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Let Us Reason Together: The Role of Process in Effective Mediation*

By the Hon. Howard W. Cummins, Ph.D.**

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I. INTRODUCTION: COLLABORATION VS. PARALYSIS

A. *Innovation Overcomes Paralysis*

2012 was the year collaboration and consensus lost their battle to paralysis. That was clearly the case with the Congress of the United States and, many would argue, any number of other areas of our public life. There is a powerful antidote. It is offered to us by Julia M. Wondolleck and Steven Lewis Yaffee in their recent volume, *Making Collaboration Work*. They remind us that

innovative collaborative partnerships and conflict management approaches have sprung up to overcome this state of paralysis. In essence, collaborative processes become *ad hoc* boundary-spanning mechanisms that foster an integration of disparate interests, values, and bodies of information while promoting trust and building relationships.¹

* In 2007 the author, as an Administrative Law Judge, drafted a program for adding a mediation component to the procedures of the Administrative Hearings Division of the District of Columbia's Department of Employment Services (the District's workers' compensation program). The program is detailed in *From Conflict to Conflict Resolution: Establishing ALJ Driven Mediation Programs in Workers' Compensation Cases*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 391 (2010). It was also the subject of a presentation on mediation process planning and design presented at *En Banc in New Orleans* NAALJ/FALJC conference, New Orleans, September 2012. The presentation focused on the importance of and "how" of process planning and design needed to insure the successful introduction of mediation programs in administrative systems.

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¹ JULIA M. WONDOLLECK & STEVEN LEWIS YAFFEE, *MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN RESOURCE MANAGEMENT* 7 (2000).

One of the most powerful collaborative tools available to the hearty souls who challenge paralysis and gridlock is Alternative Dispute Resolution (ADR).² The primary processes ADR offers parties in conflict are mediation, early neutral evaluation (ENE), arbitration, and settlement conferences. Of these, mediation is the flagship. That is arguably the case as it alone allows warring parties to fashion their own settlement. It is a hard road, but it can be done if the mediation process is planned in such a manner that the parties are not led, but offered time tested stepping stones they can traverse together. This is the case no matter how well meaning and expert the arbitrator, the neutral evaluator, or the settlement conference leader: a third party is no substitute for combatants working together toward their own solution with the guidance and calming influence of the mediator.

But, the process must be planned and implemented with great care. It cannot be assumed because mediation has become so prevalent, has offered many positive results, and is the most talked about new method on the block that all one needs do is find a mediator and get down to the business of collaborating—there has to be something of substance behind the curtain and that is *process design*, the subject of this paper. To begin, let us consider the overarching category of collaborative justice.

B. Collaborative Justice, ADR, and Mediation

One of the latest tests of collaboration can be found in the experience of the *Alternate Dispute Resolution Pilot Project* (the “*Project*”) carried out by the Virginia Workers’ Compensation Commission.³ The *Project’s* announced purpose was “to ascertain

² Some prefer to use the term “appropriate.” At the website for Oregon’s *Appropriate Dispute Resolution Center*, one finds the following quote: “Appropriate or alternative? ADR commonly stands for ‘alternative dispute resolution,’ but here at Oregon we use the term ‘appropriate dispute resolution.’ The word ‘alternative’ typically means ‘alternative to litigation’ and envisions a set of practices that exist outside the traditional legal system.” See *Appropriate Dispute Resolution Center*, UNIV. OF OREGON SCHOOL OF LAW, <http://adr.uoregon.edu/> (last visited Mar. 25, 2013).

³ To download a pdf file of the Project’s “Executive Summary,” type the following address into your browser’s address bar: <http://www.workcomp.virginia.gov/vwc-portlet-cm-contentmanagement/content/f4>

the need for ADR to more efficiently assist parties in the resolution of claims and to expedite the processing of claims which need to be resolved by a hearing.”⁴ The results of the *Project* were enthusiastically adopted by the full Commission and are in the process of being implemented.

The *Project* was carried out using a format referred to by the Commission as “*Issue Facilitation*.” The Commission describes *Issue Facilitation* as follows:

Issue Facilitation may be conducted through *ex parte* communications if both parties agree. If both parties do not agree, *Issue Facilitation* will occur through a joint telephone conference call. Communications exchanged during *Issue Facilitation* will not be shared with the Deputy Commissioner assigned to hear the case, with the Full Commission, or with other Commission employees who are not working on the ADR Pilot Project.

If *Issue Facilitation* is unsuccessful in resolving the dispute in a case, the parties may participate in *Issue Mediation* with Deputy Commissioner Deborah Wood Blevins. *Issue Mediation* is a confidential, voluntary process in which the mediator assists the parties by identifying issues, clarifying misunderstandings, exploring options, and reaching agreements. *Issue Mediation* may occur in person or by telephone, and may be requested by either party.⁵

One might ask, why this burgeoning interest in collaboration, ADR, and mediation? Beyond saving time, money, and sanity, mediation makes it possible to reach across barriers that paralyze public discussion and consensus building. It does so through the use

a54003-7b8a-11e2-ada4-8706ca0e6a4a/ADR_Project_Summary_Report_public.doc. Once at the VWC site, click on the first ***Special Notice***.

⁴ *Notice of Alternative Dispute Resolution Pilot Project*, .DOCSTOC, <http://www.docstoc.com/docs/135596541/NOTICE-OF-ALTERNATIVE-DISPUTE-RESOLUTION-PILOT-PROJECT> (last visited Apr. 18, 2013).

⁵ *Id.*

of procedures that run on a continuum from middle school peer mediation programs through community and domestic mediation systems to large multi-party and corporate mediation. ALJs are particularly aware of, and sensitive to, paralysis, given that administrative law has a pervasive reach from the top to the basic building blocks level of the nation's vast system of administrative law, i.e., from the federal to the township level. Another reason for mediation's burgeoning use may stem from the fact that ALJs are facing ever-growing caseloads and consequent backlogs. The latter further threaten to add to systemic paralysis. Consider the burdens imposed on the profession and ALJs as individuals, given their broad range of responsibilities:

[T]asks include administering oaths, issuing subpoenas, handling depositions, managing the hearings, holding conferences between the parties, and ultimately making either a decision or recommendation depending on their specific powers.⁶

Added to these responsibilities is the fact that the profession must also keep in mind the parties affected by its decisions. All too often, "party" is a term with no face. It behooves not only the profession, but also the public, to understand that the parties are schoolteachers who have been exposed to noxious chemical cleaning fumes; teachers who have classrooms without adequate insulation; bus drivers injured in traffic accidents; and physically and mentally wounded veterans who have served their county honorably, and uncountable others. These are people to whom we owe, and must guarantee, swift, steady justice. Any procedure that expedites administrative decisions deserves investigation and testing, as justice delayed is justice denied.⁷ All one needs to do to understand these

⁶ DAVID H. ROSENBLOOM, *ADMINISTRATIVE LAW FOR PUBLIC MANAGERS* 101-02 (2003).

⁷ Patrick M. McFadden, *Fundamental Principles of American Law*, 85 CAL. L. REV. 1749, 1754 n.1 (Dec. 1997) (citing applicable cases). The latter essay is highly readable. It is also reflected in a quotation from Chief Justice Warren Burger, to the effect that, "[a] sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to

difficulties is consider how the municipal bus driver with the broken arm, the teacher with severe lung problems, or the posttraumatic stress disorder veteran struggle with their afflictions. On the federal level, there is equal concern, publicly acknowledged by the Secretary of Veterans' Affairs (VA), regarding the most inexcusable backlog in the federal system, his Department's.⁸ Thus, to the extent ALJs are searching out and working to understand and utilize mediation procedures—like our colleagues in Virginia and across the nation—they are to be congratulated, encouraged and their results reported.

The VA statistics and logjam do not mean the federal government does not use ADR procedures. The process began seven decades ago with the enactment, in 1938, of the Federal Rules of Civil Procedure (FRCP). FRCP Rule 16 calls for judicial conferences in which judges and parties confer on the type, rules, and what is to be expected from upcoming litigation—ultimately with a view to settling the case in question.⁹ More recently, Congress passed the Alternative Dispute Resolution Act of 1998 (ADRA), which was codified as 28 U.S.C. § 651. ADRA directed federal courts to create and use ADR in all civil actions.¹⁰ In the same year, by Presidential

believe that inefficiency and delay will drain even a just judgment of its value” See Chief Justice Warren Burger, *What's Wrong With the Courts: The Chief Justice Speaks Out*, 69 U.S. NEWS & WORLD REPORT 68 (1970) (address to ABA meeting, Aug. 10, 1970).

⁸ In reply to an email inquiry on November 26, 2012, the author received the following: “there is not (sic) a mediation process in the Veterans claims process at the Board of Veterans' Appeals.” Diane [no last name was provided by the latter correspondent], Congressional Liaison, Ombudsman Board of Veterans' Appeals, Dep't of Veterans Affairs.

As for the claims process itself, the following was reported on NBC News on December 12, 2012: “The average wait time for wounded veterans to see their disability-compensation claims completed by the U.S. Department of Veterans Affairs has now grown to 262 days—or nearly nine months—according to a federal website and three watchdog groups.” See *Disability-Compensation Claims for Veterans Lag as 'VA backlog' Worsens*, U.S. NEWS (Dec. 4, 2012, 11:52 AM), http://usnews.nbcnews.com/_news/2012/12/04/15652938-disability-compensation-claims-for-veterans-lag-as-va-backlog-worsens?lite.

⁹ For a further discussion of early court practices and dispute resolution in general, see MICHAEL L. MOFFITT & ANDREA KUPFER SCHNEIDER, *EXAMPLES AND EXPLANATIONS: DISPUTE RESOLUTION* (2d ed. 2008).

¹⁰ See *Dispute Resolution Alternatives*, ENOTES, <http://www.enotes.com/dispute-resolution-alternatives-reference/mediation> (last visited Mar. 26, 2013).

memo, the ADR Working Group was created. Its charge was to assist federal agencies in creating ADR programs in specific subject matter areas, to include at a minimum: Workplace Conflict Management, Contracts and Procurement, Enforcement and Regulatory, and Litigation Claims against the government, as well as encouraging other agencies to take advantage of ADR programs including mediation.¹¹ As a result, federal use of ADR is becoming wider and deeper.¹² An excellent example is the Federal Energy Regulatory Agency (FERC). As the Agency itself puts it:

When parties are involved in a conflict, they may initially attempt to resolve the matter themselves. If they are unable to do so, the traditional dispute resolution process is to engage in litigation. Thus, they turn the problem over to a judge to decide who is right, who is wrong (i.e., who has the better position). However, alternative dispute resolution (ADR) offers a variety of methods to resolve the matter through settlement instead of litigation. It is a voluntary process where parties, with the aid of a third party neutral, focus on achieving a mutually satisfactory solution rather than on determining who has the stronger position. ADR usually involves a third party neutral who helps the parties design a process that they believe will aid them in finding mutually acceptable solutions to their disputes.¹³

C. Mediation Equals Savings in Terms of Time, Money, and Sanity

From general considerations to more specific: mediation equals monetary savings. The following chart, based on a database developed by the State of Oregon's Department of Justice,

¹¹ See *Working Sections*, INTERAGENCY ALTERNATIVE DISPUTE RESOLUTION WORKING GROUP, <http://www.adr.gov/activities> (last visited Mar. 26, 2013).

¹² See *generally* INTERAGENCY ALTERNATIVE DISPUTE RESOLUTION WORKING GROUP, <http://www.adr.gov/activities> (last visited Mar. 26, 2013).

¹³ *Alternative Dispute Resolutions*, FEDERAL ENERGY REGULATORY COMMISSION, <http://www.ferc.gov/legal/adr.asp> (last updated Dec. 14, 2012).

Collaborative Dispute Resolution Pilot Project, indicates the savings mediation offers as a juridical process:

Average Monthly Legal Process Costs by Type of Process¹⁴

Process utilized	Number of Cases	Average Cost
Dispositive Motion	37	\$9,558
Settlement Negotiations	29	\$10,344
Mediation	19	\$9,537
Trial - Settlement	17	\$19,876
Arbitration	15	\$14,290
Judicial Settlement	13	\$21,865
Trial - Verdict	13	\$60,557

In the narrative accompanying the figures, the Oregon Court of Appeals stated, “[i]n 2005, the court . . . continued our highly successful appellate settlement conference program. Each year, 100 to 150 civil, domestic relations, and workers’ compensation cases settle through this unique mediation program.”¹⁵ As for monetary savings, the Court pointed out:

¹⁴ STATE OF OREGON JUDICIAL DEP’T, THE OREGON COURT OF APPEALS 2005 REPORT 7 (2006), available at <http://www.publications.ojd.state.or.us/2005CAReport.pdf> (last visited Mar. 26, 2013). The chart and accompanying report can be found at the Oregon Judicial Department’s website. See STATE OF OREGON JUDICIAL DEP’T, COLLABORATIVE DISPUTE RESOLUTION PILOT PROJECT, A REPORT TO THE HONORABLE GENE DERFLER, SENATE PRESIDENT, THE HONORABLE MARK SIMMONS, HOUSE SPEAKER, AND THE HONORABLE MEMBERS OF THE LEGISLATURE 6 (2001), available at <http://www.doj.state.or.us/adr/pdf/gen74031.pdf> (last visited Mar. 26, 2013). At page 6, footnote 12 of the report, the authors point out that “legal/process costs” include all the charges, billings and expenses associated with a particular process such as the DOJ attorney billing, mediator and expert witness fees, and related expenses, but does not include the amount of any award or settlement resulting from the process or time invested by agency staff who may be involved in the process/case. The Study is also available at http://www.ecr.gov/pdf/ecr_cost_effect.pdf, in an article discussing the positive application of the Oregon data nationally.

¹⁵ STATE OF OREGON JUDICIAL DEP’T, THE OREGON COURT OF APPEALS 2005 REPORT 7 (2006), available at

At an average of \$60,557, the cost of resolving cases by taking them through a trial to verdict is the most expensive process. At the other end of the spectrum is mediation, which costs about \$9,357 or 7% of the trial process. Not only is mediation less expensive, mediated cases generally take less time to resolve when compared to other forms of resolution.¹⁶

Another good example of savings is found in the State of Maryland's experience. The state found itself saving thousands of dollars through its Maryland Mediation and Conflict Resolution Office (MACRO) program. A study carried out for MACRO by Dr. Marvin B. Mandell and Andrea Marshall reinforced the Oregon results 2,800 miles away.¹⁷ The study analyzed 400 workers' compensation cases filed in the Circuit Court for the City of Baltimore.¹⁸ It concluded:

- Nearly 25 percent of the cases in the mediation group were disposed of prior to the discovery deadline, compared to only 11 percent in the control group,
- 43 percent of the cases in the mediation group were disposed of prior to their scheduled settlement conference, compared to only 28 percent in the control group,
- more than 80 percent of the cases in the mediation group were disposed of prior to their scheduled trial date, compared to only 70 percent in the control group,

<http://www.publications.ojd.state.or.us/2005CARReport.pdf> (last visited Mar. 26, 2013).

¹⁶ *Id.* at 15.

¹⁷ See MARVIN B. MANDELL & ANDREA MARSHALL, MD. INST. FOR POL'Y ANALYSIS AND RES., THE EFFECTS OF COURT-ORDERED MEDIATION IN WORKERS' COMPENSATION CASES FILED IN CIRCUIT COURT: RESULTS FROM AN EXPERIMENT CONDUCTED IN THE CIRCUIT COURT FOR BALTIMORE CITY (2002), available at <http://www.courts.state.md.us/macro/pdfs/reports/baltcityworkercompreportfinal.pdf>. See *Maryland Institute for Policy Analysis and Research*, UNIV. OF MARYLAND, BALTIMORE COUNTY, <http://www.umbc.edu/mipar> (last visited Mar. 26, 2013).

¹⁸ MANDELL & MARSHALL, *supra* note 17, at 2.

- only 37 percent of cases in the mediation group had two or more notices of discovery compared with 56 percent in the control group, and
- of the 200 cases referred to mediation, only 17 opted out of the process.¹⁹

It is a quantum leap from Baltimore to Brussels, but for our purposes well worth the trip on the Internet, as one can find a 2011 study commissioned by The Directorate General of Internal Policies of the European Parliament. The study, titled *Quantifying the Cost of Not Using Mediation*, found:

While the time and cost figures correlating with a high mediation success rate (75% or 50%) are quite impressive (e.g. a 75% mediation success rate in Belgium can save approximately 330 days and 5.000 € per dispute; a 75% success rate in Italy can save 860 days—[sic] more than two years!—and over 7.000 € per dispute), questions about the viability of reaching this level of implementation still remain. Achieving a 50-75% success rate in mediation results is a very high mark to set for all of the Member States. However, according to the study, mediation is a cost and time-effective dispute resolution mechanism at almost every level of success rate. This begs the question: is there a percentage success rate at which mediation is not a financially viable or a time-saving option?²⁰

¹⁹ The completed study was prominently featured by Chief Judge Bell in the *Maryland Judiciary Annual Report 2001–2002*. See generally MARYLAND JUDICIARY, MARYLAND JUDICIARY ANNUAL REPORT 2001–2002 (2002), available at <http://www.courts.state.md.us/publications/annualreport/reports/2002/areport01-02.pdf> (last visited Mar. 26, 2013). A partial list of articles and information on the Maryland programs is available at the website of the National Institute for Advanced Conflict Resolution. *Training Provider Directory*, NAT'L INSTITUTE FOR ADVANCED CONFLICT RESOLUTION, http://www.niacr.org/state_tp/maryland.htm (last visited Mar. 26, 2013).

²⁰ POLICY DEP'T C CITIZENS' RIGHTS & CONSTITUTIONAL AFFAIRS, QUANTIFYING THE COST OF NOT USING MEDIATION – A DATA ANALYSIS 4 (2011),

The last question posed above must be taken quite seriously.

As already pointed out, Virginia is the latest state to complete and implement a study of ADR/mediation benefits. And time and cost were considered in their work as well. But, there are numerous other salient or decision factors that should be considered when deciding about the efficacy of various ADR procedures. In this regard, the U.S. District Court for the Northern District of California offers a website which contains a twenty-page handbook that is a virtual primer on collaboration or, as they headline their handbook, “Dispute Resolution Procedures.”²¹ It sets out detailed information on the four primary ADR procedures the court offers, i.e., arbitration, early neutral evaluation, mediation, and settlement conferences. The positive aspects of ADR and mediation covered on the website go well beyond time and cost savings. The website also sets out the court’s offer to have staff work with parties to customize ADR processes to meet parties’ needs:

Customized ADR Processes

The court’s ADR legal staff will work with parties to customize an ADR process to meet the needs of their case or to design an ADR process for them. An ADR legal staff member is available for a telephone conference with all counsel to discuss ADR options. Clients are invited to join such conferences.

Non-binding Summary Bench or Jury Trial

The ADR staff can help parties structure a non-binding summary bench or jury trial under ADR Local Rule 8-1(a). A summary bench or jury trial is a flexible, non-binding process designed to promote settlement in complex, trial-ready cases headed for long trials; to provide an advisory verdict after an

available at http://jamsadrblog.com/wp-content/uploads/2012/02/Quantifying-the-Cost-of-Not-Using-Mediation-6_2_2012.pdf (last visited Mar. 26, 2013).

²¹ DISPUTE RESOLUTION PROCEDURES IN THE NORTHERN DISTRICT OF CALIFORNIA, U.S. DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA (July 2011), <http://cand.uscourts.gov/filelibrary/38/ADRHandbookRev2011.pdf> (last visited Mar. 26, 2013) [hereinafter DISPUTE RESOLUTION PROCEDURES].

abbreviated presentation of evidence; to offer litigants a chance to ask questions and hear the reactions of the judge and/or jury; and to trigger settlement negotiations based on the judge's or jury's non-binding verdict and reactions.

Special Masters

The assigned judge may appoint a special master, whose fee is paid by the parties, to serve a wide variety of functions, including:

- discovery manager
- fact-finder
- host of settlement negotiations
- post-judgment administrator or monitor²²

Additionally, in a bow to the burgeoning development of a private sector ADR bar,

The court encourages parties to consider private sector ADR providers who offer services including arbitration, mediation, fact-finding, neutral evaluation and private judging. Private providers may be lawyers, law professors, retired judges or other professionals with expertise in dispute resolution techniques. They generally charge a fee.²³

The Court's website offers a chart of the benefits offered by various forms of ADR, including mediation. The mediation component of the chart is set out below. To view the whole of the chart, which compares Arbitration, ENE, and Settlement Conference with Mediation, see the United States District Court Northern District of California's very useful article *How to Choose an ADR Process*.²⁴

²² DISPUTE RESOLUTION PROCEDURES, *supra* note 21, at 14.

²³ *Id.*

²⁴ *How to Choose an ADR Process*, UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA, <http://www.cand.uscourts.gov/howtochoose> (last visited Mar. 26, 2013).

The following is a preface to the chart, which tells the user how to understand its comparisons:

“Very Likely” indicates the program is *Very Likely* to provide the benefit; “Somewhat Likely” indicates the program is *Somewhat Likely* to provide the benefit; and “Less Likely” indicates the program as being *Less Likely* to provide the benefit.

Enhance Party Satisfaction	Arbitration	ENE²⁵	Mediation	Settlemt. Conf.
Help settle all or part of dispute	Less Likely*	Somewhat Likely*	Very Likely	Very Likely*
Permit creative/business-driven solution that court could not order	Less Likely*	Somewhat Likely*	Very Likely	Somewhat Likely*
Preserve personal or business relationships	Less Likely*	Somewhat Likely*	Very Likely	Somewhat Likely*
Increase satisfaction and thus improve chance of lasting solution	Less Likely*	Somewhat Likely*	Very Likely	Somewhat Likely*
Allow Flexibility, Control and Participation	Arbitration	ENE	Mediation	Settlemt. Conf.
Broaden the interests taken into consideration	N/A	Somewhat Likely*	Very Likely	Somewhat Likely*
Protect confidentiality	Somewhat Likely*	Very Likely	Very Likely	Very Likely
Provide trial-like hearing	Very Likely	N/A	N/A	N/A

²⁵ A good, succinct definition of ENE is given by Erica Garay on the website of the law firm Meyer, Suozzi, English and Klein P.C.:

“Early Neutral Evaluation” [ENE] is a type of Alternative Dispute Resolution [ADR], by which counsel retain a neutral third party to help them analyze legal (and factual) issues and to reduce litigation time and expense, thereby assisting the parties in resolving their disputes. In some ways, it is a combination of “facilitative” and “evaluative” mediation.

Erica Garay, *What is Early Neutral Evaluation and How Can it Help Counsel and Clients?*, MEYER, SUOZZIE, ENGLISH & KLEIN, P.C. (Mar. 6, 2012). http://www.msek.com/publications/profile_publications.php?pub_id=228&srhProfileName=46&fullname=Erica%20B.%20Garay.

Provide opportunity to appear before judicial officer	N/A	N/A	N/A	Very Likely
Improve Case Management	Arbitration	ENE	Mediation	Settlemt. Conf.
Help parties agree on further conduct of the case	N/A	Very Likely	Somewhat Likely*	Somewhat Likely*
Streamline discovery and motions	N/A	Very Likely	Somewhat Likely*	Somewhat Likely*
Narrow issues and identify areas of agreement	N/A	Very Likely	Very Likely	Very Likely
Reach stipulations	N/A	Very Likely	Somewhat Likely*	Very Likely
Improve Understanding of Case	Arbitration	ENE	Mediation	Settlemt. Conf.
Help get to core of case and sort out issues in dispute	Somewhat Likely	Very Likely	Very Likely	Very Likely
Provide neutral evaluation of the case	Very Likely	Very Likely	Less Likely	Somewhat Likely*
Provide expert in subject matter	Somewhat Likely*	Very Likely	Somewhat Likely*	Somewhat Likely*
Help parties see strengths and weaknesses of positions	Very Likely	Very Likely	Very Likely	Very Likely
Permit direct and informal communication of clients' views	Less Likely	Somewhat Likely	Very Likely	Less Likely*
Provide opportunity to assess witness credibility and performance	Very Likely	Somewhat Likely*	Somewhat Likely*	Less Likely
Help parties agree to an informal exchange of key information	Less Likely	Very Likely	Somewhat Likely*	Somewhat Likely*
Reduce Hostility	Arbitration	ENE	Mediation	Settlemt. Conf.
Improve communications between parties/attorneys	Less Likely*	Very Likely	Very Likely	Somewhat Likely*
Decrease hostility	Less Likely	Very Likely	Very Likely	Somewhat Likely*

II. MEDIATION DONE CORRECTLY

A. *Look Before You Leap: The Necessary Art of Process Design*

It is the thesis of this paper that one of the most useful of the ADR techniques or practices is mediation, but only if the mediation

is done correctly.²⁶ “Done correctly” is a key phrase. That is the case as, all too often, the excitement surrounding mediation can lead enthusiasts to leap to its use before mastering its techniques and how to use it most effectively. This ignores the fact that, as Wondolleck and Yafee point out, there are a number of issues that must be addressed before parties launch themselves into a collaborative enterprise.²⁷ They are exactly the general kind of issues ALJs may, whether considering domestic conflict with few parties (two spouses and a mediator) or in mediation with numerous stakeholders, confront on a regular basis. For that matter, they are the kind of issues that ALJs, considering the viability of adding a mediation component to an existing administrative system, need to consider most carefully. Before looking at them, a *caveat* is in order, one that is too important to appear as a footnote. In discussing collaborative

²⁶ In a very useful review of ADR and how it works, the Legal Information Institute of Cornell Law School states that the most commonly used ADR processes are arbitration and mediation. Legal Information Institute, *Alternative Dispute Resolution*, CORNELL UNIVERSITY LAW SCHOOL, http://www.law.cornell.edu/wex/alternative_dispute_resolution (last visited Mar. 26, 2013); in addition, many state jurisdictions with administrative mediation components will have handbooks, such as that published by the State Office of Administrative Hearings of Texas (SOAH). It indicates that it has used ADR processes—primarily mediation—in its contested case hearing process since 1995. Information does not stop there in most cases, as with Texas, “although mediation is the form of ADR most frequently used at SOAH, other variations of assisted negotiation are available: mini-trials, early neutral case evaluation by an impartial third party, and fact-finding by an expert.” *Mediation: Model Guidelines for Texas State Agencies*, STATE OFFICE OF ADMINISTRATIVE HEARINGS, http://www.soah.state.tx.us/aboutus/mediations/model_guidelines.asp#Guidelines_and_Information (last visited Apr. 10, 2013). Another example is found in California on the website of the Superior Court of California County of Fresno’s website, to wit: “The mediation process is commonly used for most civil case types and can provide the greatest level of flexibility for parties.” *Alternative Dispute Resolution*, SUPERIOR COURT OF CALIFORNIA COUNTY OF FRESNO, http://www.fresno.courts.ca.gov/alternative_dispute_resolution/ (last visited Apr. 10, 2013). Also, for those new to mediation, the website of the ABA’s Section on Dispute Resolution offers general information. The highly informative and easy-to-use site spans nine topics, e.g., “Mediation Video Center,” which has videos entitled “Introduction to Mediation,” and “ABA’s Mediator Evaluation Pilot Program.” See *Mediation Video Center*, AM. BAR ASS’N, <http://aba.blogs.law.suffolk.edu/> (last visited Feb. 27, 2013). The former is highly recommended.

²⁷ WONDOLLECK & YAFFEE, *supra* note 1, at 251.

processes, ADR or mediation, it is vitally important to take into consideration the careful use of language, as an instance, the use of the term “complex.” The term, although it would be a helpful descriptive in the sentence above regarding “numerous stakeholders,” was purposely not used. The *caveat* is that in dialogue, especially with two parties, it would be a great mistake to indicate in any way that the latter’s conflict is less than complex. On the contrary, their issues as they see them, say, divorce and/or child custody, are the most complex they will ever face.

With that *caveat* in mind, we return to Wondolleck and Yaffee’s list of issues that must be addressed before launching into mediation. The first of them is to understand the mediation infrastructure in the jurisdiction in which one is practicing or presiding. The profession is fortunate in this regard as Cornell University Law School’s Legal Information Institute has set out on its website the ADR statutory titles and chapters for every state in the Union.²⁸ Once the neutral or mediator has an understanding of the statutory and administrative environment in which they are mediating, a good next step would be to bring stakeholders or parties together to share ideas regarding the ends they are each seeking. In this process it is especially important to make clear areas where the parties actually do agree. If not pointed out, commonalities which could act as consensus building resources might be missed. If agreement can be reached on even basic commonalities, e.g., location of mediation site, layout of the room, number of times to meet, and the hours of meetings, then a foundation has been set. This is not an easy process, but a necessary one. It begins the march toward trust and cooperation. If the parties accept that mediation might work, then a deeper look is needed to assess whether or not the parties’ general objectives can be aided by the process. As these conversations continue, it is quite possible a learning process for both sides may have begun. An example would be parties finding they have misunderstood, badly calibrated, or not

²⁸ *Alternative Dispute Resolution – State Laws*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/table_alternative_dispute_resolution (last visited Mar. 25, 2013). Another site of great use is *Dispute Resolution Alternatives*, ENOTES, <http://www.enotes.com/dispute-resolution-alternatives-reference/mediation> (last visited Mar. 25, 2013). The latter sets out detail regarding which state agencies use mediation and where their rules can be found in state codes.

even thought about the other party's point of view. Another result may be the discovery of additional necessary parties. If all is well to this point and commonalities are realized, the latter can be formalized by memorializing them on a flip chart. The result: old ground need not be re-visited and hopefully another stage is reached where participants begin to see the whole of the problem(s) or conflict(s) in new ways, in ways that will allow them to move forward. Beyond building a bridge plank by plank over their troubled waters, the parties may also begin to see the sun of "*our-ness*" rising—*our* problem, *our* dialogue, *our* potential solution, the realization that a collaborative effort may hold promise.

B. Necessary Parties

The next task after surveying broader issues is to consider the typology of the parties. A first consideration is where they may fit on continua, e.g., individuals to corporations, two parties to multiple parties, adversaries on an issue to implacable foes on all. This process should not be too hard given that parties in conflict are not usually shy about making their positions and "grievances" clear, and how they see their foes and how the latter are *different* from themselves. Paradoxically, the parties in actuality share the *same* anxieties:

- a primary desire not to look weak,
- a degree (varying based on past interaction history) of paranoia about their counterpart's motives,
- hardened positions on key issues (the deeper the conflict, the more likely those positions will have been made public through the media), and
- a desire to maintain their control over the direction the conflict is taking.

These not only hamper communication, but also make it devilishly difficult for the parties to consider bringing in a mediator, often referred to as a "neutral" to help them move toward consensus. It is up to the neutral to make clear to the combatants that beginning a dialogue begins a collaborative process plank by plank, one decision at a time. If things get out of hand at any point as they are bound to, the neutral can point out to the recalcitrant party that he or she need

not really worry or use his or her “gotta get tough” card. The parties can be made to feel more secure and coaxed to stay the course by being reminded that as stakeholders, by definition, they can scuttle the whole project and go back to the status quo at any time.

As in engineering, as each new plank is fitted securely in place, the whole of the structure becomes more solid and, the ability of the parties to move forward, safer. If all goes well, a careful mediator with an ability to listen to sub-text will recognize that a tipping point is coming where the parties will understand for themselves how the process is moving them more securely toward the safety of collaboration. The genius of the neutral comes into play as she or he moves the parties from their initial feeling of nakedness to one of the security offered by collaboration. As this is happening, the mediator has to guide ever so carefully. The task can be long and complicated. It calls for infinite patience and temper control, but is worth the journey.

C. Who Should Mediate

One might ask, “What kind of person can carry out a task calling for such skill and forbearance?” Richard Acello gave some help answering that question in his October 1, 2012 *ABA Journal* article *Making Mediators: As the Field Grows, So Does the Need for Negotiating Skills*.²⁹ He quotes Alex Yaroslavsky, a New York based trainer and founder of the Yaro Group as follows:

[L]awyers like the idea of being a mediator, but the toughest thing for most people to do is to suspend their own judgment. In training we throw scenarios at them that challenge their own values to see if they can balance and stay focused rather than judging the values of their participants³⁰

²⁹ Richard Acello, *Making Mediators: As the Field Grows, So Does the Need for Negotiation Skills*, ABA JOURNAL (Oct. 1, 2012, 1:50 AM), http://www.abajournal.com/magazine/article/making_mediators_as_the_field_grows_so_does_the_need_for_negotiation_skills/.

³⁰ *Id.*

The Yarolavsky quotation ends with the following sentence, which sums up the essence of mediation: “The mediator owns the process and the participants own the issues. They also own the decision as to whether to come to an agreement.”³¹ Acello also quotes Kimberly Taylor, Chief Operating Officer of Jams, the Resolution Experts, Washington, D.C., as follows:

What we look for in bringing a mediator on our panel is a significant amount of experience either as a sitting judge or as a lawyer demonstrating the ability to bring parties together . . . It requires a certain personality type and a deep knowledge of the law; it’s about bringing parties together, listening, patience, persuasiveness, being able to see commonalities.³²

Acello follows this quote with the apt comment “lawyers traditionally train to be zealous advocates, but the would-be mediator must adopt a different mindset.”³³ All one need do to see this is to consider the different strategies and tactics called for by litigation and mediation. A closing comment regarding the Acello article, he makes reference to the American Institute of Mediation. Whether mediator or lawyer, those who find their duties expanded to include a mediation component might want to read online ABA articles, such as his, and also become familiar with the Institute and other organizations like it.³⁴

The ABA’s *Model Standards of Conduct for Mediators* not only sets out standards, but reading between the lines affords further insight regarding what type of person should be chosen to mediate. In their first standard, they state how mediators should conduct a mediation:

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, un-

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See generally AMERICAN INSTITUTE OF MEDIATION, <http://www.americaninstituteofmediation.com/> (last visited Mar. 26, 2013).

coerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.³⁵

D. The Center-point of Mediation

In closing this discussion, let us end with a concise definition of mediation itself. A very good one is offered by the U.S. District Court of Northern California:

Mediation is a flexible, non-binding, confidential process in which a neutral mediator facilitates settlement negotiations. The informal session typically begins with presentations of each side's view of the case, through counsel or clients. The mediator, who may meet with the parties in joint and separate sessions, works to:

- improve communication across party lines,
- help parties clarify and communicate their interests and understand those of their opponent,
- probe the strengths and weaknesses of each party's legal positions,
- identify areas of agreement, and
- help generate options for a mutually agreeable resolution.

³⁵ AM. BAR ASS'N, AMERICAN ARBITRATION ASSOCIATION, & ASSOCIATION FOR CONFLICT RESOLUTION, *MODEL STANDARDS OF CONDUCT FOR MEDIATORS 3* (2005), *available at* <http://www.mediate.com/pdf/ModelStandardsOfConductforMediatorsfinal05.pdf> (last visited Mar. 26, 2013). The nine pages of Standards offer an even deeper glimpse into just what mediation is about. One will also find the website [mediate.com](http://www.mediate.com) offers insight into what parties should look for in choosing a mediator. See [MEDIATE.COM](http://www.mediate.com/), <http://www.mediate.com/> (last visited Mar. 26, 2013).

The mediator generally does not give an overall evaluation of the case. Mediation can extend beyond traditional settlement discussion to broaden the range of resolution options, often by exploring litigants' needs and interests that may be independent of the legal issues in controversy.³⁶

The importance of “exploring litigants’ needs and interests that may be independent of the legal issues in controversy” cannot be overemphasized, and may well be where the true center-point of mediation lies. It allows the parties in conflict to set before each other human, emotional considerations in a measured, calm manner often not found in the heat of courtroom litigation or community turmoil. In the two latter cases, one is more likely to find anger, outburst, paralysis, and a consequent need for the gavel. As Lee Jay Berman notes, “[l]awyers tell me all the time, mediation seems like the perfect profession . . . because you don’t have clients and you don’t have partners.”³⁷ Acello follows this quip saying, “[c]ourt budget cutbacks, the high cost of discovery, crowded dockets and emphasis on result-oriented ‘value billing’ [and we might add in the case of community conflict—hardened positions leading to paralysis] have created the elements of a perfect storm for a mediation wave.”³⁸

So, why not catch the mediation wave by heading to your nearest law firm with a practice in mediation? Not so fast! As Peggy Lee’s lyric asks, “is that all there is?”

³⁶ *Mediation*, UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA, <http://www.cand.uscourts.gov/mediation> (last visited Mar. 29, 2013); *see also* INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, <http://www.cpradr.org/About/CPRsWork.aspx> (last visited Mar. 26, 2013). The Institute is representative of how far ADR, especially mediation, has become accepted by the corporate and legal communities. CPR bills itself as follows: “CPR has changed the way the world resolves conflict by being the first to develop an ADR Pledge. Today, this Pledge obliges over 4,000 operating companies and 1,500 law firms to explore alternative dispute resolution options before pursuing litigation.” *Id.*

³⁷ Acello, *supra* note 29. Lee Jay Berman is a trainer at the American Institute of Mediation.

³⁸ *Id.*

III. IS THAT ALL THERE IS?

A. *The Central Importance of Process Planning*

All the praise in the world for collaborative techniques, especially mediation techniques, does not mean professionals using them will be successful simply because they put those techniques into practice. Some practitioners and law firms appear to approach mediation, whether domestic, corporate, or community, with the idea in mind of: “just do it!” The only proper approach must be: “just do it RIGHT!” And that means doing necessary process planning before launching into the mode. The author’s experience makes clear the “just do it” approach often leads to poor results, if any, as he found in his early experience working to add a mediation component to the District of Columbia’s Administrative Hearings Division’s hearing of contested cases. Parties in conflict need to do the research necessary to find two key ingredients: (1) the right personality types to act as consultants and (2) an understanding of the importance of process and proper process planning. The patient, persuasive personalities demanded by mediation will face conflict situations ranging from disputes arising from domestic conflict to complex, multi-billion dollar conundrums like the Newark, N.J. situation discussed below.

The Newark Collaboration, as it is called, is reported in Lawrence Suskind, Jennifer Thomas-Lamar, and Sarah McKearnen’s encyclopedic *The Consensus Building Handbook*.³⁹ Chapter 3, “Designing a Consensus Building Process Using a Graphic Road Map,” contributed by David Straus, discusses the problems posed by the Newark situation.⁴⁰ The tactics used by Straus and his colleagues to design a consensus process for the Newark Collaborative Process offer effective tools that can be used to introduce mediation to administrative systems that have not utilized it to date. Their narrative also suggests tactics for making mediation done by ALJs more effective. The Newark conflict began when Prudential Insurance Company of America was considering a move of its

³⁹ LAWRENCE, SUSSKIND, SARAH MCKEARNEN & JENNIFER THOMAS-LAMAR, *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* (1999). The latter is an encyclopedic compendium regarding the proper strategies and tactics for reaching consensus.

⁴⁰ *Id.* at 137.

corporate headquarters out of Newark. Prudential executives were concerned they could not attract or keep the high-quality talent they needed to prosper; employees and prospective hires simply did not want to live in or near Newark.⁴¹ Fortunately for Prudential (and Newark), the company turned to Straus and his colleagues at Interaction Associates⁴² to help them create the Newark Collaborative Process. The Process resulted in over \$5 billion dollars in investment in the community to develop its commercial and industrial base. The Process added approximately 7,000 housing units to the city's inventory, a nationally recognized recycling program, and Prudential's decision to remain in Newark. And all thanks to the right process reached through the careful design of a "process" or, to use David Straus's term, a "Graphic Road Map."⁴³ Had the author and the District of Columbia's Department of Employment Services Administrative Hearings Division managers been aware of the importance of process when they began the effort to introduce mediation to its hearings of contested cases, there is a good chance mediation therein would be in use today. As for those jurisdictions currently using mediation, the Straus "process road map" suggests lessons that can only aid in making them more effective.

The first stage of the Newark process was to identify key stakeholders—any persons, parties, or interests which could block the program—and explain to them the community needs and the stakeholders importance in helping to fulfill those needs. Once that was accomplished, the parties established a base for a common vision of the future and then worked backwards to a draft Graphic Road Map, that is, "a visual representation of the flow of face-to-face meetings and other activities that had to take place in a consensus building process."⁴⁴ Given the definition of "stakeholders," the mediator/process planner, as in the Newark conflict, finds herself or himself in the difficult situation of getting parties with strongly held, often emotionally charged positions to work together. But, how to get the process started? Straus suggests the work can be greatly

⁴¹ *Id.* at 140.

⁴² *See* INTERACTION ASSOCIATES, <http://www.interactionassociates.com> (last visited Mar. 26, 2013).

⁴³ CONSENSUS BUILDING HANDBOOK, *supra* note 39, at 148.

⁴⁴ *Id.*

facilitated by hiring a Process Design Consultant (PDC) or identifying one from the stakeholder group.

B. Process Design: Complex or Multi-party Mediation

While conflict assessment and the next stage, process planning, are arguably not as complex as astrophysics, it does demand a careful understanding of the clashes that created its need in the first place. That is where the PDC becomes important in the process. The first task is to carry out a conflict assessment in order to insure key parties have been identified and included in the stakeholder group. The question is how. The answer is quite simple—just listen. If a person or group has the power to scuttle the project, you will hear them. While a mediator or PDC is involved in the latter assessment, it would also be well to catalogue which characteristics the stakeholders have that can be utilized to insure they stay in the process when the going gets tough or dangerous shoals are in sight. Cutting to the chase, here are the “consensus building and collaborative planning process phases,”⁴⁵ as defined by Straus:

PHASE 1: START-UP PHASE: The start-up phase begins with the realization on the part of a group of initially interested parties that a problem exists which, if not solved, can have a substantial negative impact on their interests and the community in general. Next question, can the affected parties solve the problem on their own? If positions on solutions are so divided that the answer is “no,” then it becomes the task of the parties to assess whether it is feasible to find a neutral consulting mechanism to solve the problem.

PHASE 2: PROCESS DESIGN PHASE: The second phase begins when all of the stakeholders come together to determine “whether or not a consensus-based process has a chance of succeeding, who should be involved, and how to proceed.”⁴⁶ The answers to these questions can be sought by a Design Consultant or a sub-group of stakeholders working with a consultant or facilitator to bring “recommendations for a proposed process design (including,

⁴⁵ CONSENSUS BUILDING HANDBOOK, *supra* note 39, at 138.

⁴⁶ *Id.*

perhaps, a process roadmap) back to the larger group of stakeholders.⁴⁷ As a first step, the stakeholders should establish a Process Design Committee (PDCcom) made up of a sub-group of stakeholders serving as a conflict assessment and design sub-group. Straus and his colleagues recommend that, whenever possible, assessment and design should be performed by stakeholder sub-groups. One can understand why stakeholders should be involved to the greatest extent possible—their involvement will pay substantial dividends in the long run, especially in giving them an ownership stake in the design and decisions, as well as responsibility for successes and a feeling that the process is not that of a third party, but is their own. Finally, if they can reach consensus on the design, it will lead to a feeling they can reach consensus on broader challenges down the road. In working as a PDCcom, the stakeholder sub-group can also get experience in making difficult choices and informed decisions regarding whether or not to hire, at future stages, professionals such as assessors, designers and other hands on neutrals. Being involved also gives the stakeholders a better understanding of process, which will help them all work toward speaking the same language when making final decisions. Hence, the greater the stakeholders involvement, the more clearly they will understand the entire process design phase, whether there is a need for a PDCcom, and the savings that can be realized in hiring professionals when needed. Involvement will also warn them of potential problems to be avoided in the design phase itself, thus, saving time and money. With these intense steps having been taken, they can proceed with more assuredness to fashion their own sub-groups where needed, increasing twofold a feeling of owning the process of design and ultimately the final product of the design stage. Beyond design considerations and decisions, the PDCcom in operation creates for stakeholders a sense of ownership. All the latter equal a move toward the sanity of collaboration and consensus.

If it is the case that the stakeholders are able to work together in organizing a PDCcom, the next step is to design a plan for choosing its members, keeping in mind they will act as liaison to their constituents, which is often no simple task. In this regard, it must be made clear to candidates for PDCcom membership that one of their

⁴⁷ *Id.*

most important tasks as liaisons will be to help insure that project planning and resolution of conflicts is done in a way that reflects the culture of their constituent group.⁴⁸

The broader and deeper the conflict, the more stakeholders will find it in their interests to hire neutral conflict professionals specializing in assessment, process, and design. If it is decided that a PDCcom is needed, the PDCcom needs to seek out a person who is

able to coach senior executives and . . . leaders in facilitative leadership; design complex, multilevel intervention processes; and lead a team of consultants and trainers to support an intervention . . . [I]n a Process and Design Committee, for example, a process consultant must play the roles of facilitator, recorder, educator, process design expert, and advocate . . . [with facility in capturing] participants' comments on flip charts or butcher paper [and] serve as educator, by presenting the basic principles of consensus building as guidelines for a design session, and as an expert, by laying out the advantages and disadvantages of different approaches.⁴⁹

PHASE 3: CONSENSUS BUILDING PHASE: Consensus building is really not just a phase—it is a process. The early PDCcom phases of assessment and design are the piers upon which the consensus bridge is built. As tasks are fulfilled, goals met, and decisions taken, they are reported back to the stakeholders in plenary session. As they are discussed, debated, and revised, they become the planks of the bridge, or in the *Handbook's* phrasing, the stepping stones for building a “graphic road map.”⁵⁰ In actuality, it is the discussion, debate, revision and coming to final decisions, which no matter how you describe them, provide the raw material for consensus building. The job is best carried out by convening stakeholder meetings on a regular basis to hear the results of actions

⁴⁸ *Id.* at 140. Had the author realized this important principle in his 2010 effort to add a mediation component to the DOES/Administrative Hearings Division, the whole affair might have turned out very differently.

⁴⁹ *Id.* at 143 (alteration in original).

⁵⁰ CONSENSUS BUILDING HANDBOOK, *supra* note 39, at 148.

taken on their behalf. At those meetings stakeholders can debate, discuss and revise where necessary. That process will reinforce “ownership”—the key aspect of any successful consensus building process.

One of the outcomes of early joint decision-making done carefully at the PDCcom stage is a level of interaction and information which gives stakeholders the experience necessary to come to a decision as to whether or not they will need the services of consultants other than the process design consultant. As above, it would appear to be axiomatic, the larger the group of stakeholders, the more need for professional consulting support in various areas.

As for PDCcom membership, it is recommended it should consist of seven to fifteen members, and no more according to Straus. The PDCcom has to agree on:

- key decision points in consensus building,
- tasks and activities which must take place,
- what the road map might look like,
- who is involved and how and when,
- project management steering committee and staff—internal and external,
- how decisions will be made,
- how information will be gathered and disseminated,
- what services will be needed,
- what kind of training will be needed for various participants,
- how to communicate at all levels including media and with stakeholders’ senior management,
- what the size of the whole design effort will be, as well how it can be implemented at the lowest cost and still deliver solid results, and
- whether stakeholder sub-groups will be needed.⁵¹

PHASE 4: IMPLEMENTATION PHASE: This phase starts with small, short term projects with the idea in mind they will indicate to stakeholders they are not only willing, but able to work together. The implementation phase might well begin with a project to seek out all the stakeholders, make sure they are all brought under

⁵¹ *Id.* at 144.

the tent, and given an equal chance to take part in the process. A good first step in this phase might well be to bring members together in a plenary session to discuss what “consensus” means. Once that is done, then the session could hammer together an outline of just what their consensus should look like. A third and final task could be the discussion of, and agreement on, hiring professionals, e.g., a facilitator/recorder, needed experts and, perhaps, an educator in the “how” of collaboration.

Here’s a secret: the nature of short-term projects is actually secondary to the doing of them. Doing them leads to a deepening of the experience of working and succeeding together. Agreement must be reached on:

- key stakeholders, as well as persons with relevant expertise (N.B.: the importance of racial and gender representation),
- principles of collaboration. Have a beginning list and ask participants to review and revise them where needed. Agreement on principles boosts confidence that “we” can work together and offer ideas for building a process road map,
- scope of the problem. Sets boundaries on the issues and or conflicts to be resolved,
- the form of the final product, e.g., is it one or a detailed final report with recommendations or some other final result, and
- defining key phases of the road map (the latter can be based on what agreements must be reached to move the whole project forward. The best way to deal with phases is to begin with a common vision of the future and work backwards).⁵²

It cannot be emphasized enough that as each phase and the tasks therein are completed the stakeholders’ comfort level in working together will increase, as will their trust level and a feeling the task(s) they have set themselves can be accomplished.

⁵² *Id.* at 154.

*C. Process Design: Domestic Conflicts or “Three in a Room”
Mediation*

Up to this point in looking at Straus’s phases, we’ve been considering very large programs like a workers’ compensation adjudicatory setting like the one being implemented in Virginia, or one as complex as the Newark Collaborative Process. Many of the same steps recommended by Straus can be applied to any mediation even if a less populous one, i.e., domestic conflicts. As you look at the steps in the latter process, note how they parallel the social etiquette our parents labored to teach us as we were growing up, and the phases recommended by Straus and Interaction Associates.⁵³

STEP 1: INTRODUCTIONS (Straus’s Start-up Phase):

- The parties meet with the mediator for the first time.
- The mediator introduces the parties to the details of the process, e.g., the agreement to mediate, its confidential nature, how it will proceed, the etiquette of the process (which is fundamental to its success), and the role of the mediator.

STEP 2: STORYTELLING & RESPONSES (Straus’s Process Design Phase):

- The mediator calls on the parties to outline their perspective (without interruptions from the other party).
- The mediator paraphrases to clarify and dampen hostility.
- The mediator summarizes positions on flip chart or blackboard.
- The mediator accepts and responds to intense emotions and feelings, translating them for the other party(s).
- The mediator lists the issues and areas of agreement.
- The mediator sets out open-ended questions in an open-ended exchange to elicit possible solutions.

⁵³ The author owes a deep debt of gratitude to ERVIN MAST, J.D. & SUSAN SHEAROUSE, *Mediation Skills and Process*, Northern Virginia Mediation Service (printed class material), available at www.nvms.us, not only for their excellent course, but the “Steps” and their titles.

STEP 3: PROBLEM-SOLVING (Straus's Consensus Building Phase):

- List on two flip charts each parties' "wants" and prioritize them by working with the parties.
- Help each party to understand how his/her/their "*wants*" tie to *issues* of importance to them.
- Indicate without telling how "wants," now narrowed to "issues," might be met by methods other than those the party brought to the mediation.
- Help each party list and prioritize methods or options that might dissolve their issues. Here the mediator helps launder language, paraphrases and re-writes.
- Help the parties to work together by evaluating all the options listed. Then select and prioritize the ones that will work best.

As the parties move from one stage to the next, it is very important for the mediator to guide, then note and make clear to the parties the extent to which the mediation process is moving them from talking about their *positions* on issues to one of discussing what their *interests* are. The importance stems from the fact that *positions* are static and hardwired. *Interests* are dynamic and are capable of being met by a variety of processes, strategies, and tactics.

STEP 4: DOCUMENTATION (Straus's Implementation Phase):

- The mediator drafts a document of agreement, submits it to the parties, re-write.
- The mediator assists parties to include the important specific needs they feel they have.
- The mediator assists parties to consider next step.
- The mediator prepares parties to report and "sell" their agreement to key third parties.

IV. CONCLUSION

To close this discussion, we should take a look at the future. The hallmark of that future is mediation online. If we can buy gifts, chat,

gossip, learn, entertain ourselves, why not mediate online? It is a very interesting exercise to contemplate the extent to which the physical separation of online sites like *Skype* and *iChat* may have advantages over two or more in a room. Online sites offer physical separation of parties while at the same time giving them a chance to interact. One wonders. For the time being we can rely on professionals like Joseph Goodman for his very informative iBrief, *The Pros and Cons of Online Dispute Resolution: an Assessment of Cyber-Mediation Websites*:

Due to increasing use of the Internet worldwide, the number of disputes arising from Internet commerce is on the rise. Numerous websites have been established to help resolve these Internet disputes, as well as to facilitate the resolution of disputes that occur offline. This iBrief examines and evaluates these websites. It argues that cyber-mediation is in its early stages of development and that it will likely become an increasingly effective mechanism for resolving disputes as technology advances.⁵⁴

Goodman's iBrief is counterpointed by Robert R. Marquardt, who poses the following questions and answers them in his 2001 essay, *Settling Disputes Online: Just Another Tool, or are Negotiators, Mediators and Arbitrators Approaching Extinction*.⁵⁵

⁵⁴ Joseph Goodman, *The Pros and Cons of Online Dispute Resolution: an Assessment of Cyber-Mediation Websites*, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr> (last visited Mar. 29, 2013).

⁵⁵ Robert Marquardt, *Settling Disputes Online: Just Another Tool, or are Negotiators, Mediators and Arbitrators Approaching Extinction*, ADRR.COM, <http://www.adrr.com/adr4/sdo.htm> (last visited Mar. 29, 2013). It has an interesting list of ADR providers. The five star article is also listed at the website of University of Colorado at Boulder's Peace and Conflict Studies, <http://peacestudies.beyondintractability.org/citations/18107> (last visited Mar. 29, 2013). This informative site was developed and is still maintained by the University of Colorado Conflict Information Consortium. The missions of the Consortium and, more specifically, the *Beyond Intractability* project reflect the convergence of two long-standing streams of work. The first is an exploitation of the unique abilities of web-based information systems to speed the flow of conflict-related information among those working in the field and the general public. The

[i]n recent years, many innovative internet based (online) dispute resolution sites and tools have been established, such as *CyberSettle*, *Virtual Magistrate*, *ClickNSettle.com* and *SettleOnline.com*. What is their place in the established dispute resolution framework, and what is their probable place in the future? Will these e-tools replace existing forms of alternate dispute resolution (ADR), or are they just faddish gimmicks? Are trial lawyers, negotiators, mediators, arbitrators and other advocates and neutrals approaching extinction, or do they now have additional effective tools at their disposal?⁵⁶

Finally, three suggestions for ALJs contemplating adding a mediation component to adjudication systems already in place:

- (1) Carefully consider the strategies and tactics offered by experienced collaboration, ADR, and mediation experts such as those cited.
- (2) Read the National Center for State Courts' (NCSC) ADR Resource Guide⁵⁷ and the ABA's (Section of Dispute Resolution) *ADR Handbook for Judges*.⁵⁸ The NCSC describes the Handbook as one that, "addresses how to start a program; concerns involving multiple neutrals; qualification, training and compensation of neutrals; roles of the

second is an investigation of strategies for more constructively addressing intractable conflict problems.

⁵⁶ Marquardt, *supra* note 55.

⁵⁷ *ADR Resource Guide*, NATIONAL CENTER FOR STATE COURTS, <http://www.ncsc.org/Topics/Civil/Alternative-Dispute-Resolution-ADR/Resource-Guide.aspx> (last visited Mar. 26, 2013).

⁵⁸ AM. BAR ASS'N, *ADR HANDBOOK FOR JUDGES* (Donna Stienstra & Susan M. Yates eds., 2004). This book can be found as the last entry on a long list of resources set out on the highly useable and informative site of the National Center for State Courts, *available at* <http://www.ncsc.org/Topics/Civil/Alternative-Dispute-Resolution-ADR/Resource-Guide.aspx> (last visited Mar. 26, 2013). The book can also be found at your local law library as KF9084 A75 A37 2004.

participants; and program quality assurance.”⁵⁹ Taking the time to read such a guide will save you the time and pain of courting setback and/or failure.

- (3) Get the right training for yourselves or those ALJs chosen to do the mediation in the program you are contemplating as did the District of Columbia’s Office of Administrative Hearings (DC/OAH),⁶⁰ separate from the District’s DOES/AHD (mentioned above), when it instituted its highly successful mediation program. In setting up its program it reached out to the University of Maryland for initial training of its ALJs. The training was primarily aimed at teaching mediation skills to the ALJs who would be seconded to the mediation system. The training “took” and has led to an Office that works effectively as it pursues the goal of justice provided as swiftly as docket calendars allow. As a useful resource in the search for the best training, the ABA has made available a listing of mediation training resources in each state.⁶¹ In addition to making any of the latter contacts in your state, it is strongly recommended that you turn to appropriate experts in your undergraduate and law schools. They can recommend training resources and offer support to your whole enterprise.

Your task is great, the rewards even greater. Once again it is appropriate to close this discussion of *doing it right* through the use of proper *process* with the words of Maryland’s Chief Appellate Judge Robert Bell:

⁵⁹ *ADR Resource Guide*, *supra* note 57.

⁶⁰ See *Office of Administrative Hearings*, OFFICE OF ADMINISTRATIVE HEARINGS, THE DISTRICT OF COLUMBIA, <http://oah.dc.gov> (last visited Mar. 28, 2013).

⁶¹ See *ADR Training Providers*, AM. BAR ASS’N, http://www.americanbar.org/groups/dispute_resolution/resources/adr_training_providers.html (last visited Mar. 29, 2013); see also AM. BAR ASS’N, generally and more specifically, http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/usa_training.authcheckdam.pdf (last visited Feb. 28, 2013); *Links to Other ADR Entities*, AM. BAR ASS’N, http://www.americanbar.org/groups/dispute_resolution/resources/links_of_interest.html (last visited Mar. 29, 2013).

While cost and time savings are very important . . . it is also important to note that the judiciary supports the use of mediation because of the less tangible benefits that arise . . . when people are empowered to resolve their own disputes productively and creatively. Mediation is one of the tools that can help transform our society from a culture of conflict to a culture of conflict resolution.⁶²

In today's storm tossed civil/political environment, *that* is sanity.

⁶² Press Release, Maryland Judiciary, *New Research Shows Mediation Saves Time & Money*, available at <http://www.courts.state.md.us/press/2002/pr7-10-02.html> (last visited May 30, 2013).