REAL MEDIATION SYSTEMS TO HELP PARTIES AND MEDIATORS ACHIEVE THEIR GOALS

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I. INTRODUCTION

Thomas S. Kuhn's classic book, *The Structure of Scientific Revolutions*,[1] describes the process of the famous "paradigm shift." Scientists develop theoretical paradigms that are generally accepted in their scientific community. Over time, some scientists find "anomalies" that cannot be solved within the existing paradigms. Eventually, anomalies accumulate, and innovative scientists develop new theories to explain the anomalies. If a critical mass of

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[1] THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (4th ed. 2012).

scientists agrees on a new paradigm, there is a paradigm shift to the next generally-accepted paradigm.[2]

This article argues that it is time for a paradigm shift in our current general mediation theory because of numerous problems.[3] Our current theory is incomplete at best and seriously misleading at worst. The traditional mediation models are oversimplified, poorly mapping onto the reality of practice.[4] They combine multiple elements that are not necessarily correlated.[5] Many practitioners ignore them because they are confusing or not helpful.[6] People do not understand the theoretical meanings because the terms are not consistent with commonly understood language.[7] Arguments about what is or is not real or good mediation have spawned unhelpful ideological divisions in the field.[8]

Dispute system design (DSD) theory can provide a better theoretical framework for understanding mediation and guiding people's actions in mediation.[9] A DSD framework can incorporate and refine traditional mediation theory—in addition to many aspects of mediation that are completely independent of traditional theory. Moreover, using DSD as a central frame for understanding dispute resolution integrates the entire dispute resolution universe, not just mediation.

This article describes the Real Mediation Systems Project, which is intended to provide a more realistic portrayal of mediation and illustrates benefits of using a DSD paradigm. There are many potential parts of the project. I recruited thoughtful mediators to write their systems as examples of how mediators think, act, and evolve with experience.[10] Mediators and advocates in mediation can use the project's framework to become more conscious of how they think and why they act as they do in mediation. Faculty, trainers, and program administrators can use this framework to help students and mediators become more aware of their ideas and actions related to mediation. The dispute resolution field can undertake an initiative to develop a concise lexicon of recommended dispute resolution language that everyone can understand.

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2 *Id.* at 52–91.

3 *See infra* Part II.A.

4 *See infra* text accompanying notes 37–42.

5 *See infra* text accompanying notes 25–26.

6 *See infra* text accompanying notes 17, 37–40.

7 *See infra* note 29 and accompanying text.

8 *See infra* text accompanying notes 11–24, 30.

9 *See infra* Parts II.B, II.C.

10 *See infra* Parts III.B, III.C.

Empirical researchers can use this framework to better understand how various populations of mediators conceive of their work—and also operate unconsciously "on automatic." Theorists can use this research to develop empirically grounded generalizations.

Part II presents the theoretical foundation for the Real Mediation Systems Project. It critiques theories of traditional mediation models and suggests that DSD should be the central theoretical framework for our field. Traditional mediation models would be elements of mediators' actual mediation systems in particular settings, varying with practice culture, participants' goals, and many other factors. Part III describes the project, including the rationale for the project and the analysis of the mediation systems of ten mediators. Part IV is a brief conclusion.

II. Potential Paradigm Shift in Dispute Resolution Theory

This Part describes why the "ADR" field should shift from a conception as an assortment of disparate dispute resolution procedures to a DSD paradigm. Part II.A catalogs a long list of problems with traditional mediation models. Part II.B provides an overview of DSD. Part II.C describes how DSD can help explain the regular systems that mediators use before, during, and after mediation sessions. These systems include default approaches for routine procedures and strategies for dealing with challenging situations. Part II.D argues that a DSD paradigm provides a logical integration of the entire dispute resolution universe, unlike "ADR," which people continue to use because there is no general consensus for an alternative.

A. *Problems with Traditional Mediation Models*

In the mid 1990s, the dispute resolution community was all abuzz about controversies over facilitative, evaluative, and transformative mediation. In 1994, Len Riskin published a short article presenting his famous grid with a facilitative-evaluative dimension.[11] In 1996, he published a law review article fleshing out this

[11] Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 Alternatives to High Cost Litig. 111, 113 (1994).

framework.[12] That year, Kim Kovach and Lela Love responded with a famously titled article, *"Evaluative Mediation" Is an Oxymoron.*[13] In 1998, they published a law review article elaborating their arguments.[14] In 1994, Robert Bush and Joseph Folger published *The Promise of Mediation*[15] explaining their theory of transformative mediation. In 1995, Carrie Menkel–Meadow published an influential critique of this book.[16] During this period, many people in the field wrote and talked about these theoretical models with great passion.[17] Indeed, these models were the centerpieces of many conferences and polarized arguments about what is or is not good mediation.[18]

I never was a big fan of these theoretical models. In 2000, I published *Toward More Sophisticated Mediation Theory* critiquing arguments about facilitative and evaluative mediation, which I described as "wearisome."[19] I wrote that there was merit in both approaches. I said that "facilitation proponents have highlighted how mediation can promote many important values such as party self-determination."[20]

> Facilitation proponents are also right to express alarm about real and serious risks entailed in evaluative techniques. Although mediator evaluation is sometimes just what is needed to help parties seriously confront and resolve the issues in their dispute, it also risks perpetuating adversarial dynamics and en-

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12 Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 35 (1996).

13 Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996).

14 Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOTIATION L. REV. 71 (1998).

15 *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994).

16 Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices*, 11 NEGOT. J. 217, 235-39 (1995).

17 This article refers to the facilitative, evaluative, and transformative models as the traditional theoretical models in mediation theory, though there are numerous others. For example, a focus group of nineteen ADR practitioners, educators, and trainers identified their mediation styles as "eclectic/client centered," "embedded mediation," evaluative, facilitative, facilitative/evaluative, facilitative/transformative, narrative, reflective, repertoire/combination of mediations and styles, transformative, and understanding-based. *See* Howard Gadlin & Marvin Johnson, *A Small Step Toward a Tough Conversation: A Discussion Piece by the Association for Conflict Resolution's (ACR) Diversity of Practice Initiative*, 5 PRAC. DISP. RESOL. 9, 10–11 (2015).

18 *See, e.g.*, James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47 (1991) (describing conflicting views about what is good mediation).

19 John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 321.

20 *Id.* at 322.

> trenchment of positions. More important, mediator evaluation risks creating injustice through heavy-handed pressure tactics and questionable evaluations by the mediators.[21]

On the other hand, I wrote, "Some facilitation proponents take a rigidly orthodox view that facilitative mediation is the only legitimate form of mediation, predicated on an ideology that uses a false and overly formalistic dichotomy."[22] I noted, "Mediators frequently mix facilitative and evaluative techniques in individual cases, which is often appropriate and beneficial. Appropriate use of predominantly one approach or the other may vary in part depending on the type of case."[23] Rather than using these theoretical models, I suggested that mediators should aspire to promote "high-quality decision-making."[24]

Part of the problem is that the facilitative and evaluative models are incoherent. Facilitative mediation consists of very different "actions bundled into a single model: helping parties evaluate, develop, and exchange proposals; asking about strengths and weaknesses of each side's case; asking about consequences of settling and likely court outcomes; helping parties understand their interests; and helping parties develop options that respond to their interests."[25] Conversely, "evaluative mediation is a bundled model consisting of assessing the strength and weaknesses of each side's case; predicting impact of settling and court outcomes; urging parties to settle; and proposing settlements."[26]

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21 *Id.* at 326 (footnotes omitted).

22 *Id.* at 321.

23 *Id.*

24 John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?,* 24 FLA. ST. U. L. REV. 839, 843, 868-79 (1997). I suggested a set of concrete mediation tactics that may promote – and be indicators of – this approach. These tactics include: (1) explicit consideration of the principals' goals and interests, (2) explicit identification of plausible options for satisfying these interests, (3) the principals' explicit choice of options for consideration, (4) careful consideration of these options, (5) mediators' restraint in pressuring principals to accept particular options, (6) limitation on use of time pressure, and (7) confirmation of the principals' consent to selected options. This set of tactics is offered as a cluster of factors that might be used to create a continuum of the quality of consent and not as absolute or necessary requirements. *Id.* at 841. The article refers to high-quality "consent," but I later changed this term to "decision-making" to reflect the fact that parties sometime decide *not* to reach agreement. *See* Lande, *supra* note 19, at 325 (footnotes omitted).

25 John Lande, *Merging Mediation Models – And Other Lessons*, INDISPUTABLY BLOG (Dec. 30, 2020), https://indisputably.org/2020/12/ideas-for-teaching-mediation-and-negotiation/ [https://perma.cc/65M2-LGV5]. For Riskin's detailed description of facilitative and evaluative mediation, see Riskin, *supra* note 12, at 16-35.

26 *See* Lande, *supra* note 25. To his credit, Riskin recognized that his original model was too simplistic, and he recommended using a more sophisticated framework. *See generally* Leonard

On reflection, it should be clear that these two models provide confusing characterizations of what mediators actually do. I noted, "Mediators perform many different actions in response to the situations at different times in a case, and they often use interventions from both models."[27] Some mediators quip that a good mediation is facilitative in the morning and evaluative in the afternoon.[28] Is such a mediation facilitative or evaluative? Mediators who use some techniques identified with the evaluative model inevitably use some facilitative techniques. But would the use of any of evaluative techniques make the whole process evaluative? In other words, is it impossible to be just a little bit evaluative (just like one cannot be a little bit pregnant)? Moreover, these terms are opaque and do not reflect people's everyday understanding of these words.[29]

Although the models are conceptually problematic, they embody catchy metaphors that stick in people's minds and exert powerful cognitive effects. For believers in facilitative and transformative philosophies, these models reflect positive ideals of mediators as practitioners who help disputants convert destructive conflicts into constructive ones, strengthen people, and improve relationships. This contrasts with their negative view of mediators

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L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

27 Lande, *supra* note 25. In a recent webinar, I conducted a survey of participants and found that "of the 31 people who gave an identification as primarily facilitative and/or evaluative, 58% identified as both facilitative and evaluative, 39% identified as facilitative, and 3% identified as evaluative." John Lande, *Reconciling Allegedly Alternative Mediation Models by Using DIY Models*, KLUWER MEDIATION BLOG (June 6, 2021), http://mediationblog.kluwerarbitration.com/2021/06/06/reconciling-allegedly-alternative-mediation-models-by-using-diy-models/ [https://perma.cc/VQ8Z-CAJP]. *See also infra* text accompanying notes 247-50 (mediators describing their mediation systems using combination or elements of various models rather than strictly following a single model).

28 This quip may reflect a common dynamic in mediation. Dwight Golann videotaped four experienced mediators mediating the same simulated case. He found that they varied their facilitative and evaluative interventions throughout the mediations, becoming "increasingly evaluative" as the mediations progressed. *See* Dwight Golann, *Variations in Mediation: How – and Why – Legal Mediators Change Styles in The Course of a Case*, 2000 J. DISP. RESOL. 41, 61.

29 *See* Lande, *Houston, We Have a Problem in the Dispute Resolution Field*, INDISPUTABLY BLOG (Oct. 30, 2022), https://indisputably.org/2022/10/houston-we-have-a-problem-in-the-dispute-resolution-field/ [https://perma.cc/A43J-7Y6]. *See also* John Lande, *Confusing Dispute Resolution Jargon*, INDISPUTABLY BLOG (Jan. 4, 2018), https://indisputably.org/2018/01/confusing-dispute-resolution-jargon/ [https://perma.cc/R5ZE-BBGX] (jargon of negotiation and mediation models is confusing, even for emeritus professors); John Lande, *"Labels Suck,"* INDISPUTABLY BLOG (Oct. 22, 2014), https://indisputably.org/2014/10/labels-suck/ [https://perma.cc/E9LW-ZNJH]; Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. U. J.L. & POL'Y 13, 13 n.* (2012).

who impose their views on parties.[30] The graphic representation of the Riskin Grid[31] reinforces its conceptual power. For mediators who identify with these models, the concepts influence their professional identities, shape their perceptions, and affect their professional behavior.[32] Moreover, these models have captured the imaginations of many academics who simply portray some mediation methods as good or bad.

Real life is much more complicated than these models suggest. Assessing the strengths and weaknesses of each side's case, predicting court outcomes, urging parties to settle, and proposing settlements all are very different from each other. The American Bar Association Section of Dispute Resolution Task Force on Improving Mediation Quality conducted a survey of 109 mediators and lawyers that illustrates this reality.[33] 66% percent of mediators in the survey believe that it is helpful in most cases for mediators to give their assessments of the case, including strengths and weaknesses, compared with only 36% who believe it is usually helpful for mediators to make predictions about likely court results and 38% who believe it is usually helpful to recommend a specific settlement.[34] The respondents' different reactions reflect differences in the techniques themselves.

The survey identified numerous factors affecting judgments about whether particular techniques are appropriate in actual cases. Substantial majorities said that the following factors might affect their judgment about the appropriateness of a mediator giving an assessment of the strengths and weaknesses of a case:

- whether the assessment is explicitly requested
- the extent of the mediator's knowledge and expertise
- the degree of confidence the mediator expresses in the assessment
- the degree of pressure the mediator exerts on people to accept the assessment
- whether the assessment is given in joint session or caucus

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[30] Based on my conversations with mediators, relatively few mediators identify as evaluative mediators, a label that "facilitative" mediators use to distinguish their approach. "Evaluative" mediators generally do not seem interested in theoretical models or labels, preferring to describe their approaches with a wide range of different terms.

[31] *See supra* text accompanying note 12.

[32] *Cf.* Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L. J. 225, 280 (1995) (noting that battle, sports, and sex metaphors affect lawyers' identities, perceptions, and behavior).

[33] John Lande, *Doing the Best Mediation You Can*, DISP. RESOL. MAG. 43, 43 (2008) (summarizing the Task Force findings).

[34] *Id.* at 45.

- how early or late in process the assessment is given
- whether the assessment is given before apparent impasse or only after impasse
- the nature of issues (e.g., legal, financial, emotional)
- whether all counsel seem competent
- whether the mediator seems impartial.[35]

When mediators make predictions about likely court results, there are many ways that they can discuss the law. These include presenting the law as a standard in assessing possible agreements, a possible standard of fairness, society's default standard of fairness, a presumptive standard for decision, and a decisive standard.[36] Moreover, mediators can present information tentatively, to help parties make decisions, or they can pressure parties to accept the mediators' views about likely court results.

The reality of mediation practice is a lot more complex and nuanced than suggested by the theoretical definitions or is commonly portrayed. Certainly, mediators sometimes are very heavy-handed, quickly expressing their opinions about likely court results and pressing parties to make concessions. But mediators' "evaluative" interventions often are much more subtle.[37] Dwight Golann wrote, "Mediators often deliver opinions without using words at all. The videotaped mediators [who he recorded] raise an eyebrow, frown, pause, squint, dip their head, or lean back, using expressions and body language to express viewpoints silently and tactfully."[38] On the other hand, facilitative theory approves of "reality testing" questions that

> impl[y] that the mediator has developed an opinion about what reality is, the disputant's view is different, and the mediator thinks the disputant's view would benefit from testing. . . . For instance, when a videotaped mediator, in response to a low first offer, asks the lawyer and executive in a thoughtful tone, "What do you *suspect* their response is going to be?" some might say she's simply encouraging them to assess their counterparts'

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[35] *Id.* The survey did not ask about factors affecting other elements of evaluative mediation, but it seems likely that respondents would say that these factors would affect the appropriateness of the other elements as well.

[36] John Lande, *The Role of Law in Legal Disputes* 3 (University of Missouri School of Law Legal Studies Research Paper No. 2021-14, August 8, 2021), https://ssrn.com/abstract=3901378 [https://perma.cc/F9EH-AL3F].

[37] *See* Dwight Golann, *The Changing Role of Evaluation in Commercial ADR*, 14 DISP. RESOL. MAG. 16 (2007); Dwight Golann, *How Mediators Evaluate, Through Words, Participants' Gestures and Sometimes Silence,* 38 ALTERNATIVES TO HIGH COST OF LITIG. 151 (2020) [hereinafter Golann, *How Mediators Evaluate*].

[38] Golann, *How Mediators Evaluate*, *supra* note 37, at 151.

> thinking. The disputants, however, understand exactly what the mediator is saying. . . . And even if questions themselves are neutral, if you return to a topic repeatedly[,] disputants will read a message into it . . . ."[39]

In addition, mediators regularly "selectively facilitate" discussions where they ask "reality-testing" questions that disproportionately challenge one party's perspective.[40] Even the presumably neutral task of agenda setting may reflect mediators' evaluations about how to frame issues and the relative importance of various issues. Thus, the traditional theoretical concepts of facilitative and evaluative mediation do not map well onto mediators' real-life behaviors.

Moreover, empirical research does not indicate consistent differences in effects between elements of these models. The American Bar Association Section of Dispute Resolution's Task Force on Research on Mediator Techniques conducted a meta-analysis of 47 empirical studies analyzing effects of particular mediator actions associated with the facilitative and evaluative models.[41] The Task Force found that "none of the mediator actions has clear, uniform effects" on settlement and related outcomes, disputants' perceptions and relationships, or attorneys' perceptions, though some actions have the "potential" to affect these outcomes.[42]

B. *Using Dispute System Design as the Central Theoretical Framework*

Dispute system design (DSD) is the "applied art and science of designing the means to prevent, manage, and resolve streams of disputes or conflict" instead of handling individual disputes on an

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39 *Id.* at 151–52 (emphasis in original).

40 *See* David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 L. & Soc'y Rev. 613, 619–39 (1989).

41 Task Force on Research on Mediator Techniques, A.B.A., Report of the Task Force on Research on Mediator Techniques, (June 12, 2017), available at https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/materials/2019-mediation-research-task-force-report.pdf [https://perma.cc/JB5E-JWBH].

42 *Id.* at 2. *See also* John Lande, *Lessons From the ABA's Excellent Report on Mediator Techniques*, Indisputably Blog (Nov. 1, 2017), https://indisputably.org/2017/11/lessons-from-the-abas-excellent-report-on-mediator-techniques/ [https://perma.cc/N7GA-P3GW] ("[O]ne can't be confident that any of these actions are going to have particular effects. Rather, the effects of these actions presumably depend on numerous contextual factors such as the parties' pre-existing relationship, history of the conflict, expectations about the process and outcome, and role of constituents, among many others.").

ad hoc basis.[43] DSD is well established in dispute resolution theory and practice.[44] It is used in societies all around the world including in court and community programs; mass claims facilities; labor and employment systems; commercial, consumer, environmental, and international disputes; transitional justice processes for dealing with the aftermath of wars; and systems for collaborative governance.[45]

In DSD processes, designers' goals may include providing fairness and justice, efficiency, engagement of stakeholders in system design and implementation, dispute prevention, flexibility and choice of multiple process options, matching of design with available resources, training of stakeholders, and accountability.[46] DSD procedures may include identifying stakeholders' dispute system goals; understanding the context and culture affecting the system; considering appropriate dispute prevention, management, and resolution processes; and developing appropriate incentives and disincentives for using the system.[47] Traditional mediation models reflecting practitioners' goals and procedures may be elements of DSD analyses.[48]

In essence, DSD is tailoring dispute systems to fit the needs of stakeholders, especially disputing parties. Good designs fit the stakeholders' context and culture and the dispute processes to produce as much satisfaction of the parties' procedural and substantive goals as reasonably possible. Ideally, stakeholders intentionally design their systems using thorough and ethical procedures, though some system designs result from sub-optimal, poorly planned processes.[49]

The relevant stakeholders vary depending on the context. For example, in a court-connected mediation program handling civil cases, stakeholders would include judges, court administrators, lawyers, and mediators. In a community mediation program, stakeholders could include representatives of various community

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43 Lisa Blomgren Amsler, Janet K. Martinez & Stephanie E. Smith, Dispute System Design: Preventing, Managing, and Resolving Conflict 7 (2020) (footnote omitted).

44 *Id.* at 8–12 (describing origins of DSD in the US and around the world). A search for "dispute system design" yields more than 700 publications in HeinOnline's law journal library.

45 *Id.* at 111–324.

46 *Id.* at 13–14, 22–38, 325–31.

47 *Id.* at 24–34.

48 *Id.* at 44–50.

49 *See generally* John Lande, *Principles for Policymaking about Collaborative Law and Other ADR Processes*, 22 Ohio St. J. on Disp. Resol. 619, 629–44 (2007) (articulating DSD principles and noting some problematic perspectives).

organizations, government officials, and law enforcement officials. In an organization's internal mediation program, stakeholders could include representatives of management, employees, and human relations executives. In some contexts, it can be difficult to get representatives of disputants to participate in a DSD process. In that situation, other stakeholders should explicitly consider disputants' interests.

DSD is not limited to initial design of comprehensive dispute systems, as it includes potential monitoring of operation, evaluation, and periodic revision of existing systems. It need not necessarily deal with the entire system as designers can focus on parts of systems. DSD initiatives may not involve all of the steps in full-scale design initiatives,[50] nor do they require a self-conscious design effort or employing people specifically identified as "dispute system designers." For example, courts frequently engage in dispute system design as they develop and revise elements of their mediation programs such as deadlines and reporting requirements, but they may not refer to this as DSD.

Two important areas of ADR illustrate a DSD paradigm. First, part of the field involves systems designed to solve problems, prevent disputes, and establish procedures for early resolution of disputes.[51] Organizations seek to prevent disputes by (1) engaging in transactional negotiations that infuse collaboration and dispute prevention, (2) using partnering arrangements, and (3) using standing neutrals and dispute review boards.[52] Some organizations develop planned early dispute resolution systems to conduct early case assessments and handle disputes promptly.[53] Courts use (1) early case conferences to plan litigation, (2) differentiated case management systems with procedures differing based on the complexity of cases, and (3) referrals to early mediation or neutral evaluation processes.[54] Private practitioners offer various early

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[50] *See supra* text accompanying notes 47 (listing possible procedures in DSD initiatives).

[51] John Lande, *Survey of Early Dispute Resolution Movements and Possible Next Steps*, April 22, 2021, (Univ. Missouri School of Law Legal Studies Research Paper No. 2021-06), https://ssrn.com/abstract=3832282 [hereinafter Lande, *Survey of Early Dispute Resolution Movements*]; John Lande, *Dispute Prevention and Early Dispute Resolution Framework*, INDISPUTABLY BLOG (April 9, 2020), https://indisputably.org/2020/04/dispute-prevention-and-early-dispute-resolution-framework/ [https://perma.cc/NU4B-2ZVQ] [hereinafter Lande, *Prevention and EDR Framework*].

[52] Lande, *Prevention and EDR Framework*, *supra* note 51.

[53] *See* John Lande & Peter W. Benner, *Why and How Businesses Use Planned Early Dispute Resolution*, 13 U. ST. THOMAS L.J. 248 (2017).

[54] John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 88–104 (2008).

dispute resolution services, including settlement counsel, collaborative practice, cooperative practice, and early mediation services.[55]

Second, the burgeoning field of online dispute resolution (ODR) illustrates the interconnections between various dispute resolution procedures and the systemic nature of the dispute resolution field. The American Bar Association's Section of Dispute Resolution recently issued an excellent document, Guidance for Online Dispute Resolution,[56] which defines ODR as the "use of technology to facilitate or perform any central function of preventing or resolving disputes."[57] Increasingly, most dispute resolution processes will include ODR components. The Guidance notes that, "ODR may be used for any type of dispute resolution process, including negotiation, mediation, arbitration, and trial."[58] It outlines a systemic approach to dispute resolution with a section on system design, selection, implementation, and evaluation as well as specific elements of good system designs.[59]

C. *Applying Dispute System Design Concepts to Mediation Practice*

Although people often think of DSD as being used only in large organizations, individuals and small practice groups also can use DSD principles and techniques to improve their case management and dispute resolution procedures.[60] A DSD framework provides a much more comprehensive understanding of mediation than the traditional theoretical models of mediation, which generally focus only on handling the ultimate issues in dispute during mediation sessions. Mediators and mediation programs regularly perform many other significant tasks that are completely independent of traditional theories.

People who regularly mediate do so after developing their own ideas based on their practice experiences, reading, training, education, and/or mentoring. Mediators design their systems to

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55 Lande, *Survey of Early Dispute Resolution Movements*, *supra* note 51, at 2–14.

56 Sec. of Disp. Resol., A.B.A., Guidance for Online Dispute Resolution (2022), available at http://ambar.org/ODRguidance [https://perma.cc/NU4B-2ZVQ].

57 *Id.* at 2.

58 *Id.* at 2–5.

59 *Id.* at 2–11.

60 *See* John Lande, Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money 143–50, Appendixes U, V, W (2nd ed. 2015).

comply with applicable statutes, rules, and ethical guidelines. They also bring their own personal histories, values, goals, motivations, knowledge, and skills to their work.[61] Thus mediators handling the same case inevitably would mediate it differently, reflecting differences in their respective systems.

One can think of mediation systems as involving the combination of mediators' actions before, during, and after mediation sessions. Rather than deciding how to mediate every new case from scratch, mediators develop systems of default procedures that they adapt to fit the parties, issues, and circumstances of each case.[62] These systems include routine procedures and strategies for dealing with challenging situations. Some mediators engage in pre-session activities to tailor the mediation process for each case. This may include educating parties about the process, soliciting submission of documents, and discussing specific aspects of the dispute.[63] During mediation sessions, mediators vary in the extent that they use joint opening sessions or caucuses,[64] the focus of their questions (such as about expected court results and/or parties' intangible interests), role of parties (which may vary depending on whether they are represented by lawyers), use of technological tools, seating arrangements, and even lunch breaks, among many other things.[65] After mediation sessions, mediators may read relevant publications, take additional training, attend continuing education programs, reflect on their experiences, and plan how they might improve their techniques in future cases.

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61 *See infra* Part III.C for illustrations of how mediators develop their individual mediation systems.

62 *See, e.g.*, Roselle L. Wissler & Art Hinshaw, *What Happens Before the First Mediation Session? An Empirical Study of Pre-session Communications*, 23 CARDOZO J. CONF. RESOL. 143, 155–56 (2022) (finding that the factor most related to whether mediators communicated with parties before mediation sessions was mediators' usual practice regarding pre-session communications).

63 *See generally id.* (providing detailed analysis of pre-session activities in civil and family cases); John Lande, *The Critical Importance of Pre-Session Preparation in Mediation* 1-5 (University of Missouri School of Law Legal Studies Research Paper No. 2022-15, Dec. 19, 2022), https://ssrn.com/abstract=4306617 (discussing importance of preparation before mediation sessions).

64 *See generally* Roselle Wissler & Art Hinshaw, *Joint Session or Caucus? Factors Related to How the Initial Mediation Session Begins*, 37 OHIO ST. J. ON DISP. RESOL. 391 (2022) (providing detailed analysis of mediators' use of joint sessions and caucuses in civil and family cases).

65 *See, e.g.*, DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT (3d ed. 2018) (describing mediation steps and interventions); Roselle Wissler & Art Hinshaw, *The Initial Mediation Session: An Empirical Examination*, 27 HARV. NEGOT. L.REV. 1 (2021) (providing detailed analysis of activities in initial mediation sessions in civil and family cases).

Mediators who operate in organizational mediation systems (such as court-connected mediation programs, panels of practitioners, and employers' programs) obviously are affected by those systems. The designers and operators of organizational systems set the parameters of mediations in their systems. These parameters may involve selection and training of mediators, assignment of cases, case management procedures, policies about desirable and unacceptable techniques, and compensation arrangements, among many others. The organizational systems may help prepare parties for mediation by providing information about their systems. Thus, individual mediators' systems are nested within organizational mediation systems in which they mediate.

DSD involves planning procedures that can shape mediation processes even before cases are set to mediate. For example, system designers can set the timing of mediation, which can make a big difference. If a mediation is conducted too early, the parties will not have the information needed and/or may not be emotionally ready to mediate constructively. If a mediation is conducted too late, parties' decisions may be colored by a sunk-cost bias and their adversarial attitudes may have hardened.[66] Ideally, system designers would establish a process in each case to schedule mediations at the earliest appropriate time for parties to mediate effectively.

The practice culture also can have very significant effects on mediation. As mediation has become increasingly institutionalized in courts and legal practice, judges, lawyers, and repeat-player litigants have developed refined strategies for using mediation. In turn, mediators have adjusted their systems to accommodate these stakeholders' goals. I coined the term "liti-mediation" reflecting the reality that mediation often is routinely integrated into litigation practice culture, transforming both lawyers' and mediators' approach to mediation.[67] In liti-mediation cultures, it becomes "taken for granted that mediation is the normal way to end litigation."[68] Active participation of lawyers in mediation is "likely to result in ongoing relationships between mediators and lawyers that may overshadow their respective relationships with the principals and dramatically affect the mediation process. As a result of the prominent role of lawyers in mediation, mediators may feel espe-

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66 Lande, *supra* note 24, at 886.

67 *Id.* at 846.

68 *Id.* at 841.

cially obliged to cater to the lawyers' interests, which often entails pressing the principals into settlement."[69]

The process of lawyers "shopping" for mediators is a function of practice cultures and markets, and it can make a big difference in the mediation process. For example, lawyers may have particular views about when they want to mediate, whether mediators generally seem to favor certain categories of parties, whether mediators are sensitive to cultural differences, what procedures lawyers want mediators to use, how lawyers prepare clients for mediation, and how lawyers use mediators in caucus, among many other considerations.[70] Mediators may be particularly interested in satisfying lawyers' interests in the hope of being hired in future cases.

All these variables combine to define mediators' systems affecting how they think and act in mediation. Considering the complexity reflected by the multitude of variables affecting the process, mediators understandably develop some routines that become unconscious over time. Some mediators engage in careful, conscious reflection to refine their individual systems, which evolve during their careers.

This part illustrates the value of a DSD framework in understanding how mediators think and act in handling ongoing streams of disputes. While mediators may refer to (their understandings of) theoretical mediation models, they also focus on many other practical factors in preparing for and conducting their mediations.

D. *Dispute System Design Better Defines the Nature and Scope of the Field*

Using DSD as the central theoretical framework for the dispute resolution field can help resolve a fundamental theoretical question: what is the nature and scope of the field? Currently, there is no good, clear answer. There is not even a generally accepted term for the field. For decades, people have been calling it "ADR"—alternative dispute resolution. Over time, some people did not want to identify it as simply *not* being litigation, and some

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69 *Id.* at 844. *See id.* at 879–90.

70 *See generally id.* at 845–49 (describing possible considerations in the process of shopping for mediators).

have used other terms such as "appropriate" dispute resolution.[71] Some generally prefer the unqualified term "dispute resolution." But even that term does not have a good definition because there is no essential characteristic of the field, especially a characteristic that other fields cannot claim as well. For example, not all "ADR" processes involve neutral third parties, focus on parties' interests, promote party self-determination, provide good processes, promise privacy or confidentiality, or are innovative.[72] The lack of consensus about the name and definition of the field reflects deeper conceptual problems for the field.

DSD provides a logical integration of the entire dispute resolution universe. ADR is an ever-expanding collection of disparate processes. By contrast, DSD offers a relatively fixed set of concepts and procedures that can be applied in virtually any context.[73]

Part of the problem with ADR is that it excludes litigation. Marc Galanter's concept of "litigotiation" captures a fundamental reality of civil litigation inconsistent with this traditional conception of ADR. He defined it as "the strategic pursuit of a settlement through mobilizing the court process."[74] He wrote, "On the contemporary American legal scene[,] the negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it *is* litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals."[75] This reflects the reality that in many—probably most—contested lawsuits, negotiation and litigation are "inseparably entwined."[76]

This reality is reflected in a study of lawyers describing the most recent case they settled, starting with the first contact with

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71 *See, e.g.*, Kenneth L. Jacobs, *How to Implement an "Appropriate Dispute Resolution" Program in Your Litigation Department*, 76 MICH. B. J. 156 (Feb. 1997).

72 *See* John Lande, *What is (A)DR About?*, INDISPUTABLY BLOG (Jan. 13, 2015), https://indisputably.org/2015/01/what-is-adr-about/ [https://perma.cc/8FZX-43NA].

73 This Part highlights problems with the exclusion of litigation, lawyers, and judges from the "ADR" field. Of course, the field includes a wide range of issues, disputes, and processes that are not related to the law or litigation. *See* John Lande, *Shifting the Focus From the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution From Marc Galanter*, 6 CARDOZO J. CONFLICT RESOL. 191, 199–200, 209–11 (2005).

74 Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

75 *Id.* (emphasis in original).

76 *Id.* at 269.

their clients.[77] The lawyers generally "litigotiated," thinking about negotiation from the outset of their cases. In the words of one lawyer:

> "It is all negotiation from the time suit is filed. You are constantly negotiating or setting up the negotiation. It doesn't just happen. You are negotiating from the outset, setting up where you want to go. You are judging [the other side] and they are judging you." He elaborated, "Negotiations don't occur in a week or a month. They occur in the entire time of the lawsuit. If anyone tells you they aren't negotiating, they really are. Every step in the process is a negotiation. You don't call it negotiation but in effect, that's what it is."[78]

A similar dynamic occurs in liti-mediation cultures where lawyers expect cases to be resolved in mediation and develop pretrial litigation strategies accordingly.[79] Given the reality of litigotiation and liti-mediation, "ADR" should include litigation and trial processes involving lawyers, judges, and courts.[80]

Lawyers-as-advocates perform many of the same tasks as "ADR" professionals. For example, they use similar skill sets as many mediators in communicating with clients, giving advice about dispute resolution options, preparing to participate in dispute resolution processes, helping clients assess cases, giving opinions or advice about substantive issues, and predicting outcomes.[81] Obviously, there are differences in some skills between the related roles and professions, which would continue to regulate members of their professions. But the significant overlap of professional techniques reflects the value of including lawyers as part of "ADR."

Including litigation as part of the field would shift some practitioners' conceptions of their professional identities. Some practi-

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77 John Lande, *Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better*, 16 CARDOZO J. CONFLICT RESOL. 63, 68 (2014).

78 *Id.* at 66 (footnotes omitted).

79 Lande, *supra* note 24, at 886–88.

80 *See* John Lande, *The Legal Profession, Judiciary, and Dispute Resolution*, INDISPUTABLY BLOG (Feb. 28, 2022), https://indisputably.org/2022/02/the-legal-profession-judiciary-and-dispute-resolution/ [https://perma.cc/Y4UH-GNGS] (identifying overlapping parts of the legal profession, judiciary, and dispute resolution field).

81 *See* John Lande, *Concepts That Can Help Practitioners Help Parties Make Decisions in Disputes*, INDISPUTABLY BLOG (Dec. 8, 2020), https://indisputably.org/2020/12/concepts-that-can-help-practitioners-help-parties-make-decisions-in-disputes/ [https://perma.cc/T9FN-PB7Z]; John Lande, *Teaching Students to Think Like Practitioners*, INDISPUTABLY BLOG (Aug. 2, 2021), https://indisputably.org/2021/08/teaching-students-to-think-like-practitioners/ [https://perma.cc/Y8UN-YFR5].

tioners may identify more as dispute resolution professionals generally than as members of particular professions or purveyors of particular processes. In the legal context, we often think of practitioners who primarily perform a single function such as being a mediator or litigator. Yet many practitioners act in different roles in various cases. For example, a lawyer may serve as a negotiator, advocate in mediation, litigator, trial lawyer, mediator, arbitrator, and many other possible roles.

Defining the field as DSD would include judges as part of the field. Obviously, judges adjudicate disputes—but so do arbitrators, who are universally recognized as ADR practitioners. Judges regularly adjudicate issues related to mediation and arbitration. Judges frequently conduct settlement conferences, similar to mediation. Judges and court administrators manage court-connected dispute resolution programs, and they are some of the biggest boosters of ADR. The big difference between judges and practitioners who are universally recognized as part of the ADR field is that judges are public employees. But so are court-employed mediators.

"ADR" is a name without a valid conceptual meaning that people continue to use because there is no general consensus for an alternative. Switching to a DSD paradigm for the field would require overcoming status quo bias. I believe that the benefits would be worth the effort.

III. Real Mediation Systems Project

I launched the Real Mediation Systems Project to better understand how mediators actually think and act. It is designed to address problems with the system of traditional mediation models by asking mediators to reflect on the paths that led them to mediate, the values and ideas that motivate their actions, the cases they handle, the parties they work with, and the techniques they use.

At this early stage of the project, it uses an inductive methodology for theoretical investigation, empirical research, practitioner self-reflection, and instruction of mediation students and trainees.[82] It elicits mediators' observations that could lead to sound empiri-

[82] In social science terms, this is an inductive methodology—starting with observations to develop generalizations. This contrasts with deductive methodologies, which start with theoretical hypotheses and collect data to test the hypotheses. *See Business Research Methodology*, Inductive Approach (Inductive Reasoning), https://research-methodology.net/research-methodology/research-approach/inductive-approach-2/ [https://perma.cc/4DM6-KY4H].

cally-based generalizations. Researchers could use mediators' accounts to identify factors reflecting how they think instead of trying to fit mediators' thoughts and actions into the traditional models. Practitioners can use these ideas to get a better understanding of how they actually mediate and adjust their techniques to improve their performances. Mediation trainers and program administrators can use this framework to help mediators better understand their techniques and how they might improve their work.[83] Instructors can assign students to use this framework to learn about mediation. Instructors can assign students to write papers: (1) sketching the techniques they used in simulated or actual cases in the course, or (2) describing their aspirations for their mediation systems after they graduate.[84] Instructors can use this framework as the basis of "Stone Soup Project" interviews of mediators.[85] While this project focuses on mediators' systems for handling cases, it can be adapted for students to learn about lawyers' systems as advocates in mediation, negotiators, or legal practice generally.[86]

Part III.A describes the rationale for the project. Part III.B identifies actual mediation systems of ten mediators. Part III.C analyzes their mediation systems based on these mediators' accounts. The mediators described their personal histories, values, goals, motivations, knowledge, and skills as well as the parties and the cases in their mediations. They developed categories of cases, parties, and behavior patterns that led them to design routine procedures and strategies for dealing with recurring challenges. Their accounts describe how they reflected on their experiences and evolved their techniques accordingly.

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83 John Lande, *Using Real Systems Resources in Practice*, INDISPUTABLY BLOG (Dec. 13, 2022), http://indisputably.org/2022/12/using-real-mediation-systems-resources-in-practice/ [https://perma.cc/YE9B-LYJ7].

84 John Lande, *Resources for Using Real Systems Materials in Teaching*, INDISPUTABLY BLOG (Dec. 12, 2022), http://indisputably.org/2022/12/resources-for-using-real-systems-materials-in-teaching/ [https://perma.cc/7J82-ZQM4].

85 John Lande, *Collected Stone Soup Resources*, INDISPUTABLY BLOG (Aug. 3, 2018), https://indisputably.org/2018/08/collected-stone-soup-resources/ [https://perma.cc/84PV-SCEF] (the Stone Soup Project involves instructors assigning students to learn about the reality of practice, primarily through interviews of practitioners or parties).

86 John Lande, *Real Mediators' Real Mediation Models*, INDISPUTABLY BLOG (July 31, 2022), https://indisputably.org/2022/07/real-mediators-real-mediation-models/ [https://perma.cc/98SG-WM9Z].

A. *Rationale for the Project*

Psychologist Kenneth Kressel's article, *How Do Mediators Decide What to Do? Implicit Schemas of Practice and Mediator Decisionmaking*,[87] was a catalyst for this project. Kressel's article summarizes the conclusions from three in-depth studies:

> We have learned from these investigations that tacit knowledge—which we have variously described under headings like mediator "styles," "mental models," or "schemas of practice,"—plays a powerful role in such decisionmaking, is often at striking variance with what practitioners consciously believe they are doing, and can be gotten at by methods that help practitioners access their tacit decisionmaking knowledge.[88] Mediators are clearly influenced by formal models of practice and different mediators adopt very different models, even in a very simple dispute."[89] Formal models are disseminated in authoritative texts, reflecting theories of explicit and self-conscious actions.[90] However, formal models are ambiguous and cannot account for the uniqueness of cases and parties and rapid, unpredictable interactions in mediation.[91]

By contrast with formal models, schemas of mediation practice are "the partly explicit, but largely tacit and highly idiosyncratic ideas the mediator holds about the role of the mediator; the goals to be attained (and avoided), and the interventions that are permissible (and are impermissible) in striving to reach those goals."[92] Moreover, in these schemas, "[f]ormal models are inevitably sifted through each mediator's unique beliefs, values, and experiences. It is these idiosyncratic characteristics that are likely to shape what mediators actually deliver and what clients experience." Much of what mediators do is outside of their conscious awareness.[93] Their actions become "'highly automated' over time, often inaccessible to ordinary reflection."[94]

Kressel distinguished simple and complex models. Simple models depend heavily on a formal model of practice, with "clear,

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87 Kenneth Kressel, *How Do Mediators Decide What to Do? Implicit Schemas of Practice and Mediator Decisionmaking,* 28 OHIO ST. J. ON DISP. RESOL. 709 (2013).

88 *Id.* at 709.

89 *Id.* at 721.

90 *Id.* at 722.

91 *Id.* at 721.

92 Kressel, *supra* note 87, at 722.

93 *Id.* at 721–22.

94 *Id.* at 716.

linear behavioral scripts."[95] Mediators using simple models in his research had little curiosity as they reflected on their performances.[96] By contrast, "complex schemas were far less reliant on a formal model of practice, involved a more diverse and nuanced set of behavioral scripts, more decisional uncertainty and stress for the mediator, and were associated with more efforts at reflective learning."[97]

The effectiveness of mediators' interventions may be partly a function of "fit" with the parties' expectations or needs and the mediator's interests and needs.[98] Kressel also found that the context and culture of mediations had a major effect on mediators' models as reflected in his study of National Institutes of Health (NIH) ombuds-mediators.

> The mental model of the NIH team was clearly shaped by the social context in which the ombudsmen function. Thus, the primacy of [deep problem-solving] in the model appears to be due to the fact that the ombudsmen are "repeat players" in the life of the NIH and therefore become adept at recognizing the latent sources of its dysfunctional conflicts; are under a strong role mandate as ombudsmen to pay attention to covert patterns of organizational dysfunction; and deal with disputants motivated to address latent issues blocking their scientific work. The ombuds mediators are also strongly identified with the NIH's core mission of promoting scientific excellence.[99]

For future research, he advocated focusing primarily on the decisionmaking of expert practitioners who practice in different contexts and have "tolerance for ambiguity, cognitive flexibility, and ego-strength."[100]

I initiated the Real Mediation Systems Project to produce accounts of how mediators actually think and act.[101] I invited highly

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95 *Id.* at 726.

96 *Id.* at 727.

97 Kressel, *supra* note 87, at 728.

98 *Id.* at 731–32.

99 *Id.* at 715.

100 *Id.* at 733–34.

101 *See* Lande, *supra* note 86. I initially used the concept of mediators' individual "models" but changed the focus to "systems" to reflect the systemic nature of their mediation procedures and to avoid confusion with the traditional concept of mediation models. Also, "models" has a prescriptive connotation whereas "systems" is more descriptive.

self-aware and experienced mediators to write descriptions of their own mediation systems using the following sections:[102]

My Contributions to My Mediations
- My Background, Training, and Experience
- My Core Values and Goals in Mediation for Parties
- My Goals in Mediation for Myself

Participants, Cases, and Contexts in My Mediations
- Types of Cases and Participants in My Mediations
- Common Patterns of Conflict Before and During My Mediations
- Common Patterns of Parties' Goals, Interests, and Positions in My Mediations
- Factors in the Mediation Market, Practice Culture, Organizational Policies and/or Legal and Ethical Standards Affecting My Mediations

My Mediation System Design
- Preparation in My Mediations
- My Routine Mediation Session Procedures
- Challenging Situations in My Mediations and How I Handle Them

Reflection
- Evolution of My Approach
- [If applicable:] How My Teaching or Training Affected My Mediation Approach
- [If applicable:] How My Mediation Approach Affected My Teaching or Training
- What Writing This Document Made Me Conscious Of
- Things I Want to Improve in My Mediations

The accounts described in Part III.B serve as qualitative data analyzed in Part III.C. They are similar to, but better than, semi-structured interviews. The mediators invested many hours writing their accounts. Their accounts are quite rich, though they inevitably could not address all the issues comprehensively.

This project has complementary advantages and disadvantages compared with Kressel's research. His studies focused on

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102 *Id.* Mediators were invited to modify the structure to fit their situations, so the structure of their accounts is not uniform. I also modified the general structure for these accounts as this project evolved.

mediators' behaviors and thinking in individual cases, which may provide greater validity about mediators' specific interventions and intentions. However, they did not provide a comprehensive and longitudinal view of the mediators' models and their evolution over time. Conversely, this project "zooms out" to portray the "big picture" but does not provide specific case-level observations and analyses.[103]

This analysis has the advantages and disadvantages of small qualitative studies. It is based a small non-random set of mediators. In keeping with Kressel's suggestion,[104] I selected these mediators because they are much more introspective than the general population of mediators. The accounts provide deep insights into the mediators and their work, but there are limits to the generalizability, especially considering the amazing variety of mediators, parties, disputes, contexts, and cultures.

The mediators' descriptions of their systems in this article are self-reports, which presumably are pretty accurate reflections of their beliefs and intentions. The descriptions probably reflect the authors' behavior to a large extent, though not as much as their thinking. Theory inevitably is clearer and simpler than practice, which is contingent on a complex combination of circumstances. It is also hard to observe oneself objectively. Even so, thoughtful mediators' approaches probably are close to their aspirations.[105]

Unfortunately, many mediators are not as thoughtful as the mediators profiled in this article. After some mediators mediate for a while, they may "capitulate to the routine,"[106] operating "on automatic" with little self-awareness or reflection. Such mediators' actions may differ significantly from their intentions and perceptions.

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103 Two books provide biographical profiles of mediators and others in the conflict resolution field. Howard Gadlin and Nancy Welsh published a volume of the reflections of twenty-three members of the conflict resolution field about their careers. The chapters address the authors' histories, careers, views about the place of mediation in the field, and their views about the tenets of mediation and conflict resolution. HOWARD GADLIN & NANCY A. WELSH, EVOLUTION OF A FIELD: PERSONAL HISTORIES IN CONFLICT RESOLUTION (2020). Deborah Kolb and her associates published a study profiling twelve mediators who work in very different contexts. The profiles analyze a single case for each mediator to illustrate their mediation models. *See* DEBORAH KOLB & ASSOCIATES, WHEN TALK WORKS: PROFILES OF MEDIATORS (1994).

104 *See* text accompanying *supra* note 100.

105 *See supra* note 86.

106 *See* Robert M. Ackerman & Nancy A. Welsh, *Interdisciplinary Collaboration and the Beauty of Surprise: A Symposium Introduction*, 108 PENN ST. L. REV. 1, 2 (2003) ("The field of 'alternative' dispute resolution, and our beloved process of mediation in particular, had begun to capitulate to the routine.").

I believe that the fundamental premise of this project–that mediators design their own mediation systems–is generally applicable to mediators who regularly handle streams of cases, though the particular mediation systems vary based on many factors. Further study is needed to consider this hypothesis. For example, the law school clinical faculty in this group generally get referrals from courts and government agencies. Mediators in the private sector and those employed by large organizations deal with different profiles of parties and cases. There are multiple factors including national and professional culture affecting their thoughts and actions in mediation cases, resulting in different dynamics. Research would be helpful to study how variations like these affect mediators' systems.

B. *Accounts of Mediators' Systems*

This Part identifies ten mediators and accounts of their mediation systems. I started by asking Ron Kelly and Michael Lang to describe their systems. They are two of the most self-aware and intentional mediators I know. Their accounts provided models to help others consider how to describe their systems. I suggested a structure for Ron and Michael's accounts and, with experience, I refined the structure. In keeping with the inductive nature of this project, I told the mediators to modify the structure of their accounts as needed to reflect their perspectives. So the mediators' accounts have similar structures but there are variations.

After Ron and Michael wrote their accounts, I invited prominent faculty teaching mediation clinics to describe their mediation systems. I especially wanted to hear from clinical faculty because they operate at the intersection of theory and practice. They must teach mediation theory to guide students' mediations of actual cases. Because their students work with real clients and cases, clinical faculty do not have the luxury of simply articulating their preferred views about mediation theory. Rather, they must prepare students to be as effective as possible in satisfying real clients' expectations. Faculty differ, however, in their values, goals, and favored techniques as well in the types of cases their clinics handle. So their conceptions of what is desirable and effective necessarily varies. Because clinical faculty routinely debrief students about their mediation experiences, they have a built-in process of reflec-

tion that may affect how the faculty may teach and mediate in the future.

Here is a list of the mediators and the types of mediation that they do.

Debra Berman is professor and director of the Frank Evans Center for Conflict Resolution at South Texas College of Law Houston. She mediates cases referred by the U.S. Equal Employment Opportunity Commission. She describes herself as a "pragmatic mediator."[107]

Alex Carter is a clinical professor and the director of the Mediation Clinic at Columbia Law School. Her mediation practice includes extensive experience mediating commercial and employment disputes. The Clinic handles various civil cases and cases involving federal statutes. Her account is "Learning Through Teaching."[108]

Doug Frenkel is the Morris Shuster Practice Professor of Law at the University of Pennsylvania Carey School of Law. His clinic handles employment, family, commercial, Hague Convention, and higher education matters. He wrote "Reflections of a Mediation Clinician."[109]

Toby Guerin is the associate director of the Center for Dispute Resolution at the University of Maryland Francis King Carey School of Law and a clinical instructor with its Mediation Clinic. Most of her mediations involve small claims cases and workplace matters, though she also does agricultural mediations and mediations related to re-entry of incarcerated individuals into the general community. Her account is entitled, "From Undergrad to Clinician: One Mediator's Journey."[110]

Charlie Irvine runs the LLM / MSc Programme in Mediation and Conflict Resolution at University of Strathclyde in Glasgow, Scotland. He has been mediating for thirty years, handling family, workplace, and commercial cases as well as complaints against law-

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107 Debra Berman, *Pragmatic Mediation* (Oct. 2022), INDISPUTABLY, http://indisputably.org/files/2022/11/Debra-Berman-System-1.pdf [https://perma.cc/6AC4-K7A3].

108 Alexandra Carter, *Learning Through Teaching* (Nov. 2022), INDISPUTABLY BLOG, http://indisputably.org/files/2022/11/Alex-Carter-System-1.pdf [https://perma.cc/7GCA-M3MN].

109 Douglas N. Frenkel, *Reflections of a Mediation Clinician*, INDISPUTABLY BLOG, (Nov. 2022), http://indisputably.org/files/2022/11/Doug-Frenkel-System-1.pdf [https://perma.cc/VJE6-ZRXW].

110 Toby Guerin, *From Undergrad to Clinician: One Mediator's Journey*, (Oct. 2022), INDISPUTABLY BLOG, http://indisputably.org/files/2022/11/Toby-Guerin-System-1.pdf [https://perma.cc/6GUN-M59T].

yers. His account is entitled "What Usually Happens in My Mediations."[111]

Ron Kelly is a Berkeley, California mediator who handles business and organizational disputes. He specializes in disputes about buildings and land, including construction, real estate, probate cases, and disputes involving governmental entities. His account is "Practical Peacemaking in the Business World."[112]

John Lande is Isidor Loeb Professor Emeritus at the University of Missouri School of Law. Previously, I was the director of the child protection mediation clinic at the University of Arkansas-Little Rock. My account, "Designing Mediation to Satisfy Multiple Stakeholders," discusses the system design process for that clinic and how it affected my mediations.[113]

Michael Lang is a retired mediator trained in law and therapy who handled marital and workplace disputes as well as cases involving organizations. He is a co-director of the Reflective Practice Institute, and he teaches and writes about reflective practice. His account of his career is "A Mediator's Journey."[114]

Sharon Press is a professor at Mitchell Hamline School of Law and director of its Dispute Resolution Institute. She teaches their mediation clinic which mediates conciliation, housing, and harassment court cases, as well as discrimination cases filed with the Minnesota Department of Human Rights. Her account is "Helping People Make Decisions About Their Conflicts."[115]

Fran Tetunic a professor at Nova Southeastern University Shepard Broad College of Law where she directs the Dispute Resolution Clinic. She mediates cases involving diversion from the juvenile justice system and victim-offender juvenile cases as well as other *pro bono* cases, including homeowners' association pre-suit

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111 Charlie Irvine, *What Usually Happens in My Mediations*, INDISPUTABLY BLOG, (Nov. 2022), http://indisputably.org/files/2022/11/Charlie-Irvine-System-1.pdf [https://perma.cc/W22M-GUGH].

112 Ron Kelly, *Practical Peacemaking in the Business World*, INDISPUTABLY BLOG, (June 16, 2022, rev. Sept. 24, 2022), http://indisputably.org/files/2022/11/Ron-Kelly-System.pdf [https://perma.cc/K8N4-RYVS].

113 John Lande, *Designing Mediation to Satisfy Multiple Stakeholders*, INDISPUTABLY BLOG, (Sept. 2, 2022), http://indisputably.org/files/2022/11/John-Lande-System-1.pdf [https://perma.cc/ZJL2-FD9H].

114 Michael Lang, *A Mediator's Journey*, INDISPUTABLY BLOG, (June 20, 2022, rev. Sept. 25, 2022), http://indisputably.org/files/2022/11/Michael-Lang-System.pdf [https://perma.cc/ZB43-D649].

115 Sharon Press, *Helping People Make Decisions About Their Conflicts*, INDISPUTABLY BLOG, (Oct. 2022), http://indisputably.org/files/2022/11/Sharon-Press-System-1.pdf [https://perma.cc/MQD9-YFBJ].

matters and elder mediation cases. She describes her system as "Mediating to Give a Voice to Vulnerable People in Conflict."[116]

C. *Analysis of Mediators' Systems*

This Part analyzes the mediation systems listed in the preceding Part.

Motivations to Mediate and Influences on Mediation Systems. The mediators' careers grew organically from various experiences in their lives. Mediation is a personal calling for the mediators described in this article. Some "fell in love"[117] with it or were "hooked"[118] after they had the chance to mediate. Some mediators traced their interest in mediation and cooperative conflict resolution to their childhoods, reflecting their personalities as children and other early experiences.[119] Some mentioned teachers, mentors, or other supporters.[120] Mediators who grew up in the 1950s and 1960s were affected by the social movements of the time and saw mediation as a way to advance their progressive ideals.[121] Some trainings that mediators attended were particularly influen-

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116 Fran Tetunic, *Mediating to Give a Voice to Vulnerable People in Conflict*, INDISPUTABLY BLOG, (Oct. 2022), http://indisputably.org/files/2022/11/Fran-Tetunic-System-1.pdf [https://perma.cc/7WRT-D9AE].

117 *See* Berman, *supra* note 107, at 1; Carter, *supra* note 108, at 1 (feeling, after her first mediation, that Morgan Freeman's voice was booming down, telling her that this is what she should do for the rest of her life).

118 Guerin, *supra* note 110, at 1.

119 *See* Carter, *supra* note 108, at 1 (testifying, as a young teenager, at her parents' bitter divorce trial); Frenkel, *supra* note 109, at 1 (growing up in a "family where emotional eruptions were stifled"); Lande, *supra* note 113, at 1 (describing dysfunctional family conflict and reaction to social conflicts in the 1960s); Lang, *supra* note 114, at 1 (describing interest in listening to others and helping solve problems); Press, *supra* note 115, at 1–2 (working as a resident assistant and director in college dorm and coordinator of a peer mediation program); Tetunic, *supra* note 116, at 1 (being a "problem solver, harmonizer, and negotiator" as a child and learning about non-verbal communication studying dance).

120 *See* Carter, *supra* note 108, at 1–2 (Carol Leibman, Chris Stern Hyman, and Marc Fleisher); Guerin, *supra* note 110, at 1 (Leah Wing and Roger Wolf); Lande, *supra* note 113, at 1-2 (Gary Friedman and Marc Galanter); Press, *supra* note 115, at 1–2, 9 (Jonathan Marks, Josh Stulberg, and Jim Alfini).

121 *See* Frenkel, supra note 109, at 1 (public interest litigator who became uncomfortable with ordinary court-based disputing); Kelly, supra note 112, at 1 (desire to help resolve problems in his Berkeley community); Lande, supra note 113, at 1 (seeking to promote justice and help disadvantaged communities); Lang, supra note 114, at 2 (civil rights and anti-war movements made him want to be a "fighter for justice").

tial.[122] Several mediators said that they gained insights about mediation through teaching and training others.[123]

Some specific experiences influenced mediators' interest in the field. Sharon was profoundly affected by reading *The Promise of Mediation*[124] and participating in a group designing transformative mediation training for the US Postal Service.[125] She directed the Florida Dispute Resolution Center for more than twenty years.[126] Dealing with grievances was particularly instructive as she learned why some parties were dissatisfied with their mediations.[127] More recently, the racial reckoning in the wake of the murder of George Floyd in 2020 prompted her to reflect on the role of neutrality and impartiality in mediation and the potential impact of these concepts in preserving the status quo.[128]

Doug's interest in psychology fueled his interest in mediation. His extroverted personality, interest in "seeing all sides" of situations, and study of empirical research about persuasion and cognitive and motivational judgmental biases all contributed to his thinking about mediation.[129]

Core Values and Goals. Mediators have a wide variety of goals for their mediations. These include being patient,[130] respecting others and recognizing their humanity,[131] listening and learning,[132] providing communication opportunities,[133] partnering with parties,[134] helping parties make their own decisions,[135] promoting

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122 Guerin, *supra* note 110, at 1–2, 6 (took multiple trainings including trainings about mediation involving child access, probate, agriculture, individualized education plan, incarcerated individuals' re-entry into the community, elder mediation, inclusive and restorative techniques); Kelly, *supra* note 112, at 1 (participated in three hundred trainings and workshops and found family mediation trainings to be particularly helpful); Lande, *supra* note 113, at 1-2 (took mediation trainings by Gary Friedman); Lang, *supra* note 114, at 2 (studied transactional analysis, gestalt therapy, and family therapy, focusing on systems theory).

123 Carter, *supra* note 108, at 10–11; Frenkel, *supra* note 109, at 8; Guerin, *supra* note 110, at 7; Lande, *supra* note 113, at 9–10; Lang, *supra* note 114, at 8-9; Irvine, *supra* note 111, at 2; Tetunic, *supra* note 116, at 7.

124 See supra note 15.

125 Press, *supra* note 115, at 9.

126 *Id.* at 2.

127 *Id.* at 9–10.

128 *Id.* at 3, 10.

129 Frenkel, *supra* note 109, at 1–2.

130 Carter, *supra* note 108, at 2.

131 *Id.* at 3.

132 *Id.* at 2.

133 Guerin, *supra* note 110, at 2.

134 Carter, *supra* note 108, at 2.

135 *Id.* at 3; Frenkel, *supra* note 109, at 3; Irvine, *supra* note 111, at 3; Lang, *supra* note 114, at 2-3; Press, *supra* note 115, at 3; Tetunic, *supra* note 116, at 2.

"high-quality decision-making,"[136] honoring parties' mediation process choices,[137] satisfying parties' and attorneys' needs and interests,[138] promoting people's happiness by moving past destructive negative emotions,[139] avoiding parties going to court,[140] avoiding case evaluation,[141] conforming to mediation standards of practice, program policies, and theory,[142] helping people who have felt systematically disenfranchised and vulnerable,[143] populating the world with problem-solving lawyers,[144] peacemaking and changing our society for the better,[145] resolution of disputes,[146] and counteracting systemic racism implicit in mediation neutrality.[147] Charlie listed his values as unconditional personal regard for parties, parsimony (i.e., not intervening if not needed), mediation activism (i.e., intervening when needed), and empowerment.[148]

Types of Cases and Parties. This small group of mediators handles a very wide range of types of cases. These include mediations involving business-to-business contract claims,[149] family disputes,[150] various civil claims,[151] intra-organizational disputes,[152] employment discrimination,[153] American with Disability Act cases,[154] Fair Labor Standard Act cases,[155] small claims cases,[156] workplace matters,[157] housing issues,[158] clients' complaints about

136 Lande, *supra* note 113, at 6.
137 Frenkel, *supra* note 109, at 2.
138 Tetunic, *supra* note 116, at 2.
139 Frenkel, *supra* note 109, at 2.
140 Berman, *supra* note 107, at 1.
141 Guerin, *supra* note 110, at 2.
142 *Id.*; Tetunic, *supra* note 116, at 2.
143 Carter, *supra* note 108, at 3; Tetunic, *supra* note 116, at 2-3.
144 *Id.* at 3.
145 *Id.* at 2-3; Kelly, *supra* note 112, at 4.
146 Berman, *supra* note 107, at 1; Frenkel, *supra* note 109, at 2; Kelly, *supra* note 112, at 4.
147 Press, *supra* note 115, at 3, 10.
148 Irvine, *supra* note 111, at 3-4.
149 *Id.* at 4; Kelly, *supra* note 112, at 2.
150 Frenkel, *supra* note 109, at 3; Lang, *supra* note 114, at 4.
151 Carter, *supra* note 108, at 3 (contract and tort claims involving goods sold and delivered, labor and services, hospital or other bills, personal injury).
152 Kelly, *supra* note 112, at 2; Lang, *supra* note 114, at 4.
153 Berman, *supra* note 107, at 2; Carter, *supra* note 108, at 3; Frenkel, *supra* note 109, at 3; Guerin, *supra* note 110, at 2; Lang, *supra* note 114, at 4; Press, *supra* note 115, at 5; Tetunic, *supra* note 116, at 3.
154 Carter, *supra* note 108, at 4.
155 *Id.*
156 Guerin, *supra* note 110, at 2; Irvine, *supra* note 111, at 4; Press, *supra* note 115, at 4.
157 Guerin, *supra* note 110, at 2; Irvine, *supra* note 111, at 4; Lang, *supra* note 114, at 4.
158 Frenkel, *supra* note 109, at 3; Press, *supra* note 115, at 4.

their lawyers,[159] inheritance disputes,[160] student discipline,[161] homeowner association issues,[162] juvenile justice diversion,[163] victim-offender cases,[164] elder care,[165] harassment,[166] child abuse and neglect,[167] agricultural matters,[168] and re-entry of incarcerated individuals into the community.[169]

Mediators generally tailor the procedures in their systems to fit the parameters of their systems, parties, and types of case. For example, my system for handling brief, tightly-regulated child protection mediations was extremely different from my system for handling largely unregulated multi-session divorce mediations.[170] Although my mediation philosophy was the same for both types of cases, my systems varied dramatically because of the differences between the issues, parties, stakeholders' interests, and system constraints. One might consider them as different mediation systems or perhaps sub-systems of mine.

Patterns of Parties' Interests and Goals. Parties in these mediations have a wide range of goals including being respected,[171] maximizing compensation and minimizing liability,[172] getting acknowledgment or apologies,[173] getting vindication or punishing perceived wrongdoers,[174] resolving matters, achieving goals related to parties' identities, relationships, and interactions,[175] safely returning children to their parents' custody,[176] gaining power and control,[177] justice,[178] and security and closure.[179] Many of the goals

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159 Irvine, *supra* note 111, at 4.
160 *Id.*
161 Frenkel, *supra* note 109, at 3.
162 Tetunic, *supra* note 116, at 3.
163 *Id.*
164 *Id.*
165 *Id.*
166 Press, *supra* note 115, at 5.
167 Lande, *supra* note 113, at 3–4.
168 Guerin, *supra* note 110, at 2–3.
169 *Id.*
170 Lande, *supra* note 113, at 10.
171 Carter, *supra* note 108, at 5.
172 Berman, *supra* note 107, at 2; Guerin, *supra* note 110, at 3–4; Irvine, *supra* note 111, at 4; Kelly, *supra* note 112, at 3 (parties want mediator to persuade the other side that it is wrong); Tetunic, *supra* note 116, at 3–4.
173 Tetunic, *supra* note 116, at 3.
174 Irvine, *supra* note 111, at 4; Tetunic, *supra* note 116, at 3.
175 Lang, *supra* note 114, at 5.
176 Lande, *supra* note 113, at 5.
177 Tetunic, *supra* note 116, at 3.
178 Guerin, *supra* note 110, at 3.
179 Tetunic, *supra* note 116, at 4.

are specific to the type of case. For example, in juvenile victim-offender cases, a goal is to prevent recidivism whereas in elder care cases, a goal is to provide for the elders' needs.[180]

Participation of Lawyers. Lawyers' participation in mediation varies greatly, mostly as a function of the type of case.[181] In some cases, lawyers rarely participate.[182] In other cases, they are "front and center."[183] In Michael's family mediations, lawyers often participated in Florida cases but not when he mediated elsewhere, reflecting differences in the local practice culture.[184]

Lawyers' participation may significantly affect the mediation process. For example, Toby finds that when parties are represented by lawyers, they generally want to caucus earlier and more often than self-represented parties.[185] In Doug's mediations, some lawyers complain when self-represented parties refuse to accept "nuisance value" offers.[186] When Alex mediates cases involving self-represented parties and parties who are represented by lawyers, she takes special care to help the self-represented parties consider their situations by asking what information they need, caucusing, and using other techniques.[187]

Lawyers presented a special challenge in my child protection cases as most of the lawyers were part of a "club" of repeat players who had developed relationships with each other because they handled many cases together. It quickly became apparent to the parents, relatives, and other participants that they were not part of the club and had less influence than "members" of the club. The parents' lawyers, who generally were appointed by the court and paid a pittance, had little connection with their clients, often meeting them for the first time right before mediation or court hearings. These lawyers generally tried to advocate diligently for their clients, but the parents' lawyers had strong interests in maintaining good relationships with the other lawyers, which may have affected their advocacy in some cases.[188]

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180 *Id.*

181 Press, *supra* note 115, at 4–5, 8.

182 Lang, *supra* note 114, at 4 (in workplace disputes, lawyers typically did not attend mediation, but parties sometimes talked with lawyers by phone).

183 Kelly, *supra* note 112, at 2; *see also* Lande, *supra* note 113, at 4 (describing regular participation of lawyers).

184 Lang, *supra* note 114, at 4.

185 Guerin, *supra* note 110, at 4.

186 Frenkel, *supra* note 109, at 4.

187 Carter, *supra* note 108, at 9.

188 Lande, *supra* note 113, at 4-5.

Organizational System Designs. Most of the mediators' accounts did not discuss how organizational mediation systems affected their individual systems. Ron and Michael did not have regular arrangements with courts or other organizations to get referrals, so they had freedom to design their own systems. All the clinical faculty received referrals from courts or other organizations but, except for me, they did not mention the process of designing their systems. Presumably, they did not mention designing their systems because the design decisions previously had been made and were largely settled. By contrast, I was involved in designing a complex system from scratch.[189]

Several mediators mentioned the impact of organizational system parameters on their mediation procedures. For example, Sharon said that mediators explain the mediation option to parties in day-of-hearing cases except the harassment cases. In the latter cases, the referees give the explanations because they are in a better position to explain the legal implications and effects of making agreements in mediation.[190]

Timing is a major factor affecting mediation procedures. Doug said that when he has only an hour to mediate, he cannot try to be as constructive or produce satisfying outcomes as if he has more time.[191] The design of my clinic's mediation system had major effects on our mediation process. Our mediations were integral parts of the court's caseload. The court decided which cases we would mediate, and we scheduled mediations to take place shortly before court hearings.[192] We mediated issues that the court would consider in its hearings.[193] We had limited time to mediate and so we used our time as efficiently as possible, prompting us to focus on issues that might result in agreements.[194]

Initial Stage of Mediation: Pre-Session Activities. All the mediators routinely arrange for certain pre-session activities, which vary widely based on the type of case and context. Michael appropriately said that he considers mediation to begin when he receives the first email or phone call.[195]

In Sharon's day-of-hearing cases, the mediator or referee provides a brief general description at the same time to all parties ap-

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189 *Id.* at 2–4, 6–8.
190 Press, *supra* note 115, at 6.
191 Frenkel, *supra* note 109, at 4.
192 Lande, *supra* note 113, at 6–7.
193 *Id.* at 7.
194 *Id.* at 7–8.
195 Lang, *supra* note 114, at 6.

pearing for court hearings.[196] Doug finds that in his day-of-hearing cases, it is helpful to start by caucusing to learn about challenges and limitations, begin to develop trust, and start to convert pessimism or fear into openness.[197] Similarly, in Charlie's lawyer-client cases, there usually is no conversation before the day of mediation, so he has short private meetings with both sides at the beginning of his mediation sessions. These private meetings are designed to build rapport and provide an opportunity for him and the parties to assess how they will act in the mediation session. He uses these meetings to coach lawyers to listen respectfully.[198] In my child protection cases, a case coordinator contacted the participants to provide scheduling and logistical information and to answer questions for people who were not familiar with mediation.[199]

When mediations are scheduled in advance, mediators generally have individual contacts with parties and/or lawyers before convening a mediation session. In his initial conversations, Michael introduced himself, answered questions about him and his approach to mediation, and gathered limited information. He wanted to "know about the nature of the dispute, who was involved, whether litigation had been initiated, and whether other efforts had been made to resolve the dispute."[200] In family mediations involving self-represented parties, he also screened for possible intimate partner abuse."[201] Ron uses an extensive routine to initiate his mediations. He has a phone call with each lawyer, gets the parties to sign an agreement to mediate, requires them to complete a 21-question questionnaire that their lawyers edit, and then has a phone call with each party and lawyer.[202]

Before the mediation sessions in Alex's cases, the mediators have conversations with the parties to secure their agreement to mediate, explain confidentiality, start to build trust and connection, ask who might be necessary to have in the room, nail down process arrangements, identify current barriers to settlement, figure out how best to use the time before the mediation session, and get information, settlement authority, and anything else that might be needed.[203] In some of her cases, the mediators review case docu-

196 Press, *supra* note 115, at 6.
197 Frenkel, *supra* note 109, at 6.
198 Irvine, *supra* note 111, at 5–6.
199 Lande, *supra* note 113, at 4–5.
200 Lang, *supra* note 114, at 6.
201 *Id.* at 7.
202 Kelly, *supra* note 112, at 4–5.
203 Carter, *supra* note 108, at 5–6.

ments, recognizing possible limitations of the information in the documents.[204] Fran calls people to find out about any special needs or safety concerns and learn about their expectations or requests. She determines the appropriateness of mediation and parties' ability to participate meaningfully. She also requests relevant written information.[205] In Sharon's cases from the Minnesota Department of Human Rights, she talks with the parties and any attorneys to explain her "philosophy of mediation, learn about the case, and make procedural arrangements including scheduling and logistical information."[206] Toby said that her pre-session activities help alleviate parties' anxiety, prevent last-minute surprises, and often "increase parties' access to justice by exploring accessibility needs, technology competency, and legal representation."[207]

Debra sends emails to ask the parties for information, encourages them to think about their goals, and requests that lawyers come prepared to participate effectively with justifiable financial demands.[208] Doug tries to learn a reasonable amount about his cases including by doing independent legal research, reviewing court dockets, and searching social media.[209]

Toby regularly co-mediates and has pre-session conversations with her co-mediators to discuss "common practices, personal mediator goals, and division of responsibilities."[210]

Because of the COVID-19 pandemic, many of the mediations were conducted virtually and the mediators made arrangements for communication during mediation sessions.[211] Even as the pandemic has waned, some of the mediations continue to be conducted virtually.[212] In virtual mediations, Toby finds that pre-session conversations are especially helpful to build rapport.[213]

Routine Mediation Session Procedures. Probably most or all of the mediators in this sample have parties sign agreements to me-

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204 *Id.* at 6.

205 Tetunic, *supra* note 116, at 4–5.

206 Press, *supra* note 115, at 6.

207 Guerin, *supra* note 110, at 4.

208 Berman, *supra* note 107, at 2–3 (asking parties to be prepared to make and justify offers).

209 Frenkel, *supra* note 109, at 5–6.

210 Guerin, *supra* note 110, at 4; *see also* Carter, *supra* note 108, at 6 (co-mediators confer before mediation sessions).

211 Carter, *supra* note 108, at 6; Guerin, *supra* note 110, at 4; Irvine, *supra* note 111, at 5; Tetunic, *supra* note 116, at 5.

212 Carter, *supra* note 108, at 6 (offering parties the option of mediating in person or virtually); Press, *supra* note 115, at 4, 8.

213 Guerin, *supra* note 110, at 4.

diate at the outset.[214] Similarly, mediators presumably present guidelines to promote constructive communication.[215]

The mediators in this group generally prefer to use joint opening sessions rather than starting in caucus,[216] and they generally prefer to stay in joint session as long as it is productive.[217] Doug believes that joint sessions should be the "default mode" of starting mediation and that the process ideally should continue in joint session as long as it is productive.[218] However, he also believes that the "caucus is mediation's signature process contribution to the world of dispute resolution," there are good reasons to caucus, and that mediators "should not avoid using caucuses merely to elevate their own process preference over that of the disputants."[219] Debra always has the parties discuss money in caucus because it enables her to strategically frame offers and encourage parties not to respond in kind to extreme positions.[220]

Ron sets up the room so that everyone is facing him and he seats the people with the highest conflict next to each other.[221] Instead of having each side give an opening statement, he has participants jointly make a list of issues to discuss and a history of the events leading up to the dispute.[222] They jointly develop at least two different frameworks for resolution including (1) immediate separation of the parties' businesses and (2) continuing working together or unwinding their relationship over an extended period of time.[223] My child protection mediations were a stark contrast with Ron's business mediations. Although I also began by eliciting issues to discuss rather than inviting parties to make opening statements, this was because of intense time constraints as most mediations were limited to 90 minutes.[224]

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214 Kelly, *supra* note 112, at 4 (arranging for principals to sign an agreement to mediate before a mediation session); Lande, *supra* note 113, at 7; Press, *supra* note 115, at 7; Tetunic, *supra* note 116, at 5.

215 *See, e.g.*, Tetunic, *supra* note 116, at 5.

216 Berman, *supra* note 107, at 3; Carter, *supra* note 108, at 6 (offering a joint summary after both sides' presentations); Guerin, *supra* note 110, at 4; Irvine, *supra* note 111, at 6–8; Kelly, *supra* note 112, at 5–6; Press, *supra* note 115, at 7–8 (listening to both sides and then summarizing a "joint narrative"); Tetunic, *supra* note 116, at 5.

217 Lang, *supra* note 114, at 7 (uses "private meetings only when strategically useful"); Tetunic, *supra* note 116, at 5.

218 Frenkel, *supra* note 109, at 6.

219 *Id.* at 5, 7.

220 Berman, *supra* note 107, at 3.

221 Kelly, *supra* note 112, at 5–6.

222 *Id.* at 6–7.

223 *Id.* at 7.

224 Lande, *supra* note 113, at 7.

My cases always were integrated in the court process, so we started by reviewing compliance with any prior orders and we prepared agreements for the courts' review at an upcoming hearing.[225] I tried to get whatever agreements we could, and if could not get a fairly quick agreement on an issue, we generally would shift to another issue where we might get agreement.[226]

Mediators sometimes strategically plan lunch breaks to advance the process. For example, Ron uses lunch to give each side a chance to "discuss things amongst themselves in a more relaxed setting."[227] Alex sometimes tries to "thaw" relationships by suggesting that everyone eat lunch together without discussing the case.[228]

Mediators arrange for writing agreements, but this is so routine that some mediators did not mention it in their accounts. This is a significant part of the process and some of the mediators described particularly careful processes for drafting agreements.[229]

Challenging Situations and Strategies to Deal with Them. Mediators regularly encounter a wide range of challenging situations. As Debra and Charlie pointed out, if the parties could readily resolve matters themselves, they would not need a mediator.[230]

Toby identifies challenging situations in her cases involving "differences between the parties regarding familiarity with the law, knowledge of the subject-matter, lack of empathy, denial of the other person's values and experiences, and overall comfort with technology or the process."[231] She relies primarily on listening and asking strategic questions to deal with these problems.[232]

In some of Alex's cases, the parties struggle with complexity and uncertainty, and she helps them assess the facts and probabilities of future events. Mediations sometimes trigger strong emotions causing slower processing, increased reactivity, and challenges to self-regulation of their behavior. To deal with these problems, she takes short breaks to "check in" with herself as the mediator, reflecting on the emotions she is experiencing and how

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225 *Id.* at 8.

226 *Id.*

227 Kelly, *supra* note 112, at 7.

228 Carter, *supra* note 108, at 7.

229 *Id.* (discussing issues in "boilerplate" language that parties might not anticipate); Irvine, *supra* note 111, at 9; Kelly, *supra* note 112, at 7–8; Press, *supra* note 115, at 7, 9; Tetunic, *supra* note 116, at 5–6 (discussing ethical issues in drafting agreements).

230 Berman, *supra* note 107, at 4; Irvine, *supra* note 111, at 3.

231 Guerin, *supra* note 110, at 5.

232 *Id.*

she has helped parties in the past. Sometimes, Alex uses humor to defuse tensions. Some participants in her cases create strategic challenges such as a "hyper-competitive bargaining style, a 'take it or leave it' approach, repeatedly asking the other side to bid against themselves, and commitment tactics." To deal with these problems, she relies on careful listening to responses to her open-ended questions. If there is a large difference in the parties' positions, she sometimes suggests a bracket of upper and lower numbers for negotiation. When self-represented parties are mediating with parties represented by lawyers, she arranges for the attendance of a support person, asks lots of questions about needed information, slows the process, and caucuses frequently.[233]

Michael identified two general types of challenges: "parties and/or counsel lacking key data or otherwise being unprepared to engage in a productive conversation, and parties and/or counsel who want to 'speed through to a deal.'"[234] He had strategies to deal with both challenges. They involved eliciting whatever information he could and discussing timing of the process and potential for progress.[235]

Sharon is challenged when lawyers want her to run the mediation as a shuttle settlement conference. She tries to preempt this by explaining her approach early in the process.[236]

Fran encounters parties who stick to their positions for psychological reasons including cognitive dissonance, concern for looking weak, and reluctance to admit they were wrong. She asks questions to help them change their perspectives.[237] She also has mediated cases where parties have safety concerns, and she schedules them in locations with metal detectors or law enforcement personnel.[238]

In Ron's mediations, the parties often reach a point where they do not want to make further concessions—commonly referred to as "impasse"—and he has multiple strategies to help them reach agreement. These include highlighting risks at trial or arbitration, identifying differently valued elements, jointly discussing why the parties are stuck, suggesting use of an arbitrator, and suggesting reconvening at a later date.[239]

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233 Carter, *supra* note 108, at 8–9.

234 Lang, *supra* note 114, at 7; *see also* Tetunic, *supra* note 116, at 6.

235 Lang, *supra* note 114, at 7–8; Tetunic, *supra* note 116, at 6.

236 Press, *supra* note 115, at 9.

237 Tetunic, *supra* note 116, at 6.

238 *Id.* at 6–7.

239 Kelly, *supra* note 112, at 8–9.

In my child protection mediations, my most challenging problem was getting some repeat-player lawyers to cooperate in the mediation process. I tried talking with them privately to address their concerns, with mixed success.[240]

Role of Mediation Theories. Mediation theories influence mediators' thoughts and actions to some extent—along with many other factors. Many of the mediators' accounts do not mention traditional mediation theories and none identified themselves as clearly following one of these theories.

Some of the mediators follow prescriptions of facilitative mediation, though they did not use the term. They refrain from expressing opinions about the merits of the cases and advising parties what they should do, believing that this would undermine parties' self-determination.[241] Some mediators' techniques might be considered as being in a gray area between facilitative and evaluative mediation. For example, Debra and Charlie do not express their opinions about the legal merits of the cases but give negotiation advice to help parties find settlements they can agree on.[242] Transformative mediation "resonates" for Sharon, though she provides more structure than what she thinks "true" transformative mediators would be comfortable with.[243]

Doug does not identify as an "evaluative" mediator, though he believes that mediators offering information about legal rules and settlements actually can *enhance* parties' decision-making autonomy by allowing them to consider factors that they may not have considered and to overcome biases.[244] Indeed, he finds that parties in voluntary mediation are "open, if not seeking, to be persuaded."[245] He overcame his "early bias against evaluative mediation," finding that his desire for mediation to be a "quasi-therapeutic talking encounter . . . would not work in many settings."[246]

Some mediators view the traditional theories as ideas to be used selectively rather than sources of mutually exclusive prescriptions to be strictly followed. For example, when Ron finds that his interventions aren't working, he uses elements from evaluative,

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240 Lande, *supra* note 113, at 8.

241 Guerin, *supra* note 110, at 2; Press, *supra* note 115, at 6; Tetunic, *supra* note 116, at 5.

242 Berman, *supra* note 107, at 3; Irvine, *supra* note 111, at 9.

243 Press, *supra* note 115, at 3.

244 Frenkel, *supra* note 109, at 5 (emphasis added).

245 *Id.* at 4.

246 *Id.* at 8.

facilitative, transformative, community, and narrative models.[247] Doug believes that the three "conventional approaches" of facilitative, evaluative, transformative models are "complementary" rather than mutually exclusive. He thinks that mediators should respect parties process preferences and "should not rigidly use their preferred models."[248] Michael describes his approach as using a "constellation of theories," including facilitative methods he learned in therapy training combined with constructive problem-solving and a "steadfast commitment" to self-determination.[249] His work in reflective practice provides an overall framework to his approach.[250]

Some mediators use their own adjectives to describe their approach. For example, Sharon described her approach as "relational."[251] Debra described herself as a "pragmatic" mediator.[252] Toby identified with "inclusive mediation" philosophy.[253] Doug said his approach is "context-driven."[254] Charlie called himself an "activist" mediator.[255]

Mediators' Reflections and Evolution of Their Systems. Mediators experimented and refined their approaches over time. Charlie expressed this nicely:

> I rather like mediation models and get a certain intellectual satisfaction from trying to understand them. But I'm not very good at following them. Something always comes up. Real-world mediating constantly poses the question: *"Do I follow the model or do what seems right for these* people in *this* moment?" If I'm honest, the model usually goes out the window.
>
> Having said that, if you do something often enough, patterns begin to emerge. Some things happen before other things. Some moves work and some fail . . .
>
> Faced with these challenges [in mediation], you have to try something. If it works, you use it again. If it fails spectacularly,

247 Kelly, *supra* note 112, at 9.

248 Frenkel, *supra* note 109, at 4, 8.

249 Lang, *supra* note 114, at 2–3, 6.

250 *Id.* at 4.

251 Press, *supra* note 115, at 3.

252 Berman, *supra* note 107, at 3.

253 Guerin, *supra* note 110, at 6.

254 Frenkel, *supra* note 109, at 4.

255 Irvine, *supra* note 111, at 9.

> you avoid it. Soon I noticed moves that worked in one case fail in another, and I began to tweak how and when I used them.[256]

Debra's approach has evolved based on what lawyers in her cases say they want and need. In addition, for the last several years, her students have interviewed lawyers about mediations in which they represented clients. Many of the lawyers expressed a strong desire for mediators to give direct input and challenge both sides.[257]

Alex says that when she is not sure what to do, she sometimes discusses this with the parties and invites their process suggestions:

> I used to think that in order to have authority as a mediator, especially as a woman, I needed to act like I was sure of every move I made in mediation. Now, I feel more free to let parties know candidly when I'm torn between two approaches, and I talk it out with them openly. In joint session, for example, I might let parties know that I'm on the fence as to the next topic we should tackle, or whether now is the right time to move to individual sessions. In caucus, I might let one party know that I'm weighing whether delivering a precise number or just telegraphing a range is the best course of action, and that I'd like to talk it through with them. I share my thoughts on the benefits of each course of action, and I invite them to weigh in.[258]

Over time, Michael shifted from driving the process toward solutions to having conversations about the dispute and its resolution.[259] More generally:

> The evolution of my thinking and methods, like the fluid mediation process I describe and practice, has been a journey with numerous detours and unscheduled stops. Yet, in retrospect, there is a discernable path that I've walked—one that has its foundation in constantly observing of certain values, beliefs, and principles. While I may have strayed from that path, more than once, I have strived to walk my talk.[260]

The Bottom Line. For parties to understand what to expect and participate most effectively in mediation, mediators need to explain a lot more than the name of a mediation theory or use an adjective. There are just too many variables and moving parts in

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256 *Id.* at 1, 7 (emphasis in original).

257 Berman, *supra* note 107, at 4.

258 Carter, *supra* note 108, at 9–10.

259 Lang, *supra* note 114, at 8.

260 *Id.* at 10.

this complex process, even in the simplest of cases. Mediators vary their procedures based on the interactions at any given moment, as Charlie described.[261]

Instead of focusing so much on mediation theories, mediators should design as robust pre-session procedures as appropriate under the circumstances in their cases. In this important initial stage of the process, mediators may provide specific descriptions of procedures, answer questions, and address any process concerns of the participants for their particular case.[262] Mediators, lawyers, courts, and others assisting parties should use materials like the American Bar Association Section of Dispute Resolution mediation guides or otherwise help parties prepare to make the most out of their opportunities in mediation.[263]

IV. Conclusion

The system of traditional mediation models is problematic for many reasons. It uses terminology that most people—including mediators—do not understand clearly. It does a poor job of helping people understand what to expect in mediation. It omits many factors that do help explain mediation practice including contextual and cultural variables that have major effects on how people think and act in mediation. It has spawned counterproductive ideological conflict in the mediation field about which models are good or not.

Although many academics and practitioners are dissatisfied with the traditional mediation models, they do not have a clear, generally accepted alternative framework to substitute. So many practitioners simply ignore the theoretical models and create their own personal mediation systems. Often, they do so unconsciously, without much reflection.

As an alternative to the traditional theoretical models, I suggest using dispute system design as the central theoretical founda-

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261 *See supra* text accompanying note 256.

262 *See* text accompanying *supra* note 63.

263 *See e.g.*, A.B.A. Section of Disp. Resol., Preparing for Mediation (2012), http://indisputably.org/files/2022/11/ABA-Mediation-Guide-general.pdf [https://perma.cc/UL7M-EQ5C]; A.B.A. Section of Disp. Resol., Preparing for Family Mediation (2012), http://indisputably.org/files/2022/11/ABA-Mediation-Guide-family.pdf [https://perma.cc/UED5-DA3U]; A.B.A. Section of Disp. Resol., Preparing for Complex Civil Mediation (2012), http://indisputably.org/files/2022/11/ABA-Mediation-Guide-complex-civil.pdf [https://perma.cc/4VE5-UNPU].

tion for mediation practice (as well as conflict management generally). Mediators' systems include actions before, during, and after mediation sessions. Mediators' beliefs based on traditional mediation models are elements of their mediation systems along with many other factors including the relevant practice culture and participants' goals.

The nascent Real Mediation Systems Project is intended to provide a more realistic portrayal of how mediators actually think and act in mediation. It has the potential to help practitioners, theoreticians, researchers, instructors, trainers, students, and other stakeholders get better understandings of how mediators actually think and behave. This perspective can stimulate mediators to become more conscious and intentional in their work. There are many potential parts of the project, including publication of mediation systems of thoughtful mediators, educational use by faculty, trainers, and program administrators, an initiative to develop a lexicon of recommended clear dispute resolution language, and a framework for empirical researchers and theorists to better understand how mediators think and to develop empirically-grounded generalizations. This project is an example of how a dispute system design framework can help advance the "ADR" field.