring disputes. See Otis, *Conciliation Service Program*, *supra* note 5, at 81. Parties and their attorneys both frequently report episodes of situational depression as well as pathologies related to the stress of judicial litigation. See *id.*

41. For example, in matters related to property law (boundary marking, servitudes or easements, common property, co-ownership, etc.), the adjudicative function, limited as it is to the judicial contract of the parties and the rigid application of the resulting norm, has a hard time achieving complete resolution. Thus, the conflicts related to such matters often flare up again.

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None of these problems are new, of course, and the *topos* of the delays and costs of justice has a long history.<sup>42</sup> We believe that the convergence of these problems, however, indicates the existence of a real crisis in the authoritative judicial order, as the classical system is proving to be less than ideal for or even ill-suited to a growing percentage of disputes brought before it. A fundamental incompatibility exists between the judicial function as it has come to be constructed and many of the disputes it is called upon to adjudicate.

The act of judging proceeds from reflexive analysis and a maturation of juridical thought; this process, which necessarily takes a great deal of time, both runs on and generates positive law, debate, and argument. Of course, for practical reasons, it is essential that the course of a judicial dispute, which will end in final judgment, be subject to procedural and, by necessary implication, temporal constraints. But while these efficiency measures may indeed restrict frivolous or dilatory actions, they can never be allowed to constrain the act of judging, which is introspective and cautious by nature. In short, the very qualities of discernment, reason, and wisdom that give traditional adjudication its authority also prevent it from changing so as to meet the demands of an increasing volume of litigation.

This is as it should be; what we see happening is not—cannot be—a dilution or dumbing down of the adjudicative function to meet efficiency targets but rather the development of another form of justice, complementary to the classical system and based on an entirely different model of rendering justice. For, if the mission of adjudication, or the act of judging, remains steadfast, we must nevertheless recognize that, in most civil disputes, complex and procedurally-oriented contradictory debate is ill-suited both to the efficient resolution of these disputes in modern juridical reality and to the interests of litigants.

## 2. Judicial Mediation

ADR has developed in response to these perceived weaknesses of the classical model in the face of society's changing needs and expectations regarding a justice system. Flexible, party-centered modes of dispute resolution address many of the shortcomings of the adversarial system. Different conflicts respond to different solutions, however, so a diversity of

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42. See Sylvio Normand, *De la difficulté de rendre une justice rapide et peu coûteuse: une perspective historique (1840-1965)*, 40 C. DE D. 13 (1999) (discussing the history of more than a century of such complaints in Quebec).

techniques is called for.<sup>43</sup> In our view, for disputes that are already within the adjudicative system or that have proved resistant to extrajudicial resolution, judicial mediation presents a powerful alternative to the often blunt instrument of an adversarial trial. It offers a *via media*, combining some of the legal and moral *gravitas* of adjudication with the flexibility and adaptability of ADR. It thus represents not just an efficiency reform but also a reconceptualization of the role of the courts and judges in dispensing justice.<sup>44</sup>

Judicial mediation obviously presents numerous advantages over the traditional adversarial system from the point of view of efficiency. By eliminating the need for the preparation of appellate facts or briefs and court transcriptions, the parties benefit from significant savings of time and cost.<sup>45</sup> Additionally, turn-around time is vastly improved: in Quebec, mediation sessions are normally scheduled within thirty days following the receipt of the written request, so the issue of backlog largely disappears. This brings corresponding improvements to the traditional system of justice itself, because cases slated for mediation leave the adjudicative pipeline—permanently in the majority of cases—thereby removing much of the clutter from court dockets.

The cost reductions achieved in the mediation process also reduce the incentives a better-positioned party has to use the system to its advantage, a situation that could have the effect of straining the resources of the other party and effectively forcing the latter to settle regardless of the strength of its position at law.<sup>46</sup> In such circumstances, it is unlikely that the result achieved would represent a fair bargain between the parties. Accordingly, by reducing the costs of achieving post-trial resolution, judicial mediation should enable the participation of a greater number of parties and so should reduce the incidence of outright economic coercion.

Moreover, efficiency gains can result even from a mediation process that does not end in settlement. By the time the parties resign themselves to abandoning mediation and returning to the adversarial system, they will have gained valuable insight into the issues and pertinent facts underpinning their

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43. See Sander & Goldberg, *supra* note 11.

44. It is worth recalling at this point that we refer here to mediation that a judge conducts within a courthouse setting as *neutral third party* and not to the various forms of evaluative or binding judicial intervention, such as settlement conferences or mini-trials.

45. See generally David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983) (analyzing the results of the Civil Litigation Research Project on litigation costs in the United States).

46. Cf. Fiss, *Against Settlement*, *supra* note 3, at 1076-77 (“[T]he distribution of financial resources, or the ability of one party to pass along its costs, will invariably infect the bargaining process, and the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant.”).

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dispute. They will likely have come to a realization of which issues remain intractable and which do not, and can thus agree either to a partial settlement or at least to focus litigation on the principal outstanding issues between them. Ultimately, this can only make preparation for the eventual hearing—if not the hearing itself—a less resource-intensive and more efficient exercise.

Beyond efficiency, however, judicial mediation also satisfies other, more intangible needs.<sup>47</sup> First, mediation allows the parties to shift the emphasis of dispute resolution towards agreement and away from the familiar win-lose equation. This decreases the tension on the parties to the dispute and, importantly, serves to reduce mental pressure. To this end, the judge can help the parties escape the narrow confines of the specific legal and factual issues and address the broader conflicts between them.<sup>48</sup>

Second, and more significantly, mediation serves the increasingly evident desire of the community to move away from imposed justice in order to seek—in suitable cases, of course—mutually negotiated and accepted solutions to legal conflicts.<sup>49</sup> This represents an institutional manifestation of the emergence of a certain collective maturity, a move towards the control by society of its own judicial destiny.<sup>50</sup> As Carrie Menkel-Meadow has written, “conventional forms of institutionalized searches for justice, in the form of courts and trial, are diminishing in use for a reason. They are suffering from evolutionary demise because they are failing to satisfy modern requirements for voice, justice, and conflict resolution.”<sup>51</sup> Though it cannot replace adjudication, mediation contributes towards rendering justice more human, participatory, and accessible, values that better reflect many people’s needs in dispute resolution.<sup>52</sup>

47. See LAURENCE BOULLE & MIRYANA NESIC, *MEDIATION: PRINCIPLES, PROCESS, PRACTICE* ch. 2 (2001) for a survey.

48. See Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heilman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U. L.Q. 1059, 1083 (1991).

49. See Julie Macfarlane, *The Mediation Alternative*, in *RETHINKING DISPUTES: THE MEDIATION ALTERNATIVE* 1, 4-8 (Julie Macfarlane ed., 1997); Otis, *Conciliation Service Program*, *supra* note 5, at 81.

50. See Carrie Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 97, 100 (2004) [hereinafter Menkel-Meadow, *Remembrance*].

51. *Id.*

52. See *id.* (“Mediation offers the opportunity for participating parties to have more authentic dialogues and make decisions about what is fair and just to them than when an outsider applies rules that have been enacted by a legislature for some generalized mean, rather than for particularized human individuals.”)

Alternately criticized<sup>53</sup> and praised,<sup>54</sup> the existence of alternative modes of conflict resolution has contributed to the revival of ideological disagreement regarding concepts of justice, with its tension between interventionism and liberalism, antagonism and interdependence, and procedure and substance. Judicial mediation, which integrates mediational justice within the formal institutional structure of state justice, works towards resolving the stark dichotomy of these seemingly opposite concepts. As a result, trial justice and mediation can each in their own way participate in fulfilling the mission vested in the courts and other tribunals—rendering justice.

### 3. Why a Judge?

Why use judges to mediate? This is a frequent question and an understandable one, given the relatively high cost of scarce judicial resources and the already heavy demands on judges' time. Mediation need not be conducted by a judge, of course, even within a courthouse setting. In many jurisdictions trained mediators are kept as courthouse staff, acting as officers of the court to perform mediations in much the same way as court clerks hear motions.<sup>55</sup> Even in Quebec's judicial mediation system, the parties are free to choose private mediation if they so desire; the choice to

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53. See sources cited *supra* note 3; see also Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 UNIV. CHI. L. REV. 494 (1986).

54. See sources cited *supra* note 2; see also JOËLLE THIBAUT, LES PROCÉDURES DE RÈGLEMENT AMIABLE DES LITIGES AU CANADA 311 (2000) (concluding that the increasing satisfaction of parties to mediation indicates that mediation is becoming less marginalized and more of a supplement to the judicial system in Canada); Julien Paré, *Solution de rechange pour le règlement des litiges: la médiation*, in MÉDIATION ET MODES ALTERNATIFS DE RÈGLEMENT DES CONFLITS: ASPECTS NATIONAUX ET INTERNATIONAUX at 193 (Jean-Louis Baudouin ed., 1997) (discussing the use of mediation within the Canadian insurance system and offering suggestions for encouraging its further development); Alex Wellington, *Taking Codes of Ethics Seriously: Alternative Dispute Resolution and Reconstitutive Liberalism*, 12 CAN. J.L. & JUR. 297 (1999); Claude Nélisse, *Le règlement déjudiciarisé: entre la flexibilité technique et la pluralité juridique*, 23 R.D.U.S. 269 (1992); Donald L. Marston, *Project-based Dispute Resolution: ADR Momentum Increases into the Millennium*, 48 C.L.R. (2d) 221 (2000).

55. Mediation programs in most of the United States federal circuit courts of appeal, for example, are run by court mediators, usually lawyers who are either kept on-staff or who work on a volunteer basis. See ROBERT J. NIEMIC, FEDERAL JUDICIAL CENTER, MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS 10, 12-16 (1997), available at [http://www.fjc.gov/public/pdf.nsf/lookup/mediconf.pdf/\\$File/mediconf.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/mediconf.pdf/$File/mediconf.pdf). In Canada, many provinces have opted for a similar arrangement. See *supra* note 10. See Marie-France Chabot, *Des raisons et des manières d'intégrer la médiation dans le système de justice civile*, 40 C. DE D. 91 (1999) for an argument on the advantages of "public mediators."

mediate with a judge—like the choice to mediate at all—is entirely up to the parties.<sup>56</sup>

The multi-door courthouse of voluntary, participant-centered dispute resolution is a powerful image, but it does not answer the question of why parties should choose one door rather than another. We have argued that there are strong justifications for bringing mediation within the state-run justice system.<sup>57</sup> What is to be gained by devoting judicial resources to it?

Judges are well-suited for the role of mediator for several reasons, relating both to the perceptions of the parties and to the specific skills possessed by judges. Of particular importance is the perception of the judicial office as one of impartiality and independence, which confers on judges a degree of moral authority.<sup>58</sup> This can function to keep the process on track and to prevent abuses of the process by the parties or their representatives. Exercising this moral authority is extremely delicate, however: the consent of the parties is a central pillar of any mediation system, and judge-mediators must never use their position to manipulate this consent.<sup>59</sup> The judge-mediator is not there to extract a settlement or to steer the process towards a particular result but instead to help the parties come to their own resolution of their conflict.<sup>60</sup> The judicial office and the parties' opinion of it can lend credibility to the process and keep it moving when it might otherwise stop, but to use the office to control the process is to subvert it.

A more subtle advantage of judicial mediation—particularly at the appellate level—arises from its institutional relationship to the adjudicative system. A judge well-trained as a mediator is ideally placed to uphold the integrity of the adversarial system during the course of a mediation session by showing appropriate curial deference to the decision of the trial judge.

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56. See *supra* note 5.

57. See *supra* Part A.

58. See generally MARTIN L. FRIEDLAND, CANADIAN JUDICIAL COUNCIL, *A PLACE APART: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN CANADA* (May 1995). This is a controversial subject, and public perceptions of the judiciary vary in different countries (and in different jurisdictions within countries) as well as over time. For the United States, see AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AM. BAR ASS'N (1997).

59. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999); Timothy Hedeem, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary Than Others*, 26 JUST. SYS. J. 273 (2005). See also *infra* Part B.2.

60. See Hedeem, *supra* note 59, at 274-75.



Indeed, to allow a private mediator—even one attached to the courts—to consider a first-instance decision pending on appeal brings up delicate issues of confidence in the courts and could potentially affect public perceptions of the authority of judicial decisions.<sup>61</sup>

The judicial mediation model effectively keeps the review process in-house. Following the trial judge's decision, a fellow judge mediates the dispute; if a settlement agreement is reached, it is ratified by an independent panel of judges from the court of appeal.<sup>62</sup> Public perception of the judicial process can be fragile; an integrated system of judicial mediation for cases already being litigated ensures that neither process—adjudication nor mediation—undermines the other.

Besides the perceptions of the parties, judges bring to the table many particular qualities and skills that make them effective mediators. First, judges have long experience in intervening between disputing parties.<sup>63</sup> This practical experience is buttressed by a second factor, namely the judge's commitment both to achieving resolution and to dispensing justice.<sup>64</sup> Third, the judge is already part of the subsidized public court system. This provides an enormous benefit to parties for whom both adjudication and private mediators are too expensive; in the Quebec system, for example, there is no cost to the parties associated with judicial mediation beyond preparation expenses. Such programs thus have the potential to offer the best of both worlds; they provide the flexibility of alternative dispute resolution but do so by employing existing adjudicators at no extra cost.

A fourth, and obviously important, factor is the judge's knowledge of the law.<sup>65</sup> While this, too, flows from the judge's experience, this knowledge goes beyond simply discerning how to handle parties to a dispute. Judges have an understanding of legal issues that permits them cogently to focus on the issues underlying the dispute and to bring these to the fore during discussions between the parties, even if this necessarily must stop short of expressing an opinion on the case. In this way, the presence of a judge provides the ideal foil to agency costs and efficiency losses between the parties and their attorneys by providing an experienced supervisory presence during the negotiations.<sup>66</sup>

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61. Otis, *L'envers du lent droit*, *supra* note 5, at 66-67.

62. QUE. CODE CIV. PROC., R.S.Q. c. C-25, art. 508.1 para. 4 ("Any transaction resolving the matter is sent by the clerk to a panel of the court so that it may be homologated and rendered enforceable.").

63. See Otis, *L'envers du lent droit*, *supra* note 5, at 66; Landerkin & Pirie, *supra* note 4, at 293.

64. See Otis, *L'envers du lent droit*, *supra* note 5, at 66.

65. See *id.*

66. See source cited *supra* note 39.

Judges must of course be trained to mediate and, more specifically, to negotiate the particular challenges of judicial mediation.<sup>67</sup> In the Quebec program, only those judges who have undergone intensive training participate in the judicial mediation program. These training courses are fully adapted to the needs of judges, and allow them both to negotiate the transition from adjudication to mediation and to mediate effectively.<sup>68</sup> The key is changing the judicial mindset; the judge-mediator's training must address this explicitly, because there is no place for an adjudicator in a mediation session.

Adjudication is of course a natural reflex of experienced judges, as is forming opinions on the matters before them; both, however, present grave threats to the integrity and viability of a voluntary system of judicial mediation.<sup>69</sup> For this reason, a judicial mediation system must provide judge-mediators with strategies to help them shift gears between adjudication and mediation and must provide supervision as a continuing complement to the initial training provided. Letting the parties control the process and the outcome is a challenge for a mediator in any mediation. For judge-mediators this challenge is intensified, since they will always remain judges in the eyes of the parties, even when they are in the informal setting of the mediation room.

The choice of a judge as mediator thus helps effectively combat many of the problems with the classical system; the question that inevitably arises, however, is whether this is an efficient use of a judge's time. Judges have full caseloads as it is; the existence of the very backlog that mediation is supposed to alleviate is evidence of this. Clearly, adding mediations on top of the regular caseload is unworkable, so any time spent conducting mediations must be time during which the judge can no longer hear cases. Moreover, the time devoted to a mediation session—at the appellate level generally three to four hours, but sometimes longer—would appear on the

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67. See Landerkin & Pirie, *supra* note 4, at 293-97 (stressing the need for training to neutralize potential problems with judges as mediators). On training in mediation generally, see Alan Sharp, *The Training of Potential Mediators*, in RETHINKING DISPUTES, *supra* note 49, at 349 and Janine Higgins, *Mediation: The Training Component*, in RETHINKING DISPUTES, *supra* note 49, at 359.

68. In Canada, the National Judicial Institute, together with the Université de Sherbrooke, has in the past six years developed, under the direction of judges, several training programs in judicial mediation. These programs, including seminars dealing with negotiation, settlement conferences, and other aspects of the process, are now available to judges across Canada. See National Judicial Institute, [http://www.nji.ca/Public/documents/Fall2005\\_004.pdf](http://www.nji.ca/Public/documents/Fall2005_004.pdf) (last visited Mar. 23, 2006).

69. Landerkin & Pirie, *supra* note 4, at 293-94.

surface to compare unfavorably with the thirty minutes to an hour typically assigned for the hearings of cases on appeal of the kind that go to mediation.

As we have suggested already, however, such criticisms fail to take into account the uniquely complementary relationship between adjudication and *judicial* mediation. Mediation involves preparation time for the judge-mediator, of course, as well as the time devoted to the session itself. Because the judge-mediator plays a facilitative rather than adjudicative role, however, and because the parties are free to come to their own terms (subject only to public order and other legal imperatives), the amount of preparation required of the judge-mediator is usually less than in adjudication. In contrast to adjudicative hearings, where in many cases the oral arguments are little more than summaries of the written submissions, in mediation it is the negotiations and the dynamics of the session itself that play the largest role. As a result, preparation time is less, particularly when we recall that appellate adjudication requires preparation by three justices.

Furthermore, a successful mediation results in an immediate settlement rather than deliberations, another enormous savings of time.<sup>70</sup> Finally, a mediation can address the parties' conflict globally, thus resolving the principal dispute at the same time as side issues, each of which might otherwise land before the courts. In short, experience at the appellate level has shown that the investment of the time of one judge results in freeing up two other judges to hear other matters and, in many cases, clears the docket prospectively of a number of procedural or even substantive matters related to the parties' dispute that would otherwise require separate litigation.

An integrated system of mediation by judges also creates a synergy between courts, as different courts collaborate in the global resolution of conflicts. A case before an appellate court often includes other related matters pending before courts of first instance; a case before a trial court might likewise include interlocutory or other matters pending in appeal. Parties can grant a judge seized of one aspect of their litigation the mandate to settle all connected aspects, even those pending before other courts or tribunals. The prospect of a complete resolution of their conflict can convince otherwise reluctant parties to mediate rather than to continue multiple court proceedings; the advantages of efficiency, cost, and finality are strong inducements.

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70. These savings are especially significant at the trial level. The Superior Court, Quebec's court of general jurisdiction, has seen significant results from its judicial mediation program (under the name "amicable dispute resolution conferences"). In the past three years judges have mediated almost one thousand cases, of which about eighty percent achieved settlement. A great many of these cases were highly complex civil or commercial proceedings that would otherwise have required weeks or even months of hearing time. See generally Courteau, *supra* note 5.

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If mediation fails, of course, the case resumes its place in the regular docket as if the mediation had never occurred, and such cases result in a net loss of judicial time. Fortunately, the Quebec appellate mediation experience shows that this is far from the usual scenario. Of all the cases each year that proceed to judicial mediation, seventy-five to eighty percent settle. Even those that do not settle can bring certain benefits to the system, however. Though what went on in the mediation session remains confidential, a failed mediation is generally not time wasted, as the parties and their lawyers can use the experience to help them focus the issues that remain in dispute.

It is important as well to acknowledge that mediation requires judges to play a different role than their familiar adjudicative function. The judge must act more as an efficient and neutral negotiator and not simply as an oracle decreeing the law to the disputants from on high.<sup>71</sup> Though this greatly expands the latitude of what the judge can do, at the same time it imposes certain constraints. For example, and most significantly, judicial mediation is all about empowering the parties, who themselves design the judicial solution to their problem and who at all times have the option of returning their dispute to the adjudicative stream.<sup>72</sup> For this reason, the judge-mediator must refrain from expressing any opinion on the legal merits of the case or, in the case of an appeal, on the validity of the judgment being appealed.

Such commentary could potentially compromise the court's position and impair the effectiveness of the traditional system should the case return to the adjudicative stream. It would certainly undermine the relationship between the two systems. Though a judge-mediator does not speak "judicially" during a mediation session, the judge's position in society is such that it would be difficult for the parties to make this distinction, and consequently they could easily—and understandably—misinterpret what the judge says during mediation as the definitive position of the court on an

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71. Otis, *La conciliation judiciaire*, *supra* note 5, at 1. The judge-mediator is not simply a managerial or case-management judge but a new phenomenon, a different mode of rendering justice. *See id.* Compare with the case management model as discussed in Resnik, *Managerial Judges*, *supra* note 3; E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986) and Janet M. Wilson, *Case Management in Ontario: When There's a Will, There's a Way*, 9 ADVOCATES' SOC. J. 3 (1990).

72. Otis, *Conciliation Service Program*, *supra* note 5, at 81.

issue.<sup>73</sup> This is clearly an area requiring a high degree of caution and restraint and a keen sensitivity to the relationship between the two systems.

Finally, judicial mediation does not, indeed it cannot, be allowed to mean the end of private mediators outside the court system. The two are not mutually exclusive, any more than adjudication excludes the possibility of informal, community-based forms of conflict resolution (interventions by family, friends, and clergy). Each serves different purposes but at the same time works towards the same end—resolving conflicts in a satisfactory, timely, and cost-effective way. The crucial point is to develop a synergy between conflict-resolution processes, rather than defending jurisdictions.

The availability of judicial mediation in no way excludes the possibility that parties will resort to private mediators to resolve their disputes; it simply provides another option, one particularly suited to conflicts at a more advanced stage. Judges mediate cases already within the formal adversarial justice system; in most cases these will be problems of a certain duration and degree of intractability that could benefit from the particular qualities of the judge-mediator we have described above. The role of private mediators occurs most effectively at an earlier stage in the conflict process, in order to resolve, even to prevent, conflicts before litigation seems to be the only possibility.<sup>74</sup>

In summary, the presence of a judge brings certain benefits to the mediation process and makes judicial mediation a highly efficient complement to classical adjudication. Since judicial mediation is a voluntary process, the role of a judge-mediator is not to compel the parties to settle by holding the law over their heads like a sword but rather to guide the parties to a better understanding of their differences in order to resolve the conflict between them. The presence of a judge reminds the parties of what is at stake, ensures that the process is capably run in all instances, and allows continued vigilance of issues like the balance of bargaining power.<sup>75</sup>

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73. See generally Daisy Hurst Floyd, *Can the Judge Do That?—The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 50-56 (1994) (exploring several coercive techniques that federal trial judges in the United States have used in mediating disputes).

74. One potential problem with a judicial mediation program is that parties may deliberately file proceedings—and so juridicize their conflict at the outset—in order to take advantage of the cost benefits of judicial mediation. This has not been a problem in the Quebec experience—where judicial mediation is free to the parties—but to avoid it some litigants might be required to submit to private mediation first, before being eligible for judicial mediation. Quebec already has a similar requirement in place for family matters, where litigants must attend a pre-hearing mediation information session in the presence of a mediator who files a report to the court. See QUE. CODE CIV. PROC., R.S.Q. c. C-25, arts. 814.3-814.14; Hélène de Kovachich, *La médiation . . . La médiation . . . La médiation judiciaire!*, 3 REVUE DE PRÉVENTION ET RÈGLEMENT DES DIFFÉRENDS 101 (2005).

75. See Stempel, *supra* note 3, at 361-68.

Judicial mediation amounts to a new way of rendering justice, one that empowers the parties and provides justice better suited to their needs. We turn now to analyze the specifics of the process in this light.

### *B. The D roulement of a Judicial Mediation Session*

Despite the presence in each of a judge and the parties, judicial mediation as a process is markedly different from adjudication. The roles of the different actors, the communicational dynamics, the ethical constraints and pitfalls, even the goals sought differ dramatically. These differences point out some of the normative challenges posed by judicial mediation to the traditional, and still predominant, way of viewing the law and its role in society. In what follows, we will examine each of the stages of a judicial mediation session, beginning with a recognition of conflict, continuing through consent, opening, communication and negotiation, and finishing with a decision and closure.<sup>76</sup> Each step in the process brings up issues that illustrate some of the challenges and some of the potentials of judicial mediation.

#### 1. Conflict

Before there is mediation there is conflict. Conflict is what brings people to mediation—or to the courts, for that matter—in the first place, and it provides the essential context in which to understand people’s interaction with the formal institutions of the law. By the time people seek third-party assistance with their conflict, however—whether from a judge, from a mediator, or from a friend or relative—it has already reached a certain level of intractability and most likely financial and emotional cost as well. This can lead to a tendency to conflate symptom and cause; the immediate dispute can come to stand for the broader problems underlying it, and the tendency can be to treat the symptom rather than the disease.<sup>77</sup> The

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76. This template reflects the approach used in mediation sessions at the Quebec Court of Appeal and is based on the skills training program used to train judge-mediators in Quebec, which is itself based (with permission) on the “STAR Approach to Facilitated Conflict Resolution,” developed by the Straus Institute for Dispute Resolution at the Pepperdine University School of Law and adapted to the particular requirements of judicial mediation. See STRAUS INST. FOR DISPUTE RESOLUTION, PEPPERDINE UNIV. SCH. OF LAW, ADVANCED MEDIATION PRACTICE: AN INTERACTIVE TRAINING PROGRAM (1994) (unpublished teaching materials).

77. GREGORY TILLET, RESOLVING CONFLICT: A PRACTICAL APPROACH 4 (1991) (distinguishing between disputes and conflicts).

recognition that a conflict exists is thus an important first step, but more important is a desire to understand the conflict as a complex manifestation of human relationships, which depends on these relationships for both its origins and its solution.<sup>78</sup>

Why people seek outside assistance with their conflicts and from whom they seek such help are important questions for effectively resolving conflicts. In other words, before a conflict can be successfully resolved, it must be understood—not just in the abstract but in the particular and unique context of the values, assumptions, understanding, emotions, and needs of the persons involved.<sup>79</sup> For this reason, though it is appropriate to begin our analysis with conflict, we must first pause a moment to remember that, even before conflict arises, a relationship usually exists between the parties.<sup>80</sup> This fact is crucial to understanding the real scope of the task of mediation.

As we will see in more detail below, one of the strengths of mediation, as opposed to adjudication, is that it is possible to explore a problem more holistically in an effort to resolve the entire conflict and not simply its particular instantiation (the symptom, as it were) at a given point in time.<sup>81</sup> Our understanding of the fundamentally relational nature of both human interactions and their legal analogues has increased greatly in recent years.<sup>82</sup> Mediation offers a means of appreciating the complexity and power of these relationships during dispute resolution; it allows conflict to be understood as it is actually lived, rather than as bracketed into the artificial environment of the legal dispute.<sup>83</sup>

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78. Cf. Marina Cords & Filippo Aureli, *Reconciliation and Relationship Qualities*, in NATURAL CONFLICT RESOLUTION 197 (Filippo Aureli & Frans B.M. De Waal eds., 2000) (reporting research on how the relational aspects of conflicts between non-human primates influence the likelihood of reconciliation).

79. See LAURENCE BOULLE, *MEDIATION—SKILLS AND TECHNIQUES* 65-71 (2001) [hereinafter BOULLE, *MEDIATION*] (discussing the importance of diagnosing the dispute to plan the most effective intervention).

80. Though this is generally true in civil, commercial, and family matters, which have been the core constituency of judicial mediation, there are, of course, instances where no prior relationship exists between the parties. (Classic examples include a civil liability case where the parties are strangers to each other or a financial institution pursuing a surety that it has never met.)

81. See generally Menkel-Meadow, *From Legal Disputes*, *supra* note 36, at 7-29 (advocating a search for creative conflict resolution techniques that bring “fuller satisfaction of human needs and interests.”)

82. See, e.g., Jean-Guy Belley, *Théories et pratiques du contrat relationnel: les obligations de collaboration et d'harmonisation normative*, in LA PERTINENCE RENOUVELÉE DU DROIT DES OBLIGATIONS: BACK TO BASICS 137 (2000) (suggesting that relational contract theory allows understanding of certain obligations that escape classical and neoclassical contract theory); Robert Leckey, *Relational Contract and Other Models of Marriage*, 40 OSGOODE HALL L.J. 1 (2002) (“propos[ing] relational contract as a model for analyzing marriage under Canadian law”); Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1 (1993).

83. See Menkel-Meadow, *From Legal Disputes*, *supra* note 36, at 8.

Conflict has marked human history from the beginning—many see it as a normal and inevitable aspect of humanity.<sup>84</sup> The existence of conflict is a manifestation of life itself—even one of life’s vital signs. If an electrocardiogram shows a point moving across the median, all conflict—all life—has ceased. Conflict is an expression of intelligence and human creativity, which exists in a variety of forms and can be found in every sphere of human activity. New ideas “challenge” orthodoxy; an artist’s creative process is often seen as a “struggle”; ideologies “clash” or “battle.” Far from being an accident of life in society, conflict is its essence; it is the surest indication that human aspirations, emotions, values, and intelligence, all the things that make us human, are in working order.

As heirs to a Judeo-Christian world view that sees conflict as suspect and to a secular liberal philosophy that seeks to neutralize conflict through the granting of exclusive rights, we have tried to build a society that excludes conflict or at least walls it in to isolate and contain it.<sup>85</sup> This amounts to the repression of one of the most dynamic and potentially beneficial social forces. Sociologists have long recognized that conflict is a normal manifestation of human life and that allowing it to be expressed creates a more stable and healthy society.<sup>86</sup>

A state of peace should not be a police state; rather than rigid and static order, the goal should be diverse forces and opposing tendencies seeking a point of equilibrium, a harmony of different voices. Conflict remains latent in peace as peace is latent in conflict: we might view peace as a period for the consolidation of the gains of conflict and conflict as a beneficial stirring up of the complacency of peace. The crucial question, however, is how best to deal with conflict that is both unavoidable and omnipresent and how most effectively to channel it in constructive rather than destructive directions.<sup>87</sup>

To start with, it is important to understand that not all conflicts are created equal. A conflict between two commercial actors over the breach of

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84. See, e.g., NIAL M. FRASER & KEITH W. HIPEL, *CONFLICT ANALYSIS: MODELS AND RESOLUTIONS* 3 (1984); TILLET, *supra* note 77, at 1 (heralding conflict as “an inevitable and pervasive aspect of human life”); see also OTIS, *LA TRANSFORMATION*, *supra* note 12, at 8-9.

85. We might mention the injunctions regarding neighbors contained in the Decalogue as a religious manifestation of conflict aversion and control and Locke’s theory of property rights as one within the context of secular liberalism. See generally W. BARNETT PEARCE & STEPHEN W. LITTLEJOHN, *MORAL CONFLICT: WHEN SOCIAL WORLDS COLLIDE* 30-34 (1997).

86. See GEORG SIMMEL, *CONFLICT* (Kurt H. Wolff trans., 1955); LEWIS A. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* (1956); MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* 8-10 (1973).

87. See DEUTSCH, *supra* note 86.



a contract will engage very different issues than a conflict between two spouses over the custody of their child. The former case may seem on its face less intractable, since it does not engage intense emotions to the extent that a custody battle does, and since it is more clearly amenable to compromise.

If we look more closely, however, each conflict raises for its participants important, albeit different, issues, and these issues—the baggage the parties bring with them to the court or to the mediation room—affect how the conflict can be resolved.<sup>88</sup> The crucial point is that it is the participants themselves who determine the ranking of issues engaged by a conflict and who decide which issues are crucial, which are tangential, and which are not important at all.<sup>89</sup> The nature of the conflict, coupled with the ways in which the participants understand and characterize that conflict, largely determines the intensity of the conflict, the scope of its issues, and ultimately the options for its resolution.

Conflicts differ from one another in fundamental ways, and a large and multi-disciplinary literature on the analysis and taxonomy of conflict has grown up.<sup>90</sup> The crucial question for working towards resolution is not whether there is a conflict—that much is a given in the realm of human interactions—but rather what kind of conflict it is.<sup>91</sup> A conflict can be manageable or unmanageable, contained or expanding, constructive or destructive, light-shedding or obfuscating, progressive or regressive, helpful or harmful, bilateral or multilateral, and many other characterizations besides. The key to resolving a conflict is recognizing it for what it is and what it is not; in short, one must retain and foster its dynamic and productive aspects, while neutralizing its destructive side.

At its root, how we understand and interpret conflicts is closely related to the fundamental paradigm we choose to describe human interactions. Our institutions, social policies, and dispute-resolution systems will differ greatly depending on whether we choose to see human interactions as predominantly conflictual or predominantly cooperative. Often our worldview and our institutions predispose us one way or the other.

Consider evolutionary biology. The English naturalist Charles Darwin and the Russian anarchist Petr Kropotkin each independently developed

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88. Cf. Cords & Aureli, *supra* note 78.

89. Macfarlane, *Why Do People Settle?*, *supra* note 11.

90. See generally M. AFZALUR RAHIM, *MANAGING CONFLICT IN ORGANIZATIONS* 17-33 (3d ed. Quorum Books 2001) (providing a definition and several classifications of conflict); FRASER & HIPEL, *supra* note 84, at 3-8; Menkel-Meadow, *From Legal Disputes*, *supra* note 36, at 11-16.

91. See BOULLE, *MEDIATION*, *supra* note 79, at 65-71.

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evolutionary theories from radically divergent starting points.<sup>92</sup> Where Darwin saw competition as the driving force, Kropotkin saw cooperation.<sup>93</sup> Darwin's ideas took shape during the famous voyage of the H.M.S. Beagle to the Galapagos Islands, where he saw large numbers of species crammed into a small space.<sup>94</sup> This situation led Darwin to privilege a Malthusian, competition-based view of natural selection, where the individuals most fit or most adaptable survived the struggles for space, food, and mates.<sup>95</sup> Kropotkin, by contrast, developed his ideas during a five-year military service in Siberia, where he saw small numbers of species rattling around in the vast Russian steppe.<sup>96</sup> As a result, he developed a view of natural selection based on cooperation rather than competition: those most able to cooperate with others in their shared struggle against the harsh environment survived.<sup>97</sup>

To move the discussion back to law, the distinction between adjudication and mediation can in a sense be understood as an example of this contrast between competition and cooperation as fundamental organizing principles. Neither is exclusive, of course; cooperation will tend to engage competitive instincts as well, and competition from time to time embraces cooperation. Thus, adjudication has a cooperative aspect inasmuch as it is about justice rather than simply winning and losing. Similarly, the parties to mediation, whatever their interest in working together, remain on opposite sides of a conflict.<sup>98</sup>

In general, however, western law has been fundamentally shaped by a liberal paradigm that emphasizes autonomy, liberty, and voluntarism; these qualities all tend towards conflict rather than cooperation.<sup>99</sup> A legal system built around actors who are autonomous, free, and imbued with will tends naturally to promote individual self-interest. The classical doctrine of

92. See STEPHEN JAY GOULD, *Kropotkin Was No Crackpot*, in BULLY FOR BRONTOSAURUS: REFLECTIONS IN NATURAL HISTORY 325, 327-28, 331 (1991).

93. See *id.*

94. See *id.* at 333.

95. See *id.* at 333-34.

96. See *id.* at 337.

97. See *id.* at 331, 337.

98. Critics of divorce mediation, for example, have noted the impossibility of avoiding competition. See Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 477-548 (1992).

99. See generally MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Charles Taylor, *Atomism*, in 2 CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 187 (1985).

contract is a stark illustration of this; the emphasis on subjective rights in western legal systems is another.<sup>100</sup>

This liberal worldview underlying western law tends to manifest itself in what we might call an adjudicatory model of conflict rather than a resolutive model; a game with winners and losers rather than an optimal balancing of interests and a working towards peace.<sup>101</sup> The key difference between adjudication and mediation, one to which we will return repeatedly below, is that an adjudicated solution in an adversarial system must have a winner and a loser, while a mediated solution can seek a cooperative, relational solution.<sup>102</sup>

The recognition of this relational element is crucial in characterizing conflict and hence in seeking appropriate resolution.<sup>103</sup> as Menkel-Meadow writes, “[w]hile ‘disputes’ may be about legal cases, conflicts are more broadly and deeply about human relations and transactions.”<sup>104</sup> Understanding the extent and intensity of these relational issues in a particular conflict helps in determining both whether the conflict is appropriate for mediation and how the mediator will begin to approach finding a solution.<sup>105</sup>

## 2. Consent

Mediation must begin with an expression of consent, since unlike adjudication, which has a constitutional or statutory basis, mediation rests on a contractual or transactional foundation.<sup>106</sup> The mediator and any decision the parties ultimately reach have authority, not because the law grants them authority, but because the parties themselves recognize the validity of the process and the negotiated decision they reach, and because the law upholds such settlements.<sup>107</sup>

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100. On the classical view of contract, see P.S. ATIYAH, *ESSAYS ON CONTRACT* 13-17, 121-49 (Clarendon Press 1986). On subjective rights as orienting a legal system away from cooperation, see Jean-Michel Poughon, *Justice et codification*, 42 C. DE D. 725, 746-49 (2001).

101. See Bruce D. Bonta, *Conflict Resolution Among Peaceful Societies: The Culture of Peacefulness*, 33 J. PEACE RES. 403 (1996).

102. Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 504 (1985).

103. See *supra* note 82 and accompanying text.

104. Menkel-Meadow, *From Legal Disputes*, *supra* note 36, at 12.

105. See generally ADAMS, *supra* note 11, at 200-12.

106. See generally Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 315 (1970) [hereinafter Fuller, *Mediation*].

107. See *id.* Ironically, even as mediation challenges certain implications of the liberal paradigm (adversarialism and individualism), it relies on other aspects of that paradigm (voluntarism) for its legitimacy.

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Because the process is thus essentially voluntary in nature, much depends on the mindset of the parties as they embark on mediation. A party who cynically uses the process to gain an advantage, knowing that he or she can abandon mediation and jump back into the adjudicative queue if mediation does not work as planned, thus undermines the integrity of the process.<sup>108</sup> This puts a particular onus on the parties to define clearly why they are there, since the nature and scope of their consent will determine the nature and scope of any settlement reached.

The central role of consent in defining mediation underscores how different it is from adjudication. Even further, this distinct foundation of the process implicitly challenges some traditional assumptions about normative ordering, in particular the still-strong positivist view that law's legitimacy depends on authoritative imposition from above.<sup>109</sup> As Lon Fuller writes:

A serious study of mediation can serve, I suggest, to offset the tendency of modern thought to assume that all social order must be imposed by some kind of "authority." When we perceive how a mediator, claiming no "authority," can help the parties give order and coherence to their relationship, we may in the process come to realize that there are circumstances in which the parties can dispense with this aid, and that social order can often arise directly out of the interactions it seems to govern and direct.<sup>110</sup>

In consenting to bring their conflict to mediation rather than adjudication, the parties are themselves undertaking to be the architects of the social order in which they will live.

This idea of control of the process by the parties runs throughout mediation, and we will return to it in several of the sections below.<sup>111</sup> This obviously has revolutionary potential, but it need not mean that mediation is necessarily at odds with adjudication nor that its mission is to replace it as the predominant or exclusive source of normativity. Rather, an understanding of the different bases of the claims of legitimacy by mediation and adjudication underscores that each plays a distinct and essential but complementary social role.

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108. As we will see in Part C below, ethical constraints can police this, particularly where lawyers represent the parties. See also John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002).

109. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* (1961). See generally GALL, *supra* note 25, at 10-11.

110. Fuller, *Mediation*, *supra* note 106, at 315.

111. See *infra* Part B.3.

Consent-based normativity can co-exist with state-based (or authoritative) normativity.<sup>112</sup> Judicial mediation, of course, somewhat blurs the boundary between authoritative- and consent-based normative ordering, because it combines a basis in the will of the parties with many of the semiotic trappings of state-based law (for example, it is conducted by a judge within the courthouse—though not in a courtroom—and it plays out in the shadow of adjudication, since participants can at any time abandon mediation and return to the adjudicatory track).<sup>113</sup> Some types of conflicts naturally lend themselves better to one or the other,<sup>114</sup> but, in general, deciding whether a dispute should be litigated or mediated is a question of tool selection or “fitting the forum to the fuss.”<sup>115</sup>

That is, choosing a process is a political decision made by the parties in consultation with their lawyers and with the input of the judge who vets cases for their suitability for mediation. For a given dispute, the parties can select what they believe to be the more desirable or effective dispute resolution method, based on the nature of their dispute, their financial and emotional resources, and their goals for the process.<sup>116</sup> For this reason, gaining the joint consent of the parties to mediation involves selling them (to a certain extent) on the idea of mediation by convincing them that a particular tool (mediation) will be the best way to resolve their particular conflict.

Not every matter can appropriately or effectively be mediated, of course, and a variety of constraints push the parties in one direction or the other.<sup>117</sup> On a public level, the nature of the process along with received ideas of legal boundaries and appropriate legal remedies combine to limit the availability of judicial mediation.<sup>118</sup> In Quebec, judicial mediation is available for most civil, family, commercial, administrative, and criminal matters, while constitutional questions and issues involving the definition of rights under the *Canadian Charter of Rights and Freedoms* or the Quebec

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112. See, e.g., Lon L. Fuller, *Two Principles of Human Association*, 11 NOMOS 3 (1969).

113. The semiotics of adjudication, mediation, and other forms of dispute resolution are explored in Lela P. Love, *Images of Justice*, 1 PEPP. DISP. RESOL. L.J. 29 (2000).

114. See Fuller, *Adjudication*, *supra* note 35, at 366-71.

115. See generally Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 1 (Lester M. Salamon ed., 2002); Sander & Goldberg, *supra* note 11.

116. Sander & Goldberg, *supra* note 11.

117. See generally ADAMS, *supra* note 11, at 238-41.

118. This was a central concern of Owen Fiss, whose early critique of settlement remains important today. See Fiss, *Against Settlement*, *supra* note 3, at 1082-85; David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995). Among responses to this argument, see especially Menkel-Meadow, *Whose Dispute*, *supra* note 2.

*Charter of Human Rights and Freedoms* are excluded *ab initio*.<sup>119</sup> Even within the recognized areas of competence, however, family cases involving violence (where no realistic possibility of a balance between the parties exists) or assault (where pending charges or violence towards children give the cases a public-law importance) are beyond the scope of a mediated settlement.<sup>120</sup> On a private level, factors such as time, costs, or a particular desire for public vindication can lead parties either towards or away from mediation.<sup>121</sup>

In vetting cases for mediation, however, it is important to be sensitive to the quality of the consent. For example, a party who faces a long and stressful ordeal in court to collect a larger award may choose to accept a discounted settlement immediately rather than wait. This is understandable, but the judge-mediator must protect the integrity of the process by verifying that consent has been freely expressed in such situations.

Though allowing the parties the choice of consenting to work together to resolve their conflict is a radical initiative, it simply gets the parties into the mediation room, nothing more. Once seated face-to-face in the presence of the judge-mediator, the dynamic process of clarifying and redefining their conflict—mediation proper, in other words—begins, and it is here that the normative implications of judicial mediation begin to be most evident. It is to this subject that we now turn.

### 3. Opening

The mediation session proper opens with a plenary session, which gathers the parties, their lawyers, and the judge-mediator together.<sup>122</sup> This session serves two purposes. First, it allows the participants to understand why they are there and how the mediation will proceed. Second, it allows

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119. *Canadian Charter of Rights and Freedoms, The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, pt. I; *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.

120. In Quebec, these limits are not statutorily defined, but rather reflect an understanding of the proper domain of mediation in the Quebec legal system, defined in practice through the vetting of the parties' Joint Request for Mediation.

121. See generally Macfarlane, *Why Do People Settle?*, *supra* note 11 (contending that parties make decisions about mediation based on how they "think and feel about [their] conflict").

122. See ADAMS, *supra* note 11, at 178-83. See generally Michael Wheeler, *Anxious Moments: Openings in Negotiation*, 20 NEG. J. 153 (2004) (discussing some of the particular problems associated with openings).

the judge-mediator to pin down the precise terms and scope of the mandate so as to set clear goals for the next several hours.

The judge-mediator begins with an opening statement, during which he or she explains to the parties several key aspects of judicial mediation that clarify its differences from adjudication. First, the parties must understand that the judge-mediator acts as a mediator and is there neither to impose a decision on the parties nor to give an opinion about the merits of the case.<sup>123</sup> Second, the parties must be assured of the confidentiality of the process, which in Quebec is a legal obligation under the *Code of Civil Procedure*.<sup>124</sup> Third, the judge-mediator reassures the parties that what goes on during the mediation session will go no further and that the mediation file will remain separate from any subsequent court action should the mediation fail.<sup>125</sup> Fourth, the judge-mediator explains the process, stressing that it is the parties themselves who are in control.<sup>126</sup>

These explanations are crucial, since at this stage—as at all other steps in the process—the full and clear consent of the parties is required.<sup>127</sup> For this reason, the judge-mediator must dwell on certain issues that raise concerns regarding consent. In particular, this means clearly explaining the difference between plenary and caucus (or individual) sessions and reinforcing that what goes on in the caucuses is strictly confidential.<sup>128</sup> Also, it means emphasizing the importance of good faith throughout the process, because mediation requires a climate of trust to succeed.<sup>129</sup>

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123. See *supra* note 71 and accompanying text.

124. See QUE. CODE CIV. PROC., R.S.Q. c. C-25, art. 151.21 (“Anything said or written during a settlement conference is confidential”). *Id.* art. 508.1 ¶ 3 (regarding appeals) (“A settlement conference is confidential and is governed by the rules defined by the judge and the parties. The judge who presides at the conference cannot take part in any hearing relating to the matter.”). On the still unsettled question of exceptions to mediation confidentiality, see *infra* Part C.1.

125. The courts in Canada are beginning to define the parameters of this insulation of judicial mediation from adjudication. See, for example, the decision of the Saskatchewan Court of Appeal in *Condessa Z Holdings v. Rusnak* (1993), 104 D.L.R. (4th) 96. For an argument that pre-trial conference privilege should be limited, see John A. Epp, *Civil Pretrial Conference Privilege: “A Cosmic Black Hole”?*, 72 CAN. BAR REV. 337 (1993).

126. See QUE. CODE CIV. PROC., R.S.Q. c. C-25, art. 151.18 (“In agreement with the parties, the judge defines the rules of the settlement conference and any measures to facilitate its conduct, and determines the schedule of meetings.”).

127. See *supra* Part B.2; Nolan-Haley, *supra* note 59.

128. See ADAMS, *supra* note 11, at 183-88.

129. See LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 188-89 (1987); ADAMS, *supra* note 11, at 75-78.

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Once the judge-mediator has laid these foundations, the parties must agree on his or her mandate.<sup>130</sup> This too is of fundamental importance, since the quality and scope of any ultimate settlement depends on the clarity and scope of the mandate that sets the process in motion. The main issue here is whether the mandate will be limited to the specific dispute at issue or whether it will extend to the settlement of other linked cases pending in the courts.<sup>131</sup>

With the problem set out in this way, the judge-mediator can then work out ground rules and a timetable with the parties and their lawyers.<sup>132</sup> This involves determining the sequence of plenary and caucus sessions, the timing of breaks and consultations, and exactly who will be present and when (for example experts).<sup>133</sup> The normal rules of adversarial procedure do not apply in mediation;<sup>134</sup> it is up to the parties to find a workable procedure. The experience of the judge-mediator (and the lawyers), however, can ensure that whatever procedure is decided upon will be effective, efficient, and fair.

Finally, the plenary session is usually followed immediately by a meeting between the judge-mediator and the lawyers, the latter acting here as officers of the court to serve the interests of justice within the judicial mediation process.<sup>135</sup> The judge-mediator and the attorneys can use this brief meeting, in the absence of the parties, to clarify various issues, particularly whether it would be most fruitful to proceed by plenary or individual sessions. More importantly, it allows the judge-mediator to get a feel for the case and the dynamics between the parties, since the lawyers are well-placed to evaluate and relate particular difficulties with the case, the sensibilities and personalities of the parties, and other information that can affect how negotiations will proceed. Knowledge is important at this stage,

130. As a consent-based procedure, the parties determine the scope of issues to be mediated, in consultation with the judge-mediator, of course. See *supra* note 59 and accompanying text; HENRY J. BROWN & ARTHUR L. MARRIOTT, *ADR PRINCIPLES AND PRACTICE* 129 (2d ed. 1999).

131. Otis, *Conciliation Service Program*, *supra* note 5, at 82.

132. Otis, *L'envers du lent droit*, *supra* note 5, at 66.

133. QUE. CODE CIV. PROC., R.S.Q. c. C-25, art. 151.17 ("Other persons may also take part in the conference if the judge and the parties consider that their presence would be helpful in resolving the dispute.").

134. Mediation is not, of course, an anything-goes free-for-all. See Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289 (1998) (arguing that certain procedural norms continue to apply in the context of mediation); Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179.

135. On this role of lawyers in mediation, see *infra* note 228 and accompanying text.



and the meeting with the lawyers allows the judge-mediator to get a participant's-eye assessment of the outlines of the case.

The opening of the session thus allows the judge-mediator, together with the parties and their lawyers, to characterize and frame the issues to be negotiated.<sup>136</sup> In judicial mediation at the appellate level, much of this characterization will already have been done. Typically, the parties have gone through litigation at first instance, and frequently they—and their lawyers—have at least evaluated their case for appeal, even if they have not always gotten to the stage of preparing briefs, facts or written arguments.

Characterization involves winnowing, as ineffective arguments are abandoned, issues are focused, and—invariably—positions are rendered more stark and less nuanced.<sup>137</sup> This can be a hindrance to effective mediation if lawyers approach mediation with an adversarial mindset, but it can also help the process if lawyers can shift to a mediational mode of thinking.<sup>138</sup> On the one hand, classification and characterization of issues are limiting processes; they shut off avenues of inquiry, they blind the parties to potential solutions inconsistent with the chosen characterization, and they commit the parties to a particular logic that may not be the most effective in the circumstances. On the other hand, however, a carefully prepared case, where lawyers have thoroughly canvassed all issues and reviewed them with their clients, leads to more effective and focused negotiation.<sup>139</sup> It is also important to remember that characterization is a dynamic process, and much will depend on how the discussions to follow unfold.

The spatial configuration of a mediation session is also important, and this is something to be dealt with at the opening.<sup>140</sup> A courtroom is constructed to facilitate communication in a V shape: the parties' lawyers speak directly to the bench and only exceptionally to each other. Moreover, the point of the V (the judges) represents the endpoint of communication; the parties each present information to the judges, not *through* them to each other, because it is the judges who will ultimately render a decision.

Mediation is structured (or ideally should be structured) differently. Here communication is triangular, with the parties addressing each other,

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136. See ADAMS, *supra* note 11, at 72-74.

137. See generally Laura E. Little, *Characterization and Legal Discourse*, 46 J. LEGAL EDUC. 372 (1996).

138. See Jean R. Stemlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269 (1999).

139. See CINNIE NOBLE ET AL., *MEDIATION ADVOCACY: EFFECTIVE CLIENT REPRESENTATION IN MEDIATION PROCEEDINGS* 65-90 (1998).

140. See BOULLE, *MEDIATION*, *supra* note 79, at 30-32.

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even if at certain stages of the process this is done only indirectly through the mediator.<sup>141</sup> The mediator is thus not an endpoint but rather more of a conduit; the parties converse with each other through the mediator, because they themselves are responsible for the outcome.<sup>142</sup> Adjudication operates on an adversarial model, which accentuates the image of the parties as hostile opponents; mediation works on a conversational or dialogic model, which facilitates negotiation and ultimately cooperation.<sup>143</sup>

This dynamic applies even if the parties are so hostile that they cannot be in the same room during negotiations.<sup>144</sup> In such a situation the role of the mediator assumes particular importance, since it is he or she who closes the triangle by deciding how and when to transmit particular information between the parties so as to maximize the chances for settlement without compromising either party's position or the duty of confidentiality associated with caucus meetings.<sup>145</sup> In cases where negotiations take place via plenary sessions, on the other hand, seating arrangements and speaking order must be arranged carefully so as to facilitate dialogue between the parties while at the same time protecting the equality and fairness of the process.<sup>146</sup>

The judge-mediator's job in the opening, therefore, is to maintain the gap between adjudication and mediation, so as to keep the rigid classifications characteristic of litigation out of mediation as much as possible, and to prevent the process from becoming simply litigation by another name. This can involve asking the parties to step away from the formal legal characterization of the dispute and put themselves back into the mindset of the original conflict, before it became juridicized. By leading the parties away from rigid adherence to a particular characterization of their dispute, the judge-mediator can facilitate analyzing and understanding the problem from different perspectives, which is an essential preliminary step for the communication to follow.<sup>147</sup>

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141. Jonathan M. Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 19, 22 (2004).

142. See Brunet, *supra* note 4, at 235.

143. See *id.*

144. See ADAMS, *supra* note 11, at 183-84.

145. See *id.* This has particular ethical implications for a judge-mediator; see the discussion below in Part C.1.

146. BOULLE, MEDIATION, *supra* note 79, at 30-32.

147. See *supra* note 136-39 and accompanying text. See also ADAMS, *supra* note 11, at 69-70.

#### 4. Communication and Negotiation

The essence of mediation is oral communication between the parties.<sup>148</sup> The mediator is a facilitator, through whom the parties speak directly to each other.<sup>149</sup> As we saw in the previous section, the dynamics of communication in mediation are fundamentally different than in adjudication, and understanding and exploiting these differences are crucial to effective mediation.<sup>150</sup>

To say that a mediator is a facilitator, however, is true as far as it goes, but this characterization downplays the vital role that facilitation plays in moving the parties towards agreement. At the opening of a judicial mediation session, the parties are firmly in an adjudicative mindset: their positions are defined adversarially, the conflict is generally conceptualized in win-lose terms, and discourse focuses on respective rights and entitlements.<sup>151</sup> Their narrations will at first remain strongly adversarial, centered on grievance and blame.<sup>152</sup>

Later the mediator will work to change this mode of discourse; at the outset, the simple fact of frankly expressing a point of view is enough.<sup>153</sup> In telling their stories in each other's presence, the parties can begin to establish the dynamic of speaking and listening that will mark the rest of the session. This polarization of positions is magnified in appellate mediation, where the parties have already been through a trial and sometimes even drafted written submissions for the appeal hearing. In short, though the parties are communicating at the start of mediation, they are not yet negotiating, since the crucial element of listening is missing at this point.<sup>154</sup>

The judge-mediator's job is to effect this transition from communication to negotiation, from narrative to dialogue, from lecture to conversation.<sup>155</sup> As the mediation progresses, the mediator must work to shift communication from the I-centered airing of points of view with which the parties began to

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148. See generally Bonafé-Schmitt, *supra* note 22, at 164-67, where he describes mediation as "une nouvelle oralité."

149. See *supra* notes 141-43 and accompanying text.

150. See ADAMS, *supra* note 11, at 183-88.

151. *Id.* at 207-10.

152. *Id.*

153. On the communicational dynamics of mediation, see generally Gary Smith, *Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not*, 36 OSGOOD HALL L.J. 847 (1998); BOULLE, MEDIATION, *supra* note 79, at 115-41; and ADAMS, *supra* note 11, at 213-21.

154. BOULLE, MEDIATION, *supra* note 79, at 126-28.

155. See Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, 28 FORDHAM URB. L.J. 1017, 1028 (2001) (viewing the mediator's role as participating actively in the "social construction of meaning").

the resolution-centered negotiation that will ultimately lead to settlement. On the one hand this involves changing the dynamics of communication from the V-shaped adversarial model to the triangular conversational model that we discussed above.<sup>156</sup> The mediator must work actively to close off the communicational triangle and get the parties to engage with each other. On the other hand, and more fundamentally, it involves changing the mindset of the parties from one of competition to one of settling the problem. This shift is, of course, much more difficult than simply getting the parties to communicate, because parties generally reflexively associate law with adversarialism,<sup>157</sup> but it is the key to the entire mediation.

At a basic level, transforming the communicational dynamic requires creating a different dynamic of listening between the parties.<sup>158</sup> Presenting positions to a judge requires one kind of listening, while participating in a conversation requires another, and mediation as we have seen aims to be conversational rather than adversarial. In adjudication, one listens to the arguments of the other side only to refute those arguments when it is one's own turn to speak. We might call this "destructive listening," since its purpose is to pick apart what the other party is saying, and everything is interpreted with this goal in mind. In other words, listening is done in such a way as to benefit the listener, nothing more.

Mediation, by contrast, requires what we might call "constructive listening," which aims both at comprehending and at keeping the conversation going. Since settlement rather than victory is the goal, the listener must evaluate things from both sides and not strictly from his or her own point of view. Listening here may be of benefit to the listener, of course, but it is done so that the dialogue is the main beneficiary. For the mediator, fostering this shift requires being particularly attentive to the power dynamics of communication, because voice and silence can be manifestations of power differentials.<sup>159</sup> At this stage, it is imperative that communication be open and free.

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156. See *supra* notes 141-43 and accompanying text.

157. See ADAMS, *supra* note 11, at 207.

158. See BOULLE, *MEDIATION*, *supra* note 79, at 126-28; ADAMS, *supra* note 11, at 179; CHERYL PICARD ET AL., *THE ART AND SCIENCE OF MEDIATION* 232-33 (2004); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 175-77 (3d rev. ed. 2003).

159. Morgan Brigg, *Mediation, Power, and Cultural Difference*, 20 *CONFLICT RESOL. Q.* 287 (2003).

Changing communication from adversarial to conversational also involves bringing the parties to the realization that communication is a relational process and that its dynamic will be colored by the past and future of the parties' relationship as well as its present.<sup>160</sup> Unlike adjudication, with its procedural and evidentiary strictures, mediation allows the parties to explore their dispute holistically, as a conflict involving human relationships rather than simply as a single flashpoint.<sup>161</sup> The law of inheritance offers an especially vivid illustration of the difference, because such matters bring into sharp relief the tension between the legal dispute with its narrow focus (Does this will meet the criteria for validity? Who is entitled to inherit?) and the human conflict behind the dispute with its messy and entangling but crucially important extra-legal concerns (I took care of the deceased for years, and now I get nothing!). Negotiation builds on and feeds off an understanding of the relational aspects of conflict, and the judge-mediator's task is to seek ways to foster this understanding.<sup>162</sup>

An aspect of this relational understanding of legal dynamics is the cultural dimension of conflict. The cultural assumptions of the parties, their lawyers, and even the judge-mediator can present significant obstacles to successful mediation, because the same conflict can be understood in markedly different ways depending on the cultural lens through which it is viewed.<sup>163</sup> This calls for sensitivity on the part of the judge-mediator and, in particular, an understanding of the complexity of culture as it intersects with concepts of conflict and their resolution.<sup>164</sup> Recent research on culture has stressed that it is a multi-faceted phenomenon and cannot be boiled down to a single defining characteristic like ethnicity.<sup>165</sup> Moreover, culture is not something that can be avoided or put aside, but awareness of potential problems and openness about solutions can help participants work towards understanding divergent viewpoints.<sup>166</sup>

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160. See generally Menkel-Meadow, *Remembrance*, *supra* note 50 (discussing temporal issues in mediation).

161. See *supra* notes 82-83 and accompanying text.

162. See SUSSKIND & CRUIKSHANK, *supra* note 129, at 32-33.

163. On culture and conflict, see David Kahane, *Dispute Resolution and the Politics of Cultural Generalization*, 19 NEG. J. 5 (2003); Douglas P. Fry, *Conflict Management in Cross-Cultural Perspective*, in NATURAL CONFLICT RESOLUTION, *supra* note 78, at 334; and Brigg, *supra* note 159. For examples of cultural dynamics during mediation, see Otis, LA TRANSFORMATION, *supra* note 12, at 21-22.

164. See ANDREW J. PIRIE, ALTERNATIVE DISPUTE RESOLUTION: SKILLS, SCIENCE, AND THE LAW 282-306 (2000).

165. See Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER & L. 269, 272-73 (1996).

166. Kevin Avruch & P.W. Black, *Conflict Resolution in Intercultural Settings: Problems and Prospects*, in CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION 131 (Dennis J.D. Sandole & Hugo van der Merwe eds., 1993).

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Finally, though the substance of communication and negotiation in each mediation will always be unique and will depend on both the facts of the case and the parties themselves, it is worth discussing one aspect of communication common to most mediations, the role of emotion.<sup>167</sup> Emotions make a conflict what it is, and any attempt to deal with a conflict holistically must address its emotional content directly and not ignore or censure it.

A distinctive characteristic of communication in mediation is that it need not be strictly limited to the formal-rational mode as required by adjudication.<sup>168</sup> This is not to say that anything goes. As a legal process, mediation will still be, and should be, dominated by the mindset of rationality: naked appeals to emotion without grounding in logic or reason should rightly be discounted or discarded. Rather, because mediation is a conversation designed to explore the relationships behind a conflict, the mediator can more freely allow expressions of emotion to color the proceedings, since emotion can be a window onto the real conflict behind the dispute.<sup>169</sup> Letting parties express emotional reactions to the conflict or the proceedings rather than simply present thought-out legal positions can allow the mediator to see where the truly intractable problems lie and can provide insight into why the parties have taken the positions they have.<sup>170</sup>

Of course, negotiations rarely go perfectly smoothly, and a judge-mediator will often be faced with an impasse at some point in the negotiations.<sup>171</sup> Understanding the dynamics of the situation—the parties' relationships, their cultural standpoints, and the emotions behind the

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167. See generally Daniel L. Shapiro, *Emotions in Negotiation: Peril or Promise?*, 87 MARQ. L. REV. 737 (2004) (exploring how an understanding of emotions can benefit a negotiator); Laura E. Little, *Adjudication and Emotion*, 3 FLA. COASTAL L.J. 205 (2002) (discussing how emotions effect an adjudicator's impartiality, competence, and independence); Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977 (2001) (employing economic analysis to examine the relationship between emotions and various areas of law); Filippo Aureli & Darlene Smucny, *The Role of Emotion in Conflict and Conflict Resolution*, in NATURAL CONFLICT RESOLUTION, *supra* note 78, at 199 (discussing the insights that an understanding of emotion provides for interpreting and resolving conflict).

168. See Menkel-Meadow, *From Legal Disputes*, *supra* note 36, at 27-28. Cf. Jonathan R. Cohen, *Reasoning Along Different Lines: Some Varied Roles of Rationality in Negotiation and Conflict Resolution*, 3 HARV. NEGOT. L. REV. 111 (1998) (arguing that "[i]n negotiation and conflict resolution, reasoning does occur and should occur along many lines").

169. Bonafé-Schmitt, *supra* note 22, at 166.

170. *Id.* at 166-67.

171. Among the literature on impasses and stalled negotiations, see BOULLE, *MEDIATION*, *supra* note 79, at 175-77; SUSSKIND & CRUIKSHANK, *supra* note 129.

problem—can suggest what is behind the impasse and can help break up a logjam in negotiations.<sup>172</sup> This calls on the particular skills of the judge-mediator, especially experience in reading people and situations; the moral authority of the judge-mediator is a significant asset at this point and may mean the difference between settlement and stalemate.

## 5. Decision

Negotiation leads ideally to a settlement that will end the conflict between the parties. Once agreement is reached, it is up to the lawyers to put that agreement on paper; the judge-mediator plays no part in drafting the substance of the settlement and will leave the room at this point.<sup>173</sup> This does not end the mediator's role, however, as he or she may have to return to work with the parties on any unforeseen problems that might arise. The devil is, as always, in the details.

Also, once the agreement is drawn up, it must be reviewed with the parties to ensure that it accurately reflects their consent and that it resolves the conflict as fully as their expressed consent allows.<sup>174</sup> If there are no problems, the decision can then be confirmed as a settlement by the court, thus disposing of the case.<sup>175</sup> Verifying the validity of consent is decidedly not an assessment by the judge-mediator of the substance of the agreement, which (barring violations of public order or other provisions of law) is up to the parties alone.<sup>176</sup> Rather, it is the first step in its implementation.

This first step is a crucial one that the judge-mediator cannot run through hastily or cursorily. The parties must live with their settlement, and to do so they must agree to it *and* understand it. On the one hand, the nature of the process itself ensures a certain measure of comprehension by the parties. Since mediation gives the parties a high degree of self-determination,<sup>177</sup> and since communication and negotiation in mediation are structured so as to ensure that the proceedings are accessible to the parties

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172. See BOULLE, *MEDIATION*, *supra* note 79, at 175-77.

173. See ADAMS, *supra* note 11, at 196; NOBLE ET AL., *supra* note 139 at 114-17.

174. See Nolan-Haley, *supra* note 59; PICARD ET AL., *supra* note 158, at 183-84; MOORE, *supra* note 158, at 357-65.

175. QUE. CODE CIV. PROC., R.S.Q. c. C-25, art. 151.22 ("If a settlement is reached, the judge homologates the transaction on request."). For appeals, see *supra* note 62.

176. Otis, *La conciliation judiciaire*, *supra* note 5, at 9.

177. *But cf.* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 4 (2001) [hereinafter Welsh, *Thinning Vision*] (noting that as mediation becomes increasingly professionalized and institutionalized, parties are becoming less producers than consumers of settlements negotiated and drafted by lawyers).

themselves, rather than just to their lawyers,<sup>178</sup> by the time agreement is reached, the parties should be more or less on the same page.

On the other hand, however, mediation is a highly prospective endeavor, so the agreement must remain comprehensible to the parties even after they are no longer in the presence of their lawyers and the judge-mediator. The benefits of mediation, particularly the idea of global settlement of a conflict, would largely be lost if the parties had to run to their lawyers or to the courts every few years to interpret the terms of their agreement. A successful mediation agreement must thus be comprehensive *and* comprehensible to those it affects, or it runs the risk of creating dependencies on outside interpreters that can eventually lead to frustration of its object and renewed conflict.<sup>179</sup>

Understanding this prospective function of mediation is of vital importance, because mediation, much more so than adjudication, is often focused on the existence and maintenance of a relationship between the parties.<sup>180</sup> Adjudication is a primarily retrospective process: it seeks to decide a past dispute between the parties and only incidentally will it have prospective effects, if the parties choose to use the decision to help them reorient any future interactions that might arise between them.<sup>181</sup> Mediation, by contrast, is more explicitly prospective in orientation.<sup>182</sup> By seeking to resolve a conflict globally, rather than just dealing with a particular instantiation of that conflict, mediation recognizes that the parties are linked to one another in a complex relationship; mediation thus works actively to

178. BOULLE, *MEDIATION*, *supra* note 79, at 241-42.

179. *See* PICARD ET AL., *supra* note 158, at 183-84.

180. *See, e.g.*, Fuller, *Mediation*, *supra* note 106, at 314 (“Mediation by its very nature presupposes relationships normally affected by some strong internal pull toward cohesion.”); Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 *YALE L.J.* 1660, 1664 (1985) (upholding justice as a product of “reconciliation of brother to brother, sister to sister, sister to brother, child to parent, neighbor to neighbor, buyer to seller, defendant to plaintiff, and judge to both”). For a critique of this view, see Fiss, *Out of Eden*, *supra* note 3.

181. Public-interest litigation, such as constitutional issues or cases involving the definition of fundamental rights and freedoms, is another matter, however, as it frequently has strong prospective effects. An example is the recent decision of the Quebec Court of Appeal on the unconstitutionality of barriers to the solemnization of same-sex marriages. *See* Catholic Civil Rights League v. Hendricks, [2004] R.J.Q. 851. The prospective and transformative effects of such public-law adjudication are widely diffused through society, however, rather than being limited to the parties, and this is one reason why such matters are not amenable to mediation. *See supra* note 119 and accompanying text.

182. *See* Menkel-Meadow, *Remembrance*, *supra* note 50, at 98.



create for the parties a new *modus vivendi*.<sup>183</sup> What mediation helps the parties to do, to use Lon Fuller's apt description, is to draft a kind of constitution for their relationship.<sup>184</sup> The negotiated agreement creates a normative universe within which the parties agree to live.<sup>185</sup>

Not all mediation must necessarily involve ongoing relations between the parties; a damages claim between strangers, for example, is perfectly suited to mediation, though it creates nothing more than a financial link between the parties. But the majority of cases going to mediation do.<sup>186</sup> Melvin Eisenberg has described this as the difference between dispute-negotiation and rulemaking-negotiation—between negotiation “directed toward settling disputes” and negotiation “directed toward establishing rules to govern future conduct.”<sup>187</sup> Effective resolution of family matters, many commercial disputes, property squabbles between neighbors, and so forth requires rulemaking-negotiation to help the parties live together, because the conflicts behind such disputes depend strongly on the relationship between the parties.

The agreement reached is thus of a very different nature than a judicial decision, and it is vital that the parties understand this difference. Beyond simply paying a sum of money or shifting a boundary line, the conflicts calling for rulemaking-negotiation require the parties to adapt their behavior to the negotiated solution.<sup>188</sup> It is up to the judge-mediator to stress this point. Drafting the settlement is only the beginning; the real implementation begins when the parties leave the mediation session with their agreement in hand and start to reorganize their lives along the lines of the constitution that they have just drawn up.

## 6. Closure

Finally there is closure, which involves more than simply wishing the parties well and sending them on their way. In a successful mediation, after the settlement has been agreed to by the parties and drafted to their

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183. See Bonafé-Schmitt, *supra* note 22, at 161.

184. See Fuller, *Mediation*, *supra* note 106, at 311.

185. See *id.*

186. At the Quebec Court of Appeal, cases involving ongoing links between the parties (family matters, employment disputes, or landlord/tenant conflicts) make up a significant percentage of mediations.

187. See Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 637-38 (1976). Eisenberg notes that these two forms of negotiation are not mutually exclusive. See *id.*

188. Cf. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 81-84 (1994) (advocating a “transformative orientation to conflict” that includes strengthening relational ties).

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satisfaction, the mediator has an opportunity to review the process with the parties. It is here that the full promise and innovation of judicial mediation becomes evident.

As we argued above, mediation differs from adjudication in that it has an explicitly prospective purpose and effect.<sup>189</sup> The parties are not just resolving a past dispute; they must carry their relationship forward, beyond the stumbling block of the particular disagreement for which they sought mediation. This brings to the fore a different aspect of both mediation and mediator, one that is latent in the entire process but that we can bring out explicitly at this point—namely, the educative or teaching function of the process.

Judicial mediation is particularly suited to developing and exploiting this teaching role. The judge-mediator brings to the process moral authority as well as intimate experience with both adjudication and mediation, and this unique position allows the judge-mediator to step back from the dispute and the mediation process to ask the parties what they have learned, in effect to conduct a brief but searching autopsy of the mediation session. Here, the judge acts not as a neutral interlocutor as was the case during the negotiations proper but rather as an active instructor, drawing lessons from the process and showing the parties how they have just succeeded in communicating with each other and how, through negotiation, they have begun a dialogue centered on solving their problem rather than on sterile antagonism.

In examining the preceding hours, the judge-mediator can lead the parties to understand and to integrate into their lives the basic principles of conflict resolution. In other words, the judge-mediator teaches the parties how they might use in their own lives the tools that they may not even have realized they were getting. This can take five minutes or fifteen; what is important is that the parties come to realize that what they have just done is not limited to a formal process of judicial mediation and not limited to the particular dispute but is applicable to any future conflict in which they find themselves. The judge-mediator in effect shows the parties how to become agents of peace, working at the micro level to transform society.

In effect, then, the mediation process has come full circle; when the parties next arrive at a conflict, either with each other or with third parties, they will have a set of skills learned in mediation to enable them to work towards a solution without recourse to the courts. The procedure we have

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189. See *supra* notes 179-85 and accompanying text.

discussed here—from conflict through consent, opening, communication, negotiation, decision, and finally closure—is not just a process to be used in a courthouse mediation chamber, before a judge-mediator, and in the presence of lawyers. It is a heuristic for approaching any conflict. The mediation process can in this way serve to train a kind of corps of informal mediators who will take their place alongside formal judicial mediation and adjudication in the dispute resolution universe to handle some of life's everyday conflicts before they need third-party intervention.

The efficiency benefits of this are obvious; for a judge-mediator to teach people strategies for resolving conflicts on their own may add a few minutes to a mediation session but has the potential of keeping future cases off the dockets in the first place. But more than that, it brings forward an essential aspect of the law (and by extension the judge) that is often overlooked—its pedagogical function.<sup>190</sup> Part of the judicial role has always been social: judges work to ensure the smooth running of society by resolving disputes and attempting to ensure coordination and even cooperation rather than antagonism.<sup>191</sup> Judicial mediation and the educative lessons it brings forward allow the judge-mediator to play a more active role in pacifying the wider environment into which the parties return after they have settled their specific legal dispute.

### C. Ethics in Judicial Mediation

As our survey of the *déroulement* of a judicial mediation session has suggested, ethical issues arise throughout the process, and they present particular problems for the different actors who are called on to play unfamiliar and often shifting roles during a mediation session.<sup>192</sup> For judges in particular, mediation moves them out of their familiar adjudicative role and into closer proximity to the parties than is ordinarily the case. This has important ethical implications, since the judge-mediator's facilitative role puts him or her in the delicate position of keeping and on occasion strategically revealing the confidences of the parties.<sup>193</sup> This is a much more

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190. See, e.g., JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003). Cf. Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992) (critiquing the idea that the United States Supreme Court should play an educative role).

191. Lon Fuller, for example, saw adjudication as one of the basic forms of social ordering. Fuller, *Adjudication*, *supra* note 35, at 363-65.

192. See generally Catherine Morris, *The Trusted Mediator: Ethics and Interaction in Mediation*, in RETHINKING DISPUTES, *supra* note 49, at 301, 302 (emphasizing the importance of a broad approach to ethics in mediation, including all participants).

193. See the discussion of caucus sessions *supra* notes 124-28 and accompanying text.

active role than the reactive role judges ordinarily play and, as such, requires sensitivity to the potential conflicts that might arise.

For lawyers as well, the different roles required in mediation move the lawyer outside the ordinary ethical framework designed with advocacy and representation in mind.<sup>194</sup> To a certain extent the lawyer must subordinate vigorous advocacy of the client's position in favor of the agreement sought, because the goal of mediation is settlement, not victory.<sup>195</sup> In this section we will briefly explore these challenges by highlighting some problems and suggesting solutions in this area.<sup>196</sup>

Our current ethical models in law were developed primarily in the context of adversarial litigation and interpersonal conflict. Professional secrecy rules, for example, presume a potential conflict over the information in question; conflict of interest rules help protect vigorous advocacy of the client's interests; and judicial impartiality ensures that litigation is a fair fight. Mediation destabilizes this paradigm in various ways, as we have seen. Most importantly, though mediation arises from conflict and involves two (or more) sides in what is at root still an adversarial relationship, effective mediation involves not confrontation or competition but cooperation.<sup>197</sup> As such, mediation requires that legal ethics be redefined away from the paradigm of competition and towards what Carrie Menkel-Meadow has called "non-adversarial ethics."<sup>198</sup>

Existing ethics codes and principles, whose rules tend to reflect traditional judicial and lawyerly practice, often can be adapted to the practice of mediation only with difficulty.<sup>199</sup> Rules and guidelines for

194. See Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997) [hereinafter Menkel-Meadow, *Ethics*].

195. See *id.* Cf. Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141 (2004).

196. A thorough analysis of the ethical implications of mediation in general and judicial mediation in particular is beyond the scope of this article. This section draws on some of the analysis and examples in an unpublished paper by Justice Georgina Jackson of the Court of Appeal for Saskatchewan. Georgina Jackson, *The Place of the Ethical Principles for Judges in Judicial Mediation* (June 3-4, 2004) (unpublished manuscript on file with the authors).

197. ADAMS, *supra* note 11, at 35-36.

198. Menkel-Meadow, *Ethics*, *supra* note 194, at 414.

199. One can read the Canadian Judicial Council's *Ethical Principles for Judges*, for example, as applying to judge-mediators, though the applicability is neither entire nor always evident. Canadian Judicial Council, *Ethical Principles for Judges* (1998), available at <http://www.cjc-ccm.gc.ca/cmslib/general/ethical-e.pdf>. Regarding the situation in the United States, see Susan M.

mediation can help remedy this defect, though care must be taken to avoid the assumption that the tried-and-true principles will continue to serve well when applied in new areas.<sup>200</sup> There is a crucial difference between judicial mediation and adjudication, however, which puts particular emphasis on ethical accountability—its non-public nature.<sup>201</sup> This leads to several areas of ethical concern, each of which requires rethinking or readapting existing ethical principles.

First, because mediation ordinarily takes place in closed sessions involving only the parties and their representatives and because the discussions and presentations during those sessions are protected by strict confidentiality, the possibilities for appellate review of the process are limited.<sup>202</sup> This puts an onus on judges and advocates alike to be especially vigilant in protecting the interests of justice. Second, given that a mediation session is generally more wide-ranging and open-ended than a court hearing and given the central role the parties play in this frank exchange of positions and ideas, the parties' scrutiny would tend to focus more on relatively abstract issues of ethics, accountability, and justice than on legal principles and procedural guarantees.<sup>203</sup> Third, the process itself brings judges into closer contact with litigants and their counsel than does ordinary litigation, and this contact takes place in an atmosphere where rules and boundaries are not clearly defined.<sup>204</sup> Caucusing meetings, private *ex parte* discussions, even telephone and e-mail exchanges initiated by the parties present ethical dilemmas for both the judge-mediator and the lawyers involved, dilemmas

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Gabriel, Note, *Judicial Participation in Settlement: Pattern, Practice, and Ethics*, 4 OHIO ST. J. ON DISP. RESOL. 81, 89-95 (1988).

200. The draft *Uniform Mediation Act*, for example, includes detailed provisions regarding confidentiality, privilege, and conflicts of interest and reflects a certain maturity about the place of mediation in a legal system. National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act* (2001), available at <http://www.law.upenn.edu/bll/ulc/mediat/uma2001.pdf>. Compare the earlier guidelines for the mediation and conference programs in the United States Federal Courts of Appeals, which mention ethics only once and regarding the attorney, not the judge. NIEMIC, *MEDIATION & CONFERENCE PROGRAMS*, *supra* note 55, at 45. See generally Denis F. Gauthier, *Déontologie en médiation*, in 68 DÉVELOPPEMENTS RÉCENTS EN MÉDIATION 83 (1995) (discussing the ethical considerations in mediation, particularly for attorney-mediators); Pierre Renaud, *L'élaboration d'un code de déontologie en médiation: une réflexion*, 27 R.D.U.S. 31 (1996-1997).

201. See generally Menkel-Meadow, *Whose Dispute*, *supra* note 2, at 2682-87, 2694-96 (questioning the potential benefits of increased publicity and scrutiny of settlements); Epp, *supra* note 125.

202. This is a subject requiring further study.

203. See generally ADAMS, *supra* note 11, at 266-90 (surveying the accountability of mediators with respect to various recourses against their actions).

204. See Robert A. Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1.

much less frequently encountered in the more well-defined world of adjudication.<sup>205</sup>

In what follows, we will look at these points in the light of three issues that have become frequent points of reference for thinking and legislation on mediation: confidentiality, party autonomy, and fair treatment.<sup>206</sup> Though these issues do not exhaust the field of ethics in judicial mediation, they are the principal areas of ethical concern and illustrate important differences between ethics in the context of judicial mediation and in the context of adjudication. This will be followed by some remarks on the particular implications of judicial mediation for the ethical responsibilities of lawyers participating in the process.

### 1. Confidentiality

The entire efficacy of mediation rests on the confidentiality of the proceedings; without confidentiality, frank exchanges of ideas and the climate of trust necessary for fruitful negotiations are both impossible.<sup>207</sup> As previously noted, the general rule is that mediation proceedings are confidential and cannot subsequently be brought up in court, barring very rare and exceptional circumstances (for example threats to public safety).<sup>208</sup>

If we turn from considering confidentiality as the legal obligation defining the entire process to viewing it as a matter of ethics, we see that the

205. See *id.* See also Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147 (2003); Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003).

206. These are organizing principles of both the *UNCITRAL Model Law on International Commercial Conciliation* (2002) and the Uniform Mediation Act. *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002* (2004), available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf>; *Uniform Mediation Act*, *supra* note 200 (prefatory note). See generally Nadja Alexander, *The UNCITRAL Model Law on International Commercial Conciliation—An Interview with Jernej Sekolec*, 15 WORLD ARB. & MEDIATION REP. 105 (2004).

207. See generally ADAMS, *supra* note 11, at 290-300; Bonafé-Schmitt, *supra* note 22, at 161-64; Menkel-Meadow, *Ethics*, *supra* note 194, at 441-43; Anne M. Burr, *Confidentiality in Mediation Communications: A Privilege Worth Protecting*, DISP. RESOL. J., Apr. 2002, at 64, 66.

208. See *supra* note 124 and accompanying text; ADAMS, *supra* note 11, at 290-300. Defining the parameters of mediation confidentiality or privilege has been a hotly contested area. See Epp, *supra* note 125; Burr, *supra* note 207; David A. Ruiz, Note, *Asserting a Comprehensive Approach for Defining Mediation Communication*, 15 OHIO ST. J. ON DISP. RESOL. 851 (2000); Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239 (2002); Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29 (2003).

closed nature of the mediation process puts the judge-mediator in a particularly delicate ethical position. As facilitator of the process, the judge-mediator gets knowledge of sensitive information and must know how to use this information to promote settlement while at the same time respecting the exigencies of confidentiality.

The required balancing act comes out most clearly with regard to caucus sessions or *ex parte* meetings with the parties individually. This is confidentiality within confidentiality. During such meetings, confidential information is frequently revealed, sometimes with specific instructions about how this information is to be revealed to the other party.<sup>209</sup> This can, of course, appear to engage judicial impartiality, particularly since it is the judge-mediator who transmits the information and so must walk a fine line between excessive caution that can stifle opportunities and excessive liberality that can engender complaints of either partiality or breach of confidence.

Judges must be ever mindful that their role as facilitators is an active and not a passive one and that their choices of phrasing, emphasis, or timing in transmitting information have ethical implications. By intervening during the course of a mediation session, the judge makes particular strategic choices involving the information at hand—choices designed to move the mediation process towards settlement. In a sense, the more information at the disposal of the judge-mediator, the more danger there is in revealing—even inadvertently or by implication—information that one party regards as confidential or prejudicial. Negotiating this minefield requires solid and thorough skills training on the part of the judge-mediator (as indeed it does also for mediators in the private sector), careful preparation through clear definition of the mandate, and continual verification of consent.

## 2. Party Autonomy

The role of the judge-mediator is circumscribed in particular distinctive ways due to the nature of the mediation process itself, in which it is the parties who are in control and who in large measure determine how things unfold.<sup>210</sup> One of the key differences between judicial mediation and adjudication is the empowerment of the parties to define, prioritize, and find a resolution to their conflicts.<sup>211</sup> This means that though the judge-mediator is the guardian of the fairness of the process (about which we will say more

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209. See *supra* note 124-28.

210. See *supra* Part B.3.

211. See, e.g., Georges A. Legault, *La médiation et l'éthique appliqué en réponse aux limites du droit*, 33 R.D.U.S. 153, 184 (2002-2003).

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below), as to its substance his or her role is limited to verifying that the parties give real consent to the agreement they reach and that the settlement respects public order and is not manifestly and extremely unfair.<sup>212</sup>

This caveat is all the more important because during mediation the judge-mediator remains a judge, imbued with particular status, powers, and duties, whose opinion and presence are highly influential for the parties and counsel alike.<sup>213</sup> In these circumstances it is essential that judge-mediators keep in mind that their role is to facilitate and promote the autonomy of the parties and not to adjudicate.<sup>214</sup>

### 3. Fair Treatment

Though the specifics of the procedure to be followed and the substance of any agreement are up to the parties, the judge-mediator must work to protect the integrity of the mediation process from abuses of influence or power.<sup>215</sup> Dealing with such power issues at the outset is essential to prevent the mediated solution from simply replicating or reinforcing the problems that gave rise to the conflict in the first place.<sup>216</sup> This is important not just for the individual mediation session but for the institution of mediation more generally, because problems regarding the fairness of a particular mediation can lead to public questioning of the process as a whole, which in turn can undermine the effectiveness of future mediations. In the absence of formal procedural rules—and without the added safety valve of a right to appeal—a danger exists that the public will perceive the process as arbitrary and so unfair.<sup>217</sup>

This requires particular attention to two factors that can give rise to perceptions of unfairness. First, judge-mediators must be particularly sensitive to the dynamics of power in mediation and confront their own assumptions in different ways than in the more formalized adjudicative

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212. See *supra* Part B.2.

213. See *supra* Part A.3.

214. See *supra* note 60 and accompanying text.

215. See generally Hyman, *supra* note 141.

216. See generally Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1 (2000) (defining power imbalances and offering strategies for combating them in negotiations).

217. See Macfarlane, *Why Do People Settle?*, *supra* note 11, at 697-703.



process.<sup>218</sup> Second, judge-mediators must be aware of cultural differences in expectations and in negotiating style and must handle these differences carefully and respectfully.<sup>219</sup> These factors both come back to the issue of consent; as guardian of the fairness of the process, the judge-mediator must always be vigilant that consent is free and clear and that the process is not structured so as to unreasonably handicap one party or the other, especially a party unrepresented by counsel.<sup>220</sup>

#### 4. Lawyers' Ethics

Mediation imposes particular ethical obligations on lawyers as well, distinct from those in adjudication.<sup>221</sup> In contrast to classical adjudication, mediation is designed to give voice to the parties themselves; as we saw above, communication is directed between the parties (with the judge-mediator serving only as facilitator, not as interlocutor), rather than between the parties' representatives and the judge.<sup>222</sup> The role of lawyers is therefore more vaguely defined in mediation than in adjudication: their presence is seldom required, sometimes unwelcome, and can represent a problematic invasion of the classical adjudicatory model into the new paradigm of judicial mediation.<sup>223</sup> For these reasons, certain of the lawyer's traditional ethical obligations require adaptation to this new context.

In Quebec, lawyers' conduct is governed by the *Code of ethics of advocates*, which applies to every lawyer "regardless of the context or manner in which he engages in his professional activities."<sup>224</sup> The lawyer representing a client in mediation, in other words, is obliged to continue to act as a lawyer and, thus, is bound by the provisions of the *Code of ethics*.<sup>225</sup>

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218. This is particularly important in the context of divorce mediation. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1582-83 (1991); Bryan, *supra* note 98.

219. See Kahane, *supra* note 163.

220. See *supra* Part B.2.

221. There has been little commentary on the ethical aspects of the lawyer as representative during mediation, as opposed to the lawyer as mediator. Ethics are mentioned only briefly in Jovette Létourneau & André Ladouceur, *Le rôle de l'avocat en médiation*, in 162 DÉVELOPPEMENTS RÉCENTS EN MÉDIATION 33 (2001); Suzanne Clairmont, *L'avocat et la médiation*, in 80 DÉVELOPPEMENTS RÉCENTS EN MÉDIATION 155, 159-60 (1996); Gauthier, *supra* note 200, at 86. An exception is Menkel-Meadow, *Ethics*, *supra* note 194.

222. See *supra* note 141-43 and accompanying text.

223. See NOBLE ET AL., *supra* note 139, at 65-69, 107-12.

224. Code of ethics of advocates, R.Q. c. B-1, r.1, art. 1.00.01 [hereinafter *Code of ethics*].

225. See *id.*

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The lawyer's ethical obligations pull in two directions, however, particularly since the modifications to the *Code of ethics* in April 2004.<sup>226</sup>

On the one hand, the lawyer has a duty of loyalty to the client;<sup>227</sup> on the other hand, the lawyer now also "shall serve justice" and "may not act in a manner which is detrimental to the administration of justice."<sup>228</sup> In the context of mediation, this means that lawyers may find themselves torn between loyalty to the client, which looks to an adversarial or competitive conception of advocacy, and the interests of justice, which looks rather to an inquisitorial or cooperative conception.<sup>229</sup> As we saw above, a competitive win-lose model is not the most fruitful way to work towards a resolution of conflict, yet for a lawyer it is unavoidable given the dual conception of the lawyer's role as representative of the client and officer of the court.<sup>230</sup>

This tension in the lawyer's role is evident in several other provisions in the *Code of ethics* as well and has the effect of circumscribing the scope of advocacy during mediation. For example, the duty to serve justice requires a lawyer to "co-operate with other advocates to ensure the proper administration of justice,"<sup>231</sup> and where a party is unrepresented the lawyer must be vigilant so as not to lead that party into error or abuse the party's good faith.<sup>232</sup> The effect of these ethical constraints is to move the lawyers' role during mediation away from advocacy and towards general support, advice-giving, and explanation.<sup>233</sup>

226. See Quebec, O.C. 351-2004, 7 April 2004, G.O.Q. 2004.XVI.1840, ss. 5 and 14.

227. See *Code of ethics*, *supra* note 224, art. 3.00.01.

228. *Id.* art. 2.01.01, paras. 1-2. Compare also art. 3.06.05, which provides, "An advocate shall safeguard his professional independence regardless of the circumstances in which he engages in his professional activities. In particular, he must not let his professional judgment be subject to pressure exerted on him by anyone whomsoever."

229. See Menkel-Meadow, *Ethics*, *supra* note 194, at 426-29; ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 152-54 (1993). Cf. James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court,"* 48 *BUFF. L. REV.* 349 (2000) (arguing that lawyers should not "be burdened with special responsibilities to seek justice that are inconsistent with duties to clients").

230. See *supra* note 101-02 and accompanying text. See also ADAMS, *supra* note 11, at 68; KRONMAN, *supra* note 229.

231. See *Code of ethics*, *supra* note 224, art. 2.05.

232. See *id.* art. 3.02.01(i).

233. See *id.* art. 3.02.04 (duty to explain "the nature and implication of the problem . . . and of the risks inherent in the measures recommended"); *id.* art. 3.02.10 (duty to inform the client about any settlement offers); *id.* art. 3.03.02 (duty to provide explanations "necessary for the understanding and evaluation of the professional services rendered to him").

The prime actors in mediation remain the parties themselves; their representatives, like the judge-mediator, have ethical duties that look to protect the integrity of the mediation process and that limit how active a role they can play. For lawyers engaged in judicial mediation, this means especially being conscious of the ultimate goal of the process, which is settlement rather than victory.<sup>234</sup> This puts lawyers into a largely unfamiliar position, since their role as officers of the court comes forward as their advocacy role recedes.

Finally, it is worth noting that the lawyer's role as officer of the court adds a further duty, namely advising the client on the availability or suitability of mediation.<sup>235</sup> In the Quebec appellate program, a judge may recommend mediation to the parties at the stage of permission to appeal or while hearing matters as a judge sitting alone, if the judge considers the case suitable for mediation. It may happen, however, that the parties never receive this suggestion to mediate (as, for example, when a case proceeds directly to appeal by right) and so may remain ignorant of the availability of mediation, however suitable it might be.

This presents the danger of rent-seeking behavior on the part of the lawyers. In a large, lengthy, fact-driven case, for example, lawyers obviously have a financial incentive in proceeding to trial, even though such cases are eminently suitable for mediation since they involve few if any questions of law and so have little value as precedents, and since they inordinately consume court resources. Preventing such behavior is partly a question of education: lawyers and the general public alike must be informed of the availability of mediation and its suitability for certain kinds of cases.<sup>236</sup> It is also an ethical issue, however, which engages lawyers' obligations to facilitate the administration of justice and to avoid profit-seeking behavior.<sup>237</sup>

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234. See Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 96 (2002).

235. See *Greene v. Mills*, [2003] R.J.Q. 3253 (Court of Québec) (holding that a lawyer has a duty to inform the client of the availability of judicial mediation services).

236. See generally Marie-France Chabot, *Le rôle de l'avocat à l'heure des modes alternatifs de règlement des litiges*, in 80 DÉVELOPPEMENTS RÉCENTS EN MÉDIATION 127 (1996) (suggesting that attorneys have the responsibility to educate and direct their clients to the appropriate form of dispute resolution for their conflict). On the need for broad education regarding ADR, see ANDREW J. PIRIE, *ALTERNATIVE DISPUTE RESOLUTION: SKILLS, SCIENCE, AND THE LAW* 386-94 (2000).

237. See *Code of ethics*, *supra* note 224, art. 2.05 ("The advocate must avoid any procedure of a purely dilatory nature and co-operate with other advocates to ensure the proper administration of justice.") and art. 3.08.03 ("The advocate must avoid all methods and attitudes likely to give to his profession a profit-seeking or commercial character.").

## CONCLUSION

As the judicial mediation model takes hold and creates a new way of approaching dispute resolution within the formal institutions of justice, new challenges will arise. As with any process that goes up against an entrenched paradigm, solutions to these challenges will require new ways of thinking that go beyond the assumption that adjudication is normative, while other forms of conflict resolution are alternative or exceptional. The goal remains the same: resolution of legal conflicts in a just, complete, and efficient way. Judicial mediation provides another way to achieve this, one that is integrated fully within the formal legal system, but that tempers—in suitable cases—its rigidity and formalism.<sup>238</sup>

Most obviously, as the model matures, it may be profitable to expand its scope to embrace a broader range of disputes, outside its foundation of civil, commercial, and family matters. In Quebec, a pilot project has been launched for criminal cases, and the program at the court of appeal has grown to embrace administrative law matters and complex, multi-party litigation.<sup>239</sup> Setting the boundaries of mediation, however, gives rise to many questions of a practical, institutional, ethical, and political nature, and, as always, this requires a balancing of the often divergent demands of efficiency and justice.

The expansion of judicial mediation cannot simply be blind empire-building, but nor should expansion be limited simply because mediation is unfamiliar or untried in a given area.<sup>240</sup> A paradigm-challenging development must be assessed on its own terms and not on those of the paradigm it challenges; it is important to keep pre-conceived ideas of what law is for and what it can and cannot do from blinding us to the potential benefits of applying new methods to different kinds of problems.

Clarification of the ethical principles engaged by mediation is an ongoing challenge and one that does not admit of easy answers. As we have seen, judicial mediation gives rise to a variety of ethical problems for the judge-mediator and for the lawyers who participate.<sup>241</sup> These ethical

238. See *supra* Part A.2.

239. On the Quebec program of facilitation in criminal matters, see *supra* note 6.

240. Even ADR's most enthusiastic proponents recognize that it is not suitable for all cases, and reports of the death of adjudication have proved to be premature. See, e.g., Carrie Menkel-Meadow, *Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve*, 57 CURR. LEGAL PROBS. 85 (2004). For an argument on the continuing social need for broad access to adjudication, see Resnik, *For Owen M. Fiss*, *supra* note 36.

241. See *supra* Part C.

problems are moreover dynamic: they shift and change contours during the different stages of a mediation session. Any statements of ethical principles must thus account for all the different actors in judicial mediation, recognize the different roles each is called upon to play during a session, and conceptualize their ethical obligations in relational rather than strictly individual terms.

A third significant issue to be monitored as judicial mediation matures and spreads is the tendency towards the professionalization of the process.<sup>242</sup> Experience in the United States has shown that non-adjudicatory forms of dispute resolution are subject to various pressures along these lines and that the ideal of self-determination by the parties can easily give way to settlements mandated by the courts, hammered out by professional lawyers, and effectively imposed on the parties.<sup>243</sup>

The exclusion of professional advocates is not the answer—too much is at stake, and the potential for power imbalances is too great—but it is important to counteract the natural tendency of lawyers to transform all disputes into win-lose justiciable cases.<sup>244</sup> The danger is that mediation will become simply another species of adjudication, a zero-sum game where competition and not cooperation rule, and that its considerable benefits will be lost in the process. Avoiding this requires changes to legal education and professional training in order to remove the ingrained conception that adjudication is the norm and that alternative dispute-resolution processes are to be tolerated in the name of efficiency only.

The emergence of new modes of conflict resolution within state-controlled justice systems bears witness to the increased responsibility individuals are taking with regard to the legal resolution of their problems. It points to the emergence and acceptance of a new conceptualization of the law, one that no longer views law as a transcendent and immutable state monopoly against which the individual plays a strictly reactive role.<sup>245</sup> Faced with increasing scarcity of resources, growing efficiency crises affecting judicial institutions, and the realization that the traditional avenues of dispute resolution can sometimes foster the very adverse dynamics of

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242. See generally Georges A. Legault, *La professionnalisation de la médiation*, in 162 DÉVELOPPEMENTS RÉCENTS EN MÉDIATION 91 (2001).

243. This concern has been expressed by, among others, Resnik, *Many Doors?*, *supra* note 1; Menkel-Meadow, *Whose Dispute*, *supra* note 2, at 2693-94; and Welsh, *Thinning Vision*, *supra* note 177.

244. ADAMS, *supra* note 11, at 68.

245. See, e.g., Martha-Marie Kleinhans & Roderick A. Macdonald, *What Is a Critical Legal Pluralism?*, 12 CAN. J.L. & SOC. 25, 39-40 (1997) (emphasizing the creative role of legal subjects in “inventing” the law).

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conflict that they seek to solve, people are looking to reclaim the power to resolve their own disputes.

This is not a sign that the traditional normative order is losing legitimacy. Rather, it is a sign that order is undergoing democratic renewal, an indication of a healthy flexibility whose effect can only be to strengthen its legitimacy. The participation of judges—guardians of social order and democratic values—alongside the community in this transformation of the classical system of civil justice, bears witness that the gap between the judicial and the social is shrinking and that our conception of law and the institutions which administer it is broadening as a consequence. This can only mean that society, better understood, will be better served.

