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SYMPOSIUM: THE FUTURE OF COURT ADR: MEDIATION AND BEYOND

FOREWORD

ANDREA KUPFER SCHNEIDER*

The symposium in this issue of the *Marquette Law Review* is a true privilege to have organized. Stemming from our conference in fall 2011 entitled *The Future of Court ADR: Mediation and Beyond*, the articles found here have the potential to reenergize old debates while adding new and different challenges to the existing debates on what court-connected dispute resolution should provide.

In conjunction with the Association of Family and Conciliation Courts (AFCC) and Resolution Systems Institute (RSI) and graciously assisted by a JAMS Foundation grant, Marquette Law School was honored to host a conference designed to bring practitioners and professors, court personnel and judges, neutrals and client perspectives all to bear on the challenges facing the next evolution of court-connected dispute resolution. As we said in designing the conference,

The purpose of this conference is to bring together practitioners, policymakers and academics with backgrounds in family and civil ADR to examine the status of court ADR programs, the challenges they face in the future and to encourage cross-fertilization between these traditionally disconnected groups. Particular emphasis will be placed on examining new ADR options especially as they relate to the ever-evolving use of the mediation process.

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When we started to plan this conference on Court ADR, I knew that one of the crucial places to start was back at the beginning, thirty years ago, in what still is the seminal debate on mediator neutrality.¹ So it is with great delight that we begin this symposium issue with Larry Susskind and Josh Stulberg revisiting their conclusions about the proper role of the mediator.² The panel discussion, excellently moderated by John Lande, was also strengthened by the perspective of expert Bernie Mayer, whose landmark book, *Beyond Neutrality*,³ pushes us to go beyond the traditional definition of a third-party intervener. Their debate was so rich that we reprint it here in its entirety along with audience comments. (You can also listen to the debate.⁴)

Among the numerous points made in the panel session, let me highlight two. First, Larry stood by his assertion that mediators should be responsible for the outcome of the mediation—that these outcomes need to be fair, efficient, stable, and wise—and that the mediator is responsible for managing the process in the way most likely to result in that kind of outcome. Josh argues that mediation was, and still is, a “justice event” and that mediators must be neutral—not as to process—but as to the outcome of that event. Bernie, commenting on both arguments, noted that the key is the structure and purpose of the mediation as well as broadening out the roles of the third party.

Josh Stulberg then continues his explanation in the next article, *Must a Mediator Be Neutral? You’d Better Believe It!*, in which he further explains his thinking. Justice requires that a mediator be neutral and, furthermore, that a mediator *can* in fact be neutral.⁵ Josh highlights that neutrality is different from impartiality or objectivity—only neutrality will give us confidence in the process. A talented mediator, Stulberg points out, must be knowledgeable about the process and substance, both facilitative and an activist. A mediator must be neutral with regard

1. Lawrence E. Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981).

2. Panel Discussion, *Core Values of Dispute Resolution: Is Neutrality Necessary?*, 95 MARQ. L. REV. 805 (2012).

3. BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (2004).

4. Panel Discussion, *Core Values of Dispute Resolution*, THE FUTURE OF COURT ADR AND BEYOND, <http://mediasite.marquette.edu/Mediasite/Viewer/?peid=6eeb227a962142feb8d869e9d3ccf7581d>.

5. Joseph B. Stulberg, *Must a Mediator Be Neutral? You’d Better Believe It!*, 95 MARQ. L. REV. 829 (2012).

to outcome but not with respect to process. In this way, the mediator can work toward, as Stulberg outlines, pure procedural justice.

The next article, *What We Talk About When We Talk About Neutrality: A Commentary on the Susskind–Stulberg Debate, 2011 Edition*, by Bernie Mayer, gives us another bite at Bernie’s apple of neutrality. He argues that the reason the Susskind–Stulberg debate still resonates after thirty years is that the idea of neutrality is tied into the very identity of a mediator.⁶ The debate goes to “our fundamental purpose” as mediators, our knowledge base, and our social impact.⁷ Because the debate over neutrality affects each of these elements, Mayer argues, it still captivates us as we struggle to continue to build the field.

So Bernie leaves us off at the end of his article asking what really makes mediators special. The next piece, *The Current Transitional State of Court-Connected ADR*, by Nancy Welsh, responds to this call by discussing where the field of mediation is and what potentially is so unsettling about this “ugly duckling” phase.⁸ As Nancy argues, we as neutrals need to be clear on what value we are providing to parties in dispute. These three values—self-determination, process choice, and dignified roles for the parties (or being heard)—continue “to animate the field of ADR.”⁹ But in our discontent with the current state of court-connected dispute resolution, Nancy argues we must recommit to procedural justice in order to move past this stage.

Perhaps explaining part of this ugly duckling phase, Debra Berman and James Alfini discuss one of the biggest changes to the field of court-connected dispute resolution, lawyer colonization, in their article, *Lawyer Colonization of Family Mediation: Consequences and Implications*.¹⁰ And while the term “colonization” sounds to me a bit like the Planet of the Apes in which we are all oppressed and enslaved, Berman and Alfini cogently argue that this colonization is happening regardless of the initial design or intent of family court designers. Having interviewed top mediators in three important states, this article offers a unique insight into why this colonization has taken place and,

6. Bernie Mayer, *What We Talk About When We Talk About Neutrality: A Commentary on the Susskind–Stulberg Debate, 2011 Edition*, 95 MARQ. L. REV. 859 (2012).

7. *Id.* at 867.

8. Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873 (2012).

9. *Id.* at 880.

10. Debra Berman & James Alfini, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 MARQ. L. REV. 887 (2012).

more importantly, what are the future implications of a lawyer-dominated process that is less party-centric. As we circle back to the goals outlined by the first symposium panel, lawyer colonization at the expense of justice, self-determination, or neutrality is to be feared.

Julie Macfarlane, in her article, *ADR and the Courts: Renewing Our Commitment to Innovation*, perhaps answers Welsh's call to change and the challenge set forth by Berman and Alfini, by arguing that court-connected programs must continue to innovate in order to keep up with the challenges.¹¹ Julie argues that conflict resolution is an art, not a science. As court-connected programs evolve, they must keep up with changes in the 21st century. Julie uses two fascinating examples—Islamic marriage and divorce cases and self-represented litigants—to show how innovation in dealing with these elements is crucial to the success of court connected programs. Julie's call to arms is a challenge: "The heart of real and effective innovation is changing or modifying values, requiring us to look closely and deeply at our core beliefs and assumptions about disputing; often, it requires tearing them up and rethinking them in the face of yet another unique challenge or conflict."¹²

The next several articles in the symposium provide crucial ideas for innovating and discuss where the future challenges lie. Tim Hedeem's article, *Remodeling the Multi-Door Courthouse to "Fit the Forum to the Folks": How Screening and Preparation Will Enhance ADR*, argues that the very framework by which we typically operate in court-connected dispute resolution—the multi-door courthouse—needs to be remodeled.¹³ The forum, or process choice, should be tailored to the parties and not just the "fuss" or dispute. Picking up where Julie leaves off, Tim notes that different disputants need different types of support in order to appropriately engage. Screening for the participants should take account of their skills and situation individually, including, for example, concerns with capacity or disabilities that might inhibit parties from fully participating as well as concerns with domestic violence. And, Tim argues, we have the ability to do better—providing restorative justice-type communications with more conferencing in advance of the mediation to ensure party knowledge and comfort as well as better

11. Julie Macfarlane, *ADR and the Courts: Renewing Our Commitment to Innovation*, 95 MARQ. L. REV. 927 (2012).

12. *Id.* at 939.

13. Timothy Hedeem, *Remodeling the Multi-Door Courthouse to "Fit the Forum to the Folks": How Screening and Preparation Will Enhance ADR*, 95 MARQ. L. REV. 941 (2012).

negotiation preparation for the parties.

Picking up on Hedeem's concern about individuals' abilities to participate fully in court-connected dispute resolution, Nancy Ver Steegh, Gabrielle Davis, and Loretta Frederick tackle the particular challenge of domestic violence.¹⁴ The great fear *vis-à-vis* neutrality in family mediation has always been that court-connected dispute resolution would ignore or ineffectively deal with domestic violence. Trina Grillo's warning, also thirty years ago, has remained the clarion call to be careful, to not let these consensual processes result in making women even less empowered in relationships.¹⁵ As Ver Steegh, Davis, and Frederick note, screening for domestic violence as part of a "triage" approach can work, can be helpful, and can be effective. *And* this screening must be done methodically to understand the characteristics of violence. The screening cannot move from problem identification to solution but rather must assess the characteristics of the violence, the implications of the violence, and the realistic available options. Screening instruments need to protect confidentiality and be sufficiently sophisticated. In the end, the authors propose "self-triage" with informed consent aided by more public access to information about court-connected processes, unbundled legal counseling, and domestic violence advocacy.

The last article in the symposium, *Court-Connected ADR—A Time of Crisis, A Time of Change*, fills in the rest of the pieces from the conference by bringing together additional thoughts and concerns raised by the participants in a report and discussion of the conference.¹⁶ Yishai Boyarin starts off by giving us the context in which court-connected dispute resolution is at a crossroads, facing challenges in funding, support, and confidence. In addition to reporting on participant comments from the conference, the report also further explains some of the panels in the afternoon focusing on particular issues. Early neutral evaluation and parenting coordination are discussed in more detail. And, as several articles further examined above, conference participants were concerned about children, pro se litigants, and domestic violence. Finally, the report discusses participants' ideas about political will and

14. Nancy Ver Steegh, Gabrielle Davis & Loretta Frederick, *Look Before You Leap: Court System Triage of Family Law Cases Involving Intimate Partner Violence*, 95 MARQ. L. REV. 955 (2012).

15. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

16. Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, A Time of Change*, 95 MARQ. L. REV. 993 (2012).

funding on both the national and local level.

The symposium issue both starts with and ends with the conference itself—the opening plenary and the report of the entire conference. In between these wonderful bookends, we are delighted to have these talented authors tackle some of the thorniest issues from the conference—from the very definition of neutrality and third party roles to taking care of the most vulnerable parties, from recognizing the ugly phase we are currently in (at least part of which is lawyer colonization) to a call to arms to change, to innovate, to better fit the forum. As someone who has written about negotiation approaches of family lawyers,¹⁷ I know that the disconnect between what we might want in our system and what we are getting can be quite large. I hope that practitioners, judges, and academics all benefit from the candid conversations and articles included in this symposium. I am so very grateful to all of the authors. Enjoy the read!

17. Andrea Kupfer Schneider & Nancy Mills, *The Ineffective Family Lawyer*, in INNOVATIONS IN FAMILY LAW PRACTICE (Kelly Browe Olson & Nancy Ver Steegh eds., 2008); Andrea Kupfer Schneider & Nancy Mills, *What Family Lawyers Are Really Doing When They Negotiate*, 44 FAMILY CT. REV. 612, 612–22 (2006).