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ADR AND THE COURTS: RENEWING OUR COMMITMENT TO INNOVATION

DR. JULIE MACFARLANE*

I. INTRODUCTION

As the papers from this Symposium demonstrate, considerable progress has been made over the past decade toward the goal of a “multi-door courthouse”¹ that reflects an expanding legal pluralism. The traditional assumption of “one size fits all”—where that size was adjudication by third parties in a public space—has withered in the face of the growing diversity of conflict resolution practice, both private and public. Many courthouses now offer mediation programs, neutral evaluation and assessment services, counseling, duty counsel services, case management, and judicial settlement conferencing programs. The importance of attempting to resolve disputes short of a full trial is fully accepted among policymakers, for whom it makes obvious economic sense, and is increasingly accepted by members of the bench and bar, who must continue to protect the rights and interests of disputing parties. This plethora of processes—with new programs being added all the time—often feels messy and confusing. We sometimes crave the certainty and simplicity of the days before the expansion of ADR in the courts where there was just one process: litigation. Practically speaking, it is also easier to marshal support behind one or two demonstrably effective core programs than to keep testing and evaluating new pilot schemes. However, I shall argue here that we have no choice but to keep innovating if we are to meet the new challenges of change, despite how untidy and unsettled that sometimes feels.

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1. A term attributed to Professor Frank Sander, at the Pound Conference (the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice). See Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 113 (1976) (“What are the significant characteristics of various alternative dispute resolution mechanisms (such as adjudication by courts, arbitration, mediation, negotiation, and various blends of these and other devises)?”). The term “multi-door courthouse” came to be associated with Professor Sander’s ideas. See Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument that the Term “ADR” Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97, 97 n.4.

II. DISPUTE RESOLUTION IS AN ART, NOT A SCIENCE

This expansion in programming has led to an increased urgency about “fitting the forum to the fuss”²—matching processes to disputes—and has raised expectations about the efficacy of alternative dispute resolution. Surely the range of available procedures allows us to maximize the chances of settlement by selecting the “right” process for a particular dispute. Doesn’t our deepening experience with settlement procedures enable us to triage files as they come into the court registry and direct them to the “right” program?³ If almost all cases settle, can we use case management tracking to identify the characteristics of the exceptions early on and fast-track everything else? From a growing volume of significant evaluation studies, can we distinguish cases based on particular variables such as area of conflict, party type or numbers, or amounts at stake, and direct them to the most efficacious processes?

These are tempting thoughts, and we shall continue to debate their possibilities. For now, however, we must accept their limits. Conflict resolution is an art and not a science. Disappointingly, evaluation studies fail to consistently identify particular case characteristics that make those disputes more or less susceptible to resolution via ADR.⁴ Instead, we are reminded of what those of us who practice conflict resolution are forced to confront each time we convene parties for negotiation—that every conflict is unique and can rarely be understood via a checklist of variables, and that our predictive powers are seriously limited. In fact, one of the most significant variables in settlement is the amount of time spent on a case.⁵ Another crucial factor is the experience of the third party.⁶ These factors are not necessarily under

2. Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 66 (1994).

3. See Peter Salem, Debra Kulak & Robin M. Deutsch, *Triaging Family Court Services: The Connecticut Judicial Branch’s Family Civil Intake Screen*, 27 PACE L. REV. 741, 743, 755–56 (2007) (discussing the use of triage as an existing “intake and screening practice”).

4. See Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 80–82 (2004).

5. This is the conclusion of many studies; see, for example, the comprehensive meta-analysis of evaluations of family programs in Joan Hunt & Ceridwen Roberts, *Intervening in Litigated Contact: Ideas from Other Jurisdictions*, FAM. POL’Y BRIEFING (Univ. of Oxford: Dep’t of Soc. Policy & Soc. Work, Oxford, Eng.), Sept. 2008, at 1, 4 (noting a correlation between mediation attendance and higher settlement rates).

6. Craig A. McEwen & Roselle L. Wissler, *Finding Out If It Is True: Comparing Negotiation and Mediation Through Research*, 2002 J. DISP. RESOL. 131, 140–41 (2002).

our control in our courthouses, where we must live with the programming and the personnel we have, even while lobbying for more and better of each.

The uncertainty that characterizes our ability to fit disputes to processes produces a variety of responses. One is a new assertion of “one size fits all,” with extravagant claims made for a particular new procedure. This is exemplified in the zealous promotion of particular approaches—for example, the now-notorious collaborative law versus cooperative law debate⁷ or the debate over facilitative versus evaluative mediation.⁸ These discussions may be stimulating on an intellectual level, but they are often polarizing among practitioners and create inflated expectations among clients. When the zealous advocates of particular approaches or processes really get going, they veer dangerously close to suggesting that one single, preferred process works “best” for all or even most disputes. This was the flawed thinking that got us into this current mess in the first place.

The reality of practical conflict resolution requires responsiveness to the unique nature of each and every conflict. We continue to learn—about process design, about disputing, about conflict dynamics, about effective advocacy, and about intervention. This means we must reject any assumption of orthodoxy—for example, always do facilitative mediation, always do evaluation mediation, always use lawyer-mediators, never use lawyer-mediators—or simple formulations for triage. For all these reasons, it is critical that we continue to experiment and to innovate in conflict resolution programming and, as we do so, keep assessing and evaluating.

III. A LANDSCAPE OF CONSTANT CHANGE

A brief review of the pace of change in disputing both inside and outside the formal court structure reveals a state of flux. ADR in the courts is constantly evolving and developing—sometimes moving forward with new programs, sometimes seeing programs defunded, but always changing. Moreover, each court services manager brings a nuanced approach to programming in his courthouse, while each state

7. For a perspective on this debate, see John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 247–66.

8. Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31, 31–32 (1996).

policymaker sees different problems and potential in his court system. Ten years ago, judicial settlement and mediation programs were almost unheard of, but now they are features in many courthouses.⁹ Parenting-coordination programming and innovation maintenance enforcement programs proliferate.¹⁰ As the volume of self-represented litigants (SRLs) in the family and civil courts rises¹¹ and demands increase for a more simplified and streamlined civil procedure, we shall see yet more changes.

Changes in court procedures are a reflection of broader change in the disputing landscape. The World Wide Web has empowered consumers like never before through their access to information that was previously only available to them via professionals. The relationship between technical expertise and professional service has changed beyond recognition by the development of the Internet. Where lawyers and courts have for generations assumed respect and deference, clients can now seek out a range of opinions beyond traditional legal sources. This means that client expectations about “value-for-money” in professional services, including but not limited to law, are also changing. When a problem can be Googled and some sort of “expert” information can be obtained with a few clicks of a mouse, professional advisors need to be able to offer more than “just” technical information to represent value-for-money. Some of the tangible results of this shift are the movement toward web-based self-help legal services; the increasing role of paralegal services in some areas; new consumer interest in “unbundling legal services” where they purchase a particular service from a lawyer rather than retain the lawyer for the duration of a case;¹² and a developing market for all types of vaunted “cost-effective” dispute resolution processes, including collaborative law and mediation.

9. See generally Roselle L. Wissler, *Judicial Settlement Conferences and Staff Mediation: Empirical Research Findings*, DISP. RESOL. MAG., Summer 2011, at 18, 18–20 (describing the now-common use of judicial settlement and mediation programs).

10. Blaisure and Geasler found that the number of U.S. programs increased nearly six times between 1990 and 1994. Karen R. Blaisure & Margie J. Geasler, *Results of a Survey of Court-Connected Parent Education Programs in U.S. Counties*, 34 FAM. & CONCILIATION CTS. REV. 23, 32–33 (1996).

11. See *infra* Part V.B.

12. See Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422–24 (1994) (defining unbundling legal services as the ability of the client to take “charge of selecting from lawyers’ services [that are] only a portion of the full package and contracting with the lawyer accordingly”).

Because the disputing culture, court and policy initiatives, and the practice of law keep changing, we have to keep changing too. This is not a time for the entrenchment of fixed beliefs or academic arguments over who is a “real” mediator (or conflict resolution practitioner) problem-solver. Instead, we have to welcome well-thought-out innovations with an open mind.

IV. CONVERGENCE: A SYMPTOM OF CHANGE

One example of the constantly evolving nature of dispute processing is the development of hybrid models of dispute resolution in legal practice, judicial processes, and courthouse culture. In each of these areas, there is evidence of what I have described elsewhere as “convergence,”¹³ where two different structural and cultural systems have moved closer together to produce a new form that borrows characteristics of each. The result is akin to a chemical reaction, where two different agents combine to produce a new compound.

Changes in the core skills of legal practice suggest a convergence between traditional skills and practices and those skills demanded by the new environment of settlement processes. When lawyers attend mediation, settlement conferences, and in their dealings with opposing counsel (evidence shows that it is increasingly normative for this to occur earlier in the life of a file than hitherto),¹⁴ they are practicing what I have described as “conflict resolution advocacy.”¹⁵ Sometimes somewhat primitive, unschooled, and simply intuitive conflict resolution advocacy recognizes that advocacy in a settlement process requires a different set of skills than “conviction” advocacy—i.e., advocacy to convince a decision-maker.¹⁶ Conflict resolution advocacy is an example of a hybrid form. It is built on traditional advocacy tools, including the

13. See JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 20 (2008).

14. Earlier opening of negotiation was first institutionalized in some states and provinces with early mandatory mediation, but there is evidence that it has become part of the legal culture in some of these centers. See Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 247. In a 2009 private study on file with the author, 45% of files that used negotiation first opened discussions either after the receiving of a statement of claim or after pleadings were closed. Interviews with counsel suggested a significant shift in the time at which they were willing to open negotiations.

15. See MACFARLANE, *supra* note 13, at 117–20.

16. *Id.* at 49.

use of fact- and law-based argumentation, thorough research, and rational logic. But effective conflict resolution advocacy also requires a consciousness of the other side and its emotional reaction to any settlement proposal, the need to develop a bargaining relationship, and a need for clear and effective communication (it is important for the other side to want to listen to you because they can simply, if they choose, get up and walk away).¹⁷

Another example of the emergence of a hybrid skill relates to the fact that lawyers are sometimes obliged to bring their clients to and enable them to participate in a settlement discussion with a judge or a mediator. In some instances, client participation may be minimal: lawyers still like to talk about “gagging” the client and doing the talking themselves.¹⁸ Nevertheless, the presence of clients changes everything. Repeat clients become more proactive in asserting their role in the proceedings. Lawyers are being forced to accommodate a new type of client partnership that requires them to know more, and different, things about their clients before they walk them into bargaining sessions. For example, lawyers should know their clients’ emotional priorities, their psychological barriers to settlement, and perhaps any potential non-legal remedies to their problem. The evolving practice is a convergence between the traditionally dominant role of the lawyer, who has historically conducted negotiation at arm’s length from the client, and a client-only process that dispenses with lawyers altogether.¹⁹ We are watching lawyers and their clients struggling to find the balance in power, airtime, and decision-making in settlement processes.

Another hybrid is emerging in judicial practice through judicial settlement processes, variously framed as judicial mediation, settlement conferencing, and case management.²⁰ Each of these and other similar procedures requires judges to rebrand themselves as the facilitators of settlements rather than as the adjudicators. This may occur by creating momentum within a closely managed process, exploring possible deals in judicial mediation, or simply by speaking frankly to counsel in the presence of their clients. In taking on this process management role,

17. *See id.* at 111–16.

18. *See id.* at 144–50.

19. *See id.* at 129–30 (describing the “traditional model,” in which “clients are expected to defer to their lawyer’s expertise,” and contrasting it with changes that are occurring in the twenty-first century as a result of greater access to legal resources for litigants).

20. *See id.* at 232–36.

judges are altering both their relationship to the dispute—which they previously only understood from the perspective of decision-maker—and the core skills they use.²¹ However, they continue to draw on their traditional authority in all their interventions. The bench is crafting the role of the “new judge” possibly faster than lawyers are creating the “new lawyer.”

Finally, we are seeing examples of hybrid processes and procedures in courthouse culture as a result of the convergence of traditional adjudication and alternative dispute resolution processes.²² One example is the expanding role of non-lawyer professionals in courthouse programs, such as social workers, mediators, and child-welfare specialists working alongside lawyers and judges. Another symptom of change is the growing volume of SRLs, whose needs are beginning to drive calls for the simplification of court forms and procedures. The courthouse itself is now a microcosm of the change and the convergence between the old and new in litigation practice in particular and disputing in general. In this environment, and in relation to legal and judicial practice, we must keep innovating and remain open to new thinking and ideas.

V. STAYING COMMITTED TO INNOVATION: TWO CASE STUDIES

My two most recent research projects provide two informative and different illustrations of my argument about the need to keep innovating.

A. *Islamic Marriage and Divorce*

North American Muslims, both religious and secular, widely practice traditional Islamic procedures for marriage and divorce.²³ These procedures are informal private-ordering processes without the force of

21. *See id.* at 235 (asserting that various new judicial initiatives are “changing the relationship between the judiciary and disputing systems and, consequently, the way that judges imagine their role and the skills they require”).

22. *See id.* at 7 (“All courts function differently than they did twenty years ago, with at least some shift toward the judicial management of cases and their settlement.”).

23. *See* JULIE MACFARLANE, INST. FOR SOC. POLICY & UNDERSTANDING, UNDERSTANDING TRENDS IN AMERICAN MUSLIM DIVORCE AND MARRIAGE: A DISCUSSION GUIDE FOR FAMILIES AND COMMUNITIES 6 (2012), available at <http://www.ispu.org/GetReports/35/2399/Publications.aspx> (noting that “the most commonplace expression of [North American Muslims’] *shari’a* obligations is through critical rites of passage and family transitions, especially marriage and divorce”).

law, but they represent an important cultural ritual for many Muslims across social and educational demographics and inside all Muslim communities irrespective their country of origin. Public speculation over “*shari’a* law”²⁴ has created fear about these processes, and their real meaning is often obscured by media distortion and by overwhelming suspicion of Muslims. Muslim marriage (using an Islamic marriage contract or *nikah*)²⁵ and divorce approved by an imam are examples of traditional rituals—in the language of dispute theory, private-ordering processes²⁶—that are important to many Muslim families in North America in the same way that any community tends to turn to its customs in times of transition and crisis. Muslim marriage and divorce are not used as substitutes for civil marriage and divorce, but rather as additional personal and family steps aimed at satisfying the wider community that the spouses have fulfilled their Islamic obligations, as these are understood in different Muslim cultures.²⁷

As an example of cultural and religious norms that play out in the shadow of the legal system, the case of Islamic marriage and divorce offers a challenge for the courts. The justice system must decide how to respond to these traditions. My research showed that North American Muslims do not expect the courts to apply or enforce Islamic family law—regarding this as a private area for their personal conscience—but that they want the courts to have some knowledge of their culture and the fundamentals of Islamic family law when they rule on conflicts over marriage and divorce between Muslim men and women.²⁸ For example, what should the court do when faced with a dispute over the

24. *Shari’a* is the interpretation of the Qur’an (and other sources), which gives rise to guidelines for good Muslim living. *Shari’a* (which is diverse in its understanding among Muslims) covers formal religious observance, but also many other aspects of family and everyday life. *Id.* Islamic law, or *fiqh*, is a sub-set of *shari’a*, and includes only those parts of *shari’a* feasible to raise to the level of a “rule.” The vast majority of Islamic law in the modern world is concerned with family law—marriage, divorce, and inheritance. On the distinction between *shari’a* and *fiqh*, see WAEL B. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* (2004).

25. See MACFARLANE, *supra* note 23, at 11.

26. See Julie Macfarlane, *Working Towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems with the Formal Legal System*, 8 CARDOZO J. CONFLICT RESOL. 487, 490–91 (2007).

27. See MACFARLANE, *supra* note 23, at 6. See generally JULIE MACFARLANE, *ISLAMIC DIVORCE IN NORTH AMERICA: A SHARI’A PATH IN A SECULAR SOCIETY* (2012) [hereinafter MACFARLANE, *ISLAMIC DIVORCE*].

28. See MACFARLANE, *supra* note 23, at 13–26.

enforcement of a required term in a Muslim marriage contract, such as the payment of the *mahr*,²⁹ a promise by the husband to give his wife something of value (anything from a love poem to a large lump-sum payment) in the event of his death or if they divorce?

In adjudicating such conflicts, judges have a variety of possible alternatives. The least innovative—and the most pervasive, at least in the United States and to a lesser extent in Canada—is for the courts to simply ignore the existence of these extrajudicial processes and the agreements that they lead to.³⁰ Or should the courts be prepared to respond to such agreements with sensitivity and respect, taking into account the expectations they create? Should the courts enforce a promise in a marriage contract to pay a *mahr* upon divorce, when the form of the contract appears to conform to the Statute of Frauds? Or should the *nikah* be treated as a non-justiciable “religious contract,” allowing the husband to escape his obligation from a very public promise signed in front of hundreds of wedding guests? Should spousal support simply be substituted? What if this is less than what was promised in the *mahr*? What if the woman is committed to receiving her *mahr*, but uncomfortable with the idea of spousal support, which does not exist in Islam beyond the period of *iddat*,³¹ usually three months post-divorce?³²

The practice of religious and cultural traditions raises many challenges for a secular legal system. Easy answers—assuming that anything with a whiff of religion is non-justiciable—are increasingly inadequate. Many North American Muslims are using these traditional processes as an affirmation of cultural identity—especially in the aftermath of 9/11—rather than as a statement of religious piety.³³ What could the courts do to innovate here? Some judicial education in Islamic family law would be an excellent beginning and could have a

29. *See id.* at 13.

30. In the case of the *nikah*, the equivalent of a prenuptial agreement, or in the case of Muslim divorce, an agreement to divorce using Islamic principles, perhaps negotiated with the help of an imam. *See id.* at 11 (describing the importance of the *nikah* in Muslim marriage).

31. *See* JOHN L. ESPOSITO WITH NATANA J. DELONG-BAS, *WOMEN IN MUSLIM FAMILY LAW* 20–21 (2d ed. 2001) (defining *iddat* as a three-month period after divorce, during which time an Islamic “woman is prohibited from remarrying” if the marriage has been consummated); MACFARLANE, *supra* note 23, at 36.

32. *See* ESPOSITO WITH DELONG-BAS, *supra* note 31, at 20–21.

33. *See* MACFARLANE, *supra* note 23, at 7.

direct impact on judicial awards. For example, should an award for spousal support be offset by any already-paid *mahr*? Perhaps the court could appoint a mediator who is familiar with the practices of Islamic marriage and divorce, who could work with the couple to come to an agreement that respects their traditions and feels fair to both. Perhaps the court could sponsor training for imams and others in the Muslim community who are potential bridge builders between these traditions and the work of the courts³⁴ (which North American Muslims choose to use extensively to resolve their disputes³⁵).

Ignoring the existence of these traditions and their impact on the expectations of Muslim men and women coming to family court to resolve divorce conflicts is not an option if the courthouse is to continue to meet the needs of a diverse range of individuals in multi-cultural North America.

B. Self-Represented Litigants

The number of self-represented litigants (SRLs) in North American courts has increased exponentially over the last ten years. In family courts, where SRLs have historically been most common, the numbers are staggering. In 1992, 46% of divorce cases in one California court involved at least one side who was self-represented.³⁶ By 2000, that percentage had risen to 77%.³⁷ “In Ontario, unrepresented litigants in the province’s unified family courts rose almost 500 percent” from 1995 to 1999.³⁸ The numbers are rising too in civil courts, with some districts reporting well over half of litigants representing themselves.³⁹

34. *See id.* at 42.

35. *See generally* MACFARLANE, ISLAMIC DIVORCE, *supra* note 27.

36. *See* Bonnie Rose Hough, *Description of California Courts’ Programs for Self-Represented Litigants*, 11 INT’L J. LEGAL PROF. 305, 306 (2004).

37. *See id.* The 2004 California Task Force on SRLs reported a continuing rise. *See* JUDICIAL COUNCIL OF CAL., TASK FORCE ON SELF-REPRESENTED LITIGANTS, REPORT OF THE TASK FORCE ON SELF-REPRESENTED LITIGANTS 9 (2004).

38. Lynne Cohen, *Unrepresentative Justice*, CANADIAN LAW., Aug. 2001, at 40, 40.

39. Memorandum from Madelynn Herman, Nat’l Ctr. for State Courts, Re: Self-Representation Pro Se Statistics (Sept. 25, 2006), <https://www.ncsconline.org/WC/Publications/Memos/ProSeStatsMemo.htm>. In the United States, data collected by the National Center for State Courts reports that 85% of all New Hampshire district court civil cases have one pro se party, and that 58% for the same existed in Iowa district court. *See id.* For information about Canadian efforts to increase access to justice for litigants, see ADVOCATES’ SOC’Y, STREAMLINING THE ONTARIO CIVIL JUSTICE SYSTEM (2006), available at <http://www.advocates.ca/assets/files/pdf/publications/streamlining-justice.pdf>.

Just why SRLs are appearing more and more often in the justice system and what the system can and should do to accommodate them are more complex questions than is sometimes recognized. These are the questions that my new research is seeking to answer by interviewing SRLs in three Canadian provinces.⁴⁰ There is a widespread assumption that litigants choose to represent themselves because they cannot afford legal representation (exacerbated by declines in civil and family legal aid⁴¹). Some of those who might qualify for legal aid find it impossible to navigate the layers of bureaucracy they must traverse to be declared eligible for help. However, while lack of access to legal aid is clearly an overriding factor, a number of SRLs declare that they are representing themselves either because they can do “as good a job” as a lawyer, or because of a past bad experience with a lawyer.⁴² Regardless of the accuracy of this assertion—and court staff and judges may disagree—perceptions are key in research that seeks to explain a new phenomenon. This belief appears to be related to declining public confidence in lawyers and the justice system, diminishing deference toward lawyers and judges, and a renewed desire for value-for-money service in an era of economic hardship. How SRLs understand their competence and power in relation to professional advice and assistance has been dramatically altered by access to the World Wide Web and online legal information.⁴³

What does the SRL phenomenon mean for innovation in the courts? Much of the research conducted in Canada and the United States to date has adopted a traditional paradigm of “unmet legal needs” (that is, assuming that the needs of SRLs are exclusively “legal,” variously

40. See the project website at http://www.representing-yourself.com/index.php?option=com_content&view=article&id=45&Itemid=53 (last visited May 14, 2012).

41. For example, the *Ontario Legal Aid Review* reported that “in 1996/97 the Plan issued only 14,063 family law certificates. . . . The contrast with previous years [wa]s striking. In the fiscal year 1993/94, 65,691 family law certificates were issued in the province. The number of family certificates has dropped to levels not seen since 1970.” See ONTARIO LEGAL AID REVIEW, REPORT OF THE ONTARIO LEGAL AID REVIEW: A BLUEPRINT FOR PUBLICLY FUNDED SERVICES 169 (1997).

42. See, e.g., DEP’T OF JUSTICE, COURT SERVS., HALIFAX, N.S., SELF-REPRESENTED LITIGANTS IN NOVA SCOTIA: NEEDS ASSESSMENT STUDY 27 (2004), available at <http://www.gov.ns.ca/just/publications/docs/SRL%20Report%20March%202004.pdf> (reporting survey results where 21.5% of respondents indicated that they could “do as good a job for myself” and 16% indicated “previous bad experience with lawyers”).

43. See MACFARLANE, *supra* note 13, at 62–63, 129–44.

defined) and has focused on providing legal information and advice.⁴⁴ The overall goal appears to be to accommodate or assimilate SRLs into the existing system using, for example, duty counsel⁴⁵ and online information systems.⁴⁶ Many innovative programs have already commenced in these areas with courts setting up web-based and courthouse-based stations for assisting SRLs.⁴⁷ Another response is to simplify court forms and procedures, and steps are being taken across North America to make the courts more accessible and less intimidating to the huge number of SRLs that are coming forward with their cases. Both of these developments have also taken some fire, with the volume and density of information and forms continuing to frustrate even the most determined and literate SRL.⁴⁸

Innovation for SRLs may need to go much further if this growing and increasingly vocal population is to be better satisfied and less frustrated with what the courts offer them. Part of the challenge with remaining open to innovation is remaining open to reframing the research questions we are asking. A more creative way of thinking about this challenge is to ask: What would the justice system look like if it were adjusted to the needs of SRLs, instead of the other way around? To answer this question, we have to overcome our assumptions about what SRLs are really looking for in the justice system—just legal remedies—and examine the importance of a sense of fair process (procedural justice), an opportunity to express their grievances, vindication, acknowledgement, relationship repair, and practical problem-solving. What ADR processes could meet some of these needs and how could they be customized to accommodate those without legal representation? Are new responsibilities for judges a crucial part of this type of innovation? In process design, how can there be fairness where one side has counsel and the other does not? And what are the responsibilities of counsel—should they offer unbundled legal services, which so many SRLs say they want⁴⁹ but cannot find? Will this presage

44. See *INNOVATIONS FOR SELF-REPRESENTED LITIGANTS* (Bonnie Rose Hough & Pamela Cardullo Ortiz eds., 2011).

45. Duty counsel refers to counsel available for free legal advice at the courthouse.

46. *Id.*

47. See the models described in *INNOVATIONS FOR SELF-REPRESENTED LITIGANTS*, *supra* note 44.

48. Interviews with SRLs on file with the author.

49. *Id.*

another form of legal-practice hybrid?

VI. THE ESSENCE OF EFFECTIVE INNOVATION

I have argued here that continuing commitment to innovation in court-based ADR is a necessity if court programming is to meet the needs of twenty-first century disputants. It is a relatively easy argument to make. The real challenge of innovation is not its justification but its practice. 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. Innovation is not just marketing—promoting oneself as a “collaborative lawyer” or a “new lawyer” or an “accredited mediator.” Neither is it only tactical change—“making nice” in mediation or telling the client to stay quiet in a settlement conference. Innovation requires an authentic commitment to trying something new and retaining an open mind to the result. This does not mean that we should be rash or forget to use our judgment and experience—but that dispute resolution innovation deserves our full intellectual and affective energy if it is to be a “real” experiment in something new.

We are often eager to draft rules to define and constrain innovations and to try to fit a new process or procedure back into one of our more familiar schema. Witness the energy expended on debates over professional ethical regulations in relation to conflict-resolution innovations, such as collaborative law.⁵⁰ Sometimes the energy we put into developing new rules seems to be a substitute for the energy needed for trying something new. To be effective innovators, we need to limit our preoccupation with rule-based change and explore other ways to support and build culture change. When we experiment with new processes, we should resist easy orthodoxies and stay open to the possibility of failure. As we try out new process-designs, or modify existing procedures in small but important ways, we should carefully reflect on the course of our experiment—its benefits, its downsides, its special challenges. If we can do this and resist the polarities and

50. See, e.g., Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 84–116 (2005); 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. 1315, 1330–31 & n.48 (2003).

simplistic classifications that reflect our desire for certainty, we can stay committed to innovation and the courts will continue to be the focus of our hopes for a responsive, relevant, and fair justice system.