JUDICIAL MEDIATION: FROM DEBATES TO RENEWAL

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Judicial mediation involving a judge acting as a mediator in a court dispute has been implemented in many jurisdictions worldwide as a way to overcome access to justice challenges. This innovation has raised many debates on the changing role of the judge built on either its congruence with or divergence from judicial adjudication. Over the years, these debates have become increasingly stagnant. The evolving vision on access to justice brings an opportunity to draw from the earlier debates and forge a different way forward. This paper argues that a coequality approach to understanding judicial mediation is a better way to design the process in a way that respects the distinctive qualities of mediation and the justice system, and to create a renewed judicial mediation model. Based upon Singapore and Canada’s strong commitment to access to justice and long-standing judicial mediation experiences, the paper proposes an “Integrative Judicial Mediation” model.

I. INTRODUCTION

Access to justice has been associated with consensual ways of resolving disputes for many decades. According to Cappelletti and Garth, the third wave of the access to justice movement broadened the search for justice beyond advocacy in the courts, focusing instead on the full panoply of ways to resolve conflicts. Worldwide, delivering justice is now an evolving concept arising from a confluence of two streams that were once disparate: Alternative Dispute Resolution (ADR) and adjudication through the judicial system. ADR mechanisms, such as mediation, emphasize party autonomy

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over the outcome, confidentiality within a private process and a broad consideration of a whole range of interests apart from legal rights. By contrast, the adjudication process involves the imposition of a decision on the disputants, the application of legal principles alone and a largely public process.

Studies on the history of the representation of justice show different traditions in the iconography of justice that depict a constant evolution of the position of the judge. In recent times, the courts have been conceptualized as multi-door courthouses providing a diverse range of dispute resolution processes. The judge is now a multi-tasking judge, possessing areas of expertise beyond adjudication. Judges in civil and common law jurisdictions worldwide have been increasingly involved in settlement and case management activities. Our paper focuses specifically on judicial mediation, an innovation arising from the changing role of the judge. Judicial mediation in this paper refers to a process involving a judge acting as a mediator in a court dispute. Many courts have

2016 (showing the application of ADR’s value in delivering effective civil justice, therefore enhancing adherence to rule of law).

3 See JOSÉ M. GONZÁLEZ GARCÍA, THE EYES OF JUSTICE: BLINDFOLDS AND FAR-SIGHTEDNESS, VISION AND BLINDNESS IN THE AESTHETICS OF THE LAW (2017) (identifying eight traditions that can be classified in three main epochs: (1) Justice that sees all, from Mesopotamia to Venice where the judging position consists of seeing all actions and penetrating the most intimate intentions of humans beings; (2) Justice blindfolded that began to develop at the end of the Middle Ages and at the beginning of the Renaissance where the judging position require equality of all before the law; and finally (3) the search for new ways of representing the gaze of justice triggered by a crisis of the law which calls for an important reflections on justice and the judge office); see also JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011).

4 Frank E. A. Sander, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976) (also referred to as Varieties of Dispute Resolution speech at the Pound Conference).


encountered challenges in designing and implementing this unique process that draws inspiration from the traditions of both ADR and the conventional justice system. On one hand, some critics have expressed different views on the legitimacy of the process, its capacity to enhance access to justice; its potential benefits and whether it is the best investment of judicial resources. On the other hand, many scholars have recognized that mediation can deliver justice, although the meaning of “justice” is still a subject of discussion.7

Many debates concerning judicial mediation have built on either the congruence or the divergence between ADR and litigation. The “divergence approach” focuses on mediation’s distinctive qualities compared to litigation, such as process flexibility and tailor-made solutions. It appraises the potential of judicial mediation from the perspective of how distinct it is from the litigation process. The “congruence approach” has instead concentrated on the merits of judicial mediation based on the similarities between mediation and litigation, focusing on characteristics such as the judge’s functions or the use of legal principles as a basis for negotiation and settlements. It evaluates the legitimacy and contribution of judicial mediation with lenses premised on the adjudication process. In other words, the overall debate has centered on how far or how close judicial mediation is to justice traditions, in order to still be considered as part of the justice process. Both approaches have led to debates which are still recurring today and becoming less fruitful over the years in their contribution to the state of knowledge on judicial mediation.

After more than three decades of critical studies on the fundamentals of judicial mediation and practices, it is time to overcome the increasingly stagnant debates on the appropriate distance or

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similarities between mediation and litigation processes. The divergence and congruence approaches have reached their limits in building the first generation of judicial mediation. Moreover, judicial mediation has to be rethought to keep up with the rapid evolution of access to justice in recent years. Many jurisdictions are now experiencing an emerging trend towards a user-centric vision of access to justice, or what has been described as a normative individualism perspective.8 This approach centers on the individual as the source and focus of access to justice. The elements of access to justice are increasingly defined according to individual perspectives. The processes used in the justice process are also directed towards meeting individual needs. In this regard, many jurisdictions have stressed how the mediation process accentuates individual participation in the justice process, makes the overall justice system more accessible and potentially achieves outcomes that satisfy individual needs.9 It is therefore an opportune time to draw from the earlier debates concerning judicial mediation to build the next generation of judicial mediation.

This paper argues that adopting a “coequality approach” is critical to forging a way forward to create a renewed judicial mediation model. A coequality perspective recognizes that mediation and adjudication are equally valid processes within the justice system. It does not denigrate one process at the expense of the other, and yet it also respects and seeks to preserve the key differences between both processes. The first section of our paper will address ongoing debates concerning the potential and benefits of judicial mediation and suggest reframing these arguments from the coe-

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8 See Felix Steffek, Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topics, in Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads 33, 43 (Felix Steffek & Hannes Unberath eds., 2013) [hereinafter Regulating Dispute Resolution].

9 See e.g., Code of Civil Procedure R.S.O., c C-25 (Can.) 2-1-7 (Prelim. provision) emphasizing the goals of efficiency, promptness, accessibility and quality of civil justice, together with the use of fair-minded processes; making a call to avoid litigation and to focus on preventing and resolving disputes instead; and articulating principles underlying dispute resolution such as self-determination and good faith); Sundaresh Menon, Chief Justice, Singapore, Keynote Address at the State Courts Annual Workplan 2017, 11–12 (Mar. 17 2017) (transcript available at https://www.statecourts.gov.sg/Resources/Documents/State%20Courts%20Workplan%202017%20Key note%20Address%20by%20Chief%20Justice%28FINAL%29.pdf) (stating how consensual ways to resolve disputes are one of the best ways to enhance access to justice and that the traditional adversarial adjudication process is not always appropriate).

10 Coequal, Oxford English Dictionary (7th ed. 2013) (the term “coequal” refers to being of the same rank, power, importance or value as another; or being of equivalent extent as another); see also Coequal, Merriam-Webster Dictionary (“Coequal is defined as being equal to the other”).
quality stance. These positive and negative aspects will serve as a stepping stone for further discussion. We will then dedicate the second section of our paper to renewed principles for judicial mediation. We will suggest a model inspired by strong commitment and long-standing judicial mediation experiences in Canada and Singapore.\textsuperscript{11} Our overarching goals of this paper are to bring a new theoretical perspective, generate opportunities for renewed analysis in the field of judicial mediation, and to stimulate innovative ideas for future reforms in access to justice and dispute resolution.

II. DEBATES ON JUDICIAL MEDIATION—FROM DIVERGENCE AND CONGRUENCE TO COEQUALITY

The term “judicial mediation” has varying meanings in different legal traditions. Some countries use the broader term of judicial dispute resolution to describe a large range of judicial settlement activities that are both advisory and facilitative, or all types of work undertaken by judges to encourage settlement.\textsuperscript{12} Others, including Brunet and Hensler, understand judicial mediation to involve primarily evaluative rather than facilitative techniques.\textsuperscript{13} In the United States, the term “judicial settlement conference” is more commonly used, owing to the judges’ practices

\textsuperscript{11} Canada, a vast country in the northern hemisphere with British and French influences, has civil law and common law traditions in its justice system. Singapore, a multi-cultural nation-state in Southeast Asia, has its legal tradition rooted in common law. Despite the diversity of their historical and legal traditions, they have both developed themselves as leaders in performing judicial mediation in a way to enhance access to justice.


\textsuperscript{13} STACY LEE BURNS, MAKING SETTLEMENT WORK: AN EXAMINATION OF THE WORK OF JUDICIAL MEDIATORS 7 (2000) (stating that sitting judges mediate by offering their opinions on what a fair settlement would be); Edward Brunet, Judicial Mediation and Signaling, NEV. L.J. 232, 234 (2003); Deborah Hensler, A Research Agenda: What We Need to Know About Court-Connected ADR, Disp. Resol. Mag., Fall 1999, at 15 (suggesting that judicial mediation is evaluative rather than facilitative, and that “court mediation is a lot like a settlement conference”); Lawrence F. Schiller & James A. Wall, Jr., Judicial Settlement Techniques, 5 Am. J. Trial Advoc. 39, 52 (1981).
of convening pre-trial settlement conferences under Rule 16 of the Federal Rules of Civil Procedure.  

This article refers to judicial mediation as a primarily facilitative mediation process conducted by a judge in respect of a civil dispute. This judge will not preside over the trial in the event that no settlement is reached. The discussions are also kept confidential and not revealed to the trial judge. This form of judicial mediation is practiced in both Canada and Singapore. For reasons that will be evident below, judicial mediation is defined this way to distinguish the process from advisory processes such as mini-trials, arbitration and early neutral evaluation.

Judicial mediation has not been a process that is welcomed in all countries. The very notion of a judge being engaged in settlement activities has precipitated debates concerning how the process can be reconciled with both the practice of mediation and the justice system. There have been arguments advanced along the divergence approach, pointing out how judicial mediation must closely resemble mediation and clearly distinguish itself from adjudication. Conversely, critics adopting a congruence approach focus on how judicial mediation should be more identical with the funda-

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16 See generally The State Courts of Singapore, Code of Ethics & Basic Principles on Court Mediation, https://www.statecourts.gov.sg/Mediation_ADR/Documents/Code%20of%20Ethics%20and%20Basic%20Principles%20on%20Court%20Mediation%20-%20280215.pdf (articulating key values of “respect” and “empowerment” involving understanding litigants’ concerns and honoring their right to decide, and maximizing each party’s capacity to make choices; and stating that the mediator “shall always respect the parties’ right to decide” and “shall not use any language or conduct himself in any manner that may give rise to an impression that the parties must settled the matter according to his suggestion or direction”); Joyce Low & Dorcas Quek, An Overview of Court Mediation in the State Courts of Singapore, in MEDIATION IN SINGAPORE: A PRACTICAL GUIDE (2d ed. 2017).

17 In this paper, we adopt the following definitions drawn from Stephen B. Goldberg et al., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 213, 313, 318 (2007): arbitration referring to a private dispute resolution procedure involving arguments submitted to a neutral third party who has power to issue a binding decision; mini-trial involving lawyers making summary presentations to a panel comprising a neutral advisor and high-level executives with settlement authority, and seeking a prediction of the likely outcome of the matter from the neutral advisor; and early neutral evaluation involving an assessment of a case early in its history by an experienced neutral.
mental characteristics of adjudication. We turn to address both perspectives that have fueled debates on the potential and limitations of judicial mediation for several decades, with no clear solution in sight. These arguments will be analyzed below according to two overarching themes: the legitimate need for judicial mediation, as well as how judicial mediation is inconsistent with existing processes. In this section, we also propose a way forward from the binary debates by adopting a wholly new perspective to understanding judicial mediation—the coequality approach.

A. The Legitimate Need Debate

Objections to judicial mediation have been raised at the most fundamental level—why is there even a need for judicial mediation? This question is embedded within other more complex issues concerning the primary role of the court, the attributes of a judge and the allocation of judicial resources. We turn to examine this question from both the divergence and congruence perspectives.

1. Between Divergence and Congruence

Critics who have adopted the divergence approach generally perceive mediation to be thoroughly incompatible with the core judicial role. Much of this criticism was made in the “golden age” of mediation spanning from the late 1990s to first decade of the 21st century. As Menkel-Meadow noted, these commentators commonly assume that the courts have a predominantly adjudicative function. In this connection, Fiss has asserted that the courts exist “not to resolve disputes” but to give meaning to public values. Resnik, when describing how federal judges have increasingly taken on managerial functions, called for the preservation of the “uniqueness of the judicial function,” which involves disinterested and disengaged decision-making. Resnik and Hensler cautioned against the embracing mediation in lieu of adjudication, for it represents a shift away from opportunities for the state to regulate

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18 See generally Kimberlee K. Kovach, The Evolution of Mediation in the United States: Issues Ripe for Regulation May Shape the Future of Practice, in GLOBAL TRENDS IN MEDIATION 389, 389–90 (Nadja Alexander ed., 2006) (arguing that the period from mid 1970s to early 1980s was one of experimentation, while the second phase occurring a decade later was characterized by a time of rapid implementation of mediation programs).
conduct and to grant normative rights to litigants.\textsuperscript{21} Furthermore, the U.S. Federal Rules of Civil Procedure were only amended in 1983 to allow judges to discuss settlement during pre-trial conference, a likely reflection of a long-held belief that the judge’s primary work is to adjudicate.\textsuperscript{22}

Australia’s National Alternative Dispute Resolution Advisory Council (‘NADRAC’) adopted a similar view, remarking that the courts’ specific role within society was to “resolve legal disputes according to law.” It quoted former Chief Justice French’s views that the constitutional function of the judiciary should not be compromised “by blurring its boundaries with non-judicial services.” It further argued that judicial time was expensive compared to private mediation providers, thus suggesting that judicial mediation did not make the best use of court resources.

Other arguments under the divergence approach cast doubt on the ability of judges to mediate effectively. NADRAC noted the Victorian bar’s opinion that judges are appointed “not for their mediation skills but for their judicial abilities.”\textsuperscript{23} In the same vein, Alfini seems to doubt the innate ability of judges to mediate. He has argued that the experience of judges may lead them to adopt an inappropriate “bashing” style, leading to coercive mediation behavior.\textsuperscript{24} There have been numerous other studies in the U.S. suggesting that judges lack the competence to mediate without exerting undue pressure.\textsuperscript{25} The problem is further exacerbated when judges who mediate do not receive any formal training.\textsuperscript{26} In

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\item \textsuperscript{21} Judith Resnik, Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement, 2002 J. DISP. RESOL. 155, 168.
\item \textsuperscript{22} Sourdin & Zariski, Introduction, in The Multi-Tasking Judge, supra note 5, at 5.
\item \textsuperscript{23} NAT’L ALTERNATIVE DISP. RESOL. ADVISORY COUNCIL, supra note 12, at 110.
\item \textsuperscript{25} Brunet, supra note 13, at 254–56 (stating that a judge who mediates typically “appraises the relative strengths and weaknesses of the parties’ cases, presents a rough case evaluation to the parties, and seeks to extract settlement offers that mirror the judge’s analytical perception of the dispute”); Nancy Welsh, The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?, 6 HARV. NEGOT. L. REV. 1 (2001); James A. Wall Jr. & Dale E. Rude, The Judge as a Mediator, 76 J. APPLIED PSYCHOL. 54 (1991); Dale E. Rude & James A. Wall Jr., Judicial Involvement in Settlement: How Judges and Lawyers View It, 72 JUDICATURE 175, 177 (1988) (noting that judges more often prefer to ask both lawyers simply to compromise); James A. Wall Jr. & Dale E. Rude, Judicial Mediation: Techniques, Strategies, and Situational Effects, 41 J. SOC. ISSUES 47 (1985).
\item \textsuperscript{26} Lawrence E. Susskind, Judicial Dispute Resolution: An Approach Evolving to Suit Litigants’ Needs, DISP. RESOL. MAG., Spring 2014, at 27, 28 (commenting that it is a mistake that the judges in Alberta province are not required to receive formal dispute resolution training before
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sum, mediation has been deemed to be incongruous with a judge’s conventional functions, thus negating the need for judicial mediation.

Conversely, judicial mediation has also been assessed from a congruence approach through the lenses of adjudication. Many views along this vein were expressed while the mediation movement was increasingly being incorporated into the court process during its golden age. From this standpoint, judicial mediation has been depicted as similar to, or an extension of, the adjudication process. Commentators adopting this perspective tend to characterize judicial mediation as an evaluative process that resembles a judge’s usual work. For instance, Brunet has asserted that case evaluation—involving the appraisal of the merits of the case—is the very essence of judicial mediation.27 Brunet also suggests that judicial mediation bears similarities with judges signaling their leanings throughout the litigation, which is a natural occurrence that cannot be prohibited practically.28 Similarly, NADRAC’s report notes that some lawyers were supportive of judges conducting advisory settlement processes, but not facilitative ones. These arguments effectively conceptualize judicial mediation in the likeness of the adjudication process, instead of a process that differs vastly from decision-making.

2. Towards Coequality

The present authors propose a departure from a dichotomous approach that fails to consider the changing nature of the justice system across the globe. The arguments leaning on the side of divergence tend to portray the courts as synonymous with adjudication alone. Yet this is presently not a view that is uniformly held across jurisdictions. Sourdin has observed in this regard that several countries’ judges have combined adjudicative, advisory and facilitative functions to fit societal and individual needs.29 This combination of functions is, incidentally, acceptable in many European and Asian civil law countries which utilize both inquisitorial


27 Brunet, supra note 13, at 233.

28 Id. at 254–56.

and adversarial processes. Even within common law jurisdictions, the roles of the courts and the judge have not remained static. In this regard, the Canada Law Commission coined the term “participatory justice” to emphasize how processes such as mediation seek transformation through the active participation of parties involved in the conflict. In a similar vein, the Australian courts have regarded mediation as an integral part of the courts’ processes and judges in several courts and tribunals have acted as mediators. The changes to the American Bar Association Code of Judicial Conduct also reflect these paradigmatic changes. The commentary to the code encouraged a judge to facilitate settlement and expressly allowed ex parte communications with parties and their lawyers to facilitate settlement.

In varying degrees, the courts’ interaction with the parties has been shifting from that of a detached adjudicator to a more proactive problem-solver, offering a range of dispute resolution processes to fit the exact contours of the dispute. Cappelleti and Garth have described this new paradigm as “co-existential justice,” in which private dispute resolution processes have an expanded role alongside formal public models. Accordingly, to move the debate productively, the focus should shift towards the coequality and coexistence of facilitative and adjudicatory processes within the courts. The clock cannot be turned back—the reality of the changes that have occurred within the justice system across many legal traditions cannot be denied. Many of the arguments advanced along divergence or congruence lines in the previous decades no longer resonate strongly in the current age.

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30 Code de Procédure Civile [C.P.C.] [Civil Procedure Code] art. 21 (Fr.) (requires that, for individual disputes, “[i]t shall be part of the duties of the judge to conciliate the parties”); Civ. L. Proc. art. 130 (Indon.) (obliges the judges to try the amicable settlement before the civil proceeding starts); Code Civ. Proc. art. 10, 31, 41, 64, 131; 180-188 (Viet.) (provides that a judge in a civil case has a duty of conciliation); see also Archie Zariski, Understanding Judges’ Responses to Judicial Dispute Resolution: A Framework for Comparison, in The Multi-Tasking Judge, supra note 5, at 48 (stating that civil law procedures are “judge-centric” compared to common law, and the judges who are more accustomed to active involvement in all stages of case may feel more comfortable intervening for the purpose of settlement; and that the increase of managerial judging in common law systems represents a convergence with civil law).


32 Sourdin, supra note 29, at 159–60.

33 Nancy A. Welsh, Magistrate Judges, Settlement, and Procedural Justice, 16 Nev. L.J. 983, 1004–10 (2016); Welsh et al., supra note 14, at 59–62; Menkel-Meadow, supra note 19, at 503 (noting that on a historical level courts have often done more than adjudicate, but have managed and administered themselves).

34 Cappelletti, supra note 2, at 287, 289.
The embracing of mediation should not replace trial adjudication, as Resnik cautioned. However, a coequality approach by a judiciary need not, and should not, result in the diminution of the role of adjudication. On the contrary, accepting the equal legitimacy of different processes has great potential to enhance the legitimacy of the adjudicatory process. Landerkin, commenting on the Canadian justice system, has argued that the judges could be left to adjudicate only if the adversarial system of justice were running smoothly. However, the criticisms of adversarial justice have led to multiple reforms. Landerkin reasoned that the “role of a judge primarily predicated on a seriously flawed . . . approach to justice is surely not sustainable.”

The courts’ encouragement of the use of mediation in appropriate cases while allowing others to proceed for a trial is surely a more sustainable way for the justice system to be responsive to diverse needs.

Moreover, a coequality approach allows facilitative and adjudicatory processes to co-exist within the justice system. If it is acceptable for a judge to take on a variety of roles, there is no compelling need to design judicial mediation as a primarily evaluative process, a response stemming from the congruence stance. Such an approach risks distorting the common understanding of mediation, as well as rendering judicial mediation almost indistinguishable from litigation. By contrast, a court’s decision to use judges to engage in facilitative mediation helps signify its clear endorsement of mediation as being a different process from adjudication, but having equal standing. Wayne Brazil wrote about this legitimizing effect when observing how a court using its own full-time employees to serve as ADR neutrals is likely to inspire the greatest public confidence that ADR services represent real added value, instead of being a poor substitute to adjudication. He astutely observed that “the closer and the more visible the connection between the Court and its ADR program, the clearer the Court’s signal that it identifies with that program—and endorses its value and quality.”

It is therefore argued that judicial mediation is consonant with a broader concept of justice and an enlarged role for the courts to include both facilitative and adjudicative functions. Far from failing to fulfill a legitimate need in the justice system, judicial mediation has a potentially substantial legitimizing

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impact on the role of mediation in advancing access to justice within the court system.

B. The Inconsistency Debate

Commentators have also debated about the potential benefits of judicial mediation and whether such an innovation is worth the investment of court resources. In this respect, trenchant criticisms have been leveled against judicial mediation as being inconsistent with mediation as well as the traditional justice system. Once again, the arguments have been commonly advanced along either a divergence or congruence stance.

1. Between Divergence and Congruence

As alluded to earlier, critics taking the divergence approach tend to argue that mediation has to be kept distinct from the adjudication process. The greatest misgiving that mediation practitioners and scholars have with judicial mediation is its potential inconsistency with a central principle of mediation, party autonomy. The literature on judicial mediation has often portrayed it as a largely evaluative process involving the judge sharing his or her opinion about the merits of the case, a development that has tainted the development of mediation as a consensual process. Menkel-Meadow has commented that this style may well have departed from pure mediation and taken the hybrid form of “med-arb.”

Referring to studies showing that lawyers want judges to express an analytical opinion, Menkel-Meadow observed that judges adopting such styles are not necessarily mediators, since a “mediator facilitates communication between the parties and helps them to reach their own solution.” While there are indeed studies reflecting lawyers’ general preference for a case evaluation,

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37 Brunet, supra note 13; Hensler, supra note 13.
39 Menkel-Meadow, supra note 19, at 510–11.
Welsh has highlighted how such an approach potentially leads to the disputants feeling coerced into settlement. A party may agree to settle out of a fear of reprisal from the judge’s subsequent rulings and behavior. Welsh argued that there may be the perception of coercion and a genuine lack of self-determination even without the judge’s use of explicit threats.41

Apart from case evaluation, other techniques used in judicial mediation have also been roundly criticized as undermining the parties’ self-determination. In the early days of the mediation movement, Wall and Rude’s survey of lawyers demonstrated that a significant number of heavily utilized settlement techniques were deemed by lawyers as unethical, including talking to each lawyer separately about settlement, suggesting a settlement figure to a client and giving advice to the lawyer with the weaker case.42 A recent comprehensive review of empirical studies shows that “pressing” or “directive” mediation styles that have an element of pressure tend to lower party satisfaction levels.43 In this regard, Robinson observed, in a study of California judges, that many judges who had high settlement rates tend to use directive techniques.44 If judicial mediation is largely characterized by directive methods, there is a worrying impact on the parties’ exercise of autonomy within mediation.

The risk of coercion is further accentuated when the judge who mediates subsequently presides over the trial. Several studies

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L. REV. 473, 524 (2002) (noting that 87% of the lawyers surveyed wanted the mediator to value a case); Roselle Wissler, Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research, 17 OHIO ST. J. ON DISP. RESOL. 641, 685 (2002) (observing that lawyers found a mediation fairer if the mediator suggested solutions, helped the parties in evaluating the merits of their case or assisted them in assessing the value of the case); Rude & Wall, supra note 25, at 77 (noting that lawyers surveyed desired judges to indicate show similar cases have settled); Wayne Brazil, Settling Civil Cases: Where Attorneys Disagree About Judicial Roles, 23 TRIAL JUDGES J. 20, 20–24 (1984) (observing that most lawyers surveyed in Northern California preferred judge who would make suggestions).

41 Welsh, supra note 25, at 67.

42 James Wall Jr. et al., Judicial Participation in Settlement, 1 J. DISP. RESOL. 25, 38–39 (1984) (showing how seventeen out of seventy techniques being examined were thought by lawyers to be unethical practices).


have demonstrated the danger of this practice. Alfini argued that “even the most sensitive judge may initially be perceived by some parties as coercing settlement merely by virtue of his or her position as the judge assigned to their case.”45 Reinforcing this conclusion, Wissler’s survey of lawyers showed that settlement conferences with judges assigned to the case had a lower preference rating by lawyers than conferences with judges not assigned to the case.46 Furthermore, Welsh has argued that when magistrates offer both settlement assistance and adjudication, the parties and lawyers are unlikely to perceive that the judge will give trustworthy consideration to their voice or be even-handed. Procedural justice concerns are at risk of being undermined.47 Evidently, mediation practitioners tend to think that judicial mediation detracts from the consensual basis of mediation.

On the other hand, criticisms also abound concerning how judicial mediation is inconsistent with due process and other principles of natural justice. These critics adopt the congruence approach, focusing on how the process resembles the conventional adjudication process. In this connection, Resnik has expressed grave concern about the constitutionality of judicial settlement in the United States context. She observed the growing trend of dispute diffusion, in which the courts (and government agencies) have embraced a range of dispute resolution options that “clouds the courts’ identity as a unique constitutionally obliged mode of decision making.”48 Resnik further argued that the First Amendment doctrine should be shaped “in light of commitments that courts function as open, egalitarian venues,” because the public should not be excluded from observing how conflicts in democracies are handled. From her perspective, the constitutional right of audience should also entail the obligation by the courts to public oversight, whether the courts exercise its powers in trials or private resolution of claims. She thus proposed that private dispute resolution in the

45 Alfini, supra note 24, at 14.
46 Wissler, supra note 39, at 285 (finding that lawyers thought that judges assigned to the cases were much less able to fully explore settlement without prejudice to ongoing litigation compared to other types of neutral); see also Ellen E. Deason, Beyond “Managerial Judges”: Appropriate Roles in Settlement, 78 OHIO ST. L.J. 73 (2017) (all articles pointing up the danger of coercion and partiality resulting from trial judges being involved in settlements); Welsh, supra note 33; Cratsley, supra note 26; Frank E. A. Sander, A Friendly Amendment, DISP. RESOL. MAG., Fall 1999, at 11; Leroy J. Tornquist, The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry, 25 WILLAMETTE L. REV. 743 (1989).
47 Welsh, supra note 33, at 1032–33.
court ought to be accompanied by public accountings of what transpired.\textsuperscript{49} There is therefore the suggestion that the lack of publicity within court mediations, including judicial mediation, breaches constitutional obligations.

There have been similar misgivings within Australia. Some have argued that judicial mediation is incompatible with the exercise of judicial power in the constitution, though there are also dissenting views. Additionally, there is unease with the use of private sessions as being inimical to procedural and natural justice.\textsuperscript{50} Welsh, in assessing magistrates’ settlement practices in the U.S., also sounds caution in relation to the proper use of \textit{ex parte} communications. Although the U.S. A.B.A. Code of Conduct for Judges allows the judge to confer separately with the parties in settlement efforts, it also highlights the potential for coercion to occur.\textsuperscript{51} Welsh argued that judges have to be mindful of the impact of private meetings on their appearance of objectivity and impartiality, particularly if the same magistrate is handling both the settlement and adjudication processes.

2. Towards Coequality

It is suggested that the concerns expressed on either the divergence or congruence approach ultimately stem from the absence of clarity on the model of judicial mediation being practiced. The sheer diversity of judicial settlement practices—ranging from facilitative to “bashing” techniques—has clouded the entire concept of judicial mediation. It is presently not evident whether judicial mediation is more akin to mediation or to an adjudicatory process. Instead, judicial mediation has been practiced as an odd mixture of facilitative and adjudicatory techniques, with variations arising from the differing practices across countries and individual styles of judges. Consequently, the lack of clarity regarding judicial mediation has risked discrediting both the mediation process and the justice system. Mediators tend to disavow the connection between judicial mediation and the facilitative mediation process they know, preferring to label the process a settlement conference or even “med-arb.” On the other hand, some judges and commen-


\textsuperscript{50} Sourdin, \textit{supra} note 29, at 160–61.

\textsuperscript{51} \textit{Model Code of Jud. Conduct Canon 3A(4)} (Am. Bar Ass’n) (stating that a “Judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts”).
tators have extreme discomfort with infusing the conventionally public and adversarial justice system with elements of facilitation and confidentiality. It appears as if a merger of the two streams of mediation and adjudication has gone awry and failed to benefit either stream.

Nevertheless, it is the present authors’ view that coequality may be achieved within judicial mediation. However, such coequality cannot be attained through a mindless mixture of facilitative and advisory techniques. Such an approach, far from achieving the best of both worlds of mediation and adjudication, taints both processes. It is instead proposed that the courts respect the coequality of the different streams of mediation and adjudication. In other words, judicial mediation has to be thoughtfully designed to harness the benefits of both streams and yet not muddy the distinction between the different dispute resolution processes.

Can such coequality be achieved in practice? It is argued that it is more than feasible. Such coequality requires thoughtful conceptualization of judicial mediation in light of the principles underlying both mediation and the adjudication system. First, there has to be clarity about what judicial mediation is from the mediation perspective. The present authors deliberately use the term judicial mediation instead of settlement conference to emphasize the crucial need to preserve the quintessential principles underlying mediation, chief of which is party autonomy. It is undisputed in many jurisdictions’ mediation codes that the key focus of mediation is to help the disputants reach their own decision instead of having an outcome imposed on them.52 If the practice of judicial mediation casts substantial doubt over the disputants’ genuine exercise of autonomy, it is likely such an innovation has done more harm than good to the standing of the mediation process.

It is therefore evident that what has been known as muscle mediation and other coercive practices should not form part of the practice of judicial mediation. Judges taking on this role require the relevant training in mediation and cannot simply translate an adjudication mindset and behavior into a different setting. The gravitas of the judge has to be utilized not to impose an outcome, and therefore change the complexion of the process to be more akin to adjudication, but to facilitate a consensual settlement. In this regard, Canadian Judge Landerkin helpfully stated that judicial

mediators have to be competent facilitators, employing dialogue as
the basic approach, and that the use of judicial clout should not be
countenanced.53 In the same vein, former Magistrate Judge Morton
Denlow in the U.S. suggested that magistrates respect the par-
ties’ control of the outcome, protect the confidentiality of
communications, and encourage creative solutions—advice that
Welsh noted resembles mediation principles.54

Welsh’s call to guard against the parties’ perception of coer-
cion is also worth paying heed to. The Ontario Bar expressed a
similar concern when crafting a report evaluating judicial dispute
resolution. Commenting that judicial gravitas is a double-edged
sword, the report stated that a judge’s suggestion for settlement
can be perceived as coercive even by sophisticated litigants. The
report thus called for judges to be trained in facilitative tech-
niques.55 Moreover, Otis and Reiter, when writing about the Que-
bec judicial mediation model, emphasized the need for a judge-
mediator to be trained to “shift gears between adjudication and
mediation,” because the failure to do so poses “grave threats to the
integrity and viability of a voluntary system of judicial media-
tion.”56 The Quebec judicial mediation system was introduced to
shift the disputants away from the win-lose equation and from im-
posed justice in order to address the broader conflict between
them.57 It was hence crucial to practice judicial mediation in a way
that brought the benefits of mediation, as opposed to adjudication.
In this regard, Roberge’s survey concerning Quebec’s system
showed that the parties and lawyers identified the interpersonal
treatment by the judges as the greatest strength of the process as
the interpersonal treatment by the judges. Roberge argued that

53 Landerkin & Pirie, supra note 35, at 252.
54 Welsh, supra note 33, at 995, 1020–21.
55 OBA DAY IN COURT, supra note 12, at 16.
56 Otis & Reiter, supra note 15, at 367.
57 Id. at 363; see generally Code of Civil Procedure R.S.Q., c C-25 (Can.), art. 161–63 (“Pres-
siding over settlement conferences falls within the conciliation mission of judges,” “The purpose
of a settlement conference is to facilitate dialogue between the parties to help them better un-
derstand and assess their respective needs, interests and positions, and explore solutions that
may lead to a mutually satisfactory agreement to resolve the dispute.” and “A settlement confer-
ence is held in the presence of the parties and, if the parties so wish, in the presence of their
lawyers. It is held in camera, at no cost to the parties and without formality.”); JEAN-FRANÇOIS
ROBERGE, LA JUSTICE PARTICIPATIVE—FONDEMENTS ET CADRE JURIDIQUE (2017); Suzanne
Courtéau, La Conférence de Règlement à l’Amiable, in RÈGULER AUTREMENT LES DIFFÈRENDSD (Pierre-Claude Lafond ed., 2015); Jean-François Roberge, La Conférence de Règlement à
l’amiable: Les Enjeux du Raisonnement Judiciaire et du Raisonnement de Résolution de
this finding confirmed the wisdom of choosing a facilitative approach.\textsuperscript{58}

However, it may be argued that such a model of judicial mediation is indistinguishable from other types of mediation and there is thus no added benefit in having a judge perform the role of a mediator. Nevertheless, there are valuable benefits, one of which is the potentially substantial gains in procedural justice arising from the stark reversal of the judge’s conventional role. The judge, who is usually the adjudicator, now adopts radically different behavior as a mediator who listens and shows understanding for the individual’s concerns without passing judgment. There is huge satisfaction for the parties when the judge, who is thought to embody the authority of the judicial system, is willing to listen to each party, explore their underlying concerns, and reflect an accurate understanding of their circumstances and emotions. This surprising reversal of the conventionally authoritative figure’s behavior can have a favorable impact on the mediation. Parties who are given an opportunity to present their stories to the judge mediator potentially experience a greater sense of voice due to their concerns being heard by a representative of the judicial system.\textsuperscript{59} It has also been observed that this process effectively extinguishes a party’s desire to seek adjudication by trial, since the process of “telling it to a judge” has fulfilled the person’s need for a “day in court.”\textsuperscript{60}

\textsuperscript{58} Roberge, \textit{supra} note 6, at 352–53.

\textsuperscript{59} Patrick E. Longan, \textit{Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators}, 73 Neb. L. Rev. 712, 732 (1994) (noting one magistrate’s view of the cathartic effect of the judge’s presence arising from a judge allowing the parties time to express their views and feelings. “Having a judge listen and show understanding for the litigant’s concerns, without passing judgment, is often more important than adding an extra twenty percent to the settlement figure.”); Lucy V. Katz, \textit{The L’Ambiance Plaza Mediation: A Case Study in Judicial Settlement of Mass Torts}, 5 Ohio St. J. on Disp. Resol. 277, 307 (1990) (noting from a case study that the parties felt almost as if they “had their day in court” when they had the opportunity to present their stories to a judge-mediator. The mediation proceedings seem to replicate the due process that they would have expected from a trial. She quotes one magistrate as saying, “[A judge] can, in effect, give the litigants their day in court, i.e. a chance to tell their side of the story and to release their frustrations to a representative of the judicial branch. Such a ‘day in court’ may be the only thing a litigant needs to be sufficiently ‘emotionally cleared’ to begin constructive settlement negotiations.”); see also Michael Hogan, \textit{Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation}, 27 Willamette L. Rev. 429, 445–46 (1991) (observing that there is a catharsis when a judge is able to listen and show understanding of the litigants’ concerns).

\textsuperscript{60} \textit{OBA DAY IN COURT}, \textit{supra} note 12, at 15 (observing that for those who are alienated from the court system, judicial mediation can be, in their minds, their “day in court”, which is expressly colloquially as the parties’ desire to “tell it to a judge”); see also Sourdin & Zariski, \textit{Introduction, in The Multi-Tasking Judge}, \textit{supra} note 5, at 8 (stating that a judge may be well
The potential for a facilitative judicial mediation model to advance perceptions of procedural justice cannot be underestimated.

It has been argued above that judicial mediation be carefully conceptualized in light of the principles underlying the justice system and mediation. There remains the question of how a facilitative judicial mediation model also leverages on the judge’s legal expertise and experience in a way that is compatible with the justice system. Several studies have indicated lawyers’ general preferences for mediators to give opinions on the merits of the case. Brazil’s study showed that a large majority of Northern California lawyers preferred judges who made suggestions during settlement conferences. Nonetheless, Welsh has also pointed out that other studies show how lawyers appreciated judicial signaling and assisting them to be realistic in the application of law, but did not like judges to evaluate the matter in the presence of clients or to emphasize the high risk of going to trial. As such, the standing and experience of a judge is certainly useful in assisting parties in reality testing (about legal issues or the enforcement of the agreement for example), but such reality testing has to be done sensitively.

Court-connected mediation invariably involves negotiation in the shadow of the law, and the disputants will be concerned about their prospects of success at a trial. Otis and Reiter have observed that Quebec judges’ knowledge of the legal issues enables them to cogently help the parties focus on the issues underlying the dispute and to bring them to the fore of the discussions, even if the mediators stop short of explicitly expressing an opinion on the merits. This “deflation effect” on overly optimistic or unrealistic disputants can help to effectively break impasses in the negotiations. In addition, the judicial mediation process has great potential for lawyers’ “face-saving” purposes. When facing the judge mediator, they are able to provide their honest opinion of the client’s prospects of success without appearing to be unduly weak before their clients. In sum, it is suggested that the judge’s stand-

61 Brazil, supra note 36.
62 Welsh, supra note 33, at 1008–09.
63 Otis & Reiter, supra note 15, at 366.
64 Longan, supra note 59, at 739–74.
65 Brazil, supra note 40, at 23 (highlighting that the lawyer can escape his stereotypical role in judicial settlement conferences and recommend compromise based on the judge’s suggestion, thus avoiding the loss of standing in his client’s and opponent’s eyes); see also Longan, supra note 59, at 742.
ing and expertise offer substantial benefits to the mediation pro-
cess, but should be used in a predominantly facilitative manner
because of the huge likelihood of the perception of coercion. If
parties wish to have a largely advisory process, it is more advisable
to term it an “early neutral evaluation” or a “mini-trial.” Trans-
parency of the purpose of the judicial mediation process is vital to
ensure that both the mediation process and the justice system are
not discredited.

In order for coequality to be achieved, judicial mediation also
has to be compatible with other aspects of the overall justice sys-
tem. There are varying views across different jurisdictions on
whether judicial mediation is a constitutional practice. While some
maintain that it is an exercise of non-judicial power which is incom-
patible with the separation of powers or the court’s conventional
role, others take the view that there are no impediments to supe-
rior courts adopting the practice. Even if there are doubts, appro-
priate empowering legislation could be enacted.

The more difficult issue pertains to maintaining the perception
of impartiality of the judiciary. It is therefore unsurprising that a
large body of studies have criticized the practice of trial judges me-
diating the cases assigned to them. The likelihood of confidential
communications revealed in mediation being used by the trial
judge is undoubtedly high, and will tend to decrease the parties’
trust in the legitimacy of the process and increase the probability of
the perception of coercion.66 This dangerous impact on parties’
perceptions and on the judge’s objectivity during the trial has been
highlighted in the ABA Model Code.67 As will be explained fur-
ther in the article, a model of judicial mediation that inspires public
confidence should therefore have a clear separation between the
roles of the judicial mediator and the trial judge.

Finally, there have been suggestions that the prominence of
confidentiality and the lack of public oversight within mediation
militate against the principles of due process and transparency. It
is argued that confidentiality of the process per se does not infringe
fundamental principles of natural justice. The lack of publicity of
mediation as contrasted to a trial is a significant feature rendering
it an attractive dispute resolution process. As judges get increas-
ingly involved in case management activities behind closed doors,
judicial mediation is not such an anomalous development. The
more salient question is how to ensure accountability of judicial

66 Wall et al., supra note 42.
67 Welsh, supra note 33, at 1006.
mediators, so that confidentiality does not become a cloak for unchecked abuses to take place. This is a valid concern as even private mediators are subject to ethical obligations, regulation, and disciplinary procedures. Measures to increase transparency, accountability and trust within judicial mediation will therefore be proposed in the subsequent section.

In sum, the distinctions and similarities of judicial mediation with adjudication have been analyzed extensively by renowned academics and experienced practitioners. However, the preoccupation with defining judicial mediation solely from the mediation perspective or the adjudication lens has not led to beneficial innovations to either process. Notwithstanding their value, the divergence and congruence approaches on judicial mediation have reached their limits for public regulators, judicial administrators and judges who want to go further in their reflection and practices. A coequality approach is needed to pave the way forward. Judicial mediation can be designed in a way that respects the fundamental principles underlying the unique streams of mediation and adjudication. In the next section, we propose a renewed model that departs from a dichotomous stance.

III. RENEWAL OF JUDICIAL MEDIATION—ACHIEVING COEQUALITY THROUGH AN INTEGRATIVE JUDICIAL MEDIATION MODEL

As demonstrated in Section 2, judicial mediation has been the subject of debates about how its potentials and pitfalls balance the “scale of justice.” We believe a more promising way is needed to bring forward the state of knowledge in the judicial dispute resolution field and this is where our paper can be useful. In this third section, we argue that the time has come to explore coequality, reached by respecting the equivalence of mediation and litigation in providing justice and harnessing their best qualities towards a renewed theoretical model.

We propose the “Integrative Judicial Mediation” (“IJUM”) framework to create the next generation of judicial mediation. This model has been built in line with the emerging user-centric vision of access to justice that is shared by both Singapore and Canada amongst others.68 We developed the model to fit within a

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68 For an overview of a user-centric vision of access to justice in Canada, see ACTION COMMITTEE ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS, CANADIAN ACCESS TO JUSTICE
judicial system that pursues access to justice through achieving the dual goals of efficiency and quality of justice.\textsuperscript{69} By efficiency, we refer to how a litigant experiences the judicial process, from the initial procedure to the execution of a judgment, in terms of the value resulting from the resources invested (time, money, removal of psychological impediments, etc.). By quality, we refer to procedural fairness (quality of participation, information, interpersonal treatment, etc.) and substantive justice (quality of results in terms of compensation, functionality and transparency, etc.) experienced within dispute resolution processes connected to the judicial system. Our ambition is to create a framework of essential characteristics for designing the next generation of judicial mediation. While the model ultimately has to be adapted to different cultural and socio-legal contexts, it is proposed that most jurisdictions would share the twin goals of efficiency and quality of justice. The IJUM model has been designed to advance these specific aims and will thus be beneficial to different judiciaries.

\textsuperscript{69} Efficiency and quality of judicial processes, including alternative dispute resolution, are criteria measured in international benchmark tools like the Rule of Law Index conducted by the World Justice Project under the “civil justice” factor and the Doing Business Report conducted by the World Bank under the “ease of enforcing contracts” indicator. See generally World Justice Project, supra note 2; Doing Business: Enforcing Contracts Methodology, The World Bank, http://www.doingbusiness.org/Methodology/enforcing-contracts (last visited Apr. 14, 2018).
The model has been created through an “Integrative Thinking” methodology.\(^{70}\) Using abductive logic\(^ {71}\) and assertive inquiry,\(^ {72}\) we analyzed the elements of Singapore and Canada’s judicial mediation programs and their underlying rationales. We explored the literature and training materials for judges, and took into consideration speeches from judicial officials as well as regulations relevant to judicial mediation. Assuming an “optimistic model seeking” approach,\(^ {73}\) we identified “leverage points”\(^ {74}\) from each country’s model, in order to discuss what “might be” the elements of an optimal judicial mediation program that effectively enhances access to justice. It is evident that Singapore and Canada have complementary strengths that could bring opportunities for a renewed model. We thus identified five leverage points which became the elements of our proposed IJUM model: (a) sense of access to justice assessment, (b) procedural values, (c) ethical accountability, (d) process harmonization, and (e) training and spe-

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\(^{70}\) ROGER MARTIN, THE OPPOSABLE MIND: HOW SUCCESSFUL LEADERS WIN THROUGH INTEGRATIVE THINKING 15 (2009) (integrative thinking can be defined as “the ability to face constructively the tension of opposing models and instead of choosing one at the expense of the other, generate a creative resolution of the tension in the form of a new ideas that contains elements of the individual ideas but is superior to each.”); see also Elizabeth Ruth Wilson & Leigh L. Thompson, Creativity and Negotiation Research: The Integrative Potential, 25 INT’L J. CONFL. MGMT. 359 (2014).

\(^{71}\) MARTIN, supra note 70 at 146 (abductive logic can be defined as an inference to the best explanation when faced with incomplete, new or interesting data that does not fit with existing models. It is modal reasoning. It uses logic to inquire into what could possibly be true. Abductive reasoning is the logic of what might be, in other words, what could possibly be true. It is different from deductive reasoning, that is, the logic of what must be (from the general to the particular) and from inductive reasoning, that is, the logic of what is operative (from detailed facts to general principles). Deductive and inductive are declarative reasonings with the objective to determine the truth or falsity of a given proposition.).

\(^{72}\) Id. at 156–57 (assertive inquiry can be defined as a mode of communication that combines the explicit expression of one’s own model with the sincere exploration of the other’s model, with the aim of producing meaningful dialogue and increased understanding. It seeks common ground between conflicting models. It is different from advocacy, where we communicate in an argumentative way to explain our model to others and defend it from criticism.).

\(^{73}\) Id. at 126–29 (optimist model seekers “see the value in the complexity of multiple models, and their preference is always to wait for a better model to emerge rather than to justify the existing model.” They don’t believe there is a right answer, just the best available now. “In essence, the stance can be characterized as optimistic because it implies optimism that future models will be superior to the current model.” In contrast, contented model defenders see the value in certainty and accumulate data in support of the theory they have adopted to confirm and defend existing models.).

\(^{74}\) Id. at 123–24; see also Rotman Executive program. Rotman Integrative Thinking Program. (Toronto, Oct. 2011) (a leverage point is “a component of a model—part of the supporting logic, an assumption, a logical link – that provides a unique insight to the problem and, when challenged or extended, opens up new possibilities for a solution.” It provides an opportunity).
cialization (see figure 1). The next sections will be dedicated to these characteristics.

**FIGURE 1. INTEGRATIVE JUDICIAL MEDIATION model (IJUM).**

**A. “Sense of Access to Justice” Assessment**

Following the user-centric trend to improve access to justice, we argue that the litigants’ perspectives should be at the heart of a renewed model for judicial mediation. We suggest that it is the prerogative of litigants to assess the quality and efficiency of judicial mediation or any dispute resolution methods and to make an informed decision on what seems an appropriate way to obtain justice for them. This approach follows from a coequality perspective that respects the use of both mediation and adjudication as equally legitimate ways to achieve access to justice. Instead of denigrating one process over the other, the coequality stance seeks to understand the litigant’s perceptions on how judicial mediation should be conducted in a way that harnesses the best qualities of mediation and the conventional justice system. This approach is consistent with the recent worldwide trend towards the use of “access to justice metrics” in order to build an evidence-based approach to support reform and continuous improvement of the justice system.75

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75 For international comparative studies, see World Justice Project, supra note 2; World Bank, supra note 69; Hague Institute for the Internationalisation of Law, Measuring Access to Justice in a Globalising World (2010), http://www.hiiil.org/data/sitemanagement/media/HiiL_final_report_Measuring_260410_DEF.pdf [hereinafter MA2J]. For
Quantifiable measures of activities and performance that can be combined in an index serve many purposes, such as enabling comparison, enhancing litigants’ choices, increasing transparency in the delivery of judicial services and creating benchmarks and incentives for improving access to justice.\(^7\) Since public accountability is a key principle in every justice system, we believe there should be measures to introduce oversight and accountability to the confidential judicial mediation process and to facilitate its continuous improvement. Measurement tools have been developed over time,\(^7\) and consistent with the user-centric approach in our paper, we suggest designing as well as monitoring judicial mediation through the litigants’ perceptions, or what we term as their “sense of access to justice” experience.

Developed and empirically tested in the Canadian context, the “Sense of Access to Justice Index” (“iSAJ”) measures the litigant’s experience of the quality and efficiency of judicial mediation services.\(^7\) Sense of Access to Justice (“iSAJ”) is a combination of the user’s three assessments: (1) sense of fairness, (2) sense of usefulness, and (3) sense of professional support. Sense of fairness is


\(^7\) See e.g., Welsh, supra note 33, at 1046 (enclosing a suggested questionnaire courts can use) and id. at 1040–44 (arguing court surveys helps understand whether court practices result in positive perceptions of substantive and procedural justice and encourage regular evaluation to assess whether court programs are consistent with the goals set out); Reports from Courts, CourTools, http://www.courtools.org/Trial-Court-Performance-Measures/Reports-from-Courts.aspx (last visited Apr. 15, 2018) (providing basic indicators of court performance. Many states used and adapted CourTools empirical measurement instruments (Statewide reports from California, Colorado, Georgia, Massachusetts, Michigan, Minnesota, Montana, New Jersey, Ohio, Oregon, Pennsylvania, Utah, Wisconsin)).

\(^7\) The SAJ index has been tested with users of judicial mediation at trial courts in Quebec in 2013–2014. A total of 740 participants, 51% were litigants and 49% were lawyers, answered the self-administered questionnaire. Overall sense of access to justice reported by users is eighty-three out of a possible score of one-hundred. They scored fairness of the process experienced and results to a level of 71%. Efficiency has been score as useful to a level of 88% in terms of cost-benefit value. Support received from the judge mediator was evaluated at a quality rate of 89%. Each were given an equal weight to calculate overall SAJ. To learn more about the study, its methodology and results, see Roberge, supra note 6.
measured through the user’s satisfaction with quality of process and results. Process corresponds to participatory qualities (voice, consideration, implication) experienced by the user as well as the quality of information exchanged (transparent and unbiased) and interpersonal treatment (respect and dignity). The outcome of the dispute resolution process is assessed through restorative (for the past) and functional (for present and future) qualities of the solution achieved in mediation as well as the transparency of criteria (equality, merit or needs’ based) supporting it. Sense of usefulness experienced by users is a measure of the perceived value-ratio of economic advantage (money worth, investment payoff, etc.), psychological well-being (stress, emotional factor, peace of mind, etc.) and reputational capital (network and relationships related). Finally, sense of professional support corresponds to user’s perceived quality and efficiency of the judge mediator’s performance in terms of risk management (legal expertise, law related), as well as problem solving (communication and negotiation expertise, interest-based), and justice facilitation (cooperation building expertise, fairness based) approaches. In summary, iSAJ provides a measure of “experienced justice” in terms of quality and efficiency of judicial mediation process, as well as its outcome and the support received from the judge mediator.

<table>
<thead>
<tr>
<th>Sense of Access to Justice</th>
<th>User’s assessment on the quality and efficiency of judicial mediation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sense of Fairness</td>
<td>Process: (1) Participatory, (2) Informational, (3) Interpersonal treatment; Results: (4) Restorative, (5) Functional, (6) Transparent and principle-based</td>
</tr>
<tr>
<td>Sense of Usefulness</td>
<td>Value-ratio in terms of (7) economic advantage, (8) psychological well-being, (9) reputational capital</td>
</tr>
<tr>
<td>Sense of Professional Support</td>
<td>Support from the mediator in the role of (10) risk manager, (11) problem-solver, (12) justice facilitator</td>
</tr>
</tbody>
</table>

**Table 1. Sense of Access to Justice Assessment by Litigants Participating in a Judicial Mediation.**

**B. Procedural Values**

Designing judicial mediation to enhance access to justice begs the fundamental question of which values are guiding the judge mediator’s interventions. As argued earlier, a coequality approach to judicial mediation will not distort the foundational principles of
mediation, particularly the value of party self-determination. Pro-
cedural justice is greatly enhanced when the judge mediator re-
spects and supports the parties’ exercise of self-determination and
gives them the opportunity to voice their concerns. As such, we
believe that judicial mediation should be conducted according to
five core process values: (1) respect, (2) self-determination, (3)
fairness, (4) integrity, and (5) problem solving (see table 2). This
framework is based on the Singapore State Courts’ “Code of Eth-
ics and Basic Principles on Court Mediation.”79 Similar values can
also be found in the Canadian context where the prevention and
resolution of disputes should be achieved through “fair-minded
processes that encourage the persons involved to play an active
role.”80 Collectively, these values are consistent with the central
tenet of party self-determination within mediation. An articula-
tion of these core principles also has the potential to harmonize prac-
tices amongst mediators and bring predictability to this judicial
service.

<table>
<thead>
<tr>
<th>Core process values</th>
<th>Role of mediators</th>
</tr>
</thead>
<tbody>
<tr>
<td>Respect</td>
<td>Listening to parties’ views in a non-judgmental way, understanding their concerns and taking them into consideration.</td>
</tr>
<tr>
<td>Self-Determination</td>
<td>Expanding each individual’s capacity to exercise freedom of choice and action. Honoring their right to decide.</td>
</tr>
<tr>
<td>Fairness</td>
<td>Providing a fair, balanced and non-adversarial process.</td>
</tr>
<tr>
<td>Integrity</td>
<td>Encouraging transparency and honesty in information exchange.</td>
</tr>
<tr>
<td>Problem Solving</td>
<td>Facilitating holistic and effective solutions.</td>
</tr>
</tbody>
</table>

Table 2. Core process values and roles of mediators.

These procedural values act as safeguards and prevent potential pitfalls identified previously, including the likely role confusion be-

tween a trial judge and a mediator judge that could lead to coercive judicial opinions or undue pressure to settle. Such partiality would be an impediment to party self-determination and could shift the balance in favor of one party at the expense of the other. Fairness concerns arising from power imbalances under the supervision of a mediator are even more worrying in the context of a confidential procedure. As such, the mediator—particularly the judicial mediator—is under the duty to preserve the quality of the process by conducting the process according to these core values. Conducting a problem-solving process with fairness, respect and integrity should positively influence the participant’s quality of participation and their sense of empowerment.

C. Ethical Accountability

Apart from respecting the underlying philosophy of mediation, a coequality approach to judicial mediation should also respect the crucial values of the judicial system, including the need for accountability and due process. Most of the misgivings about judicial mediation stem from concerns that the mediation takes place behind closed doors without the benefit of public accountability that is expected of a judicial system. It is therefore argued that a judicial mediation system has to be governed by clear ethical obligations that are made known to the public. We suggest a framework that is consistent with judicial functions as well as the mediator’s role in resolving disputes. As such, we believe judicial mediators should be bound by four ethical duties: (1) good faith, (2) impartiality, (3) confidentiality, and (4) informed consent (see table 3). This is the orientation chosen by Singapore via the State Courts’ “Code of Ethics and Basic Principles on Court Mediation”81 and it is also consistent with the Canadian Judicial Council’s “Ethical principles for judges.”82 The ethical duties we suggest are

81 State Courts of Singapore, Code of Ethics and Basic Principles on Court Mediation, supra note 16.
82 In the Canadian context, judges performing mediation are bound by principles of independence, integrity, diligence, equality and impartiality. See Canadian Judicial Council, Ethical Principles for Judges, https://www.cjc-ccecm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf. No specific adaptations of these ethical principles to judicial mediation have been developed so far, although there is literature exploring this topic. See Georgina R. Jackson, The Mystery of Judicial Ethics: Deciphering the “Code”, 68 SASK. L. REV. 1 (2005); Keet & Cotter, supra note 15; Louise Otis & Catherine Rousseau Saine, The Mediator and Ethical Dilemmas: A Proposed Framework for Reflection, 4 J. Arb. & MEDIATION 43 (2014); Michaela Keet,
consistently found in mediation associations’ codes of conduct worldwide\textsuperscript{83} and implemented in model laws on mediation or national laws,\textsuperscript{84} like for instance the provisions of the Quebec Code of Civil procedure related to the “Principles of Procedure applicable to private dispute prevention and resolution processes.”\textsuperscript{85}

<table>
<thead>
<tr>
<th>Ethical obligations</th>
<th>Commitments of mediators</th>
</tr>
</thead>
<tbody>
<tr>
<td>Good faith</td>
<td>Promoting mutual respect, honesty and trust among all parties. Not advancing his/her own interests at the expense of the parties.</td>
</tr>
</tbody>
</table>


\textsuperscript{85} Quebec, Code of Civil Procedure, R.S.Q., C-25 (Can.), Arts. 1–7.
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| Impartiality                                                                 | Assisting all parties, providing equivalent support and encouraging collaboration.  
| Disclosing actual or potential conflict of interest.  
| Avoiding the use of any language or conduct that gives the appearance of partiality. |

| Confidentiality                                                               | Respecting the privacy of parties.  
| Preserving the confidentiality of anything said, written or done during the process. |

| Informed consent                                                             | Respecting the parties' right to decide whether and how to settle the case.  
| Refraining from language or conduct that puts undue influence on parties to settle according to mediator's suggestion or direction. |

**Table 3. Ethical obligations and commitments of mediators.**

Ensuring the ethical accountability of mediators addresses the criticism that there is a risk of denying the litigant’s rights behind closed doors as a result of power imbalances. Under our suggested framework, a mediator has the ethical duty to facilitate unbiased exchange of information between the parties and ensure that the parties’ settlement is based on informed consent. Furthermore, the impartial mediator must be careful not to give any impression that the matter is to be settled according to his or her views or to give any impression of bias.86 The mediators are “not to direct, coerce, push parties to change their minds even if they personally believe that the parties’ choice is not right or beneficial.”87 The judge’s gravitas cannot be used in a coercive way when courts publicly commit that mediations are conducted under such ethical principles. This public commitment towards accountability increases trust in the mediators and brings credibility to the judicial mediation program.

**D. Process Harmonization**

As alluded to above, the confusion over judicial mediation practices is rooted in the woeful lack of clarity about acceptable judicial mediation practices. Consequently, there has often been a haphazard combination of facilitative and advisory techniques that has severely tainted both the mediation process and the judicial

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86 State Courts of Singapore, Code of Ethics and Basic Principles on Court Mediation, *supra* note 16, paras 3.4.3 and 4.1(c).

87 Id. at para 4.1(a).
system. Leaving the court’s mediation program to be characterized by individual judges’ styles is highly risky. A judicial mediation system that inspires confidence requires much greater clarity and consistency amongst judges as to how the process should be conducted in a way that is compatible with mediation principles and due process. It is thus argued that a process framework largely premised on a facilitative mediation model should be used for training and continual monitoring of judges involved in judicial mediation. We encourage judicial mediators to harmonize their practice around a five-step process: (1) preparation and opening, (2) communicating facts and perceptions, (3) exploring interests and priorities, (4) developing options and crafting solutions, and (5) closing and follow-up (see table 4). Our framework is based on materials used in judicial mediation training programs delivered in Canada.88 This process has the advantage of being structured enough to provide predictability of process for litigants, as well as being flexible enough to respect party self-determination and to provide the latitude for tailor-made solutions consistent with a user-centric vision of access to justice.

<table>
<thead>
<tr>
<th>Problem solving process</th>
<th>Role of mediators</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preparation and Opening</td>
<td>Set rules to create a respectful environment and bring parties to a problem-solving mindset.</td>
</tr>
<tr>
<td>Communicating facts and perceptions</td>
<td>Provide a safe environment to explore facts and account of experiences. Establish a dialogue for mutual understanding and trust.</td>
</tr>
<tr>
<td>Exploring interests and priorities</td>
<td>Narrow down the problem from facts to interests and priorities. Converge to common ground.</td>
</tr>
<tr>
<td>Developing options and crafting solutions</td>
<td>Reframe positions as options that meet interests/priorities. Redirect criticism toward development of new option. Sustain settlement discussions leading to a fair outcome chosen by parties.</td>
</tr>
<tr>
<td>Closing and follow-up</td>
<td>Canvass agreement to make it enforceable. When there is no agreement, assess where barriers lie and suggest strategies to overcome them.</td>
</tr>
</tbody>
</table>

Table 4. Problem solving process and role of mediators.

The overarching emphasis of the five-step process is on encouraging collaborative problem-solving in a non-adversarial and

unbiased way, and facilitating settlements based on the parties’ interests. To this end, there is a preference to use joint sessions to involve lawyers and their clients in forming solutions together. Even when caucuses are called, the mediator has to involve all the lawyers in the creation of options. The mediator ought to “cast the conflict as a problem to be solved by all the parties, lawyers and mediator jointly, instead of a contest between parties represented by their lawyers.”

A recurrent concern in debates about judicial mediation is whether and how a “legal opinion” is given to litigants. We suggest leaving this role to lawyers assisting their clients given our interest-based orientation. If the parties cannot afford a lawyer, a mediator could refer them to legal pro bono services that exist in many jurisdictions. Nevertheless, the probable outcome at trial is certainly a relevant factor for litigants to assess their alternative to a settlement. Therefore, we understand the usefulness of “a reality-check” in the mediation process. Without positioning himself with respect to the probable outcome of a case, or risking perceived coercion given the judge’s gravitas, the judge mediator may still explore the conditions necessary for litigants to reverse the burden of proof. Asking questions is a better option than taking a firm position so as to respect party autonomy and lead to the same “reality-check” results. Refraining from giving an opinion, even if merely preliminary, is respectful of the integrity of the judicial system because any proper judicial decision must result from an adversarial process where evidence rules have been respected. Not providing legal opinions appears to be the best way for mediators to act consistently with the fundamental values of the judicial system.

As highlighted in the earlier section, informal justice has sometimes been criticized as not providing parties with procedural safeguards comparable to the formal procedure within the courts. Our multi-layered model addresses this criticism by offering litigants guarantees on core process values, predictability on the problem solving process and accountability on the mediator’s ethical behavior. We suggest strengthening these core qualities of the model with mandatory training for mediators to learn essential techniques. This is the final element of the “Integrative Judicial Mediation” model that will be explored in the next section.

89 State Courts of Singapore, Code of Ethics and Basic Principles on Court Mediation, supra note 16, para 4.1b.
90 Id.
E. Training and Specialization

The integrity of the judicial mediation process is guaranteed by several guiding principles and ethics as explored in the previous layers of our model. Regardless of their approach and working style, all mediators must guarantee the quality of the process as well as acquire and maintain professional qualifications required to perform effective facilitated negotiations. The success of a judicial mediation system ultimately rests on developing a high quality of mediation skills.91 While there could ostensibly be a process framework based on co-existence of mediation principles and values of the justice system, what is more critical is to have judges who have been trained to develop and hone these skills.

As demonstrated above, the existence of unethical or coercive mediation practices has the potential to mar the entire standing of the judicial mediation process. Furthermore, many critics have doubted judges’ innate capacity to perform mediation. Admittedly, not all judges would have the suitable temperament to be competent facilitators using dialogue as the main tool for dispute resolution. Selection of judges that will perform judicial mediation is a vital first step. In addition, we suggest the selected judges should be adequately trained and engage in some degree of specialization in dispute resolution. Although not every judge will feel comfortable practicing judicial mediation, we believe a training program should be mandatory for all judges involved in some form of dispute resolution. This ensures that they will understand its potential to provide access to justice to litigants and how facilitated negotiation can be used with the objective of proper case management.92 Based on best practices in the mediation field as well as

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92 In Canada, Quebec civil law judges are all required to follow judicial mediation training with the main objective to develop a shared knowledge of its potential to facilitate access to justice. Judges have to follow a skills-based training program delivered by National Judicial Institute before they engage in judicial mediation functions. Such mandatory training pursue effective and harmonized practices in sustaining settlement discussions.
Canadian judicial mediation training programs,\textsuperscript{93} we suggest that judges should learn the following techniques: (1) communication skills, (2) value assessment skills, (3) trust building skills, and (4) skills to facilitate negotiation.

<table>
<thead>
<tr>
<th>Mediation Techniques</th>
<th>Role of mediators</th>
</tr>
</thead>
<tbody>
<tr>
<td>Communication skills</td>
<td>Asking open-ended questions.</td>
</tr>
<tr>
<td></td>
<td>Developing active listening and reframing to change perspective from negative resistance to positive problem solving.</td>
</tr>
<tr>
<td>Value assessment skills</td>
<td>Looking for global value resulting from instrumental motives and social connectors of every party.</td>
</tr>
<tr>
<td>Trust building skills</td>
<td>Looking for trustworthiness resulting from an anticipated cost-benefit ratio and perceived mutual similarities.</td>
</tr>
<tr>
<td>Skills to facilitate negotiation</td>
<td>Stimulating curiosity and creativity between parties to facilitate negotiation based on common interests, preferences, differences and cost-minimization.</td>
</tr>
</tbody>
</table>

\textbf{Table 5. Mediation techniques learned through training and specialization.}

Providing mediation training to judges reinforces the probability that the process is conducted efficiently, core values are followed, and ethical duties are respected. \textit{Communication skills} refer to the interaction between listening, questioning and reframing. The objective is to create a dialogue leading to a mutual understanding instead of a debate where parties try to persuade each other of the merit of their case. Good listening can help parties provide each other feedback to show understanding, which will have a positive effect on trust building. Good questioning will aim toward curiosity instead of judgment. Questions are useful to discover interests underlying factual statements. Good questioning helps the parties to expand and clarify their views and provides an opportunity to explain the relationship of one idea to another. Parties can also re-examine what they previously said and re-assess their views to improve mutual understanding.

\textit{Value assessment skills} correspond to the ability for the mediator to identify the parties’ motivations to cooperate and engage in a negotiated agreement. What value, whether of an instrumental nature or social nature, is at stake for litigants? By \textit{instrumental}, we refer to material self-interest sustained by incentives, sanctions and

\textsuperscript{93} In Canada, National Judicial Institute offers four different skills-based program (three days each) exploring competencies necessary for judges facilitating negotiations between parties. \textit{See Nat’l Jud. Inst., https://www.nji-inm.ca} (last visited Apr. 21, 2018).
dependences, related to cost or delays for instance. Social motivations correspond to internal predispositions driving behaviors and the desire to engage in a relationship. People may be willing to cooperate because of their (individual or shared) beliefs, values and identification with one another such as similar management approach, prospective of market growth for businesses, or shared environmental care beliefs or moral standards for individuals, etc. In judicial mediation, no priority should be given to one approach or the other given the centrality of party self-determination.

Trust-building skills correspond to the ability for the mediator to create trustworthiness between parties and lead them to some partnership to solve their dispute. Trust is a necessary condition for cooperation. Therefore, mediators can help parties evaluate to what extent every party can trust each other. Anticipated positive balance in terms of benefits compared to costs lead to a “working partner” relationship driven by the instrumental desire to get rewards and avoid sanctions. When solving the dispute out of court is more appealing than pursuing to trial, we are in a situation where “calculus based trust” developed amongst parties will likely lead them to a negotiated agreement. Perceived similarities can also play a role in building trust between parties leading to a “friendly partner’s” relationship. Under the guidance of a mediator, the parties can explore common visions and beliefs, shared values, as well as compatible goals. Thus the judge mediator guides the parties to develop quality communication oriented towards mutual understanding. Partners willing to “put themselves in the other’s shoes”

95 Id. at 31–42.
98 Lewicki & Wiethoff, supra note 96, at 88, 92 (calculus based trust is “an ongoing, market-oriented, economic calculation whose value is determined by the outcomes resulting from creating and sustaining the relationship relative to the costs of maintaining or severing it.”) (“It is grounded in impersonal transactions, and the overall anticipated benefits to be derived from the relationship are assumed to outweigh any anticipated costs”).
will be able to make a judgment on trustworthiness based on reciprocal similarity, leading to “identity based trust”99 amongst parties. Cooperation will be more reliable and sustainable if both types of trust (calculus based and identity based) are developed between partners.

Another essential competency for a judge mediator is to sustain negotiation settlement discussions between litigants. Stimulating curiosity and creativity between parties to facilitate negotiation could be learned through techniques focusing on their common interests, preferences, differences, and cost-minimization.100 Looking for the underlying interests of parties at stake corresponds to using their real motivations as the object of negotiation, instead of the firm positions they would like the other to comply with.101 Interests are objectives while positions are means to attain them. One objective can be fulfilled with different compatible means. For instance, satisfying an employee could be possible through a raise or improvement of pension plans or even with flexible work schedule, depending on his situation as single person looking to buy a property, or as a seasoned worker closed to his retirement, or as a young family father who wants to spend more time with his children.

A “partnership exploration” technique could be used by judges with the objective of exploring shared incentives to become partners that could be mobilized into a new joint objective. Mutual interests to overcome a joint peril, such as a loss of market share, or to improve their common benefits, such as diversifying services to better serve the needs of clients, can be mobilized to creatively resolve the dispute. Interests can also be prioritized and used in a negotiation technique called “rotation of interests” where every party fulfill his top priority because of a reciprocal exchange where one party exchanges with the other something that has less value for him but has significant value for the other. “Costs minimization” is another possible technique that can be used in mediation to

99 Lewicki & Wietthoff, supra note 96, at 93 (identity based trust “exists because the parties can effectively understand and appreciate one another’s wants. This mutual understanding is developed to the point that each person can effectively act for the other . . . . It is grounded in perceived compatibility of values, common goals, and positive emotional attachment to the other.”).

100 Jean-François Roberge & Sylvain Coutlée, Curiosity and Creativity Workshop. Think Outside the Box!, Settlement Conference Program: Clinics, National Judicial Institute (Toronto 2017).

facilitate an agreement. An assessment of all costs related to pursuing the dispute (economic, emotional, reputational, health related, etc.) could be balanced against the advantages of a settlement in a short-term to long-term. Legal risk assessment on the probability to win at trial can be combined with an assessment of value at risk by continuing the lawsuit, like for instance assets being frozen as legal fees provisions, trust erosion by creditors leading to limited credit loans and cash flow difficulties, loss of investment opportunity, etc.

In summary, we suggest that judges must be trained to learn a set of cooperation building and related skills to become efficient mediators. Acquiring this set of skills should help judges perform their multi-tasking roles of risk manager, problem solver and justice facilitator to sustain productive settlement-oriented discussions. Training judges should increase the likelihood of a mutually satisfying solution resulting from a useful and fair process, therefore contributing to the parties’ sense that they had access to justice with a “different day in court.”

IV. Conclusion

Access to justice has gone through many waves of change in the past decades, and presently reflects a fascinating coexistence of consensual and adjudicatory processes as well as a focus on individual participation. Much of this evolution of justice has occurred within the courts, evinced by the increasingly multi-faceted role of the judge and the creation of innovative processes such as judicial mediation. However, the legitimacy of judicial mediation has been severely marred by the lack of clarity of the relationship between the individual streams of ADR and adjudication within the justice system. Debates on this subject have vacillated between the opposing perspectives of divergence and congruence. Critics have conceptualized judicial mediation as either very distinct from justice traditions, or largely similar to the adjudication process. As such, the two streams of ADR and adjudication within judicial mediation have either remained disparate or have merged in a way that resembles adjudication more than mediation.

It has been argued that a renewal of judicial mediation lies in departing from a dichotomous approach that favors either mediation or the justice tradition as the more superior process within the courts. A sea change has to take place by adopting a coequality
perspective to understanding and designing judicial mediation. The process has to be shaped in a way that respects the equal validity of adjudication and mediation as processes to achieve justice. Since both processes co-exist within the courts, judicial mediation also has to be practiced in a way that does not muddy the distinction between them. We have thus suggested that using judges to engage in a predominantly facilitative mediation process will greatly enhance the legitimacy of the mediation process as part and parcel of a broader concept of justice. The validity of adjudication is concurrently respected since a clear distinction between the judicial mediation process and the trial process is maintained.

Our suggested Integrative Judicial Model (“IJUM”) comprised of five elements is founded on the coequality approach. Premised on the user-centric concept of access to justice, this renewed model seeks to understand the litigant’s views of justice, the usefulness of the judicial mediation process and the sense of being given support by the mediator. These findings on the users’ sense of access to justice are used as a basis of designing the process as well as to consistently monitor the effectiveness of the process in meeting individual needs. In addition, five procedural values premised on the core principles of mediation and the justice system have been proposed. To complement these values, we have argued that clear ethical duties consistent with the judicial system and the mediator’s role should be publicly articulated in order to introduce public accountability to a private and confidential process. We further argue that process harmonization is introduced to ensure that judicial mediation is conducted consistently by different judges to properly reflect the articulated procedural values and ethical duties. In this connection, we have suggested using a process framework premised primarily on a facilitative mediation model for training and continual monitoring of judges. Moreover, it is crucial to have clarity on how the position of a judge is to be properly utilized in the process, and the common pitfalls to avoid to ensure that due process and the foundational principles of mediation are adhered to. Finally, the model stresses the importance of initial and continual training of judges, to enable them to hone their skills and develop expertise.

In sum, the IJUM represents a shift in understanding the role of the courts, access to justice, and how diametrically opposing processes can be properly regarded as part of the justice system. The coequality approach is able to properly integrate the variegated developments within access to justice, and avoid the pitfall of
preferring only one development to the other. Divergence and congruence can no longer be an appropriate approach for creating solutions to the access to justice challenge. It is timely for judicial mediation to be renewed through this paradigm shift. As dispute resolution and access to justice within the courts continue to change, the coequality approach will also be invaluable in overcoming binary debates and holistically developing other innovations within the justice system.