PEPPERDINE UNIVERSITY

Pepperdine Dispute Resolution Law Journal

Volume 22 | Issue 1 Article 1

5-15-2022

Micro-Mediation: A New First Step on the Mixed-Mode Alternative Dispute Resolution Ladder in Higher Education

Joseph C. Alfe

Micro-Mediation: A New First Step On The Mixed-Mode Alternative Dispute Resolution Ladder In Higher Education

Joseph C. Alfe, J.D., L.L.M.*

"Ultimately the most basic values of society are revealed in its dispute settlement procedures."[1]

Acknowledgments

The author would like to extend special thanks to the following Directors and Professors of the Straus Institute for Dispute Resolution, Pepperdine Caruso School of Law, for their advice and counsel in researching and editing this work: Thomas Stipanowich, Ken Cloke, and Joan Goldsmith. Additional thanks to Alan Schwartz and Asad A. Jaleel for their contributions of religious interpretation and research, as well as Chris "Bull" Garlington for his editing assistance.

Abstract

Higher education is fraught with disputes on both a macro and micro level. In a broad sense, institutions of higher education serve as a focal point for many disparate cultures, economic strata, ages, genders, races, ideologies, and other societal influences, and concentrates them within an insular community. Such an amalgamation of humanity

* Joseph C. Alfe holds a J.D. and LL.M. (real estate) from the UIC-John Marshall Law School in Chicago, Illinois where he was a Stanley Marion Fellow. He has also earned his LL.M. in dispute resolution from the Straus Institute for Dispute Resolution, Pepperdine Caruso School of Law in Malibu, California. Mr. Alfe is currently the Informal Resolution Facilitator and Mediator for the Texas A&M University System, based on the largest university campus in the nation.

[1] JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 3–4 (Oxford Univ. Press 1983).

is bound to produce conflicts of all kinds. These disputes can range from the elementary to the criminal. Title IX of the Educational Amendments of 1972 governs disputes rising to the level of sexual harassment or discrimination and are updated by periodic agency updates disseminated through "dear colleague" letters. Most organizations and institutions have an authority in place to handle these disputes, the most common being a Dean, Ombudsperson and/or a Title IX office. However, the picture gets murkier when faced with ordinary disputes, or those which may be "riding the line" of Title IX discrimination. These lower-level disputes often involve "micro aggressions" or other conduct that individually may not rise to the level requiring Title IX attention, but in the aggregate—may do so in time. Universities and other educational institutions may not have clear plans to handle these disputes. This may lead to them becoming underserved, or worse, ignored, often leading to larger and more costly disputes. In short, there is a missing link in the chain. In response, I propose a new species of dispute resolution and framework for intervention—*micro-mediation*.

In this paper, I first define micro-mediation, its scope of application, and who should administer the intervention. Next, I explore the pros and cons of micro-mediation as a response to disputes in higher education, taking particular care to address concerns of fairness and access to justice within an intersectional framework. Next, micro-mediation and other ad hoc dispute resolution options are compared with and placed within a mixed-mode dispute resolution structure. Campus risk mitigation and legal liability is then discussed. Lastly, I propose a micro-mediation construct in the context of a mixed-mode alternative dispute resolution ("ADR") model applicable to institutions of higher education.

Key words: micro mediation, intersectionality, race, Title IX, dispute resolution, mediation, micro aggression, gender, higher education, mixed-mode.

2

I. Introduction

Traditional mediation can be less time consuming and less costly than litigation or other forms of dispute resolution.[2] Mediation can also be unwieldy. Because the principal aim of mediation is to create a non-adversarial, non-binding form of dispute resolution, it can be thought of as a structured "teaching moment" in a higher education context.[3] Mediation is an educational process whereby conflicted parties are guided by an unbiased third party to reach a consensus and formulate their own resolution to their conflict.[4] They arrive at an agreement by learning about their own and each other's interests, practical requirements, and emotional needs.[5] These, in turn, foster empathy for each other's experiences, feelings, and perspectives—important elements in finding common ground.[6]

Much has been written recently of mixed-mode dispute resolution constructs.[7] ADR schemes, such as the "Spectrum Model" (or "Spectrum Continuum Model") pioneered by Schrage & Giacomini have gained national

---

[2] *What is Mediation?*, ABN LAW GROUP, https://www.abnlawgroup.com/portfolio-item/mediation/ (last visited Sept. 20, 2021).

[3] FindLaw Atty Writers, *Alternative Dispute Resolution: Which Method Is Best For Your Client*, FINDLAW (Aug. 1, 2017), https://corporate.findlaw.com/litigation-disputes/alternative-dispute-resolution-which-method-is-best-for-your.html.

[4] *What is a Neutral Third Party?*, HARV. L. SCH. PROGRAM ON NEGOT., https://www.pon.harvard.edu/tag/neutral-third-party/ (last visited Sept. 7, 2021).

[5] Chuck Doran & Daniele N. Goldberg, *Mediation Techniques for Managing Emotions*, WMI, https://www.mwi.org/mediation-techniques-for-managing-emotions/ (last visited Sept. 7, 2021).

[6] *Empathy in Mediation*, CTR. FOR EMPATHY INT'L AFFS., https://www.centerforempathy.org/empathy-in-mediation/ (last visited Sept. 7, 2021).

[7] *See* Nadja M. Alexander, *Ten Trends in International Mediation*, 31 SING. ACAD. L. J. 405, 405 (2019).

interest.[8] The Spectrum Model and others combine various modalities of dispute resolution into a linear scheme, often referred to as "med/arb" or "mixed-mode."[9] These practices provide a timeline of dispute interventions, often starting with an informal mediation or ombuds intervention and escalating to formal mediation and arbitration.[10] It is at this early, informal stage that I propose introducing the use of "micro-mediation," designed to resolve conflict in a condensed fashion before it blossoms into a full-fledged dispute or claim.

II. A New Species of Dispute Resolution: Micro-Mediation

Before discussing micro-mediation, I will discuss the origins of informal dispute resolution, which lie in the cultural and religious roots of global society and are thousands of years old.[11] This collective wisdom spans all cultures and forms the basis of all law and legal systems, and of all conflict resolution processes.[12]

A. The Religious and Cultural Roots of Dispute Resolution

Professors Andrew McThenia and Thomas Shaffer, early devotees of alternative dispute resolution, argued that ADR was rooted in the religious cultures of Christianity and

[8] JENNIFER M. SCHRAGE & NANCY G. GIACOMINI, REFRAMING CAMPUS CONFLICT: STUDENT CONDUCT PRACTICE THROUGH A SOCIAL JUSTICE LENS (Stylus Publ'g, LLC, 2009).
[9] Thomas J. Stipanowich, *Arbitration, Mediation and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med and Settlement-Oriented Activities by Arbitrators*, 26 HARV. NEGOT. L. REV. 265, 267–69 (2021).
[10] Katie Shonk, *What is Med-Arb? The Pros and Cons of Med-arb, a Little-known Alternative Dispute Resolution Process*, HARV. L. SCH. PROGRAM ON NEGOT. DAILY BLOG (July 12, 2021), https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/.
[11] F. Matthews-Giba, *Religious Dimensions of Mediation*, 27 FORDHAM URB. L.J. 1695, 1695–1703 (2000).
[12] *Id*.

Judaism.[13] Today it is recognized that ADR's cultural and religious roots span all cultural and religious boundaries.[14] Many scholars tend to separate religious based dispute resolution techniques from secular ones.[15] In the Islamic tradition, mediation is an important part of resolving family law issues, whereby divorce is allowed, but viewed as "reprehensible."[16] In an effort to keep these disputes out of the courts, Islamic culture turns to informal ADR processes to settle these and other disputes.[17] Judaism too, relies on Rabbinic wisdom to informally settle disputes quickly.[18] Indeed, an important passage in the *Mishna,* or core of the *Talmud*, called the *Pirke Avot–The Sayings of the Sages,* seems to extol the wisdom of compromise and mediation:[19]

> Rabbi Yishmael [the son of Rabbi Yosay] said: [A judge] who refrains from handing down legal judgments [but instead seeks compromise between the litigants] removes from himself from enmity, theft and [the responsibility for] an unnecessary oath. But a judge who aggrandizes himself by [eagerly] issuing legal decisions is a fool, wicked and arrogant.[20]

---

[13] James F. Henry, Joseph Allegretti, Robert A. Baruch Bush, & Sarah Cobb, *Dialogue on the Practice of Law and Spiritual Values,* 28 FORDHAM URB. L. J. 991 (2001).
[14] *See*, *e.g.*, JEROME T. BARRETT & JOSEPH BARRETT, A HISTORY OF DISPUTE RESOLUTION: THE STORY OF A POLITICAL, SOCIAL, AND CULTURAL MOVEMENT (Jossey-Bass, 1st ed. 2004).
[15] *See*, *e.g.*, Ratno Lukito, *Religious ADR: Mediation in Islamic Family Law Tradition*, 44(2) AL JAMI AH J. ISLAMIC STUD. 325 (2006).
[16] *Id*. at 332; IBN MAJAH, THE CHAPTERS ON DIVORCE (Sunan Ibn Majah 2018, Hadith 3) ("The most hated of permissible things to Allah is divorce."); ABI DAWUD, REGARDING THE DISLIKED NATURE OF DIVORCE (Sunan Abi Dawud 2178, Hadith 4); 7 IMAN AL-BAYHAQI, SUNAN AL-KUBRA LIL BAYHAQI 322 (384 A.H.–458 A.H.).
[17] Lukito, *supra* note 15, at 332–34.
[18] Henry, et al., *supra* note 13, at 1008.
[19] *Id*.
[20] *Id*. (quoting MISHNA, *Pirkei Avot* [Ethics of our Fathers] 4:9, *reprinted in,* SIDDUR TEHIL-LAT HASHEM 222 (Nissen Mangel trans., Kehot Publ'n Soc'y 1978) (emendation in cited translation by original translator)).

Many religious or culturally based dispute resolution mechanisms begin with an informal process; in Judaic dispute resolution, this informal process is known as *bitzua* or a *p'sharah*.[21] The key word here is *informal*. These proceedings are often presided over by a Rabbi, or in the case of Islamic systems, an Imam, or in many other cultures by an ad hoc panel of respected elders.[22] The religious leader or panel quickly hears the dispute, hears presentations from both sides, sometimes asks questions or hearing from others, then renders a decision or facilitates a settlement, sometimes immediately, that may be binding or non-binding.[23] If non-binding or unsuccessful at settlement, the disputants may then appeal to more formal means of dispute resolution, such as the *Beth Din* or *Sharia,* the religious tribunals tasked with more formal dispute resolution in the Jewish and Islamic traditions.[24] Similar systems of dispute resolution exist in Hinduism through the Panchayat, as well as via spiritual belief systems of the Aboriginal, Maori, and New World First Nations' traditions.[25]

---

[21] Michael J. Broyde*, Multicultural ADR and Family Law: A Brief Introduction to the Complexities of Religious Arbitration*, 17 CARDOZO J. CONFLICT RESOL. 804 (2015); *c.f.* R. Seth Shippee, *"Blessed are the Peacemakers": Faith-Based Approaches to Dispute Resolution*, 9 INT'L L. STUDENTS ASS'N J. INT'L & COMP. L. 237, 249-250 (2002).

[22] Shippee, *supra* note 21, at 249–50; Francis Kariuki, *Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities*, 3 ALT. DISP. RESOL. J. 30, 30–32 (2015); HAMID M. KHAN, ISLAMIC LAW, CUSTOMARY LAW, AND AFGHAN INFORMAL JUSTICE 4-5 (U.S. Inst. Peace 2015).

[23] Broyde, *supra* note 21, at 804, 813.

[24] *Id*. at 804.

[25] *Panchayat*, MERRIAM-WEBSTER.COM (2021), https://www.merriam-webster.com/dictionary/panchayat; Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?*, 35 Mich. J. Int'l L. 485, 495–96 (2014) "India, the most populous and diverse democracy in the world, has a legal system to match. The system, a composition of ancient Hindi panchayats (village assemblies), Islamic law, and a formal British judiciary, has long been under immense strain, stifling economic compe[ti]tiveness and the pursuit of justice alike."

It is in this spirit of informal dispute resolution that we turn to the concept of *Micro-Mediation*.

B. Micro-Mediation

Taking cues from traditional cultural and religious based forms of ADR, I propose to add micro-mediation as a new, informal step in a mixed-mode alternative dispute resolution matrix. Although any organization or setting may apply this idea, I will narrow my focus for the purpose of this discussion to institutions of higher education, and in particular, law schools.

In a nutshell, micro-mediation simply adds a highly informal, immediate intervention to resolve low-level issues or disputes and would be helpful to define the scope of these disputes and the appropriate criteria, including the ability to triage conflicts through micro-mediation intervention.

1. Defining the Scope of Appropriate Conduct for Micro-Mediation Intervention

Conflict and inappropriate conduct can arise on any university or law school campus for "a variety of reasons from immaturity to substance abuse."[26] Campus officials often overlook these lower-end issues because they may not rise to the level necessary to involve the Title IX office or other campus disciplinary authorities.[27] This may allow these issues to fall through the cracks and escape attention, leading to increased levels of disagreeable conduct or an aggregation of conduct that can later lead to larger disputes that could even impact student enrollment. Katz and Kovack found that "when the underlying issues, needs, and concerns which fueled the dispute are overlooked, students often exit or transfer to another university, and student affairs administrators rarely follow up with exit interviews traditional in corporate environments."[28] It is this

[26] Neil H. Katz & Linda N. Kovack, *Higher Education's Current State of Alternative Dispute Resolution Services for Students*, 4 INT'L J. CONFLICT MGMT. 1, 6 (2016).
[27] *Id.*
[28] *Id.*

"aggregation" cycle that micro-mediation intervention aims to break. Doing so helps reverse the elements of the "hostile work environment" that define Title IX's close cousin, Title VII, which governs harassment and discrimination in the workplace.[29] Under Title VII, "a single act of harassment may not be actionable on its own. Such claims are based on the cumulative effect of individual acts."[30] In other words, failure to regulate and resolve conduct that, by itself may not be actionable, may compound over time into something that greatly heightens an educational institution's exposure to claims under Title VII (or Title IX for that matter). The failure of higher education institutions to properly address micro-aggressions, bullying, cyber-bullying, and other inappropriate conduct, should not be for lack of trying.[31] Schools run the gamut of overreactions from immediate escalation of even minor activity to student disciplinary tribunals, to outright ignoring the issue, or worse—burying the conduct.[32] Some universities and law schools, such as the University of Michigan, employ robust ADR programs to help address these issues.[33]

These lower-level disputes and conduct are appropriate intervention points for the use of micro-mediation. It is in these disputes that may be minor by law, but are incredibly important in human terms, that the first

[29] Civil Rights Act of 1964, Pub. L. 88-352, § 7 (1964) (actionable through 42 U.S.C. 1981).
[30] Debra S. Katz & Alan R. Kabat, *Harassment in the Workplace, KATZ, MARSHALL & BANKS, LLP (July 29, 2004)* https://www.kmblegal.com/publications/harassment-in-the-workplace. Presented at the American Law Institute-American Bar Association continuing legal education seminar, Current Developments in Employment Law in Santa Fe, NM on July 29, 2004. *See also* National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002) (internal citations omitted).
[31] Joseph Raditch, *Teaching Online and Cyberbullying: Examining Higher Education Cyberbullying Policies in The Florida State University System*, UNIV. CENT. FLA. STARS: ELECTRONIC THESES AND DISSERTATIONS, 2004–2019 (2019), https://stars.library.ucf.edu/etd/6726.
[32] *Id*.
[33] SCHRAGE & GIACOMINI, *supra* note 8, at 23.

rung of the ADR mixed-mode ladder ought to be placed. It is these disputes that can and should be immediately addressed through micro-mediation. Conduct and disputes that rise to the Title IX level, or that require the full attention of campus disciplinary authorities, should immediately be escalated to the appropriate campus authority. For those that do not, however, micro-mediation offers immediate opportunities for de-escalation, settlement, and resolution.

2. Defining Micro-Mediation

I coin the term micro-mediation to clearly announce what it is. It is mediation. The only differences are the scope, how quickly, and by whom the mediation occurs.[34] At its essence, mediation is simply facilitated negotiation.[35] "In the ever-changing academic environment, ADR practices are believed to create a balance between risk management involving individual rights and institutional obligations, and developmental issues intertwined with social justice."[36]

Traditionally, "mediation places primary emphasis on negotiation and mutual accommodation, rather than adjudication," and unlike a judge or arbiter, a mediator "does not judge the case."[37] Moreover, though there is no guarantee of success, mediation offers a potentially shortened process compared to litigation or other, more formal types of ADR.[38] Most importantly, mediation's principal aim is to displace the adversarial nature of dispute resolution that forms the basis of litigation or other forms of ADR, such as formal binding arbitration, by approaching dispute resolution with a "perspective of cooperation and

[34] Stipanowich, *supra* note 9, at 267–69 (explaining the scope and process of mediation).
[35] *See generally id*.
[36] Katz & Kovack, *supra* note 26, at 6.
[37] Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 KY. L.J. 855, 868 (1993) [hereinafter Stipanowich, *The Quiet Revolution Comes to Kentucky*].
[38] *Id*.

mutual betterment." [39] For our purposes, traditional mediation still has its drawbacks. Namely, it is a somewhat formalized process that requires preparation, scheduling, assistance of counsel or other advocates, and likely results in a permanent record of outcome. [40] In short, for all its usefulness in higher education, mediation is still somewhat ponderous, time consuming, and intimidating. [41] By resorting to formal mediation first, one may lose the "teaching moment" available if an issue or dispute is addressed immediately and informally.[42]

In contrast, micro-mediation is built for brevity and inclusiveness. By resolving minor issues immediately and directly, while the incident is fresh in the minds of the participants, mediators can likely intervene as quickly as possible to capture the emotional importance of the issue.[43] This is the "intangible space as the 'magic real estate' time frame between the issue and the parties' selected pathway—a time when relationships can be salvaged and discussions between the parties themselves are more open to address the issues at the heart of the dispute."[44]

The proposed framework roughly translates to:

(1) give each party an opportunity to be heard;

(2) apply advanced ADR techniques such as affect labeling and reframing;[45]

(3) provide training on listening, understanding, conduct and moral codes, social justice issues, and apology and forgiveness; and

[39] *Id*. at 870.
[40] *Id*. at 868–75.
[41] *Id*. at 873–75.
[42] *See generally id*. at 868–70.
[43] Jared B. Torre & Matthew D. Lieberman, *Putting Feelings Into Words: Affect Labeling as Implicit Emotion Regulation*, 10 EMOTION REVIEW 2, 116 (2018).
[44] Katz & Kovack, *supra* note 26, at 12.
[45] Torre & Lieberman, *supra* note 43, at 116.

(4) facilitate a peaceful and educational resolution, or failing that, provide triage and referral to the next step in the mixed-mode ADR process adopted by the institution.[46]

It is important to note that unlike traditional mediation, the outcome of micro-mediation may not result in a signed agreement, but rather an understanding (with a written record of the meeting).[47] The key here is acting quickly. To do so, a university or law school must have a predetermined intervention template and logistical competence. Using the rough strategy described above, we can break each step down as follows:

a) Give Each Party the Opportunity to Be Heard

It is indisputable that human beings need to be heard. This is especially true in the framework of race, sex, culture, and orientation (the traditionally voiceless). Indeed, science has shown the critical role of being heard when describing the interaction of groups with the "other," in the context of conflict.[48] This first step then becomes the most important. Micro-mediation is about quickly addressing an issue. It is about swiftly making a connection between disputants. This first step relies on "Contact Theory" to foster immediate connection.[49]

Contact Theory proposes that positive intergroup contact should decrease stereotypes and increase positive attitudes towards an out-group, particularly if three key conditions are met: (1) both groups have equal status in the contact environment, (2) the groups work towards a common

---

[46] *Id*.
[47] Katz & Kovack, *supra* note 26, at 32.
[48] *See* Emile G. Bruneau & Rebecca Saxe, ***The Power of Being Heard: The Benefits of "Perspective-Giving" in the Context of Intergroup Conflict***, 48 J. EXPERIMENTAL SOC. PSYCH. 855 (2012) (examining how certain marginalized and conflict weary groups responded to hearing personal stories of the "other" and how these experiences evoked empathy).
[49] *Id*.

goal, and (3) the intergroup contact is sanctioned by some authority.[50]

By using this rubric, we establish the first step of micro-mediation. To illustrate the process, it may be helpful to introduce a hypothetical example of a micro-aggression-based conflict.

Mary is a twenty-three-year-old student at a small Midwestern law school. She is of Native American ancestry and is the first of her economically-disadvantaged community to attend law school. Jim is twenty-five years old and attends the same school. Jim is Caucasian of Anglo-Saxon heritage, comes from an upper-middle-class family, and has a stellar academic and athletic resume. After studying a case involving First Nations' rights in class, Jim gathers with a small study group discussing the case. Jim casually makes several remarks, such as: "The Indians lost, they should get over it and do something to improve their communities instead of waiting for the government to do it." Mary overhears this from the group at an adjacent table, and immediately calls over to Jim and says, "Not cool, white boy." Jim responds with a laugh, "I guess not all is cool on the 'rez.'" The instructor notices the exchange and intervenes, referring Jim and Mary to the school's micro-mediation center to discuss the issue. It is important to note that this referral be exercised within twenty-four hours, preferably immediately, and reported back to the instructor when concluded. It is also important to communicate that this referral is not a punishment, but rather an opportunity for dialogue and learning. This law school uses trained student mediators from the school's ADR clinic, who staff an on-call student resolution office on campus. Jim and Mary choose to meet with the mediator immediately. Candace introduces herself as a student mediator, then asks the disputants to give a short introduction and background. Candace guides the disputants to give more detail about their

[50] *Id.*

respective origins, personal journey to law school, family, and so on. This exercise in "knowing" each other fosters "perspective taking" by learning about the other to cultivate understanding and empathy.[51] Candace then moves to the next step of the micro-mediation rubric.

b) Apply Advanced ADR Techniques Such as Affect Labeling and Reframing

Candace then caucuses with Jim and Mary separately to create a safe space in which each party can be heard without interruption or conflict. Candace employs techniques such as "affect labeling," which is the practice of "putting feelings into words."[52] This practice can help reset and regulate emotions, allowing disputants to decrease emotional responses, such as anger or fear, to allow for effective dialogue.[53] Candace practices affect labeling by actively listening to Mary explain the incident and why it was offensive while in caucus.[54] In effect, Candace repeats Mary's words back to her: "Mary, what I hear you say is that when Jim used the term 'the rez,' you took it as a put-down and a derogatory insinuation that your community is poor and sub-standard, does that sound right? And that made you feel both angry and diminished . . . ." This "reading back of perceived feelings" is the mechanism that creates autonomic responses that have been shown to produce physiological responses in the listener.[55] Similarly, Candace caucuses with Jim to understand where he is coming from and to listen to his version of events. Candace learns that Jim did not intend to be offensive, and Jim was shocked that his bad attempt at humor was offensive. Jim further relayed that he was shocked that Mary was "allowed" to denigrate his ancestry with her "white boy" remark. Candace repeats this

[51] *Id.*
[52] Torre & Lieberman, *supra* note 43, at 116.
[53] *Id*. at 117.
[54] *Id*.
[55] *See id.* at 118 (affect labeling produced decreased anger, heart rate, and reduced emotional reactivity).

back to Jim and adds, "What I'm hearing is that you found the 'white boy' remark offensive, and you also felt it unfair that Mary could use that term when a white person using a similarly derogatory term would be punished?" Notice that in both instances, Candace used active listening techniques, such as the "restate, reframe, reflect" rule.[56] "Restating" simply lets the speaker know that their message has been received by repeating it in the listeners' own words.[57] This allows the speaker and the listener to clarify the message.[58] Through this process, Candace understands the disputant's perspective and can move to the next step.

c) Provide Training on Listening, Understanding, Conduct and Moral Codes, Social Justice Issues, and Apology and Forgiveness

Candace now reconvenes Jim and Mary face-to-face. She starts by restating the perceptions and reactions to the incident to each disputant. This clearly relates each's perspective of the incident. Again, she practices affect labeling to allow each to empathetically connect with the other[59]: "Jim, what I heard Mary say is that she really felt angry at your comment about 'the rez,' and she felt it was a personal denigration of where she and her family are from. She felt insignificant and ashamed by this; can you understand that?" Jim considers this and replies, "I had no idea that Mary lived on a reservation. I don't even know where I got that term from—maybe television or something. I had no idea that it was an insult." Here, Jim experiences empathy for Mary, and perhaps better understands her perspective. Candace then restates that calling Jim a "white boy," even as a traditionally privileged class, was still an inappropriate reaction that offended Jim and further

[56] Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833, 851, 857, 868 (2004)
[57] *Id*. at 851.
[58] *See id*.
[59] *See* Torre & Lieberman, *supra* note 43, at 117.

hindered empathy and diversity learning. Candace uses this as a teaching moment and introduces Jim and Mary to the intersectional learning and micro-aggression concepts[60]—what they are, how they affect others, and how to understand their power. Candace further counsels Jim on why the intersectionality of race, culture, sex, and caste adds to the power of the micro-aggressive comments. [61] "Intersectionality" was first described by UCLA law professor Kimberle Crenshaw in her groundbreaking article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics.* [62] In essence, "[i]ntersectionality is the study of intersections between different forms of oppression or discrimination."[63] This applies here as Mary is a woman (sex) of color (race) and of Native American descent (origin/ethnicity). Micro-aggressions are described as "subtle and everyday verbal, behavioral, and environmental expressions of oppression based on the intersection of one's race and gender."[64] Candace educates both Jim and Mary on these social justice issues and helps both understand how the incident at hand fits into this construct. This experience helps Jim and Mary

---

[60] *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Marlene G. Williams & Jioni A. Lewis, *Gendered Racial Microaggressions and Depressive Symptoms Among Black Women: A Moderated Mediation Model*, 43(3) PSYCH. WOMEN Q. 368, 369 (2019) (quoting Jioni A. Lewis, Ruby Mendenhall, Stacy A. Harwood, & Margaret Browne Huntt, *Coping with Gendered Racial Microaggressions among Black Women College Students*, 17 J. AFR. AM. STUD. 51 (2013)).

[61] Williams & Lewis, *supra* note 60, at 369.

[62] Crenshaw, *supra* note 60, at 139.

[63] ANI GIORGADZE, DANIELA PRISACARIU, EIRIK RISE, EUAN PLATT, GEORGE-KONSTANTINOS CHARONIS, JOSHUA MCCORMIK, MARYAM DIN, MINA TOLU & ORLAITH HENDRON, INTERSECTIONALITY TOOLKIT 3 (Int'l LBGTQ Youth & Student Org. 2014), https://www.iglyo.com/wp-content/uploads/2015/09/Inter-Toolkit.pdf.

[64] Williams & Lewis, *supra* note 60, at 369.

reach common ground and empathize from each other's perspective. This is particularly valuable for Jim, as he was horrified to learn that his careless humor was perceived by Mary (and others) as classic micro-aggressive conduct.[65] It is precisely these minor, yet profound, incidents of inappropriate conduct that, by themselves, may not be actionable in a classic legal or even school disciplinary code sense, but could, over time, aggregate into an actionable claim. Thus, quick and effective intervention by trained dispute resolution personnel is very important. Candace also takes the opportunity to educate Jim and Mary on apology, forgiveness, and reconciliation techniques. Jim is now ready and open to learn apology methodology because he has a clearer understanding of Mary's perspective and a working understanding of how his conduct was perceived as an intersectional micro-aggression. Candace explains to Jim and Mary the transparency, remorse, and regret concepts and how they may be successfully communicated as a sincere apology.[66] Jim is now equipped to tell Mary: "I apologize for my words and conduct. I now understand why they were insensitive and hurtful, and I thank you for giving me this opportunity to learn. I feel so bad that I hurt your feelings, and I promise to do better in the future. I truly hope you can accept my apology." Candace also talks about the nature of forgiveness and offers some insights into forgiveness modalities such as therapeutic, relational, and redemptive techniques.[67] This allows Mary to respond in kind: "I accept your apology. I want you to understand why you cannot make racially and ethnically insensitive jokes, and I hope you now realize my people's history of oppression and confinement on reservations is no laughing matter. I have a great deal to think about. Perhaps we can both learn

[65] *See id.*
[66] Law 2282 Lecture Slide, Straus Institute, Pepperdine Caruso School of Law (2020).
[67] *Id*.

something; I know I did. It was just as wrong for me to respond to your insensitive remark with one of my own, and for that I'm sorry." With that, Jim and Mary are ready for the final step.

d) Facilitate a Peaceful and Educational Resolution, or Failing That, Provide Referral to the Next Step in the Mixed-Mode ADR Process Adapted by the Institution.

Now that Jim and Mary have learned each other's perspectives, experienced empathy and understanding of the other, and learned how their conduct was inappropriate, a resolution may be found. In this case, because each disputant felt heard and experienced newfound empathy and education, Jim and Mary are willing to resolve the dispute. Candace restates Jim's apology to Mary, and Mary's forgiveness of Jim. The two agree to move on, confident that a real understanding has been achieved. Candace suggests some reading and other resources (such as cited here) to Mary and Jim to further encourage understanding and inclusive learning. They return to class, with a total elapsed time of less than one hour. By contrast, had the issue not been resolved—through a lack of understanding or accommodation, refusal to participate, or safety concerns of one or more of the parties—Candace would have then stopped the mediation and referred the issue to the appropriate disciplinary or civil rights authority designated by the school. A short report is then generated by Candace and submitted to the instructor and appropriate student office for review.

3. Who Should Administer Micro-Mediation in an Institute of Higher Education?

Designing a workable micro-mediation system requires care because of student privacy and confidentiality concerns.[68] Due to differing student conduct standards,

[68] Katz & Kovack, *supra* note 26, at 9.

maturity, and expectations, I propose different models for law schools, universities, and colleges.

a) Law Schools

Because of their nature of preparing students to become officers of the court, as well as state bar codes of conduct, law schools offer a unique opportunity for micro-mediation.[69] These heightened confidentiality, ethical, and character requirements adequately protect the privacy and sensitivity of mediation.[70] I propose that student-led mediations become the norm at law schools. Many law schools have dispute resolution clinics or other applicable clinics.[71] In this absence, a special panel of student mediators may be formed and placed under the direction of a clinical director, Title IX office, ombudsman, or student disciplinary dean.[72] This does not need to be a grand undertaking; a small office with a round table, a closed door, and access to security personnel is all that is needed.[73] Most micro-mediations can be easily attended to—staffed by student volunteers on call for set periods. One to two students per shift may be sufficient at most law schools.[74] When not engaged, they can study as with any volunteer student office. Faculty, administrative directors, or the school's ADR clinic will train student volunteers.[75] This live mediation experience is valuable for building critical ADR skillsets and ought to be rewarded with academic credit or recognition.[76]

---

[69] MODEL RULES OF PRO. CONDUCT r. 3.3[5] (AM. BAR ASS'N 1983).
[70] *See* MODEL RULES OF PRO. CONDUCT preamble (AM. BAR ASS'N 1983).
[71] *See* Katz & Kovack, *supra* note 26, at 7; *see also* William C. Warters, *The History of Campus Mediation Systems: Research and Practice*, *in* CNCR-HEWLETT FOUNDATION SEED GRANT WHITE PAPERS 10, 6, 12 (Ga. State Univ. Coll. L. 1999), https://readingroom.law.gsu.edu/seedgrant/10.
[72] Warters, *supra* note 71, at 6.
[73] Katz & Kovack, *supra* note 26, at 22.
[74] *See id*.
[75] *See id.* at 11–12.
[76] *See*, *e.g.*, *id*. at 24.

b) Universities and Other Institutions of Higher Learning

Generally, university and college students do not have the same character requirements as law school students.[77] Thus, privacy and confidentiality concerns should preclude the use of volunteer student mediators. In these institutions, micro-mediations ought to be handled by traditional campus authorities such as ombudsman, faculty chairs, disciplinary deans, and Title IX officers—or local law student volunteers.[78] In many institutions of higher learning, informal peacemaking is the responsibility of the ombudsperson.[79]

Originating in the Scandinavian countries and utilized in multiple disciplines, the ombudsperson often is referred to as an ombud or ombuds and remains a high-ranking independent neutral using alternate dispute resolution approaches intertwined with ethics, coaching, shuttle diplomacy, face saving options, and the authority to make recommendations for change.[80]

The role of the ombudsman is "offering informal mediation inside the organization by bringing various people together to explore options in a structured conversation."[81] Ombudsmen protect the confidentiality of those they serve.[82]

---

[77] *Cf. id*. at 6 ("Acceptable behaviors are published in the student handbooks . . . . [College] handbooks regarding civility and appropriate behavior provide student focused details about due process style options to respond to misconduct reports or grade appeals, but often exclude other alternatives or options to address disputes regarding faculty or administration other than appeals to the appropriate chain of command.").
[78] *See* Warters, *supra* note 71, at 8, 14–15.
[79] *Id*. at 8.
[80] Katz & Kovack, *supra* note 26, at 8; *see also* THE SAGE GLOSSARY OF THE SOCIAL AND BEHAVIORAL SCIENCES (Larry E. Sullivan ed., 2009).
[81] MARY ROWE, TIMOTHY HEDEEN, & JENNIFER SCHNEIDER, WHAT DO ORGANIZATIONAL OMBUDS DO? AND NOT DO? 4 (Int'l Ombudsman Ass'n 2020), https://mitsloan.mit.edu/shared/ods/documents/?PublicationDocumentID=7572.
[82] *Id*. at 1.

They aren't necessarily tasked with dispute resolution so much as guiding dialogue, being a sounding board, and then reporting issues and patterns of conduct to managers.[83] They, in effect, work for systemic change.[84] This position may be flexible to include direct student dispute resolution.[85] Ombudsmen don't usually mediate directly, but with adequate training there is no reason they can't. Faculty may also be trained to handle disputes; in fact, there are some examples of the use of mediation and mediation training in facilitating faculty relations.[86] The issue here is ensuring that there is adequate coverage and fitting time into faculty's busy schedule.[87] Though the idea of training faculty is not new, having been described by Dr. Warters in 1999, I recommend that faculty act as contingency options should others be unavailable.[88]

III. The Pros and Cons of Micro-Mediation to Handle Disputes in Institutes of Higher Education—Fairness and Access to Justice Within an Intersectional Framework

According to Dr. William C. Warters, "conflict resolution practices are a type of 'due process' to mitigate the risks involved with potential litigation, thus, the need to

[83] *Id*. at 2–3.
[84] *Id*. at 5.
[85] *Id*. at 3.
[86] *See* Loraleigh Keashley & Joel H. Neuman, *Faculty Experiences with Bullying in Higher Education Causes, Consequences, and Management*, 32 ADMIN. THEORY & PRAXIS 48, 62-63 (2010); *see also* Raymond R. Leal, *From Collegiality to Confrontation: Faculty-to-Faculty Conflicts*, 92 NEW DIRECTIONS FOR HIGHER EDUC. 19 (1995).
[87] Colleen Flaherty, *So Much to Do, So Little Time*, INSIDE HIGHER ED (Apr. 9, 2014), https://www.insidehighered.com/news/2014/04/09/research-shows-professors-work-long-hours-and-spend-much-day-meetings ("'It is harder to count . . . service and administrative duties [of professors] . . . and it's hard to quantify the impact of these activities or the time spent . . . . [H]ow professors spend their time has major implications for faculty, students and their institutions . . . especially as Boise State has recently adopted a policy that professors should spend 60 percent of their time teaching.").
[88] Warters, *supra* note 71, at 15.

expand ADR to include the entire university population from administration to staff, faculty and students." [89] This includes "pracademics," who are faculty that practice ADR within their institutions. [90] Many campus ADR programs allow for mixed-mode hybrid programs or may include "conflict coaching, restorative practices, and the design of conflict management systems." [91] To meet the needs of evolving and diverse campus populations, it is critical that campus ADR programs adapt to prevailing social and restorative trends. [92] "Stressing social identity and cultural diversity, Schrage & Giacomini (2009) note that traditional structural responses to misconduct predetermine punitive outcomes." [93] In other words, ADR programs that are traditionally formal or inflexible evoke negative outcomes when diverse or marginalized persons "oppressed by the rigidity of a one-size-fits-all perspective" are subject to them. [94] Social justice and inclusiveness concerns are now at the forefront of campus, and student, concerns.

Mediation is the opportunity for parties to engage in the informal resolution of disputes, guided by skilled neutrals and the disputants' own needs rather than the strict rules of more formal approaches to dispute resolution. [95] However, there is no shortage of critics in higher education who have serious concerns with campus ADR schemes

---

[89] Katz & Kovack, *supra* note 26, at 10 (quoting Niel Katz & Linda Flynn, *Understanding Conflict Management Systems and Strategies in the Workplace: A Pilot Study*, *in* 30 CONFLICT RESOL. Q. 4, 393-410 (2013)). *See also* Warters, *supra* note 71, at 9–11.

[90] Maria Volpe & David Chandler, *Resolving Conflicts in Institutions of Higher Education: Challenges for Pracademics*, CNCR-HEWLETT FOUNDATION SEED GRANT WHITE PAPERS, 8, 1 (Ga. State Univ. Coll. L. 1999), https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=1007&context=seedgrant.

[91] Katz & Kovack, *supra* note 26, at 13.

[92] SCHRAGE & GIACOMINI, *supra* note 8.

[93] Katz & Kovack, *supra* note 26, at 13.

[94] *Id.*

[95] Robert A. Baruch Bush & Joseph P. Fogler, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO STATE J. ON DISP. RESOL. 1, 7 (2012).

acting as a wall separating access to justice rather than a shield for justice.[96] Many of these concerns are legitimate. For some, the lack of formal rules in mediation could allow mediators themselves to "steer and pressure parties into agreements that were actually unfair to them—whether or not the mediators had intended that unfairness."[97] The risk of unfairness is greatest when serving the vulnerable and marginalized identities, minorities, and those of diverse orientation, especially women of color—often leading to student depression and disenfranchisement.[98] "Critics have argued from early on that attempts to offer a fair and neutral process in private settings[—]without the protection of public scrutiny and the ability to appeal or enforce agreements[—]can reinforce power imbalances and steer disenfranchised populations further away from rights[,] protection[,] and enforcement."[99]

Moreover, campus and student mediators may represent the very class of "haves" themselves—that is, Caucasian, affluent, and educated—and represent the very privilege that is the antithesis of social justice concerns.[100] The problem is obvious—minority group members are underrepresented in campus ADR systems and ADR

---

[96] *Id*. at 1.
[97] *Id*. *See also* RICHARD L. ABEL, *The Contradictions of Informal Justice,* 1 THE POLITICS OF INFORMAL JUSTICE 267, 20 (1982); Roman Tomasic, MEDIATION AS AN ALTERNATIVE TO ADJUDICATION: RHETORIC AND REALITY IN THE NEIGHBORHOOD JUSTICE MOVEMENT, *in* NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 215, 225–28 (Roman Tomasic & Malcolm M. Feeley, eds. 1982).
[98] Williams & Lewis, *supra* note 60, at 375–76.
[99] Leah Wing, WHITHER NEUTRALITY? MEDIATION IN THE 21ST CENTURY, RE-CENTERING CULTURE AND KNOWLEDGE IN CONFLICT RESOLUTION PRACTICE 93, 96 (Mary A. Trujillo, S.Y. Bowland, Linda J. Myers, Phillip M. Richards, Beth Roy eds., 2008). *See also* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545 (1991); Christine B. Harrington, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court*, 133 CONTRIBUTIONS IN POL. SCI. at 96 (Bernard K. Johnpoll ed. 1985).
[100] Wing, *supra* note 99, at 97–98.

systems as a whole.[101] Maria A. Volpe's study of over 100 persons from various minority groups, examining barriers of entry to the field, reported that gaining access to the ADR field was like trying to enter a "gated community."[102] Because many mediators currently in the field do not represent a racially or sex-based equity, "it will inevitably be harder for them even to understand fully, much less give adequate weight to the accounts of parties with minority characteristics.[103] Thus, the likely result is injustice

[101] Maria R. Volpe, Robert A. Baruch Bush, Gene A. Johnson, Christopher M. Kwok, Janice Tudy-Jackson & Roberto Velez, *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field,* 35 FORDHAM URB. L. J. 119, 144 (2008).

[102] *Id.* at 139; *see also* David A. Hoffman & Lamont E. Stallworth, *Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, 63 DISP. RESOL. J. 37, 37–41 (2008).

[103] Barush, *supra* note 95, at 26–27. *See also* Wing, *supra* note 99 (presenting a strong argument regarding the effect of mediators' own class and cultural biases on their ability to understand parties of different classes and cultures); Gunning, *supra* note 17 (presenting an extensive discussion of the effects of cultural diversity on fairness in the mediation process). A research study conducted several years ago by a multi-racial team of researchers strongly suggested that minority group members are underrepresented in the mediation field. *See* Maria Volpe, et al., *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field*, 35 FORDHAM URB. L.J. 119 (2008). The study interviewed nearly 100 individuals from various minority groups regarding their experiences as mediators or aspiring mediators, and the barriers to their participation and advancement in the field. *Id*. at 139. The large majority reported that gaining access to the field was extremely difficult—it was like a "gated community." *Id*. Some of the greatest barriers were those posed by the "professionalization" of the field, especially the requirements of substantive knowledge expertise that could only be satisfied at substantial investments of time and funds. *Id*. at 136–37. Other factors also constituted significant barriers, including the implicit requirement of pro-bono or volunteer service as a precursor to paid work and the difficulty of gaining access to the networks of working mediators who might serve as mentors. *Id*. at 138–41. The impact of these and other barriers to potential minority mediators, itself an injustice, multiplies the likelihood of injustice to minority parties in mediation. As discussed in this article, mediators face difficulty in ensuring justice in the room by both accountability practices and power-balancing when the mediators themselves have cultural backgrounds and biases that obstruct their full understanding of and attunement to the discourse patterns of minority

regardless of mediator intent. The solution is obvious: Any selection, training, and education of student or campus mediators practicing micro-mediation must be inclusive. I propose that, in the case of law schools, every opportunity must be made to recruit and train student mediators from the diverse student body. In the case of universities and colleges, efforts should be made to collaborate with inclusive social justice and civil rights organizations to help diversify this initiative.

IV. Micro-Mediation's Place Within Mixed-Mode ADR Systems in Higher Education

In today's vibrant and complex world of alternative dispute resolution, the term "mixed-mode" can mean many things.[104] The term likely originated with the rise of hybrid systems such as "med-arb," "arb-med," and "arb-med-arb," as well as with the resulting "lane shifting" of neutrals engaging in adjudication, settlement negotiation, mediation, and shuttle diplomacy—sometimes within the same case.[105] The time has come for the term to encompass not only formalized approaches to hybrid models but also ADR schemes and systems employing a linear menu of ADR modalities. Some of the pioneers in mixed-modality systems

disputants. The likely result is injustice in the room, despite the good intentions of the mediators involved. Such injustice would likely be lessened if more mediators from minority groups were available to serve in cases involving minority parties as the problem of biased understanding would be lessened if not eliminated. However, the lack of practicing minority mediators, itself an injustice, makes it harder to guard against injustice to minority parties in actual mediations. Some scholars have noted this problem specifically in relation to discrimination claims in workplace disputes where the use of mediation has increased greatly, but not use of minorities as mediators. *See*, e.g., David A. Hoffman & Lamont E. Stallworth, *Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, 63 DISP. RESOL. J. 37, 37–39 (2008).

[104] Thomas J. Stipanowich & Veronique Fraser, *The International Task Force On Mixed Mode Dispute Resolution: Exploring The Interplay Between Mediation, Evaluation And Arbitration In Commercial Cases*, 40 FORDHAM INT'L L. J. 839, 843 (2017).

[105] Stipanowich, *supra* note 9, at 267–69.

in higher education are Schrage, Thompson, and Giacomini, whose "'Spectrum of Resolution Continuum Model' offers flexible options for disputants seeking solutions."[106]

A. The Spectrum of Resolution Continuum Model

Most commonly, higher education disciplinary models give students notice of an infraction or complaint in writing, whom are then "informed of the reported infraction in what is to be a timely fashion and are typically required to attend an individual meeting to share their side of the story, review their rights, and consider their resolution options."[107] This is a unilateral system with one-on-one meetings.[108] In this type of system, the student either accepts responsibility and ensuing consequences or requests some sort of formal hearing or resolution option.[109] Many school's programs "offer traditional mediation and facilitation interventions, yet many expand their efforts to include conflict coaching, restorative practices, and the design of conflict management systems."[110]

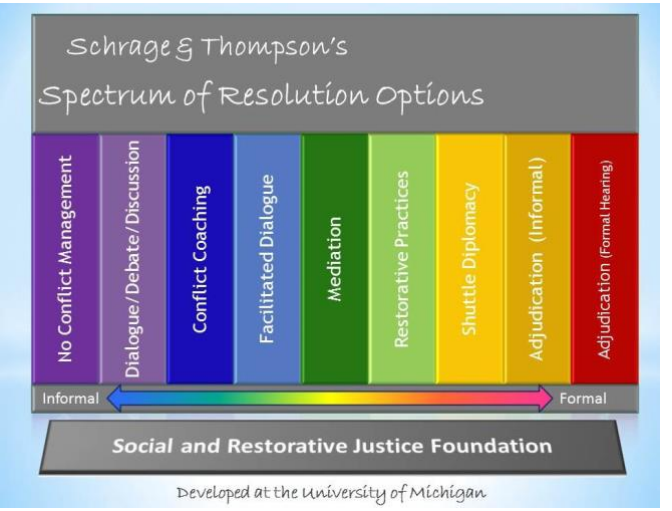
The Spectrum Model offers a bilateral approach with a flexible continuum of informal and formal dispute resolution options involving both or all parties to the issue.[111] This continuum, or spectrum, consists of a sliding scale with formal mediation marking the mid-point: one end is a less structured, informal set of options where the stakes are lower for both parties, while the other end escalates to "highly structured formal legal processes where often there is one winner and one loser determined by an authority outside the

---

[106] Katz & Kovack, *supra* note 26, at 13.
[107] Nancy G. Giacomini, INCORPORATING PRINCIPALS OF CONFLICT RESOLUTION AND SOCIAL JUSTICE INTO FORMAL STUDENT CONDUCT CODE PATHWAYS, REFRAMING CAMPUS CONFLICT: STUDENT CONDUCT PRACTICE THROUGH A SOCIAL JUSTICE LENS 181, 184 (Jennifer Meyer Schrage, ed., 2009).
[108] *Id.*
[109] *Id*.
[110] Katz & Kovack, *supra* note 26, at 13.
[111] *Id*. at 12.

dispute." [112] In their article titled *Higher Education's Current State of Alternative Dispute Resolution Services for Students*, Katz and Kovak explain it like this: imagine a couple experiencing an issue threatening their relationship. [113] They discuss how to approach the issue—do they try to work out the issues themselves through dialogue? Or should they seek help in the form of therapy or guided reconciliation? Or do they involve attorneys straightaway?[114] The idea is to take advantage of what Schrage & Giacomini described as "the 'magic real estate' or the lull between issue, thoughts, recognition, and the disputants' choice of constructive actions forward." [115] In their book *Reframing Campus Conflict: Student Conduct Practice Through a Social Justice Lens*, Schrage and Thompson describe their model as an "intentional, deliberate and thoughtful educational approach aimed at increasing access and improving student learning . . . to return to individualized incident management focused on learning, student development, and the unique needs of the involved parties."[116] Perhaps it's best to visualize the model with this graphic from Jennifer Meyer Schrage's personal website[117]:

[112] *Id*. at 13.
[113] *Id*.
[114] *See id*.
[115] *Id.* at 13.
[116] JENNIFER M. SCHRAGE & NANCY G. GIACOMINI, *Foreword to the First Edition* by EDWARD STONER, REFRAMING CAMPUS CONFLICT: STUDENT CONDUCT PRACTICE THROUGH A SOCIAL JUSTICE LENS 67 (1st ed. 2009).
[117] Jennifer Schrage, *Spectrum Model*, JENNIFER MEYER SCHRAGE, J.D., https://sites.google.com/site/jennifermeyerschrage/spectrum-model (last visited Sept. 20, 2021).



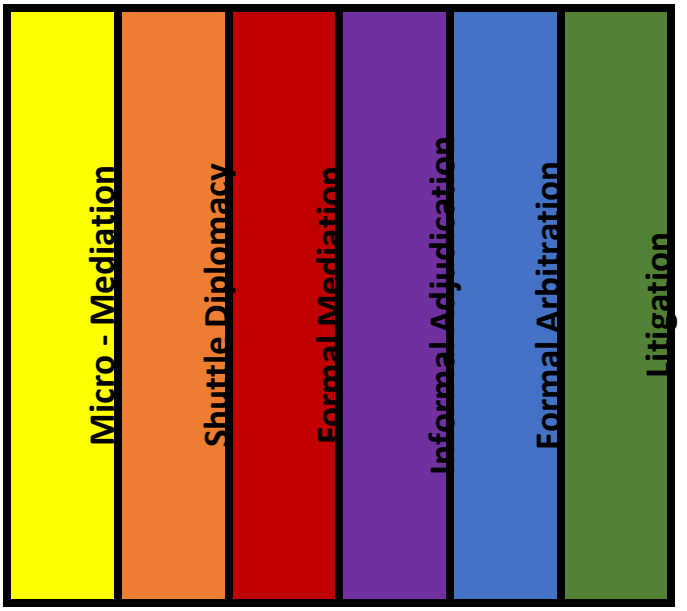
B. Fitting Micro-Mediation into a Mixed-Mode Structure

Now we can see the Spectrum Model as a linear "ladder" of escalating ADR options. The beauty of this system is its flexibility. There is no set rule as to what steps go where, or where a particular intervention must begin. Indeed, a more serious conduct infraction or dispute may well best be served entering the ladder in the more formal range. As mentioned before, mediation marks the mid-point, or the separation between informal and formal response.[118] "As one moves along the Spectrum Model options, the focus shifts toward both conflict resolution and risk management. Arbitration becomes an option at the more formal level of the Spectrum."[119]

Micro-mediation is meant to occupy the most informal rung on the ADR ladder. Thus, micro-mediation should occupy the second slot on the Spectrum Model—the

[118] Giacomini, *supra* note 107, at 84.
[119] Katz & Kovack, *supra* note 26, at 19

first being no intervention at all. In fact, it could be said that micro-mediation consolidates steps two to four (dialogue, conflict coaching, facilitative dialogue) but within a mediated construct. In other words, it is a less formalized, abbreviated, and ad hoc version of mediation—hence the term micro-mediation. Employing a neutral who facilitates micro-mediation and combines dialogue with conflict coaching, education, and mediation can resolve issues quickly. If unsuccessful, the micro-mediator acts as a triage and escalates the dispute to the appropriate level along the Spectrum, the goal being either quick resolution of the issue or escalating just as swiftly in order to mitigate risk. The overarching idea is simple: micro-mediation should be used to ensure that low-level micro-aggressions, borderline harassment, and other campus conduct threatening to violate student codes be recognized and attended to quickly, thereby reducing the likelihood of such conduct aggregating to actionable levels. The new Spectrum Model can then be visualized as shown below:



V. Liability, Risk Mitigation, and Policy Considerations at Institutions of Higher Learning

A three-year study by United Educators revealed that 23% of sexual assault claims at colleges and universities resulted in no investigation or adjudication by campus authorities.[120] The same study showed that 28% of complaints were ultimately litigated.[121] Of these litigated complaints, the average settlement was in excess of $350,000 with verdicts and settlements exceeding $1 million

[120] ALYSSA KEEHAN, EMILY CAPUTO, HILLARY PETTEGREW & MELANIE BENNETT, CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS, UNITED EDUCATORS 11 (2015), http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf.
[121] *Id.* at 14 n.7 ("The term 'litigation' includes lawsuits, complaints filed with [the Office of Civil Rights (OCR)], and demand letters that may never result in a lawsuit or OCR complaint.").

and sometimes much more.[122] This study encompassed only Title IX campus sexual assault claims and not harassment, bullying, cyberstalking, racial or gender based micro-aggressions, or other actionable conduct.[123] Plaintiffs often file accompanying civil claims in federal court alleging "due process violations during Title IX proceedings at public institutions." [124] Moreover, some students have filed "erroneous outcome" suits alleging bias in the institution's proceedings.[125] According to Peter Lake, director of Stetson University's Center for Excellence in Higher Education Law and Policy, high litigation and settlement costs have become a "lose-lose" proposition for institutions.[126] "'If you don't deal with sexual violence, you're going to get sued. If you deal with sexual violence, you're going to be sued,' Lake said."[127] This has prompted some institutions to pass on these costs to students.[128]

Title IX and Title VII both apply to academic institutions, as they are both places of employment and learning.[129] "Institutional compliance with both statutes has

---

[122] *New Canopy Programs by United Educators Offers Strategic Approach to Harassment*, UNITED EDUCATORS: CANOPY PROGRAMS (May 21, 2017), https://www.canopyprograms.org/newsroom/news-releases/canopy-programs-offers-strategic-approach-to-harassment/.
[123] *Id*.
[124] Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED (Oct. 3, 2019), https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings/.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] Tyler Kingkade, *University of Maryland Passes Title IX Costs on to Students*, BUZZFEED NEWS (Oct. 11, 2016, 12:12 PM) available at https://www.buzzfeednews.com/article/tylerkingkade/university-of-maryland-title-ix-fee/.
[129] NAT'L ACAD. SCIS., ENG'G, & MED., SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE (Paula Johnson, Sheila Widnall, & Frazier Benya eds. 2018) [hereinafter SEXUAL HARASSMENT], https://www.ncbi.nlm.nih.gov/books/NBK519453/ (last visited Sept. 20, 2021), *see also* Muro v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.,

taken the form of a widespread adoption of policies and procedures to deal with sexual harassment complaints (as a form of sex discrimination) and to inform employees and students of these policies and procedures."[130] While Title VII does not require compliance, Title IX specifically requires institutional compliance by designating an "employee [Title IX officer] to coordinate compliance, adoption, and publication of a grievance procedure, and widespread notification that it does not discriminate."[131]

A. The Legal Requirements of Title IX and Title VII

Liability under Title IX requires an educational institution to have been "deliberately indifferent" with "actual knowledge" of harassment.[132] *Davis v. Monroe County Board of Education* established the standard for schools as being "clearly unreasonable in light of the circumstances."[133] By contrast, claims under Title VII require a "hostile work environment." Here, the liability standard is whether the institution exercised "reasonable care" by providing written policy, trainings, and a grievance procedure, and whether the aggrieved party made use of these procedures.[134] In other words, a successful Title IX or

---

No. 19-10812 § "R" (5) (E.D. La. Nov. 7, 2019) ("As both parties recognize, courts analyze sex discrimination cases under Title IX by looking to the body of law developed under Title VII."). *See*, e.g., Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 404 (5th Cir. 1996) ("In reviewing claims of sexual discrimination brought under Title IX, whether by students or employees, courts have generally adopted the same legal standards that are applied to such claims under Title VII.").

[130] *Id.*

[131] *Id.*; *see also* 34 C.F.R. § 106.8–9 (2012).

[132] SEXUAL HARASSMENT, *supra* note 129.

[133] 526 U.S. 629, 649 (1999) (explaining the court's use of the phrase "clearly unreasonable" is in reference to how a school board responds to allegations of sexual harassment or abuse).

[134] SEXUAL HARASSMENT, *supra* note 129, at 97. ("In 1998, two Supreme Court cases, [*Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)] and [*Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)], clarified the nature of legal liability in Title VII sexual harassment cases. An employer is vicariously (or automatically) liable for a supervisor's sexual harassment if the

Title VII claim pivots on whether the school acted early to acknowledge, investigate, and respond to a report of inappropriate conduct. Both the deliberately indifferent and reasonable care standards are squarely addressed by implementing a Spectrum Model of campus dispute resolution incorporating micro-mediation.[135] By swiftly intervening in low-level disputes, schools fulfil their burden under both the deliberate indifference and reasonable care standards.[136]

B. How Law Schools and Universities are Dealing with Title IX Compliance

---

harassed employee suffered a tangible harm such as a demotion, firing, failure to promote, or, in the academic context, such harms as exclusion from a research site or lab; restrictions from using data; or withdrawal of promised fellowship support (examples of outcomes of quid pro quo harassment). Strict liability means that a court need only find that the harassment occurred with a tangible harm to the harassed person's working conditions (i.e., there is no separate investigation into whether the employing college or university was negligent). Employers are liable for a hostile work environment resulting from sexual harassment only if they were negligent, however—that is, if they knew or should have known about the harassment and failed to stop it. The *Ellerth* and *Faragher* cases provided a two-pronged affirmative defense for organizations accused of negligently allowing the hostile work environment variety of sexual harassment to go on: if (1) the organization exercised reasonable care to prevent and correct workplace harassment (by having a written policy, trainings, and a grievance procedure) and (2) the harassed employee failed to take advantage of those mechanisms, the employer can limit or avoid liability. Organizations had already begun to adopt these personnel practices in the 1970s and 1980s, and by the time of these rulings in 1998, anti-harassment policies and grievance procedures were already widely used."). SEXUAL HARASSMENT, *supra* note 129, at 97; *see also* FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 21 (2009); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-1999-2, Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors (TITLE 7) OF THE CIVIL RIGHTS ACT (1999).

[135] Adam Laytham, *Mediation and Misconduct: A Better Way to Resolve Title IX Disputes*, 2020 J. DISP. RESOL. 191, 191–206.

[136] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Emily Tulloch & Jackie G. Wernz, *Why Your Next OCR Title IX Complaint May Feel Like a Lawsuit*, (May 20, 2020), https://www.jdsupra.com/legalnews/why-your-next-ocr-title-ix-complaint-10560/ (last visited Sept. 20, 2021).

Under the revised final Title IX rules the U.S. Department of Education issued in May 2020, a school must "initiate its grievance process whenever a formal complaint of sexual harassment is filed by a complainant or Title IX Coordinator."[137] "A formal complaint is a document signed by a complainant or a Title IX Coordinator alleging sexual harassment against a respondent concerning conduct within the school's education program or activity and requesting initiation of the school's grievance procedures."[138] Schools, however, have discretion in determining whether to mandate employees to report allegations of sexual discrimination to the Title IX office, or whether to designate confidential resources without a reporting trigger.[139] Because higher learning institutions have extremely broad powers that render these institutions "quasi-governments" with their own "private legal systems," a law school, college , or university often operates its "own police or security force; runs internal grievance and dispute resolution procedures; dispenses punishments and sanctions; manages public relations and information services; and employs in-house counsel staffs as well as administrators to oversee this legal order."[140] "The college or university is likely also the health care and psychological support services provider for students and perhaps even employees."[141] Inaction, or perceived inaction, likely contributes to the low instances of reporting.[142] Likewise, the fear of campus authorities

---

[137] Jemi Lucey, Cameryn Hinton & Irene Hsieh, *Sexual Violence and the New Title IX Rules: Where Do We Go From Here?*, N.J. L.J. (Aug. 26, 2020), https://www.law.com/njlawjournal/2020/08/26/sexual-violence-and-the-new-title-ix-rules-where-do-we-go-from-here/; *see also* Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance, 34 C.F.R. § 106 (2020).
[138] *Id*.
[139] *Id.*
[140] SEXUAL HARASSMENT, *supra* note 129, at 99.
[141] *Id*.
[142] KEEHAN, CAPUTO, PETTEGREW & BENNETT, *supra* note 120; *see also Harassment on College Campuses*, HOLLABACK,

overreacting also likely contributes to low reporting, with fear of retaliation, public shame, or overly harsh adjudication (expulsion is frequently a sanction) as reasons students do not file formal complaints.[143] Institutions frequently either discourage pursuit of a complaint, downplay the complaint, defer to local law enforcement (in violation of Title IX), or simply ignore the complaint.[144]

The key concepts here are that campus grievance processes are often arcane, intimidating, and overly formalistic. By streamlining the process and designing and implementing informal steps to the larger grievance process by utilizing a Spectrum Model as described above and incorporating micro-mediation as its first step, institutions of higher education may be able to increase reporting while simultaneously decreasing the number of cases that require or request formal Title IX complaints. Administering these steps could save law schools and universities millions of dollars in formal adjudication costs, settlements, and verdicts, while helping control the public perception by demonstrating that schools are, in fact, dealing with this important issue. While institutional risk mitigation is certainly a positive outcome, the true value is in providing students, faculty, and staff a safe, caring, and equitable environment in which to learn and work, as well as swift access to a system designed to ensure that they are heard.

VI. Proposing a Micro-Mediation Construct in the Context of a Mixed-Mode ADR Model Applicable to Institutions of Higher Education

Law Schools and other institutions of higher learning employ a variety of dispute resolution and

https://www.ihollaback.org/harassment-on-college-campuses/ (last visited Sept. 20, 2021) (only 17% of students reported sexual harassment to a person of authority on campus.).

[143] KEEHAN, CAPUTO, PETTEGREW & BENNETT, *supra* note 120.

[144] *Id.* (allegations that a staff member told the victim that the perpetrator had been "punished enough," that the process would be "grueling," etc.).

disciplinary modalities. The University of Michigan's student ADR program has long been admired as innovative.

According to The University of Michigan Office of Student Conflict Resolution's Director, Dr. Erik Wessel (2015), their extensive staff includes an Associate Director, 2 full-time program managers, a half-time program manager for sexual misconduct, a full-time program specialist, a records specialist, an office supervisor, and 10 undergraduate student facilitators even producing annual reports available on their website (https://oscr.unmich.edu).[145]

It is also undeniable that many institutions simply do not have the resources to facilitate such a program. The following structure is suggested as a minimum working construct to employ micro-mediation:

For Law Schools:

1. Clinical Director/Disciplinary Dean/Title IX Officer oversees the program, provides education and training, keeps records, and reports to the executive; and
2. Volunteer student mediators handle the disputes, recommend escalation when necessary, and write reports submitted to director; and
3. Title IX Office/Office for Student Life are tasked with producing and distributing materials and campus messaging announcing the availability of services.[146]

For Universities and Other Institutions of Higher Learning:

1. Disciplinary Dean/Title IX Officer oversees the program, provides education and training, keeps records, and reports to the executive; and

[145] Katz & Kovack, *supra* note 26, at 23.

[146] Perhaps law schools pursuing such a route could create a certification with: JAMS, AAA, CiArb, IMI, or CEDR to recognize such applicable training to incentivize students to serve in this capacity.

2. Ombudsperson/Title IX Officer/Faculty Chair handle the disputes, recommend escalation when necessary, and write reports to the director (outside ADR professionals may be substituted); and
3. Title IX Office/Dean of Student Life produces and distributes materials and campus messaging announcing the availability of services.

As discussed earlier in this paper, space to house such a program need not be substantial.[147] All that is required is privacy, a table and chairs, and access to security. Thus, schools can keep budgets low with minimal overhead, which allows funding to be used for a qualified ADR trained director and marketing efforts. As with any venture, a better mousetrap means nothing if you cannot get the message out and students do not utilize the services (unless they are directly referred by campus authority). It is worth noting that law schools and universities with well-developed ADR clinics and programs should assist other institutions of higher learning by providing expertise, consultation, education, and training to assist creating new student ADR centers. One innovator in the ADR outreach community is The Straus Institute at the Pepperdine Caruso School of Law in Malibu, California. Distinguished Straus professors such as Dr. Sukhsimranjit Singh[148] and Thomas Stipanowich[149]

---

[147] *See supra* Section II(B)(3)(a).

[148] *Faculty-Research*, *Sukhsimranjit Singh*, PEPPERDINE CARUSO SCHOOL OF LAW, https://law.pepperdine.edu/straus/about/faculty/ (last visited Sept. 20, 2021). Professor Singh is the Judge Danny Weinstein Managing Director and Associate Professor of Law and Practice for the The Straus Institute for Dispute Resolution at Pepperdine University Caruso School of Law. Prof. Singh is a distinguished international mediator, author, and speaker.

[149] *Faculty-Research*, *Thomas J. Stipanowich*, PEPPERDINE CARUSO SCHOOL OF LAW, https://law.pepperdine.edu/faculty-research/thomas-stipanowich/ (last visited Sept. 10, 2021).

> Thomas J. Stipanowich is a William H. Webster Chair in Dispute Resolution and professor of law at Pepperdine University, as well as associate dean of the Straus Institute for Dispute Resolution (ranked number one

have created numerous programs designed to promote dispute resolution practices and develop educational training initiatives in schools and other institutions. Professor James Coben at Mitchell-Hamline School of Law, located in St. Paul, Minnesota, has also written extensively on the subject of ADR clinics and provides "a variety of innovative alternative dispute resolution clinical opportunities for law students."[150] It is essential that law schools and others who successfully create student ADR programs implementing the ideas proposed and described above also educate and train other academic professionals, students, and institutions about the benefits of alternative dispute resolution in higher education.

VII. Conclusion

Professor James Coben said that "conflict, if channeled correctly, allows for more ideas to enter the sphere of learning."[151] The art of channeling conflict to become an agent for learning is through the creation and implementation of well structured, mixed-mode ADR systems at law schools and institutes of higher education. By using schemes such as the Spectrum of Resolution Model Continuum, and by implementing the proposed micro-mediation construct as the first step in that continuum,

---

among academic dispute resolution programs in thirteen of the last fourteen years by *U.S. News & World Report*), where he teaches courses in negotiation theory and practice, mediation, arbitration practice and advocacy, international commercial arbitration, and international dispute resolution. He has also taught contracts, commercial law, remedies, Anglo-American legal history, and property. He is a leading scholar, speaker, and trainer on conflict resolution topics, as well as an experienced arbitrator and mediator.

[150] *Faculty, Staff, and Administration*, *James Coben*, MITCHELL HAMLINE SCHOOL OF LAW, https://mitchellhamline.edu/biographies/person/james-coben/ (last visited Sept. 10, 2021) ("Professor James Coben, a senior fellow in Mitchell Hamline's Dispute Resolution Institute, which he directed from 2000–2009, teaches civil procedure, mediation, negotiation, and theories of conflict."

[151] Katz & Kovack *supra* note 26, at 6.

institutions of higher learning may mitigate risk, increase student and faculty retention, and most importantly, better serve students.