

THE VANISHING TRIAL: LAND MINE ON THE MEDIATION LANDSCAPE OR OPPORTUNITY FOR EVOLUTION: RUMINATIONS ON THE FUTURE OF MEDIATION PRACTICE

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I. INTRODUCTION AND OVERVIEW

Several decades ago,² mediation developed as an alternative to the use of courts for resolving disputes.³ Over the years, the use of mediation to resolve lawsuits has greatly increased. The reasons for this evolution are numerous, and the primary underlying impetus for the use of mediation has, in many cases, impacted just how the process is conducted. For example, some view mediation as a process which provides individuals or groups engaged in a dispute or conflict with a collaborative and flexible process for dispute resolution. This view of the process also encourages party participation and empowerment, which often allows relationships to be preserved. Others, however, see mediation merely as a procedure

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² Although mediation as a dispute resolution mechanism has a history of several thousand years, my reference here is to the modern mediation movement which is often noted as having its genesis during the Pound Conference in 1976. See KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE*, ch.2 (3d ed. 2004); Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 545 (2002).

³ Mediation in this paper is viewed primarily as a court-annexed model or procedure imposed to assist in the resolution of "legalized" disputes. Such focus is made in examining the impact of the vanishing trial, notwithstanding that many other uses of mediation exist. For a listing of the many specialized uses of mediation, see KOVACH, *supra* note 2, at ch. 16.

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which accelerates settlement, thereby reducing the caseload for the courts and saving litigants time and money.⁴ These and other views⁵ have tended to influence how both mediators and the participants approach the process. Also quite influential have been the consequences of mediation's intersection with the legal system. In fact, the blending of mediation and the court system, also known as court-annexed or court-connected mediation,⁶ could be viewed as both a blessing and a curse.⁷

Certainly, the suggestions of the courts, and, in many cases, their mandates of mediation, have been quite effective in getting cases to the table. Early referral methods merely encouraged parties to voluntarily participate in mediation. Many times, parties who would have likely benefited from participation in mediation were not familiar with the process and therefore declined to participate. Since historically mediation has not been the default paradigm for dispute resolution, parties often needed awareness and encouragement. To advance mediation use and simultaneously increase knowledge and familiarity of the process, courts urged, and often mandated, that parties in litigation participate in mediation. While this approach resulted in enhanced public awareness of mediation, it was also likely responsible for the public's current per-

⁴ This is commonly referred to as the efficiency view of mediation. See, e.g., Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems and Possibilities*, 108 PENN. ST. L. REV. 327 (2003). This goal was most highlighted when mediators urged courts to initiate mediation programs. Often, when efficiency is highlighted, other process attributes, such as empowerment and creativity are omitted, de-emphasized or de-valued. See Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998) (discussing the shortcomings of the process when mediators become too focused on evaluation and merely lawsuit settlement); see also, Cheryl Dolder, *The Contribution of Mediation to Workplace Justice*, 33 INDUS. L.J. 320, 331-335 (2004); Joseph P. Folger, "Mediation Goes Mainstream" - *Taking the Conference Theme Challenge*, 3 PEPP. DISP. RESOL. L.J. 1 (2002); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 5 (2000).

⁵ For example, one distinct approach to mediation is known as "transformative mediation" which focuses primarily on the relationship of the parties, and is viewed as a process which allows individuals to experience empowerment and recognition through the process of resolving disputes. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

⁶ See Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002).

⁷ An early use of the term, is "set before you this day a blessing and a curse". Deuteronomy 11.26. For another view of the both advantageous and detrimental effects of court use upon mediation, see Sharon Press, *Institutionalization: Savior or Saboteur of Mediation*, 24 FLA. ST. U. L. REV. 903 (1997).

ception that mediation is part of the legal system.⁸ This view of mediation, not as a stand-alone process, but rather as one of many procedures and “hoops to jump through” in litigation, can be considered part of the “curse.” That is, such a limited view decreases the potential of process expansion. Another consequence stemming from court-mandated mediation is the regulation of participant⁹ and mediator conduct.¹⁰ Additional legal requirements and interpretations now set standards for mediation practice. These include issues such as setting or limiting the parameters of confidentiality,¹¹ as evidenced by the enactment of a Uniform Mediation Act focused almost exclusively on confidentiality,¹² and the enforcement of mediated agreements.¹³ Most experts agree that

⁸ See Linda L. Golden & Kimberlee K. Kovach, *Public Perception of Mediation: Truth or Consequences* (forthcoming) (on file with authors) (summarizing a study conducted to ascertain public perception toward mediation).

⁹ For example, cases as well as academic literature have been replete with discussions of participant conduct, primarily examining good faith participation in mediation. See Kimberlee K. Kovach, *Good Faith in Mediation — Requested, Recommended, or Required? A New Ethic*, 38 SOUTH TEX. L. REV. 575 (1997); Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation* 28 FORDHAM URB. L. J. 935 (2001); John M. Lande, *Using Dispute Systems Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002); Edward F. Sherman, *Court – Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?* 46 SMU L. REV. 2079 (1993); Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L. J. 591 (2001); see also Roger L. Carter, *Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediation*, 2002 J. DISP. RESOL. 367 (2002); Carol L. Izumi & Homer C. La Rue, *Prohibiting “Good Faith” Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel out of the Mediation Tent*, 2003 J. DISP. RESOL. 63 (2003); Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. OF MATRIMONIAL LAWYERS 69 (2001).

¹⁰ Much regulation of mediator conduct is through the use of credentialing, ethical codes or standards of conduct. See Charles Pou, Jr., *Assuring Excellence or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, 2004 J. DISP. RESOL. 303.

¹¹ See Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. DISP. RESOL. 239 (2002); Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARO. L. REV. 79 (2001); Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising From the Texas Experience*, 38 S. TEX. L. REV. 541 (1997).

¹² See Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARO. L. REV. 9 (2001); Brad Reich, *A Call for Intellectual Honesty: A Response to the Uniform Mediation Act’s Privilege Against Disclosure*, 2001 J. DISP. RESOL. 197 (2001); Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 99 (2003); Brian D. Shannon, *Dancing with the One that “Brung Us”:* *Why the Texas ADR Community Has Declined to Embrace the UMA*, 2003 J. DISP. RESOL. 197 (2003).

¹³ See Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U. CAL. DAVIS L. REV. 33 (2001); Allison Ma’luf, *A Mediation*

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these developments are, at least in part, the results of court-annexed mediation. There is little doubt that current mediation practice, for many, is ingrained within the court system. As a result, concern has emerged about the process. In many court models, mediation appears to have lost some of its procedural advantages, such as flexibility and informality that were at its core,¹⁴ as well as attributes such as active party participation.¹⁵

During this time of increased use of mediation and other Alternative Dispute Resolution (ADR) processes, there seems to have been a concurrent reduction in the use of the trial process, both bench and jury.¹⁶ Statistics clearly demonstrate this trend in both state and federal courts.¹⁷ While the focus of most of the discussions, as well as this article is on civil cases, the same appears to be true for criminal matters.¹⁸ Experts have pondered the reasons for such a decrease, and some have suggested that the increase in ADR use is a factor, if not a primary cause. Others see ADR not as the reason for the disappearance of the trial, but rather as a beneficiary of such a phenomenon.¹⁹ Moreover, other factors may have served as a basis for the evaporation of the trial process, such as the cost of trials²⁰ and individuals' aversion to risk.²¹ Yet, there is

Nightmare?: The Effect of the North Carolina Supreme Court's Decision in Chappell v. Roth on the Enforceability and Integrity of Mediated Settlement Agreements, 37 WAKE FOREST L. REV. 643 (2002).

¹⁴ See Kovach & Love, *supra* note 4; Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field*, 3 PEPP. DISP. RESOL. L. J. 111, 126-127 (2002); Folger, *supra* note 4; see also Patrick Coy & Timothy Hedeon, *A Stage Model of Social Movement Co-Optation: Community Mediation in the United States*, 46 THE SOCIOLOGICAL Q 4, 305 (2005).

¹⁵ See Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179 (2002).

¹⁶ See, e.g., Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935 (1997); Thomas J. Stipanowich, *ADR and "The Vanishing Trial" What We Know and What We Don't*, 4 DISP. RESOL. MAG. 7 (2004).

¹⁷ For the foremost analysis of this data, see Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459 (2004); Marc Galanter, *The Hundred Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255 (2005) [hereinafter Galanter, *Hundred Years*].

¹⁸ Marc Galanter, *The Vanishing Trial: What the Numbers Tell Us, What They May Mean*, 10 DISP. RESOL. MAG. 3, 5 (2004).

¹⁹ Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843 (2004) (reporting on several studies of court mediation use).

²⁰ Galanter, *Hundred Years*, *supra* note 17, at 1262.

²¹ Syverund, *supra* note 16; Galanter, *Hundred Years*, *supra* note 17, at 1262-63.

little doubt²² that there has been an erosion of the trial process, and along with it, perhaps the role of the courts. This article briefly examines this backdrop, and then concentrates on exploring the direct impact that this phenomenon may have upon the use and practice of mediation. Exactly what that impact may be is currently an unanswered question, but one which must be addressed by mediators before they too disappear.

II. WHAT EXPERTS (AND STATISTICS) HAVE REVEALED

Over the last few years, the decrease in the use of the trial process has drawn together numerous judges, lawyers and social scientists.²³ They have examined the phenomenon, both in terms of cause and effect, with empirical data as well as anecdotally based reports. While the articles explore the topic from differing views, most seem to agree that there has been a marked decrease in the number of trials both in total numbers and in contrast to case dispositions.²⁴ Admittedly, as most cases have always settled,²⁵ the trial has never been the dominant method of lawsuit resolution.²⁶ In fact, it was noted many years ago that lawsuit activity and disposition is more like a process of “liti-gotiation” consisting of negotiation and bargaining that takes place during the course of a lawsuit.²⁷ With additional decreases, these few trials are now be-

²² Though doubt does exist. 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*, 7 *CARDOZO J. DISP. RESOL.* 1 (2005) (arguing that the concept of the vanishing trial is more a myth than reality and aptly labeled “The Phenomenon Known As The Vanishing Trial (TPKATVT)). Regardless of whether the vanishing trial is a myth or reality, many, particularly lawyers and judges, are reacting to it.

²³ One example was a conference in December of 2003, which was sponsored by the ABA Litigation Section. See *Vanishing Trial Conference*, <http://www.abanet.org/litigation/vanishing-trial/home.html> (last visited Mar. 17, 2006). Since that time, several law schools have held symposia on the topic, with law review issues in progress dedicated to the subject. These include the Benjamin N. Cardozo School of Law, the University of Missouri at Columbia, and the University of Texas School of Law. See, e.g., <http://www.utexas.edu/law/journals/trol/sym/events.html> (last visited Mar. 17, 2006) (the “Review of Litigation”).

²⁴ Galanter, *Hundred Years*, *supra* note 17.

²⁵ In fact, some statistics indicate that after 1970, less than 2 percent of civil cases go to trial. *Id.* at 1259.

²⁶ See Galanter, *Hundred Years*, *supra* note 17, which notes a steady decline in trials for over one hundred years. Yet it is also noted that the decline has accelerated significantly in the last twenty years. *Id.*

²⁷ See Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 *J. LEGAL EDUC.* 268 (1984). Galanter has also observed that most disputes “are settled bilaterally, without the intervention of a third party.” Marc Galanter, *Reading the Landscape of Dis-*

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coming nearly nonexistent. While lawyers often used the backdrop of the court or a trial in the context of negotiation, they may no longer be able to do so. Several years ago, it was noted that negotiation took place in the “shadow of the law”;²⁸ it now appears that such a shadow is imprecise, doubtful, and illusory at best.

A. The Decline in Trials

Over the last few years, decreasing trials have been discussed from various perspectives. In most instances, statistics document that fewer trials have been conducted.²⁹ In fact, looking over the last several decades, a clear trend has been established³⁰ in both federal and state courts. A rather interesting feature of the research is that it also demonstrates that while trials have decreased, the number of cases filed, and in most instances case dispositions, have increased.³¹ Yet exactly how cases are finally resolved has yet to be determined, although many surmise that a large percentage of resolution is the result of summary judgments and other dispositive motions in addition to voluntary settlements.³²

Although current research has demonstrated an increase in filings,³³ in some jurisdictions this is not the case.³⁴ Individuals and corporations have become concerned about costs, and may forgo filing a lawsuit, especially as information and knowledge about the early use of ADR processes becomes more common. An increase in the contractual obligation to use mediation or arbitration often produces an early resolution.³⁵ As a result, a lawsuit is never filed.

putes: *What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4, 18 (1983).

²⁸ See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L. J.* 950, 968-69 (1979).

²⁹ Galanter, *Hundred Years*, *supra* note 17.

³⁰ The data is reviewed in detail in the numerous articles cited in this piece. For a brief overview, see *ADR and the Vanishing Trial*, 4 *DISP. RESOL. MAG.* 7 (2004).

³¹ See, e.g., Galanter, *Hundred Years*, *supra* note 17, at 1265-66.

³² Galanter, *supra* note 18, at 3; Galanter, *Hundred Years*, *supra* note 17, at 1265-66; Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah*, 1 *J. EMPIRICAL LEGAL STUD.* 591 (2004).

³³ See Galanter, *Hundred Years*, *supra* note 17, at 1255.

³⁴ Texas is a prime example, where anecdotal reports indicate that lawyers are filing far less cases, at least the tort variety. See also Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 *EMORY L.J.* 1225 (2004) (noting the decrease in filings in Texas as well as other states); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 *PENN. ST. L. REV.* 165, 165 (2003).

³⁵ Stipanowich, *supra* note 19.

In addition, tort reform and limitations or caps on damages have resulted in fewer lawsuits being filed.³⁶ It may be possible that as lawyers become less familiar with the courthouse, they will become more reluctant to even bring a cause of action, particularly where other fora for dispute resolution are available.

B. Possible Causes of Trial Reduction and Relevance of Mediation

Numerous reasons for the phenomenon of the vanishing trial have been suggested.³⁷ For example, some ponder whether society has become less litigious.³⁸ Others immediately discount this idea, as the total number of case filings has increased and the United States is often viewed as a contentious society rather than one concerned primarily with harmony and accord.³⁹ Another suggestion is that courts are no longer well equipped to handle numerous trials, and a deficiency in judicial resources is to blame.⁴⁰ The complexity of conducting a trial, particularly with the use of advanced technology, is also viewed as a cause.⁴¹

An inability to acquire jurors has been suggested as another basis for fewer trials. Some experts have noted that potential jurors have become much more sophisticated in terms of revealing conduct which results in disqualification.⁴² This can be particularly troublesome when, in a large county, for instance Harris County Texas, nearly all of the jurors are used for capital murder cases and other criminal trials.⁴³ As a result, no jurors are available for civil matters.

³⁶ Daniels & Martin, *supra* note 34.

³⁷ An analysis of the available statistics is far beyond the scope of this paper. The articles referred to here, however, contain an abundance of such information. For a brief summary, see Galanter, *Hundred Years*, *supra* note 17, at 1262-63.

³⁸ This was one matter discussed during a panel presentation, *The Vanishing Trial*, CLE program Advocacy Skills for Resolving Disputes, South Texas College of Law, Houston (Oct. 14-15, 2004) [hereinafter CLE Program].

³⁹ See, e.g., DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* (1999) (examining aspects of the United States culture and highlighting the contentiousness and emphasis on polarization of positions).

⁴⁰ Shari Seidman Diamond & Jessica Bina, *Puzzles About Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals*, 1 J. EMPIRICAL LEGAL STUD. 637 (2004).

⁴¹ Galanter, *Hundred Years*, *supra* note 17.

⁴² Statement of panelist at the CLE program. See CLE Program *supra* note 38.

⁴³ *Id.*

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Expense may be another possible reason for trial reduction. The cost of conducting extensive pretrial activity as well as a trial has increased dramatically.⁴⁴ Cost encompasses numerous aspects of litigation ranging from attorney time to sophisticated technology.⁴⁵ Legal fees have increased, both in terms of per hour rates and the amount of time spent in the discovery process. Cases are often more complex, available information has escalated dramatically, and the discovery process is long and arduous. Often clients are not aware of the nature or relevance of such activity, and when lawyers engage in less than professional tactics, such as what has been known as the “Rambo style” approach, attorney time increases.⁴⁶ The inability or unwillingness of individuals and businesses to pay excessive amounts during the pretrial phase often leads to early settlement.

In addition, many individuals are risk adverse. Both clients and attorneys have often settled cases to avoid the risks inherent in the trial process.⁴⁷ It has even been suggested that while some attorneys appreciate going to trial, others are fearful of malpractice claims, and hence encourage clients to settle. This aspect continues to intensify as fewer cases are tried, and less data is available to accurately predict potential outcomes. Consequently, this dearth of information results in an increased risk in future trials. Since few cases are tried, lawyers are unable to gain trial experience. Due to this lack of experience, the lawyers handling the cases are hesitant to actually push the case to trial.⁴⁸

The use of ADR has also been suggested as a cause for the decrease in trials.⁴⁹ In examining the disposition of court cases, ADR, and in particular mediation, has had an impact. While statistics have not demonstrated a direct correlation between mediation and the settlement of additional cases, it is certainly responsible for earlier resolution.⁵⁰ Others assert that as parties are more satisfied

⁴⁴ See Scott Atlas & Nancy Atlas, *Potential ADR Backlash: Where Have All the Trials Gone? To Mediation or Arbitration*, 4 DISP. RESOL. MAG. 14 (2004).

⁴⁵ *Id.* at 15.

⁴⁶ *Id.*

⁴⁷ Jeffrey J. Rachlinski, *Gains, Losses and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 121 (1996); see Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEG. L. REV. 1, 42-48 (1999).

⁴⁸ *Disappearing Act: Trials are Vanishing from Courtrooms Even as Lawsuits Increase*, 2005 LEGAL AFF. 13 (2005).

⁴⁹ Paula Young, *As Trials “Vanish,” Alternatives Play a Dominant Role in Dispute Resolution*, <http://www.mediate.com/articles/young14.cfm> (last visited Mar. 17, 2006); see also Atlas & Atlas, *supra* note 44.

⁵⁰ Stipanowich, *supra* note 16.

with the mediation process, they will likely use ADR in the future, resulting in fewer cases for trial.

III. ROLE OF DISPUTE SETTLEMENT IN SOCIETY

At least some of the influence of the vanishing trial phenomenon and how it is perceived will depend, in part, upon the views of the justice system and courts in society. There appears to be perpetual debate regarding the appropriate or intended role of the legal system. Yet, regardless of the nature of that role, it is likely to be impacted by the decrease in trials.

In much of the commentary, courts are viewed as a mechanism for dispute settlement.⁵¹ The vision of courts as a dispute settlement tool replaced an older, somewhat different perspective: one of norm setting.⁵² In this view, the role of the courts is to interpret laws so that societal standards for behavior are set, known and enforced.⁵³ Courts provide guidance to society so that individuals have parameters by which to judge conduct, although this view has faded somewhat when replaced by the dispute settlement perspective. An additional, more contemporary and expansive view of the legal system calls for courts to be mechanisms for social change.⁵⁴ An early and vocal opponent of ADR contended that the role of the court is much broader than mere dispute resolution; courts serve a political and remedial function in society.⁵⁵ In many of these views, to resolve lawsuits before trial is to lose resources. On the other hand, if courts serve as mediums for protest, where parties use litigation as a background to voice social and political reforms,⁵⁶ the role will be less affected. As this function of courts depends much less on a final outcome, these proponents are less concerned with the lack of trials.⁵⁷

⁵¹ David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622 (1995) (citing *inter alia* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1978)).

⁵² *Id.* at 2622; see also Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477 (2004) (reviewing the models of the courts' roles in society).

⁵³ See Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 247-51 (1996); see also Luban, *supra* note 51, at 2622-26.

⁵⁴ Lobel, *supra* note 52.

⁵⁵ Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984); Luban, *supra* note 51.

⁵⁶ Lobel, *supra* note 52, at 479.

⁵⁷ Lobel, *supra* note 52.

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If, as some predict, continued ADR use will diminish the role of the courts, the influence of the legal system on societal norms and values will also lessen. Some contend that the bedrock of our justice system, and our societal dispute resolution mechanism, the trial, must continue to be a foundation of society.⁵⁸ Proponents of the trial process call for modifications so that more litigants can have their “day in court,” and trials can continue.⁵⁹ Others go so far to urge that most cases, even those which are capable of resolution through settlement, should be adjudicated.⁶⁰ Alternatively, another perspective notes that little, if anything will be lost by society through settlement, and heartily endorses the use of ADR.⁶¹ Such an approach seems to support comprehensive privatization of dispute resolution.

One overarching concern is whether people are capable of co-existing without guidance, rules, cases or some other standards or norms for conduct. In fact, such deliberations are not new. Recent reflections highlight that years ago suggestions were made similar to what is heard today about the potential of society to exist peacefully and in harmony, without reliance on or even the existence of, a legal system.⁶² Perhaps there is no real need for the trial process. Options to create norms have been suggested, such as a method to document private resolutions.⁶³ A method of private ordering could replace the courts,⁶⁴ though without an adjudicatory element in place for enforcement, maintenance of the system may be uncertain. While the trial currently remains, at least a theoretical possibility, a new process has not been invented, and courts remain active, the dearth of trials certainly impacts the legal system and its

⁵⁸ See generally Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405 (2002).

⁵⁹ See Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627 (2004); John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlements, and Other Things Needed to Administer Justice*, J. DISP. RESOL. (forthcoming 2006) [hereinafter Lande, *How Much Justice Can We Afford?*].

⁶⁰ See Fiss, *supra* note 55.

⁶¹ See Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 993 (2004).

⁶² See Hensler, *supra* note 34, at 168-169 (discussing a novel, *Looking Backward*, by Edward Bellamy which discussed a utopia where adversarial processes are non-existent and the law is abandoned).

⁶³ See Lande, *supra* note 22; Anthony R. Benedetto, *The Impact on “The Vanishing Trial”*: *If People of Faith Were Faithful to Religious Principles of Settling Disputes Without Litigation*, PEPP. DISP. RESOL. L. J. (forthcoming 2006).

⁶⁴ See Luban, *supra* note 51.

societal function. Mediators who assist parties in reaching settlements of lawsuits as part of that system, will feel that effect.

IV. IMPACT ON THE LEGAL SYSTEM

The vanishing trial may have an indirect long term effect upon society, in particular on its norms and traditions. Even more imminent, however, is the impact that this trend has, and will continue to have, upon the role of courts, lawyers and as a consequence, legal education. These factors, in turn will have a direct impact upon mediation and its development in several ways. Consequently, an examination of the influence and interaction of this trend and what it means for the legal system is of interest to mediators.

A. Consequences for Judges

A popular view of the judge is someone who presides over a jury trial. The media has reinforced that role, particularly in the ornamentation of the trial process.⁶⁵ Yet much has been written on the changing role of the judge, and in particular the managerial roles that many judges must assume.⁶⁶ While some case management is likely inevitable in terms of docket control and movement, especially as the number of case filings increased, the primary role as viewed by the general public is that of trial judge. Yet over the last decade or so, there has been a recognition that judges do much more than preside over trials.⁶⁷ Many judges are engaged in a myriad of activities, including case management, facilitation of settlement discussions, and engagement in problem solving roles.⁶⁸ In fact, it has been noted that the role and responsibilities of the “trial

⁶⁵ See Lande, *supra* note 22.

⁶⁶ Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

⁶⁷ Edmund V. Ludwig, *The Changing Role of the Trial Judge*, 85 JUDICATURE 216 (2002).

⁶⁸ See Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L.J. 851, 862 (1997); John Feinblatt, Greg Berman & Aubrey Fox, *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L. J. 277 (2000); Greg Berman & John Feinblatt, *Judges and Problem-Solving Courts* (2002), available at http://www.courtinnovation.org/pdf/Judges_problem_solving_courts.pdf (last visited Mar. 17, 2006); Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125 (2004); Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501 (2003).

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judge” has changed dramatically over the last twenty to thirty years.⁶⁹

If, however, judges cease to try cases, they will fail to be experienced in trial procedures. For example, in Harris County Texas, one of the most populous counties in the United States, the likely youngest judiciary in the history of the court is currently on the bench.⁷⁰ Yet these young judges, especially those serving solely on civil courts, will not have the opportunity to gain the experience that comes with trying cases. This, in some ways, may result in an erosion of confidence in the courts.⁷¹ Judges may also change their perspective and function as part of the movement toward resolution without adjudication. Eventually, this may result in transformations in societal views and expectations of courts. Courts may move from a process for dispute resolution to a method of dispute management or forum to allow parties to voice concerns even though a resolution is not achieved in the process.⁷² Others, however, caution that such changes may weaken the overall authority of courts.⁷³

In addition, the ability to generate common law may decrease, as much law is derived from cases that are tried and appealed. Although some appeals result from motion practice, even those cases may decrease as a result of the lack of a possibility of trial. Currently however, it appears from the most recent statistics that courts remain busy, while not conducting trials, resolving cases nonetheless.⁷⁴

Another view of the legal system contends that courts and judges are instruments of lawyers.⁷⁵ Noting that most judges, at least on the state level are appointed or recommended by lawyers, the contention is that courts are but one part of the legal culture which is dominated by lawyers, whether acting in a representational, legislative or political role.⁷⁶ In this regard, mediation’s connection to, and interplay with the court may very well be shaped

⁶⁹ Ludwig, *supra* note 67.

⁷⁰ Statement of panelist, CLE Program, *supra* note 38.

⁷¹ See Luban, *supra* note 51, at 2625.

⁷² This can be viewed as an adaptation of Lobel’s view of a vehicle for protest. See Lobel, *supra* note 52.

⁷³ Luban, *supra* note 51, at 2615.

⁷⁴ See Galanter, *Hundred Years*, *supra* note 17, at 1265-66.

⁷⁵ See Robert A. Creo, *Mediation 2004: The Art and the Artist*, 108 PENN. ST. L. REV. 1017, 1038 (2004).

⁷⁶ *Id.*

and controlled by lawyers.⁷⁷ It then follows that how the vanishing trial impacts the bar may determine how the bar influences mediation practice.

B. Implications for Lawyering

If, in fact, lawyers are no longer trying lawsuits, and there is little chance that the trend will be reversed any time soon, it would seem that time on pretrial practice matters would decrease. Yet most lawyers continue on the pre-trial “litigation” path. Perhaps that is what they were taught to do. Yet, clients are diverse as are their needs, and so too their expectations of legal representation. Some desire a more expansive role from lawyers, rather than only a litigator or a warrior to carry a cause into battle. What individuals and businesses often want is to have a problem solved.⁷⁸ Just as courts have expanded their role, so too has the work of the lawyer broadened to encompass a variety of tasks and skills in addition to a purely adversarial representational role.⁷⁹ Yet focus often remains on “pretrial” efforts.

i. Current Bar

Over fifteen years ago, concern was raised about the inability of lawyers to gain trial experience and, as a consequence, lack competency in representational skills in an adjudicatory system.⁸⁰ Today it is even rarer for new lawyers to acquire trial experience.⁸¹ The reasons are no doubt complex and involve numerous elements

⁷⁷ The lawyer’s role in managing mediation practice is further explored *infra* Part V.B.i.

⁷⁸ For a discussion of this role, see Symposium, *Conceiving the Lawyer As Creative Problem Solver*, 34 CAL. W. L. REV. 267 (1998); Thomas D. Barton, *Creative Problem-Solving: Purpose, Meaning, and Values*, 34 CAL. W. L. REV. 273 (1998); Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811 (1999); Carrie J. Menkel-Meadow, *When Winning Isn’t Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905 (2000); Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375 (1999); Janet Reno, *Lawyers As Problem Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5 (1999); Center for Creative Problem Solving, California Western School of Law, http://www2.cwsl.edu/mcgill/mc_main.html (last visited Feb. 20, 2006).

⁷⁹ Much of this is known as comprehensive lawyering, encompassing a number of representational roles beyond adversarial representation. These include ADR, collaborative law, preventive lawyering and the lawyer as problem solver. See Susan Daicoff, *The Comprehensive Law Movement*, 19 TOURO L. REV. 825 (2004).

⁸⁰ Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833 (1990).

⁸¹ Atlas & Atlas, *supra* note 44, at 14.

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of cost control.⁸² Similarly, this trend has resulted in the “graying of the trial bar,”⁸³ that is, litigators with trial experience now have grey hair.⁸⁴ The complexity increases when clients, in the rare instances where a case is actually set for trial, decline to have a younger lawyer try it.⁸⁵ The problem is then exacerbated as lawyers cannot gain experience if trials are not available. So the cycle continues.

Even though much of the current statistics demonstrate an increase in case filings, some firms have revealed they are accepting fewer clients and filing fewer lawsuits. As noted, tort reform and damage caps have limited the availability of attractive remedies at the courthouse, and as a result, lawyers decline to take the cases in the first place.⁸⁶ Therefore, individuals, even though harmed, remain unrepresented and do not have the opportunity to present a claim.⁸⁷ It seems logical that this, in turn, will decrease the number of trials even further. At first glance, this deficiency in trial experience would seem to impact how lawyers represent clients in court. A more thorough analysis of the essentials of representation point toward the fact that a lack of experience affects additional aspects of representation as well, including initial case appraisal and settlement negotiations.

Another implication of the decrease in trials and the corresponding lack of trial experience is the parallel inability of lawyers to assess a case in order to make decisions about its course. Lawyers, in an initial evaluation of a matter, determine whether to represent a client. This decision is based, in part, upon what may be possible to achieve at the court house. Even though most cases settle, the knowledge of verdicts in similar cases informs decision-making. Without verdicts, there is little information. In the past, if the lawyer did not have trial experience, alternative ways to get information included discussions with colleagues and reviews of “blue sheets”.⁸⁸ Without trials, such information will vanish, and

⁸² *Id.* at 14-15.

⁸³ A term used at a CLE program discussing the phenomenon of the lack of trial experience, at least in Houston. See CLE Program *supra* note 38.

⁸⁴ That is not to say, of course, that grey hair is a negative factor. And I suppose there are some experienced litigators who may use assistance in keeping the grey away.

⁸⁵ Statement of panelist, see CLE Program, *supra* note 38.

⁸⁶ Daniels & Martin, *supra* note 34.

⁸⁷ See e.g., Eric Dexheimer, *Medical Lawsuit Caps Shutting Some Out of Courthouse*, Austin American Statesman, Mar. 26, 2006, <http://www.statesman.com/news/content/news/stories/local/03/26medmal.html>.

⁸⁸ Blue sheets were the name of some listings of verdicts, prior to the Internet, as the covers of the periodical were blue. Now there are a variety of sources to gain information on trial

lawyers will be unable to competently evaluate whether to take on representation. In most cases, settlement negotiations were also informed by other cases, which now may no longer exist. Judgment calls made by lawyers regarding settlement discussions may likewise be uninformed.⁸⁹ In many instances, where attorneys are inexperienced, they may lack confidence and push more cases to settle prematurely.⁹⁰ Each of these factors can also have a direct bearing on how the mediation process will be approached and conducted.

ii. Considerations for Legal Education

If lawyers will no longer be engaged in the trial process, then it would seem logical that law schools will decrease the number and extent of trial advocacy programs. Law schools have been urged for some time to be more cognizant of what lawyers do and to better prepare their graduates for the practice of law.⁹¹ This resulted in an increase in skills and clinical courses in a number of law schools. Now perhaps, it is time to reassess what lawyers do on a daily basis, and consider additional courses in law schools which are focused on those activities.⁹² It is likely that data would demonstrate that such skills and activities as negotiation, mediation problem solving and advising are quite common. Yet in most instances,

outcomes as well as information about settlements. *See generally* Blanca Fromm, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 *UCLA L. REV.* 663, 685 (2001).

⁸⁹ Luban, *supra* note 51, at 2623-25. Although there has been much debate about whether the use of information about verdicts for settlement purposes was actually helpful, as the contention is that the really odd cases are the only ones that are tried. Lande, *How Much Justice Can We Afford?*, *supra* note 59 (citing Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selections of Cases for Trial*, 90 *MICH. L. REV.* 319, 320 (1991) (making the observation that a trial is a failure)).

⁹⁰ Luban, *supra* note 51.

⁹¹ The seminal work in this regard is known as the MacCrate report. *See* ABA Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development — An Educational Continuum, Report of the Task Force on Law School and the Profession: Narrowing the Gap* 138 (Chicago, 1992). Over the last decade, many law schools have responded to the report's recommendations and have increased skill and clinical courses. The report was, however, not without criticism. *See* Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing From the MacCrate Report — Of Skills, Legal Science and Being a Human Being*, 69 *WASH. L. REV.* 593 (1994).

⁹² A reexamination of skills and competencies is now appropriate as law practice has changed considerably since the time of the MacCrate study. Some efforts are being made in this regard. *See, e.g.*, Macfarlane & John Manwaring, *Reconciling Legal Education with the Evolving (Trial-less) Reality of Legal Practice*, 2006 *J. DISP. RESOL.* (forthcoming).

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these types of courses are limited, and not offered as frequently as trial or pretrial matters.⁹³

Even clinical legal education, known to be ahead of the curve in terms of the progressive nature of educational efforts, remains focused for the most part on adversarial and trial type representation.⁹⁴ Although some clinical programs include mediation clinics, and others incorporate negotiation and settlement into the representation process, the greater part of clinical education remains focused on an adversarial process for case disposition. While new lawyers need to appreciate the trial process, it is at least equally important that they have not only an understanding, but expertise in those activities in which they will engage, namely negotiation and mediation. Such activities are consistent with the expanding view of the lawyer's work. As lawyers are called upon to be more than litigators, to see and understand the entirety of their clients' matters and to engage in problem solving and dispute resolution,⁹⁵ it is imperative that legal education maintain strides in such directions.

While legal education has been instrumental in terms of awareness and learning of mediation as well as ADR generally, it has been only to a limited degree. The extent of these courses varies, but many, if not most, schools offer some instruction in either negotiation, mediation, or ADR generally, and several law schools provide clinical opportunities for the students.⁹⁶ Most of these classes however, are electives with limited enrollment.⁹⁷ In many ways, the myth of the trial continues in legal education.

⁹³ A few exceptions exist, particularly those law schools which have made efforts to integrate dispute resolution course and skills throughout the curriculum.

⁹⁴ Exceptions exist, as clinics are becoming more expansive and creative in their work. Recent establishment of transactional clinics and those who represent not-for-profit entities are examples. Susan R. Jones, *Small Business and Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 *CLINICAL L. REV.* 195 (1997).

⁹⁵ Barton, *supra* note 78.

⁹⁶ For an overview or survey of the ADR courses offered at American Law schools, see the Directory of Law School Dispute Resolution Courses and Programs, available at <http://www.law.uoregon.edu/aba/> (last visited Mar. 20, 2006).

⁹⁷ Only in rare cases, such as the University of Missouri at Columbia School of Law where ADR has, for some time, been integrated within the entire curriculum, will most, if not all, students graduate with an adequate understanding of ADR theory, law and skills. This is due in no small way to Professor Leonard Riskin, a leader in the ADR field, who many years ago, urged a full integration of dispute resolution into the entire law school curriculum. See Center for Dispute Resolution, <http://www.law.missouri.edu/csdr/> (last visited Mar. 20, 2006). Since that time, several additional law schools, such as Cardozo, Hamline, Harvard, Ohio State and Pepperdine have increased ADR concentrations.

V. CONSEQUENCES FOR MEDIATORS

Mediation evolved as an alternative to litigation, a process very dissimilar to the adversarial system. And, in many ways, the legal system was responsible for the growth of mediation. Now the essence of that very system, in other words, mediation's *raison d'être*, has changed. What now, for mediation?

With change may come alterations in the mediation process, and "the jury is still out,"⁹⁸ as to what those changes and revisions may be. As discussed in this and the final section, it is quite possible that a number of very advantageous changes will take place regarding the practice of mediation. On the other hand, as a prominent plaintiff's trial lawyer commented, once the risk of trial is eliminated, there will be no need for mediators.⁹⁹ While the extent of this statement may not be realized, at least any time soon, it appears that the mainstream of cases which a number of mediators¹⁰⁰ have as their basis of business is likely to decrease, evidencing that the vanishing trial phenomenon has a direct bearing on mediation practice.

Mediators will likely confront a variety of issues. These include matters relating to attaining cases, business development, and whether the practice of mediation can truly evolve into a separate profession. Further considerations and concerns relate more to the specifics of the process itself. These factors include the conduct of all participants in mediation and the management of the process by mediators. Since both the backdrop of the dispute as well as options for resolution may have changed, similar alterations may occur in just how mediators conduct the process. With trial results no longer foreseeable, non-settlement options, along with mediation outcomes, may change as well.

A. Issues Relating to Administrative Facets of Mediation Practice

The vanishing trial may impact mediators in a number of ways. Most likely, those mediators who have come from law prac-

⁹⁸ The irony is intentional.

⁹⁹ CLE Program, *supra* note 38.

¹⁰⁰ This is not to say that all mediators focus exclusively or predominantly on court-annexed cases, but many do.

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tices¹⁰¹ have a professional interest in the vanishing trial and its impact upon the legal profession. In fact, some are concerned and have taken a position that dispute resolution professionals must also be sure to advocate for the trial and its continued use.¹⁰² For those mediators who look to the courts and pending cases for business, the primary issue is whether the vanishing trial, whether real or imaginary,¹⁰³ will change their mediation practices. Pure economic logic leads us to believe that fewer trials results in less work for lawyers in terms of preparing for trial. Yet, in order to achieve production goals, lawyers may try to retain cases rather than settle or resolve them. This may result in fewer mediations or at least fewer cases settling at mediation. While a dearth of trials will clearly impact how the mediation process is conducted, the topic of a subsequent section, it is important to first consider the impact upon the setting and scheduling of mediations. A lack of sufficient lawsuits to mediate is a paramount concern, particularly when mediators need to earn a living. In other words, an assurance of cases to mediate is a basic element of practice.¹⁰⁴

i. Acquiring Cases to Mediate

An initial issue is whether lawsuits will continue to be mediated. As noted earlier, fewer cases may result in less mediations. Some believe that one way to deal with the vanishing trial may be to revise how trials are conducted in order to increase usage. For example, if one reason for the decrease is the complexity and duration of trials, a suggested remedy may be to streamline the procedure.¹⁰⁵ If trials are not as lengthy, there will be an increase in

¹⁰¹ For a personal account of the transition from law practice to mediation, see generally JOHN VAN WINKLE, *MEDIATION: A PATH BACK FOR THE LOST LAWYER* (2001).

¹⁰² David A. Hoffman, *From the Chair, Courts and ADR: A Symbiotic Relationship*, 11 *DISP. RESOL. MAG.* 2 (Spring 2005).

¹⁰³ Regardless of whether this phenomenon is a myth, or real, people continue to act on it and behave in accordance with such beliefs. As with many myths, behavior is affected without regard to veracity.

¹⁰⁴ For example, where parties are not contractually obligated to mediate or courts do not mandate cases to mediation, it can be difficult to get parties to the table, even after nearly thirty years of public awareness efforts. But see Creo, *supra* note 75, at 1034 in which he contends that most of his cases are of a voluntary nature.

¹⁰⁵ One suggestion is the use of a chess clock approach. See Gregory P. Joseph, *Trial Evidence in the Federal Courts: Problems and Solutions*, SL044 ALI-ABA COURSE OF STUDY 653 (Oct. 20-21, 2005).

their use.¹⁰⁶ It is possible that if a shortened trial becomes a reality, then fewer cases will be mediated.

Other approaches are aimed directly at ADR, even though currently, despite much commentary, the direct relationship between ADR usage and a decrease in trials has not been determined. In fact, it has never been demonstrated unequivocally that ADR reduced the number of pending suits in court.¹⁰⁷ Similarly, no reliable study has suggested, let alone proven, that decreasing ADR usage will increase the number of trials. So even though statements have been made regarding the downsides of ADR, specifically that alternative processes have diverted cases, it is unknown whether increasing the occurrence of trials necessitates a reduction in ADR use.¹⁰⁸

The number of lawsuits actually filed is another critical vector. Certainly fewer total cases will result in fewer court-annexed mediations, a factor already being experienced in some jurisdictions.¹⁰⁹ While currently in federal courts it appears that filings have increased, such may not be the case in some state courts.¹¹⁰ As tort reform progresses on state and national levels, certain types of claims may be severely reduced if not eliminated. As lawyers conclude that damage caps make certain cases unprofitable, they will no longer take cases. Lack of experience compounds the problem. As lawyers become less familiar with particular causes of action, they may be more hesitant to file those types of claims. A decrease in case filings, coupled with an active and deliberate increase in the number of trials, could result in a significant decrease in the total number of mediations – at least those of the court-annexed variety.¹¹¹

¹⁰⁶ For example, the ABA Section of Litigation has explored this issue in great detail. *See, e.g.,* Litigation On-line, <http://www.abanet.org/litigation/home.html> (last visited Mar. 20, 2006).

¹⁰⁷ *See* Hensler, *supra* note 34, at 166-67. On the other hand, studies have also shown no effect on the incidence of trial. Stipanowich, *supra* note, at 16; *see also* Sanford M. Jaffe & Linda Stamato, *Views on Rand's CJRA Report: No Short Cuts to Justice*, 15 *ALTERNATIVES TO HIGH COST LITIG.* 67 (1997).

¹⁰⁸ Some experimentation with this response may have already begun. For example, the District Courts in Travis County, Texas have, for many years, had a standing order which requires that litigants mediate as a condition precedent to a trial setting. *See* Local Rules, http://www.co.travis.tx.us/district_courts/text_files/local_rules/local_rules_17.asp (last visited Mar. 20, 2006). Attempts are currently underway to repeal that Standing Order.

¹⁰⁹ Texas is one example. *See* Daniels & Martin, *supra* note 34.

¹¹⁰ *Id.*; Hensler, *supra* note 34, at 166-67.

¹¹¹ This may imply a real need to expand the types and sources of cases which are mediated, as I suggest in the final section of this article.

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The participants' motivation for going to mediation is another influential aspect of continued practice. If participation in trial is not a realistic possibility, the parties' reasoning for going to mediation may change. Often, in many jurisdictions, participation in mediation is required as part of the pretrial order¹¹² or as a condition precedent to obtaining a trial setting.¹¹³ These approaches are no longer workable if the carrot is not available. In other words, once "litigants" realize how improbable it is that their cases will go to trial, they may fail to see mediation as a condition precedent or necessary step in the process. Such views will decrease mediations.

Another factor which has some bearing on mediation use is the context of law practice. Fewer trials inevitably results in less trial experience,¹¹⁴ once viewed as critical for young lawyers.¹¹⁵ New or even experienced lawyers may feel a need to gain additional "litigation" (translated pre-trial and motion practice) experience. In order to do so, lawyers may need to decline to resolve their cases. Consequently, they will certainly not go to mediation, but rather look to other court related methods for resolution. In addition, as lawyers have had less opportunity for trial experience, their knowledge, experience and skills in negotiation and mediation have likely improved.¹¹⁶ In the past ten to fifteen years of participating in mediations, many lawyers have learned from their experiences. As they improve negotiation skills, lawyers may see little need for mediators – or at the very least, use mediators only in very difficult cases. Even now it is not uncommon that cases settle right before the mediation. If, as it appears, the new goal of "litigation" is settlement, then mediation may have replaced trial as the endpoint. In the past, most cases settled - usually just prior

¹¹² For example, in Harris County, Texas, many judges provide a statement as part of pretrial procedure that the litigants are expected to mediate or make attempts to resolve the matter through another form of ADR. See Order of Judge John Coselli, Harris County District Court, available at <http://www.justex.net/civil/125/proc125.htm> (last visited Mar. 20, 2006).

¹¹³ This option is used in Travis County Texas, which has a standing order referring cases to ADR prior to obtaining a trial setting. See Local Rules, http://www.co.travis.tx.us/district_courts/text_files/local_rules/local_rules_17.asp (last visited Mar. 20, 2006).

¹¹⁴ See McMunigal, *supra* note 80.

¹¹⁵ See Atlas & Atlas, *supra* note 44, at 14.

¹¹⁶ Research has demonstrated a trend by some lawyers to appreciate problem solving negotiation and see the process as more effective than more traditional adversarial negotiation. See Andrea Schneider, *Exploding Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002).

to trial or what has been termed “on the courthouse steps”.¹¹⁷ This may now be replaced by settling “at the mediator’s doorstep.” While this occurrence was not a problem for courts, which always had more cases on the docket, such settlements are quite problematic for full time mediators who do not have a stack of other cases to work on- at least not for that day of mediation. Consequently, the mediator is unable to replace the lost work, or, frankly stated, income. If attorneys and clients realize that settlement is inevitable, the attorneys may look for ways to reach an agreement prior to mediation, thereby saving the time and expense of mediation.

On the other hand, it is possible that the vanishing trial will have a positive impact on mediation. The phenomenon could possibly increase the number of cases or matters that are mediated. For example, if parties realize that a trial is not realistic or economically feasible, perhaps they will explore alternative means of dispute resolution before going to the courthouse or even retaining a lawyer. In many ways, this approach was the original goal of the mediation movement,¹¹⁸ that is, to keep the cases out of the courthouse,¹¹⁹ whose dockets were overburdened.

In addition, concerns about vanishing cases may actually motivate some mediators to work on ways to increase public awareness of mediation. Even without the impact of the vanishing trial, expanding the type and nature of matters that are mediated beyond the legal system is vital. While courts provided a natural and simple method of securing cases, mediation offers parties much more than mere settlement, specifically, innovative ways to deal with conflict in a constructive manner. In the early days of the media-

¹¹⁷ This is why the benefit of mediation and ADR is often viewed as expediting the settlement process. See Roselle L. Wissler & Bob Dauber, *Leading Horses to Water: The Impact of an ADR “Confer and Report” Rule*, 26 JUST. SYS. J. 253 (2005).

¹¹⁸ The modern mediation movement is commonly recognized to have begun in 1976 with the Pound Conference. See Jeffrey Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309-10 (1996). Essentially, the movement followed two parallel, yet different, paths: courts and the community centers. The creation of community centers had several goals, including that of resolving small matters before they could escalate and require legal action. For additional information on early work in community mediation, see Edith Primm, *The Neighborhood Justice Center Movement*, 81 KY. L. J. 1067 (1992-93). Yet, over time, the strength of the legal system has pulled the community movement away from its original path. See Coy & Hedeon, *supra* note 14, at 305. For greater detail in the examination of this movement, see, KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE*, 26-48 (3d ed. 2004); KIMBERLEE K. KOVACH, *MEDIATION IN A NUTSHELL*, 18-23 (2003).

¹¹⁹ Not all cases that are mediated are court referred. For instance, there has been an increase in the use of mediation and other ADR clauses in contracts. See Stipanowich, *supra* note 16, at 8-9.

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tion movement, many mediators viewed the process in light of its potential to resolve a variety of matters far beyond pending litigation.¹²⁰ Although such approaches are wrought with difficulties, such as how to get reluctant people to the mediation table, this scheme does hold potential for a tremendous broadening of mediation use. While some expansion of mediation use can be observed already, such as with hospital ethics committees,¹²¹ in-house employment disputes¹²² and public policy matters,¹²³ a more concerted and deliberate effort to promote mediation is likely necessary in order to increase its use.

ii. Business Aspects of Mediation Practice

While obtaining cases is a very important aspect of mediation practice and the initial consideration, additional questions surround what mediators should or must do in order to continue to grow their practices in the shadow of the vanishing trial. While mediators have always done pro bono and volunteer work, many now see mediation as a profession; in other words, it is their primary business and source of income.¹²⁴ Mediators cannot merely volunteer their time, especially when lawyers charge the parties for their time in mediation. This would, as has been the case, devalue mediation.¹²⁵ In order to increase the professional and business im-

¹²⁰ See Coy & Hedeem, *supra* note 14, at 413-22.

¹²¹ See, e.g., Nancy Neveloff Dubler & Carol B. Liebman, *Bioethics: Mediating Conflict in the Hospital Environment*, 59 DISP. RESOL. J. 32 (2004).

¹²² The United States Postal Service established one of the largest in-house mediation programs, REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly), to resolve employee grievances. See Lisa B. Bingham, *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341, 355-56 (2002); see also Indiana Conflict Resolution Institute, *Project: United States Postal Service (USPS)*, <http://www.spea.indiana.edu/icri/usps.htm>.

¹²³ See Bruce T. Levi & Larry Spears, *Public Policy Consensus Building: Connecting to Change for Capturing the Future*, 70 N.D. L. REV. 311 (1994); Peter S. Adler, *State Offices of Mediation: Thoughts on the Evolution of a National Network*, 81 KY. L. J. 1013 (1992-93).

¹²⁴ Some associations promote the business aspect and are self-described as a trade association. For example, the Association of Attorney-Mediators. See Homepage, <http://www.attorney-mediators.org> (last visited Mar. 20, 2006); see also International Academy of Mediators, <http://www.iamed.org/index1.cfm> (last visited Mar. 20, 2006).

¹²⁵ This has long been a concern of the mediation community, particularly the community centers. The concern is that if, as is often the practice, mediation services are provided on a pro bono basis, or at no charge to the parties, some parties may interpret such services as having little or no value. This debate has been a thorn within the community mediation movement, as one objective was to increase the use of mediation, and offering the service at no charge seemed to fulfill that goal. On the other hand, by doing so, a message was sent, or at least received by many parties, that mediation was a free service, and consequently not as valuable as those items or services which one would have to pay for. For a mediator's perspective, see Jeff Kichaven,

age of mediation, mediators must present their work as a service which provides value and benefits to the parties. Mediators are deserving of compensation and appreciation as is any business or profession. As mediation practices have been established and become the exclusive source of income for many mediators,¹²⁶ sufficient and steady caseloads are a necessity in order to maintain a business.

Such issues lead to an examination of why parties may return to mediation. One often voiced incentive is the satisfaction level of the participants. If parties are pleased with the process, they are likely to return if involved in another dispute. They may also recommend the process to others. In fact, research has demonstrated that what is valued in mediation is not just the savings of time and money. Rather, the real “value added” in mediation appears to be how the process works.¹²⁷ Specifically, studies evaluating mediation in light of procedural justice issues show that parties appreciate the opportunity to voice their concerns and be heard by a fair and neutral person.¹²⁸ Moreover, the ability to understand each other and exchange information was also found to be important components of the process. Achieving results based upon a legitimate information exchange and enhanced communication is central to the process.¹²⁹ The opportunity for self-determination, that is not having a result imposed or coerced, but rather maintaining control over the outcome, is another feature of mediation that is quite significant to the parties.¹³⁰ Because it appears that the parties are attuned more to the process rather than the result, mediators must be cognizant of these factors in conducting mediations. While the matter of specific mediator technique is considered in a later section relating to potential outcomes, party perception of process activities must be considered a larger dimen-

Pay More and Resolve Cases? The Value Issue in Court Mediation, 23 *ALTERNATIVES TO HIGH COST LITIG.* 177 (2005); Jeff Kichaven, *When It Comes to Mediators, You Get What You Pay For*, <http://www.irmi.com/Expert/Articles/2004/Kichaven06.aspx> (last visited Mar. 20, 2006).

¹²⁶ While some mediators also practice law, accounting, counseling or other profession, many prefer to concentrate solely and exclusively on mediation. See *ADR PERSONALITIES AND PROFILES* (James J. Alfini & Eric R. Galton eds., 1998).

¹²⁷ See Robert A. Baruch Bush, “*What Do We Need a Mediator For?*” *Mediation’s “Value-Added” for Negotiators*, 12 *OHIO ST. J. ON DISP. RESOL.* 1 (1996).

¹²⁸ See *id.* at 17-19.

¹²⁹ See *id.*; see also Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 *WASH. U. L.Q.* 787, 817-20 (2001) (providing an in-depth examination of the procedural justice literature that demonstrates the necessity of the actual parties’ participation in dispute resolution).

¹³⁰ See Bush, *supra* note 127, at 20-21.

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sion related directly to continued use of the process. An assurance that parties are active participants in mediation is critical to process satisfaction, which will help assure continued use. Such participation, however, does not always occur.¹³¹ Mediators fear the alienation of lawyers, upon whom they depend for business and lawyers have been hesitant to allow parties to actively participate in mediation. As a result, in many court-annexed cases the client has a very minimal role. Yet, for mediation use to develop beyond court cases, it is imperative that mediators keep in mind the need for party involvement in the process. By doing so, and acting consistent with party satisfaction factors, mediators may continue to develop and expand their practices.

Other business considerations, however, may ultimately have a harmful effect on mediation. Prior to the recent publicizing of the vanishing trial, mediators established reputations and businesses by resolving cases. Mediators would often boast of settlement rates in excess of eighty percent as a method of developing and maintaining business.¹³² But, the vanishing trial and other market conditions could render proficient settlement rates harmful. We know anecdotally that in some jurisdictions where mediation is mandatory that certain parties (and their lawyers) attend mediations only to get “their ticket punched,” with no intention of settling cases. Such participants may actually prefer mediators who have no concern regarding whether the case is resolved. Other parties may visualize, and therefore expect, a mediation process in which only one side (the other) is reality tested. Some lawyers, with fewer cases in the bucket, may view a mediator who is effective at resolving a difficult dispute as a threat. Institutions may also determine that it is their policy to never settle claims brought against them.¹³³ In these instances, mediators who are skillful at resolving matters are viewed disapprovingly. In essence, these parties may acknowledge a requirement to mediate, but look for a mediator who is unconcerned with reaching a resolution. Of course, such issues raise profound ethical issues for both mediators and

¹³¹ See Welsh, *supra* note 129.

¹³² Of course, the focus on settlement rates also, in some instances, prompted coercive tendencies in some mediators. See generally Welsh, *supra* note 4; Timothy Hedeem, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, But Some are More Voluntary Than Others*, 26 *JUR. SYS. J.* 273 (2005).

¹³³ Such a forceful litigation policy is used for a number of reasons, such as sending a message to deter other potential litigants. This is an often stated reason why some corporations are very hesitant and unlikely to settle matters early on; they fear that others will come forward and sue in the hope of obtaining a quick (and easy) settlement.

lawyers but practically, many mediators who derive a significant portion of their income from certain repeat players, may feel pressured to conform to expectations or lose the opportunity to mediate. Yet such approaches can also have a very negative impact upon the process beyond the ethical considerations. In some instances, the participants on the “other side” of the refusal to settle view the mediation as a waste of time. As a result, they decline to participate in any further mediations.

ii. Professionalism of Mediation

As the use of mediation has increased, a trend to establish a professional status for mediators has evolved. If, as many mediators contend, a new profession has been created, then regulatory aspects of practice such as establishing and enforcing ethics, credentialing, and the existence of a complaint process are inevitable.¹³⁴ While these efforts have taken on a variety of forms, such as ethical rules, standards of conduct and a wide array of certification and accreditation attempts,¹³⁵ the bottom line is essentially that mediation is endeavoring to become a profession.¹³⁶ If mediation use decreases, such efforts will certainly be impacted.

For example, as mediators try to establish qualifications and certification, focus is placed on assessing what mediators do.¹³⁷ Many of the qualifications currently in place have a significant experiential component. If fewer cases are mediated, the ability to become an experienced mediator is lessened. Professionalism or regulation through credentialing has been difficult for a number of reasons and a great deal of debate about training and accreditation has ensued. Yet most agree that some type of internship, clinical experience or mentoring with experienced mediators is a vital component to learning and the development and refinement of neces-

¹³⁴ Some of these practices have been put into place. See Pou, *supra* note 10.

¹³⁵ For example, two national organizations of mediators, the ABA Section of Dispute Resolution, along with the Association for Conflict Resolution, are engaged in a feasibility study regarding the accreditation of mediators. For additional information about the project, see <http://www.abanet.org/dispute/> (last visited Mar. 20, 2006) and see also Pou, *supra* note 10.

¹³⁶ Nancy A. Welsh & Bobbi McAdoo, *Eyes on the Prize*, 11 DISP. RESOL. MAG 13, 13-16 (2005) (noting the interrelationship of ethics and the search for professionalism).

¹³⁷ One early study in this regard began the focus on mediator skills. See Christopher Honeyman, *On Evaluating Mediators*, 6 NEGOTIATION J. 23 (1990). For a discussion of Honeyman's Test Design Project, see <http://www.convenor.com/madison/tdesign.htm> (last visited Oct. 31, 2005). For another more contemporary view, see Christopher Honeyman, *Something More Than Skill: What are Parties Really Seeking in a Mediator*, 23 ALTERNATIVES TO HIGH COST LITIG. 63 (2005) [hereinafter Honeyman, *More than Skill*].

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sary skill sets.¹³⁸ Even so, accomplishing such has been difficult thus far. The time and expense in structuring such opportunities has made such approaches infrequent. If less mediation occurs, then the ability for novice mediators to gain experience will lessen even more, rendering experiential requirements unworkable.

As discussed in greater detail in a subsequent section,¹³⁹ how mediators conduct the process may also change with the transformation of the options available to parties. Mediator techniques in reality testing and discussing options will need to be modified, as the information upon which discussions have been based may no longer be viable. This, in turn, impacts the teaching and training of mediators, a vital component of professionalism efforts.

Others may express concern that mediators retain their neutrality, ethics and independence only when a public entity, such as the justice system is in place, providing some check on conduct.¹⁴⁰ In other words, if the entirety or near entirety of dispute resolution becomes privatized, then the ability to monitor mediator conduct may become much more difficult. While many professionalism issues remain currently undetermined and the subject of debate,¹⁴¹ with considerable changes in practice, achievement of professionalism objectives will likely become even more troublesome.

B. Impact on Participants in the Mediation Process

In court-annexed mediation, the realization of a shortage of trials will likely significantly impact how the process is approached by all mediation participants. Without trial as a possible endpoint, the mind set and the considerations of the participants, lawyers, parties and mediators, will change. In cases where current practices remain intact, such as where the lawyers guide their clients to and through mediation, the effect of the vanishing trial on law practice will undoubtedly carry over to mediation. The impact of lawyering changes on mediation is first explored, followed by a consideration of how these changes may affect the parties to a dispute.

¹³⁸ See, e.g., Charles Pou, Jr., *Scissors Cut Paper: A "Guildhall" Helps Maryland's Mediators Sharpen Their Skills*, 26 JUST. SYS. J. 307 (2005); Paul Speigelman, *Certifying Mediators: Using Selection Criteria to Include the Qualified Lessons from the San Diego Experience*, 30 U.S.F.L. REV. 677 (1996).

¹³⁹ See *infra* Part V.C.ii.

¹⁴⁰ See Lande, *supra* note 59.

¹⁴¹ See generally Pou, *supra* note 10.

i. The Lawyer Representative's Role and Actions in Mediation

Because significant mediation use has been in the context of pending lawsuits, it is not surprising that lawyers have occupied a key role in the process. Lawyers have been active in matters such as deciding whether a case should go to mediation, in selecting the mediator, in preparing the parties for the mediation and in guiding the clients either toward or away from settlement.

1. Background of Lawyer Participation in Mediation

In many jurisdictions, mediation has evolved as an alternative to court or trial for the resolution of matters. Yet mediation and the court, or the adversary system, are based on very different principles.¹⁴² For example, the goals and objectives underlying the adversary process or paradigm include finding truth; preserving rights for a party; determining a right or a wrong; and perhaps punishing a wrongdoer.¹⁴³ This is accomplished through procedures such as the offer of proofs, reasoned argument, and party presentation of evidence in a competitive setting. On the other hand, some very different goals and objectives underlie mediation. In fact, the very terms adversary and argument are essentially contradictory to mediation as well as collaborative, interest-based approaches to negotiation and problem solving.¹⁴⁴ Throughout the mediation process, attempts are made to discover the underlying interests and needs of the parties. All participants are encouraged to engage in creative problem solving. Opportunities for the parties themselves to participate are available, which rarely occurs in court. As a result, parties are empowered and satisfied with the mediation process as well as the outcome.

Another major difference between the two systems concerns the way information is presented and used. In litigation, a search for truth and determination of facts places the focus on the past. Outcomes are based upon examining and proving (or disproving) what happened at some earlier time. In contrast, the focus in mediation is on the future. Through the mediation process outcomes or resolutions are achieved without a right-wrong determination or

¹⁴² See generally Paul T. Wangerin, *The Political and Economic Roots of the "Adversary System" of Justice and "Alternative Dispute Resolution"*, 9 OHIO ST. J. ON DISP. RESOL. 203 (1994).

¹⁴³ See *Id.*

¹⁴⁴ For example, negotiation is often explained in dichotomies, or the comparison of two contrary approaches. One of the more common definitions of negotiation is the dichotomy of adversarial and problem solving. See generally, Schneider, *supra* note 116.

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factual finding as participants are encouraged to formulate creative and satisfactory solutions to their disputes.

Behaviors are often quite different in mediation and litigation. Even with the strong recommendations of civility in law practice, as a practical matter, there is still little expectation of cooperation and collaboration when engaged in the adversarial arena.¹⁴⁵

When mediation joined with the legal system, the fact that the goals of each process were so different was not emphasized¹⁴⁶ or even acknowledged. As a result, most lawyers and judges failed to appreciate these differences, and tried to blend the dissimilar processes into one familiar process. In many ways, the legal system has engulfed mediation, so much so that in some versions mediation and court-based settlement are hardly distinguishable.¹⁴⁷

And to some degree, the confusion has been enhanced. For example, numerous articles and even books have been published focusing on advocacy in mediation¹⁴⁸ rather than utilizing terms which might illuminate the differences in the processes such as “partnering in problem solving” or merely representation in mediation.¹⁴⁹ Others claim to “win” at mediation,¹⁵⁰ implying that mediation is merely part of the adversary system.¹⁵¹ Some commentators have gone so far as to contend that ADR and medi-

¹⁴⁵ This very topic, the differences in attorney representation in the legal system as compared with mediation, was the subject of the first Cardozo conflict resolution symposium. 1 *CARDOZO J. OF CONFLICT RESOL.* 1 (1997).

¹⁴⁶ See Welsh, *supra* note 4.

¹⁴⁷ See Lela Porter Love, *Twenty-Five Years Later with Promises to Keep: Legal Education in Dispute Resolution and Training of Mediators*, 17 *OHIO ST. J. ON DISP. RESOL.* 597, 603-604 (2002). See generally Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 *J. DISP. RESOL.* 247.

¹⁴⁸ See, e.g., JOHN W. COOLEY, *MEDIATION ADVOCACY* (1996); Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 *BAYLOR L. REV.* 963 (1998).

¹⁴⁹ See Suzanne J. Schmitz, *What Should We Teach in ADR Courses? Concepts and Skills for Lawyers Representing Clients in Mediation*, 6 *HARV. NEGOT. L. REV.* 189 (2001) (noting that Professor Carrie Menkel-Meadow sees the term “mediation advocacy” as an oxymoron and instead prefers the term “representatives of parties” to that of “advocates.” In addition, Schmitz points out that Professor Jacqueline M. Nolan-Haley uses the term “representational mediation practice” in *Lawyers, Clients, and Mediation*, 73 *NOTRE DAME. L. REV.* 1369, 1372 (1998)). See, e.g., ERIC R. GALTON, *REPRESENTING CLIENTS IN MEDIATION* (1994).

¹⁵⁰ See Robert E. Margulies, *How to Win in Mediation*, 218 *N. J. LAW.* 66 (2002).

¹⁵¹ See Wayne D. Brazil, *Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts*, 2000 *J. DISP. RESOL.* 11, 29 (2000); see also Joan Stearns Johnsen, *Mediator – Friend or Foe? Using the Mediator to Your Best Advantage*, ABA Continuing Legal Education (CLE), *Alternative Dispute Resolution: How to Use it to Your Advantage* (Oct. 2000).

ation are simply variations in the litigation process.¹⁵² On the other hand, efforts have been made to underscore the notion that mediation offers a model for resolving disputes genuinely different from the courts, and as a consequence must retain those differences that make it so.¹⁵³

Contributing to the lack of clarity in the processes is a lack of education. As lawyers were mandated to attend and participate in mediation, they took with them to the new process old, familiar behaviors. While much time and energy was spent on training mediators and educating judges and court administrators about mediation, precious little effort was made to help lawyers acknowledge and appreciate the differences in the paradigms. In fact, in order to fend off objections to mediation, lawyers were often told that they could still win at mediation. The need to change the manner and method of representation was not generally recognized or stated, let alone emphasized.

Although recent attempts have been made to educate lawyers about the nuances and dissimilarity of mediation and court, much resistance has been encountered. Organizations have scheduled continuing legal education programs about representing clients in mediation and often they have been canceled due to a lack of registrants. In other instances, when such programs are offered which purport to educate lawyers about mediation, the large majority of the attendees are mediators themselves. Perhaps lawyers believe that additional education is not necessary or that representation in mediation could not really be any different from court.¹⁵⁴ It is certainly ironic, that in this day of the vanishing trial, programs concerning litigation skills are still in demand. Yet as a result of the use of adversarial approaches in a new and different process, mediation is often counter-productive at best.¹⁵⁵ It is not uncommon that adversarial behaviors derail or cause the termination of media-

¹⁵² Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L. J. 1289, 1349 (1998); see also John Lande, *How Will Lawyering and Mediation Practices Transform One Another?*, 24 FLA. ST. U. L. REV. 839 (1997) (coining the term "liti-mediation").

¹⁵³ See Kovach & Love, *supra* note 4; see also CARRIE MENKEL-MEADOW, ET AL., *BEYOND THE ADVERSARIAL SYSTEM* (2005).

¹⁵⁴ Interest in these programs, despite much marketing and efforts, have been minimal.

¹⁵⁵ Attempts, however, have been made to point out the differences. See Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 278-90 (1999). Also, adding some confusion to the discussion, is the combination of the terms "problem-solving" and "advocacy." See, e.g., Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEGOT. L. REV. 103 (2005).

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tion.¹⁵⁶ Even in law schools which have a number of programs which purport to teach new ways of lawyering, such education is still often included in the context of advocacy programs. And those students, who enroll in courses such as mediation and problem solving negotiation, are, after graduation, placed in the predominant paradigm of win-lose adversariness.¹⁵⁷ Hence, despite efforts to emphasize differences,¹⁵⁸ it has been difficult for mediation to escape the strong and forceful paradigm of the adversary system.

Lawyers' adversarial conduct then impacts mediation practice. In most litigation matters, lawyers hire mediators, and therefore many mediators have succumbed to pressures to be "legal like". As a result, over the last fifteen years of court-annexed mediation, the process has been recreated to be more court, motion and deposition - like. One result of this "legalization" of mediation has been what is known in the field known as the facilitative evaluative debate.¹⁵⁹ This debate was initiated by an acknowledgement that

¹⁵⁶ For much greater detail concerning the problems of using advocate-like conduct in mediation, see Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 *FORDHAM URB. L. J.* 935 (2001).

¹⁵⁷ I, for one, have talked with many former students who embraced the mediation paradigm, and yet upon graduation and employment found themselves adopting strident, adversarial approaches to "fit in."

¹⁵⁸ Numerous law review articles, and most recently a textbook for law school use, prominently note that there is lawyering away from the win-lose system. See *CARRIE MENKEL-MEADOW, ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (2004); see also Daicoff, *supra* note 79.

¹⁵⁹ This matter has resulted in numerous articles debating the topic. See, e.g., Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 *HARV. NEGOT. L. REV.* 71 (1998) [hereinafter *Mapping Mediation*] (arguing that mediation should not be among the processes where the neutral has an evaluative orientation or role); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 *HARV. NEGOT. L. REV.* 7 (1996) (depicting on a grid the mediation universe); James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 *FLA. ST. U. L. REV.* 919 (1997); Kimberlee K. Kovach, *What Is Real Mediation and Who Should Decide?*, 3 *DISP. RESOL. MAG.* 5 (1996) [hereinafter *Real Mediation*]; Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 *FLA. ST. U. L. REV.* 937 (1997); Robert B. Moberly, *Mediator Gag Rules: Is it Ethical for Mediators to Evaluate or Advise?*, 38 *S. TEX. L. REV.* 669 (1997) (arguing against ethical rules that prohibit mediator evaluation); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 *FLA. ST. U. L. REV.* 949 (1997) [hereinafter Stempel, *Beyond Formalism*] (endorsing flexible mediation that permits judicious use of evaluative techniques); Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation*, 14 *ALTERNATIVES TO HIGH COST OF LITIG.* 62 (1996) (describing appropriate uses for mediator evaluation and recommending specific mediator strategies); Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 *J. DISP. RESOL.* 371 (2000); John Bickerman, *Evaluative Mediator Responds*, 14 *ALTERNATIVES TO HIGH COST LITIG.* 70 (1996);

mediators engaged in a practice of reality testing¹⁶⁰ which included, and in many instances emphasized, the lawsuit and legal outcome.¹⁶¹ The practice, where mediators evaluated the strengths and weaknesses of the lawsuit and the likelihood of each side to prevail, became known as “evaluative mediation”.¹⁶² Practices evolved to where, in litigation cases, such evaluation was the only expectation of mediation. As a result, nearly anything that concerned itself with settlement was termed mediation.¹⁶³ Now, however, Riskin and others are examining in greater detail aspects of mediator conduct and specifically each participant’s role in determining the nuances of the process as a method of moving away from the dichotomy, and focusing more on the intricate activities throughout the process.¹⁶⁴

Yet much evaluation in mediation continues. In order to evaluate, mediators rely upon and emphasize the law. With what might be termed the overuse of the law in mediation, many of the distinct characteristics of the process such as party empowerment and creative option generation have been minimized or lost. Even though mediators, with a focus on the interests of the parties and moving beyond legal considerations, may try to conduct the process in a manner consistent with early goals and objectives of the process, because of lawyer conduct and role dominance, they hesitate to do so. As a result, in many cases, mediation much more resembles traditional settlement conferences rather than the innovative and creative process that it was intended by many to be.¹⁶⁵

Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309 (2000).

¹⁶⁰ Reality testing, that is, the challenging of many assumptions people hold as well as beliefs about the options and outcome, is normally a part of the process. It was the near exclusive use of a lawsuit paradigm for reality testing that sparked the debate in the field.

¹⁶¹ This was first articulated by Professor Len Riskin, in Leonard L. Riskin, *Mediator Orientations, Strategies, and Techniques*, ALTERNATIVES TO HIGH COST OF LITIG. 111 (1994), which produced a near immediate contrary response. See Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996), which then cultivated numerous additional commentaries.

¹⁶² See Marjorie Corman Aaron, *Evaluation in Mediation*, in DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS*, ch. 10 (1996).

¹⁶³ Stempel, *Beyond Formalism*, *supra* note 159.

¹⁶⁴ See Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

¹⁶⁵ I acknowledge that for some, merely to assist the courts or lawyers with settlement was the only goal of mediation. But for many others, the mediation process holds promise and potential outside of those goals. See Dorothy J. Della Noce et al., *Transformative Mediation: New Dimensions in Practice, Theory and Research Clarifying the Theoretical Underpinnings of Mediation:*

2. Current Practice in Mediation

It appears that in many, if not most, jurisdictions, lawyers control mediation in several ways. For one, lawyers usually initiate mediation. They decide when to mediate as well as select the mediator. Courts often order cases to mediation or enact a standing rule or order which requires that the case be mediated, but stop short of setting a time certain or choosing the mediator.¹⁶⁶ Lawyers also often control the process. That is, attorneys for the parties currently take a dominate role in the procedure even though this has been shown to be detrimental to the process and especially to the parties who “own” the dispute.¹⁶⁷

For years, mediators have been stressing the need that parties themselves take an active role in the process. Reasons behind this are many, and include matters such as ownership in the dispute, the need to be heard, that parties themselves know much more about the matter and possible solutions, and the notion that individuals are much more likely to comply with an agreement that they have a part in making. Many of these factors fall under the rubric of “self-determination.”¹⁶⁸ Early studies demonstrated great satisfaction with the mediation process, even in those cases where a final resolution was not achieved. Active participation by the parties contributed greatly to party satisfaction.¹⁶⁹

More recently, this attention to party participation is derivative of a different perspective, specifically one with a focus on mediation and justice issues. As mediation has been integrated within the courts, questions concerning justice have arisen.¹⁷⁰ Mediation scholars have begun to consider research by social scientists which demonstrates that procedural fairness or justice is an important,

Implications for Practice and Policy, 3 PEPP. DISP. RESOL. L. J. 39 (2002); Coy & Hedeem, *supra* note 14.

¹⁶⁶ In early practice, courts did refer cases to specific mediators. Today, in some instances, particularly in difficult cases, the judge may hand pick the mediator, but for the most part, the choice is up to the parties (which, in reality, is the attorneys’).

¹⁶⁷ See, e.g., Welsh, *supra* note 129, 817-20 (2001) (providing an in-depth examination of the procedural justice literature that demonstrates the necessity of the actual parties participation in dispute resolution).

¹⁶⁸ See Welsh, *supra* note 4, at 16-21.

¹⁶⁹ See, e.g., Chris Guthrie & James Levin, *A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute*, 13 OHIO. ST. J. ON DISP. RESOL. 885 (1998).

¹⁷⁰ See Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157 (2001); Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL ED. (2004); Jonathan M. Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 CARDOZO J. DISP. RESOL. 19 (2004).

perhaps the most critical, objective of any dispute resolution process.¹⁷¹ In fact, it has been noted that procedural justice relates directly to an individual's perception of distributive justice or the substance of the outcome.¹⁷² In other words, a litigant's ability to be satisfied with an outcome or the impression of distributive fairness is directly correlated with their perceptions of procedural justice.¹⁷³ Particular process elements which assist in achieving procedural justice include the opportunity for disputants to express "voice" and assurance that a third-party neutral considered what they said.¹⁷⁴ As a consequence, it seems that in order to achieve a durable resolution, one with which the parties are satisfied, mediators and lawyers alike should assure that the parties take a very active role in the process. In many jurisdictions, however, parties are discouraged from participation in mediation and often do not have an opportunity to talk directly with each another. In some cases, the parties are separated early in the process, and their role in the mediation minimized with most of the discussions taking place between the lawyers and the mediators.¹⁷⁵

Presently, in court-annexed mediation, lawyers also tend to dominate much of the reality testing portion of the process. In the consideration and reassessment of the alternatives to a settlement, known as BATNA, WATNA and LATNA,¹⁷⁶ the focus is primarily on considerations of the lawsuit and its potential outcome. These propositions are discussed by the lawyers throughout the day of mediation with considerations based upon what the evidence may demonstrate. Because trial was viewed as the endpoint, a real option if the case did not settle, other options or settlement proposals were often compared or weighed against going to court. While mediators may continue reality test with the parties, the use of the courthouse as the primary subject of that testing may be only illusory and of little value, as statistics show there is little likelihood that trial is a real option. Evidence will not be presented. Ques-

¹⁷¹ See Welsh, *supra* note 129.

¹⁷² See Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise without Procedural Justice*, 2002 J. DISP. RESOL. 179, 180 (2002).

¹⁷³ See Welsh, *supra* note 129.

¹⁷⁴ See *id.* (citing E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988)).

¹⁷⁵ See Welsh, *supra* note 129.

¹⁷⁶ The first, one's BATNA, or Best Alternative to a Negotiated Agreement, was made common by the seminal work, ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT* (1981). Various trainers and practitioners have developed additional derivatives such as WATNA (Worst Alternative to a Negotiated Agreement), LATNA (Likely Alternative to a Negotiated Agreement), and HATNA (Hoped for Alternative to a Negotiated Agreement).

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tions now emerge as to what should be considered as viable alternatives to a negotiated resolution. What information should parties examine when taking into account possible alternatives to the proposals presented at mediation? These questions remain unknown at this point, but must be addressed.

3. Future Possibilities: Changes in Mediation to Adapt to Lawyering or Changes in Lawyering to Accommodate the Spectrum of Opportunities Mediation Offers

One concern is that if mediation is the end point in the life of a case, the lawyers will continue to lawyer, placing even more emphasis on the law. This trend has already been observed in the minimizing and marginalizing of the parties.¹⁷⁷ If trial is no longer viable, lawyers will look to replacement fora to “lawyer.” As a result, the expansion of lawyer roles and controls in mediation could grow even more. If this is the case, it would not be surprising that mediation is swallowed up and encompassed wholly within the legal paradigm. Mediation would no longer be visible or viable as a distinct process.

Another fear may be that mediation will become like arbitration.¹⁷⁸ Not in terms of the specific process, but rather how it is conducted. It is possible that mediation, as was arbitration, will be transformed into that which is was not intended. For example, arbitration began as a process of dispute resolution by business which wanted to avoid the legal system and the cost expense of going to court.¹⁷⁹ In addition, early users thought it sensible that the judge or the one who decides the matter should have expertise in the subject matter of the dispute. Since the decision was not to be based, at least wholly by the law, it was not necessary that the neutral had legal experience. The process itself was designed to be quick, not drawn out, but rather concise and to the point.¹⁸⁰ Parties usually represented themselves and often results or awards were based more on equity and business practices rather than issues of law. Although this seemed to work well for some time, the process in many ways was altered. Arbitration, now quite popular

¹⁷⁷ See Welsh, *supra* note 129.

¹⁷⁸ For an observation of how this has already occurred, see Robert A. Baruch Bush, *supra* note 14.

¹⁷⁹ See Sarah Rudolph Cole & Kristen M. Blankley, *Arbitration*, in *THE HANDBOOK OF DISPUTE RESOLUTION*, 318-321 (MICHAEL L. MOFFITT & ROBERT C. BORDONE EDS. 2005); see also Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN. ST. L. REV. 929 (2004).

¹⁸⁰ See Yarn, *supra* note 179.

and enthusiastically supported by courts including the United States Supreme Court,¹⁸¹ has become a much more lengthy, involved and expensive process. Over the years lawyers became more active in arbitrations. As they did, the lawyers needed “to lawyer” within arbitration and consequently the process has now become complex and overburdened.¹⁸² It is indeed ironic that complaints are now made that arbitration is too cumbersome, too costly and often more time consuming than court.¹⁸³ While many lawyers blame the arbitrators, it has also been shown that the entry of lawyers into the process contributed significantly to the increased complexity. One specific factor has been the heavy focus on intricate discovery.¹⁸⁴

So it is quite plausible that if trials are no longer an option, and mediations are the end event in the course of litigation, then lawyers will make the mediation process more like court, more complex and more protracted. Some of this has begun, as mediators are experiencing postponements due to the need for additional discovery. Could it be possible that mediation rooms become filled with boxes of documents and evidence, with elaborate video and power point presentations could take several days to observe and consider? In the future, it may be that only after three or four days of presentations the parties begin to seriously discuss options for settlement or resolution. In effect, mediation will replace the trial as the forum where lawyering is played out. Mediation will then have become a complex burdensome procedure for dispute resolution, just what it intended to remedy.

On the other hand, it is also quite possible that without trial as a final step in the process, lawyers will begin to concentrate on solving the client’s problem outside of the courthouse. Mediation use may increase and become the dominant paradigm for dispute resolution, although this may have its own challenges.¹⁸⁵ With trial

¹⁸¹ Numerous cases in recent years have demonstrated an approval of the use of arbitration in nearly all types of matters. See, e.g., Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

¹⁸² See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996); Bush, *supra* note 14.

¹⁸³ See Yarn, *supra* note 179.

¹⁸⁴ See *id.*

¹⁸⁵ Some of these challenges include some distinct changes in the process. In addition, many believe some type of norms are needed for society. See, e.g., Stempel, *Beyond Formalism*, *supra*

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as only an illusion, it is possible that the conversations during mediation would not be about trial outcomes, but rather broadened to encompass a variety of other aspects of problem solving. And instead of a presentation which is focused on evidence, relevancy and admissibility, issues can be discussed void of legal jargon and context. Discovering the underlying interests of the parties, a hallmark of interest based negotiation and mediation, may become easier. The potential of reaching more creative and innovative outcomes (read as less legal or court based) may become a reality. And certainly without the contentiousness and posturing which all too often accompanies an adversarial approach, more attention can be placed upon relationships and the opportunities for reconciliation as well as resolution. Often parties desire some closure to the dispute whether that be reconciliation or termination of a relationship. With an exclusive focus on legal concepts, the “people part” of the problem often got lost.

Law practice may also change in a positive way. Lawyers may be able to find satisfaction in helping their clients resolve matters creatively and in doing so, broaden the perspectives of what it means to represent clients.¹⁸⁶ Changes in law practice impact not only the clients but also the lawyers.¹⁸⁷ Law practice can be transitioned from a method through which battles are fought to one where people problem solve to find acceptable solutions. Other movements such as collaborative lawyering,¹⁸⁸ the lawyer as problem solver,¹⁸⁹ preventive law and therapeutic jurisprudence,¹⁹⁰ which collectively have been identified as the comprehensive lawy-

note 159; Lande, *supra* note 22. Yet it is possible that in a completely private system, procedures could be enacted whereby outcomes of private processes, such as mediation, would be compiled and maintained. See Benedetto, *supra* note 63.

¹⁸⁶ See, for example, the relatively recent discussion of the lawyer as problem solver where the lawyers work is not limited to adversarial representation, but rather appreciating, understanding and solving the client's larger problems in a more general sense. See, e.g., Symposium, *Conceiving the Lawyer as Creative Problem Solver*, 34 CAL. W. L. REV. 267 (1998).

¹⁸⁷ See Susan Daicoff, *Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers*, 5 PSYCH. PUB. POL'Y & L. 811 (1999).

¹⁸⁸ See Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLYAN L. REV. 45 (2004); cf. John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L. J. 1215 (2003); John Lande, *The Promise and Perils of Collaborative Law*, 12 DISP. RESOL. MAG. 29 (2005).

¹⁸⁹ Thomas D. Barton, *Creative Problem-Solving: Purpose, Meaning, and Values*, 34 CAL. W. L. REV. 273 (1998); Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811 (1999); Menkel-Meadow, *supra* note 78; Morton, *supra* note 78; Reno, *supra* note 78; California Western School of Law, Center for Creative Problem Solving, http://www2.cwsl.edu/mcgill/mc_main.html (last visited Feb. 20, 2006).

ering movement, demonstrate movement toward a more expansive and holistic approach to law practice.¹⁹¹

Finally, additional questions surround what this trend may mean for the potential “vanishing litigator,” those lawyers who focused almost exclusively on trial preparation. For the most part, the statistics say that motions and all of the other aspects of litigation work such as discovery still exist, and in some instances have increased.¹⁹² Perhaps those skills will become sharpened and only those used in actual trial will atrophy. As opportunities for broadening the view of lawyering continue to arise, litigators may realize different models of client representation, and in doing so broaden their capabilities to solve problems.

ii. The Parties in Dispute (a.k.a. Clients)

Another issue concerns the ownership of the dispute. The parties themselves and the clients are a critical part of the equation. Without the parties bringing a matter forward, there would be no need for lawyers, judges, courts or mediators. Changes in the litigation process will also impact those who “own” the dispute or in some cases, the parties. How individuals are informed about and prepared for mediation may change. The parties’ type and level of participation in the process, along with their expectations of outcome, are additional factors which must be considered.¹⁹³ When parties prepare for mediation with the understanding that trial is not a possibility, they may no longer view mediation solely as a legal or procedural obligation, but rather as an opportunity to explore acceptable resolutions. Accordingly, their mind-set may be more open to problem solving.

In many cases, people involved in a conflict or dispute want the problem solved, and often do not care exactly how that is accomplished. Yet they find themselves in a lawsuit because they retained a lawyer. When individuals walk in the door, attorneys, too often, make assumptions that the potential client wants to file a lawsuit. Perhaps parties are more likely to use mediation as a first step in problem solving if, when consulting with a lawyer or other professional, they were informed about other options such as medi-

¹⁹⁰ See generally Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15 (1997).

¹⁹¹ Daicoff, *supra* note 79.

¹⁹² Atlas & Atlas, *supra* note 44, at 14.

¹⁹³ See *supra* notes 126-30 and accompanying text.

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ation and ADR generally.¹⁹⁴ Individuals involved in disputes often have very different goals and objectives regarding outcomes. The need for lawyers and others to focus on objectives of the client when choosing a dispute resolution process can be a significant factor, for different goals point to different processes.¹⁹⁵

When no lawsuit is pending and parties attend mediation as a first step, they often view options for resolution with little concern for court. Even where lawsuits are filed or present as a backdrop, with trial no longer a viable option, the way the parties consider the mediation process will likely change from current practice. First, without trial as the primary focus, more emphasis can be placed upon allowing the parties to tell their story in an uninhibited fashion.¹⁹⁶ Recent research and literature demonstrate that what is paramount to the parties, in addition to getting the matter resolved, is the opportunity to be heard.¹⁹⁷ It is very important for the mediator to not only allow the parties to be engaged in the process but also to let them know they have been heard.¹⁹⁸ If the parties believe that mediation is their opportunity, perhaps only opportunity, for voice, participation and interaction will increase. Advance awareness will then effect the preparation for, and participation in, the process.

The parties themselves can be much more active. Often lawyers have been hesitant and unwilling to allow the clients to actively participate in mediation, particularly in what is termed the joint session, where all parties are together. Such resistance has been based, for the most part, on concerns that unrestricted disclosures may damage trial strategy. Since the case will not be tried, this fear should diminish and lawyers will no longer feel the need

¹⁹⁴ For a discussion of a potential requirement that lawyers inform clients about ADR processes, see Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 *GEO. J. LEGAL ETHICS* 427 (2000).

¹⁹⁵ For an analysis of several potential client goals and how to match the appropriate dispute resolution procedure which may best achieve those goals, see Frank E.A. Sander and Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 *NEGOTIATION J.* 49 (1994).

¹⁹⁶ Gary Paquin & Linda Harvey, *Therapeutic Jurisprudence, Transformative Mediation and Narrative Mediation: A Natural Connection*, 3 *FL. COASTAL L. J.* 167, 170-175 (2002) (discussing the need for storytelling from a psychological perspective); see also JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2000).

¹⁹⁷ Scott Barclay, *A New Aspect of Lawyer-Client Interactions: Lawyers Teaching Process-Focused Clients to Think about Outcomes*, 11 *CLINICAL L. REV.* 1 (2004) (noting that a primary client goal is storytelling); Nancy A. Welsh, *supra* note 129, at 817-20.

¹⁹⁸ Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 *CARDOZO J. CONFLICT RESOL.* 117 (2004).

to instruct clients to remain silent. Apprehension in terms of offering apologies will also decrease. Although it is well recognized that the power of apology can be substantial in terms of effect on resolution and closure,¹⁹⁹ apologies have been discouraged by lawyers out of concern that an expression of regret may be used as evidence of liability or an admission in a later trial. With trial no longer an option, that concern should dissipate.

And because the primary focus is no longer “the law”, something unfamiliar to most parties, mediation conversations can now surround the subject matter of the dispute, a topic that the parties themselves have expertise in. Conversations will focus less on similar court outcomes and as more sophisticated participants, the parties will be able to engage in the process and better make judgments about acceptable or workable outcomes. All participants can concentrate more on solving the problem. Without the win-lose, right-wrong paradigm encasing the discussions of potential alternatives for resolution, the range of options can be expanded. Creative and innovative solutions become much more realistic and widespread. And as the parties therefore no longer see each other as the opponent or other “side”, they may then be more likely to listen to one another. In doing so, they may realize that common interests exist and that all parties may have something to gain by collaborating with one another.

C. Influences on the Mediator and Mediator Techniques

In addition to the lawyers and parties, the vanishing trial is likely to produce changes in how mediations are conducted. In some ways, this trend has already begun as lawyers with fewer cases heading to trial are hesitant to settle matters, and have become more tentative about participating in mediation and ADR. How mediators see themselves fitting within the civil justice system may also impact their approach to the process. The mediator’s role may no longer be to focus on merely settling cases, since all cases will settle. Mediators may need to rethink, even redesign, the underlying foundation of the process. In addition to general role definition, the vanishing trial phenomenon may also have some

¹⁹⁹ On the role of apology in litigation and mediation, see Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999); Jennifer K. Robbennolt, *Apologies and Legal Settlement: an Empirical Examination*, 102 MICH. L. REV. 460 (2003); Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y. U. L. REV. 1165 (1997).

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bearing on the many specific techniques and skills used by mediators. These changes also directly impact the future training and teaching of mediators.

i. Mediator's Role

Mediation is often defined as a process through which the mediator assists the parties by facilitating communication, understanding and resolution.²⁰⁰ How a mediator facilitates, however, has been the subject of a great deal of discussion and debate.²⁰¹ And what mediators actually do often springs from the vision which a mediator may have about his role in assisting parties in reaching a resolution or perhaps a better understanding of the matter or each other. For example, when a mediator views his role as one of settling lawsuits, then specific tactics and measures which achieve that purpose are employed.²⁰² One method may be that the mediator pushes or urges the parties to reconsider their positions by providing an evaluation or assessment of the lawsuit. The goal is to move the parties to a middle ground in order to achieve an agreement or settlement.²⁰³ Alternatively, when, as in transformative mediation, the focus is on the relationship between the parties, the mediator's role is to assist with empowerment and recognition.²⁰⁴ As a result, the mediator may take dramatically different steps during the process. These may include directives to the parties to speak directly with one another or to restate what the other has said. In this process, the focus is much more relational. Depending upon the type of assistance to be provided to the parties, very different actions of the part of the mediator emerge.

As trials vanish and mediation use is affected, the role of the mediator may become much more chameleon-like. Mediators will undoubtedly need to redefine methods for intervention. Changes in how the parties and the process are approached will likely surface, based upon expectations of the process outcome. Mediators will take on a variety of tasks, depending upon the parties, the dispute and the context of the mediation. Methods of evaluating lawsuits may no longer be relevant. With trial no longer the dominant

²⁰⁰ See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(a) (2003). For a listing of various definitions of the term, see KOVACH, *supra* note 2, at 26-28, and DOUGLAS H. YARN, *DICTIONARY OF CONFLICT RESOLUTION*, 272-84 (1999).

²⁰¹ See, e.g., Riskin, *supra* note 164.

²⁰² Aaron, *supra* note 159.

²⁰³ See Aaron, *supra* note 162; see also Marjorie Corman Aaron & David P. Hoffer, *Using Decision Trees as Tools for Settlement*, 14 *ALTERNATIVES TO HIGH COST LITIG.* 71 (1996).

²⁰⁴ BUSH & FOLGER, *supra* note 5.

alternative to settlement, more options surface. Yet documented, tested knowledge about the probabilities of other options is virtually non-existent. In other words, very few records of non-court outcomes are available.²⁰⁵ Specific predictions become difficult, if not impossible. Mediators' roles will become more adaptable. If settlement replaces trial as the true endpoint of the litigation process, mediators will need to broaden the focus of their work to maximize their role. In enhancing the benefits of mediation and the opportunities that it brings,²⁰⁶ mediators can establish a new place in a system of dispute resolution rather than be a component of the civil justice system.

ii. Changes in Specific Mediator Techniques

The most prevalent debate regarding mediator conduct has centered on whether the mediator should be facilitative or evaluative in approach.²⁰⁷ Evaluative, in this context, often refers to the mediator's conduct in evaluating the strengths and weaknesses in the lawsuit and assessing the chances or risks inherent in a trial. This assessment is usually based upon the mediator's prior experience as a lawyer or judge. But if trials vanish, mediators will no longer have information on which to base an evaluation. Where trial is not a realistic option, the need to assess the strengths or weaknesses regarding a trial outcome no longer exists. As a result, other alternatives and methods of disposition may become more relevant.

A record number of cases are still disposed of by the courts, but often by motion practice and pretrial proceedings.²⁰⁸ One consequence may be that mediators will need to become more knowledgeable about the various decisions of courts in these other methods of case disposition. It would seem that such knowledge would be a necessity if mediators continue to reality-test potential alternative outcomes in a meaningful way. If this is the case, mediators may then become truly what has been referred to as judging adjuncts.²⁰⁹ The role of mediator as a judging adjunct

²⁰⁵ While there has been some compilation of settlements of lawsuits (see Fromm, *supra* note 88), most of these have been only monetary settlements, with no reference to non-monetary or creative outcomes.

²⁰⁶ Bush, *supra* note 127.

²⁰⁷ See *supra* notes 159-64 and accompanying text.

²⁰⁸ Galanter, *Hundred Years*, *supra* note 17, at 1265.

²⁰⁹ Welsh, *supra* note 198, at 137 (citing Judith Resnik, *Uncle Sam Modernized his Justice: Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L. J. 607, 654 (2002)).

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might actually begin to replace the courthouse, thereby increasing privatization of dispute resolution services.

Another possibility is that the decrease in trials will result in less emphasis placed on any potential court outcome and allow greater emphasis on relational issues and non-monetary interests. This move away from considering and predicting court outcomes will be viewed by many as a welcome change.²¹⁰ The advantages and benefits of mediation as a process which offers a truly innovative and genuinely different and unique process for dispute resolution can then be realized,²¹¹ whereas in many cases due to emphasis placed on legalities and settlement, these benefits were often not achieved.²¹² Because of the vanishing trial, mediators may now be able to refocus the goals of the process toward offering participants a process more centered on relationships, enhanced communication and understanding, and outcomes based upon interests.

In looking at settlement options, mediators might emphasize the cost and impact of conflicts (both financial and personal) and the expense (both monetary and emotional) of litigating a matter that, in the end, will almost certainly not go to trial. With trials essentially non-existent, lawyers in mediation will no longer concentrate the information exchange on legal constructs. Mediators may then be able to move to a more in-depth exploration of the parties' issues and underlying interests. Finding common ground may become more a function of the mediator managing personalities and communication between the parties rather than motivating parties to settle based on an analysis of legal risk.

Mediators will likely continue to assist parties reassess available options for resolution. On one hand, reality testing is necessary so that decisions about settlement are informed and durable.²¹³ Yet, without standards such as predictable and authoritative outcomes, the means, in many ways becomes more difficult.²¹⁴ Often such disagreements about case assessment or predicted court outcomes have resulted in the parties and lawyers at extreme distances

²¹⁰ Kovach & Love, *supra* note 4.

²¹¹ See, e.g., KOVACH, *supra* note 2; MENKEL-MEADOW, ET AL., *supra* note 153; Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation — Worldwide*, 80 NOTRE DAME L. REV. 553 (2005).

²¹² Kovach & Love, *supra* note 4.

²¹³ For an in-depth discussion of the considerations in informed consent in mediation, see Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999).

²¹⁴ Luban, *supra* note 51.

when considering settlement.²¹⁵ Without these frames of reference, it may be even more divisive. On the other hand, it has also been pointed out that a lack of information may be advantageous with regard to achieving a voluntary resolution. It may be, as others have suggested, that without information about “blurry legal entitlements”, parties will bargain more honestly and earnestly.²¹⁶ In other words, not knowing what other outcomes are possible or probable may be a dynamic motivation for settlement.²¹⁷

iii. Implications for Mediator Education

In recent years, as part of the move toward regulation, additional focus has been placed on the teaching and training of mediators.²¹⁸ As the field more closely examines the content or substance of mediation training,²¹⁹ teaching and training methodologies have also been analyzed. While some consensus exists regarding basic content of mediation training, educational programs differ significantly. In some instances there is doubt whether it is truly necessary, while others advocate for longer and more in-depth training.²²⁰

Changes in mediator knowledge, skills and techniques necessitate variations in the teaching and training of mediators. As a consequence, it is important that teachers and trainers have a more accurate understanding of just what mediators are doing.²²¹ As ac-

²¹⁵ This is at the basis of some approaches to mediation where the goal is to move parties along a distributive negotiation by testing the legitimacy of assessments. See Aaron, *supra* note 162.

²¹⁶ See Luban, *supra* note 51, at 92 (citing Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 *YALE L. J.* 1027 (1995)).

²¹⁷ See *id.*

²¹⁸ Texas has been a leader in this regard through the creation of the Texas Mediation Trainers Roundtable in 1993. More recently, from June 13-15, 2005, the Strauss Institute at Pepperdine Law School hosted a gathering to examine teaching mediation in law schools. In addition, the ABA Section of Dispute Resolution, at its annual conference, carves out modules which address teaching dispute resolution skills, known as the legal educator's colloquium. The ADR Section of AALS occasionally sponsors programs at the annual meeting that focus on teaching methods. These efforts have placed additional attention on how these skills and knowledge are taught. See Joseph B. Stulberg, *Training Interveners for ADR Processes*, 81 *KY. L.J.* 977 (1992-93).

²¹⁹ For example, at the Pepperdine workshop, the deliberations surrounded how closely the mediation approach or style that is taught in the law school arena mirrors that which takes place in the everyday practice of mediating litigation cases.

²²⁰ See Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalism*, 1997 *BYU L. REV.* 687.

²²¹ Some concern has already been expressed that there is a disconnect between what is taught in mediation courses, particularly those in legal education, and what actual commercial mediators do on a daily basis. See *supra* notes 217-218; see also The Straus Institute for Dispute

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tivities and techniques of mediators change so too must training. Reliance by lawyer mediators on examining the lawsuit and reality testing legal outcomes may no longer be appropriate or effective. As a result, more emphasis must be placed upon techniques such as interest identification, reframing and creative option generation.

If, as was suggested, mediators decrease their dependence on court cases by proactively increasing the variety and types of cases, additional training and education will be necessary. As cases grow and become more diverse, and approaches to the process evolve, consideration of specialized applications is essential. Corresponding specialized trainings emphasizing different approaches to the process are the next logical step.

Over the last two decades, as more has been learned about mediation in terms of theory as well as skills, much has changed and evolved in the field of training. Many of the changes in training have been a reaction to the changes in practice. Perhaps it is time for teachers and trainers to be more proactive and visionary. We must think in advance as to the nature of the practice, and construct training initiatives accordingly. As the “profession”²²² undertakes issues regarding certification and licensure, and examines educational issues in greater depth, the time is ripe to re-evaluate both *how* mediators are taught, as well as *what* they learn.²²³

VI. PONDERING THE FUTURE

No doubt we will continue, at least for the immediate future, to ponder the future of both the vanishing trial and its impact upon mediation practice. While most, if not all, of the literature and discussions of the vanishing trial surround litigation, courts and law, we must also realize that the impact goes far beyond the legal system. While ADR has been discussed in terms of its potential responsibility for this trend, the pendulum will likely swing back in

Resolutions, <http://www.law.pepperdine.edu/pdfs/resolutions2004/pdf> (last visited Mar. 22, 2006).

²²² The issue as to whether mediation can actually be considered a profession remains an open one. See Pou, *supra* note 10; Welsh & McAdoo, *supra* note 136.

²²³ While training is recommended, such recommendations are often silent about what the training should consist of. Therefore, it is not surprising that training programs differ. A few exceptions exist, such as in Texas, where over ten years ago, the Texas Mediation Trainers Roundtable set out specific standards for training. See Texas Mediation Trainers Roundtable, <http://www.tmtr.org/> (last visited Mar. 22, 2006). In addition, the Minnesota legislature set forth the required content for training. See MINN. R. 114.13(a) (2006); see also Pou, *supra* note 10.

the other direction. That is, ADR practice will be affected. We must now question if court-annexed mediation can survive amid these changes.

Concrete answers to the issues raised are not yet forthcoming, at least not from me. We are still in a time of continuing research and analysis in order to sort out just what the potential causes and effects of the vanishing trial might be. It does seem clear, however, that the use of the trial process is diminishing. The ultimate effect of the vanishing trial on lawyers and judges is yet unknown as is what, if anything, will be done to remedy or reverse the trend. While suggestions have been made²²⁴, ranging from an increase of more judges and support staff, to streamlining the process to jury summits, and no doubt litigators will continue to research such options, it is far too early to tell if this will increase trial use and what the ultimate effect on the courts and caseloads will be. It is still quite doubtful that large numbers of cases will be disposed of by trial or a trial-like process, as this was never the case.²²⁵ Many issues impacting those in the legal arena such as lawyers and judges, remain uncertain. The role of ADR remains unclear as well. Some view ADR and its contribution to increased settlement with praise, while others voice disdain for having removed cases from the courts' venue.

While the specific interaction between ADR and trial must still be researched, the focus of this article was to isolate and highlight potential consequences for mediation. Many, if not most, of the foregoing considerations will have a direct impact upon mediation practice. Reduced caseloads have already driven changes in mediation practice in some jurisdictions. Discussions need to be initiated. It was my intent to underscore some of the possibilities so that we, the mediation community, may have the opportunity to consider in advance long term impacts and options. An array of changes in practice is possible, but mediators must proactively plan for their future. This article has examined a few potential changes; others may wish to also consider different views.²²⁶ One question surrounds whether mediators can or should become involved in the issues surrounding the vanishing trial. Perhaps moving away from the trial issue itself will likely be more productive. Rather than a

²²⁴ See generally *supra* Part V.

²²⁵ See Galanter, *Hundred Years*, *supra* note at 17; Lande, *supra* note 22.

²²⁶ For example, Professor Lande suggests a broad examination of the use of dispute resolution in light of the variety of opportunities for multiple processes. Lande, *supra* note 22.

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focus on the vanishing trial, such changes should be viewed as opportunities for mediators to expand the nature of their work.²²⁷

As mediators must be optimistic²²⁸ each day in their work, so too should they remain constructive and positive in business endeavors. Concerns about the potential negative consequences of the vanishing trial must be addressed. Yet, just as the focus of the mediation process is future oriented, so too, must mediators prospectively turn to defining or redefining professional and business issues. Mediators encourage parties to always search for numerous possibilities; mediators must now use those same skills²²⁹ and begin looking at a variety of different and innovative opportunities for practice. Noting that connectedness and are hallmarks of what many desire from mediators,²³⁰ this can serve as a springboard to assist in further practice and new methods for using skills and abilities. Another approach involves a change in the role of the process. For example, recommendations have been made to emphasize process pluralism.²³¹ That is, rather than view the courts as the central aspect of a dispute resolution system, the focus is placed on the many different processes which are appropriate and therefore should be made available.²³² Such an approach may place mediation as an initial process where the focus is not on resolution, but rather the identification and design of a unique, individualistic and tailor-made process for dispute resolution.²³³

Additional concerns touch upon the features of the process. For example, one often criticized aspect of mediation is the secrecy

²²⁷ For another view on the need for mediators to be proactive in the development of the "profession", see Tom Oswald, *Political Action for Mediation*, <http://www.mediate.com/articles/oswaldT4.cfm?nl=99> (last visited Mar. 29, 2006).

²²⁸ Although little empirical research has been conducted on the subject of mediator personality, (despite an interest and potential need), it is clear from personal and anecdotal information that optimism is a necessary characteristic. For some discussion of mediator personalities, see ALFINI & GALTON, *supra* note 126.

²²⁹ The need for mediators to "mediate" has been suggested some time ago. See Kimberlee K. Kovach, *Mediation for Mediators? If You Talk the Talk, You'd Better Walk the Walk: An Examination of How Dispute Resolvers Resolve Disputes*, 11 OHIO ST. J. ON DISP. RESOL. 403 (1996).

²³⁰ See Honeyman, *More Than Skill*, *supra* note 137 (pointing out that the parties desire and employ mediators who they view as authority figures and who they view as being similar or "connected").

²³¹ Lande, *supra* note 22.

²³² *Id.*

²³³ This view is somewhat similar to the recommendation for the early use of convening conferences. See Karl A. Slaikeu & Ralph H. Hasson, *Not Necessarily Mediation: The Use of Convening Clauses in Dispute Systems Design*, 8 NEGOTIATION J. 331 (1992).

surrounding the process.²³⁴ In fact, that is one of the primary complaints from those who urge that some level of dispute resolution must be public so that others may know and learn of rules and guidelines for conduct.²³⁵ This issue is also addressed in the concern about lack of precedent or norms. Could mediation be redesigned so to provide a level of partial confidentiality during the process, yet have a limited degree of disclosure so that the outcomes and decisions are known? While this would not actually set precedent, it can certainly provide needed information to others, resulting in a method of establishing norms, which is noted to be essential to a system of justice.

The suggestion of the use of dispute system design to create and modify processes must also be given serious and thoughtful consideration. Rather than react to what has happened, the mediation community must realize that change is probable and take a proactive role in the redesign of mediation and additional processes. The potential for mediation in any dispute resolution system is immense. Mediators can provide individuals a method to peacefully and efficiently reach satisfactory resolutions to all types and magnitudes of disputes. No doubt, however, additional questions or issues are inevitable. Can or should mediation replace the legal system as a primary dispute resolution method? What changes must then take place with regard to the process if this is truly to come about? Perhaps we are farther along in a purely privatized system of justice or of dispute resolution than we know.²³⁶ If so, it may be time to stop and consider the consequences and issues which may arise. For example, what will be the primary purpose of the private system? Who will be involved and what necessary education, training and skills must they have? What are the most critical features of this new system?²³⁷ How will

²³⁴ Stephanie Brenowitz, *Deadly Secrecy: The Erosion of Public Information Under Private Justice*, 19 OHIO ST. J. ON DISP. RESOL. 679 (2004); Hughes, *supra* note 12; Scott H. Hughes, *A Closer Look: The Case for a Mediation Confidentiality Privilege Still Has Not Been Made*, 5 DISP. RESOL. MAG. 14 (1998).

²³⁵ See additional suggestions in Seul, *supra* note 61.

²³⁶ Others have examined this issue with a conclusion that such a possibility is quite realistic. See Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1 (2004).

²³⁷ For example, Lande has enumerated what is commonly thought to be important goals of dispute resolution processes. These can be viewed as “procedural criteria” for a system, and include:

(perceived) party control over the process and outcome, opportunity for expression, respectful hearing and treatment, focus on the merits of the issues, focus on parties’ interests, exploration of potential for joint gains, enhancement of relationships (or minimizing harm to them), fairness and accuracy of decision, reference to appropri-

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this effect what may remain in a public system? What are the financial factors? The answers to these questions must, however, wait.

My intent was to move from a consideration of the impact and influence of ADR on the legal system,²³⁸ to an examination of how changes in the legal system may reshape the use of ADR. As others have hypothesized, numerous factors may converge, such as predictability and rancorous debate within the field, to render mediation obsolete. It is possible that mediation will no longer be valued or viable. The influence that reactions to the vanishing trial can have upon mediation practice should not be underestimated. Others have asked, is this potential death of mediation preventable?²³⁹ What should mediators be doing? What should lawyers and judges be doing? For one, individuals must begin to utilize mediation before going to court and even before consulting lawyers. But first there must be broadened, additional education of the general public, most of whom still view mediation as part of the legal system.²⁴⁰ While some efforts have been made to educate students early through peer mediation programs,²⁴¹ much more work must be done so that mediation is known as a separate and distinct process which offers numerous benefits. Is it possible for society to shift from a win-lose, right-wrong paradigm to one that has as its basis collaboration? This of course was the initial objectives of many of the early leaders of the mediation movement.²⁴²

Nearly thirty years ago, the modern mediation movement began with a goal that individuals would learn to resolve disputes and problems in a productive and collaborative manner. Progress, no doubt has been made. Mediation use has increased. Yet change is inevitable. Mediators must acknowledge that the landscape of mediation has changed and be attentive to those changes. Otherwise

ate norms, consistency of process and outcome, suppression of bias, protection from procedural abuses, opportunity to correct errors, protection of legitimate privacy, implementation of decisions, and efficiency in use of time and money.

Lande, *supra* note 22, at 20.

²³⁸ See Hensler, *supra* note 34.

²³⁹ See Eric R. Galton, *The Preventable Death of Mediation*, 8 *DISP RESOL. MAG.* 23 (2002); Jeff Krivis, *Preventing the Death of Mediation*, <http://www.mediate.com/articles/krivis15.cfm> (last visited Mar. 22, 2006).

²⁴⁰ See Golden & Kovach, *supra* note 8.

²⁴¹ See William S. Haft & Elaine R. Weiss, *Peer Mediation in Schools: Expectations and Evaluations*, 3 *HARV. NEGOT. L. REV.* 213 (1998); Kelly Rozmus, *Peer Mediation Programs in Schools: Resolving Classroom Conflict But Raising Ethical Concerns?*, 26 *J.L. & EDUC.* 69 (1997).

²⁴² See Kovach, *supra* note 2 (discussing the history of mediation).

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they may find themselves stepping upon the landmines without appreciation for what lies beneath. Mediators must not only be aware of these unknown dilemmas, but prepare accordingly. One step around the landmine is to take the lead and inform the general public of the nature and availability of mediation as a true independent alternative for dispute resolution. To do otherwise will allow mediation to vanish along with the trial.

