Is That All There Is?: "The Problem" in Court-Oriented Mediation

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Abstract: The “alternative” process of mediation is now well-institutionalized in the courts and widely (though not universally) perceived to save time and money and satisfy lawyers and litigants. However, the process has failed to meet important aspirations of its early proponents and certain expectations and needs of one-shot players. In particular, court-oriented mediation now reflects the dominance and preferences of lawyers and insurance claims adjusters. These repeat players understand “the problem” to be addressed in personal injury, employment, contract, medical malpractice and other civil non-family disputes as a matter of merits assessment and litigation risk analysis. Mediation is structured so that litigation issues predominate; other potential issues—personal, psychological, relational, communitarian—disappear.

This approach to mediation may be satisfactory to many litigants and appropriate for courts that must engage in the mass processing of cases. But at least some individual one-shot litigants, who suddenly find themselves forced to seek redress or defend themselves in court, need something more. This Article describes a case involving such litigants, dealing with their son’s heart-breaking disabilities and the narrow problem definition of their two mediations. We consider why the problem definition of their mediations mattered to these litigants and how the mediation sessions could have been different. We then propose a systematic method that would enable the customization of mediation sessions, along with three proposed court initiatives to provide litigants with the opportunity to choose whether they wish to engage in such a customized process. We also explore why courts should be willing to experiment with broadening the problems to be resolved by non-family civil court-connected mediation.

* The authors wish to thank Robert Ackerman, Daniel Bowling, Jennifer Brown, Melody Daily, Bill Doyle, James Elkins, Deborah Hensler, Howard Herman, Michael Koskoff, Paul Ladehoff, John Lande, Bobbi McAdoo, Craig McEwen, Michael Moffitt, Sharon Press, Richard Reuben, Frank Sander, Daniel Shapiro, Jean Stermlight, Donna Stienstra, Roselle Wissler, and Rachel Wohl for their very helpful feedback and suggestions during the development of this article. We also thank participants at workshops at the University of Florida College of Law, the University of Missouri-Columbia School of Law, Suffolk Law School, West Virginia University College of Law, Quinnipiac University School of Law, and the University of Texas at Austin Law School for their feedback regarding a preliminary version of this Article. Finally, the authors are grateful to Linas Ledebr for his excellent research assistance.

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Introduction

A recently circulated cartoon shows a king and his queen seated on either side of an advisor, who is looking at the king. “You said, ‘Off with her head,’ says the advisor, “but what I heard was ‘I feel neglected.’” Plainly, this advisor was trying to do something that a good mediator should do—help the parties understand the psychological and emotional “interests” that precipitated the king’s “position” and consider whether that position actually fosters his interests. This has been one of the great promises of mediation, at least to many early “mediation imperialists” who saw its potential for loosening the pinched perspective that typically dominates not only litigation practices but also settlement discussions in cases that are, or are likely to be, in the litigation stream. The idea was that mediation could help the parties exercise autonomy, not only in agreeing to a solution, but also in determining what to address in mediation, which could lead to broader problem definitions and to processes and solutions that were better suited to the real needs of the parties.

This Article focuses on what we call “court-oriented” mediations in “bread-and-butter” civil, non-family disputes—e.g., personal injury matters, employment cases, contract and property damage disputes, medical malpractice claims, and the like. Generally, these mediations take place in the shadow of the court house; someone has already filed a lawsuit or contemplates doing so if the mediation does not produce an agreement. There is generally one individual

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1 Despite diligent efforts, we have been unable to identify this cartoon’s author or place of publication.
2 See Deborah R. Hensler, In Search of “Good” Mediation: Rhetoric, Practice and Empiricism, in Handbook of Justice Research in Law 231, 254-55 (Joseph Sanders & V. Lee Hamilton eds., 2001) (based on new analyses of the Rand ADR data, describing attorneys’ process evaluations, as well as their assessments of how satisfactory and fair mediation was for their clients).
3 We are inspired by Professor Robert Mnookin’s description of himself as a “negotiation imperialist.” Robert Mnookin, When Not to Negotiate: A Negotiation Imperialist Reflects on Appropriate Limits, 74 U. Colo. L. Rev. 1077, 1083 (2003).
plaintiff and one or more defendants. Lawyers and insurance claims representatives are nearly always involved. In some of these cases, courts order or coax the parties into mediation; in others the parties choose the process voluntarily. Undoubtedly, some percentage of these mediations see the development of a broad problem definition that allows the parties to deal with their underlying interests. In the vast bulk of such mediations, however, available evidence indicates that the problem definition is quite narrow, characterized almost entirely by litigation-oriented risk analysis and valuation. Similarly, these mediations’ outcomes do not vary much from those produced by lawyers’ traditional bilateral negotiations.

In these cases, the plaintiffs and defendants are often one-shot players, unfamiliar with the courts and their ways. The lawyers and insurance claims representatives, meanwhile, are repeat players. The repeat players’ interests and conception of court-oriented mediation play a

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5 See infra Part I n. ?? and accompanying text.
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8 See Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc’y Rev. 95-99?, 107, 122? [check pinpoints] (1974) (generally theorizing that repeat players hold an advantage over one-shot players; categorizing personal injury insurers as repeat players and personal injury plaintiffs as one-shot players); Lisa Blomgren Bingham, When We Hold No Truths to Be Self-Evident: Truth, Belief, Trust, and the Decline in Trials, 2006 J. Disp. Resol. 131, 145-6 (2006) (observing that though corporations may be institutional repeat players, the managers and officers involved in litigation generally are not repeat players and do not express faith in the courts) (citing John Lande, Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives' Opinions, 3 HARV. NEGOT. L. REV. 1, 39 (1998)). Some commentators have focused on the fates of one-shot players and repeat players in ADR processes. See e.g., Carrie Menkel-Meadow, Do the “Haves” Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR, 15 Ohio St. J. on Disp. Resol. 19, 59 (1999) (“We have little empirical verification of the claims made both for and against arbitration and ADR, including positive assertions made about reduced cost, speed, and access to dispute mechanisms, as we really do not have much data about whether one-shotters always do worse in institutionally established ADR, although the Bingham and Engalla data do demonstrate some clear areas for concern.”); Andrew Little, Making Money Talk, 44-46 (2007) (describing differences between repeat players and one-time plaintiffs and their relationship to their lawyers in mediation sessions). Other commentators have considered the differing interests and expectations of one-shot and repeat players in various contexts. See e.g., H. Laurence Ross, Settled Out Of Court: The Social Process of Insurance Claims Adjustment [year] (examining the interests of repeat players, largely in cases involving small amounts in controversy); Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Amer. Sociological Review 55 (1963) (parenthetical?); Sally Engle Merry & Susan Silbey, What Do Plaintiffs Want? Reexamining the Concept of Dispute, 9 Justice Sys. J. 151 (1984) (focusing primarily on the interests of individual plaintiffs and finding that once they seek assistance from courts or attorneys, they want vindication); Jerome H. Skolnick, Justice Without Trial: Law Enforcement In Democratic Society [year?] (parenthetical?). A slightly different but related focus involves comparing individual and organizational litigants’ characteristics and resolution patterns. See e.g., Gillian Hadfield, Exploring Economic and Democratic Theories of Civil Litigation: Differences
significant role in the narrow definition of the problem to be resolved in these mediations and the limited scope of available remedies. At least some of the one-shot players’ interests and conception of mediation may be quite different from those of the repeat players. Nonetheless, it is the repeat players who control the process and the problem definition and exercise that control in a way that sometimes serves their own interests better than that of their clients. In the mediation of the bread-and-butter cases that are the focus of this Article, the lawyers and the mediators (generally also lawyers) set the scope of inquiry and the procedures—often without any explicit discussion or recognition of the many available alternative formulations. They tend to focus narrowly on two questions: “What would happen if this case were litigated?” and “How much is the defendant willing to pay and the plaintiff willing to accept to avoid the delay, risks and costs of trial?” The lawyers (assisted by the mediators) then implement mediation procedures that they think will enable them to address those questions efficiently. In practice, this usually means an emphasis on private caucuses rather than joint sessions, and few, if any, opportunities for clients to speak or listen to each other directly. Any reality-testing employs that limited reality. These mediations foster a bracketed understanding of the dispute

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Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases, 57 Stan. L. Rev. 1275, 1280-1, 1298 (finding that “individual plaintiff cases are substantially more likely to be determined by an adjudication—especially a non-trial adjudication—than are organizational plaintiff cases” and finding “evidence that organizational plaintiffs—when pitted against either individual or organizational defendants—are substantially more likely to settle their cases than to have them decided either by trial or nontrial adjudication; also finding that if federal lawsuits for the recovery of defaulted student loans are excluded from consideration, “organizations are defendants in more than 80% of all federal civil litigation; individuals are plaintiffs in almost 70%”).

9 We are not referring to the private mediation of large commercial disputes with sophisticated parties on both sides. In these cases, it is quite likely that the parties are involved in the development of the mediation process and influence the problem definition. See Bryant G. Garth, Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution, 18 Ga. St. U. L. Rev. 927, 930-33 (2002).

10 See infra Part I, n. ?? and accompanying text.

11 Bryant Garth has noted that there is a growing difference between the mass processing offered by court-connected mediation programs and the individualized treatment offered to “larger” clients with “larger” cases. See Garth, supra, n. ?? at 930.

12 See infra, Part I n.?? and accompanying text.

13 See infra, Part I n.?? and accompanying text.

14 See infra, Part I n.?? and accompanying text.
and rational-cognitive-legal\textsuperscript{15} approaches to resolving it, so they generally offer few opportunities, or none, to deal with underlying interests,\textsuperscript{16} particularly the psychological and emotional needs of the parties.

For many parties—who have chosen, or are likely to choose, the courts to resolve their disputes—this narrow approach may be wholly appropriate and even preferable.\textsuperscript{17} In some segment of cases, though, a litigation focus means that at least some of these parties miss out on opportunities for processes and outcomes that could be far better for them.

This gap between the expansive aspirations that many hold for mediation and the constricted reality of most court-oriented cases—which has many causes and many effects—is the challenge this Article seeks to address. Part I elaborates the problem, using a case study for illustration. Part II sets forth a systematic method for “setting” the appropriate problem definition in a given mediation and then proposes three approaches that courts could undertake to encourage and assist litigants in developing the most appropriate processes and problem definitions. Part III explains why we propose that courts provide these opportunities to parties, rather than relying on the parties themselves or their lawyers to take the initiative.

Part I. The Gap between Aspiration and Reality in Court-Oriented Mediation


\textsuperscript{16} Meanwhile, recent research indicates that repeat mediation users assess mediators’ ability to listen for interests as very important. See John Lande & Rachel Wohl, Listening to Experienced Users: Improving Quality and Use of Commercial Mediation, Dispute Resolution Magazine (Spring 2007).

\textsuperscript{17} See Bobbi McAdoo & Nancy Welsh, Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation, 5 Nev. L.J. 399, 422-23 (2004-2005) (observing that most parties participating in court-connected mediation perceive outcomes as fair or satisfactory and research indicates that parties “appreciate mediators’ help in achieving outcomes that are consistent with the rule of law”). Also, as Professor Robert Ackerman has observed, when plaintiffs invoke the power of the courts, it is reasonable to assume that they seek the application of legal norms. See Robert M. Ackerman, Disputing Together: Conflict Resolution and the Search for Community, 18 Ohio St. J. on Disp. Resol. 27, 55 (2002).
With the advent of notice pleading,\(^\text{18}\) the easing of access to the courts,\(^\text{19}\) and legislative encouragement of private litigation to enforce public rights,\(^\text{20}\) state and federal courts in the U.S. attend to a strikingly wide variety of private and public ills.\(^\text{21}\) And in the public imagination, courts provide a unique function; they are the public forum that can best discover the details of an individual case and adjudicate it.\(^\text{22}\) Yet the courts condition access upon a particular focus. In civil proceedings, the “problem” defined by the pleadings\(^\text{23}\) must state a sufficiently recognizable legal claim. If this relatively low hurdle can be met,\(^\text{24}\) discovery is permitted—but only for information that is relevant to the legal claims and defenses in the case.\(^\text{25}\) In pre-trial motions and at trial, the “problem” remains narrow: what is the applicable law, what are the legally-relevant facts, and how do they mesh?\(^\text{26}\)

But mediation—a process in which an impartial third party who lacks authority to decide the outcome, helps others to communicate and negotiate to reach their own understanding and resolution of the dispute—is an entirely different story. Or at least that has been a dominant

\(^{18}\) See F. R. C. P. Rule 8(a)(ii).


\(^{20}\) See e.g., 29 U.S.C.A. § 2617(a)(3) (2004) (fee-shifting provision of Family Medical Leave Act allowing plaintiffs to recover attorney's fees, expert witness fees, and other costs in addition to the judgment).

\(^{21}\) See Herbert M. Kritzer, American Adversarialism, 38 Law & Soc'y Rev. 349 (2004); Alexis de Tocqueville, Democracy in America [pinpoint].

\(^{22}\) In a foreword to the published proceedings of the 1976 Pound Conference, three former ABA presidents observed that Americans “feel and see that they are getting a measure of justice in the courts, the kind of respectful attention and thoughtful consideration that they do not think they get anywhere else . . . . THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE: PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 11 (A. Leo Levin and Russell R. Wheeler eds., 1979). [Insert wonderful quote, if can find it, about how people perceive courts as the one place that government provides individualized attention—might be in Lind/Tyler chapter in Justice Research book or Trouble Cases book]

\(^{23}\) See Michael Moffit, Pleadings in the Age of Settlement, 80 Ind. L.J. 727, 736 (2005).

\(^{24}\) The precise height of this hurdle, however, remains a matter of contention. Compare e.g., Conley v. Gibson, 355 U.S. 41, 45-46 (1957) to Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1968-69 (2007).

\(^{25}\) See F. R. C. P. Rule 26(a) (“Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”).

\(^{26}\) See F. R. C. P. Rules 50 and 56.
theory. Conventional wisdom among a segment of influential commentators on mediation holds that the process has several capacities that courts lack. It can: empower the parties to work together in a respectful and productive manner; allow a focus on the parties’ real needs and interests, in addition to their legal claims; offer a flexible process customized to fit the parties’ situation, emotions and interests; and encourage the development of a range of creative and responsive outcomes. In appropriate situations, mediation may even enable the parties to heal or restructure their relationships, personal and professional.


28 See e.g., Lon L. Fuller, Mediation—Its Forms and Functions, 44 S. Cal. L.R. 305 (1971).


30 See Andrew W. McThenia & Thomas L. Shaffer, For Reconciliation, 94 Yale L.J. 1660 (1985); Jean R. Sternlight, ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice, 3 Nev. L.J. 289 (2002/2003). Research indicates, however, that civil non-family mediation frequently does not realize this potential. See e.g., Dwight Golann, Is Legal Mediation a Process of Repair—or Separation? An Empirical Study, and its
In recent years, many state and federal trial and appellate courts have begun to order or proffer mediation in large numbers of civil non-family cases. After some initial resistance, many lawyers now select mediation voluntarily, either before or after filing. The in-house counsel for major corporations regularly report that they favor the use of mediation over arbitration or other options.

Implications, 7 Harv. Neg. L. Rev. 301, 331 (2002) (“Even when able mediators work with parties whose dispute arises in the context of a significant prior connection with each other, relationship repairs in legal mediation appear to be uncommon events.”); Roselle Wissler, The Effectiveness of Court-Connected Dispute Resolution in Civil Cases, 22 CONFLICT RESOL. Q. 55 (2004) (In one study, 43% of litigants thought mediation improved their relationship with the other party; most studies did not find that a significant percentage of disputants perceived mediation as improving their relationships.). It could be that academics and practitioners who appreciate mediation’s potential for a more humanistic, relation-oriented approach find themselves at odds with the psychological and rights-oriented profile of those who dominate actual civil non-family mediation sessions.

Professor Susas Daicoff has observed that one response to such dissonance may be to “attempt[] to change the lawyer’s role and lawyering to incorporate a care orientation.” Susan Daicoff, Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism, 46 Am. U. L. Rev. 1337, 1402 (year?). See Nancy A. Welsh, Looking Down the Road Less Traveled: Can the Legal Profession Afford to Define Problems Broadly?, __ JOURNAL OF DISPUTE RESOLUTION __ (forthcoming, 2008). Other responses can include denial of the conflict or dividing one’s personality so that the ethic of care dominates personal and family life while the analytical side dominates one’s professional life. Daicoff supra at [pinpoint].

We emphasize that we are focusing here on civil non-family mediation. Though court-connected family mediation also employs this conception of the problem, there is evidence that the process frequently addresses a broader array of issues. This is probably because all of those involved in a custody dispute—i.e., judge, lawyers, mediator, perhaps even the parents—recognize that the court does not have the resources (or probably the desire) to serve as a close monitor of the ongoing implementation of the agreement reached by the parents and thus the agreement will require their commitment. Such commitment is much more likely with sufficient customization and communication. See Nancy A. Welsh, Reconciling Self-Determination, Coercion and Settlement in DIVORCE MEDIATION: CURRENT PRACTICES AND APPLICATIONS [pinpoint] (describing parents’ involvement in the development of agreements) (J. Folberg, Ann Milne and Peter Salem, eds., 2004).

In 2004, for example, 13,566 federal district court cases were referred to mediation; in 2005, 68 of 94 federal district courts had authorized referral to mediation. See Donna Stienstra, Emerging Issues in Federal Court ADR (presentation at Penn State Dickinson School of Law, September 12, 2005). In Florida’s state courts, all 20 judicial circuits order some percentage of substantial non-family civil cases—i.e., “circuit” cases—into mediation. Seven of those circuits kept sufficient data to report that they had ordered 8,947 circuit court cases into mediation in 2005-2006, while 6,494 of these were mediated. Florida Mediation & Arbitration Programs: A Compendium 73, 75 (19th Ed. 2005-06). See also, Sharon Press, Institutionalization of Mediation in Florida: At the Crossroads, 108 Penn St. L. Rev. 43, 55 (2003) (observing that Florida’s “‘official’ statistics only tell part of the story because court supported mediators and mediation programs exist alongside a thriving private mediator sector”) [Also look for data from Texas, Virginia, Maryland, New York, Ohio]

See Roselle L. Wissler, When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys’ ADR Recommendations, 2 Pepp. Disp. Resol. L.J. 199, 207-17 (2002) (observing that lawyers use the process voluntarily after they have been introduced to it through court order). See also McAdoo research—attorneys use “voluntarily” in anticipation of court order, concludes that judicial advocacy for ADR very important to institutionalization (could be in reports of research in Minnesota, Missouri, Look Before Leap, or most recent article).

See CPR International Institute for Conflict Prevention & Resolution, The CPR Survey on Alternative Dispute Resolution Trends (conducted first quarter 2007) (reporting that in response to the question “How would you rank...
Available evidence is at best mixed, however, regarding these mediation sessions’ fulfillment of the expansive promise described *supra*. Certainly, there are many mediators who are committed to offering parties opportunities to exercise influence and to understand and address their underlying interests. There is also evidence that a growing percentage of lawyers who handle significant commercial litigation, as well as parties who are involved in multiparty, polycentric disputes, recognize the value of uncovering and addressing interests in the adoption of ADR techniques in your organization over the past 3 years?" with 5 meaning “high” and 1 meaning “low,” corporate counsel assigned the following scores: mediation (4.00); early case assessment (4.00); arbitration (2.74); multi-step ADR clauses (2.84); internal ADR training (2.97); ADR training for business clients (2.12); lawyers at law firms assigned the following scores: mediation (3.89); early case assessment (3.37); arbitration (3.76); multi-step ADR clauses (3.28); internal ADR training (2.99); ADR training for business clients (2.55). See also Lipsky, D. B., and Seeber, R., *In Search of Control: The Corporate Embrace of ADR*, 1 U. Pa. J. Lab. & Emp. L. 133, 138-9? (1998) (describing a Cornell/PERC Institute on Conflict Resolution survey of the corporate counsel of the 1,000 largest U.S.-based corporations, which found that they perceived mediation as saving time and money, providing control over outcomes, offering a more satisfactory process than litigation, and resulting in more satisfactory settlement); Nancy A. Welsh, *Institutionalization and Professionalization in The Handbook of Dispute Resolution* 487, 489, n. 17 and associated text (Michael Moffitt & Robert Bordone, eds., 2005).

35 For example, many mediators have been trained in the “understanding-based” model of mediation, as well as “transformative” mediation. The understanding-based model focuses on the enhancement of mutual understanding and eschews the use of caucuses. See Gary J. Friedman & Jack Himmelstein, *Challenging Conflict: The Understanding-Based Model of Mediation* (forthcoming 2008). The transformative model, meanwhile, emphasizes disputants’ “voice and choice.” Mediators view settlement as a by-product of mediation, rather than its goal. See Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* 1, 106-7 (1994); Joseph P. Folger et al., *A Benchmarking Study of Family, Civil and Citizen Dispute Mediation Programs in Florida* 105–6 (2001) (describing the “synergistic” approach in court-connected mediation programs, which acknowledges court constraints but also works to emphasize mediation as an “alternative” process that provides “voice and choice,” and describing social impacts of this approach).

36 A group of lawyers with significant commercial mediation experience (often in the roles of both lawyers and mediators), for example, recently identified “satisfy[ing] parties’ underlying interests” as one of their usual goals for the process. See American Bar Association Section of Dispute Resolution Task Force on Improving Mediation Quality, “Survey Responses,” 5 (April 16, 2007) [draft—need permission of Task Force to cite] (68.5% of mediation users identified “satisfy parties’ underlying interests” as a goal in “all or almost all” with 13% identifying this as a goal in “most cases;” ): American Bar Association Section of Dispute Resolution Task Force on Improving Mediation Quality, “Mean Survey Responses by Respondent Type,” 3 (April 16, 2007) [draft—need permission of Task Force to cite] (On a scale of 1 to 5, with 1 described as “not at all important” and 5 as “essential,” “understanding parties’ interests” received a mean score of 4.29 from mediation users in response to the question “How important are the following skills, qualities, or functions for mediators to be effective?”). See also Lande & Wohl, supra n. ?? at 20; Macfarlane, *Culture Change*, supra at n. ?? at 266.

37 The exploration of interests seems to be a relatively common feature of the mediation of environmental disputes, the reform of public institutions, and other public policy disputes, which also are the sorts of cases that are not easily resolved by civil litigation. See Lon Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978) (explaining the value of “knowing when . . . polycentric elements have become so significant and predominant [in a dispute] that the proper limits of adjudication have been reached.”). Particularly, in environmental mediation, it is common to have a separate stage in which the mediator conducts a “conflict analysis” and based on interviews and documents, reports to the parties regarding “what the conflict is.” See Statement of mediator Howard Bellman of Madison, WI in Dedham, MA (June 18, 2006). See also Lawrence E. Susskind, *Consensus Building and ADR*:}
mediation. It is also noteworthy that some court-connected mediation programs’ descriptions or rules include language that explicitly references interests, and a small set of courts can even point to evaluation results that evidence the helpful use of underlying interests in court-connected mediation sessions.

We fear, however, that these are exceptions and that the vast majority of court-oriented, non-family civil mediations continue to employ the same narrow problem definition that typically prevails in lawyers’ negotiations of bread-and-butter cases. Most lawyers continue to prefer retired judges or experienced litigators with relevant substantive expertise to serve as their

Why They Are Not the Same Thing, in Handbook of Dispute Resolution 358, 364 (Michael L Moffitt & Robert C. Bordone, eds., 2005) (describing how mediators in consensus-building process must identify stakeholders and underlying interests, in contrast to court-connected mediators). It is also not unusual to invite a broader focus in public policy disputes or cases involving the reform of large institutions. Mediators may do something similar in other cases by conducting “premediation” sessions with each side. See Jeffrey Krivis, Improvisational Negotiation: A Mediator’s Stories of Conflict About Love, Money, Anger—And The Strategies That Resolved Them [pinpoint] (2006). Another alternative would be including such caucuses in the mediation or urging the parties to introduce deeper aspects of their conflict in joint sessions. See Part II.B.2. infra.

38 The local rule of the U.S. District Court of the Eastern District of New York, for example, states that the mediator “helps parties articulate their interests and understand those of the other party” and that “mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.” E.D.N.Y Local Rule 83.11. The U.S. District Court of the Northern District of California uses similar language, providing that the mediator “helps parties articulate their interests and understand those of their opponent” and that “[a] hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.” [cite?] The local rule of the U.S. District Court of the Middle District of Pennsylvania including the following sentence in its definition of mediation: “Benefits of a mediated settlement may include reduced cost to the litigants and agreements which serve the underlying interests of the parties.” [cite?] And in the U.S. District Court of the Western District of Missouri, mediation is defined as “a process in which a neutral third party assists the parties in developing and exploring their underlying interests (in addition to their legal positions).” General Order of the Western District of Missouri, Early Assessment Program, VII.B.1.a. (effective May 9, 2002).

39 For example, 87% of mediators and 62% of lawyers surveyed about their participation in mediations under the ADR Program of the U.S. District Court for the Northern District of California said “the mediation had helped the parties identify their underlying interests, needs, and legal priorities beyond their legal positions.” Wayne Brazil, Hosting Mediations as a Representative of the System of Civil Justice, , 22 Ohio St. J. on Disp. Resol. 227, 253 (2007).

40 These types of cases have also been described as “ordinary litigation” involving individual plaintiffs. See Herbert M. Kritzer, The Justice Broker: Lawyers and Ordinary Litigation (1990); Herbert Kritzer, Lets Make a Deal: Understanding the Negotiation Process in Ordinary Litigation (1991).
mediators. Given this preference, it is not surprising that lawyers are more likely to report that
they value mediation for its potential to settle cases quickly and provide litigation-focused
"reality testing," rather than its creative potential or ability to respond to non-monetary

41 See Bobbi McAdoo, A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota, 25 Hamline L. Rev. 401, 405–6 (reporting that lawyers perceive that the most important qualifications for mediators are “substantive experience in the field of law related to case” [84.2% of respondents] and “being a litigator” [66.2%]); James J. Alfini, Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”? 19 Fla. St. U. L. Rev. 47, 66-71 (1991) (describing new techniques brought into mediation because of the use of legal professionals as mediators); Elizabeth Ellen Gordon, Attorneys' Negotiation Strategies in Mediation: Business as Usual?, Mediation Q., Summer 2000 at 228 (noting that attorneys prefer mediators who are experienced trial lawyers); Bobbi McAdoo & Art Hinshaw, The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri, 67 Mo. L. Rev. 473, 533 tbl.34 (2002) (reporting that eighty-seven percent of lawyers indicated that a mediator should know how to value a case and eighty-three percent indicated that a mediator should be a litigator); Barbara McAdoo & Nancy Welsh, Does ADR Really Have a Place on the Lawyer's Philosophical Map?, 18 Hamline J. Pub. L. & Pol'y 376, 390 (1997) (reporting that the majority of Hennepin County lawyers interviewed wanted mediators to give their view of settlement ranges); Thomas B. Metzloff et al., Empirical Perspectives on Mediation and Malpractice, 60 Law & Contemp. Probs. 107, 124-25 (1997), at 144-45 (reporting that almost seventy percent of attorneys want mediators to provide opinions on the merits of medical malpractice cases and that attorneys highly valued mediators who possessed substantive expertise in medical malpractice); Roselle L. Wissler, An Evaluation of the Common Pleas Court Civil Pilot Mediation Project, at ix (Feb. 2000) (unpublished manuscript, on file with author) (reporting that “[a]torneys had more favorable assessments of the [mediation] process and mediator and analyzed mediation was more helpful in achieving case objectives if the mediator evaluated the merits of the case and suggested settlement options”).

42 See McAdoo, A Report to the Minnesota Supreme Court supra note ???, at 429 (reporting that the top factors motivating lawyers to voluntarily choose mediation include saving litigation expenses (67.9%), making settlement more likely (57.4%), providing a needed reality check for opposing counsel or party (52.2%), and providing a needed reality check for own client (47.7%)); McAdoo & Hinshaw, supra note ???, at 512-13 (reporting that top factors motivating lawyers to choose mediation are: saving litigation expenses (85%), speeding settlement (76%), providing a needed reality check for opposing counsel or party (69%), making settlement more likely (69%), helping everyone value the case (69%), and providing a needed reality check for own client (67%)); Donna Stienstra et al., Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990, 187 (Federal Judicial Center 1997) (attorneys choose mediation to resolve the case more quickly); Keith Schildt et al., Major Civil Case Mediation Pilot Program: 17th Judicial Circuit of Illinois, Preliminary Report (N. Ill. Univ., 1994). See also Tamara Relis, Consequences of Power, 12 Harv. Negot. L. Rev. 445, 473-475 (2007).

43 See McAdoo, A Report to the Minnesota Supreme Court, supra note ??, at 429 tbl.10 (reporting that about thirty-one percent of attorneys voluntarily choose mediation to "increase potential for creative solutions"); Metzloff et al., supra note ??, at 151 (noting that during the course of a study involving court-ordered mediation in the malpractice context, parties rarely considered "creative solutions"); Gordon, Attorneys' Negotiation Strategies, supra note ??, at 384. One survey showed that less than twelve percent of "plaintiffs settling at a mediated settlement conference received nonmonetary relief." Id. In contrast, nearly thirty percent of plaintiffs who opted for adjudication "received some type of nonmonetary relief." Id.; Stevens H. Clarke & Elizabeth Gordon, Public Sponsorship of Private Settling: Court-Ordered Civil Case Mediation, 19 Just. Sys. J. 311, 321 (1997) (research finding that in North Carolina, mediated settlement outcomes were indistinguishable from conventional negotiation settlements). But see Julie Macfarlane, Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation, 2002 J. Disp. Resol. 241, 272-77 (2002) (observing that when parties attend mediation, many lawyers perceive that the outcomes are changed to reflect the parties’ needs and interests).
concerns. The lawyers, not the clients, dominate the discussions that take place in most mediation sessions, and in most personal injury and medical malpractice cases, the actual defendants do not even attend. Meanwhile, most mediation sessions are dominated by the use of settlement-focused caucus, rather than joint sessions designed to promote parties’ mutual understanding.

44 See Deborah Hensler, “The Real World of Tort Litigation,” in Everyday Practices and Trouble Cases at 156-66 (A Sarat et al., ed., Northwestern University Press, 1998), reprinted in Deborah R. Hensler, The Real World of Tort Litigation 158-59 (RAND 1998) (contrasting tort plaintiffs’ desire to vindicate their rights and to use the legal system with lawyers’ focus on monetary concerns); Gordon, Attorneys’ Negotiation Strategies, supra note ??, at 384 ("[M]ost attorneys (56.1 percent) feel that litigants are not necessarily involved in these suits to satisfy some sense of justice; instead, they think litigants are concerned about money.")
45 See, e.g., Gordon, Attorneys' Negotiation Strategies, supra note ??, at 383 ("[A]ttorneys rather than disputants are unquestionably the main negotiators in mediated settlement conferences."); Gordon, Why Attorneys Support Mandatory Mediation, 82 Judicature 224, 227 (1999) (reporting that in observed mediations, lawyers dominated negotiation, the minority of clients who did "play active roles" were "supporting rather than starring players," and that three-quarters of responding attorneys disagreed with the statement, "Litigants should be the most active participants in mediation, with attorneys standing by to offer legal advice."); McAdoo & Hinshaw, supra note ??, at 523 tbl.32 (reporting that fifty-one percent of lawyers perceive that mediators speak primarily with or to the lawyers, but forty-two percent of lawyers perceive that mediators encourage the clients to speak for themselves); Metzloff et al., supra note ??, at 123-25 (discussing the limited involvement of plaintiffs and defendants during medical malpractice mediation sessions). But see McAdoo, A Report to the Minnesota Supreme Court, supra note ??, at 435 tbl. 14 (reporting that nearly eighty-percent of attorneys perceive that mediators always or frequently encourage clients to participate in the mediation process).
46 See Tamara Relis, Consequences of Power, 12 Harv. Negot. L. Rev. 445, 457 (observing that lawyers rarely invite defendant doctors to attend mediation sessions); Sharon Press, Institutionalization of Mediation in Florida, supra n. ?? at 62 (reporting anecdotal evidence that parties increasingly do not attend mediation sessions in Florida); Thomas B. Metzloff et al., Empirical Perspectives on Mediation and Malpractice, 60 Law & Contemp. Probs. 107, 124-25 (1997). But see Bobbi McAdoo, All Rise, The Court Is In Session: What Judges Say About Court-Connected Mediation, 22 Ohio St. J. of DR 377, 398-99 (2007) (observing that one of the top reasons that judges order cases to mediation is because they believe the process “gets clients directly involved in discussions”).
47 See e.g., McAdoo, A Report to the Minnesota Supreme Court, supra note 66, at 435 tbl.14 (reporting that approximately seventy-two percent of attorneys perceive that mediators always or frequently use caucuses effectively and approximately forty-nine percent of attorneys perceive that mediators always or frequently ask each side to present an opening statement); Alfini, supra note ??, at 66 (reporting that "trashers" discourage direct party communication and quickly move to caucuses); Gordon, Attorneys' Negotiation Strategies, supra note ??, at 382 ("Observations suggest that mediation conferences typically involve extensive cauicusing, a structure that supports bargaining rather than open information exchange or direct communication between the parties."); Hensler, A Research Agenda: What We Need to Know About Court-Connected ADR, Disp. Resol. Mag., Fall 1999, at 15, 17 ("After initial presentation of the dispute, evaluative mediators appear to move quickly to 'shuttle diplomacy.' Parties may not meet together again until an agreement has been struck ...."); McAdoo & Hinshaw, supra note ?? at523 tbl. 32 (reporting that approximately sixty-two percent of lawyers perceive that mediators use caucuses almost exclusively but approximately three percent of lawyers perceive that mediators use joint session almost exclusively; also reporting that about eighty-five percent of lawyers indicated that mediators ask each side to present an opening statement in joint session); McAdoo & Welsh, Does ADR Really Have a Place, supra note ??, at 391 (reporting that in "lawyer interviews, several lawyers observed that opening statements could promote unproductive adversarial posturing and thus should not be part of the typical mediation"); Metzloff et al., supra note ??, at 119 (describing the structure of mediation sessions, which typically involve a series of private caucuses). See also Richard Reuben,
The dominant practice of court-oriented mediation largely reflects the influence of the repeat players. Its consequence is that some parties—most commonly the one-shot, individual players involved in bread-and-butter cases—miss opportunities for outcomes and processes that could seem to them more and better suited to their needs.

A. An Example: The Sabia Damages Case

A poignant example comes from Barry Werth’s *Damages: One Family's Legal Struggles in the World of Medicine,* an in-depth study of a medical malpractice case that has been required reading in courses at a number of law schools. In April, 1984, Donna Sabia gave birth to twins at Norwalk Hospital in Norwalk, Connecticut. One child was stillborn; the other, who came to be known as "Little Tony," was born brain damaged and so severely compromised that he would never be able to walk, talk, or care for himself in any way. He would require extensive medical and nursing care for his entire life. Donna and Tony, her husband, worked heroically to care for Little Tony. They suffered both economically and emotionally, struggling to provide their son with the care he needed.
Three years after Little Tony’s birth, the Koskoff law firm—perhaps the leading plaintiff’s medical malpractice firm in Connecticut—filed suit in Superior Court on behalf of Donna and Little Tony against Norwalk Hospital and Maryellen Humes, M.D. Dr. Humes was an obstetrician-gynecologist who had never seen Donna before being called in to perform the delivery. The complaint alleged numerous acts of negligence involving both nonfeasance and misfeasance.\(^{50}\) In reality, neither side was quite clear about what produced Little Tony’s condition or whether either the hospital or Dr. Humes caused it or could have prevented it.\(^{51}\)

The lawyers engaged in settlement negotiations throughout the course of the litigation. In April, 1991, the Sabia's lawyers demanded a total of $15 million to settle the claims against the hospital and Dr. Humes. The hospital's insurance company, Travelers, offered $5 million, which the Sabias declined. In February, 1992, under pressure from her insurance company, Dr. Humes settled for $1.35 million. The hospital then remained as the only defendant.

While a trial was in sight, Donna and Tony Sabia hoped for vindication, some recognition of the injury that they and their son had suffered,\(^{52}\) and an end to the emotional turmoil and sense of desperation that had engulfed them.\(^{53}\) Instead of trial, though, their case went to mediation—twice.\(^{54}\) The lawyers on each side entered into the process anticipating that mediation would

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\(^{50}\) The complaint alleged that the hospital was negligent in not treating Donna's pregnancy as high risk; not having adequate procedures for twin pregnancies; and failing to follow even the procedures it did have in place. It also alleged that the hospital was negligent in providing nurse-midwives rather than physicians; ignoring the fact that the fetal heartbeat was not audible on admission; delaying the ultrasound and C-section; and not arranging for an obstetrician to attend to Donna as soon as she arrived at the hospital. The claim against Dr. Humes asserted that she failed to meet the appropriate medical standard of care in not examining Donna earlier and not delivering the twins by C-section immediately after an ultrasound.

\(^{51}\) Dr. Humes also suffered greatly, working to defend her reputation and maintain malpractice insurance coverage.


\(^{53}\) Werth at 31.

\(^{54}\) For Barry Werth’s descriptions of the mediations, see Damages, supra n. ?? at 298-99, 310-325 (the first mediation), 341-44, 356-63 (second mediation). For extensive analyses of these mediations, see Leonard L. Riskin, Teaching and Learning from the Mediations in Barry Werth’s Damages, 2004 J. Disp. Resol. 119 (2004).
encourage the other side to moderate its expectations\(^{55}\) and thus enable the parties to reach a monetary settlement. Donna and Tony, meanwhile, sought a financial resolution, particularly because they needed a good deal of money to provide around-the-clock care for little Tony. But they also wanted something more, and different. They felt a desperate need to understand what had caused Little Tony’s terrible condition.\(^{56}\) Equally important, they wanted recognition and acknowledgment of how they had suffered and how well they had coped.\(^{57}\) Neither mediation fulfilled these interests, though the second mediation produced a monetary settlement.

From the very beginning, the Sabias’ participation in mediation was severely limited. At the first mediation, Tony, Donna and Little Tony left the mediation room after they were introduced to the lawyers, the insurance company representatives and the mediator. Donna and Tony participated only in the private caucuses with their lawyers and the mediator. The case did not settle. In the second mediation, Tony insisted on being present in the joint session. His lawyer, Michael Koskoff, agreed, but only on the condition that (in Werth’s words) they “held their questions until the end.”\(^{58}\) He was worried that Tony would lose control. His apprehension turned out to be justified. Well before the end of the mediation, Tony exploded at Bill Doyle, the lead defense counsel.

According to Werth, Tony “wanted [the defense lawyers] to

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55 See McAdoo, A Report to the Minnesota Supreme Court supra note ???, at 429 (reporting that one of the top factors motivating lawyers to voluntarily choose mediation was providing a needed reality check for opposing counsel or party (52.2%)); McAdoo & Hinshaw, supra note ???, at 512-13 (reporting that one of the top factors motivating lawyers to choose mediation was providing a needed reality check for opposing counsel or party (69%)).

56 See Stephen L. Fielding, The Practice of Uncertainty 107-09, 139 (1999) (research indicates that plaintiffs in medical malpractice cases want to learn the truth about what happened and that learning what happened and holding a provider accountable are important steps in the emotional healing process for plaintiffs). [related to attribution theory? Self-other blaming?]

57 Professors Bush and Folger have written most extensively about “recognition” in the “transformative” approach to mediation that they developed. See Robert A. Baruch Bush & Joseph Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition, at 84-99 (Jossey-Bass, 1994) but even academics and mediators who do not promote or practice transformative mediation emphasize the importance of recognition. See, e.g., Nancy A. Welsh, Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value, 19 Ohio State Journal on Dispute Resolution 573, 665 (2004).

58 Werth, supra n. ?? at 357.
concede that he, Tony, had taken all the world could throw at him, and was still standing. He wanted respect. 

Tony particularly sought recognition from Doyle. He believed, incorrectly, that Doyle could not possibly understand or empathize with the Sabias’ situation.

Doyle responded to Tony’s outburst with a legal argument, which must have only confirmed Tony’s perception of the gulf between them. Ironically, Doyle could have understood Tony’s predicament. He had grown up with a sibling who needed extensive care. Years later, Doyle said that he felt he could not afford to allow himself to feel or express empathy with Tony because that would have interfered with his ability to represent his client.

After Tony’s explosion—or cry for recognition, depending on one’s point of view—the co-mediators “threw everyone out” of the room and began to caucus with each other. They wanted to discuss what they considered the “key issue”—causation. Eventually, this second mediation produced a settlement with the hospital for $6.25 million. This resolution, combined with the earlier settlement with Dr. Hume and Tony’s hard work, gave the Sabias’ enough money to support Tony and keep their family together. But it also left them in a raw emotional state, feeling confused and victimized by their son’s disability and the mediation itself. Donna and Tony were angry, in part because the mediations totally ignored their interests in learning about what really

59 Werth, supra n. ?? at 359-60
60 Interview of William Doyle by Leonard Riskin, Columbia, MO (April 11, 2003). Tony never learned about Doyle’s family history until he read the book about his case, which, ironically, gave him the recognition he thought he would get from his lawsuit or mediation.
61 Werth supra n. ?? at 360.
62 Werth supra n. ?? at 360. [Need to check whether this is a quotation]
happened and in getting respect and acknowledgement for what they had gone through and how well they had performed.

One way to understand what happened here is through a framework described by Professor Bernard Mayer. He suggests exploring conflict along three dimensions—behavioral, cognitive, and emotional—and argues that full resolution requires resolution along all three dimensions. All the participants achieved behavioral resolution in the sense that they stopped contesting this case. And on the cognitive dimension, which involves how the parties understand what happened and how they understand their settlement, most of the repeat players achieved resolution even though no one really understood what led to Little Tony’s disabilities. In author Barry Werth’s words:

The question of exactly what Travelers had paid for remained unresolved.

Koskoff believed absolutely it was for Norwalk Hospital’s negligence in causing Little Tony’s brain damage in 1984. Travelers and Doyle, just as vehemently thought the insurer had paid in order to avoid paying much more if a jury agreed with Koskoff.

Thus, plaintiff’s lawyers understood the settlement as an admission of liability. Defendant and its insurer and lawyer understood the settlement as risk management. Despite the repeat players’ differing interpretations of the agreement, it resulted from and accorded with conventional practices and valuation schema that they generally understood and accepted; in other words, they seemed cognitively content with “knowing” what happened only in the limited the sense that they could make, and believe, adversarial arguments about what happened. The behavioral

64 See id., at [need pinpoint].
65 Werth, supra n. ?? at ??.
and cognitive resolutions that the repeat players achieved also enabled emotional resolution, at least for most of them. 66

In contrast, the one-shot players involved in these mediations never achieved cognitive comfort with the fact that they did not learn what really happened or why. As a result, they also did not achieve emotional resolution. After the Christmas Eve settlement, the Sabias thanked their lawyers, but:

[T]hey were too conflicted to be settled. . . . “You mean I’m going to walk out of here with a check and that’s going to be it? Is that all it means?” Tony asked, his voice steeped in remorse. Already he was “kicking myself in the ass, because I watched that guy [Doyle] agree with everything Michael [Koskoff] said.” They had gotten it over with, Donna would say, but for what purpose, and at what price, she and Tony still didn’t know.67

The essential reason that neither mediation provided Tony and Donna with the knowledge, respect and acknowledgment that they sought—and which might have enabled them to achieve cognitive and emotional resolution—is that none of the professionals considered these appropriate goals of the mediation process.68 Instead, the lawyers, insurance adjusters, and mediators adopted a slender formulation of the questions to be resolved: What monetary result,69

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66 At least one lawyer on the defense side, though, did not reach cognitive resolution or emotional resolution. Werth observed that “[u]nlike Doyle, [Beverly Hunt had] been unable to put her identification with her client aside, and the mediations had proved unsupportable—‘the most castrating experience of my life,’ she calls them.” Werth supra n. ?? at 368.

67 [Need pinpoint cite.] Other books also describe plaintiffs’ dissatisfaction with processes that produce monetary settlements but do not respond to other psychological and emotional needs. See e.g., Jonathan Harr, A Civil Action (1995); Gerald M. Stern, Buffalo Creek Disaster (1976). See also, Jonathan R. Cohen, Advising Clients to Apologize, 72 S. Cal. L. Rev. 1009, 1016-23 (1999) (observing that apologies provide a variety of benefits to injured parties, but also can benefit offenders).

68 It likely was impossible for them to have gotten an accurate understanding of what actually caused Little Tony’s injuries. In our view, no one actually knew the cause, though the lawyers on both sides, of course, argued as if they did.

69 Arguably, this focus is consistent with a desire to emulate the form of substantive justice produced by trial. See Bobbi McAdoo & Nancy A. Welsh, Look Before You Leap and Keep on Looking: Lessons from the
or range of results, would a trial produce and what financial and other costs would the parties incur before completing a trial? What kind of financial settlement was feasible for both sides? For the repeat players in the room, the only information that seemed relevant was that which would bear on these questions. To them, procedures that excluded other sorts of information seemed appropriate.

Could the definition of “the problem” have been different? Should the definition have been different? We now turn to these questions.

B. Finding the “Correct” Problem definition in the Sabia Mediations

In this section, we illustrate in more detail how the mediations failed to give the Sabias some of what they thought they needed and how the mediations might have been structured so as to respond to such needs. We do not claim that Donna and Tony would necessarily have been better off with such adjustments, though we believe they would have been happier with the process and outcome.

The following discussion will be clearer if we tell you how we are using three common terms: positions, interests, and issues. A position is essentially a statement or a demand or a want. When plaintiffs’ lawyer Michael Koskoff demanded multiple millions of dollars on behalf

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71 We humbly acknowledge the burgeoning body of research suggesting that people are not very good at predicting what will make them happy in the future. See Daniel Gilbert, Stumbling on Happiness (Alferd A. Knopf 2006); Chris Guthrie & David Sally, The Impact of Impact Bias in Negotiation, 87 Marq. L. Rev. 817 (2004).
of his clients, he was asserting a position.\textsuperscript{72} An \textit{interest} is a need or goal that motivates someone to assert the position. In the Sabia case, that positional claim for money was meant to serve a number of interests, including Tony and Donna’s interest in supporting Little Tony in particular and their family in general. But, as we will see, it did not, and was not intended to, serve some of their other interests, such as knowing what really happened and receiving recognition from others of how well they had performed in tragic and challenging circumstances.\textsuperscript{73} An \textit{issue}, in this context, is a question that could be included as part of the subject-matter or problem definition in a dispute resolution procedure. For example, and as we illustrate more fully below, in the negotiation to settle a case such as this one, the focus could be on litigation issues, business or other economic issues, personal “core” issues, or community issues. If the problem definition is limited to litigation and economic issues, then the procedures adopted may allow no room for other interests.

1. The Problem Definition Continuum

The problem definition or subject matter of a mediation can be depicted along a continuum running from narrow to broad, as shown in Figure 1.\textsuperscript{74} A narrow focus means that a small number of issues will be relevant. A broad problem definition permits the inclusion of a diverse array of issues and typically allows more readily for \textit{explicit} attention to underlying interests. The particular sequencing of potential issues along the continuum usually is affected

\textsuperscript{72} See Roger Fisher, et al., \textit{Getting to Yes: Negotiating Agreement Without Giving In} (2\textsuperscript{nd} ed., 1991) at [pinpoint.]

\textsuperscript{73} We are distinguishing here between recognition of the harm that their son had suffered—which arguably was acknowledged through the provision of monetary compensation—and recognition of his parents’ heroic efforts to manage their lives.

\textsuperscript{74} This is a modified version of previously published graphic depictions of the Problem – Definition Continuum. Riskin, \textit{Understanding Mediators’ Orientations}, supra n. ?? at [pinpoint].
by the context within which the mediation occurs. In other words, the context helps to determine which set of issues the participants are most likely to view as central or peripheral to dispute resolution and decision making. As we will explain more fully below, the Sabia mediations focused primarily on Point I, Litigation Issues and at least implicitly on Point II, Business/Economic Issues; this is usual in the kinds of mediations we are discussing. It gave no attention to Point III, Core Issues (which we elaborate below) or Point IV, Community Issues--i.e., those that would have affected a wider community, such as the community’s interests in fostering better prenatal care for families like the Sabias.\textsuperscript{75}

Each point on the problem definition continuum may offer opportunities for addressing any of the dimensions of conflict—behavioral, cognitive, emotional--depending on the circumstances of the case and needs of the participants.

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\textbf{Problem-Definition Continuum}
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\caption{Problem-Definition Continuum}
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\textsuperscript{75} Such issues do not generally arise in the court-oriented mediations that are the focus of our article, in part, because the persons or entities that would raise them are rarely parties. These are individual lawsuits that focus on individual rights. See Kreitzer, Adversarial Legalism, supra n. ?? at ???. Nonetheless, the Sabias might have raised such issues had they understood that they could have done so.
Point I. Litigation Issues. This represents the principal, explicit problem definition that held sway in the Sabia mediations. In the parenthetical accompanying that point, the symbols “M, Ds, Ls” indicate that the mediators, the lawyers, and defendants (particularly, the representatives of the insurance company) thought that this was the appropriate focus.76

Point II. Business/Economic Issues. Economic impacts certainly influence the development of law in general, the assessment of damages in particular cases and parties’ negotiating options. Therefore, regardless of the extent to which these issues were explicitly raised in the mediation sessions, it is very likely that they had at least a significant indirect influence upon both the hospital’s offers and the Sabias’ demands. For example, the Sabias were dealing with serious economic needs in order to support Little Tony and maintain a reasonable standard of living for their family.77 They believed public funding and services available to them were inadequate to meet their son’s needs.78 The Sabias’ economic instability must have affected their ability to choose freely between settling their lawsuit and waiting for a fully-responsive resolution.

Defense attorney Doyle tried to satisfy what he assumed to be the plaintiffs’ interests. His first offer was a structured settlement of $1.7 million, with an initial payment of $700,000 and $100,000 invested in annuities that would yield $60,000 per year for Little Tony’s lifetime. In addition, Travelers offered to pay $12,500 each year for four years for college tuition for the Sabias’ other two children, not realizing that they had three other children.79 Of course, the hospital and its insurer, Travelers, also sought to protect their own economic and business

76 See William L. F. Felstiner, et al., The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…, 15 Law and Society Review 631, [need pinpoint] (1980-81) (observing that whatever harm or dispute a party brings to a professional, the professional will transform the harm or dispute so that the professional’s expertise is appropriate for its resolution.).
77 See Werth, supra n. ?? at ??.
78 [Need to check book for Len’s recollection that there were some social service programs, of which they were never aware, that may have been available to the Sabias.]
79 Werth, supra note ____ at 319
interests. The hospital’s lawyers and other representatives, for example, had to consider the financial, personnel and future business risks presented by the case, as well as how any resolution would affect their reputation and ability to manage their services and avoid or discourage litigation. Thus, these issues likely were incorporated, implicitly or explicitly, into the subject matter of the mediation session.

Point III. Personal “Core” Issues. Core issues, as we use the term, are based on the five “core concerns” that Roger Fisher and Daniel Shapiro tell us are shared by all negotiators. The five “core concerns”—which, for our purposes are comparable to interests—are autonomy, affiliation, appreciation, status and role. Everyone wants to have freedom to decide matters that are important to them (autonomy), to feel a sense of connectedness (affiliation), to have others acknowledge the merit of their thoughts, feelings and actions (appreciation), to receive full recognition of their standing (status) and have a fulfilling role. Core concerns and emotions are directly related. Satisfaction of one’s core concerns tends to promote positive emotions. Failure to satisfy one’s core concerns tends to promote negative emotions. It is likely to be overwhelming to deal with the multiple, interacting, and constantly-changing emotions that occur during a negotiation. So, instead of attending directly to emotions we should attend to the core concerns that give rise to them. Fisher and Shapiro suggest using concerns both as a

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81 We must note that Daniel Shapiro is somewhat wary about the using the terms interchangeably. He explains: Some people have described the core concerns as core interests, and I think it could make sense. From my own perspective, however, the word "concerns" calls forth a more emotional sense, whereas "interests" seems a bit more business-like/political in its historical use and nature. . . . An unmet concern. . . can be seen clearly to trigger an action tendency (and concomitant emotion). An interest (at least in terminology) seems to be a bit less intrinsically emotionally charged.
Email message from Daniel Shapiro, Harvard Law School, to Leonard Riskin (June 10, 2007). [Ask Dan for permission to publish this.]
82 Fisher and Shapiro, Beyond Reason 16.
83 Id. at 12-14.
“lens” to foster understanding and as a “lever” to promote positive emotions in ourselves or in other negotiation participants. Positive emotions generally help us negotiate more effectively and more collaboratively. Of course, the emotions precipitated by core concerns will inevitably affect negotiation, even if they are not formally considered. If the problem definition of a mediation includes core issues, however, then the mediation also should make explicit room for addressing emotions by addressing core concerns. This could enable better negotiation and foster emotional resolution.

For Donna and Tony, core concerns likely arose in connection with both the injury to Little Tony and its effects (“life/dispute-related core concerns”), on the one hand, and, on the other, the actual mediations (“mediation-related core concerns”). The life/dispute-related core interests included autonomy in the sense of their ability to choose how they would function as an independent and self-sufficient family unit, and affiliation—the ability to feel connected as a family and as part of the larger community. They clearly thought that the situation made it extraordinarily difficult to play the role of parent and provider and wanted others to appreciate the enormity of what they had endured and how valiantly they had performed. They may also have felt that the situation threatened their social status as a normal and self-sufficient family. The Sabias’ need to know what actually caused Little Tony’s injuries—and why, and whether the tragedy might have been avoided—could have drawn on any number of core concerns, especially autonomy. All of this produced a good deal of anger, despair, fear, and other negative emotions. The Sabias brought these concerns about their life situation, and the

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84 Id. at ?? [pinpoint].
accompanying emotions, into the mediations. In addition, the same core interests arose in connection with the mediation processes themselves. As we will show below, their concerns for appreciation, affiliation, autonomy, status, and role—in the mediation process—were largely ignored by the repeat players.

The professionals—mediators, lawyers, and other representatives and employees of the defendant hospital and insurer—also had core concerns. For purposes of simplicity, we will focus primarily on the lawyers and the mediators. Each lawyer, for instance, had needs—both inside and outside the mediation—to be appreciated by others for his or her professional skills and performance; for affiliation with others (on the same side, primarily); for autonomy (e.g., to be able to act independently); for status; and to have a meaningful role. The mediators had similar needs. The mediation processes, by and large, served these needs. In contrast, they did not serve the core needs of the Sabias, the only one-shot players in the room.

In both mediations, the operational problem definition focused explicitly on the litigation issues and implicitly or indirectly on related economic issues. In other words, the mediation reflected a “normative framing” based on the application of litigation standards. This framing certainly met the expectations of the repeat players. And since this was a court-oriented mediation and the courts are responsible for upholding legal standards, one could argue that such a “norm-enforcing” mediation was entirely appropriate. But the Sabias—who were the only one-shot players in the room, the participants affected most directly and personally by Little

87 The need for autonomy varies with context. For instance, in the mediation, the need for autonomy concerns expression of self and decision-making; outside the mediation, the need for autonomy may be personal and professional—e.g., being able to regulate one’s own conduct, independent of clients, other lawyers or governmental regulators.

88 See Welsh, Stepping Back Through, supra n. ?? at 667-669 (contrasting the “different, yet equally legitimate, normative frames” used by parents and school officials in special education mediation).

Tony’s disability and the parties least able to afford to wait for trial—wanted the mediation to address their core interests as well. This did not happen.

The outcome of the settlement did address some of their life/dispute-related core interests. By providing a substantial amount of money, the settlement helped address part of their core interest in autonomy in their lives. It may also have enhanced part of their core interests in role (as parents and providers) and affiliation (having the resources to keep their family together). But the Sabias wanted the mediations also to address other of their dispute/life-related core interests. The processes failed to respond to their autonomy-related need to know what really happened and why they were now living with dramatic life changes that they had not chosen.

The mediation processes also failed to consider the Sabias’ mediation-related core interests. The procedural choices made by the lawyers and (apparently) not questioned by the mediators—that they would not attend or speak in most of the joint sessions, and that they would have no role in deciding procedures or what would be discussed—ignored their mediation-related core interests in autonomy, status and role. This limited participation also restricted their opportunities to receive the appreciation of others, though the defense apparently decided not to make such expressions in any event.90

In stark contrast, the mediations were structured to address the mediation-related core interests of the professionals. The repeat players were able to play the roles and exercise the autonomy to which they were accustomed—and which they apparently preferred. Most law students and lawyers prefer to be dominant91 and naturally tend to make decisions based on the

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90 See supra, text accompanying note ___[about Bill Doyle].
91 See generally Susan Daicoff, Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism, 46 AM. U. L. REV. 1337, 1349 (1997). Research has found that law students tend to come from an elite socio-economic background, which might explain the need for dominance and
application of rules and standards, rather than more nebulous values or impacts.92 Most lawyers also prefer not to deal with emotional issues, their own or others,93 and place great importance themselves on financial remuneration.94 The restricted problem identification we have described, therefore, is likely to have matched the lawyers’ own psychological tendencies.

In addition, the mediation sessions fostered or at least accommodated the lawyers’ core interests, both in and out of the mediation. Lawyers exercised autonomy, along with the mediators, in selecting the problem definition and procedure. All concerned had to appreciate the lawyers’ status and expertise in law, and the lawyers exercised a dominant role.95 If the

expectation/protection of privilege. Id. at 1355. See also RONIT DINOVITZER, ET AL., AFTER THE J.D.: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 20 (The NALP Foundation for Law Career Research and Education & American Bar Foundation, 2004) (observing that the newly admitted lawyers in its study “come generally from relatively privileged socioeconomic backgrounds” though “[f]ully 21% of respondents’ fathers and 28% of respondents’ mothers did not attend college; 15% of the fathers had blue-collar occupations, and 15% of respondents’ parents were born outside the United States….The more selective the law school, the more likely it is to educate the children of relative privilege, and the less selective schools are notably more accessible to the less privileged students.”) Interestingly, research has also shown that high LSAT scores are highly correlated with factors such as socioeconomic status and even zip code. See Richard Delgado, Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit), 34 U.C. DAVIS L. REV. 593, 601-02 (2001).


93 See Daicoff, supra n. ?? at 1349. A 1960 study found that law students’ early childhoods were characterized by authoritarian male dominance, self-discipline, school achievement and reading. Id. at 1350. See also Lawrence Krieger, The Hidden Sources of Law School Stress: Avoiding the Mistakes that Create Unhappy and Unprofessional Lawyers 9-10 (Publisher? Year?).

94 See Daicoff, supra, n. ?? at 1360-62. But see Adam Neufeld, Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School, 13 Am. U.J. Gender Soc. Pol'y & L. 511 (2005) (study shows women in law schools were more likely to identify altruism as a priority in choosing a career and also more likely to choose public interest jobs).

lawyers performed their professional roles well, their clients would *appreciate* them and demonstrate the value of their *affiliation*, with expressions of gratitude and the payment of substantial fees. Moreover, this could lead to more legal work for them, which would foster all of their life-related core interests. The processes similarly accommodated some of the mediators’ core interests—e.g., status, role and autonomy. In the first mediation, for example, the mediator had enough autonomy to refuse to make predictions about what would happen in court. Similarly, it seems that the narrow focus of these mediations met many of the core interests of the insurance company and its claims representatives, whose role was to manage the financial and precedential risk posed by the Sabias’ lawsuit.

In light of all of the repeat players’ important core interests, it should not be surprising that they would expect court-oriented mediation to operate within the procedural and substantive “shadow of the law”\(^{96}\) or that lawyers would seek guidance from the “lawyer’s standard philosophical map.”\(^{97}\) Nor should we be surprised that court-oriented mediation exhibits a symbiotic relationship with its repeat players. Indeed, sociological theories and research affirm


\(^{97}\) *See* Riskin, *Mediation and Lawyers*, supra n. ?? at 44-45. Riskin observes:

> What appears on the map is determined largely by the power of two assumptions about matters that lawyers handle: (1) that disputants are adversaries—i.e., if one wins, the other must lose—and (2) that disputes may be resolved through application, by a third party, of some general rule of law. . . .

> On the lawyer’s standard philosophical map. . . the client’s situation is seen atomistically; many links are not printed. The duty to represent the client zealously within the bounds of the law discourages concern with both the opponent’s situation and the overall social effect of a given result.

Moreover, on the lawyer’s standard philosophical map, quantities are bright and large while qualities appear dimly or not at all. When one party wins, in this vision, usually the other party loses, and, most often, the victory is reduced to a money judgment. This “reduction” of nonmaterial values—such as honor, respect, dignity, security and love—to amounts of money, can have one of two effects. In some cases, these values are excluded from the decision maker’s considerations, and thus from the consciousness of the lawyers, as irrelevant. In others, they are present but transmuted into something else—a justification for money damages. . . . The lawyer’s standard world view is based upon a cognitive and rational outlook.
that social structures—including dispute resolution processes—inevitably influence and are influenced by those who seek access and, through their actions, recreate the structures.98

We also do not mean to suggest that the operant problem definition in this case was necessarily the wrong one. We do mean to point out that the problem definition was narrow and that the lawyers, claims adjusters and mediators set that problem definition without giving the Sabias the opportunity to exercise any influence in regard to it. The repeat players assumed the standard problem definition, rather than customizing it to fit the concerns of the actual plaintiffs (or perhaps, defendants). In addition, also without consultation with the Sabias, the lawyers and mediator established a mediation procedure that had the effect of excluding the Sabias from the kind of direct participation that would have been meaningful to them. Now, the Sabias’ lawyers did this with the best of intentions—to protect their clients’ legal and financial interests. And

98 See Anthony Giddens, The Constitution of Society: Outline of the Theory of Structuration 19 (1984) (“The rules and resources drawn upon in the production and reproduction of social action are at the same time the means of system reproduction (the duality of structure.”); Anthony Giddens, Studies in Social and Political Theory 118 (1977) (“[S]tructure is the generative source of social interaction but is reconstituted only in such interaction.”) (cited in Clinton W. Francis, Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840, 80 NW. U. L. Rev. 807, 869 (1986)) (“In mobilizing structure as the medium of social interaction, actors reproduce the structure. The idea that structure helps constitute action and is at the same time reconstituted by action—the notion that it is both the medium and the outcome of action—is expressed in the concept of the ‘duality of structure.’ This concept replaces the dualism of subject (the knowledgeable actor) and object (structure) entrenched in traditional social theory, and exemplified in functionalism, structuralism, and economic analysis. Structuration theory opens the way for the development of a theory in which the subject interacts in a reciprocal fashion with structure, without determinatively attaching causal primacy to either.”). See also Arthur F. McEvoy, A New Realism for Legal Studies, 2005 Wis. L. Rev. 433 (2005) (describing New Legal Realism as assuming the “reciprocal, recursive... interaction [among] law, experience, and culture” that is inspired by Giddens’ theory of structuration; offering the example of scholarship regarding “‘girl watching’ in the workplace” which “excuses itself as a kind of harmless masculine play--boys just horsing around—but... also ratifies and reproduces a system of social dominance[,...] ...presses its subjects, blinds the perpetrators to the harm they do, and enervates potential response on the part of anybody concerned. Entitlement, behavior, and consciousness interact-reciprocally and recursively.”); Daniel Markovits, Adversary Advocacy and the Authority of Adjudication, 75 Fordham L. Rev. 1367, 1384-5 (2006) (“[A]n engagement with the legal process does not just translate or test disputants’ claims but fundamentally reconstitutes them, specifically by transforming brute demands into assertions of right, which depend on reasons and therefore by their nature implicitly recognize the conditions of their own failure. ... [T]he transformative effect on a dispute of the legal process is potentially so powerful... that the parties abandon any of their demands that cannot be accommodated within the transformation. When this happens, the legitimacy of the legal process naturally follows, because the reconstructed disputes and the resolutions that the legal process proposes have been tailored to suit each other... “) See also, Geert Hofstede, Culture’s Consequences 11-12 (2d ed., 2001) (illustrating how ecological factors lead to societal norms which then lead to societal institutions with particular structures and ways of functioning; further illustrating how these become mutually reinforcing and result in cultural stability; finally illustrating that outside forces—e.g., forces of nature or man—can produce change).
given the realities of the situation, including the potential effect of Tony’s strong and unruly emotions, we do not mean to suggest judgments made by his lawyer and the other professionals were wrong or unwise. We mean merely to highlight the huge gap between the predispositions as to problem definition held by Tony and Donna, on the one hand, and the repeat players, on the other.

The lawyers and mediators apparently established the problem definition and procedures without any explicit discussion, acknowledgement or, possibly, even awareness that the problem definition could be broader. Figure 2 illustrates our assessments of the differences among the participants in their predispositions or aspirations concerning the problem definition and who should exercise influence in determining the problem definition.

**Predispositions/Aspirations re: Problem-Definition**

The horizontal axis in Figure 2 is the same as the horizontal axis in Figure 1, illustrating a narrow problem definition at the left and a broad problem definition at the right. The vertical
axis adds a new dimension: who exercises influence in “setting” the problem. Points near the top of this axis show that the repeat players—including the lawyers, the lawyer-mediators and the insurance claims adjuster—would exercise most of this influence. Points toward the bottom of this axis show that the one-shot players would exercise such influence. Point A shows that the mediator (M), representatives of the defendants (D) and the lawyers (PL, DL) thought that the problem definition should be narrow, in accordance with their customary practices in negotiation and mediation; each also assumed—consciously or unconsciously—that they and the other repeat players would decide upon, or exercise influence over, the problem definition. Point B depicts the plaintiffs’ predispositions, which differed dramatically from those of the repeat players. The plaintiffs wanted a broad problem definition and hoped to exercise influence in establishing it. In fact, Tony tried to exert such influence, but his emotional outburst was ineffective. Thus, Point A also identifies the actual problem definitions in the Sabia mediations and the actual influences—the repeat players’ preferences—that brought it about.

2. Why Problem Definition Matters

We believe that this kind of disparity between the aspirations of the one-shot players and the repeat players is quite common, perhaps even the norm, in mediations of the court-oriented


100 Norms and practices are much less likely to diverge between lawyers and their repeat corporate clients. See David B. Wilkins, Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics, in Everyday Practice and Trouble Cases (A. Sarat, ed., Northwestern University Press 1997); John P. Heinz & Edward O. Laumann. Chicago Lawyers: The Social Structure of the Bar (1982) (discovering two worlds of lawyers; the group of lawyers that serves higher status and corporate clients has higher status, higher incomes but less autonomy; the group of lawyers that serves individual, “ordinary” clients has lower status and income but greater autonomy). See also Julie Macfarlane, The New Lawyer, (forthcoming, 2007).

cases we have been discussing; moreover the repeat players typically assert their influence to impose a narrow problem definition and mediation procedures that support a narrow problem definition, without giving the one shot players much opportunity, if any, to influence the problem definition and procedures or to play a significant role, if any, in the mediation.

A recent study of 64 court-oriented medical malpractice mediations in Ontario provides empirical support for these propositions.\textsuperscript{102} Despite a rule requiring parties to attend court-connected mediation sessions, it actually was quite rare for physicians to attend; their lawyers commonly invoked an opt-out procedure. Using interviews, questionnaires, and observations, Tamara Relis found that the lawyers representing plaintiffs and defendant physicians shared a common set of attitudes and beliefs about the purpose of the mediations and about whether physicians should attend. Their attitudes and beliefs were directly contrary to those held in common by plaintiffs and physician defendants. Lawyers on both sides tended to oppose attendance of physicians despite potential “extra-legal” benefits to both plaintiffs and physicians.\textsuperscript{103} The lawyers generally believed that the purpose of the mediations was to try to settle the case through a monetary agreement or (from defense counsel’s perspective) encourage the plaintiff to abandon the claim. The primary reasons they gave for opposing attendance by physicians was that physicians did not “instruct on money” and that their presence could invite an emotional dimension that might interfere with settlement.\textsuperscript{104} Physicians’ lawyers also believed that their clients did not want to attend.\textsuperscript{105} In stark contrast, every plaintiff and every physician believed that defendant physicians should attend because this would allow the plaintiff and defendant to communicate, which they thought should be a central aspect of the

\textsuperscript{102} Tamara Relis, Consequences of Power, 12 Harv. Negot. L. Rev. 446, 452-3 (2007).
\textsuperscript{103} \textit{Id.} at 457-458.
\textsuperscript{104} \textit{Id.} at 461.
\textsuperscript{105} \textit{Id.} at 481.
mediation. Relis concludes that the lawyers saw the mediation as primarily their process, i.e., to help them reach settlement, and only secondarily or incidentally serving any emotional or psychological needs of the parties.

For clients, particularly one-shot clients, what consequences follow from the dominance of the repeat players’ predispositions in court-oriented mediation?

First, the narrow focus preferred by the repeat players can provide certain important protections for clients and useful boundaries for the lawyers and mediator. For example, if parties are uncomfortable in or incapable of dealing with personal core issues or cannot use such discussion to move toward an appropriate resolution, then an exclusively litigation focus offers a rational, socially-supported and peaceful mechanism for decision-making. Indeed, in a country that is said to be governed by the rule of law rather than the arbitrary will of men, it is especially valuable for lawyers to anchor dispute resolution in the norms provided by our laws.

106 Interestingly, the lawyers who represented hospitals tended to see good reasons for physicians to attend. Id. at 463. Perhaps significantly, these lawyers also were more likely to be women than the lawyers representing the plaintiffs or the defendant physicians. However, these lawyers did not want hospital employees, such as nurses, to attend. They supported this attitude with the same sorts of reasons that physicians’ lawyers had used to justify excluding their clients: the hospital employees did not “instruct on money” and might bring in emotions that could interfere with settlement. Id. at 464-68. 
107 Id. at 473.
108 See Ackerman, supra, n. ?? at [pinpoint]
109 See Jean Sternlight, Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad, 56 DePaul L. Rev. 569, 572 (2007) (“The strength and appeal of the rule of law critique should not be underestimated. In the United States, even many of ADR’s staunchest advocates recognize that there are circumstances in which disputes are better resolved publicly, through litigation, rather than through negotiation, mediation, arbitration, or some other private means.”); Jean Sternlight, Creeping Mandatory Arbitration: Is It Just?, 57 Stan. L. Rev. 1631, 1662 (2005) (“From a rule of law standpoint, we hope that our public litigation system will ensure predictable, fair, and consistent interpretation of the society's laws. The fundamental premises of the “rule of law” are that similarly situated persons should be treated similarly under the law and that persons of privilege or influence should not receive special treatment”); McAdoo & Welsh, Look Before You Leap, supra n. ?? at 404; Deborah Hensler, Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System, 108 Penn St. L. Rev. 165, 196 (asserting that “[t]he public spectacle of civil litigation gives life to the ‘rule of law.’ To demonstrate that the law’s authority can be mobilized by the least powerful as well as the most powerful in society, we need to observe employees and consumers successfully suing large corporations and government agencies, minority group members successfully suing majority group members. . .); Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, [pinpoint] (1984) (“[c]ivil litigation is an institutional arrangement for using
Second, though—and this is our main point—the untempered dominance of the repeat players’ predispositions sometimes will deprive clients and lawyers of opportunities for better processes and better outcomes—robbing mediation of its greatest potential for helping parties. Some may question whether it matters that mediation may not be achieving its entire potential. When clients bring their disputes to lawyers, lawyers take primary responsibility for the means that will be used to achieve their clients’ objectives. If lawyers exercise that responsibility by invoking a narrow perspective on the problem definition and choosing mediators who implement that focus, thus determining the preferences of the market, what is the harm?

Our main concern is that the choice to create such a narrowly-focused mediation does not necessarily meet the needs of all clients—particularly the one-shot players who are often involved in personal injury, medical malpractice, employment, contract and administrative cases—and this choice rarely is the result of deliberation or even consultation that includes them.110 Instead, this approach to mediation usually rests on lawyers’ habitual ways of seeing and behaving and preference to continue operating in the manner that is most comfortable for them. As we have seen, it sometimes forecloses problem definitions, processes and outcomes that might better serve the parties, or some of them—without letting anyone know what they are missing, or might be. And it does this in an almost imperceptible fashion. The repeat players tend to assume implicitly that the problem definition is narrow; this leads them to establish procedures that will be limited primarily to the kinds of information that is relevant to litigation

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110 See ABA Model Rules of Professional Responsibility, Rule 1.2 (2004) (“...a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”) and Rule 1.4 (1)(2) (2004) (“A lawyer shall...reasonably consult with the client about the means by which the client's objectives are to be accomplished.”).
and economic issues. And, once such the mediation commences, information and perspectives that would broaden the focus are largely absent, excluded or marginalized. In other words, the procedures not only rely on the professionals’ assumptions about the appropriate problem definition; they also make that definition real.

3. A Customized Mediation that Would Have Considered the Sabias’ Core Interests

What would a mediation designed to consider all of the Sabias’ core concerns, including their need to understand what happened, have looked like? The mediation could have been different in several ways. A first modification would have allowed Tony and Donna to be present during the joint sessions. It is likely that this simple change would have increased their participation in a variety of ways. If Tony and Donna had been present, their lawyers likely would have consulted with them beforehand to determine what they felt was most important to say in joint session in order to educate the defendants and their lawyers and try to reach resolution. The Sabias would have witnessed their story being told by their lawyers. Hopefully, they also would have witnessed the respectful verbal and non-verbal response of the defendants’ representatives. The mediator might have chosen to paraphrase and demonstrate to the Sabias that he had heard and understood their perspective. Simple attendance likely would have increased the Sabias’ perception of their control over the process, which seemingly also would

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112 See Welsh, Making Deals, n. ?? at 819-25, 841-44 (describing the effect of “voice,” “consideration” and “dignified, respectful” treatment on perceptions of procedural justice; describing early studies finding that when parties witnessed their lawyers’ presentations, they perceived process control); Tina Nabatchi & Lisa Bingham, Expanding Our Models of Justice in Dispute Resolution: A Field Test of the Contribution of Interactional Justice (June 12-15, 2005) (paper presented at conference of the International Association of Conflict Management) (finding that disputants’ satisfaction with mediation in the U.S. Postal Service REDRESS program was best explained by their perceptions of their interactions with each other—and particularly, being empowered (i.e.,
have enhanced their sense of process-related autonomy, role, status and perhaps even appreciation and affiliation.

A second modification would have allowed an even more active role for the Sabias. In both joint session and caucus, the mediator could have invited the Sabias to supplement their lawyers’ statements, enabling Tony and Donna to describe their lives and needs in their own words. With their lawyers’ assistance, the Sabias might have prepared their own opening statements describing their suffering, success, limited understanding of what led to their son’s disability and hopes and fears about the future. Such statements likely would have required additional time from the Sabias’ lawyers in preparing their clients, as well as more time from everyone early in the mediation session. The provision of this opportunity, however, likely would have responded to some of the Sabias’ core interests and resulted in presentations that were less strident and emotionally charged than Tony’s actual outburst in the second mediation.

The decision to address the Sabias’ core concerns by including them throughout the mediation and increasing their participation also could have changed the substance of what the lawyers chose to say in the mediation. Plaintiffs’ lawyers might have included different

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113 For a description of the various ways parties can participate in a mediation and their potential advantages and disadvantages, see Leonard L. Riskin, The Represented Client in A Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp., 69 WASHINGTON UNIVERSITY LAW QUARTERLY 1059-1116 (1991). Of course, there are potential risks to the greater participation. We discuss one such risk, the negotiator’s dilemma, infra at n. ?? and accompanying text. In addition, there is the potential that a client will reveal information that later guides opposing counsel’s post-mediation discovery and results in damaging evidence presented at trial. Though the original disclosure may be protected from admission, the Uniform Mediation Act provides that “[e]vidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.” Unif. Med. Act §4(c). See Stuart Widman, More Mediation Confidentiality Limits: What the Court May Allow in to Establish a Settlement Agreement, 24 Alternatives to High Cost Litig. 179, [pinpoint] (Dec. 2006); Joel M. Grossman, Clarifying the Confidentiality of Mediation Evidence, 27-APR L.A. Law. 14, 15-19 2004 (discussing California Evidence Code Section 1119 and case law); Rojas, et al. v. Superior Court, 33 Cal. 4th 407 (S.Ct. Cal. 2004) (holding that pursuant to California statute, only the evidence prepared for a mediation session is protected).

114 See Tom Arnold, 20 Common Errors in Mediation Advocacy, 13 Alternatives to the High Cost of Litigation 69, [pinpoint?] (1995) (urging lawyers to prepare their clients to make opening statements).

115 See Welsh, Stepping Back Through, supra n. ?? at ?? (describing school officials’ variable appreciation of the time required to permit parents to make initial presentations in mediation sessions).
information or chosen to emphasize different points or potential solutions.\textsuperscript{116} The defendants’ lawyers might have tailored their presentations to respond to the Sabias’ limited familiarity with the law, litigation process, negotiation, and mediation.\textsuperscript{117} Members of the defense team might have expressed acknowledgment, appreciation or empathy. The Sabias’ presence and greater participation might have made it more likely that Doyle would have revealed his family history to his clients or to the mediator. It then may have been easier for him to express just the kind of understanding that the Sabias so sorely needed as they dealt with a role, status and affiliation they had never sought.

With the Sabias in attendance, both the lawyers and the mediators might have attended more carefully to the importance of listening. The mediators could have directed the lawyers to prepare their clients to listen carefully to each other, for facts but also for any core interests or emotions. Alternatively, during the mediation itself, the mediators could have urged the parties to listen to learn from each other, despite the inevitable difficulty of doing so.\textsuperscript{118}

Coupled with their eventual and substantial settlement, Tony’s and Donna’s enhanced role in the mediation session might have helped them to reach a cognitive and emotional resolution as well as an increased level of satisfaction with the process and outcome.\textsuperscript{119} Equally important, even partial satisfaction of the Sabias’ process-related core interests would have created some positive emotions, or at least decreased some of their negative emotions, which

\textsuperscript{116} See Macfarlane, Culture Change, supra n. ?? at 270-77 (reporting lawyers’ perceptions that their understanding of the dispute and potential resolutions change when their clients attend the mediation session).

\textsuperscript{117} See Arnold, 20 Common Errors, supra n. ?? at [pinpoint] (suggesting that presentations in mediation be addressed to the decision-makers on the other side of the table, rather than the mediator.)

\textsuperscript{118} Some of these suggestions resemble those made by Professors Bush and Folger to achieve empowerment and recognition. See Bush & Folger, supra, n. ?? at ??

\textsuperscript{119} Although disputants generally express satisfaction with mediation, they are even more likely to be satisfied with mediation if their case settles. See Jennifer E. Shack, Bibliographic Summary of Cost, Pace, and Satisfaction Studies of Court-Related Mediation Programs (2003), available at http://www.caadrs.org/studies/MedStudyBiblio.htm (last visited Aug 13, 2007) (listing the methodologies, variables examined, and key findings of more than 50 studies of court-connected mediation). See also Roselle L. Wissler, Court –Connected Mediation in General Civil Cases: What We Know from Empirical Research, 17 Ohio St. J. on Disp. Resol. 641, [pinpoint] (2002).
should have made the Sabias better partners in negotiation. Indeed, modifying the mediation process to respond to Tony and Donna’s core interests would not have replaced the discussion of law and its implications. Rather, it may have improved their ability to comprehend and participate in that discussion.

The mediation also could have been structured to respond to the Sabias’ strong need to know what really caused the damage to Little Tony, his brother, and to the lives of everyone in the family. Both of the actual mediations included much talk about causation. In the second mediation, the mediators considered it “the key issue.” But they were talking about legal causation, or the proof and arguments about causation that could be offered in a court of law. This meant that the lawyers on each side tried to find expert witnesses who would support an argument about what happened that was consistent with their legal theory, i.e., that would help them win. The lawyers’ behavior was useful, necessary and entirely appropriate in this court-oriented mediation. But Tony and Donna wanted to understand what had really caused the damage to Little Tony and his stillborn sibling and whether it could have been prevented. For that reason, these adversarial arguments provided no cognitive resolution for the Sabias, and that contributed to their failure to find an emotional resolution.

Would it have been feasible, or appropriate, for a mediation process in a case such as this to have accommodated Tony’s and Donna’s interest? As mentioned above, trials, and the mediations that take place in the dark shadows of trials, search for solutions by relying principally on a very limited form of truth-seeking: the presentation of legally-relevant factual information in the context of adversarial argumentation and consideration of the realities and

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120 Fisher and Shapiro recommend expressing appreciation, building affiliation, respecting autonomy, acknowledging status and choosing a fulfilling role in order to generate positive emotions. See Fisher & Shapiro, supra, n. ?? at [pinpoint].
121 Werth, supra note ?? at ??.
risks of litigation. Each of the repeat players seemed to assume that this was the appropriate way to address the causation question. What about other options? Based on Barry Werth’s description of the Sabia case, it is clear that no one really knew what happened.\textsuperscript{122} If the lawyers had fully accepted the Sabias’ “need” to know what really happened, they could have agreed to hire a neutral expert to examine the facts and make a report. Or they might have decided on a more elaborate, non-adversarial procedure to develop information. Professor Eric Green describes the creation and operation of such a non-adversarial information gathering process in connection with a case in Toms River, New Jersey.\textsuperscript{123} Residents of Toms River believed that pollutants emitted into the air and water by various corporations caused cancer. Rather than joining others who had filed law suits, “the families instead decided it was more important to try to find out what really was happening to their children and why.”\textsuperscript{124} They hired Green to help them design a process that might provide such knowledge. It was a non-adversarial scientific dialogue, over which Green presided, not as a mediator but as a so-called “Institutional Memory.” The dialogue in fact produced much of the knowledge they sought and led to a mediation, conducted by Green, that produced a settlement. The parents never filed a lawsuit.

In the Sabia case, such a procedure probably would not have produced a clear picture of the causes of this tragedy; more likely, it would have revealed that no one could be certain about the causes. Recognition of that reality, in itself, could have allowed the Sabias a higher degree of cognitive and emotional resolution than did the kind of adversarial argumentation that characterized the mediations. If both sides had conducted a joint and careful investigation that ultimately led to an assessment of uncertainty, this might have led to an easier settlement.


\textsuperscript{123} Eric D. Green, Re-Examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons from Microsoft and Other Megacases, 86 B.U. L. Rev. 1171, 1196-98 (2006).

\textsuperscript{124} Id. at 1196.
It might seem far-fetched to imagine that repeat players such as those in the Sabia case would agree to a formal, non-adversarial process; but a broader focus, designed to uncover and respond to the parties’ underlying interests is a staple in the mediation literature and characterizes certain models of practice.\(^{125}\) As noted \textit{supra}, there is also evidence that repeat mediation players in commercial cases value the understanding and satisfaction of underlying interests.\(^{126}\) Had such a focus been employed here, it might have led to the inclusion of Dr. Maryellen Humes, the obstetrician, who agreed to settle the claim against her under pressure from her insurance carrier, based largely the idea that she would not be well-received by a jury. Neither she nor the Sabias thought she had done anything wrong. The settlement, however, triggered a series of devastating professional and financial setbacks for her. Direct contact between the Sabias and Dr. Hume, as part of an effort to understand what had happened, might have led to a form of emotional healing for all of them.\(^{127}\) Other hospital employees might also have benefited from participating in such a process.

A less-adversarial, understanding-based\(^{128}\) process might also have permitted attention to business/economic issues such as funding or administrative considerations that led to what seemed to be shortages in hospital staffing. In addition, it might have prompted a consideration of community issues, e.g. the value of having better pre-and post-natal care for people like the Sabias. Of course, the lawyers, the hospital and the defendants’ insurance carriers likely would have seen risks in any such lines of inquiry. Such a choice also could have required the investment of substantial additional time and resources into the mediation itself.

\(^{125}\) \textit{See supra} n. ?? [see note citing to transformative and understanding-based models]

\(^{126}\) \textit{See supra} n. ?? [note citing to ABA Task Force on Improving Mediation Quality] [or cite infra to Part III]

\(^{127}\) \textit{See} Relis, \textit{supra} n. ?? at 481-86 (quoting from plaintiffs and defendant physicians who sought emotional healing in mediation).

\(^{128}\) We are using “understanding-based” in a general sense. For an elaboration of the “Understanding-Based” model of mediation, \textit{see} Friedman & Himmelstein., \textit{supra} n. ??.
The Sabias never had the choice of participating in a more customized mediation session, such as we have described. In Part II, we present a method for customizing mediation and three proposals designed to enable parties in court-connected mediations to choose whether they wish to engage in such a customized process. As noted supra, our concern is particularly for one-shot players like the Sabias.

Part II. Recommendations for Determining the Appropriate Problem definition in Court-Oriented Mediation

In recent years, law schools, law firms, government agencies, dispute resolution trainers and mediation providers have attempted to broaden lawyers’ understanding of the issues that are relevant for the resolution of disputes. Law schools and CLE providers regularly offer interest-based negotiation,129 supported by a rash of excellent books.130 Mediation skills and mediation advocacy training programs have urged mediators and lawyers to focus on interests.131 Much

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130 See e.g., Carrie J. Menkel-Meadow, et al., Negotiation: Process for Problem-Solving (2006); Jay Folberg & Dwight Golann, Lawyer Negotiation: Theory, Practice, and Law (2006); Russell Korobkin, Negotiation Theory and Strategy (2002);

131 See e.g., Nebraska Mediation Center Association, http://www.nemediation.org ("[a] non-profit organization with a primary focus of providing interest-based mediation training."); Northern Virginia Mediation Service, Interest-Based Problem Solving Teams, available at http://www.nvms.us/catalog05.htm ("This is a hands on workshop for those involved in leading and participating in interest-based problem resolution teams."); Dispute Resolution Center, Basic Mediation Course, available at http://www.austindrc.org/mediation-training/40hrbasic.htm (Participants learn, "A seven-stage mediation process based on the theory of interest-based negotiation."); Connecticut Mediation, ADR/Mediation Training for Collaborative Professionals, available at
writing, teaching and training on the role of emotions in negotiation also has appeared recently. Many lawyers in private practice and government agencies have attended such trainings and read the books on which they are based. There is certainly evidence that the books and educational programs have made some difference. They have helped to produce broader perspectives and more attention to the needs of individual parties in many sectors—including substantial commercial cases involving sophisticated parties on both sides and large environmental and other public policy disputes—but not in the vast bulk of the court-oriented non-family cases we are addressing. In this context, the lawyers—even those who have been trained in and appreciate interest-based negotiation—tend to apply their habitual lens, and the mediators tend to either share that perspective or adopt it to accommodate the lawyers who hire them. Indeed, some mediators have told us that, although they would like to encourage the parties to focus more broadly, they ordinarily do not do so because they anticipate that the lawyers, and maybe the clients, will not agree, or the lawyers might lose enthusiasm for using them in the present case or in the future.

As we argued in Part I, one factor that contributes to the narrowness of the typical problem definitions in the mediations that we have been discussing is that the repeat players tend

http://www.connecticutmediation.com/training.htm (Topics include, "Interest based conflict resolution, facilitative, narrative and transformative mediation methods.").


133 See Milton Heumann & Jonathan Hyman, Negotiation Methods and Litigation Settlement Methods in New Jersey: “You Can't Always Get What You Want,” 12 Ohio St. J. on Disp. Resol. 253, 309-10 (1997) (“While 61% of the lawyers would like to see more problem-solving negotiation methods, about 71% of negotiations are carried out with positional methods instead. . . . [F]urther empirical research that generates even more detail than we have been able to capture. . . . may reveal ways in which the structure of negotiation itself plays a more powerful role, or may reveal elements of habitual social practice that stand out as being particularly responsible for the existing state of affairs.”)
to adopt procedures based on a narrow problem definition, and these procedures in turn make it difficult to broaden the problem definition. In this Part, we focus on mechanisms to encourage and enable mediation participants—actual parties, lawyers, and mediators—to explore problems broadly in a particular case and then to decide what problem definition is most appropriate. First, we offer a systematic way of “setting”\textsuperscript{134} the problem in any court-oriented mediation to encourage the most appropriate problem definition in a given case. Then, we propose two variations of a court rule\textsuperscript{135} that would help lawyers, mediators and parties implement this systematic way of working with problem definition in court-connected mediation. Last, we offer a third proposal that also focuses on court-connected mediation and encourages courts to recognize and offer two kinds of mediation: “standard” (or “default”) mediation with a litigation focus, and “custom” mediation which seeks an appropriate problem definition that is not limited to litigation issues.

A. A Three-Step Method for Identifying and Addressing “the Problem”

Our first recommendation is a distillation of good practices in other mediation arenas.\textsuperscript{136} The main idea is to make explicit the process of creating the problem definition for a mediation. We call the first step “mapping\textsuperscript{137}” the problem,” which means exploring the situation

\textsuperscript{135} But see John Lande, Principles for Policymaking about Collaborative Law and other ADR Processes, 22 Ohio St. J. on Disp. Resol. 619, 623-4 (2007) (observes that “rather than promoting ‘reflective practice,’ regulation can promote unreflective practice” and recommends that “ADR policymakers should generally begin by considering nonregulatory options and adopt regulatory options only to the extent needed to accomplish desired goals”).
\textsuperscript{136} See supra n. ?? (about convening, conflict analysis). See also [Umbreit, victim offender mediation, mapping of dispute and interests]
\textsuperscript{137} The term “mapping” is also referenced in Maggie Herzig & Laura Chasin, Fostering Dialogue Across Divides: A Nuts and Bolts Guide [pinpoint] (Public Conversations Project, [year?]).
comprehensively, as much as possible without preconceptions about what is relevant or important. In court-oriented mediation, this step will include the litigation and economic issues, but will also involve looking at personal core and community issues, as well as the behavioral, cognitive and emotional dimensions of all of these issues. During the second step, ”setting the problem,” the parties decide which aspect(s) of the broadly-mapped problem the mediation will seek to examine further or address, directly or indirectly. Of course, these two steps lead to the third step, ”addressing the problem as it has been defined.” 138 We now elaborate on each of these steps.

1. Mapping the Problem

To map the problem in the ordinary case, the participants need to reveal to the mediator—and potentially to the other parties--as much as is feasible and appropriate about all of the issues potentially involved in the court-oriented mediation. In this context, for reasons we have already examined, the clients and their lawyers are likely to understand that litigation issues will be relevant. But in order to get a full picture of the problem and unless the lawyers and parties are unusually forthcoming, the mediator will need to encourage the parties to reveal more information. She will need to plumb for economic issues, personal core issues and even community issues. 139 She will assume that these issues might exist, rather than assuming that they do not. Further, all three of the dimensions identified by Mayer—behavioral, cognitive and emotional—will be explored for each issue.

138 We should note, however, that the first steps do not lead inevitably to the third step. Sometimes, just giving witness to a person’s suffering can help. See William Ury, The Third Side [pinpoint] (publisher, year);
139 See Richard P. Larrick, “Debiasing,” in Blackwell Handbook of Judgment and Decision Making 316 (Derek J. Koehler & Nigel Harvey eds., 2004) (observing that the strategy of asking about these other issues can help overcome bias, including the status quo bias).
We are aware of some mediators who encourage lawyers and clients to disclose their underlying interests prior to the mediation, but the responses generally represent a rehash of earlier-stated positions or legal arguments.\textsuperscript{140} Clearly, it is not sufficient to rely on the question “What are your interests?” We propose, therefore, that, at the request of the mediator or otherwise, the parties consider questions such as the following:\textsuperscript{141}

1. For you, what is it most important to accomplish in this mediation? How can the process and/or the mediator help you accomplish this goal?\textsuperscript{142}

2. If the mediation focuses on the legal merits of your case and the likely cost of continuing in litigation, will this be sufficient to help you to reach a complete resolution of your dispute with the other party? If not, what other issues need to be addressed? How could they be addressed?

3. As you imagine settling this case, what are your most important needs or goals? (For example, are you most concerned about compensation for expenses? The availability of future medical coverage for you or your dependents? Training? Assistance in finding a job? An apology?)

\textsuperscript{140} For example, lawyer-mediator Sheldon J. Stark of Ann Arbor, MI routinely invites the lawyers to elect to send him confidential letters “describing their own underlying needs and interests in the case, and how they size up the underlying needs and interests of the other side.” Sheldon J. Stark, engagement letter (Jan. 4, 2007). Although many lawyers elect to send such confidential letters, they almost never actually describe their underlying interests, tending instead to restate their positions (which he asks them to include only in other letters that they are to share with each other). Interview of Sheldon J. Stark by Leonard L. Riskin, Port Huron, Michigan (May 28, 2007).

\textsuperscript{141} Exactly how these questions should be raised and by whom is discussed \textit{infra} at Part II.B.

\textsuperscript{142} These questions can be framed in other ways. \textit{See e.g.}, Welsh, Stepping Back Through \textit{supra} n. ?? at 673-74 [questions for pre-mediation interview instrument]. [See victim-offender literature re questions asked to help parties decide whether to meet and then to help them prepare for meeting.]
Knowing that there will be a change in the other party’s behavior or business practice?) What do you think are the most important needs or goals of the other side?

4. (If not already described) Are there any non-monetary outcomes that would help to resolve this matter?\(^{143}\)

5. (If not already described) Do the parties need to change any behaviors to resolve this conflict? If yes, what behavioral changes are required?

6. (If not already described) Are emotions a significant part of this conflict? If yes, what outcome or procedure could help you (or the other party) to feel at peace about this dispute and its resolution?

7. Do you have any questions about how the mediation process works? Do you have any questions or concerns about your role during the presentations or discussions? Do you have any questions or concerns about your role in making a decision about whether to settle your case?

\(^{143}\) Professor Jeanne Brett has found that while some cultural groups tend to ask questions about interests and priorities as a means to develop integrative solutions, other groups are more likely to share a series of proposals and counter-proposals as a means to discern interests and priorities. This question, which focuses on outcomes rather than interests, is meant to engage those who think more like the latter group. See Jeanne M. Brett, Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions Across Cultural Boundaries 61-66 (2001).
In the Sabia case, if the parties and their lawyers had responded to these sorts of questions, Donna and Tony (or their lawyers) may have revealed important clues about their personal core needs for appreciation, autonomy, role, status and affiliation, along with the behavioral, cognitive and emotional aspects of these needs, especially their need to understand what had happened. The interests and needs of individuals and organizations on the defense side, though less obvious, also could have been discussed with the mediator. Such revelations could have occurred before the mediation or during the mediation in private caucuses or joint session.

2. Setting the Problem: Selecting the Issues to be Addressed in the Mediation Process

In this step, the parties and lawyers advise the mediator regarding the aspects of the broadly-mapped problem that they wish to include in the mediation, either explicitly or more indirectly. They can respond to questions such as the following:

1. Should the mediation address:
   a. All of your non-litigation issues? If no, which non-litigation issues should be addressed?
   b. All of your underlying needs or concerns? If no, which underlying needs or concerns should be addressed?
   c. All of the other side’s underlying needs or concerns? If no, which underlying needs or concerns should be addressed?

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144 If Dr. Hume had remained in the case, her interests and needs could have been nearly as poignant as those of the Sabias.
d. The interests of individuals or organizations that are not direct parties to this lawsuit or potential lawsuit?

e. Behavioral changes, if these are an important part of resolving this dispute?

f. The parties’ different understandings of what took place, if these are an important part of resolving this dispute?

g. The parties’ emotions, if these are an important part of resolving this dispute?

2. Should the mediation address all of these issues explicitly? Alternatively, should the mediation process address certain issues only indirectly? How?

The mediator can also interject her thoughts regarding the utility of incorporating various issues into the discussion, explicitly or implicitly. In the Sabia case, such a step might have led to a request from the Sabias for the opportunity to address Tony’s and Donna’s interest in receiving an acknowledgement of how much they had suffered and how well they had coped. The hospital, its insurer and lawyers then could have made an implicit or explicit decision about whether to venture beyond the standard litigation issues. They could have discussed the potential value—to their case, to their lawyer—of permitting Doyle to reveal his familiarity with the difficulty of caring for a disabled child. Engagement in this step also could have led to an explicit decision to use the mediation to provide the Sabias with a cognitive understanding of the events that led to their son’s disability—or to make it clear that the achievement of such

145 Even if they did not make the explicit choice to address this issue, the defendants would now be sensitized to its existence and could then choose whether or not to respond at some point in the mediation.

146 Their decision, of course, would reflect the tension between empathy and assertiveness. See Robert H. Mnookin et al., The Tension Between Empathy and Assertiveness, 12 Negot. J. 217 (1996).
understanding, though entirely understandable, was not feasible. If Tony and Donna had wished to address a community issue—e.g., a strong interest in protecting other similarly-situated mothers and newborns—while the hospital also had an interest in avoiding a similar occurrence in the future, the problem definition might also have included a focus on potential changes to hospital regulations and procedures.

3. Addressing the Problem

In this step, the parties, lawyers and mediator establish the mediation process and begin to address the problem or problems they have set. As noted supra, if the participants in the Sabia case had agreed to address Tony’s and Donna’s personal core interests, both Tony’s and Donna’s participation and the examination of the events leading up to Little Tony’s birth might have varied quite dramatically from what occurred in the actual mediation sessions. Similarly, in the mediation of a corporate contract dispute, the corporate representatives may choose to speak with each other about the personal toll that each has borne and will continue to bear if the dispute is not resolved.147 They may even discuss their organizations’ different cultural expectations and their mutual need for recognition and appreciation for their attempts to accommodate each other. In an employment mediation, the employer and a long-time employee may choose to discuss the health needs of the employee’s spouse that have affected the employee’s personal core concerns and that also restrict the retirement options available to the employee.

Of course, none of the benefits of mapping and setting the problem will occur if the parties or their lawyers choose not to reveal the other issues that could become part of the

147 This example is based on one of the authors’ experience in mediating corporate contract disputes, as well as a situation described in Fisher and Shapiro, supra n. ?? at [pinpoint].
mediation. Non-disclosure is a frequent tactic employed by negotiators due to the phenomenon known as the negotiator’s dilemma.\textsuperscript{148} Negotiators achieve optimal outcomes when they collaborate,\textsuperscript{149} but they generally do not know whether they can count on each other to collaborate. And collaboration presents risks. If one negotiator behaves in a collaborative manner while the other competes, the competitive negotiator gains the advantage. Thus, even if the Sabias had been given the opportunity to reveal their core interests in appreciation and autonomy, it is quite possible that their lawyer would have counseled against revealing this information, out of fear that the defendants might use it to fashion a smaller monetary settlement.

There can be no guarantee that all parties will reveal all this is necessary to choose the most appropriate problem definition in every mediation. However, we believe that explicitly taking the first two steps—mapping the problem and then setting it—makes it more likely that the appropriate problem definition will be realized in some percentage of court-oriented mediations. In the next section we propose court initiatives that would enhance the likelihood that appropriate problem definitions would develop.

B. Court Initiatives to Encourage Establishment of Appropriate Problem Definitions

The series of steps outlined above is not a radical new idea; rather, it is a distillation of practices commonly taught in many negotiation and mediation courses and employed in the

\begin{footnotesize}
\textsuperscript{149} We have chosen to use the language of “collaboration” rather than “cooperation.” See Carrie Menkel-Meadow, Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR, 44 UCLA L. Rev. 1613, 1619 (1997).
\end{footnotesize}
mediation of cases that often are viewed as worthy of extra care—e.g., environmental cases, public policy disputes involving large numbers of parties, class actions, large commercial matters. In the vast majority of the bread-and-butter mediations we are discussing here, however, the lawyers and mediators assume a litigation focus and narrow the issues to make them fit that focus, rather than exploring the entire problem and then determining the appropriate focus for resolving it.150

In this section, we propose three court initiatives that—standing alone or together—would make it more likely that mediations would employ the most appropriate problem definitions. Changes in court rules, coupled with meaningful judicial involvement,151 have been reasonably effective in motivating lawyers to take the actions needed to overcome some of the excesses of our adversarial litigation system152—e.g., confer with each other about case management issues and potential settlement,153 attempt to resolve their own disagreements

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150 See Felstiner, supra, n. ?? at 645 (“the essence of professional jobs is to define the needs of the consumer of professional services. . . Generally, this leads to a definition that calls for the professional to provide such services. . .”); Carrie Menkel-Meadow, The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us, 2 Mo. J. Disp. Resol. 25 (1985); Hensler, The Real World of Tort Litigation, in Everyday Practices and Trouble Cases, supra n. ??, at 156-63 (contrasting tort plaintiffs' desire for accountability and vindication of their legal rights with lawyers' monetary focus in assessing claims). See also Clark D. Cunningham, The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse, 77 Cornell L. Rev. 1298, 1367-85 (1992) (describing lawyers' translation of a clinical client's racial harassment case into a "stop and frisk" case for purposes of litigation); Gay Gellhorn, Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews, 4 Clinical L. Rev. 321, 350-53 (1998) (describing a clinical law student's failure to hear a client's concern regarding her mental state); Carl Hosticka, We Don't Care What Happened, We Only Care About What Is Going To Happen, 26 Soc. Probs. 599, 601-05 (1979) (describing lawyer-client interviews in which lawyers quickly interrupted client's narrative and began pursuing a legal pigeonhole for case); Jean R. Sternlight, 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, 320-21 (1999) (describing monetary, nonmonetary, and psychological divergences between lawyers and clients that result in lawyers blocking settlements or reaching settlements that are inconsistent with clients' self-defined interests).
151 See Bobbi McAdoo, A Report, supra n. ?? at 472; Bobbi McAdoo & Nancy A. Welsh, Look Before You Leap, supra n. ?? at 408 (reporting that Minnesota judges' embrace of ADR—and willingness to order its use--increased the likelihood of attorneys' use of mediation).
152 See Kagan, supra, n. ?? at ??
153 See F.R.C.P., Rule 26(f) (“Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make
before bringing them to the court, counsel their clients about ADR processes, confer with each other about ADR, propose the use of appropriate ADR processes, and actually use ADR processes. Many judges order parties into mediation in part because they believe that the process engages the parties and produces better outcomes. We recommend, and hope, that some judges—particularly those believe that court–connected mediations are not living up to their promise—will launch one or more of these efforts. The proposals, which we detail below, are: 1) A court rule for existing mediation programs that is directed primarily toward lawyers; 2) A court rule for existing programs that is directed primarily toward mediators; and 3) A new proposal to arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan...

154 Rule 11(c)(1)(A) (“A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.”), Rule 37(a)(2)(A) (“If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.”)

155 See e.g. Minnesota Gen. R. Prac. Rule 114; GA Code of Professional Responsibility Canon 7-5 (before Jan. 1, 2001) (“When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation.”) [still in effect?]; [check Maryland’s current Rules of Professional Conduct]. See Roselle L. Wissler, Barriers to Attorneys’ Discussion and Use of ADR, 19 Ohio St. J. on Disp. Resol. 459, 498 (2004) (“Although almost all Georgia attorneys felt they had an obligation to counsel clients about ADR under an ethical code provision, only 27% always told their clients about ADR, and 37% frequently did so.”).

156 See e.g., Minnesota Gen. R. Prac. Rule 114; Alaska R. Civ. Proc.; Local Rule 16.6(b), Northern District of Indiana; Local Rule 16.1(D)(3)(b), District of Massachusetts. See McAdoo, A Report supra n. ?? at [pinpoint] (reporting an increase in lawyers’ use of ADR, particularly mediation, after Rule 114 was adopted); McAdoo & Hinshaw, supra n. ?? at [pinpoint]; Wissler, Barriers supra n. ?? at ?? (“Under a mandatory advising rule, 32% of Missouri attorneys discussed ADR with clients within the first three months of filing suit, and another 30% did so within the next three months. Under a mandatory conferring rule, 40% of Minnesota attorneys usually or always conferred with opposing counsel about ADR within the time period by which they were required to confer and report to the court. The rate of compliance appeared to be higher (54%) in a county in which the court devoted substantial resources to enforcing the rule.”); Rosselle L. Wissler & Bob Dauber, Leading Horses to Water: The Impact of an ADR “Confer and Report” Rule, 26 Just. Sys. J. 253, 263-4 (2005) (finding that confer and report rules did not increase the frequency of early ADR discussions but did increase the frequency of ADR discussions at some point during litigation).

157 See e.g., Minnesota Gen. R. Prac. Rule 114; [others?]

158 See McAdoo, A Report supra n. ?? at [pinpoint] (reporting an increase in lawyers’ use of ADR, particularly mediation, after Rule 114 was adopted); McAdoo & Hinshaw, supra n. ?? at [pinpoint].

159 See McAdoo, All Rise, supra n. ?? at 398-99 (judges report that the following are very important factors in ordering parties into mediation: “mediation can provide better, more durable outcome for parties” (56%) and “gets clients directly involved in discussions” (50%)).
court-connected mediation program that offers both “standard” mediation and “custom” mediation. Although these proposals apply particularly to the context of court-connected mediation, we hope that their adoption also would influence practice in the bread-and-butter court-oriented mediations that, for various reasons, are not taking place within court programs.

1. A Court Rule for Existing Programs that is Directed Primarily toward Lawyers

The first approach would focus on affecting the behaviors of lawyers as they prepare their clients for mediation, regardless of whether the process occurs early or late in the life of the

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160 For example, some mediation sessions are occurring pursuant to provisions in boilerplate contracts; others are occurring in mediation programs sponsored by employers, corporations, associations, agencies, etc.; still others are occurring on an ad hoc basis as a prelude to litigation. See Welsh, Institutionalization and Professionalization, supra n. ?? at 488-89 (describing corporate and agency use of mediation); Financial Industry Regulatory Authority, Definition of Mediation Program, available at http://www.finra.org/ArbitrationMediation/Mediation/MediationAnAlternatePath/index.htm ("FINRA Dispute Resolution developed a mediation program to provide additional dispute resolution options for parties. The goal of the mediation program is to provide public customers, member firms, and associated persons with another effective way to resolve their disputes.").

161 The spread and success of court-connected mediation programs (as well as the language of courts’ rules and codes of ethics) certainly have helped to trigger state and federal agencies’ adoption of mediation programs, as well as private associations’ and industry groups’ institutionalization of the process. Some now argue, however, for that “the multi-door courthouse bureaucracy . . . seriously impairs the development of an independent, private market for” ADR services. Arthur B. Pearlstein, The Justice Bazaar: Dispute Resolution Through Emergent Private Ordering as a Superior Alternative to Authoritarian Court Bureaucracy, 22 Ohio St. J. on Disp. Resol. 739, 783 (2007).

162 Research has shown that both settlement and parties’ perceptions of procedural justice are enhanced when lawyers spend more time preparing their clients for their participation in mediation. See Roselle L. Wissler, Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research [hereinafter Court-Connected Mediation: What We Know"], 17 Ohio St. J. on Disp. Resol. 641, 676, 687 (2002); Roselle L. Wissler, Which Cases Will Settle?, 8 No. 4 Disp. Resol. Mag. 28 (Summer 2002) (“Cases were more likely to settle when parties reported more rather than less preparation for mediation by their attorneys.”); Roselle L. Wissler, Court-Connected Mediation: Process Viewed as Fair and Non-Coercive in Ohio Civil Cases, 8 No. 3 Disp. Resol. Mag. 30 (Spring 2002) (“Parties who had more preparation for mediation by their attorneys felt less pressured to settle by the mediator and felt that the mediation process was more fair than did parties who were less prepared. Interestingly, attorneys who did more to prepare their clients for mediation also felt the mediation process was more fair than did attorneys who did less client preparation.”). Such preparation may enable the parties to achieve cognitive understanding of the process, including its goal and their role. It also may help to moderate their outcome expectations. See Hensler, Real World supra, n. ?? at ??; Morton Deutsch, Justice and Conflict in The Handbook of
lawsuit. This rule would require the lawyers to consult with their clients in the creation of written pre-mediation responses to questions such as those posed in Parts II.A. supra. and to submit such responses to the mediator on a confidential basis. Although a party’s lawyer could sign this document on her client’s behalf, we also believe she should certify that the responses represent the result of a thorough discussion with her client. This submission would help the mediator facilitate the first and second steps—mapping and setting the problem—of the three-step method we have outlined. Even if the mediator is not following the three-step approach, the submission would help the mediator identify the issues that could and should be addressed in the mediation process.


Mediation can be required immediately after filing, after basic discovery has been completed, after judicial time or attorneys’ fees have reached a certain point, etc. Research has found that early mediation, if enforced, increases settlement and reduces the time required for disposition of cases. See Wissler, Court-Connected Mediation: What We Know, supra n. ?? at 697-8; Julie Macfarlane, Culture Change (describing the effects of Ontario’s mandatory mediation program in Ottawa). Mediation could even be required as a condition of filing a lawsuit, particularly if the parties are unwilling to attempt to negotiate. See Michael Moffitt, Pleading in an Age of Settlement, 80 Ind. L.J. 727 (2005). (proposing that negotiation be required as a condition of filing a lawsuit); John Peysner and Mary Seneviratne, The Management of Civil Cases: The Courts and Post-Woolf Lanscape, DCA Research Series (9/2005) (describing the communications and exchanges that are now required, pursuant to the Woolf reforms, before a lawsuit may be commenced).

Professor Richard Reuben has suggested that a system of check offs might be clearer or more efficient. Obviously, confidentiality would be an important issue and would require the same sort of protection that applies to the pre-mediation statements currently submitted by parties to lawyers. See supra n. ?? at ?? [regarding confidentiality]. If the mediator is made responsible for setting the problem definition, however, confidentiality might not apply to parties’ responses to the question asking them what issues they wish to address in the mediation. The mediator may need to reveal such information in order to determine how to “set” the mediation. See Part II.A.2. Alternatively, parties may need to answer an additional question such as “The other party may elect to address issues different from those you have elected to address. Please choose one of the following: 1) I am willing to address all of the issues elected by any of the parties; 2) I am willing to address only those issues elected by all of the parties; 3) I am willing to permit the mediator to determine which issues will be addressed and, as part of that process, permit the mediator to disclose to the other party the issues I have elected to address.”
Many mediators and court-connected mediation programs already require the submission of confidential pre-mediation statements to mediators. Generally, however, these statements reflect the narrow problem definition that we have described. They request information about the events giving rise to the legal action, the legal theories and defenses relevant to both liability and damages, and the history of settlement demands and offers. Admittedly, some mediators and court programs go further and ask about non-litigation interests, but the lawyers’ responses tend to maintain a narrow focus. We suspect that many

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166 See e.g., Darren Aitkin, WINNING MEDIATIONS: SUCCESSFUL PREPARATION FOR SUCCESSFUL PRESENTATION, 48-NOV Orange County Law. 32, 33 (Nov. 2006) (“In regard to the mediator, the first step is to know the mediator's “local rules.” In other words, what does the mediator want by way of a pre-mediation submission, and when does she want that material.”); Mark A. Frankel & John Mitby, Think Like A Negotiator: Effectively Mediating Client Disputes, 76-DEC Wis. Law. 11, 13 (December 2003) (“Mediators frequently request premediation submissions from counsel.”)

167 See e.g., Ill. Cook County Cir. Ct. R. 20.03(c) (2004) (“At least ten (10) days before the session, each side shall present to the mediator a brief, written summary of the case containing a list of issues as to each party . . . the facts of the occurrence, opinions on liability, all damage and injury information, and any offers or demands regarding settlement. Names of all participants and their relationship to the parties in the mediation shall be disclosed to the mediator in the summary prior to the session.”) [check language of rule]; U.S. District Court for the Eastern District of New York, Local Civil Rule 83.11(b)(4) (“No less than seven days prior to the first mediation session, each party shall submit directly to the mediator a mediation statement. . . outlining the key facts and legal issues in the case. The statement will also include a description of motions filed and their status, and any other information that will advance settlement prospects or make the mediation more productive.”). See Suzanne J. Schmitz, A CRITIQUE OF THE ILLINOIS CIRCUIT RULES CONCERNING COURT-ORDERED MEDIATION, 36 Loy. U. Chi. L.J. 783, 800-1 (2005) (suggesting that the rule should be revised to provide more discretion to mediators regarding the content of submissions). See also John Lande, Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs, 50 UCLA L. Rev. 69, 129-30 (2002) (proposing that courts require the exchange of position papers which “at a minimum might include: ‘(1) the legal and factual issues in dispute, (2) the party's position on those issues, (3) the relief sought (including a particularized itemization of all elements of damage claimed), and (4) any offers and counteroffers previously made.’ In addition, these papers could identify everyone who will attend from each side and identify their roles.”)

168 Id. [Additional cites needed?] It is worth noting, however, that some lawyers will provide information regarding their clients’ needs or their assessments of the other clients’ needs in response to a question about obstacles to settlement.

169 See e.g., Ron Kelly, Key Questions Before You Meet, accessed at http://www.ronkelly.com/RonKellyTools.html#KeyQuestions (last visited August 25, 2007) (including questions such as “List your basic interests, and then number their order of importance to you. (For instance: time, money, security, get even, get on with life, minimize risk, fairness, future plans, maintain a working relationship, etc.). To help identify your real interest in each area, ask yourself - “Suppose they agree to what I want - exactly what will that do for me?” and “How do you think they see their interests? List and rank them.”); U.S. District Court for the Northern District of California, ADR Local Rules, R 6-7 (c)(4) (Dec. 2005) (required confidential mediation statement must “[d]escribe the history and current status of any settlement negotiations and provide any other information about any interests or considerations not described elsewhere in the statement that might be pertinent to settlement.”) The Northern District also provides a sample letter to its mediators for correspondence with counsel. The letter asks the lawyers to “… prepare for the mediation by discussing each of the following items with your clients . . . clients’ interests, not just positions, and how these interests could be met [and] other side’s interests, and
of these lawyers do not comprehend what information is being sought. They may understand “interests” as “positions,” despite all of the books and training available to dispel this notion. Our proposed rule provides more guidance to enable lawyers (with their clients) to take a detailed look at the other issues that could be addressed in mediation.

What might such a rule accomplish? Obviously, a certain group of lawyers and clients will welcome the opportunity to respond.171 This group will include lawyers who believe in and implement a broader approach to client counseling and treat their clients as partners in understanding problems and potential solutions.172 They will comply with both the letter and the spirit of the questions. Such lawyers and clients, along with their mediators, are likely to come to mediation sessions with a broadened understanding of the situation and the aspects that the mediation potentially could explore. Their mediations are more likely to include expansive problem definitions.

Inevitably, though, others will not embrace the opportunity to answer the non-traditional questions that we pose. Despite our best efforts, some lawyers will continue to be confused by questions asking for something other than legal positions and arguments. Other lawyers and

170 For example, lawyer-mediator Sheldon J. Stark of Ann Arbor, MI routinely invites the lawyers to elect to send him confidential letters “describing their own underlying needs and interests in the case, and how they size up the underlying needs and interests of the other side.” Sheldon J. Stark, engagement letter (Jan. 4, 2007). Although many lawyers elect to send such confidential letters, they almost never actually describe their underlying interests, tending instead to restate their positions (which he asks them to include only in other letters that they are to share with each other). Interview of Sheldon J. Stark by Leonard L. Riskin, Port Huron, Michigan (May 28, 2007).
171 It is possible, for example, that collaborative and cooperative lawyers already are asking these sorts of questions. See John Lande, Principles for Policymaking about Collaborative Law and Other ADR Processes, 22 Ohio St. J. on Disp. Resol. 619, 626 (2007) (observing that clients commit to participating in interest-based negotiation).
clients, threatened or bemused at the notion that the exploration of non-legal issues or the expression of deep emotions might become part of mediation sessions, are likely not to take the questions seriously and give *pro forma* answers. Still other lawyers and clients might make the strategic choice to submit incomplete answers to certain questions, particularly if they fear that complete answers would undermine their negotiation strategies.173

Though any of these latter reactions by lawyers will keep the pre-mediation submissions from achieving the potential we have described, we do not suggest that any lawyer or client can or should be punished for submitting incomplete answers. Our proposal provides parties with the opportunity to address a broader version of their dispute; mediation parties also should have the power in a mediation to address only narrow aspects of their dispute. We hope, though, that the simple requirement that lawyers and clients *consider and answer* these questions together will have a salutary effect.174 The attempt to craft responsive answers could inspire useful dialogues between lawyers and clients, which in some cases could even lead to negotiated resolutions outside of mediation. The invitation to develop a heightened awareness of non-litigation issues, underlying interests and the cognitive or emotional dimensions of conflicts may increase the likelihood that lawyers or clients will see opportunities to use such interests or dimensions after they are in mediation sessions and better able to assess the motives and needs of the other side. The content of the pre-mediation submission may simply give mediators increased confidence in the legitimacy of asking questions regarding interests, emotions and other non-litigation issues.175 All of these impacts should increase the number of mediation

173 See Lax & Sebenius *supra n.*??.
174 See Larrick, *supra*, n. ??? at ???
175 See Maurits Barendrecht & Berend R. de Vries, Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?, 7 Cardozo J. Conflict Resol. 83, 112 (2005) (hypothesizing that as a result of the status quo bias and other psychological and cognitive biases, “the majority of disputes will be dealt with by application of the default” dispute resolution approach). See also, Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228-29 (2003) (examining the relationship between the status quo bias
sessions in which problem definition results from intentional decision-making rather than reflexive mimicry of the narrow framing that characterizes litigation.

Of course, the potential benefits of this rule depend principally on the percentage of parties and lawyers who take it seriously. The history of discovery offers one example of lawyers’ values undermining a litigation innovation’s lofty goals. Indeed, in order for our proposed court rule to be effective, judges may also need to commit to significant involvement in oversight and enforcement. It is likely that staff members would need to become responsible for monitoring to ensure that the forms are completed. Ideally, the bench and bar would collaborate in the development of specific aspects of the implementation of this rule, including educational programs for lawyers and mediators. These measures may sound unattractive to courts that hope mediation will reduce the need for judicial oversight of lawyers and clients. Yet they may also have the effect of encouraging lawyers, in their roles as counselors and officers of the court, to be more effective in understanding their clients, counseling them, and helping them come to resolutions that respond to their real needs.

and the endowment effect and describing the effect of the status quo bias as “individuals tend to prefer the present state of the world to alternative states, all other things being equal”); Russell Korobkin, The Status Quo Bias and Contract Default Rules, 83 CORNELL L. REV. 608, 625-30 (1998) (examining the application of the status quo bias to contract rules).

176 See Wayne Brazil, The Adversary Character of Civil Discovery, 37 Vand. L. Rev. 1295 (1978) (“In this context, it is indeed naïve to expect that discovery, armed only with its own executional rules, could somehow resist the inroads of the adversarial and competitive pressures that dominate its surroundings. . . . [A]dversary litigation and competitive economics offer no institutionalized rewards for disclosure of potentially relevant data. They instead offer many institutional deterrents to full disclosure.”). But see Stephen Yeazell, Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial, 1 J. of Empirical Leg. Studies 943, 958 (2004) (observing that discovery was intended to enable parties to reach their own resolutions and it has had just this effect, due to the information provided, the cost of discovery and the reconfiguration of the plaintiff’s bar; these combine to create “a climate of rational risk aversion and a slight preference for settlement in most cases.”)

177 See McAdoo, A Report supra n. ?? at [pinpoint] (noting that lawyers’ “voluntary” use of mediation is likely a response to their perception that judges will order them into the process anyway); McAdoo and Hinshaw, supra n. ?? at [pinpoint]; McAdoo & Welsh, Look Before You Leap, supra n. ?? at [pinpoint].

2. **A Court Rule for Existing Programs that is Directed Primarily toward Mediators**

We also offer a second approach to creating a court rule. Courts may require their mediators to ask some or all of the mapping and setting questions in pre-mediation conversations or during mediation sessions. Implementation of this proposal, like the one explained above, would require some work by the courts. These might include training sessions, in which lawyers would learn that they and their clients will be asked some or all of these questions before or during mediation sessions. Indeed, courts that provide educational information to lawyers about mediation for distribution to their clients could include these sorts of questions in their explanation of what to expect in mediation. At the end of each mediation session, courts could also administer evaluation forms that ask litigants and their lawyers whether they had the opportunity to reveal the issues that were relevant to their dispute and choose—or at least have input into the choice of—the issues to be addressed in their mediation. Finally, court staff periodically could monitor mediators to ensure that they are asking questions about interests, the non-legal dimensions of conflict, and litigants’ preferences regarding the definition of the problems to be addressed in mediation. Such monitoring could be used to determine whether certain mediators will continue to be permitted to handle court-connected cases.

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179 See, e.g., [http://www.abanet.org/dispute/forumsguidesreports.html](http://www.abanet.org/dispute/forumsguidesreports.html) (website of the American Bar Association Section of Dispute Resolution which includes brochures used by various courts).

180 Researchers have used this variation when assessing parties’ perception of their level of control over mediation outcomes. See Nancy A. Welsh, Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice, 2002 J. Disp. Resol. 179, 182 (2002); Wissler, What We Know, supra, n. ???? at 661-62; R. J. Maiman, Massachusetts Supreme Judicial Court: An Evaluation of Selected Mediation Programs in the Massachusetts Trial Court 14, 44 (1997); Schildt, supra n. ?? at 29-30.

181 Commentators have proposed various mechanisms to assess mediators’ performance. See e.g., TEST DESIGN PROJECT, INTERIM GUIDELINES FOR SELECTING MEDIATORS 2 (1993); TEST DESIGN PROJECT,
Though we are not proposing the use of a transformative model of mediation or any other defined model of mediation, we are inspired by the successful program design used by the U.S. Postal Service (“USPS”) to institutionalize its mediation program (i.e., Resolve Employment Disputes, Reach Equitable Solutions Swiftly or “REDRESS”). Consistent with its goals for its program, the USPS decided, after the first year of the program, that its mediators should employ Transformative Mediation. To implement this decision, the program required its mediators to participate in special training sessions, conducted extensive and national “stakeholder training” to prepare employees and managers to participate constructively in these mediation sessions, and established a special corps of ADR Specialists to observe mediators and ensure the quality of their approach and techniques. The USPS REDRESS program has been very successful. It is credited with reducing the number of EEOC filings and improving managers’ handling of conflict outside of mediation sessions, one of the goals of the program. The USPS continues to monitor the REDRESS program for quality, voluntary usage rate and settlement rate. Ultimately, the USPS can serve as a model of an institution that carefully defined the goals


183 See Cynthia J. Hallberlin, Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream, 18 Hofstra Lab. & Emp. L. J. 375, 381-82 (2001) (describing the importance of training over 20,000 Postal Service employees on “the tenets of transformative mediation”).
186 See Jonathan F. Anderson & Lisa Bingham, Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS 48 Labor L. J. 601, [pinpoint] (1997); Lisa Bingham, Employment Dispute Resolution, supra n. ?? at [pinpoint].
and character of its mediation program and was prepared to invest in widespread education and targeted oversight in order to achieve those goals.\textsuperscript{187}

Nonetheless, critics are likely to raise many concerns regarding even this variation of our second proposal. Training and monitoring can be expensive, and attempts to broaden the problem definition may not seem appropriate, or likely to bear fruit, in every case. Therefore, we turn to our third proposal.

3. A New Program to Offer Two Kinds of Court-Connected Mediation: “Standard” and “Custom”

Our third proposal is that courts should offer two different forms of mediation—“standard” and “custom.” “Standard” (or “default”)\textsuperscript{188} mediation would be the term for court-oriented mediation as we have said it is generally practiced. The focus would be on litigation issues, with indirect reference to economic issues and no assumption that core or community issues would be addressed. “Custom” mediation would begin with some form of mapping and setting the problem definition. The focus of this forum would be designed to fit the particular

\textsuperscript{187} Some court programs also deserve recognition for their significant efforts to develop the professional identity of their mediators. For example, staff of the U.S. District Court for the Northern District of California regularly facilitate “brown bag” lunches for the program’s mediators to provide an opportunity to discuss current issues and encourage reflective practice. [Florida? Maryland? Virginia?] Some private ADR organization also have institutionalized opportunities for reflective practice. \textit{See e.g.}, Margaret L. Shaw, Style Schmyle!: What’s Evaluation Got To Do With It?, Dispute Resolution Magazine 17, 20 (Spring 2005) (describing regular monthly conference calls held by groups of JAMS mediators). \textit{See also}, Craig McEwen, Giving Meaning to Mediator Professionalism, Dispute Resolution Magazine 3, 4-5 (Spring 2005) (calling upon mediators to develop “collegial control” over their work and noting that for such “control to be meaningful, broad identities with the mediation community must be complemented by personal contacts that reinforce professional standards and expectations and help practitioners with problem-solving, reflection and professional growth.”) Courts with staff mediators who are in easy and frequent contact actually may find it easier to develop a shared sense of professional identity. \textit{See} Wayne D. Brazil, Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns, 14 Ohio St. J. on Disp. Resol. 715, [pinpoint] (1999).

\textsuperscript{188} See Berendrecht & DeVries, \textit{supra}, n. ??? at 83 (referring to traditional litigation as a “sticky default”).
fuss that the parties wish to address.\footnote{See Frank E. A. Sander & Stephen B. Goldberg, Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure 10 Negot. J. 49 (1994).} We suspect that in court-connected mediation, the fuss will almost always require the discussion of litigation issues, but also will include others.\footnote{Perhaps this option should be described as “litigation-oriented-plus” in the same way that Justice O’Connor’s analysis of minimum contacts in \textit{Asahi} is sometimes described as “stream of commerce plus.” \textit{Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County}, 480 U.S. 102, [pinpoint] (1987). We are sensitive, however, to the possibility that there may be some rare cases in which the parties choose not to discuss litigation issues.}

Because there has been so much debate about what should occur in mediation, we want to be careful to note here that we are \textit{not} proposing that courts offer two mutually-exclusive and rigid categories of mediation—e.g., evaluative vs. facilitative, litigation-oriented vs. non-litigation-oriented. Our proposal would allow parties and lawyers to “customize” their mediation—or to avoid all of the time and effort that would be required for such customization by choosing standard mediation. The opportunity to choose between standard and customized offerings is available in other settings—e.g., in the purchase of cars, computers, clothing, even tax advice. It turns out that most people are willing to buy their cars off the lot, their computers at the major retailers and their clothing off the rack. Standardization offers predictability and efficiency. Similarly, perhaps most parties and lawyers will prefer to participate in a standard mediation. On the other hand, for those parties and lawyers who believe that their disputes are unique or will be handled better if certain non-litigation issues are guaranteed to be made part of the mediation, a “custom” process will be available.

Of course, this undertaking also would require education of mediators, lawyers and citizens. Courts could communicate the differences between standard and custom mediation to both lawyers and parties through continuing education programs, descriptions in brochures, FAQs on the court’s website, and even videotaped simulations available on the website or
Some form of monitoring also may be needed to ensure the distinction between “standard” and “custom” mediation, but this also may be a self-enforcing initiative due to the parties’ involvement in shaping the process.

C. Likely Concerns Regarding the Efficacy of the Proposed Court Initiatives

All of these proposals are likely to encounter resistance. Critics of the three-step method may point to likely difficulties in its implementation. For example, what if one party wants very much to discuss core interests while the other is repelled at that notion, and the parties then disagree on how to “set” the problem? In considering this concern, it is important once again to highlight what we are not proposing. We are not suggesting that courts require a broad problem definition in their mediation program, or that courts require lawyers to reveal information about their clients’ underlying interests that they or the client wish to keep secret for strategic reasons. We are proposing only that the parties should have a real opportunity to influence the problem definition. The sole requirement is that the parties consider a series of issues and interests that do not routinely appear in the kinds of mediations we have been discussing and consider whether to make these issues and interests part of their mediation. If the parties disagree about the appropriate breadth of the problem definition, we believe that the mediation must incorporate only those issues that are acceptable to all. In many cases, of course, this will mean reverting to the status quo, “standard” mediation with the narrow but entirely legitimate focus on litigation issues.

For CLE programs in Minnesota, mediators demonstrated the mediation of one case using three different models of mediation. [More from Jim Coben?] The same sort of thing was done several years ago for family mediation.
A next set of concerns may reflect skepticism regarding the need for “custom” mediation. Judges and lawyers may argue that if courts offer settlement conferences or early neutral evaluation along with mediation, there is no need to distinguish between “standard” and “custom” mediation. The assumption here is that settlement conferences and early neutral evaluation focus on the legal merits of each side’s case to encourage settlement while the scope of mediation is necessarily broader. The stereotype regarding judicial settlement conferences has substantial empirical support. The character of early neutral evaluation, meanwhile, can vary substantially with the preferences of the neutral. Most important, though, and as we have argued throughout this Article, most court-connected mediation used by most average citizens is “one-size-fits-all,” and that size is modeled after the law suit. Thus, we believe that the presumed differences between mediation, on one hand, and settlement conferences or early neutral evaluation, on the other, are not reflective of most actual practice.

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192 For example, the U.S. District Court for the Northern District of California offers early neutral evaluation as well as mediation. Virginia offers both facilitative mediation and settlement conferences with retired judges. See Geetha Ravindra, Virginia’s Judicial Settlement Conference Program, 26 Just. Sys. J. 293 (2005). The Court of Queen’s Bench of Alberta, Canada, similarly offers both interest-based mediation and judicial dispute resolution (JDR), and Civil Practice Note No. 11 specifically provides that interest-based mediation “is not intended to derogate in any way from the JDR program...” Court of Queen’s Bench of Alberta, Civil Practice Note No. 11, Court-Annexed Mediation, effective September 1, 2004.

193 See Milton Heumann & Jonathan M. Hyman, Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want," 12 Ohio St. J. on Disp. Resol. 253, 287-89 (1997) (“[J]udicial intervention observed in the settlement conferences primarily supported positional bargaining. Very few of the judges strove to create reasonable settlement terms of the problem-solving kind.”); James A. Wall, Jr., Judicial Participation in Settlement, 1984 J. Disp. Resol. 25 (1984). Meanwhile, research indicates that lawyers are relatively consistent in their preferences regarding judges’ behaviors in settlement conferences. See D. Marie Provine, Settlement Strategies for Federal District Judges 35-36 (1986) (noting that attorneys prefer a settlement judge who points out evidence or law that attorneys misunderstand or are overlooking); Dale Rude & James Wall, Judicial Involvement in Settlement: How Judges and Lawyers View It, 72 Judicature 175, 176-77 (1988) (reporting that attorneys prefer judges to inform them regarding how similar cases have settled and to argue logically for concessions, but do not prefer judges to share their evaluations of the case with clients or discuss with the lawyers the high risk of going to trial).


195 Pun intended.
For all of our proposed court initiatives, we have indicated that courts will need to invest in training, education and monitoring. How can courts afford this? Frankly, there is no easy answer to this question. We believe, however, that any court that currently sponsors a mediation program should already be investing in training, education and monitoring. Without these program elements, no court can be sure what services are being provided in its name.196

The most troublesome and systemic objection, however, is that lawyers will resist the opportunity to expand mediation’s problem definition, for the identical reasons that they embrace the focus that currently characterizes court-connected mediation. The narrow problem definition is consistent with most lawyers’ core interests in autonomy, a dominant role and appreciation.197 This problem definition also matches most lawyers’ psychological preferences for the resolution of disputes based on the application of standards and rules and the avoidance of emotional issues.198 Finally, the focus on knowledge of the law and litigation expertise supports lawyers’ claims to the privileges of professionalism, including autonomy, status and substantial fees.199 Viewed from this perspective, it may not be in lawyers’ own best interests to encourage their clients to venture beyond litigation (and to a lesser extent, economic) issues. Our proposals—whether requiring lawyers to consult with their clients regarding the scope of the mediation, requiring mediators to offer the opportunity to broaden the problem definition, or offering “custom” mediation—would be doomed to irrelevance at best.

197 See supra n. ?? [regarding lawyers’ core interests]
198 See supra n. ?? [regarding lawyers’ tendency to make decisions based on application of rules and standards rather than values or human impacts]
199 See supra n. ?? [regarding professionalism literature]
This objection is well-grounded and deeply troubling. There are, however, interesting hints of change in the legal profession that may both provide and gain support from courts’ adoption of our proposals. Many lawyers, for example, express a desire to use a broader problem definition in working with clients to resolve disputes, but perceive insurmountable hurdles. A growing number of lawyers are overcoming some of the hurdles by forming groups of “collaborative” or “cooperative” lawyers who support each other through their practice protocols. Though the genesis of these practice models was in the family law area, there are now initiatives bringing aspects of the “collaborative” or “cooperative” approaches to other types of disputes, including the bread-and-butter matters that have served as the focus of this Article. In addition, certain influential elements of the commercial bar have expressed their appreciation for a mediation process that includes litigation analysis but also explores the underlying interests that may not be captured by a focus on litigation issues. In a recent survey of lawyers with substantial experience in commercial mediation, a strong majority said that satisfying the parties’ underlying interests was one of their goals in “all,” “almost all” or “most” of the cases that had gone to mediation. These respondents also rated “understanding parties’ interests” as a very

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201 See Heumann & Hyman, supra n. ?? at 257 (Even though litigators would like the methods used in their negotiations to be more “problem-solving” and less “positional,” this has not happened, perhaps because of a “combination of persistent litigator habits, a limited vocabulary of negotiation, and the time and expense necessary to change established practices”).
204 American Bar Association Section of Dispute Resolution Task Force on Improving Mediation Quality, “Survey Responses,” 5 (April 16, 2007) [draft—need permission of Task Force to cite] (68.5% of mediation users identified “satisfy parties’ underlying interests” as a goal in “all or almost all” with 13% identifying this as a goal in “most cases;”):
important skill for effective mediators.\textsuperscript{205} Another survey yielded strong support among business
executives and outside counsel for finding outcomes that satisfy both parties’ underlying
interests rather than seeking only the largest possible concessions.\textsuperscript{206}

Presumably, the lawyers and clients involved in large, well-funded, commercial disputes
do their best to negotiate a solution before they turn to mediation. For the difficult cases that
cannot be settled, these lawyers and clients endeavor to hire the mediators who are prepared to
go beyond the litigation risk analysis that is the lawyers’ stock-in-trade. Indeed, our three-step
method may simply formalize an exploration that many such lawyers and clients expect from
good commercial mediators, at least in complex, multi-party cases.\textsuperscript{207}

The concern about lawyers’ resistance to our proposals also suggests the need to help the
lawyers representing clients in bread-and-butter cases see and appreciate the shortcomings of the
dominant model of court-oriented mediation for at least some of their clients. Our proposals
offer relatively painless ways for lawyers to identify these clients and respond more productively

\textsuperscript{205} See American Bar Association Section of Dispute Resolution Task Force on Improving Mediation Quality,
“Mean Survey Responses by Respondent Type,” 3 (April 16, 2007) (draft—not to be cited without permission of
Task Force) (On a scale of 1 to 5, with 1 described as “not at all important” and 5 as “essential,” “understanding
parties’ interests” received a mean score of 4.29 from mediation users in response to the question “How important
are the following skills, qualities, or functions for mediators to be effective?”).

\textsuperscript{206} John Lande, Getting the Faith: Why Business Lawyers and Executives Believe in Mediation, 5 Harv. Neg. L.
Rev. 137, 188 (Spring 2000) (reporting that in response to a question regarding how often it is “appropriate for
businesses to try to find outcomes addressing the underlying interests of each party as opposed to seeking the largest
possible concessions,” when considering “the practical realities of litigation between two businesses” . . .
more than three-quarters (82%) of each type of respondent said that it would be appropriate to seek outcomes addressing
underlying interests in more than half the cases. Although the outside counsel gave significantly higher responses
(an average rating of 8.1) than executives (who gave an average rating of 7.2), clearly the vast majority of all three
types of respondents said that it is normally appropriate to focus on underlying interests.”)

\textsuperscript{207} As noted supra, the U.S. Postal Service has institutionalized a mediation program that uses the transformative
model, which focuses on facilitating parties’ “voice and choice” rather than litigation risk analysis. Aware of the
USPS’ success with this model in reducing EEOC filings and increasing managers’ conflict resolution capacities,
other agencies have also chosen to institutionalize it. This may be viewed as another example of sophisticated
parties’ interest in using a broader focus in mediation in order to achieve meaningful resolution. But see, Howard
Gadlin, Bargaining in the Shadow of Management: Integrated Conflict Management Systems, in Handbook of
Dispute Resolution 371, 379-83 (Michael L Moffitt & Robert C. Bordone, eds., 2005) (“. . . [H]owever well
intentioned they are currently, ICMS [integrated conflict management systems] threaten to become another tool by
which management wields power” and subverts conflict that should erupt).
to their needs in mediation. Indeed, we would encourage courts to offer to collaborate with these members of the bar to improve upon our proposals and make them more effective.  

Critics may direct a final set of concerns at the appropriate role of the courts: Should the courts invest in offering to broaden the subject matter of a mediation session when access to this public resource historically has been conditioned upon narrowing the subject matter of a dispute in order to make it manageable and consistent with the unique mission of the courts?  

We turn to these issues next.

Part III. The Courts and Fostering Appropriate Problem Definitions

Though strong psychological, economic and social forces will always support the maintenance of the status quo, the courts have evolved throughout their history in response to the changing needs of society and the emergence of competing, successful models of dispute resolution. Examples abound. In medieval Europe, characterized at that time by a patchwork of contradictory local laws and business practices, a private system known as the Law Merchant arose to create and apply commerce-facilitating rules and procedures to the resolution of international merchants’ disputes. Over time, ordinary courts throughout Europe incorporated the Law Merchant’s principles into commercial law. In England, after an ad hoc and morality-based system of Equity arose in response to the rigidity of the writs used by the
Common Law courts, the courts evolved to include a complementary Court of Chancery available to provide relief when the Common Law could not.\(^\text{211}\) More recently in the U.S., the congestion and conservatism of the courts, coupled with the profound needs unleashed by the Great Depression and the innovations of the New Deal, led to the creation of administrative adjudication.\(^\text{212}\) Though the judiciary initially objected to the usurpation of its role, courts now display substantial deference to administrative decision-making.\(^\text{213}\)

As noted supra, it is increasingly clear that certain elements of the bar see the value in broadening problem definitions in appropriate cases. Increasingly, these lawyers and clients are turning to private dispute resolution organizations for mediation.\(^\text{214}\) Meanwhile, some judges, court administrators and policy makers may see our proposals as a means to achieve mediation’s original promise as a distinctive supplement to the usual practice and focus of litigation—or to re-awaken the dream of the multi-door courthouse.\(^\text{215}\) Some courts’ definitions of mediation are particularly evocative of mediation’s original promise.\(^\text{216}\) The local rules of the federal district courts in the Eastern District of New York and the Northern District of California, for example, note that “[a] hallmark of mediation is its capacity to expand traditional settlement discussions


\(^{213}\) See id at 125-6.

\(^{214}\) For example, JAMS describes its business as follows: “Founded in 1979, JAMS, The Resolution Experts, is the nation’s largest private provider of alternative dispute resolution services. With 23 Resolution Centers nationwide, JAMS and its more than 200 full-time, exclusive neutrals are responsible for resolving thousands of the nation’s most important cases.” Available at http://www.jamsadr.com/FeatureFull.asp?Feature2ID=71.

\(^{215}\) See The Pound Conference: Perspectives on Justice in the Future: Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice 84 (A. Leo Levin and Russell R. Wheeler eds., 1979) (Professor Frank Sander first introducing the concept that was later labeled as the “multi-door courthouse”). Excerpts from the Pound Conference are also found in Varieties of Dispute Processing, 70 F.R.D. 79 (1976).

\(^{216}\) See supra n. ?? and accompanying text. [note beginning “The local rules…”]
and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy." Some courts have found the resources and staff needed to promote mediation that lives up to its “hallmark.” Most courts, however, have either been unable or unwilling to do much more than monitor their mediation programs for their settlement rates. We reiterate that we are not proposing that a court require all parties to participate in a mediation that expands traditional settlement discussions. Our proposal would, however, end the current situation in which most parties’ choice is foreordained by the preferences of lawyers and insurance claims adjusters, as well as the “one-size-fits-all” demands of mass processing. Parties would undertake an informed consideration of their mediation options and be empowered to choose the problem definition most responsive to their needs. We view this change as particularly important for the one-shot users, the average individual citizens, who might otherwise never know they could receive the advantages of “custom” mediation.

Our proposal also would not diminish the courts’ focus on dispute resolution pursuant to the rule of law. As any first-year law student quickly learns, the rule of law sounds substantial but is actually a very slippery concept heavily influenced by context and self-interest. Customized mediations under our proposals would incorporate a litigation focus and discussions of the applicable substantive law, of course. But they also would offer the opportunity to supplement that focus. We believe that empowering parties to choose whether to grapple with other issues would enhance their sense of being treated fairly by their courts. In other words,

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217 E.D.N.Y Local Rule 83.11; [ND cite].
218 See McAdoo & Welsh, Court-Connected General Civil ADR Programs supra n. ?? at [pinpoint].
219 See Welsh, Perceptions of Fairness, in The Negotiator’s Fieldbook 165 (Christopher Honeyman and Andrea Schneider, eds., 2006); Deutsch, supra n. ?? at [pinpoint].
220 See Keith Allred, Relationship Dynamics in Disputes, in The Handbook of Dispute Resolution 83, 91 (Michael Moffit & Robert Bordone, eds., 2005) (“If we are in a dispute with someone and he or she asks us what we think the process should be to try to resolve it, we will feel the process is fairer whatever the process turns out to be.”).
this option would influence their perceptions of the procedural justice offered by the courts, and procedural justice has been shown to have a profound influence on parties’ perceptions of substantive fairness and institutional legitimacy.\(^{221}\) Ultimately, we believe that parties’ judgments regarding both substantive and procedural fairness would be improved by the opportunity to elect the problem definition that they perceive as most appropriate.

It is also possible that our proposal would contribute, at least a little, to courts’ effectiveness in assisting parties—perhaps like the Sabias—whose need for cognitive and emotional resolution is very strong and currently unmet by procedures with a narrow litigation focus. The courts have shown a willingness to adapt to respond better to the needs of particular groups of disputants. For example, there are now mental health courts, juvenile courts, domestic violence courts, drug courts and community courts.\(^{222}\) In each of these contexts, courts\(^{223}\) have concluded that their traditional processes and remedies were not sufficiently effective. Domestic violence courts arose, for example, because victims sought orders of protection only as a last resort after long periods of abuse.\(^{224}\) In order to be more effective in promoting the safety of these victims, domestic violence courts introduced batterer intervention programs, dramatically expanded judges’ responsibility for monitoring and forged partnerships with other community agencies.\(^{225}\) Judges in these courts supplemented their traditional tools in order to help people

\(^{221}\) See Welsh, Making Deals supra n. ?? [previous note regarding effects of procedural justice].


\(^{223}\) Or sometimes only a few innovative judges.

\(^{224}\) See Berman & Gulick, supra n. ?? at 1041.

change their lives. Mental health courts similarly respond to the needs of a particular set of litigants. Litigants who meet eligibility requirements are able to choose whether to participate in programs that will require participation in mental health assessments, individualized treatment plans, ongoing judicial monitoring and the completion of mandated treatment programs.\textsuperscript{226} These options certainly are more labor-intensive for the courts, but they also appear to be more effective in addressing the issues that played a significant role in bringing these litigants to the courts. The same philosophy would support offering the opportunities we have proposed.

Finally, though other countries’ courts reflect their own procedures, histories and values, it may be useful for courts in the U. S. to consider\textsuperscript{227} some aspects of the mediation program that has been institutionalized throughout the courts of the Netherlands.\textsuperscript{228} There, mediating and judging are understood as different, in terms of process \textit{and} problem definition.\textsuperscript{229} Dutch judges,

\begin{itemize}
\item \textsuperscript{226} See Greg Berman & Anne Gulick, \textit{Just The(Unwieldy, Hard to Find, but Nonetheless Essential) Facts Ma’am: What We Know and Don’t Know about Problem-Solving Courts}, 30 Fordham Urb. L.J. 1027, 1030 (2003).
\item \textsuperscript{227} Before establishing their program, The Netherlands carefully investigated U.S. courts’ experience in institutionalizing mediation.
\item \textsuperscript{228} See Bert Niemeijer & Machteld Pel, \textit{Court-Based Mediation in the Netherlands: Research, Evaluation, and Future Expectation}, 110 Penn St. L. Rev. 345 (2005).
\item \textsuperscript{229} Judge Machteld Pel, who heads the Netherlands’ court mediation program, has identified four categories of disputes that are brought to Dutch courts: 1) \textit{Pure procedure} (The civil procedures really are what they seem to be; the parties bring up a legal question in front of the judge and that is really what it is about. The dispute is completely resolved with the court ruling. The interests here are the same as claims.); 2) \textit{Process procedures} (Procedures where the parties actually have a legal dispute but doubt that there is a possibility of ‘getting their justice’ on material grounds or in relation to the burden of proof. For that reason, they introduce all sorts of additional (procedural) decision points in order to, at least, get their way on formal points or improper grounds. The court decision on the additional decision points puts no end to the underlying dispute. The claim that contains real interests is overshadowed by improper procedural interests.); 3) \textit{Shadow procedures} (Procedures where the parties wish to achieve something that cannot be accorded by law. They propose therefore something that is the next best. They bring a lawsuit about the ‘shadow’ of their real wishes. The legal decision does not end their dispute but can bring closer one party in the dispute to the desired outcome. The interests and claims differ but the interests do motivate the procedure.); and 4) \textit{Pretence procedures} (Procedures that are initiated or brought only because of the feeling of frustration, impotence or other strong feelings instead of business, logical motifs based on objective criteria. The motivation is that ‘those who do not hear must feel’. The parties climb the ladder of escalation and prefer ‘to go under together’ rather than give in a little to the other party. The court decision cannot bring an end to the conflict. The motivation for bringing a lawsuit is not interests but emotions and miscommunication.) Machteld Pel, \textit{Referral to mediation in the civil procedure: extra service or profession blurring?}, Tijdschrift voor Civiele Rechtspleging [complete cite]. See also, Wayne Brazil, \textit{Hosting Mediations}, 22 Ohio St. J. of Disp. Resol. 227, 235 (differentiating between court-appointed mediators and judges by observing that mediators will not perform judicial duties such as “considering formally presented evidence and argument, then engaging in thorough research and analysis en route to forming reliable and binding judgments about the merits of parties’ disputes).
who may meet with the parties and lawyers several times to investigate and attempt to resolve the case, are taught to ask, “Will my decision solve your problem?” If the answer is “yes,” then the judge should retain the case, continuing the investigation into its legal merits and issuing a decision. On the other hand, if the parties acknowledge that their issues are not only legal, the judge urges them to try mediation because it can help them address all that fits within the appropriate definition of their problem.  It is possible that only a minority of cases will be resolved by court-connected mediation in the Netherlands,  but the country supports many different “paths to justice” and does not seem to assume that any particular process should be appropriate for all—or even a majority of all—disputes.

Through our proposal, courts will give lawyers and their clients the option to participate in a customized forum that includes the analysis of legal issues and the other economic, personal core and community issues that may play a significant role in achieving real resolution. The

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230 See Nancy A. Welsh, The Future of Mediation: Court-Connected Mediation in the U.S. and The Netherlands Compared, 1 Forum Voor Conflictmanagement 19, [pinpoint] (2007); Nancy A. Welsh, En vergelijking tussen doorverwijzing naar mediation in civiele zaken: voorspelt de ervaring van de Verenigde Staten (VS) de toekomst van Nederland? (Comparing Court-Connected Non-Family Civil Mediation: Does the U.S. Experience Predict The Netherlands’ Future?), 7 Trema 310 (September, 2006). In some ways, the Dutch judges question is reminiscent of the original relationship between the courts administering the dual system of equity and law. See Main, supra n. ?? at 352-3 (observing that “[e]very order or rule administered in Equity was born of some emergency, to meet some new condition that was not otherwise remediable in the Common Law courts.”). In contrast, few judges in Minnesota selected “relief is outside the court’s jurisdiction” as a significant factor that they consider when ordering parties to mediation. See McAdoo & Welsh, Look Before You Leap, supra n. ?? at 414, n. 77 (chosen by 13% of the judges surveyed).

231 See Welsh, The Future of Mediation supra n. ?? at ??; Welsh, En vergelijking n. ?? at ??.

232 The number, however, is growing. See Machteld Pel, Results of the Mediation Referral System in the Netherlands Judiciary (presented at ABA Section of Dispute Resolution Conference, “Civil vs. Common Law: Does Context Matter in ADR?” April 25-28, 2007 [which particular date?]).

233 See Ben C.J. van Velthoven & Marijke ter Voert, Paths of Justice in the Netherlands, ILAG Conference, Killarney, Ireland (June 8-10, 2005).

234 See Welsh, Future of Mediation supra n. ?? at [pinpoint]. See also Kreitzer, supra, n. ??? at ???.

235 See Lon Fuller, Mediation: Its Forms and Functions, 44 S. Cal. L. Rev. 305, 325 (1971) (describing mediation’s “capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.”); Isabelle R. Gunning, Diversity Issues in Mediation: Controlling Negative Cultural Myths, 1995 J. Disp. Resol. 55, 67, 86 (1995) (highlighting the connection between mediation, social justice, and procedural justice in urging that disadvantaged people “need, even more so than advantaged group members, a forum in which their
courts will then be offering a real “value-added” for the disputants and disputes that do not quite fit the mold provided by the standard litigation focus. Indeed, in a country where most citizens are one-shot players, it seems quite appropriate that our courts should provide these citizens with input into the design of the process that will be most responsive to the needs of their unique disputes. Judge Wayne Brazil has written that the primary goal of mediators in court-sponsored programs should be “to promote the participants’ respect for the integrity of the proceedings.” Transparency and inclusiveness are important attributes of processes designed to earn that respect. In his words:

…the focus on transparency itself is not sufficient….transparency about process can acquire its full constructive power only when we include all the participants in the mediation in the key decisions about which process routes we should follow. In short, inclusiveness is essential to maximizing both the reality and the potential of process transparency.

Conclusion

In one sense our proposals are quite modest. They simply suggest mechanisms that could help court-connected mediation programs do what many have assumed they were already doing. In another sense, however, these proposals represent a significant intrusion into “business as usual” in court-connected mediation. Suffering an injury from an accident or experiencing an authentic voices and experiences can be expressed” and observing that mediation, as a forum fostering the expression of such authentic voices, offers “another locus in American political, social and legal life where ideas about equality are defined and redefined.”); Jonathan Cohen, When People Are the Means: Negotiating With Respect, 14 Geo. J. Legal Ethics 739 (2001) (describing what could and should happen in a negotiation grounded in morality).


237 Id. at 268.
termination from a job rarely feels routine. Similarly, for most people, being sued is a dramatic life event. Yet, these are also just the cases—and mediations—that repeat players treat as routine, focusing on the same issues and arriving at the same basic resolutions. Routinization becomes a self-fulfilling prophecy. We hope that inviting the litigants themselves to reflect upon and select the issues that will be discussed in their mediations will enable more one-shot players to get what they need in the discussion and resolution of their cases. Our proposals may even produce an intriguing by-product—making these cases and the journey toward resolution come alive for at least some of the repeat players. As Marcel Proust wisely wrote, “The real voyage of discovery consists not in seeing new landscapes, but in having new eyes.”\textsuperscript{238}