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Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*

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Two years ago, the dispute resolution world was set reeling by the release of the long-anticipated Rand Corporation report on mediation and neutral evaluation in the federal courts.¹ That study concluded that there was “no strong statistical evidence that time to disposition [or lawyer work hours were] significantly affected by mediation or neutral evaluation in any of the six programs studied.”² In fact, these findings were not at all inconsistent with the mixed results shown by the limited research about civil case mediation in state courts.³ Nonetheless, this report generated

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¹ See JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT at xxvii (1996).

² KAKALIK ET AL., *supra* note 2, at xxx.

³ Some studies of civil mediation suggest reductions in time and costs through mediation. See STEVENS H. CLARKE ET AL., COURT-ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS at vii (1995); JULIE MACFARLANE, COURT-BASED MEDIATION OF CIVIL CASES: AN EVALUATION OF THE ONTARIO COURT (GENERAL DIVISION) ADR CENTRE 13, 17, 35 (1995); Susan Keilitz,

fierce debate between the Rand researchers and defenders of mediation who were concerned about the policy effects of these conclusions which suggested that mediation "didn't work."⁴

According to the mediation defenders, the programs studied were not representative of those in federal courts;⁵ they were poorly implemented examples of mediation;⁶ they were studied in their early stages before improvements were implemented;⁷ and the research too narrowly construed the impact of mediation, focusing primarily on time and cost rather than on the less tangible benefits relating to quality and party satisfaction.⁸ The exchanges between Rand researchers and mediation defenders raised blood pressure levels, and consumed pages of print, but left unresolved the question of whether civil case mediation works to affect the timing, cost, and quality of case resolution.

In this Article, I will use evidence from a study of the varying ways that corporations manage business-to-business disputes to argue that this debate between mediation defenders and researchers does not focus on the

Civil Dispute Resolution Processes, in NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON RECENT RESEARCH FINDINGS—IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS 1, 8–9 (Susan Keilitz ed., 1993). Research also documents high party satisfaction. See MACFARLANE, *supra*, at 47–48; Keilitz, *supra*, at 9. Other research results are not so promising. See CLARKE ET AL., *supra*, at vi–vii; Stevens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settling: Court-Ordered Civil Case Mediation*, 19 JUST. SYS. J. 311, 311 (1997); Keilitz, *supra*, at 7–9.

⁴ See Pamela Chapman Enslin, *Insights on Participant Satisfaction May Be Real Significance of RAND Report*, 3 DISP. RESOL. MAG. 14 (1997); Deborah R. Hensler, *Rand's Rebuttal: CJRA Study Results Reflect Court ADR Usage—Not Perceptions*, 15 ALTERNATIVES TO HIGH COST LITIG. 79 (1997); Sanford M. Jaffe & Linda Stamato, *Views on Rand's CJRA Report: No Short Cuts to Justice*, 15 ALTERNATIVES TO HIGH COST LITIG. 67 (1997); Diane E. Kenty, *RAND Report Provides Insights for State Court ADR Programs*, 3 DISP. RESOL. MAG. 18 (1997); Jefferey G. Kichaven, *ADR Doesn't Save Time or Money? Great News!*, 3 DISP. RESOL. MAG. 15 (1997); Craig A. McEwen & Elizabeth Plapinger, *RAND Report Points Way to Next Generation of ADR Research*, 3 DISP. RESOL. MAG. 10 (1997); Francis E. McGovern, *Beyond Efficiency: A Bevy of ADR Justifications*, 3 DISP. RESOL. MAG. 12 (1997); Kent Snapp, *Five Years of Random Testing Shows Early ADR Successful*, 3 DISP. RESOL. MAG. 16 (1997); *Views on Rand's CJRA Report: Concerns and Recommendations*, 15 ALTERNATIVES TO HIGH COST LITIG. 67 (1997).

⁵ See McEwen & Plapinger, *supra* note 4, at 10.

⁶ See *id.*

⁷ See Enslin, *supra* note 4, at 14.

⁸ See Enslin, *supra* note 4, at 14; Jaffe & Stamato, *supra* note 4, at 68; Kenty, *supra* note 4, at 18; Kichaven, *supra* note 4, at 15; McGovern, *supra* note 4, at 12–13.

right issues. Instead of asking *whether mediation works or not*, we need to examine *how and why parties and lawyers “work” mediation in varying ways*. Asking the second question rather than the first would refocus the conclusions from the Rand research. What if the press release summarizing that study had said, “Lawyers and parties in federal courts fail to make effective use of mediation and early neutral evaluation to speed resolution and reduce costs”? This perspective on mediation reflects the presumption that it is a process that the parties and their lawyers control in many ways. As a result, it follows that parties and lawyers have considerable responsibility for the impact of mediation on the costs and the timing of events in civil litigation and for the character and quality of the results it produces.

Once said, the importance of lawyers and parties to mediation seems pretty obvious. Certainly, it was readily apparent to one of the corporate counsel we interviewed in research that I will describe later in this Article. As he put it:

Mediation in and of itself is not going to reduce costs or time. You could go back and forth for years and then go into mediation. Or you could go into mediation immediately. It’s everything that happens around mediation that makes it more or less expensive. . . . Mediation itself, sitting in a room with a so-called neutral third party, is no panacea.⁹

In this view, mediation is a tool. Its effects depend on its uses and on the skills, goals, and orientations of its users.¹⁰

⁹ Corporate Study, *infra* note 13.

¹⁰ This view of mediation has been at least implicit in commentary raising concerns about the engagement in mediation of lawyers who bring to it their “adversarial orientation.” From this perspective, lawyers can transform the mediation process from imaginative problem solving to extensions of litigation in which winning is the objective. Thus, the orientations of lawyers and parties to mediation shape how it is employed. See generally Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1354 (1995); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1, 13 (1998). Further, there is research noting how little the introduction of mediation changes the ways that lawyers approach the practice of law. Clarke and Gordon note, for example, that the introduction of civil case mediation in North Carolina courts “did not substantially alter the way [lawyers] practiced law Remarkably, a majority (55 percent) reported that mediation did not change their approach to settlement negotiation.” Clarke & Gordon, *supra* note 3, at 332.

The effects that preoccupied this lawyer and that were the focus of the Rand analysis were those relating to the cost and timeliness of resolution, even though many in the mediation world have come to believe they are secondary at best to concerns about the quality of process and outcome.¹¹ In business-to-business disputing, however, time and cost appear to be tightly interwoven with issues of quality.¹² Longer, costlier processes grow out of the same approaches to disputes that arguably produce lower quality outcomes (e.g., less imaginative and more threatening to business relationships). Time and cost, thus, can be viewed as important indicators of underlying approaches to disputing that shape quality outcomes as well. In the corporate context, these underlying approaches turn out to involve the ways that businesses organize themselves to deal with disputes, not just their willingness to use alternative dispute resolution (ADR) in general or mediation in particular. This Article describes differing degrees to which businesses manage disputing and thus put mediation to use in varying ways with varying effects on time, cost, and quality.

I. CORPORATE DISPUTE RESOLUTION

This study of corporate disputing comes from a research project that was supported by the National Science Foundation and conducted some years ago with colleagues at Ohio State—Professors Nancy Rogers, Philip Sorensen, and Richard Klimoski, and effectively managed by graduate student Mary Courtney. It examined the ways in which six very large corporations resolved their disputes with other businesses. In this research, we interviewed in-house counsel and business executives about disputes and disputing and gathered evidence from documents and interviews about roughly 170 business-to-business disputes.¹³

¹¹ See sources cited *supra* note 8.

¹² See John Lande, *Relationships Drive Support for Mediation*, 15 ALTERNATIVES TO HIGH COST LITIG. 95, 96-97 (1997).

¹³ In the research [hereinafter Corporate Study], the six companies agreed to varying degrees to share case documents and permit law/graduate students access to legal staff and business personnel for interviews with the understanding that the researchers would not divulge the identities of the companies studied or release the qualitative data gathered to others. During 1993-1995, the principal investigators and law and graduate student research assistants interviewed general counsel, conducted written surveys of legal staff, and gathered documentary evidence and information through open-ended interviews on roughly 30 business-to-business disputes for each company. The quotations in this article come from field notes collected during the course of that study. At times these notes have been edited slightly for sake of clarity.

MANAGING CORPORATE DISPUTING

The six companies that we studied were selected to reflect the range of approaches to dispute resolution that we understood to exist among large businesses in the United States. Two of the companies we selected rarely or never initiated ADR, two employed it occasionally and expressed interest in it, and two appeared strongly committed to using ADR, especially mediation. This variation reflected the widely held view that what really matters in differentiating companies is the extent to which they use ADR.¹⁴ The Center for Public Resources (CPR) Institute for Dispute Resolution, for example, has had as a central mission the promotion of the CPR Pledge to employ ADR in disputes with other businesses.¹⁵ Five of the six companies we studied were signatories. More particularly, however, this variation reflected the researchers' assumption that the extent of use of mediation, not of other ADR processes, provided a more meaningful way of distinguishing companies.¹⁶

Our research results challenged this assumption, however, by suggesting that the most consequential differences among companies lie deeper than either signing or not signing the CPR Pledge or using mediation heavily, some, or not at all. These differences involved variation in what I will call the "management of disputing," and they seemed to be closely linked to the time, cost, and quality of dispute resolution. By management of disputing I mean a systematic assessment of the ways that a corporation produces, prevents, and processes disputes; coordinated efforts to achieve clear goals related to dispute prevention and processing; and careful monitoring of the achievement of those goals. Such management means that disputes are not viewed as exceptional events to be handled on a case-by-case basis, but rather are seen as regular occurrences that can and should be managed to achieve wider organizational objectives.

In business-to-business disputes involving large corporations, maintaining relationships, controlling costs, and limiting the duration of

¹⁴ See *Briefs: Survey #1: ADR Use Is Rising*, 15 ALTERNATIVES TO HIGH COST LITIG. 85, 85 (1997). For a general description of the three stages of the development of corporate dispute resolution, see Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 859-878 (1996).

¹⁵ See Cronin-Harris, *supra* note 14, at 862; *Pledges Encourage ADR Use, Cost Savings*, 15 ALTERNATIVES TO HIGH COST LITIG. 88, 89 (1997).

¹⁶ The crucial distinctions to the research team were between mediation and other processes that are generally designed to be like adjudication (arbitration) or to predict outcomes in adjudication as a tool for inducing settlement. See Craig A. McEwen, *Pursuing Problem-Solving or Predictive Settlement*, 19 FLA. ST. U. L. REV. 77, 87-88 (1991).

conflicts all seem to matter to managers and to lawyers.¹⁷ But these concerns get translated into practice in highly variable ways having to do with the extent to which the management of disputing is organized and rationalized.¹⁸ Thus, my reading of the data from the six companies suggests the following hypothesis: Where the management of disputing is weak or inconsistent, costs appear higher, disputes longer, and relationships in greater jeopardy, but where that management is coherent, strong, and oriented to reasonable settlement, costs are likely to be lower, disputes shorter, and relationships more often preserved.¹⁹ Deployment of mediation is only one part of the enterprise of managing disputes, and the effects of its use on such factors as time and cost depend largely on the degree to which other aspects of disputing management are or are not in place. At the same time, the perspective on disputing that mediation can provide parties has the potential to promote effective management that makes resolution faster, less expensive, and of higher quality.

Where the management of disputing is well developed, companies undertake a careful assessment of and coordinated effort to address the widely shared problems businesses face in dealing with disputes. Where the management of disputing is weak, these problems fester, are unexamined, or are taken for granted as inevitable parts of the corporate disputing landscape. Before examining in detail what the management of disputing entails, let us review some of the common problems corporations face in handling disputes.

II. COMMON CHALLENGES OF DISPUTING IN THE CORPORATE ENVIRONMENT

Unlike most individuals, but similar to government agencies and other large organizations, big businesses regularly find themselves embroiled in conflicts. The experience of disputes thus is commonly shared across businesses, even if their approaches to dealing with them vary considerably. The business people and lawyers in the companies that we

¹⁷ See Lande, *supra* note 12, at 96-97.

¹⁸ Catherine Cronin-Harris suggests that corporate disputing is just beginning to enter a third stage characterized by "systems design." See Cronin-Harris, *supra* note 14, at 873. What I call management of disputing fits into this third stage of development.

¹⁹ Because this hypothesis was derived from the study reported here, the evidence from that study does not serve to "prove" the hypothesis, only to illustrate it.

studied differed little in their perceptions of the problems they face in responding to these disputes.

First, they generally shared worries about the costs of disputing through litigation and the challenge of bringing those costs under control.²⁰ These concerns were especially understandable given reports of rapidly escalating legal expenses in recent years. For example, one company reported a nine-fold increase in legal costs over the ten years prior to the study while another reported a ten-fold increase.²¹ Pressures within businesses to reduce expenditures make large cost centers vulnerable to controls. In the words of one general counsel, "The legal department is seen as part of overhead, as part of maintaining the headquarters facility, and so, it is seen as something that is not directly related to productivity and could/should be cut back in costs."²²

In one company a management consultant had examined legal costs and concluded that transaction costs—the expenses associated with pursuing or defending a legal claim—amounted to two to three times the costs of settlements and judgments paid out.²³ We do not know whether such ratios apply to all companies, but counsel agreed generally on the major sources of the transaction costs that their companies faced in resolving conflicts through litigation: outside counsel, discovery, and management time.²⁴

These companies, like many others,²⁵ were increasingly attentive to the expense of outside counsel and were trying in varying degrees to control those costs. One inside counsel noted that "[c]osts and time are always an issue in any dispute, but the most important factor in cost is outside counsel

²⁰ These concerns are widely shared among corporate counsel. See Curtis H. Barnette, *The Importance of Alternative Dispute Resolution: Reducing Litigation Costs as a Corporate Objective*, 53 ANTITRUST L.J. 277, 277-278 (1984); The Corporate Counsel Section of the N.Y. State Bar Ass'n, *Legal Development: Report on Cost-Effective Management of Corporate Litigation*, 59 ALB. L. REV. 263, 265 (1995).

²¹ See Corporate Study, *supra* note 13.

²² *Id.*

²³ See Corporate Study, *supra* note 13. Robert Kenagy reports similar findings in a study of the transaction costs of subrogation claims between Whirlpool and State Farm. See Robert T. Kenagy, *Whirlpool's Search for Efficient and Effective Dispute Resolution*, 59 ALB. L. REV. 895, 898 (1996).

²⁴ See also the emphasis of one corporate counsel on streamlined discovery, eliminating expenditures on outside counsel, and tighter deadlines. See Kenagy, *supra* note 23, at 898.

²⁵ See The Corporate Counsel Section of the N.Y. State Bar Ass'n, *supra* note 20, at 265.

fees.”²⁶ A lawyer in another company cited the results of the earlier-noted consultant’s study of litigation costs:

As a result of the consultant’s study we are very concerned about the costs of disputes, especially outside counsel because “most of the costs are there.” . . . Outside counsel must clear everything they do with the inside attorney. This was always the policy but now it is being enforced. There is also a push to reduce outside lawyer time in research, reduce partner time, and a big push to do more in house.²⁷

This business was much more aggressive than some of the others in finding ways to reduce outside counsel fees, but all recognized the problem.

A significant element of the costs of outside counsel and of the litigation process generally was seen to result from discovery which, in turn, played a major role in imposing burdensome demands on business people.²⁸ As one lawyer put it, “The number one cost item is depositions. And this has many aspects to it. For example, how many representatives do we send to a deposition? Who reviews the documents? The more lawyers, managers, and expert witnesses involved, the more expensive the case gets.”²⁹ This attorney focused on discovery but also hinted at hidden costs of litigation resulting from the commitment of management time to handling disputes. These costs were a central issue for other counsel: “The greatest costs of disputing are management time. The effort that goes into it is almost immeasurable. Whenever management is involved in disputing, we are eating into our profits.”³⁰ “The most important issue in disputing between corporations is the drain on resources to resolve the dispute. The truth is, even if it costs \$1 million no one will say ‘Oh my god!’ It is the drain on people’s time—that is more important than the money.”³¹ The

²⁶ Corporate Study, *supra* note 13.

²⁷ *Id.*

²⁸ “Because most cases are settled and not tried, much of the expense of litigation is attributable to discovery.” The Corporate Counsel Section of the N.Y. State Bar Ass’n, *supra* note 20, at 312. These concerns about the “expense and delay” of discovery echo throughout a recent symposium on innovations in discovery directed at efforts to alter both the rules and practices of discovery. See Alex W. Albright, *Introduction to Symposium on Innovations in Discovery*, 16 REV. LITIG. 249, 251 (1997).

²⁹ Corporate Study, *supra* note 13.

³⁰ *Id.*

³¹ *Id.*

serious impact of extended litigation on management was one of the central reasons to try to find speedier resolutions to disputes.

In order to reduce the strain on business managers and control costs, it was clear to lawyers in at least four of the companies studied that reducing the time to resolution of disputes was an important objective.³² One general counsel observed, for example, that “[w]e like to nip cases in the bud.”³³ According to another, “Our company has always attempted early settlement. People act like this is a big discovery. Where have they been?”³⁴ Despite this lawyer’s belief that the conclusion about the value of early settlement was obvious, it was reported in another company as the “biggest idea to come out of” their consultant’s report on legal costs noted earlier.³⁵

III. BARRIERS TO ACHIEVING FASTER, LESS COSTLY, AND HIGHER QUALITY RESOLUTION OF BUSINESS-TO-BUSINESS DISPUTES

Unfortunately, identifying costs turned out to be easier than controlling them, just as embracing early settlement proved simpler than achieving faster resolutions of disputes. Although the lawyers we interviewed generally shared a similar understanding of the symptoms of the problems they faced, they were far less clear about the forces producing those symptoms, thus making their cure difficult. The interviews suggest, however, four major factors that seemed to create barriers to achieving faster and less costly resolution of disputes—contentious corporate cultures, the emotional investment of managers in disputes, misalignment of incentives for managers and outside lawyers, and what we might call the professional culture of lawyers.

Contentious and competitive corporate cultures could both encourage disputes in the first place and get in the way of their efficient resolution.³⁶ Such cultures help to make popular negotiation seminars like those on “How to Win at Negotiation” or “How to Be a ‘Tough-as-Nails’

³² “Sometimes the most cost-effective management of litigation consists of settling the litigation before its cost becomes excessive.” The Corporate Counsel Section of the N.Y. State Bar Ass’n, *supra* note 20, at 295.

³³ Corporate Study, *supra* note 13.

³⁴ *Id.*

³⁵ *Id.*

³⁶ For a general analysis of corporate cultures and the ways that they play out in internal disputing, see CALVIN MORRILL, *THE EXECUTIVE WAY: CONFLICT MANAGEMENT IN CORPORATIONS* (1995).

Negotiator.”³⁷ For example, according to the chief litigator, the “tough guy” culture at a business unit of one company generated disputes—often with business customers—and prompted litigation with the company as a defendant.³⁸ The general counsel in another company noted, “We’re the defendant almost all of the time. Our business people think that they’re right all the time. We [lawyers] need to separate emotion from fact.”³⁹ Another observed that “[w]e might be the plaintiff more frequently if it were left at the district manager level, but not when management looks at the overall picture.”⁴⁰ Scrappy, competitive business cultures appear to encourage disputing and get in the way of efforts to settle cases.

Individual managers also became personally invested in disputes in ways that made settlement harder and often diverged from the larger interests of the corporation. This was particularly likely, according to one general counsel, “[e]specially when there is emotion, if they think they’ve been wronged. We’ve had our share of experience with executives digging their heels in.”⁴¹ Another lawyer noted that:

The most difficult thing for us here is to get managers to cool off and back down. It’s the lawyers who emphasize the need to settle. The lawyers are pragmatists. So we pursue what is most reasonable and fastest. The lawyers try to separate the emotional issues, the egos involved, and the facts of the case. The lawyers would like the facts to prevail, but often emotion takes over. So in hindsight it may *not* look like they took the best route, but at the time, it was the most reasonable path available given the personalities involved. [The handling of business disputes] is a lot of politics.⁴²

This lawyer describes the practical realities that corporate counsel face in having to depart from preferred methods of approaching cases in order to respond to the personalities, politics, and cultures of their client organizations, but not all counsel felt powerless to change these features of the corporate landscape.

The problems of contentious corporate cultures and personally invested clients could be reinforced by a set of incentives that encouraged litigation

³⁷ See, e.g., *Briefs: Napalm Negotiation Tactics*, 15 ALTERNATIVES TO HIGH COST LITIG. 116, 116 (1997).

³⁸ See Corporate Study, *supra* note 13.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

and delayed settlement. For example, the costs of lawyer time (both outside counsel and inside lawyers) were often borne by the corporation as a whole, while the costs of settlements or judgments typically came out of the budgets of the business units engaged in disputes. The consequences were predictable:

Settlements come off the bottom line of the divisions. That is precisely the reason management wants to fight. They hold out the hope that they will win and not have to pay a settlement. And the costs of the legal department are overhead that do not come off any division's bottom line. . . . So whatever we [the lawyers] can do is to stall.⁴³

With such an incentive structure, it was not surprising that managers wanted to pursue disputes aggressively and to delay the pay out or to reduce it, no matter what the transaction costs to the company as a whole.

The incentives for outside counsel in litigation were also perceived as inconsistent with efforts to settle early and cheaply. One general counsel observed:

Another problem is the diametrically opposed interests of outside counsel with those of their clients. The hourly billing rate is the villain. It is in the best interest of lawyers to do things slowly. The word settlement strikes fear throughout the entire body of a private law firm lawyer. With a client wanting . . . high quality and priority to early settlement and appropriate use of ADR at the earliest possible time and to do so in as few hours as possible, the law firm is in conflict with the client.⁴⁴

From his perspective, these incentives remained in place because inside counsel had not been sufficiently imaginative or motivated to change the accustomed way of doing business.⁴⁵ "The real villain is the in house

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ One of the potential opportunities for changing incentives for outside counsel was by altering billing arrangements. This general counsel observed that "[w]e are at the leading edge of alternative billing. But if you imagine movement toward a better billing arrangement on a scale of 1 to 100, we have just gotten to 1. The concept of risk sharing is at center of the venture." *Id.* See the growing literature on alternative billing, for example: The Corporate Counsel Section of the N.Y. State Bar Ass'n, *supra* note 20, at 285-287. See also Kenneth R. Feinberg, *Billing Reform Initiatives*, 59 ALB. L. REV. 963 (1996); Jeffrey M. Rubin & Melissa G. Thompson, *An Overview of Alternative Billing Practices*, 6 PRACTICAL LITIGATOR 75 (1995); *Legal Billing: Seeking Alternatives to the Hourly Rate*, 77 JUDICATURE 186 (1994).

counsel who has failed to look for alternatives. They have a comfort level with the hourly rate system which they understand. But outside counsel takes no risks. Whether they win or lose, go fast or slow, they get paid by the hour.”⁴⁶ In companies, thus, where the economic incentives of managers were to litigate and delay, and of outside counsel were to proceed cautiously, the likelihood of speedy settlement seemed especially remote.

The professional culture of lawyers could also work against low cost and rapid resolution of disputes.⁴⁷ A significant aspect of that culture has to do with expectations regarding the extent of information required before rendering advice about how to proceed with a case. The preference to maximize that information promotes heavy reliance on discovery. One attorney, for example, commented on the importance of discovery in the culture of American lawyers:

Arbitration and mediation would be better than litigation only if you eliminated discovery because that is where the costs are. But in the U.S. the use of discovery will never diminish because it's tradition. It's the way we've done things. We don't want to deal at a disadvantage with our opponent. They're going to get the facts, so we have to, too. [When asked if management said to reduce discovery:] I would tell them that they were taking a big risk to cut discovery.⁴⁸

Given this powerful professional culture, it is not surprising to hear of attorney resistance to the recommendation of the management consultants who had studied legal costs and recommended speedy settlement. “Early settlement is disputed as a good idea by some of our legal staff because some argue that you cannot settle until you know all the facts.”⁴⁹ A lawyer in another company identified the same tension: “The biggest cost issue in disputing is getting an early settlement. But having said that, there are situations where we have to have options or facts regarding the case and in these situations, we are not concerned about early settlement.”⁵⁰ Thus, the obvious solutions to problems of cost and delay were not easy solutions,

⁴⁶ Corporate Study, *supra* note 13.

⁴⁷ See Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 842 (1998) (discussing lawyers' hesitation to use mediation before the completion of formal discovery).

⁴⁸ Corporate Study, *supra* note 13.

⁴⁹ *Id.*

⁵⁰ *Id.*

and lawyers for a wide range of reasons tended to continue practice as usual.

One perceptive business person noted that this pattern of practice as usual was driven in part by the professional commitment of lawyers to what they saw as high quality, careful work. In his words “[lawyers] like to do a good job, which means a thorough case, spending money on depositions.”⁵¹ Informal professional norms about the character of litigation also affect the pace and cost of resolution because “lawsuits take on a life of their own.”⁵² “One lawyer does one thing and the other reacts. Finally business people say, ‘Let’s sit down and talk.’ [It is not done earlier] because it’s not part of the tactics. . . . The lawyer will say that the other side isn’t ready, it’s not the right time, or something.”⁵³ It is possible then that tradition and the momentum of litigation practice and the assumptions of legal professionals about tactics and about the “ripeness” of cases can also delay settlement and drive up costs.

The case-centered tradition of legal training and practice also plays an indirect part in raising costs and delaying resolution of disputes. Lawyers learn to assess each case as unique in relation to the wishes of individual clients. As one general counsel reported, “We look at each case individually, fact pattern by fact pattern.”⁵⁴ This view echoes through the interviews with lawyers in other companies about the ways that they understood disputes. According to another general counsel, the use of mediation is evaluated case-by-case, too: “We have to see the merits *of a case* to see if it’s worth settling. We are pro-ADR in theory but when you get down to specifics, it’s a hard pill to swallow. We haven’t seen many opportunities to use it.”⁵⁵ This professional orientation toward case-by-case analysis not only may make attorneys reluctant to adopt mediation in particular instances, but also may make it more difficult for them to see the opportunities to take a leadership role in creating and implementing changed policies and practices for managing disputing generally.

The difficulty of taking a leadership role in managing disputing is further reinforced by the professional sense that it is clients, not lawyers, who should be in charge of crucial decisions about the goals of disputing,

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

whether to settle, and the acceptable terms of settlement.⁵⁶ In this view, "Lawyers are there to provide services. It is the client that must decide if the case is tried or settled. Lawyers cannot always expect management to follow their advice."⁵⁷ Or as an attorney put it at another company: "The business people are completely in charge of the disputes in this company. Whatever they want is what happens."⁵⁸ One result of the case-by-case, client-directed orientation is the absence of a clear policy or philosophy relating to disputes and dispute resolution in general:

There is no corporate philosophy for handling disputes. Each case is different. . . . Most disputes are resolved before they get to a fight. Once it's a fight, then management wants to win. But most disputes are resolved immediately in the interest of the relationship. Preservation of business relationships is a management philosophy, not a dispute philosophy, which is "how do we fight?"⁵⁹

In this traditional view of the lawyer's role then, attorneys are advisors and counselors, not disputing policymakers or managers. The result in most situations is that although each dispute will be managed in some fashion, no one in the corporation has the responsibility for managing disputing generally and systematically.

IV. OVERCOMING THE BARRIERS BY MANAGING DISPUTING

The management of *disputing* in an organization which is regularly involved in conflict with customers, competitors, vendors, business partners, contractors, or government agencies is much different from the management of *individual disputes*. The latter happens case-by-case. The former involves an assessment and systematic organization of the ways that disputes are generally understood, evaluated, and handled in the company. Management of disputing requires establishing clear objectives in dealing with disputes, identifying strategies to achieve those objectives, and

⁵⁶ This view is not inconsistent with the perception that we also heard that lawyers "take over" disputes from business people once the problems are referred to a legal department. Indeed, attorneys expected to manage the day-to-day aspects of litigation, but generally in the context of the direction that they understand had been set by their clients.

⁵⁷ Corporate Study, *supra* note 13.

⁵⁸ *Id.*

⁵⁹ *Id.*

monitoring their achievement. It may require challenging taken-for-granted practices and changing organizations.

In our observations of the six corporations, we saw one where the management of disputing was well developed and five where it was less well developed. What was generally missing in these five was a clear sense of either organizational goals or of an overall strategy for achieving goals by managing disputes. Most, however, had adopted piecemeal one or more methods for dealing with the costs or timing of disputes, but these innovations had little coherence and, apparently, limited effect. Among the methods we learned about were the following: stricter management of outside counsel and increased use of inside counsel,⁶⁰ education of business people about the costs and problems of litigation,⁶¹ changed incentives for disputing by charging back costs of lawyers to business units,⁶² and, of course, introduction and promotion of the use of ADR, especially mediation.⁶³ The introduction of ADR generally or of mediation in

⁶⁰ For example:

The legal department is currently working on an approved counsel list. The point of this is to reduce the number of firms they deal with and ultimately, to reduce fees. We are trying to establish tighter rein on outside counsel, establish a bidding process, develop creative billing arrangements and make much greater use of inside counsel.

Id.

⁶¹ For example:

I interview production guys when they begin a dispute in order to make them understand the expenses involved in proceeding. They don't realize what's going on; they think it is going to be out of their hands. They need to know that they will be spending days pulling documents. It seems like it rarely strikes one executive twice, so there is always the education process.

Id. Or: "Litigation is pretty ugly these days. Coming to the table can be an eye opener for management. They think they have a winner; but after they've spent a day negotiating [they change their minds]." *Id.*

⁶² For example:

From a monetary standpoint, settlements come off their bottom line. When we got into benchmarking, we were surprised to learn that it was a minority position. Each lawyer here tracks their time [to a division]. Then we take our monthly budget and allocate the percentage of it to that division based on the percentage of our total time spent on the case.

Id.

⁶³ For example: "We have a letter that goes to outside counsel that requires that they use ADR." *Id.* Or: "[We like to] use ADR clauses. When both parties are signatories or when they agreed ahead of time, then no one can infer anything about the

particular, however, like the use of these other techniques, seemed to change little unless they were done as part of a systematic effort to manage disputing. Unlike the other techniques, however, mediation provides an alternative way of thinking about conflicts that in turn could promote the development and organization of systematic strategies for managing disputing.

To understand more clearly what the management of disputing involves, let us take a close look at the company that was most organized in this respect. For purposes of this Article, I will call that company MOD.

A. *The Management of Disputing at MOD*

Several key lawyers including the general counsel and the litigators in MOD took on the role of managers of the disputing process. What led them to move beyond the case-by-case, client service role that dominated in other companies and to take the lead in rethinking and redesigning both corporate and lawyer practices that affected the generation and processing of disputes? The organizational context matters a great deal here in explaining the adoption of the disputing management role. As the story is told, it seems to involve a convergence of several factors. In a company that was reorganizing itself around notions of Total Quality Management and increased efficiency and quality in production, the legal division was challenged to see how it could define in measurable ways its own efficiency and quality management. Identifying measures for achieving such objectives could be a difficult problem for a legal department, especially for its litigators, who more typically look at their work on a case-by-case basis, balancing the likelihood and nature of possible outcomes in each dispute against the expense of achieving them while advising clients who are the final decisionmakers.

In response to these demands for accountability, MOD's legal division developed a clear organizational mission and set of standards to assess its own success in achieving that mission. The mission was to maximize prompt and favorable settlements, and the indicators of success were the shortness of the duration of disputes, favorable outcomes, cost savings, and client satisfaction. The principles of alternative dispute resolution, especially mediation, provided both the theory and much of the strategy for achieving these goals. Thus, the head of the litigation unit noted that "[t]he truth is that ADR (and particularly mediation) principles have become so

other party wanting to use ADR. No one wants to make the first move otherwise, because it makes you seem weak." *Id.*

much a part of how we look at each case, that we now very frequently resolve matters using these principles in negotiations, without the intervention of a third party neutral.”⁶⁴ One annual report of the litigators elaborated on “the principles of our ADR program, i.e., early case evaluation followed by client consultation followed by early and good faith ‘interests-based’ negotiation.”⁶⁵ In a nutshell, then, the corporate dispute resolution goals at MOD were as follows: “Resolving disputes at the lowest level through ADR is most cost effective and least disruptive to your business. . . . If you fix it earlier and lower, you keep the dollars. This creates financial incentives for business people to use alternatives to resolve disputes.”⁶⁶

One of the annual reports of the litigators at MOD provides a good picture of the way that they had come to think about the management of disputing in relation to these objectives. First, that report listed prominent achievements, including cases won through dismissal and summary judgment decisions and cases in which “favorable settlements” were achieved.⁶⁷ The report then described in detail all the cases that went to formal mediation, while noting that at least thirteen others were resolved through “ADR principles.”⁶⁸ It reported on the percentage of cases—over ninety percent—in which “favorable outcomes” could be claimed.⁶⁹ And then, based on an annual tracking of the amount of time to resolve cases coming to the litigation section, it reported a reduction in that average from 9.7 months to 7.8 months.⁷⁰ This reduction is particularly important because it reflects the objective of settling as many cases as possible in what was called Stage 1 of a dispute (a stage of internal investigation prior to formal discovery) or the early steps of Stage 2 (formal discovery).⁷¹ The results claimed were significant costs savings which were set out in impressive tables and multi-colored graphs.⁷²

With such clear objectives guiding their work, the lawyers at MOD took on the responsibility of managing the disputing process in the company toward these objectives, not just to work on the individual cases

⁶⁴ *Id.*

⁶⁵ MOD Company Annual Litigation Report 9, in *Corporate Study*, *supra* note 13.

⁶⁶ *Id.*

⁶⁷ *See* MOD Company Annual Litigation Report, *supra* note 65, at 1–6.

⁶⁸ *See id.* at 9.

⁶⁹ *See id.* at 15.

⁷⁰ *See id.*

⁷¹ *See id.* at tab 12.

⁷² *See id.* at tabs 3–12.

that came to it. That meant taking on the role of active agents of change in the corporation and rethinking their own assumptions about how lawyers go about their work.⁷³

To begin with, the litigators completely redesigned the litigation process in order to achieve earlier and less costly settlement. The crucial step was to challenge the professional assumptions of attorneys about the necessity of discovery.⁷⁴ The general counsel argued that “lawyers must be put on an information diet,” especially in a corporation where multimillion dollar business decisions are based on considerable uncertainty.⁷⁵ However, an information diet did not mean starvation, because it was important for lawyers to be confident in their understanding of the issues they faced. The challenge then was to redesign the ways to gather the needed information.

The solution adopted, according to the chief litigator at MOD, was “early case analysis.” According to him:

Early case analysis is not an inexpensive process. It means an early bubble for the outside lawyers, but it is a one-time investment in their knowledge about the case. Clients have typically not been willing to spend early to learn about a case when hiring outside counsel. As a result they get into discovery and learn about their own case when the other side is doing depositions of their own people. We invest early in the case and interview everyone here who knows about the dispute. Often as a result we know the other side’s case better than they do, and can forego expensive depositions of the other side. We are in a better settlement posture early on.⁷⁶

Heavy reliance on early case analysis was made possible by the fact that this company, like the other five we studied, was far more often the defendant than the plaintiff in litigation. Reliance on early case analysis permitted careful assessments of the risks and benefits of varying legal and dispute resolution options. It also led to careful monitoring of the use of formal discovery. In addition, any decision to hire outside counsel that might include costs beyond a certain amount had to be authorized, and an ADR Case Evaluation Worksheet had to be completed and reviewed by an ADR Coordinator. Thus, in-house resolution, careful risk analysis,

⁷³ My account of the management of disputing at MOD organizes and rationalizes a process that was much less explicitly planned and organized. Rather the features of this process grew over time through trial and error.

⁷⁴ See the discussion of “informal discovery” in The Corporate Counsel Section of the N.Y. State Bar Ass’n, *supra* note 20, at 303–304.

⁷⁵ Corporate Study, *supra* note 13.

⁷⁶ *Id.*

avoidance of discovery, and use of ADR—almost always mediation—were the working default options for the company lawyers.

Lawyers did not stop at reorganizing litigation and giving prominence to early settlement. They also became leaders in moving dispute resolution down deeper into the company. Some of this effort involved diagnosis of patterns of disputing and efforts to change the corporate culture and the incentives that produced disputes. Thus, one division was identified as having a particularly strong tough guy culture that generated conflicts with business customers.⁷⁷ In the context of strong management statements about the importance of preserving business relationships, especially with customers, lawyers worked closely with division managers to counsel and train their personnel about dispute resolution with the objective—successfully achieved—of reducing the numbers of lawsuits directed at that business unit.

Instead of taking for granted the existing incentive systems that help to encourage litigation, the lawyers took initiative in changing them. Before, settlement dollars came out of a manager's budget, while attorney fees were part of the general corporate overhead. This policy was altered so that attorney fees of both inside and outside counsel were allocated to managers' budgets, and as a result they were aware of and responsible for the substantial transaction costs of legal action.⁷⁸

The litigation lawyers also redesigned the way that disputes with small dollar amounts were handled by business people. Litigators created a system for gathering information to provide a basis for early settlement discussions at the business level. As a result, a paralegal would put together that information for managers. According to one of the litigators, "That gets you back to dispute avoidance which is the most important thing that we do."⁷⁹

Aware of the problems of personal ego and emotional investment in disputes and the barriers they posed to resolution, lawyers created new roles in the disputing process—that of independent advisors who assisted in assessing the dispute, the company's interests, and possible outcomes. These "wise advisors" were high level people without direct responsibility for the area or product in dispute. Their presence allowed the lawyers to depersonalize disputes and promote reasonable and cost-effective outcomes that reflected the company's long-term interests.⁸⁰

⁷⁷ *See id.*

⁷⁸ *See id.*

⁷⁹ *Id.*

⁸⁰ *See id.*

All of these changes together amounted to a systematic effort to manage disputing at MOD. Just as important were the choices made about *how* disputes should be managed. Here, in the context of corporate emphasis on speed and cost, the disputing managers adopted what they called “ADR or mediation principles”⁸¹ as the framework for thinking about disputes. The lawyers employed these principles themselves in analyzing potential or actual disputes. They would examine the relationship with the other party as well as the other party’s needs and interests, and explore ways of moving forward with interest-based negotiation. At the same time, they did a more conventional “risk analysis,” assessing likely litigation costs and the probabilities of varying legal outcomes. Sometimes the result of these analyses would be a summary judgment motion, sometimes a negotiation strategy, and sometimes a proposal to mediate.

The dispute managers also encouraged business people to learn and adopt the same framework by focusing self-consciously on the needs and interests of the other party in seeking resolution, not only on their own positions. For example, one business manager told the story of a problem that never reached the legal staff when the company faced termination of a long-term relationship with an individually-owned business that provided a needed service.

I was involved, but felt that I did not have the appropriate local knowledge or personality to deal with this individual. I chose a company man from another part of the country who had no previous contact with him—a fresh face—but who was familiar with the territory and people like this individual. He knew the breed and style. This company man met with me and talked with people who had dealt with this individual on other matters. Along with other company people, our representative worked out a strategy and approach. They examined how they had dealt with him in the past, where it had gone wrong, and how they could prevent problems in the future. Then our representative jawboned with him over the phone and then flew out to meet with him in person. As a result we paid less money than demanded, maintained our access to his services, and improved our relationship.⁸²

This story provides a good example of “case assessment” at an early stage and of the use of “mediation principles” to arrive at a settlement without litigation or mediation.

⁸¹ See discussion *infra* Part IV.B (discussing MOD’s use of “mediation principles”).

⁸² Corporate Study, *supra* note 13.

In this company, thus, we see that the introduction of mediation helped to provide a perspective on disputes that guided the assessment, reorganization, and rationalization of the way that MOD managed disputing generally. It was these changes in combination, however, not the introduction of formal mediation alone, that appear to have altered the costs and timing of disputes for this company and the quality of outcomes. The lawyers at MOD went well beyond the more typical, reactive, and case-centered roles of other corporate counsel by taking on leadership as managers of the disputing process.

In doing so, these litigators had to overcome common concerns about both corporate policy and about their roles as lawyers. The most difficult of these appeared to be the perception that a company or a lawyer was an “easy target” if it or he was disposed to settling cases. The general counsel of MOD denied that his company had a “target reputation” but worried that some in the company thought it did. Those managers needed to be reminded, he later observed, that the commitment to ADR was a commitment to efficiency and that it benefited all to engage in it. “But,” he went on, “only up to a certain point. If you push too far, we will litigate and bury you.”⁸³ The heavy reliance on mediation was thus placed in the context of a tough-minded approach to defending corporate interests.

It appears that MOD’s litigators thus embraced mediation principles and widened their roles by blending their commitment to mediation principles and to their broader roles as managers of disputing with more conventional roles as vigorous advocates for their clients. Their ability to do so suggests that the contrast between an “adversarial culture” and one of commitment to interest-based settlement does not stand as polar opposites but may be imaginatively integrated.⁸⁴ In integrating these roles and perspectives, the litigators at MOD understand their work in relation to the larger interests of the company in good business relationships, efficiency and timeliness of work completion, and cost saving. As the general counsel put it:

Our record is one of being tough on high principle cases. But we are not dealing with rights usually but rather with interest determinations. Our disputes are almost all as defendants with businesses that are in continuing

⁸³ *Id.*

⁸⁴ This distinction plays a central role in Menkel-Meadow, *supra* note 10, at 34.

relationships with us that we should be seeking to continue not to rupture.⁸⁵

In retrospect the litigators acknowledged that they had to be pushed to redefine their widened roles and to think differently about how to practice law. According to the general counsel, "I can't think of an initiative that was harder to sell. Lawyers generally were resistant to the spread of ADR in the company."⁸⁶ The chief litigator reflected this view: "I came to ADR dishonestly and reluctantly," and in doing so, he says, he had not abandoned what he described as his "litigator's personality."⁸⁷ "I love litigation. I love depositions. But ADR demands new skills, and I love it too. One of the reasons is that we can advocate in ADR. We litigate like hell in caucuses, but we are very polite in setting mediation up and when the other parties are present."⁸⁸ The vigorous efforts to advance the broadly understood interests of their client company have shaped their tough-minded approach to mediation.

A story told of a mediation in one civil suit the company was defending illustrates that approach, even though it draws us away from our focus on business-to-business disputes.⁸⁹ The mediation took place in a spot distant from their corporate headquarters. The company was represented by three lawyers and one company officer, and the plaintiff was represented by several attorneys. According to a company litigator:

We requested mediation. We had to do a lot of investigation [of our own employees] first because there were lots of situation witnesses. . . . Our employee who was responsible for the harm was no longer with us.

[In the mediation] the plaintiff made a statement to start with. There was extreme emotionality and feelings were expressed. We knew that people had to ventilate and yell and scream. We immediately focused discussion on damages, not on liability because we did not want to upset the plaintiff by telling him that we thought he was wrong or untruthful or hadn't suffered. It would have upset the plaintiff, and his lawyers were very aggressive. I don't want to tell the man that he is wrong. He is very angry and thinking of millions of dollars in the abstract for damages. We

⁸⁵ Corporate Study, *supra* note 13.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Important facts in this case have been changed in order to insure that it is not identifiable.

had someone there with us who spoke Spanish, and we were as happy to have the other side talking in Spanish or English. We didn't want to make language an issue.

On damages, we had to get the numbers down to where they made sense. During the mediation we made calls to our home office and did a LEXIS search to check on the reasonableness of damages. To begin with we had told them that there is a statutory cap to damages in this jurisdiction, so when you make a demand, it had better be less. We pulled from LEXIS the legislative history of the statute, and established that was the field to the satisfaction of the lawyers. They accepted that finally. Then we told them that "we are interested in working this out with you."

About three in the morning we got close enough to make a deal and sign an agreement. We wanted to sign it there, not let people have second thoughts or begin to argue about the commas. That is our general practice in mediation. We like to do it there so we bring along a computer and draft the agreement and do changes there on the computer.⁹⁰

What we see in this account is a blend between attentiveness on the part of MOD's lawyers to the needs and interests of the other party, a commitment to interest-based bargaining, a sophisticated awareness of mediation process, and a powerful sense of the interests of their client company in the context of the law. In order to advance the interests of their client, they added a willingness to "listen, synthesize, and empathize" to their approach to the dispute without abandoning their willingness to "argue, criticize, and persuade."⁹¹

B. Dealing with Disputes One-by-One at Other Companies

The picture at MOD, then, is of systematic approaches to managing disputing in the context of "mediation principles" along with aggressive efforts to protect the company and to advance a clear set of corporate objectives focused on speedy and low-cost settlement and preserved business relationships. This picture differs in degree but not in kind from the one that emerges in the other five companies that we studied. Among these companies several used mediation in significant numbers of cases, and all were concerned about controlling litigation costs and had taken some steps to do so. The differences had to do in part with the extent of the efforts and the degree of coordination of those efforts. But most crucially, the differences had to do with the willingness at MOD to monitor results

⁹⁰ Corporate Study, *supra* note 13.

⁹¹ Menkel-Meadow, *supra* note 10, at 36.

and to manage disputing generally and litigation particularly toward reduced time and costs at all points in the disputing process and clear self-awareness at MOD about employing mediation principles early in assessing disputes and making strategic choices about how to handle them.

The similarities across the companies were apparent. For example, one of them had a president who was taking a visible leadership role in advocating improved relationships with customers and early resolution of disputes. However, the lawyers in that company had not embraced mediation or self-consciously altered their approaches to early negotiation and appeared to maintain their conventional roles as case-by-case counselors rather than as managers of disputing with clear organizational goals to achieve. In another company, the use of ADR generally and mediation in particular was strongly embraced but in the context of a "scrappy" corporate culture and unchanged assumptions about the use of formal discovery and the importance of early resolution. In these other five corporations it appeared that disputes took longer to settle and did so at a higher cost both to relationships and to company budgets, although there was also variability among these companies.

V. CONCLUSION: THINKING ABOUT THE LIMITS AND PROMISE OF MEDIATION

This study of variations in the ways that corporations approach conflict with other businesses highlights the significant limitations of mediation by itself in affecting the costs, timing, and even the quality of dispute outcomes. Mediation does least when it is a tool used by lawyers and parties proceeding with business as usual in handling disputes. It has the prospect of doing most when it provides the rationale for other changes in the ways that law is practiced and disputing is managed. Thus, the Rand study findings, with which this Article began, may say less about mediation per se and more about the uses to which mediation has been put in the federal courts by the lawyers and clients whose cases appear there. In thinking about the time, costs, and quality of dispute resolution, we need to understand much more than whether or not disputes go through some ADR process. We must know how parties organize and orient themselves to utilize processes like mediation.

As we begin to see more clearly how businesses vary in the ways that they manage disputes, we also can begin to add complexity to analyses of competing philosophies of dispute resolution. Professor Menkel-Meadow, for example, highlights the tensions between an adversarial culture of

disputing and one focused on integrative negotiation.⁹² She cautions in particular against the co-optation and legalization of mediation by parties and lawyers oriented to an adversarial approach who transform the mediation process into a tool for strategic advantage in litigation, not for imaginative and low cost settlement.⁹³ In a way, our study of corporate approaches to disputing provides strong evidence for these concerns. We have seen that some companies adopted mediation, but changed little else in their litigation and disputing strategies; for them mediation seemed to produce far less by way of benefit in reduced costs, shorter duration of disputes, and enhanced business relationships. In MOD, by contrast, the use of mediation principles to shape the entire design of a system for managing disputes within the company appears to have had significant consequences for time, cost, and quality of dispute resolution. One view of this comparison, then, could be of mediation co-opted (and in at least two companies studied, unused) compared to mediation in “uncompromised” form at MOD.

But that interpretation does not do full justice to the evidence. The differences between MOD and the other companies are not between companies and lawyers that cynically exploit mediation for litigation advantage and those that do not. Instead, the primary differences among these businesses relate to the way lawyers (litigators especially) understand their roles and the degree to which businesses organize to manage disputing. The lawyers at MOD are much more like their peers at other companies than they are different. They conceive of themselves—and they appear to be—aggressive advocates of their client’s interests in the context of the law. They employ mediation and principles of integrative bargaining along with tough-minded litigation to advance those interests. They are driven less by a commitment to a “warmer” way of disputing⁹⁴ than by a devotion to the much cooler goals of cost and time efficiency. But the clarity of time and efficiency goals at MOD—goals often seen as antithetical to the real meaning and value of mediation⁹⁵—have prompted changes in both litigator roles and organizational approaches to disputing.

Thus, if we were to add to Professor Menkel-Meadow’s insightful analysis, it would be to say that the greatest threats to the effective use of mediation to produce higher quality, more timely, and cost efficient

⁹² See *id.* at 18–19, 34.

⁹³ See *id.*

⁹⁴ See Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1663–1664 (1985).

⁹⁵ See sources cited *supra* note 8.

resolution of disputes come not from an "adversarial culture" but from the fact that frequently lawyers and their clients are trapped by the routines, incentives, and traditional expectations of legal and business practice. What frees lawyers and clients from these routines and their accompanying expectations is not the use of mediation processes alone. Rather it is new ways of thinking systematically about disputes that are made possible by taking on new roles as managers of disputing with clear objectives to manage toward and by self-consciously accepting mediation principles as the default framework for assessing conflicts.

How far can we generalize these tentative conclusions from corporate dispute resolution to the broader arena of civil litigation? Clearly not far. There are many special features to this study. For example, large corporations are what Professor Marc Galanter calls "repeat players" in the world of disputing.⁹⁶ They, along with government agencies, can think about managing disputing as a matter of policy and regular practice because it is part of what they do regularly even if they typically treat the cases one-by-one. Individual disputants generally do not have the same opportunity. Their disputes are often one-time events and the focus for these parties is on the case, not patterns of cases and policies and long-term objectives for disputing.⁹⁷ Also, many parties are plaintiffs, not defendants. It is the defense posture that may permit a company to forego significant formal discovery because its own internal investigations may reveal the crucial information. Companies are defendants in part because they are sued by business customers with whom they often have an interest in maintaining relationships,⁹⁸ but not all civil disputes are between parties where sustaining relationships is a plausible goal.

⁹⁶ See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974).

⁹⁷ For such cases, courts may be in the best position to manage disputing by setting deadlines, encouraging effective limits of formal discovery, and facilitating efforts at settlement. The relationships between case management and dispute resolution appear to be close but need further examination. Rand, for example, examines judicial case management in a separate report and finds some promising strategies for reducing time and costs while maintaining lawyers' sense of process fairness. See JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 91-93 (1996).

⁹⁸ Lande reports that the business executives he studied reported that "they were almost always defendants" in lawsuits. John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOTIATION L. REV. 1, 51 (1998).

Lawyers vary too. Inside counsel, for example, are in a very different position than are law firm lawyers who work with corporations. The long-term relationship of inside counsel with their clients permits them to think strategically about policy and management of disputing. Their relationship to their clients may help diminish for them the sense that they are exposed to liability for negligent recommendations about settlement with anything short of full information.⁹⁹ By contrast, to the degree that outside counsel are engaged on a case-by-case basis, their focus will be on particular disputes and more cautious advice about settlement. Although they are changing and highly variable, the financial incentives vary between inside counsel who must manage and explain their budgets and outside counsel who feel they must produce results in particular cases. The general point is that practice situations differ enormously across lawyers, and that these practice situations can tell us much about the incentives and pressures that produce different ways of understanding and employing mediation.

The challenge as we think about mediation both inside and outside of the corporate context, thus, is to attend to the uses that parties and lawyers make of mediation. Mediation can be a useful tool for resolving disputes in ways that reduce costs, speed resolution, and improve quality of outcomes, but, as the Rand report suggests to us, only if parties and lawyers employ it to those ends.

⁹⁹ See NANCY H. ROGERS & CRAIG A. MCEWEN, 1 MEDIATION: LAW, POLICY & PRACTICE § 4:03 (2d ed. 1994 & Supp. 1997).

