

# MEDIATION, SELF-REPRESENTED PARTIES, AND ACCESS TO JUSTICE: GETTING THERE FROM HERE

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## INTRODUCTION

Mediation is enthusiastically promoted as a vehicle for providing access to justice.<sup>1</sup> This is as true in developing countries as it is in the United States.<sup>2</sup> For individuals, mediation promises autonomy, self-determination and empowerment;<sup>3</sup> for courts, there is the lure of procedural and administrative reforms—reduced dockets and greater efficiencies. Unburdened with formal discovery, evidentiary and procedural rules, pleadings, and motions, mediation is thought to generate access to justice at a faster pace than litigation. Commentators sing its praises while bemoaning its underutilization.<sup>4</sup>

I argue that claims about mediation’s ability to provide access to justice should be more modest because mediation falls short on its original promise

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1. See, e.g., ABA SECTION OF DISPUTE RESOLUTION, ACCESS TO JUSTICE THROUGH ALTERNATIVE DISPUTE RESOLUTION WHITE PAPER 2 (2002), [https://www.americanbar.org/content/dam/aba/images/dispute\\_resolution/publications/A2J\\_%20white\\_paper.pdf](https://www.americanbar.org/content/dam/aba/images/dispute_resolution/publications/A2J_%20white_paper.pdf) [<https://perma.cc/XJV5-LL5S>] (“Access to mediation is one way to increase an individual disputant’s access to justice.”); Amy Applegate & Connie Beck, *Self-Represented Parties in Mediation: Fifty Years Later it Remains the Elephant in the Room*, 51 FAM. CT. REV. 87, 88 (2013) (discussing mediation advocated in family law cases for self-represented parties).

2. See generally Jacqueline Nolan-Haley, *Mediation and Access to Justice in Africa: Perspectives from Ghana*, 21 HARV. NEGOT. L. REV. 59 (2015). For a discussion of the development of Alternate Dispute Resolution as an access to justice vehicle in Latin America, see Mariana Hernandez-Crespo, *From Noise to Music: The Potential of the Multi-Door Courthouse (Casas de Justicia) Model to Advance Systemic Inclusion and Participation as a Foundation for Sustainable Rule of Law in Latin America*, 2012 J. DISP. RESOL. 335, 364; see also Dorcas Quek Anderson, Eunice Chua & Ngo Tra My, *How Should the Courts Know Whether a Dispute is Ready and Suitable for Mediation? An Empirical Analysis of the Singapore Courts’ Referral of Civil Disputes to Mediation*, 23 HARV. NEGOT. L. REV. 265, 268 (2018).

3. Court administrators have also suggested the benefits of “closure, insight, clarity, acceptance . . . and control for the parties themselves.” See Rebecca Price, *From the Southern District of New York, a Success Story: Limited-Scope Pro Se Program Provides Access and Justice*, 1 ABA DISP. RESOL. MAG., 13, 15 (2016).

4. See, e.g., John D. Feerick & Linda Gerstel, *The Underutilization of Mediation in New York and What Should Be Done About It?*, 11 NYSBA N.Y. DISP. RESOL. LAW. 23 (2018).

of being a voluntary process based on party self-determination.<sup>5</sup> In what I label a “withering away of consent,” courts and legislatures have pushed hard to sell mediation as an access to justice opportunity, often without regard for the consensual nature of the process. Too often, this hard sell has negative consequences for individuals with disadvantaged economic status who navigate the legal system on their own.<sup>6</sup> These are the self-represented parties who seek access to justice in the formal judicial system but then find themselves in mediation, a different, informal system than what has been institutionalized in the courts. The extent to which they receive justice from either system is unclear.<sup>7</sup>

There are multiple understandings of the meaning of “access to justice” that frequently begin with the need for access to legal representation and to legal processes that can resolve disputes.<sup>8</sup> Beyond these basics, scholars consider a range of issues including whether the scope of the access to justice movement should be expanded to pursue specific goals and reform of specific policies or whether it should pursue incremental change as distinct from deeper change in the infrastructure of the justice system.<sup>9</sup> From a historical perspective, access to justice is a reform movement described by Mauro Cappelletti and Bryant Garth in their international and interdisciplinary study of access to justice,<sup>10</sup> wherein they identified three waves of law reform: legal aid, procedural devices for class actions, and promoting systemic reform of the legal system through alternative dispute resolution (ADR).<sup>11</sup>

In this Essay, I engage with the third wave of the historical access to justice reform movement—promoting systemic reform of the legal system through ADR. My focus is on the institutionalization of mediation in court-connected programs. In addition to the withering away of consent, there are other negative features associated with these programs which impair access to justice and diminish fairness. These impediments include lack of

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5. See generally Jacqueline Nolan-Haley, *Does ADR’s “Access to Justice” Come at the Expense of Meaningful Consent?*, 33 OHIO ST. J. DISP. RESOL. 373 (2018).

6. See Ian Weinstein, *Access to Civil Justice in America: What do We Know?*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS 3 (Samuel Estreicher & Joy Radice eds., 2016) (discussing gap in access to justice for persons of low and moderate income).

7. See generally Robert Rubinson, *Indigency, Secrecy, and Questions of Quality: Minimizing the Risk of “Bad” Mediation for Low-Income Litigants*, 100 MARQ. L. REV. 1353 (2017). “The risk of poor mediation intensifies in settings where there are large numbers of low-income litigants.” *Id.* at 1355.

8. Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 532–33 (2013).

9. See Fordham University School of Law, *Agenda for the A2J Summit* (Oct. 2, 2018) (on file with the author). The five agenda items were related to whether (1) the A2J movement should pursue specific goals, and the reform of specific policies and practices; (2) pursue incremental change as distinct from deeper changes in the infrastructure of justice; (3) related to other movements; (4) inform and relate to communities that pursue A2J in single practice areas; and (5) to what extent should the movement address the civil/criminal connection.

10. Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 196–223 (1978).

11. *Id.* at 198. The term “ADR” is frequently understood today to mean “appropriate dispute resolution.” *Id.*

information for parties to guide them through an informed decision-making process, rushed mediation sessions, and questionable mediator behaviors. Critics have observed that current ethical standards focus more on guiding mediators than on protecting the rights of self-represented parties in mediation.<sup>12</sup> All of this raises concerns about the quality of justice experienced by self-represented parties in mediation.<sup>13</sup> Do they achieve the kind of fairness that is considered a core value of the access to justice movement? Beyond fairness concerns, blending the informal justice of mediation with the formalities of the court system raises a basic access to justice question—are the benefits of court mediation more desirable for unrepresented parties than the benefits provided by the civil litigation system?<sup>14</sup>

I argue that to the extent courts, legislatures, and policymakers have institutionalized mediation in the court system, there needs to be greater accountability for its functioning in that system, particularly where vulnerable (self-represented) parties are involved. We need to be concerned not just with the withering away of consent but with the collateral damage that follows in its wake. Towards that end, I will offer a proposal that the mediation community of scholars, practitioners, and users develop a set of best practices specifically directed towards self-represented parties. These stakeholders would then work towards establishing an Index that would rate the performance of court mediation programs serving unrepresented parties.

#### I. SELF-REPRESENTED PARTIES AND THE COURT MEDIATION EXPERIENCE

Studies show that many people do not go to court when they have a legal problem, and when they do take a legal problem to court, they come without an attorney.<sup>15</sup> A large proportion of the cases that are brought to court involve contract, debt collection, and landlord/tenant issues. Most litigants

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12. Applegate & Beck, *supra* note 1, at 95–96 (describing such practices in the family law context). For an example of guidance to courts that is not focused on self-represented parties, see generally CTR. FOR DISPUTE SETTLEMENT, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1992), <https://s3.amazonaws.com/aboutrsi/594428b132c16660b4360f46/NationalStandardsADR.pdf> [<https://perma.cc/7T4T-CA5V>]; ABA SECTION OF DISPUTE RESOLUTION, *supra* note 1.

13. See Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMU L. REV. 721, 730 n.36 (2017) (discussing the potential for inequality, bias, and prejudice to undermine mediation's potential to deliver justice and self-determination).

14. This parallels the debate in the field of arbitration as to whether private adjudication by an arbitrator rather than the public court system increases or decreases access to justice. Compare Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN L. REV. 1631, 1635–36 (2005), with Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-Dispute Employment Arbitration Agreements*, 16 OHIO ST. J. DISP. RESOL. 559, 563 (2001).

15. See Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 60 (2010); see also Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1549 (2016) (discussing barriers to the court for economically-disadvantaged people).

in courts that deal with these issues are self-represented because they cannot afford a lawyer.<sup>16</sup>

When self-represented parties arrive in court they interact with a number of actors, including clerks, magistrates, judges, mediators, and arbitrators.<sup>17</sup> They may also discover that their opponent is represented by an attorney,<sup>18</sup> thus adding one more player to the mix. Many self-represented parties expect to see a judge, not a mediator. The information that is available to them about mediation varies, depending upon the state in which they live. Some states have extensive information offerings with detailed websites, brochures, and videos while others offer very little information.

Depending upon the nature of their dispute and the jurisdiction in which they find themselves, when self-represented parties arrive at court there are a few possible mediation scenarios that might take place.<sup>19</sup> First, they may be automatically referred to mediation through a mandatory program. Alternatively, a judge, clerk, or ADR program director may suggest that they try to resolve their dispute through the court's mediation program. A third possible scenario, oddly enough, is that some parties may never even learn that the court has a mediation program available.<sup>20</sup>

#### A. *Forms of Mediation*

There are countless variations of court-connected mediation programs. In this Essay, I brush with broad strokes and sketch only basic descriptions, focusing upon the main divide between mandatory and voluntary mediation programs.

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16. Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 41–43 (2010) (describing data on self-representation in family, small claims, and housing courts). In the family law context, some parties are self-represented because they believe they are capable of representing themselves or because they fear that attorneys will hamper the process with adversarial conduct. Applegate & Beck, *supra* note 1, at 87.

17. See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators and Clerks*, 67 FORDHAM L. REV. 1987, 1998–99 (1999).

18. A Civil Justice Initiative study showed that in 76 percent of cases at least one party was self-represented (usually the defendant). PAULA HANNAFORD-AGOR ET AL., CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS vi (2015), [www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx](http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx) [<https://perma.cc/7T63-NZND>].

19. There are many different referral schemes. The referral procedures in small claims courts, for example, may differ from family courts and even within the category of small claims courts there are several models of referrals. See generally Heather Kulp, *Increasing Referrals to Small Claims Mediation Programs: Models to Improve Access to Justice*, 14 CARDOZO J. CONFLICT RESOL. 361 (2013) (describing six models by which cases are referred to mediation).

20. Donna Shestowsky, *When Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L. REV. 189, 218–22 (2017). Julie Macfarlane's study of self-represented litigants in Canada found that, in some jurisdictions, they are not offered mediation or do not know what mediation is. JULIE MACFARLANE, THE NATIONAL SELF-REPRESENTED LITIGANTS PROJECT: IDENTIFYING AND MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS CONVOCATION 12 (2013).

*Mandatory mediation:* The state's power to compel mediation has been upheld in the United States,<sup>21</sup> and mandatory mediation is now a common feature in many state and federal courts.<sup>22</sup> In essence, this means that mediation is a type of condition precedent to trial or even to meeting with a judge. Other sanctions may also be imposed on parties who refuse to mediate. A variation of mandatory mediation is the opt-out model. While there are several variations of this model, in essence, it requires that litigants participate in an initial session with the mediator as a pre-condition of bringing an action in court.<sup>23</sup>

Critics claim that mandatory mediation imposes additional procedural hurdles on parties—thereby increasing the cost of litigation—and that coercive behaviors by some mediators lead to a dilution in informed consent.<sup>24</sup> Advocates for the poor and others in the mediation community oppose adoption of mandatory mediation for unrepresented parties because of their inability to receive legal advice from the mediator given the restrictions imposed by unauthorized practice of law rules.<sup>25</sup>

*Voluntary mediation:* In contrast to compulsory programs, many courts offer parties the option of participating in the mediation process. Mediation may be among a menu of ADR offerings including arbitration, early neutral evaluation, or settlement conference. In these courts, parties must weigh all the options available to them and make a procedural choice. In reality, the choices are not always so clear cut because the label mediation is attached to many processes, including settlement conferences.<sup>26</sup> If parties have the benefit of being represented by counsel, there is a high likelihood that they would seek their lawyer's advice about whether or not to choose mediation.<sup>27</sup> Without counsel, they may become confused.

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21. See generally *In re Atlantic Pipe Corp.*, 304 F.3d 135 (1st Cir. 2002).

22. See generally SARAH RUDOLPH COLE, NANCY HARDIN ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY & PRACTICE* 143 (2008). Family courts, for example, have long required parties to engage in the mediation process. But see Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End For Mandatory Mediation?*, 47 *FAM. CT. REV.* 371, 378 (2009).

23. This approach is used in Italy. See generally Leonardo D'Urso, *Italy's "Required Initial Mediation Session": Bridging the Gap Between Mandatory and Voluntary Mediation*, 36 *INT'L INST. FOR CONFLICT PREVENTION & RESOL.* 49 (2018).

24. See, e.g., Jacqueline Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 *WASH. U. L. REV.* 47, 61 (1996); Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 *NOTRE DAME L. REV.* 775 (1998) [hereinafter *Informed Consent*].

25. Unauthorized practice of law statutes prevent non-lawyer mediators from giving legal advice to parties. See DEP'T OF DISPUTE RESOLUTION SERVS. OF THE SUPREME COURT OF VA., *GUIDELINES ON MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW* (2001), [http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl\\_guidelines.pdf](http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl_guidelines.pdf) [https://perma.cc/BVU6-6XQU]; see also Applegate & Beck, *supra* note 1, at 91, 92.

26. Salem, *supra* note 22, at 371.

27. See Donna Shestowsky, *Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedures*, 36 *CONFLICT RESOL. Q.* 69, 70 (2018); see also Engler, *supra* note 16, at 54 n.74 (noting how the presence of counsel influences the choice of the dispute resolution process).

Studies report mixed motivations for self-represented parties' choices in accepting or rejecting mediation. Julie Macfarlane's study of self-represented litigants in Canada found that some self-represented parties were hesitant about participating in mediation because of concerns over fairness when the opposing side was represented by a lawyer.<sup>28</sup> Studies from small claims court mediation programs show that, as a practical matter, litigants may opt for mediation if they are persuaded by an authority figure that mediation makes the most sense for them.<sup>29</sup>

*B. Behind Closed Doors: What Can Go Wrong for Unrepresented Parties in Mediation*

Procedural and substantive information about mediation is necessary for informed consent.<sup>30</sup> Lack of information about the mediation process and understanding how it differs from the judicial process, as well as a lack of information about the law relevant to their case, can dramatically affect the outcome of mediation for unrepresented parties.<sup>31</sup> They could end up like the tenant in New York who, following a court-referred mediation, lost the only home she had known for over twenty years<sup>32</sup> or the homeowner in a New Jersey foreclosure mediation who reached an agreement in mediation and two years later lost her home to foreclosure.<sup>33</sup>

Beyond a lack of procedural and substantive information, the mediator's style may also make a difference in outcome. Unsuspecting self-represented parties may find mediators who engage in evaluative behaviors even though a program is labeled as "facilitative mediation."<sup>34</sup> To the extent that the mediator's evaluation becomes aggressive, parties may be coerced into settlement agreements.<sup>35</sup> Short of coercion, there are many anecdotal reports of mediators becoming directive, making recommendations, predicting court outcomes, and pressuring parties into agreement.<sup>36</sup> For example, studies of

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28. MACFARLANE, *supra* note 20.

29. See Kulp, *supra* note 19, at 386 (noting that, in the context of small claims court mediation, "litigants are more likely to choose mediation if an authority figure gives them a number of legitimate, easy-to-understand incentives for doing so").

30. Nolan-Haley, *Informed Consent*, *supra* note 24.

31. Applegate & Beck, *supra* note 1, at 94. The authors observe that, in the context of family law issues and court-mandated mediation, self-represented parties may be confused if they have no prior mediation experience. *Id.* at 95.

32. Wright v. Brockett, 571 N.Y.S.2d 660, 661 (1991) (referring parties to a mediation-arbitration process conducted at the Institute for Mediation & Conflict Resolution Dispute Resolution Center).

33. GMAC Mortgage, LLC v. Willoughby, 165 A.3d 787, 789 (2017).

34. See E. Patrick McDermott et al., "What's Going On" in *Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit*, 9 HARV. NEGOT. L. REV. 75, 95 (2004) (describing results of studies of Equal Employment Opportunity Commission (EEOC) mediation).

35. Empirical studies in the context of EEOC mediation programs show that, when an evaluative mediation is conducted without representation, the charging party was worse off than if the mediation was facilitative and without representation. See E. Patrick McDermott & Ruth Obar, *Mediation of Employment Disputes at the EEOC*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA, *supra* note 6, at 476.

36. See, e.g., Salem, *supra* note 22, at 378.

family court mediation programs show that conditions are less than ideal, with mediation practice described as being “rushed and mechanical.”<sup>37</sup> Many mediators acknowledge that they cannot conduct a facilitative mediation process if they are to meet the demands of the workplace with its complex cases, growing caseloads, and diminished resources.<sup>38</sup>

## II. STRATEGIES FOR IMPROVEMENT

### A. Information

Information is a critical component of fairness. Self-represented parties need information about the mediation process, how it differs from adjudication, and what it means to consent to mediation.<sup>39</sup> There are a wide variety of ways in which states provide this information, whether through websites, brochures, fact sheets or videos. In some cases, process information about mediation is available on the court’s general website. In other cases, information is limited to specific areas such as small claims court. Some states have excellent programs that provide information on multiple platforms. Maryland, for example, has a designated office for ADR and a website that provides clear information and is easily navigated. It has a web-based program which collects feedback to try to make ADR resources more efficient. The video links on Maryland websites are accompanied by helpful fact sheets. California provides several videos that describe mediation in small claims court and how to navigate the process.

Self-represented parties also need substantive information about their legal rights and entitlements. Would they be entitled to treble damages if their case were heard in court? Has the statute of limitations expired? Was the landlord’s lockout illegal? All of these inquiries relate to informed decision-making.<sup>40</sup> Given the strictures imposed by unauthorized practice of law statutes,<sup>41</sup> self-represented parties are limited to receiving legal “information” rather than legal “advice” from non-lawyers. But even if court clerks or mediators give parties legal information, it is not clear how the litigants would work through its complexity. A recent study in the family law context identified several challenges faced by self-represented parties when they attempt to process legal information.<sup>42</sup>

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37. Rebecca Love Kourlis et al., *Courts and Communities Helping Families in Transition Arising from Separation or Divorce*, 51 FAM. CT. REV. 351, 364 (2013).

38. Salem, *supra* note 22, at 377–78 (questioning whether court connected mediation continues to deliver on the promise of family self-determination).

39. See Jennifer Reynolds, *Luck v. Justice: Consent Intervenes, but for Whom?*, 14 PEPP. DISP. RESOL. L.J. 245, 247 (2014).

40. Nolan-Haley, *Informed Consent*, *supra* note 24, at 835–36.

41. *Id.* at 794.

42. See Jonathan Crowe et al., *Understanding the Legal Information Experience of Non-Lawyers: Lessons from the Family Law Context*, 27 J. JUD. ADMIN. 137, 139–41 (2018) (describing the challenges faced by self-represented parties). First, parties must deal with the complexity of the information they receive; second, parties are challenged by the difficulty in assessing credibility of the sources of information; third, parties indicate a clear preference for informal sources such as websites; fourth, parties are challenged in being able to apply the

### B. Beyond Information

Many proposals that have been advanced for assisting unrepresented parties in mediation include the greater use of online technology.<sup>43</sup> Three other correctives that are worth considering on a larger scope than already exist are pre-mediation counseling, limited scope representation, and non-lawyer advocates with subject matter expertise.

*Pre-mediation counseling:* In some mediation contexts, parties may benefit from assistance in dealing with difficult legal issues before participating in mediation.<sup>44</sup> An empirical study of foreclosure mediation programs found that homeowners who worked with housing counselors before their mediation reported that they believed that it was beneficial in helping them understand their options.<sup>45</sup>

*Limited scope representation in mediation:* In general, parties who are represented by attorneys are much more likely to achieve better results than self-represented parties.<sup>46</sup> In the context of mediation, studies show “some evidence” that those who are represented by attorneys might obtain better outcomes than those who are not represented.<sup>47</sup> In the EEOC mediation context, studies show that parties who are represented by counsel achieve higher monetary amounts in mediation than those who are not represented.<sup>48</sup>

Limited scope representation provides unrepresented parties with an attorney for a particular event. Ethical rules of the legal profession permit lawyers to engage in limited scope representation if it is reasonable and the client gives informed consent.<sup>49</sup> While full representation may be the ideal in a perfect access to justice world, the assistance of an attorney who can help

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information to their own situation; and fifth, parties tend to rely on outdated language. *Id.* at 141.

43. Nancy Welsh, for example, suggests that online technology may contribute to ensuring “real, informed self-determination in mediation.” She notes that online dispute resolution is already being used experimentally by Legal Services attorneys to provide information to self-represented parties. Welsh, *supra* note 13, at 758–59; *see generally* J. J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993 (2017).

44. *See* Jennifer Shack & Hanna Kaufman, *Promoting Access to Justice: Applying Lessons Learned from Foreclosure Mediation*, 1 ABA DISP. RESOL. MAG. 16, 18–19 (2016).

45. *Id.* Resolutions Systems Institute researched all the foreclosure mediation programs in the country to identify best practices. It identified four program design elements that align with access to justice goals. *Id.*

46. *See* Russell Engler, *When Does Representation Matter?*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA, *supra* note 6, at 71, 73; *see also* Emily S. Taylor Poppe & Jeffrey J. Rachlinksi, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 885 (2016); Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers’ Impact*, 80 AM. SOC. REV. 909, 920–24 (2015). *But see* Jean Poitras, Arnaud Stimec & Jean-Francois Roberge, *The Negative Impact of Attorneys on Mediation Outcomes: A Myth or a Reality?*, 26 NEG. J. 9, 22 (2010).

47. Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 468 (2010).

48. *See* McDermott et al., *supra* note 34, at 76, 107.

49. MODEL RULES OF PROF’L CONDUCT r. 1.2(c) (AM. BAR ASS’N 2018).



parties engage in informed decision-making is beneficial.<sup>50</sup> For example, a housing court study showed that limited scope representation both in mediation and in the courtroom achieved better results for pro se tenants than receiving information alone in the hallways.<sup>51</sup>

Scholars have proposed the concept of limited representation in the context of mediation, and this approach has already been adopted by some foreclosure mediation programs.<sup>52</sup> A successful limited scope representation program has also been instituted by the Southern District of New York. It provides limited scope representation to pro se parties in employment discrimination cases.<sup>53</sup> Despite the ethical challenges related to the nature of the lawyer-client relationship, including the scope of representation, confidentiality, and conflicts of interest, the concept of limited scope representation is worth pursuing for court-connected mediation.<sup>54</sup>

*Non-lawyer advocates:* In general (outside of the mediation context), scholars have called for an expanded role for non-attorneys to participate in access to justice efforts.<sup>55</sup> Lay advocates are already a common feature in the mediation of special education disputes<sup>56</sup> and in EEOC mediations.<sup>57</sup> The use of non-lawyer advocates with subject matter expertise could be

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50. It should be noted, however, that even if unrepresented parties were appointed legal counsel, it would not necessarily affect their satisfaction with the mediation process. Empirical studies of EEOC mediation and related data found that “mediation can provide party satisfaction on both procedural and distributive dimensions without representation.” See McDemott & Obar, *supra* note 35, at 469.

51. See Engler, *supra* note 17, at 2064.

52. Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 OHIO ST. J. ON DISP. RESOL. 659, 705–06 (2013); see also Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 150 (2005) (proposing a corps of lawyers who would represent parties in mediation).

53. See Price, *supra* note 3, at 14.

54. Russell Engler, *Limited Representation and Ethical Challenges*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA, *supra* note 6, at 431, 440.

55. Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1245 (2014); see also Alex Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2277 (1999). With respect to ADR processes, Elayne Greenberg has discussed the advantages and disadvantages of non-lawyer advocates in arbitration hearings. Elayne Greenberg, *Acts Like a Lawyer, Talks Like a Lawyer: Non-Lawyer Advocates Representing Parties in Dispute Resolution*, NYSBA N.Y. DISP. RESOL. LAW. 7, 7 (2018); see also Rebecca L. Sandefur & Thomas Clarke, *Roles Beyond Lawyers: Summary, Recommendations and Research Report of an Evaluation of the New York City Court Navigators Program and its Three Pilot Projects*, AM. B. FOUND. RES. J. 14–22 (2016) (describing a successful program using non-lawyer court navigators in cases involving tenants facing eviction).

56. See, e.g., Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 407–12 (discussing a special education mediation program that permits non-lawyer advocates to assist parties). It should be noted that this practice is not without its critics who believe in the importance of attorney assistance in special education mediation cases. See, e.g., Sonja Kerr & Jenai St. Hill, *Mediation of Special Education Disputes in Pennsylvania*, 15 U. PA. J.L. & SOC. CHANGE 179, 193 (2012).

57. Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. DISP. RESOL. 341, 347, 364 (2002) (noting the use of union representatives or fellow employees to represent parties in EEOC mediations).

expanded to the court mediation programs that are typically frequented by self-represented parties: family court, housing court, and small claims court.

### III. MEDIATION INDEX

Mediation has become an important asset to the judicial system. The diversion of cases to mediation has relieved federal and state courts of some of their burdens by reducing dockets, thereby enabling greater efficiencies. At the same time, mediation has affected the legal rights of parties who seek access to justice in the judicial system. For this reason, accountability for court-connected mediation programs is crucial to their legitimacy. In this regard, what Judith Resnik has said with respect to arbitration, can also be said of mediation: “[t]he alternatives must be publicly available and accountable so as to permit analyses of whether their processes and results constitute law, justice, or both.”<sup>58</sup> The specific inquiry for mediation is whether court mediation programs provide justice. Under the current mediation landscape, where you live determines how much information you will have about the mediation process and how your legal rights may be affected by mediation.

One form of accountability is the use of an index or similar assessment tool that would capture a snapshot of what is happening in court mediation programs throughout the United States. In general, several commendable efforts are underway in courts to assist self-represented litigants in accessing ADR options, including the mediation process.<sup>59</sup> However, too often, the good news about these programs is not appreciated.

The Index would operate to measure the extent to which states adhere to best practices with self-represented parties in court mediation. It would build on the work of states that have already begun to identify best practices in court mediation.<sup>60</sup> However, its specific focus would be on self-represented parties and it would be designed to rate the performance of courts that serve these parties with regard to problems that affect all of them. Working with courts and other stakeholders, Index designers would examine the data and consider a variety of potential best practices for self-represented parties in mediation.<sup>61</sup> These practices might include specific guidelines to assist

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58. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *YALE L.J.* 2804, 2939 (2015).

59. Jerome B. Simandle, *Enhancing Access to ADR for Unrepresented Litigants*, 1 *ABA DISP. RESOL. MAG.* 6, 7 (2016).

60. See, e.g., UTAH COURTS, UTAH MEDIATION BEST PRACTICE GUIDE, <https://www.utcourts.gov/mediation/docs/Mediation%20Best%20Practices%20Guide%20-%20Final%20Draft.pdf>; see also Kelly Browe Olsen & Andrea Clark, *Guide for Family Mediators: Working with Self-Represented Litigants*, ASS’N FAMILY & CONCILIATION COURTS (2017).

61. A valuable resource in this endeavor is the Resolutions Systems Institute, which provides numerous publications, evaluations, and data on the operation of mediation programs throughout the states. *About Us*, RSI, <http://aboutrsi.org/> [<https://perma.cc/7WGW-NFR5>] (last visited Mar. 2, 2019).

mediators in dealing with self-represented parties,<sup>62</sup> mediator training to address explicit bias,<sup>63</sup> the availability of limited scope representation, and the availability of lay advocates with subject matter expertise to assist parties. Index designers would also be concerned with how information about the mediation process is conveyed to parties, confidentiality protections, mediator impartiality, and how the cost of mediation is covered.

The Index is not a novel proposition. Heather K. Gerken's book<sup>64</sup> describes the benefit of having an index to create incentives for political reform. The National Center for Access to Justice, housed at Fordham Law School, operates a Justice Index which measures access to justice across four categories.<sup>65</sup> An index has been used in other contexts including the Rule of Law.<sup>66</sup>

No doubt, developing a Mediation Index would involve a number of challenges. Given the multiple state and federal court mediation programs with different subject matters, measuring fairness in a way that is both systematic and comparable across subject matters and states is a daunting task. For this reason, it makes sense to begin on a small scale: collecting data with one court, such as family court or small claims court, distilling best practices, and then developing categories for an Index.

#### CONCLUSION

From an access to justice perspective, it is not simply the availability of mediation that contributes to reform of the legal system, but the quality of justice that results from a given mediation program. If court-connected mediation is to reflect Cappelletti and Garth's vision of contributing to the systemic reform of the legal system, there needs to be transparency and some measure of accountability for its functioning. A Mediation Index is one place to start. Yes, a daunting task but worth the effort if we continue to promote mediation as an opportunity for achieving access to justice.

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62. See Applegate & Beck, *supra* note 1, at 87 (discussing the rules of Virginia, Indiana, and California).

63. Welsh, *supra* note 13, at 750–52.

64. See generally HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009).

65. See *The Justice Index*, NAT'L CTR. FOR ACCESS TO JUST., <https://justiceindex.org> [<https://perma.cc/9JJR-VYDZ>] (last visited Mar. 2, 2019).

66. See generally Juan Carlos Botero, *The Rule of Law Index: A Tool to Assess Adherence to the Rule of Law Worldwide*, NYSBA J., Jan. 2018, at 30. There are four universal principles: accountability, just laws, open government, and accessible and impartial dispute resolution. Eight categories are ranked within these principles: constraints on government power, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. *Id.* at 31.