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Article

MATCHING CASES AND DISPUTE RESOLUTION PROCEDURES: DETAILED ANALYSIS LEADING TO A
MEDIATION-CENTERED APPROACH

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I. Introduction

One of the most challenging problems in the field of alternative methods of dispute resolution (ADR) is deciding which process or processes (e.g., arbitration, mediation, trial, or some hybrid of these *2 primary processes) are most appropriate for a particular dispute. This question may be asked by a lawyer, a client, or a court official. Indeed its reach extends to any setting where disputes are pending. We will begin by looking at the context in which this problem commonly arises. Then, in Part II, we will analyze the various responses given in the literature and offer our conclusions, as well as a modified approach derived partly from the work of our predecessors. Finally, in Part III, we will suggest a simplified, user-friendly solution--namely, to begin with mediation in all cases except a limited group of situations in which mediation is inappropriate.

A. Problem and Scope of Matching Conflicts and Procedures

The key question is what process or processes can best satisfy the interests of the party that is seeking guidance on what dispute resolution method to use. This party could be either the client or her lawyer. Although choosing the process remains art rather than science, we believe that there are both theoretical and practical indications to guide this process choice.

Although in this Article we focus on the choice of process that would best satisfy the interests of one party, it should be noted that "the most appropriate process" could also be defined as one that best satisfies the interests of both parties. The highest payoff for both parties is a Pareto efficient outcome, which can often be achieved by a problem-solving process like mediation.¹ The most appropriate process can also mean a procedure that best satisfies the goals of a court, society, or the state. This aspect of the appropriate process is described in Part III.B.2 of this Article, dealing with the "public perspective."

B. Importance of Matching Tools to Process

Choose the most effective tool for the dispute. One obvious reason for thinking about the process is to choose the one that will give the parties the most appropriate tool to resolve their dispute and that will best satisfy their interests.

Convince your opponent. Another reason for thinking about the process choice is to give a party and her counsel arguments to convince the other party why she should agree to a particular process.²

Convince the court. Additionally, thinking about the process prepares a party for making arguments to a court, as necessary, as to ^{*3} why such a process would or would not be appropriate for the particular case.³

Our focus in this Article is primarily on helping the party (and her counsel) to choose the process that would most effectively maximize their interests, but in Part III.B.2 we include the perspective of a judge and the legislature.

C. Process Choices at Different Stages of the Conflict

Dispute resolution process choices exist at all stages of conflict or potential conflict.

1. A Conflict Exists but a Dispute Resolution Clause Does Not

In this Article we assume that the dispute already exists, or at least that the parties' goals and some other facts about the dispute are known. In such a case the party should have a tool to decide whether there is any procedure more appropriate than litigation, which is the default unless the parties decide otherwise.

2. A Conflict Exists, but the Existing Contractual Clause Is Not Apt for the Dispute

Similarly, when an existing clause is not appropriate for the dispute, the parties may want to change it at the outset of the dispute or while another procedure is being used. The analysis of the process choice at this point might be useful not only for deciding on the most appropriate procedure for the dispute, but also for convincing the opponent why the new process would be superior to the status quo. In such a case, mediation, because of its non-threatening, consensual nature, might be the preferred first choice of the parties.

3. A Conflict Does Not Yet Exist

The dispute resolution clause should not be considered only at the stage of imminent conflict. We believe that much of the advice presented in this Article will also be helpful to the parties when forming a contract and designing the dispute resolution clause, when they do not yet know the details of the dispute or even whether such a dispute will ever occur. In such a case mediation should be the preferred third-party process because it involves no commitments and because it is the most universal in achieving goals and overcoming impediments to settlement. The parties might also consider a multi- ^{*4} stage clause that begins with negotiation followed by mediation, and which might include other more binding processes such as arbitration.⁴

4. Our Approach

The analysis of the problem will be approached in three ways. First, there will be a theoretical discussion of issues that parties and their counsel should consider before deciding which process would suit them best. Second, there will be an assessment of the data on which dispute resolution processes parties most frequently choose and the levels of satisfaction with these processes. Third, there will be an examination of the judgment of dispute resolution professionals as reflected in Table 2 (Goals), Table 3 (Facilitating Features), and Table 4 (Impediments).⁵

We seek to integrate both theory and practice into the analysis, which is supported with appropriate data where such data exist. However, because much of the data is conflicting and context-specific, it is difficult to offer any general conclusions.

Although in this Article we focus on existing procedures, our analysis and conclusions can be used not only for choosing a particular process but also for designing a new or hybrid process specifically fitted to the needs of the parties. Therefore, this Article suggests that matching processes may be just the first step of the process choice, after which the parties should modify their preferred procedure to suit the particular needs of their dispute.

Probably the most important process choice takes place when the parties first choose their dispute resolution process. That original choice, however, may not continue to be optimal. Due to possible changes of conditions throughout the dispute and gains in understanding of the dispute pending its resolution, the parties could profit from changing their dispute resolution procedure during the processing of the dispute. Thus, they should continually question their choice of procedure throughout the process and keep a flexible mind attuned to possibly changing or modifying the selected procedure. ^{*5} For example, during a pre-agreed mediation of a family dispute, the parties may decide that it will be more beneficial for them to use arbitration instead, perhaps because they need a definitive third-party expert opinion. In a commercial dispute, a mediator and two mid-level managers may conclude that their goals may be better achieved through the participation of more senior

company officials with broader perspectives. Therefore, the parties may decide that a minitrial will be more appropriate to resolve their dispute than mediation.

5. Court-Related (Public) and Out-of-Court (Private) Processes

One of the key problems in selecting the most appropriate procedure for a case involves the choice between court-related and out-of-court processes. Although public and private processes can share an identical name (e.g., court-annexed “mediation” and private divorce “mediation”), they may produce very different results. For example, even if the party knows that she prefers mediation, she can choose not only from an array (continuum) of forms of mediation, but she can also decide whether she wants some court connection and assistance, such as help in choosing a mediator, more formal discovery, or enforcement.⁶ A similar relationship exists between court adjudication and private judging, private arbitration and court-annexed arbitration, and early neutral evaluation (ENE) and case evaluation.⁷ Another approach to this problem is to look at critical differences in court-related and out-of-court processes in general and not with regard to particular processes.

Considerations in assessing the options include finding out the dispute resolution climate in the place of dispute and deciding whether to select a third party neutral. Different state and federal courts offer a variety of ADR procedures to choose from. A party can only make an informed choice between a court-related process and a private process when that party knows which processes are available in court. In addition, if a party wants to retain the choice of the neutral, she should decide on a private process. Sometimes parties have such great confidence in a particular neutral that they leave the ^{*6} choice of process to her, but often the choice of a neutral comes after the procedure is already chosen.⁸

Private and public processes are not mutually exclusive, and it is possible to combine them. For example, particularly where a factual issue needs to be established, a party may file a claim in order to go through discovery and later settle the dispute through a more facilitative and creative process like mediation. This raises the strategic question of how best to sequence private and public procedures. Should parties sue first and then settle, or is it better to start with the friendlier private procedure? Or, should the public and private processes proceed on parallel tracks?

6. Fitting the Fuss to the Forum and the Forum to the Fuss

The problem of matching the case to the process can be looked at from two ends: the fuss and the forum. Prior to the Frank E. A. Sander and Stephen B. Goldberg article,⁹ attempts to match procedures and disputes always began by describing processes or forums and then matching or fitting cases to these procedures (“fitting the fuss”). These approaches are still in use now-- for example, the Guide to Judicial Management of Cases in ADR,¹⁰ or other publications that describe one or more of the dispute procedures and predict what kind of fuss would usually fit them.¹¹

Alternatively, one can analyze the case, including the parties and their goals, and then match the case to an existing process (forum) or design a process that would best fit the parties’ interests and case characteristics. This kind of analysis was proposed by Sander and Goldberg¹² and has been repeated in other publications.¹³

The first method assumes that the dispute resolution procedures are somewhat fixed, and therefore, prior to knowing the case, one can predict what kind of case should be matched to a certain procedure. ^{*7} To some extent this is true, and such predictions are possible. However, since disputes usually include a great number of elements that can influence and determine the most appropriate procedure, the latter approach of fitting the forum to a described fuss seems more efficient. Beginning the analysis from the parties’ goals and case characteristics, which are hard to change, and then fitting (tailoring) the most appropriate forum for such a case seems a more reasonable approach.¹⁴ Moreover, since one procedure can have a variety of forms, knowing the case allows one not only to match it to one of the known procedures, but also to adapt a procedure to best fit the given dispute.¹⁵

Although the latter approach seems to be superior in most circumstances, in this Article we combine both perspectives. In the first step of the process of matching cases with procedures, described in Part II.B of this article, we focus on examining the fuss through the lens of the goals of the parties. In the second step, we analyze the facilitating features of both cases and procedures. Finally, in the third step, which deals with how particular procedures can overcome impediments to an effective¹⁶ resolution, we focus mainly on the features of the forum.

II. Implications of the Existing Theory and Data

Until today there have been at least four principal attempts to develop a taxonomy for deciding which process is best for a dispute. Table 1 provides a brief summary of the key points of these four approaches. In this part of this Article we offer our conclusions and a modified approach derived partly from the work of our predecessors. We propose a revised comprehensive system, in which we distill the ^{*8} key factors affecting choice of process down to three main categories: goals, facilitating features, and impediments. Conclusions from this three-step approach lead us to a simpler and more user-friendly method of matching cases with procedures, which we describe in Part III. We believe that both the more elaborate method presented here in Part II and the simpler, user-friendly method presented in Part III can be used by courts, parties, or their counsel.

A. Summary of Key Points¹⁷

Table 1: Matching Cases with Procedures; Summary of Approaches

| Whose Approach | Processes Considered | Basic Question/Issue | Proposed Tools and Basis for the Results |
|--------------------------------|--|---|---|
| SANDER & GOLDBERG ^a | All (major) ADR processes. Non-adjudicative processes in “impediments to settlement” | What are client’s goals and what dispute resolution process is likely to achieve these goals? What are the impediments to settlement, and what ADR procedure is likely to overcome those impediments? | Two grids with numeric utility of how each of the major ADR processes achieves each of 8 party objectives or avoids each of 10 impediments to settlement. (Based mostly on authors’ experience, and later supported by empirical data.) |
| DAUER ^b | Not specified. | Characteristics of the case; Attributes to the parties; Features of the environment (including parties’ objectives); Barriers to Settlement. | More detailed questions regarding each of the four basic questions/ problems together with a commentary. Example of the DC screening process presents utility value for 19 objectives/ characteristics of mediation, arbitration and neutral case evaluation. (Based mostly on ADR literature and some court data.) |

| | | | |
|------------------|--|---|--|
| CPR ^c | Mainly mediation. Particular focus on business disputes. | What are parties' goals for managing the dispute? Is the dispute suitable for a problem solving process? What are potential benefits of mediation for the dispute in question?; and, additionally Are there any "Contraindications for Mediation" ? | Screening process consisting of 10 to 11 subquestions for each of the three basic questions listed to the left. Parties/counsel choose one of three possible answers, and use the key to interpreting responses and commentary to each question, to provide a preliminary assessment of whether a case is appropriate for mediation. (Based on survey of more than 600 corporate counsel and a study of 449 commercial dispute cases.) |
| FJC ^d | All major court-annexed ADR. | Is the case appropriate for ADR: • Parties' characteristics; and • Case characteristics; If appropriate, then, how can we best match the ADR process to the case. The two basic questions are: • Who might select the ADR process? (parties, court ADR staff, or judge); and • What criteria can the court use to match a case to an ADR process? (Mediation, Arbitration(s), ENE, SJT, and Minitrial). | Two-stage approach: First, detailed questions re. parties and case characteristics indicate whether case is appropriate for any ADR process at all. Second, list of examples of kinds of cases appropriate for different ADR processes. (Based primarily on federal court practice and ADR theory.) |

^a Sander & Goldberg, *supra* note 9.

^b Dauer, *supra* note 3.

^c CPR Guide, *supra* note 13.

^d FJC Guide, *supra* note 7.

^{*9} It is particularly difficult to create a taxonomy and directly compare these systems for a variety of reasons. First, the systems focus on different processes. For example, the CPR approach focuses on mediation; the Dauer approach does not specify the procedures.¹⁸ Second, the systems use different categories to describe the same issue. For example, an issue that is within "party/case characteristic" in one system could be assigned to "parties' goals" or "impediments to ^{*10} the resolution of the case" in others. Lastly, the systems focus on different kinds of cases.¹⁹ The CPR Guide focuses on commercial cases, for example, while the FJC Guide focuses on court-annexed cases.²⁰ In order to decrease the overlap between different

approaches, and to most effectively select (or design) the appropriate process for a dispute, we believe three lenses are key to focusing the analysis: goals,²¹ facilitating features,²² and impediments.²³

Goals. The first question regarding the choice of the most appropriate process relates to the kind of objectives the party would like to achieve during, or at the end of, this process. In other words, this future-oriented approach asks what should happen as a result of the choice of the particular dispute resolution process. As a party will usually have more than one objective, she should also prioritize her various goals.

Facilitating Features. When the party determines the desired (future) outcome, she should reflect on her present resources, i.e., the attributes of the case that make it particularly suitable or unsuitable to solving the case. We therefore propose that the party should focus next on the attributes of the process, the case, and the parties that are likely to facilitate reaching effective resolution. For example, if the dispute involves lower-level representatives of the parties, but requires a broader view of the problem from the perspective of the whole company, this might suggest the use of a minitrial, which involves high-level officials.

Impediments. In the third step of the analysis, we suggest that one should focus on the ability of various procedures to overcome impediments to effective resolution. This is a focus on the forum.

In this three-part analysis we apply our mixed forum and fuss approach. In the first two steps above, (Goals and Facilitating Features), we emphasize analysis of the case and the parties (the fuss). In the last step (Impediments), we direct our main focus to the procedures (Forum) and the effect they may have on the dispute in question. Our analysis has one more dimension--time. While the first **11* step of the analysis is future-oriented (what should happen), the latter two ask about the present situation and resources: What is available now?

B. The Goals of the Parties

One of the most basic aspects of finding the appropriate dispute resolution procedure is to look to the goals of the parties and how they can be satisfied by various processes. As the example below makes clear, the determination of the goals leads to the particular process or processes that will achieve those goals.

1. Assessing Goals

One of the most essential tasks of a party and her counsel is assessing appropriate goals. We illustrate that by the example that follows.

Anna is going through a divorce with John. She brings her problem to you--an attorney--and asks for your advice on how to proceed. Her choice of procedure will partly depend on the goals that she wants to achieve. Does she want to preserve a good relationship with John? Does she want John to participate in raising their children, or on the contrary, does she want to prevent him from seeing them? How important is it for her to maximize her monetary income from the divorce? How important is her financial concern when balanced against the relationship with John and other concerns? Does she want to keep divorce matters private? Does she have a desire for public vindication?

Before knowing what Anna really wants, it is impossible to make an informed decision about the preferable process. The table below shows some of the possible goals that Anna or other parties may want to achieve, and the degree to which various processes satisfy them.²⁴ See Table 2.

Anna's analysis. In the divorce case described above, probably the first question Anna has to answer is what kind of a relationship she wants to have with John after the divorce. If they have children, she should also consider what parental relationship would be best for the children. As indicated in Table 2 (Goals), mediation gives the highest chance of preserving and even improving the relationship. On the other end of this spectrum, litigation often threatens to destroy the relationship. According to research, thirty percent of **12* couples that mediated their divorces felt that mediation actually improved their relationship. By contrast, only fifteen percent felt that litigation improved their relationship and fifty percent believed **13* that it worsened it.²⁵ The benefits of mediation are also salient in the context of commercial contracts--fifty-nine percent of attorneys in the Cornell Survey stated that an important reason for choosing mediation over adjudication was "preserving good relationship."²⁶

Table 2: Goals^a

| | | | |
|------------------------------|--|--|---------------------------------------|
| 0 = unlikely to satisfy goal | | | 2 = satisfies goal substantially |
| 1 = satisfies goal somewhat | | | 3 = satisfies goal very substantially |

| | Process ^b Goal | Mediation | Minitrial ^c | Summary Jury Trial ^d | Early Neutral Evaluation ^e | Arbitration/Private Judging | Adjudication |
|----|---|--------------------|------------------------|---------------------------------|---------------------------------------|-----------------------------|--------------|
| 1 | Speed ^f | 3 | 2 | 2 | 3 | 0 - 2 ^g | 0 |
| 2 | Privacy | 3 | 3 | 1 | 2 | 1 | 0 |
| 3 | Public Vindication | 0 | 1 | 1 | 1 | 2 | 3 |
| 4 | Neutral Opinion | 1 | 1 | 2 | 2 | 3 | 3 |
| 5 | Minimize Costs ^h | 3 | 2 | 2 | 3 | 0 - 2 ⁱ | 0 |
| 6 | Maintain/Improve Relationship ^j | 3 ^k | 2 | 2 | 1 | 1 | 0 |
| 7 | Precedent | 0 - 1 ^l | 0 - 1 | 0 - 1 | 0 - 1 | 2 | 3 |
| 8 | Max/Min Recovery | 0 (3) ^m | 1 | 1 | 1 | 2 | 3 |
| 9 | Create New Solutions ⁿ | 3 | 3 | 1 | 2 | 1 | 0 |
| 10 | Party Control of Process ^o | 3 | 2 | 1 | 1 | 1 - 2 ^p | 0 |
| 11 | Party Control of Outcome ^q | 3 | 3 | 1 | 2 | 1 | 0 |
| 12 | Shift Responsibility for Decision to a Third Party ^r | 0 - 1 ^s | 1 | 2 | 2 | 3 | 3 |
| 13 | Court Supervision or Compulsion | 0 - 2 ^t | 0 | 1 | 1 | 2 | 3 |
| 14 | Transformation of the Parties ^u | 3 | 1 | 0 | 0 | 0 | 0 |
| 15 | Provide Satisfying Process ^v | 3 | 3 | 2 | 2 | 2 | 0 |
| 16 | Improve Understanding of the Dispute ^w | 3 | 3 | 1 | 2 | 2 | 1 |
| | OTHER | | | | | | |

^a Goals 1-8 in the Table were taken (after some modification) from the table in Sander & Goldberg, supra note 9. Since these goals are extensively described there, we only refer to that article here. Goals 9-14, which were added to the original Sander & Goldberg table, are briefly described and illustrated in the footnotes below.

^b For a detailed description of various court-based ADR processes, see, e.g., FJC Guide, supra note 7, app. A, at 128-35.

^c The minitrial is a process that was invented in a complex patent and trademark dispute in 1976. It involves a hearing panel consisting of a neutral provider and high-status settlement officials from each side. Pursuant to a protocol jointly developed by the parties and the neutral, each side summarily presents the essence of its case and attempts to respond to questions from the panel and the other side. At the conclusion, the settlement officials of the two sides go off to see whether they can reach a mutually satisfactory, often interest-based solution. If this is unsuccessful, then the neutral gives her view of the likely outcome if the case went to court, and, armed with that prediction, the parties again try to settle the case.

^d The summary jury trial is simply an adaptation of the minitrial for a jury case. Here a small mock jury is assembled which, following the hearing, gives its “decision” solely for settlement purposes.

^e Early neutral evaluation (ENE) was first developed in federal district court in the Northern District of California. Early in the case the parties appear before an experienced volunteer lawyer who seeks to help the parties reach an amicable settlement, or, if no settlement is achieved, helps get the case ready for trial.

^f Most of the parties and their counsel (sixty-five to eighty percent) believe that mediation and arbitration reduce the time and costs of resolving commercial disputes as compared to litigation. See David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* 15-19 (1998); American Arbitration Ass'n, *Dispute-Wise Business Management* 9-10 (2003). But see Mack, *supra* note 17, at 25-36.

^g Since there are so many forms of arbitration (e.g. single versus multiple arbitrators), speed and costs will vary depending on the length of the proceedings, the arbitration provider, the number of arbitrators and their fees, etc.

^h The subject of cost savings for various ADR procedures is a complex one, and the results vary significantly depending on the kinds of cases and court settings, as well as the sophistication of the research. In addition, a distinction must be drawn between cost savings to the disputants and savings to the legal system. In general, there has been no persuasive evidence of the latter, but some evidence of the former. See C. McEwen, Note on Mediation Research, in *Dispute Resolution*, *supra* note 4, at 162-64. Compare James S. Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act (1996)*, with Robert G. Hann et al., *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Executive Summary and Recommendations (2001)*. See also American Arbitration Ass'n, *supra* note f, at 19-20 (finding that ninety-one percent of corporate counsel surveyed believed that mediation saves money and that seventy-one percent believed arbitration saves money); Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 *Negot. J.* 3, 263 (1996) (concluding that mediation is far less expensive than arbitration).

ⁱ See *supra* note f.

^j See American Arbitration Ass'n, *supra* note f, at 7 (finding that one of the distinguishing features of companies that efficiently deal with their disputes is that they highly value maintaining relationships with their customers and suppliers).

^k See Lipsky & Seeber, *supra* note f, at 17 (noting that fifty-nine percent of attorneys surveyed indicated that "preserving good relationship" was an important reason for choosing mediation and that mediation is particularly important for parties who would benefit from continuing business or professional relationships). See also Roy J. Lewicki et al., *Negotiation* (3d ed. 1999). For more data, see CPR Guide, *supra* note 13, at 6.

^l While mediation and related processes do not establish precedent for the world at large, they can serve to establish precedent for the parties involved in the dispute.

^m Strictly speaking, mediation is not well-suited to provide maximized gain or minimized loss; however, through creating value, sometimes one or both parties can achieve better outcomes through mediation than through adjudicative processes like litigation or arbitration. (The same is true for other processes that can generate new pie-expanding solutions.) For an example, see the analysis of Anna's situation, *supra* Part II.B.

ⁿ Sometimes, a party may realize that the court or some other existing procedure may not offer any good solution for the problem. In this circumstance, inventing a new solution itself becomes a goal for the parties. For example, in a dispute over the ownership of an indivisible object, the judge will usually be limited to awarding the object to one side. To avoid the risk of losing and to increase the utility of the resolution, parties could agree to a creative time-sharing solution that would increase the value for both of them. See *infra* Part II.C.

^o A choice of the most appropriate process for a party may also depend on procedural issues. Tactical goals of a party may include avoiding discovery (which would suggest a private procedure) or providing for court enforcement possibilities or cross-examination (which would suggest a court-related procedure). In cases where it is important for a party to retain the choice of a neutral, she should consider a process other than litigation, since parties do not have any choice in selecting the judge who will hear their case. Cf. discussion *infra* Part II.C.1.

^p Ex ante, parties have considerable freedom to select the process they want, but once they have done so, they are locked in. Cf. *supra* Part I.C.4 (explaining that though the most important process choice takes place when the parties first choose their dispute resolution process, that original choice may not continue to be optimal and parties could profit from changing their dispute resolution procedure during the processing of the dispute).

^q One of the main differences between various dispute resolution processes is the degree to which parties can influence the outcome of the dispute. In Table 2 (Goals), the further a procedure is to the right, the less influence parties have over the outcome of the dispute. It is also possible that parties might decide certain issues and leave others to be decided by a neutral. For example, a party may want the recovery not to be larger or smaller than a certain number and will agree to a resolution only within that range (high-low arbitration).

^r This may be particularly important in cases where the government is involved or where there are agency issues such that lower-level agents do not feel empowered to make settlement decisions or substantial concessions.

^s This depends on the type of mediation being used. In evaluative mediation, parties are subject to some of the pressure akin to a court decision and, hence, may be able to shift part of the responsibility to the mediator.

^t “0” is the value for a private, out-of-court mediation. Higher values may be appropriate when issues of settlement approval and enforcement of the agreement are at stake. Moreover, in mandatory mediation there is arguably at least court supervision over some aspects of the process though not the outcome.

^u The most important goal of a party may not be to achieve a certain outcome but to transform its own or the other party’s behavior. See Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* 160-61 (2d ed. 2005) (suggesting that the transformative approach to mediation does not seek resolution of the immediate problem, but rather seeks the empowerment and mutual recognition of the parties involved).

^v There is consistent evidence in the ADR literature that mediation is more satisfying than litigation. See Mack, *supra* note 17, at 26. For evidence in the context of family mediation, see Joan B. Kelly, *A Decade of Divorce Mediation Research*, 34 *Fam. & Conciliation Cts. Rev.* 373, 377 (1996). According to the American Arbitration Association, eighty-three percent of the participants agree that mediation is a more satisfying process while sixty-six percent agree that arbitration is more satisfying than litigation. American Arbitration Ass’n, *supra* note f, at 18.

To some extent the satisfaction may result from the parties’ control over process, outcome, a better relationship or other goals presented in this table. We believe, however, that “increasing satisfaction” or “avoiding dissatisfaction” can be an independent goal.

^w Even if a procedure does not end with a settlement, a better understanding of the interests of the other party and the roots of the dispute can lead to agreement and/or improvement of the relationship at a later stage.

***15** However, a future relationship with John may not be what Anna desires. To the contrary, she may prefer her children to have as little exposure as possible to John. In such a case, she should probably go to court and request that the court grant very limited visitation rights to John or even issue a restraining order against him if the situation warrants one.

If Anna decides that her most important goal is to maximize her monetary income from the divorce, the suggested forum to best realize such a goal would probably be court. However, the question of the highest payoff is a complicated one. At first sight, winning a case in litigation might secure the highest possible payoff. There are, however, three caveats. First, losing the case may result in the highest loss rather than the highest gain, and, therefore, considering the risk of loss, this procedure may turn out to be not so beneficial after all.²⁷ Additionally, a monetary outcome of litigation will probably be offset by higher transactional costs compared to other procedures. Thus, due to a risk of high loss and to high transactional costs, the expected value of litigation may be lower relative to its alternatives. Second, the outcome of a court case likely will assume a constant pie and disregard the possibility of increasing the payoffs. Thus, parties often could get higher payoffs through a pie-enlarging settlement (via mediation) than in court. This would be the case where, in exchange for higher alimony, child support, or a lump sum, Anna offers John something he could not get through the court. For example, Anna could agree not to reveal some of John’s business or private secrets or she could agree to more convenient visitation times than would otherwise be set by the court.²⁸ Hence, through problem-solving and value-creating opportunities, one or both parties could achieve an outcome more favorable than the court alternative. Third, winning in litigation may win the battle but lose the war if Anna is unable to collect on the judgment against John.

Another important question that Anna needs to ask herself is whether she wants the case to become publicly known or whether she would prefer to keep it confidential. If John’s behavior would be dangerous to their children, or if Anna wanted to publicly shame John, she might want to make the case public. The court would be the best place to do so. If, however, her intention is to keep the case private ***16** and confidential, non-court mediation or another private, non-court process like case evaluation would be more suitable.

One of the key issues that Anna needs to contemplate is whether the mediation agreement should be enforceable as a private contract or as a court judgment.²⁹ If the parties want to use a more facilitative process and still benefit from the enforcement of the court, they can settle through a facilitative court-annexed process such as mediation. Then the settlement, after being confirmed by the court, can be embodied in a court decree.

On the other hand, research shows a higher compliance rate with consensual agreements than with decrees that are forced upon the parties.³⁰ Therefore, particularly when the parties desire continued cooperation in the future, they may prefer voluntary agreements to court decisions.

It should be noted that court enforcement should be balanced against the party’s goal to keep the dispute and its result confidential, and, thus, parties must decide which objective is paramount.

2. Other Possible Goals

A particular challenge arises when the dispute is one of a group of disputes or centers on one event in a series.³¹ Not only

does the party have to consider the future relationship with the other side, but the party must also determine how this case relates to other cases, which may completely change the goals of the party. For example, a party may care less about the outcome of a particular case than about such factors as precedent, future claims, economies of scale, chronology of the cases, or relationships with other parties (repeat players). Thus, when the perspective of the party widens from one specific case to a few linked cases, her goals, and hence the analysis of the most appropriate procedure, will shift as well.³²

**17* It is very important that parties treat the goals given in Table 2 (Goals) just as examples among many possible objectives. The list of goals is far from exhaustive, and, in each dispute, the parties should ask themselves which particular goals are salient under the circumstances. For example, in this case Anna may not want her children to testify in court, and she may therefore strongly prefer mediation or other processes that are private and confidential. In commercial and other cases, a party may prefer to collect a lower amount sooner rather than a higher amount later. This situation may arise where a company has liquidity problems or where an accident victim needs money now for medical treatment.³³

Fairness is another goal that may occasionally be salient. For example, Anna, for reputational reasons, may say that her primary goal is to reach a fair settlement with John. Fairness, however, is an elusive concept that different individuals value differently. Fairness of process and fairness of outcome are also traditionally distinct.³⁴ In light of these ambiguities, it will be difficult to pinpoint the process implications for Anna in such a case. Given the prevailing evidence of high satisfaction with mediation,³⁵ as well as its flexibility,³⁶ that process would generally be a good starting choice. More generally, consensual processes (i.e., mediation, minitrial, summary jury trial, and ENE) would seem to provide the best opportunity of achieving what disputants define as fairness. However, some parties may view inclusion of a third-party decision-maker as essential to fairness, which would point towards arbitration or court adjudication.

The reader will note that some of these goals pertain to a process outcome (e.g., to control process, to maintain privacy, etc.), and others are related to a substantive outcome (e.g., to create new solutions, to minimize or maximize recovery). Some goals include objectives that have both a substantive and a procedural impact (e.g., to minimize costs). These categories may serve as a helpful guide when looking for additional goals not listed in Table 2.

3. Prioritizing and Weighting the Goals

After deciding which goals the party wants to achieve, one might add together the values in Table 2 (Goals) and “determine” which process best satisfies her goals. Such an approach, however, assumes **18* that all of these concerns are of equal value to the party, which may not be true. A better approach would consist of both ranking and weighting the goals. Therefore, a party could assign a weight, in points, to each of her concerns, and then multiply them by the measure by which such procedure satisfies these goals, as indicated in Table 2 (Goals). For example, Anna might decide that since it would be best for the children that she and John maintain a good relationship, this should be her highest priority. She would therefore assign a weight of 3 to this goal.³⁷

It may also be very important to Anna that the procedure be kept private. Although everybody thinks of her only as a victim now, she is convinced that if outsiders knew all the facts about the breakdown of their marriage, she would have to bear part of the blame for it. Since it is less important than maintaining the relationship, she could assign a weight of 2 to the goal of privacy.

On the other hand, she is not quite sure whether she will manage to be tough enough in settlement negotiation with John; moreover, according to her lawyer, the law is on her side. For these reasons, she has a slight preference for shifting the responsibility for making the decision to a third party. Her last concern is to resolve this matter at a minimal cost. Since shifting responsibility for a decision to a third party and minimizing costs are less important to her than the first two goals, which she weighed at 3 and 2, she should assign a weight of 1 to each of the latter ones.

Assigning weights to these different goals should then be followed by multiplying the assigned weight by the effectiveness of each procedure in satisfying this goal. For example, weight 3 for “Maintaining/Improving Relationship” (from Table 2, Goals) would translate to the weighted “power/strength” of: 9 (3x3) for mediation; 6 (3x2) for minitrial; 6 (3x2) for summary jury trial; 3 (3x1) for early neutral evaluation; 3 (3x1) for arbitration; and 0 (3x0) for adjudication. After multiplying weights assigned to the selected goals, a party would then add up the numbers representing the strength of the weighted goals for each of the available procedures. For example, after adding weighted power/strength of goals selected by Anna: (Maintain/Improve Relationship x 3) + (Privacy x 2) + (Minimize costs x 1) + (Shift Responsibility for Decision to a Third Party x 1) the **19* appropriate power/strengths of the processes are as follows: mediation (18-19),³⁸ minitrial (15),³⁹ summary jury trial, (12),⁴⁰ early neutral evaluation (12),⁴¹ arbitration (8-10),⁴² and litigation (3).⁴³ Therefore, Anna could conclude that mediation would probably best realize her objectives and that the worst choice in this case would be adjudication.

Although this example and proposed method involves a lot of counting and weighing, we still think that this method is more art than science. It is very important to remember that the outcomes of these calculations should not be taken literally, but rather that they only provide guidance for evaluating the parties’ goals. Sometimes the primary benefit will be the exercise of

going through this process rather than the numerical result reached.

4. The Goals of the Other Party?

Parties who have consistent goals probably can be convinced easily to use one process. However, what if the goals of the other party are inconsistent and would suggest another process? One option might be that they would agree to start from mediation, which seems to be a “safe” procedure (no commitment) for both parties, unless the case is one when even mediation is not appropriate.⁴⁴ Another approach is suggested by the New Hampshire court rules. When the parties’ ADR preferences are incompatible, the court will utilize the least binding process (e.g., mediation over arbitration).⁴⁵

***20 C. Features of the Process, the Case, and the Parties that Facilitate Effective Resolution**

Certain features of the case and the parties can facilitate reaching effective resolution. However, only with an appropriate dispute resolution procedure will they be triggered. For example, a good relationship and trust between the parties’ attorneys can facilitate communication and lead to a better settlement. These facilitating features would not be maximally utilized if the parties selected litigation. Moreover, litigation could quickly destroy both a good pre-existing relationship and trust, creating an impediment to settlement later. Therefore, it is crucial for the parties to recognize the attributes of the case that may facilitate effective resolution, and to match these attributes with the process (e.g., mediation) that may trigger them.

Generally speaking, every procedure is capable of activating some of the facilitating features of the case or the parties. For example, mediation and minitrial can facilitate communication and maximize the parties’ chances for a value-creating resolution. Summary jury trial and early neutral evaluation may provide an opportunity to make an early assessment of the strengths and weaknesses of the case, allowing the parties to make a more informed decision about a possible settlement. Adjudication (and binding arbitration) provides certain procedural tools that can serve parties’ needs, including court enforcement during the dispute resolution process and at the decision-implementation stage.

In our mixed approach of fitting the forum to the fuss and the fuss to the forum, we think it is crucial not only to analyze the features of the case and the parties, but also to recognize the individual features of each procedure that can benefit the party. For example, if discovering assets of the defendant is important, or if a third party needs to appear at the proceedings, a party may prefer litigation, which offers ways of achieving these objectives, such as through discovery or impleader. In cases where the specific expertise of a neutral is needed, litigation may not be the best option. Other procedures like mediation, minitrial, or case evaluation, where parties can choose an expert-neutral, will be more advantageous. Each procedure may have many strengths. In Table 3 we present just a few of them, but in each case, parties should carefully consider the existence of other beneficial characteristics of the procedures.

***21 Table 3: Facilitating Features**

| | Process Feature | Problem-Solving | | Reality-Checking | | Adjudicating | |
|---|---|-----------------|------------|--------------------|-----|-----------------------------|--------------|
| | | Mediation | Mini-trial | Summary Jury Trial | ENE | Arbitration/Private Judging | Adjudication |
| 1 | Good Relationship Between the Attorneys ^a | 3 | 2 | 1 | 1 | 0 | 0 |
| 2 | Good Relationship Between the Parties | 3 | 2 | 1 | 1 | 0 | 0 |
| 3 | Case/Parties Seem Apt for Problem-Solving | 3 | 2 | 1 | 1 | 0 | 0 |
| 4 | One or Both Parties are Willing to Apologize ^b | 3 | 3 | 1 | 1 | 0 | 0 |
| 5 | Eager to Settle (or Engage in ADR) | 3 | 2 | 2 | 2 | 0 | 0 |
| 6 | High-rank Agents Involved ^c | 2 | 3 | 2 | 2 | 1 | 1 |
| 7 | Many Issues in Case ^d | 3 | 3 | 1 | 1 | 1 | 0 |

| | | | | | | | |
|---|---|--------------------|---|---|---|---|---|
| 8 | Party Would Benefit from Procedural Features of Litigation ^e | 0 - 2 ^e | 1 | 2 | 1 | 2 | 3 |
| 9 | Specific Expertise of a Neutral Required | 3 | 3 | 1 | 3 | 3 | 1 |
| | OTHER | | | | | | |

^a A similar effect can be achieved if a particular counsel (or party) has an excellent reputation for truth and reliability.

^b See generally Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. Cal. L. Rev. 1009 (1999), and extensive bibliography cited therein. See also Deborah Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. Rev. 1165 (1997).

^c The lack of power to settle, resulting from the agent or agents involved not having sufficient autonomy, is a serious disadvantage in negotiation and dispute resolution. On the other hand, the involvement of an official of a higher rank than the one who feels responsible for the dispute may provide a broader perspective (more issues) and more flexibility in settlement negotiation. This advantage is particularly useful in a minitrial where high officials on each side assume an active settlement role. See *supra* note 31.

^d Cases with more than one issue provide more possibilities for beneficial tradeoffs and are more likely to settle. See Mack, *supra* note 17, at 26. See also FJC Guide, *supra* note 7.

^e Some of these features are: injunction, discovery, third-party involvement, formal hearing, court enforcement, etc. Each of these features and its benefits should be considered and valued separately. Benefits of procedural features of litigation are described in more detail below in Part II.C.1.

1. John's Business Dispute

One of the things that has been distracting John from his home and that has indirectly caused many quarrels with his wife, Anna, is his ongoing involvement in a messy business dispute.

Six years ago, John started a small commercial printing company, which has been operating with modest success. Last year, Jim, a college friend and computer whiz, approached John about providing sophisticated computer services for John's printing company, which *22 he assured John would significantly enhance productivity. John was intrigued, and following extensive discussions, a contract was drawn up by their respective lawyers. Before it was formally executed, John, preoccupied by his divorce, got cold feet and called the whole deal off. Considering the long-standing relationship between the two of them, John was immensely surprised and hurt when he was served with a writ for a breach of contract suit filed by Jim. To make matters worse, in this document Jim accused John of getting a divorce for the sole purpose of immunizing some of his assets against possible claims by Jim. He demanded that the court freeze John and Anna's shared bank account and some other assets. Jim also accused John of dealing behind his back with someone else and asserted that John refused to talk to him and did not reply to his phone calls or any other messages.

Process implications for John. John, already emotionally fragile due to his divorce, wants a process that will be satisfying and that will also reduce the amount of pressure on him. Believing he was partly to blame for the miscommunication and the terminated deal, John is willing to apologize to his friend. Jim, however, has lost all trust in John and does not want to listen to him. After analyzing the possible opportunities to avoid litigation and to come to a mutually beneficial solution, John may conclude that he needs to regain trust and open channels of communication. One of the ways of facilitating communication with Jim may be through Jim's lawyer, who is a good friend of John's counsel. John wants to use the good relationship of their lawyers to communicate his intentions to apologize and regain Jim's trust, as that could lead to productive mediation. Another reason why John thinks litigation would not be beneficial is the technical complexity of the dispute. He is afraid a random judge may not have a sufficient understanding of the matter; he believes that both parties need to better understand the nuances of the technological process as well as all the risks involved. Thus, he would like to be able to agree with Jim on an expert who could become their mediator or evaluator. For all the above reasons, John is convinced that mediation or early neutral evaluation would trigger more features facilitating effective resolution of their conflict than would litigation.⁴⁷

In the following paragraphs, we analyze some of the most important facilitating features of a procedure (litigation or arbitration), a *23 case (suitability for problem solving), and the parties (relationship between the parties and their counsel).

2. Features of the Procedure

Procedural features of litigation or arbitration.⁴⁸ Before deciding which process might be most useful in promoting a party's interests, a party (or more often her counsel) should reflect on the procedural advantages and disadvantages of various procedures. Since among contemplated processes only litigation and arbitration have formalized procedures, those procedures will be our main focus here. As civil procedure is a large, complex subject, we will limit our remarks to only a few selected

issues: discovery, formal hearing, and third-party involvement.

Discovery can either help or hinder a party's position. Unlike private dispute resolution forums, courts, through judicial orders, can compel a disclosure or protect against it. If Anna suspects her husband of concealing assets, a court process may be appropriate. However, a party must also account for the possibility of discovery abuse; as noted by Dauer, "discovery abuses are among the most frequently cited causes of excess cost and dissatisfaction with the formal judicial system."⁴⁹ Even if there are no abuses in the discovery process, its costs can escalate and its results are sometimes unpredictable.

An alternative to formal discovery can be a private process of neutral (expert) fact-finding where the parties conduct their discovery according to their own rules. Parties in mediation or any other private procedure could, for example, limit their discovery to certain agreed-upon key issues and choose not to formally decide the remaining ones. In mediation and other facilitative processes, the parties could go so far as to avoid the entire discovery process, and choose instead to focus on their future relationship.

Another feature of litigation that may provide strategic advantage (or disadvantage) is a formal hearing. Because this involves the adversarial process, it can lead to discovery of the truth about particular issues in the case, or it could lead to a deterioration of the parties' relationship.⁵⁰ Court hearings can also lead to witness examination, which can be very stressful for individuals (e.g., Anna's ^{*24} children in a divorce case) and harmful to parties. Litigation can be very advantageous in a case where joining a third party would be necessary. This can be compelled only in court or in court-annexed programs like mediation or arbitration.⁵¹

3. Features of the Case

Suitability for problem-solving.⁵² A problem-solving approach to dispute resolution suggests that the parties "focus on their actual objectives and creatively attempt to satisfy the needs of both parties, rather than [] focusing exclusively on the assumed objectives of maximizing individual gain."⁵³ A problem-solving solution is a result the parties have not contemplated previously which is better than otherwise achievable results.⁵⁴ These solutions are only possible where parties can create and freely choose from new potential outcomes. Sometimes suggestions by mediators may aid this process, but decisions imposed by neutrals are not likely to be based on attempts to enlarge the pie. As reaching a creative solution is one of the greatest advantages of processes where parties control the outcome (e.g. mediation or minitrial), it is crucial to recognize which cases might have the greatest potential for problem-solving.

Although it is not easy to predict which cases can be "problem-solved," certain features of the case and the parties can indicate a higher or lower probability of such a resolution. A reliable indicator of a high chance for a problem-solving resolution is a cooperative approach of the parties and their counsel⁵⁵ and the trust that the parties and counsel have towards each other.⁵⁶ In order to come up with new, creative options and to solve problems, parties usually have to ^{*25} share information, which can either create more value or cause harm to the disclosing party.⁵⁷ Thus, trust and a cooperative relationship are needed.⁵⁸

On the other hand, certain features of the case or the parties may make it more difficult to arrive at a problem-solving resolution.⁵⁹ Frequently such difficulties exist

(1) when the parties:

(a) Are certain they will prevail in court (or arbitration);⁶⁰

(b) Have sensitive information, which could harm the disclosing party when shared;

(c) Want to secure public vindication;⁶¹

(d) (Or leaders on each side) Are unreceptive to the general idea of problem-solving;⁶² or

(2) when the case:

(a) Turns on the existence of a fundamental principle;⁶³ or

(b) Involves a single issue.

4. Features of the Parties

The relationship between the parties and between their counsel. As noted by Edward Dauer, "[t]he relationship between the parties is at once a resource, an objective, a constraint, and a source of a future contention."⁶⁴ Maintaining or improving a good relationship between the parties often can be one of their goals following the dispute.⁶⁵ It is also an important factor in choosing the dispute resolution procedure that would provide the best substantive results (not only in ^{*26} terms of the relationship). As previously mentioned, a good relationship between the parties, including trust and a cooperative approach, is

a positive indication of effective communication and problem-solving. There is data showing that low to moderate levels of conflict, distrust, and tension between the parties produce the best outcomes.⁶⁶ On the other hand, a number of impediments described later in this article,⁶⁷ such as poor communication, excessive emotionality, or fear of disclosing true interests, are the result of a poor relationship. A good relationship is important between the parties; research shows, however, that attitudes of counsel may be even more important for effective resolution.⁶⁸ Many commentators and practitioners agree that in all of these circumstances, processes in which the parties control the outcome are recommended.⁶⁹

Another issue that can determine the relationship between the parties and the choice of procedure is the dispute resolution styles of the parties and particularly their counsel. According to empirical research, much evidence shows that different results follow from the choice of a cooperative or a competitive style.⁷⁰ Consequently, a competitive style of the other party and particularly her counsel is an argument against choosing a negotiation-based procedure (like mediation or minitrial). On the other hand, a cooperative style of the other party will suggest a higher probability of a problem-solving solution. The problem-solving solution depends not only on the negotiating styles of the parties, but also on their eagerness to get involved in ADR and their negotiating skills. Parties who feel that they have strong negotiation skills should be more eager to engage in mediation; conversely, inability to negotiate is a counter-indication for mediation.

When analyzing personal features and opportunities of the dispute, one should also consider the positions of the engaged individuals in their respective organizations. When an opponent on the other side of the table is relatively low in the hierarchy of the organization that she represents, her power may be narrowly defined and she may ^{*27} not be able or willing to agree to a solution that was not pre-approved. The higher the position of the official, the broader picture of the dispute she may have and the more flexible and creative she may be with respect to the resolution of the dispute.

A bad relationship between the parties will not only decrease the chance of effective resolution, but it can also be the reason for a legal dispute in the first place. If this is the case, facilitative processes like mediation are better suited for improving the relationship and getting to the root of the problem. This may be particularly true where the legal dispute is only a symptom of a deeper conflict or when parties could benefit from the improved relationship in the future.

D. Capacity of a Procedure to Overcome Impediments to Effective Resolution

The vast majority of cases ultimately settle.⁷¹ At least, most parties try to settle, for they often perceive settlement as more beneficial than the binding decision of a third party. Therefore, in considering impediments to resolution, parties and their counsel should mainly focus on impediments to settlement and particularly on the capacity of different procedures to overcome such impediments.

There are cases in which impediments can be better overcome by some adjudicative procedure (e.g., important principle, “jackpot” syndrome,⁷² or different view of facts).⁷³ For that reason, and in order to give the parties the full spectrum of procedures from which to choose, adjudicative procedures are added to the table below.⁷⁴ There are other instances where settlement is not an appropriate resolution of a case. This problem is described in Part III.B of this Article dealing ^{*28} with cases where mediation is not appropriate because of private or public perspectives.

Table 4: Capacity of a Process to Overcome Impediments to Effective Resolution

| 0 = unlikely to satisfy goal 1 = satisfies goal somewhat | | 2 = satisfies goal substantially | | | | | |
|---|-----------------------------------|---------------------------------------|------------|-----|-----|----------------|--------------|
| | | 3 = satisfies goal very substantially | | | | | |
| | Process Impediment | Mediation | Mini-trial | SJT | ENE | Arbitration | Adjudication |
| 1 | Poor Communication | 3 | 2 | 1 | 1 | 1 | 0 |
| 2 | Need to Express Emotions | 3 | 1 | 1 | 1 | 1 | 0 |
| 3 | Different View of Facts | 2 | 2 | 3 | 3 | 2 | 2 |
| 4 | Different View of Law | 1 | 2 | 3 | 3 | 2 ^a | 2 |
| 5 | Important Principle | 1 | 0 | 0 | 0 | 1 | 3 |
| 6 | Constituent Pressure | 3 | 2 | 2 | 2 | 0 | 0 |
| 7 | Linkage to Other Disputes | 2 | 1 | 1 | 1 | 1 | 0 |
| 8 | Multiple Parties | 2 | 1 | 1 | 1 | 1 | 1 |
| 9 | Different Lawyer-Client Interests | 2 | 1 | 1 | 1 | 1 | 1 |
| 10 | Jackpot Syndrome | 0 | 1 | 1 | 1 | 3 | 3 |

| | | | | | | | |
|--------|--|---|---|---|---|----------------|---|
| 1 1 | Fear of Disclosing True Interests, Negotiator's Dilemma ^b | 3 | 2 | 1 | 1 | 0 | 0 |
| 1 2 | Psychological Barriers ^c | 2 | 2 | 1 | 1 | 0 | 0 |
| 1 3 | Inability to Negotiate Effectively ^d | 2 | 2 | 1 | 1 | 2 | 2 |
| 1 4 | Unrealistic Expectations ^e | 2 | 2 | 3 | 3 | 0 ^f | 0 |
| 1 6 | Power imbalance | 1 | 1 | 3 | 3 | 2 | 2 |
| 1 7 | Other ^g | | | | | | |

^a Although adjudicative processes are, in fact, the only way to resolve the disputed question of law, the answer may come too late for the parties to use this knowledge. They can come to a more efficient solution if they receive an informed opinion earlier in the case. For this reason, we assign value 2 (not 3) to the adjudicative processes.

^b One of the key tensions in negotiation is the dilemma of whether to disclose one's own interests or preferences and thus increase chances for value creation, or whether to conceal them and claim value, thereby protecting oneself from being exploited by the other party. See Lax & Sebenius, *supra* note 59, at 29-45. See also Russell Korobkin, *Negotiation Theory and Strategy* 223 (2002); Mnookin et al., *supra* note 56, at 11-43. One solution to this dilemma is for the parties to make partial reciprocal disclosures over time. Another solution would be to involve a third party neutral to facilitate the exchange of information.

^c Examples of psychological barriers include reactive devaluation, loss aversion, or optimistic overconfidence. Overcoming psychological barriers requires a third-party perspective. Therefore, it is likely that a neutral person such as a mediator can most effectively deal with impediments of a psychological nature. For detailed descriptions of these barriers and some ways to overcome them, see Part II, *Social and Psychological Perspectives, Barriers to Conflict Resolution* 26-107 (Kenneth Arrow & Robert H. Mnookin et al. eds., 1999). Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 *Ohio St. J. on Disp. Resol.* 235, 235-49 (1993).

^d Inability to negotiate effectively may be caused either by a very hostile negotiation style or, at the other extreme, by an extremely yielding style. Sometimes otherwise good negotiators may be very ineffective when dealing with certain parties. For example, in a family/divorce dispute each spouse should carefully consider the past patterns of decision-making of the divorcing parties, and make sure that he/she can face the other spouse and effectively advocate his/her own interest. Inability to do so may suggest a procedure where a third party makes a binding decision, instead of a mediation that might be otherwise advisable. Another approach here would be to use agents. See generally *Negotiating on Behalf of Others: Advice to Lawyers, Business Executives, Sports Agents, Diplomats, Politicians, and Everybody Else* (Robert H. Mnookin & Lawrence E. Susskind et al. eds., 1999); see also Goldberg & Sander et al., *supra* note 4, at 66.

^e According to many economists, trial is caused by excessive optimism on the part of one or both parties of the dispute. For economic analyses of incentives to settle, see John P. Gould, *The Economics of Legal Conflicts*, 2 *J. Legal Stud.* 279 (1973); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 *J. Legal Stud.* 235 (1979). Cf. Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 *J. Legal Stud.* 225 (1982).

^f Although in fact arbitration and litigation most effectively can show parties whether their expectations were realistic, after such a binding resolution, it is generally too late for the parties to use this knowledge to arrive at a better result. We think that the benefit for the party of having a realistic expectation is to be able to settle rationally. An arbitration or a court award often precludes the possibility of such later settlement. (However, in some cases a post-settlement (or post-award) settlement is possible. See Howard Raiffa, *Post-Settlement Settlements*, 1 *Neg. J.* 9 (1985)).

^g For more examples of impediments and their descriptions see, e.g., *Barriers*, *supra* note c; Michael Watkins & Samuel Passow, *Analyzing Linked Systems of Negotiations*, 12 *Negot. J.* 325 (1996); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950 (1979); Mnookin et al., *supra* note 56; Michael Watkins & Susan Rosegrant, *Breakthrough International Negotiation: How Great Negotiators Transformed the World's Toughest Post-Cold War Conflicts* (2001); Goldberg & Sander et al., *Dispute Resolution*, *supra* note 4, at 99; Lax & Sebenius, *supra* note 59; Max H. Bazerman & Margaret A. Neale, *Negotiating Rationally* (1993); Lawrence Susskind & Geoffrey Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (1987).

*29 This list of impediments is not exhaustive. Parties should be encouraged to look for other impediments in their particular case. Moreover, much more can be said about each of these impediments and ways of overcoming them. Two of the most

challenging impediments are discussed below.

1. Power Imbalance

Disputes can be resolved based either on (1) rights of the parties, as through litigation, or (2) parties' interests, often through facilitative mediation because the more evaluative the mediation, the more rights-based it usually is, or (3) power, such as through coercion or war.⁷⁵

The implications of power imbalances for process selection represent one of the most difficult and unsettled subjects of dispute resolution. Generally speaking, an interest-based approach is preferable because it is usually cheaper and faster, and because it ^{*30} has the potential of providing mutual benefits. However, the interest-based approach also provides an opportunity for exploitation by the more powerful party. This may suggest the use of a rights-based approach, like adjudication, in situations where there is disproportionate power and a higher probability of such abuse.⁷⁶ One must also keep in mind the alternative to using a particular process. For example, power imbalances pose a difficult challenge for mediation, but often the alternative to mediation is negotiation rather than litigation, and, arguably, power imbalances are aggravated in negotiation.

There is a serious discussion in the dispute resolution literature of not only whether mediation could mitigate power imbalances but, more importantly, whether it ought to do so.⁷⁷ Some authors believe that mediation is not capable of mitigating these power imbalances and that mediation should not mitigate such imbalances, as this would be against the principle of neutrality. Other commentators think that sometimes mediators can mitigate such imbalances but believe that the parties should be warned in advance about the mediator's inclination to do so.⁷⁸

Disproportionate power may be the result of various differences between the parties, such as financial resources, legal arguments and representation,⁷⁹ negotiation skills, emotional dependence, etc. Depending on the source of power, the parties may have different strengths in different forums. Knowing her sources of power, the weaker party should strategically select a forum where her powers ^{*31} are relatively strongest. For example, in a case that requires extensive discovery, a poor party may prefer to "forget the past" and focus on the future, proposing to mediate or to use ENE instead of going through a long and costly discovery. Litigation could also be beneficial if a party "can withstand long delays and significant risk."⁸⁰ If the party knows that her case is strong on law, and that in negotiation she would be intimidated by powerful and sophisticated lawyers on the other side, she may prefer to go to court with a lawyer instead of engaging in face-to-face negotiation or mediation. Moreover, as many mediators do not believe that power balancing is a part of their role, a weaker party (particularly an unrepresented party) may be better protected in court than in mediation. With respect to the success rate of mediation, according to research, mediation is more likely to end with a settlement where there is disproportionate power between the parties.⁸¹ This, however, does not answer the question of the fairness, and thus appropriateness, of the procedure. Apart from those procedures mentioned earlier in this article (e.g., in Table 2 and Table 3), most of the courts have court-annexed ADR procedures, which can combine some benefits of both court-supervised and private procedures. According to Dauer, though some of the risks of mediation will remain, "mediators who conduct court-referred sessions tend to believe more in their role as guardians of fair solutions."⁸²

2. Questions of Law, of Fact, or Both⁸³

Facilitative processes, such as mediation, are less appropriate in cases where facts need to be determined. This is particularly true where a case depends on a witness's credibility or complex discovery.⁸⁴ On the other hand, even when facts are uncertain but relevant ^{*32} for the case, a facilitative method might direct the solution away from the past and toward some future-oriented resolutions. Another situation where parties might decide not to dispute all the facts might be when this would inflict great costs on them. In such a case, instead of resorting to costly and time-consuming expert witnesses, parties may prefer a creative solution based on some other criteria. The parties can also agree to start with an evaluative process determining the facts, and based on such findings to follow with a facilitative, problem-solving process like mediation. Depending on the agreement of the parties, the fact determination can be either binding (such as through adjudication and arbitration) or non-binding (such as through non-binding fact-finding or non-binding arbitration). When, however, the sole issue in the case is a legal one, a court proceeding may be the most efficient approach. Parties may resolve the dispute by filing motions to dismiss or motions for summary judgment. When legal issues are in question, there is often a need for precedent, and, thus, adjudication would be the most appropriate procedure.

III. A User-Friendly, Mediation-Centered Approach⁸⁵

A. Step One: Assume Mediation

The combination of the theoretical examination presented above and the empirical data suggests that mediation is almost always a superior starting process.

1. Conclusions from the Theory and Data (Part II)--Some Arguments for the "Superiority" of Mediation

We roughly divide advantages of mediation into two categories--ones generically present in any mediation (which we call "macrobenefits") and ones applicable to particular cases and parties (which we call "microbenefits").

(1) Macrobenefits

(a) In most cases, mediation is capable of resolving disputes.⁸⁶

(b) Even if mediation does not produce a settlement, it becomes a route leading to other processes. Trying to resolve disputes through mediation can result in three ^{*33} possible outcomes, each usually making a party better off than if she had gone straight to litigation:

(i) The case can settle.

(ii) In case of failure, the mediator may be able to give an informed recommendation for another procedure.⁸⁷

(iii) Mediation can assist in settling some of the issues, leaving others for another possibly more coercive procedure.

(c) This approach is consistent with writings on dispute resolution system design where less invasive and less expensive methods are usually preferred and should precede the more expensive and invasive ones.⁸⁸

(d) Mediation is very flexible. It can be fitted to many different contexts and made to accommodate different party needs and case characteristics.

(e) Mediation is most likely to overcome impediments to settlement.⁸⁹ Since mediation is more likely to produce a Pareto efficient result than adjudication, it is more likely to be responsive to the needs of both parties to the dispute, often by avoiding the need to resolve disputed questions of fact and focusing instead on a forward-looking solution.

(f) Mediation is most likely to trigger facilitating features of the case and the parties and thus facilitate efficient resolution of the dispute.⁹⁰

(g) Even where one or both parties believe they will win in litigation, mediation will still be useful by quantifying ^{*34} the likelihood of victory and exploring more attractive alternative solutions.⁹¹

(h) A settlement obtained through mediation is more likely to be complied with.⁹²

(i) According to empirical research, mediation is preferred by practitioners and parties.⁹³

(j) Mediation has a higher participant satisfaction rate than any other procedure.⁹⁴

(2) Microbenefits

In addition to the above macrobenefits of mediation, there are a number of potential microbenefits that argue for resort to mediation in most cases:

(a) Clarifying the issues in dispute;

(b) Helping channel or control anger or other negative emotions;

(c) Giving one or both parties an opportunity to tell their stories and to be fully heard by the other side;

(d) Providing an opportunity for an apology;

(e) Providing a "reality check" from a knowledgeable intermediary of their positions or expectations;⁹⁵

(f) Providing a confidential setting in which to explore each other's interests and needs;

(g) Helping to explore the possibility for trade-offs or creative solutions;

(h) Helping to educate the decision-makers on either side;

^{*35} (i) Providing an intermediary who could make offers and counteroffers more acceptable by presenting them as his or her own;

(j) Providing an intermediary who can reframe proposals, inject her own ideas as appropriate, and take blame, if necessary.

Finally, if "the most appropriate process for dispute" is defined as the one that best satisfies the interests of both parties and creates the largest possible pie (has the largest probability of producing a Pareto efficient outcome), mediation, having the highest value-creating potential, should be the process of first choice.

Since mediation is the most often used and often the most useful process of dispute resolution, a simpler, more efficient approach to matching cases with procedures is to regard mediation as a point of departure, unless there are contraindications to its use, a topic to which we now turn.

2. Mediation and Adjudication: Opposite Sides of the Same Coin?

At the outset, it should be noted that a careful study of Table 2 (part of which is shown below as Table 5) will show that there is a complementary relationship between the capacities of mediation and adjudication to achieve particular goals. Goals such as improving the relationship or minimizing costs that are highly likely to be attained through mediation (score of 3) are highly unlikely to be achieved through adjudication (score of 0). Similarly, goals such as obtaining a precedent are highly likely to be achieved by adjudication (score of 3) but very unlikely to be achieved through mediation (score of 0). Thus, many of the cases that are inappropriate for mediation are those cases that require adjudication. See Table 5.

Note that when a procedure does not satisfy a particular goal (“0” value in Table 5), such a goal may later become an impediment to efficient resolution of the dispute through this procedure. Thus, for example, if Anna desires that her case result in a precedent, that goal cannot be satisfied by mediation, and, therefore, the value for mediation is “0” in Table 5. Accordingly, this goal would become a contraindication to effective resolution of this dispute through mediation. If, on the other hand, Anna wants to minimize costs and maintain relationships, these will become contraindications to the satisfactory resolution of her dispute through adjudication, and, hence, the value for litigation in Table 5 is 0.

***36 Table 5: Mediation and Adjudication Contrasted⁹⁶**

| Goals | Mediation | Adjudication |
|--|-----------|--------------|
| Minimize Costs | 3 - max | 0 - min |
| Speed | 3 - max | 0 - min |
| Privacy | 3 - max | 0 - min |
| Create New Solutions | 3 - max | 0 - min |
| Control Process | 3 - max | 0 - min |
| Control Outcome | 3 - max | 0 - min |
| Maintain/Improve Relationship | 3 - max | 0 - min |
| Transformation of the Parties | 3 - max | 0 - min |
| Provide Satisfying Process | 3 - max | 0 - min |
| Vindication | 0 - min | 3 - max |
| Neutral Opinion | 0 - min | 3 - max |
| Precedent | 0 - min | 3 - max |
| Maximize/Minimize Recovery | 0 - min | 3 - max |
| Shift Responsibility for Decision to a Third Party | 0 - min | 3 - max |

We notice that: (1) since mediation and adjudication satisfy or do not satisfy opposite goals, and (2) the goals that are not satisfied by a certain procedure become contraindications to this procedure, certain conclusions follow. Mediation’s goals are contraindications to satisfactory adjudication, and adjudication’s goals are contraindications to mediation. Therefore, in the great majority of cases either mediation or adjudication will satisfy the goals of the parties and will overcome impediments to resolution. Finally, in cases where goals of the parties are not satisfied by litigation, mediation should be employed.

B. Step Two: When Is Mediation Not Appropriate?

1. Party’s Perspective

a. Contraindications to Mediation

As a matter of party choice, mediation may be inappropriate or insufficient for certain kinds of disputes. Some of the indications for such a situation might be the following features:

(1) A party’s need to attain a goal that only a court or an arbitrator can provide such as:⁹⁷

(a) a precedent valid beyond immediate parties;⁹⁸

***37** (b) maximizing or minimizing the recovery; or

(c) public vindication.

(2) The case turns on a matter of principle.⁹⁹

- (3) There is a wholly frivolous claim--if so, the client may have standard policy for handling such claims.
(4) The jackpot syndrome.¹⁰⁰

Besides these examples, parties may have other specific reasons why mediation would not be appropriate.

b. Partial Contraindications to Mediation

In other circumstances, mediation is simply less likely to be successful (partial contraindication) and other procedures may be more appropriate. The first category of partial contraindications is where there are different views of the law. There are a variety of ways to clarify legal uncertainty in other processes, ranging from evaluative mediation to early neutral evaluation or arbitration and court adjudication. A second category of partial contraindications to mediation is where the parties anticipate needing judicial enforcement. This is not a contraindication to mediation itself. For example, a specific case where court enforcement is particularly important is where there is a need for a “structural injunction”--a case in which an outcome is an order that will govern the parties for a certain period of time and under which there will be repeated occasions for new disputes to arise.¹⁰¹ In some other situations where enforcement issues are anticipated but the case basically needs the problem-solving feature of mediation, the resulting agreement could be embodied in a court decree. Third, mediation may be partially contraindicated where there are different views of key facts that need to be established.¹⁰² Even in these cases, mediation may still be helpful after ^{*38} the facts have been established (e.g., by a neutral third party or a panel of experts). Mediation might not be appropriate where there is a significant imbalance of power.¹⁰³ Finally, parties may not want to use mediation when they have full information and only seek a neutral opinion on the extent of damages and other limited issues, or they believe they have all relevant information and they are positive that they will prevail in court or arbitration. If such contraindications exist, the case may be inappropriate for mediation. These impediments, however, do not exclude mediation, but simply should be weighed against the goals of the parties, strengths of the parties and the case, and other factors that may result in mediation still being superior to its alternatives.

If this analysis results in a 50-50 case for mediation, then mediation should still be utilized because it is a hospitable procedure. It is always easier, if necessary, to go from mediation to adjudication than to take the reverse course. Moreover, frequently the case may lend itself to fragmentation. One or more issues could be resolved by mediation, while the remainder are resolved by some other approach that is likely to suggest itself in the course of the mediation proceeding.

2. Public Perspective

The public concern about process selection may arise in a number of ways. Sometimes, for public policy reasons, the legislature provides specific procedures for particular transactions¹⁰⁴ or bars them for others.¹⁰⁵ Where courts have the power to assign cases to various ADR procedures they may take account of the public interest when making such an assignment. For example, a court might conclude that a garden-variety tort case posing no novel issues should be settled, and, therefore, referred to mediation or ENE. However, unless ^{*39} that referral is only a step preliminary to litigation, it could be challenged on the ground of denial of access to court. Conversely, a court may decide that a case raises novel issues of statutory or constitutional interpretation, and may insist that the case be litigated.¹⁰⁶ With the exception of specialized cases requiring court approval for settlement,¹⁰⁷ however, there is no way for a court to prevent the parties from settling the case and dismissing the lawsuit.

Aside from specific statutory directives of the kind mentioned, the most salient cases against settlement from a public policy perspective resemble, in some respects, those listed from a party perspective, namely:

- cases presenting “a genuine social need for an authoritative interpretation of law;”¹⁰⁸
- cases involving serious power imbalances;
- cases that may involve issues of judicial enforcement;
- cases involving a need for public sanctioning (e.g., serious health code violations by a landlord); and
- recurring violations (e.g., of consumer protection laws).

C. Step Three A: If Mediation, What Type?

Although the implication of having mediation as a presumed process may sound simplistic, there is, in fact, a whole range of mediation processes that may be applied in each case. Mediation is not a simple, pre-determined single process, but a range of processes.

The most important kinds of mediation are:¹⁰⁹

- facilitative/elicitive;
- evaluative/directive;
- transformative/problem-solving;
- court-related/out-of-court.

*40 These approaches are not exclusive; there is a continuum of mediator behaviors that can be “both evaluative and facilitative--on the same issue, on different issues, simultaneously, or at different times.”¹¹⁰ It is also possible to be facilitative on substance yet directive on process.

Other choices for the design of mediation include: with/without caucuses, with/without lawyers, length of the process, etc.¹¹¹ There are at least two ways of deciding what kind of mediation a party needs. Some disputants have a clear view of the kind of mediation they want. For example, in a commercial case where the parties are far apart, a more evaluative form of mediation may be preferred. On the other hand, Anna and John, going through a divorce, may prefer a more facilitative model, which will maximize their chances of a good relationship in the future. In other instances, where parties do not quite know what they need, they may look for a certain kind of mediator and let her take the lead on deciding about the type of process.

D. Step Three B: If Not Mediation, then What?

Where mediation is not appropriate, for the reasons indicated earlier,¹¹² parties must resort to the three-step analysis¹¹³ in Part II of this article in an effort to fit the forum to the fuss, including the possibility of designing a custom-made process that responds to the needs of the parties and the characteristics of the case. We believe that the case where mediation is inappropriate will be relatively rare. According to data from the federal courts, ninety-eight percent of all civil cases and ninety-five percent of criminal cases settle through agreement of the parties or are withdrawn from the court without a final court decision.¹¹⁴ Hence, our thesis is that one should begin the search for the most appropriate process with automatic resort to mediation, leaving open the question of the type of mediation that is most suitable for the particular case.

*41 Figure 1

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E. Summary and Conclusions

Selecting an appropriate dispute resolution procedure for the effective resolution of a particular dispute is a challenging task--more art than science. It may involve a number of intangible factors, such as the ADR culture in the venue in question and the power dynamics between the parties. In this Article we have examined the theoretical issues presented by some of the leading scholars and organizations who have looked at the problem. We have also described the actual practice in the field (to the extent there exist reliable data).

A preliminary conclusion of this examination is that there are no ironclad, definitive answers. However, in this Article we tried to present several reasons for our suggested approach of normally beginning with mediation (a revealing and flexible process that readily opens the way to other processes as needed). The only exception to this approach comes in the limited situations where there are contraindications to mediation. In all other situations, using some form of mediation at the outset is likely to be most productive.

| Footnotes | |
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| d1 | Frank E. A. Sander is the Bussey Professor of Law, Harvard Law School. Lukasz Rozdeiczner is an Associate at the Dispute Resolution Program, Program on Negotiation, Harvard Law School and an Adjunct Professor of Law at the Georgetown University Law Center. |
| 1 | See <i>infra</i> Part III. |
| 2 | See discussion <i>infra</i> Part II.B. |

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| 3 | See Edward A. Dauer, <i>Manual of Dispute Resolution: A Student's Guide to ADR Law and Practice</i> § 6-01 and § 5-04 (1994). |
| 4 | For an example of a multi-stage clause, see American Arbitration Ass'n, <i>Drafting Dispute Resolution Clauses: A Practical Guide</i> , http:// www.adr.org/Guides (July 1, 2004); or International Institute for Conflict Prevention and Resolution at http://www.cpradr.org/adr_detail.asp?M=9.1 (last visited Feb. 27, 2006); see also Stephen B. Goldberg & Frank E. A. Sander et al., <i>Dispute Resolution: Negotiation, Mediation, and Other Processes</i> 605-07 (4th ed. 2003). |
| 5 | Such judgment is based on the synthesis of experience, theory, and available data. |
| 6 | For different kinds of mediation, including court-related and out-of-court options, see <i>infra</i> Part III.C. |
| 7 | For a description of principal court-based ADR processes, see, e.g., Robert J. Niemic et al., <i>Guide to Judicial Management of Cases in ADR</i> , Federal Judicial Center 128-35 (2001) [hereinafter FJC Guide], and Goldberg & Sander et al., <i>supra</i> note 4, at 382-83. |
| 8 | For more detailed analysis of choice of neutral in mediation, see <i>infra</i> Part III.C. |
| 9 | Frank E. A. Sander & Stephen B. Goldberg, <i>Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure</i> 10 <i>Negot. J.</i> 49 (1994). |
| 10 | FJC Guide, <i>supra</i> note 7, at 20-47. |
| 11 | For example, a minitrial would generally fit a corporate case where senior managers or executives should be involved, and particularly where the relationship between the parties is crucial or the outcome of the case may influence the whole company. Neutral evaluation would usually be a good solution for parties who disagree about the law. |
| 12 | Sander & Goldberg, <i>supra</i> note 9. |
| 13 | See generally <i>infra</i> Table 1 (Various Approaches); Dauer, <i>supra</i> note 3, at § 7-02; Int'l Inst. for Conflict Prevention and Resolution, <i>ADR Suitability Guide</i> (2004) [hereinafter CPR Guide]. |
| 14 | An analogy for beginning the analysis from the parties' goals and case characteristics is the purchase of a sophisticated, costly suit. Manufacturers describe suits by different measurements and other features, and suits can be ordered through a catalog without fittings or knowledge of the exact attributes of the person for whom the suit is bought. Suits can also be purchased without regard for the occasion at which they will be worn. However, a more reasonable approach seems to be first to learn about the objective of the person buying the suit and only then pick a style appropriate for the occasion and match it to that person's characteristics. Later, if necessary, the suit can be further fitted and tailored to the exact requirements of the person. |
| 15 | This is illustrated, for example, by the different types of mediation. See discussion <i>infra</i> Part III.C. |
| 16 | Frank E. A. Sander, <i>Varieties of Dispute Processing</i> , in <i>The Pound Conference: Perspectives on Justice in the Future</i> 65, 67 (A. Leo Levin & Russell R. Wheeler eds., 1979) (specifying the following effectiveness criteria: "cost, speed, accuracy, credibility (to the public and the parties), and workability. In some cases, but not in all, predictability may also be important."). |
| 17 | Some other more limited efforts to deal with the same problem of matching choices and procedures can be found in Jeffrey M. Senger, <i>Federal Dispute Resolution: Using ADR with the United States Government</i> (2004); Jack Efron, <i>Alternatives to Litigation: Factors in Choosing</i> , 52 <i>Mod. L. Rev.</i> 480, 480-97 (1989). See also Kathy Mack, <i>Nat'l Alternative Dispute Resolution Advisory Council, Court Referral to ADR: Criteria and Research</i> 26 (2003), available at http:// www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/4DC4C646C9E10D27CA256E49007C5EB0/\$FILE/0+Court+Referral+o+ADR.pdf . |
| 18 | See Dauer, <i>supra</i> note 3; CPR Guide, <i>supra</i> note 13. |

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| 19 | Other existing approaches are limited to certain legal fields such as business disputes (CPR), family disputes, or federal disputes. See Senger, <i>supra</i> note 17, at 18-46. Acknowledging the differences between these kinds of disputes, this Article proposes a more general taxonomy that could be applicable to all kinds of disputes. |
| 20 | See Table 1. |
| 21 | For more on goals, see discussion <i>infra</i> Part II.B. |
| 22 | For more on facilitating features, see discussion <i>infra</i> Part II.C. |
| 23 | For more on impediments, see discussion <i>infra</i> Part II.D. |
| 24 | The point values in this and later tables are not based on research data but on the judgment of experienced ADR scholars and practitioners. |
| 25 | Jessica Pearson & Nancy Thoennes, <i>Divorce Mediation: Reflections on a Decade of Research</i> , in <i>Mediation Research</i> 9, 23 (Kenneth Kressel & Dean G. Pruitt eds., 1989). |
| 26 | See David B. Lipsky & Ronald L. Seeber, <i>The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR By U.S. Corporations</i> 17 (2003). For discussion of this problem and additional literature, see CPR Guide, <i>supra</i> note 13, at 6; Roy J. Lewicki et al., <i>Negotiation</i> (3d ed. 1999). |
| 27 | The payoff multiplied by the probability of achieving it may have a lower value than a settlement. Additionally, the more risk averse the party is, the more she should support the settlement. |
| 28 | Various ethical aspects of out-of-court agreements are not discussed here. |
| 29 | See Dauer, <i>supra</i> note 3, at 7-15 to 7-16. |
| 30 | See <i>supra</i> Goldberg & Sander et al., <i>supra</i> note 4, at 162. This argument is even stronger in the area of transformative mediation. See generally Robert A. Baruch & Joseph P. Folger, <i>The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition</i> 160-61 (2d ed. 2005). Robert A. Baruch Bush, <i>Efficiency and Protection or Empowerment and Recognition: The Mediator's Role and Ethical Standards in Mediation</i> , 41 <i>Fla. L. Rev.</i> 253, 274 (1989). On the other hand, in domestic cases mediated solutions may result in higher degree of further abuse than court-imposed solutions. See Dauer, <i>supra</i> note 3, at § 7-16 (quoting <i>Mediation Can Make Bad Worse</i> , <i>Nat'l L.J.</i> , June 8, 1992, at 15). |
| 31 | See Dauer, <i>supra</i> note 3, at 7-19 to 7-22. |
| 32 | Since John has a business dispute at the same time that he is undergoing the divorce, see <i>supra</i> Part II.C., there is a clear linkage between the two disputes, i.e., divorce and business. |
| 33 | We are focusing here solely on the ways of satisfying the interests of the parties and not on other issues. |
| 34 | See Goldberg & Sander et al., <i>supra</i> note 4, at 162-64. |
| 35 | See Table 2; <i>supra</i> note 24 and accompanying text. |
| 36 | See <i>infra</i> Part III. |
| 37 | For the sake of consistency, we assume that the scale of goals' priorities is the same as the scale of processes satisfying these goals, presented in Table 2 (i.e., a scale from 0 to 3). |

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| 38 | Full calculation for mediation = 3 (Maintain/Improve Relationship) x 3 (weight given) + 3 (Privacy) x 2 (weight given) + 3 (Minimize Costs) x 1 (weight given) + 0 to 1 (Shift) x 1 (weight given). |
| 39 | Full calculation for minitrial = 2 (Maintain/Improve Relationship) x 3 (weight given) + 3 (Privacy) x 2 (weight given) + 2 (Minimize Costs) x 1 (weight given) + 1 (Shift Responsibility) x 1 (weight given). |
| 40 | Full calculation for summary jury trial = 2 (Maintain/Improve Relationship) x 3 (weight given) + 1 (Privacy) x 2 (weight given) + 2 (Minimize Costs) x 1 (weight given) + 2 (Shift Responsibility) x 1 (weight given). |
| 41 | Full calculation for early neutral evaluation = 1 (Maintain/Improve Relationship) x 3 (weight given) + 2 (Privacy) x 2 (weight given) + 3 (Minimize Costs) x 1 (weight given) + 2 (Shift Responsibility) x 1 (weight given). |
| 42 | Full calculation for arbitration = 1 (Maintain/Improve Relationship) x 3 (weight given) + 1 (Privacy) x 2 (weight given) + 0 to 2 (Minimize Costs) x 1 (weight given) + 3 (Shift Responsibility) x 1 (weight given). |
| 43 | Full calculation for litigation = 0 (Maintain/Improve Relationship) x 3 (weight given) + 0 (Privacy) x 2 (weight given) + 0 (Minimize Costs) x 1 (weight given) + 3 (Shift Responsibility) x 1 (weight given). |
| 44 | See discussion infra Part III.B. |
| 45 | N.H. Super. Ct. R. 170(b) . |
| 47 | The result may depend on whether we are dealing with in-court or out-of-court mediation. |
| 48 | All the above arguments applied to Table 3 (Facilitating Features) could yield numerical values suggesting which process might be most beneficial for John. Jim's analysis would probably have some similar arguments, but also some different ones, including the possibility of an injunction. |
| 49 | Based on Dauer, supra note 3, at 7-17 and 7-19. |
| 50 | See id. at 7-17. |
| 51 | See "Maintain/Improve Relationship" in Table 2 (Goals). |
| 52 | Dauer, supra note 3, at 7-11. |
| 53 | Compare with CPR Guide, supra note 13, at 11-16. |
| 54 | Carrie Menkel-Meadow, Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education , 6 Harv. Negot. L. Rev. 97, 98 (2003). |
| 55 | For more on problem-solving negotiation, see Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving , 31 UCLA L. Rev. 754 (1984); Carrie Menkel-Meadow, The Lawyer as a Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering , 72 Temp. L. Rev. 785 (1999). |
| 56 | Most mediators believe that attitudes of lawyers are often more important than those of clients in repairing a relationship between the parties. See Dwight Golann, Is Legal Mediation Really a Repair Process? Or a Separation? , 19 Alternatives to High Cost Litig. 171, 191 (July 2001). For relationship of lawyers and clients, see generally Robert H. Mnookin & Ronald J. Gilson, Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation , 94 Colum. L. Rev. 509 (1994); Robert H. Mnookin et al., Beyond Winning: Negotiating to Create Value in Deals and Disputes 69-96 (2000). |

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| 57 | See CPR Guide, <i>supra</i> note 13, at 13-14. |
| 58 | In order to enhance parties' abilities to problem-solve, one can use a technique of brainstorming with two distinct stages of (1) generating and (2) evaluating ideas. See, e.g., Roger Fisher, William Ury & Bruce Patton, <i>Getting to Yes: Negotiating Agreement Without Giving In</i> 60-65 (1991). |
| 59 | See "Fear of Disclosing True Interests" in Table 4, <i>infra</i> Section II.D (noting that mediation is most likely to overcome the fear of disclosing true interests and adjudication unlikely to overcome that impediment). For more information on the dilemma of creating/claiming value and revealing/concealing information (the "Negotiator's Dilemma"), see David A. Lax & James K. Sebenius, <i>The Manager as Negotiator: Bargaining for Cooperation and Strategic Gain</i> 29-45 (1986); Mnookin et al., <i>supra</i> note 56, at 11-43. |
| 60 | Note that some of these features are contraindications to mediation. See <i>infra</i> Part III.B. |
| 61 | See CPR Guide, <i>supra</i> note 13, at 12. |
| 62 | Compare with "Public Vindication" in Table 2 (Goals), <i>infra</i> Part II.B. |
| 63 | CPR Guide, <i>supra</i> note 13, at 13. |
| 64 | <i>Id.</i> at 11. |
| 65 | See Dauer, <i>supra</i> note 3, at 7-23. |
| 66 | See Table 2, <i>supra</i> Part II.B (showing that mediation very substantially satisfies goal of maintaining/improving relationship). |
| 67 | See CPR Guide, <i>supra</i> note 13, at 18, citing Mediation Research, <i>supra</i> note 25. |
| 68 | See "Capacity of a Process to Overcome Impediments" in Table 4, <i>infra</i> Part II.D. |
| 69 | See Golann, <i>supra</i> note 56. |
| 70 | See generally William L. Ury et al., <i>Getting Disputes Resolved: Designing Systems to cut the Costs of Conflict</i> (1988); Roger Fisher et al., <i>supra</i> note 58; see also Carrie Menkel-Meadow, <i>Mediation</i> xiii (2001). |
| 71 | See Andrea K. Schneider, <i>Perceptions of Effectiveness: An Empirical Study of Negotiation Skills, Alternatives to High Cost Litig.</i> , Dec. 2000, at 1; see also Mnookin et al., <i>supra</i> note 56, at 44-68 (discussing the tension between empathy and assertiveness). |
| 72 | In federal civil matters, as many as ninety-eight percent of cases eventually settle or are withdrawn, and in federal criminal cases the figure is approximately ninety-five percent. See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts , 1 <i>J. Empirical Legal Stud.</i> 459, 465, 495 (2004). |
| 73 | A "jackpot" syndrome is a situation when a party expects to achieve a very high payoff if there is no settlement (e.g. through litigation), and another party believes that this is very unlikely. See Sander & Goldberg, <i>supra</i> note 9, at 59. |
| 74 | As previously noted, the best solutions are sometimes achieved by utilizing the future-oriented focus of mediation rather than by focusing on determining the exact facts. For example, in Anna's case, there might be some dispute about her children visiting their father with his new girlfriend there. The parties may agree in advance that the girlfriend should not be present for these visits, and, thus, the issue becomes moot. |

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| 75 | Impediments 1-10 are taken (after modification) from the table in Sander & Goldberg, supra note 9, at 55, and are discussed and explained there (finding mediation most likely to overcome fear of disclosing true interests and adjudication unlikely to overcome that impediment). |
| 76 | For fuller discussion of rights-, interest-, and power-based resolutions, see Ury et al., supra note 70, at 3-19. |
| 77 | Bargaining power may have a variety of sources: wealth, skills, history of parties' relationship, external pressures and needs, perceptions of relative, social or economic positions, parties' alternatives and their perception, psychological strengths, etc. See also Dauer, supra note 3, at 7-25. For different definitions of power and how it might be used, see Gary Klein, Sources of Power: How People Make Decisions (1988); Robert S. Adler & Elliot M. Silverstein, When David Meets Goliath: Dealing with Power Differentials in Negotiation , 5 <i>Harv. Negot. L. Rev.</i> 1, 6-28, 77-110 (2000). Although in the case of imbalance of power we would usually use a rights-based approach, no procedure can eliminate all imbalances of power. For example, in a case turning on expert opinions, the disparity of wealth may further enhance the imbalance of power in litigation. |
| 78 | For a discussion on what constitutes power in negotiation, see Lax & Sebenius, supra note 59, at 249-57; see also Adler & Silverstein, supra note 77, at 3-28. |
| 79 | Some have suggested that transformative mediation can remedy this problem, but we wonder whether objective power imbalances in mediation can be addressed by a transformative approach. See generally Bush & Folger, supra note 30, at 160-61. |
| 80 | Lack of legal representation, particularly where the other party has a lawyer, may represent a serious disadvantage depending on the legal complexity of the case. Some jurisdictions have attempted to mitigate this disparity by providing paraprofessional assistance in court or court-connected settings. Moreover, it is not clear which process most helps to ameliorate this impediment. See Dauer, supra note 3, at 7-25. |
| 81 | Dauer, supra note 3, at 7-26. |
| 82 | For data regarding divorce conflicts, see Joan B. Kelly & Lynn L. Gigy, Divorce Mediation: Characteristics of Clients and Outcomes, in <i>Mediation Research</i> , supra note 25. For information international conflict, see Jacob Berkovitch, International Dispute Resolution: A Comparative Analysis, in <i>Mediation Research</i> , supra note 25, quoted in CPR Guide, supra note 13, at 14. |
| 83 | Dauer, supra note 3, at 7-27. |
| 84 | For a comprehensive description of this problem, see Dauer, supra note 3, § 7-06; compare "Control Process" in Table 2 (Goals) with "Different View of Facts/Law" in Table 4 (Impediments). |
| 85 | See Dauer, supra note 3, at 7-11. |
| 86 | Some authors propose a different analysis as a first step: whether or not a case is good for ADR, and only then what kind of ADR procedure should be employed. See FJC Guide, supra note 7, at 20; see also Senger, supra note 17, at 18-23. |
| 87 | The National Alternative Dispute Resolution Advisory Council (Australia) summarized the mediation research as follows: The research literature on mediation suggests that rates of agreements seem to be consistent across diverse forms of mediation and service types (about fifty to eight-five percent). Mack, supra note 17, at 26. "Nearly all studies of divorce mediation in all countries and settings indicated that client satisfaction with both the mediation process and outcomes is quite high in the 60% to 85% range." Joan B. Kelly, A Decade of Divorce Mediation Research 34 <i>Fam. & Conciliation CJS Rev.</i> 373, 377 (1996). See also Jeanne M. Brett et al., The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers, 12 <i>Negot. J.</i> 3, 267 (1996). |
| 88 | As Sander and Goldberg conclude, mediation "seems promising particularly when the parties are having difficulty in agreeing upon an ADR procedure." Sander & Goldberg, supra note 9, at 59. The benefit to the parties may be less apparent when the mediator's recommendation is not accepted. In that case, there could still be a future benefit to the recommendation. |

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| 89 | See generally Ury et al., supra note 70; Cathy A. Costantino & Christina S. Merchant, <i>Designing Conflict Management Systems</i> 12-13 (1996). |
| 90 | See Table 4 (Impediments), supra Part II.D. |
| 91 | See Table 3 (Facilitating Features), supra Part II.C. |
| 92 | There are a few reasons why even the prospect of winning in litigation is not a sufficient reason for avoiding mediation. First, the party that is likely to lose may be persuaded through an ADR method that she would lose; thus, both parties would save the costs (financial and psychological) of litigation. Third, a pie-enlarging settlement may be preferable to a division of a fixed pie. See Sander & Goldberg, supra note 9, at 54. |
| 93 | See C. McEwen, Note on Mediation Research, in <i>Dispute Resolution</i> , supra note 4, at 162-64. |
| 94 | See also American Arbitration Ass'n, <i>Dispute-Wise Business Management</i> 24 (2003). Mediation is by far a preferred ADR procedure among all major commercial industries. See Lipsky & Seeber, supra note 26, at 12; see also CPR Guide, supra note 13. |
| 95 | According to the a survey by the American Arbitration Association, eighty-three percent of corporate counsel think that mediation provides a more satisfactory process than litigation; sixty-six percent of those surveyed think that arbitration provides a more satisfactory process than litigation. American Arbitration Ass'n, supra note 94, at 24-25. |
| 96 | Reality check in mediation refers particularly to its evaluative form. See infra Part III.C. |
| 97 | Table 5 is a part of Table 2 (Goals) and compares values for mediation and adjudication. |
| 98 | See Table 2 (Goals), supra Part II.B, and Table 5 (Mediation and Adjudication Contrasted), supra Part III.A. |
| 99 | In a survey of lawyers participating in a program in the Northern District of Illinois, reported disincentives for mediation were (1) the need to establish legal precedent (forty-seven percent of cases), and (2) the need for injunctive relief (sixty-four percent). We think, however, that injunctive relief is not a reason to decide against mediation but rather may be a reason for postponing mediation until after achieving such relief. See Yates & Schack, <i>An Evaluation of the Lanham Act Mediation Program: U.S. District Court for the Northern District of Illinois</i> (2000), cited in CPR Guide, supra note 13, at 8. |
| 100 | A matter of principle must be distinguished from a hard bargaining position or strategy. |
| 101 | See infra note 104; see also Table 4 (Impediments), supra Part II.D. See also Sander & Goldberg, supra note 9. According to the survey done by Brett et al., the jackpot syndrome is one of the two main characteristics that distinguish cases that do not settle. Brett et al., supra note 87, at 262. |
| 102 | Examples of structural injunctions might be cases involving school desegregation orders, voting rights, etc. See Dauer, supra note 3, § 7-06 and 4-02. |
| 103 | According to the survey by Brett et al., parties preferred arbitration to mediation when they perceived that the case turned on an issue of fact or law. However, since these cases settled in mediation as often as the cases in which parties did not perceive a serious issue of fact or law, the authors concluded that the parties were probably overly cautious. Parties who hold to completely different stories usually will not be able to settle. In such a case, neutral fact-finding preceding mediation, or conducted during mediation, may greatly help in reaching a satisfactory mediated solution. See Brett et al., supra note 87, at 262. |
| 104 | Imbalance of power may also be considered a contraindication from the public perspective. |

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| 105 | See, e.g., Cal. Fam. Code §3170 (Deering 1994) (mandating mediation in cases of disputed child custody). |
| 106 | See Minn. Stat. § 518.619 (2004) (barring mediation in cases involving spousal abuse). |
| 107 | See, e.g., Brown v. Bd. of Educ., 347 U.S. 483 (1954) . |
| 108 | See Fed. R. Civ. Proc. 23(e) (requiring court approval for class action settlements). See generally Carrie Menkel-Meadow, Whose Dispute Is It Anyway? , 83 <i>Geo. L.J.</i> 2663 (1995) (a philosophical defense of settlement in appropriate cases). |
| 109 | See Owen M. Fiss, Against Settlement , 93 <i>Yale L.J.</i> 1073, 1087 (1984). There is also a lively scholarly debate about whether such “significant” cases should be settled. In a recent article, Jeffrey Seul argued that negotiation “should be viewed as a legitimate alternative to litigation for addressing disputes involving deep moral disagreements.” Jeffrey R. Seul, Settling Significant Cases , 79 <i>Wash. L. Rev.</i> 881, 968 (2004). Negotiation (and negotiation-based processes like mediation) are complementary to litigation in pursuit of justice and development of social norms, even ones that involve deep moral disagreement (“significant cases”). <i>Id.</i> at 968. |
| 110 | See, e.g., Carrie Menkel-Meadow et al., <i>Dispute Resolution: Beyond the Adversarial Model</i> 266-324 (2004); Christopher W. Moore, <i>The Mediation Process</i> (2004); Bush & Folger, <i>supra</i> note 30. |
| 111 | Leonard L. Riskin, Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed , 1 <i>Harv. Negot. L. Rev.</i> 7, 51 (1996). |
| 112 | See <i>id.</i> at 18-23, where Riskin makes another distinction between narrow and broad focus. |
| 113 | See <i>supra</i> Part III.B. |
| 114 | See Table 2 (Goals), <i>supra</i> Part II.B; Table 3 (Facilitating Features), <i>supra</i> Part II.C; Table 4 (Impediments), <i>supra</i> Part II.D. |
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