EVALUATION WITHIN MEDIATION AND THE IDEAL OF NEUTRALITY

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I. MEDIATOR BOUNDARIES IN FACILITATIVE MEDIATION

By its very definition, mediation purports to be a neutral process.[1] Given this ideal, a debate has continued regarding whether a mediator's evaluation of a case has a valid place in the practice of mediation, or whether evaluation is unethical or can even constitute the unauthorized practice of law.[2] This paper discusses evaluation and similar mediator conduct which can undermine the neutrality of the process, offers a brief overview of the schools of thought on the propriety of evaluation in mediation, and ultimately concludes that implicit case evaluation by mediators is impossible to avoid. Because truly neutral mediation is impossible, this paper suggests that mediators remain free to define their own styles, so long as they properly inform the parties of the process and of that underlying impossibility. This approach will better support the voluntariness and confidence in the process that the ideal of neutrality is supposed to engender.

Consider the following scenario, based loosely on a real case. A small-claims mediator has moved the parties (unrepresented by counsel) into caucus. First, she speaks with the defendant, the plaintiff's ex-girlfriend and a single mother, who allegedly has failed to repay two debts incurred during their relationship. The defendant disputes that one of the alleged debts was actually a loan. With regard to the second debt, which amounts to only about $200, she

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[1] *See, e.g.*, Va. Stds. of Ethics and Prof. Responsibility for Certified Mediators ("Mediation is a process in which a neutral facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute."), *available at* http://www.courts.state.va.us/soe/soe.htm.

[2] *See* E. Patrick McDermott & Ruth Obar, *"What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit*, 9 HARV. NEGOT. L. REV. 75, 77 (2004); *see also* Robert B. Moberly, *Mediator Gag Rules: Is it Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669, 670–71 (1997) (discussing the positions on both side of the debate).

acknowledges her liability but tells the mediator that she cannot afford to pay. Given her present financial hardship, she will have trouble making even small periodic payments.

The plaintiff, for his part, is clearly more well-off than the defendant. He tells the mediator that the suit "isn't about the money," and the mediator agrees. He clearly does not need the money, and the suit appears to be motivated by bitterness over the break-up and the defendant's ensuing unwillingness to maintain a friendly relationship with him. Thus, when the mediator starts off by telling him that the first debt probably will not be enforceable, and raises the issue of the defendant's indigence, the plaintiff quickly expresses willingness to accept payment for the second debt only, and even to accept payment in the form of small periodic payments (which the mediator suggests). The plaintiff insists, however, that the defendant also pay his $60 in court costs. Still in caucus with the plaintiff, the mediator essentially rejects his position, saying that "it's standard practice for the parties to split the court costs."

Unwilling to fight with the mediator, the plaintiff accepts this figure and returns with the mediator to the room where the defendant awaits. The mediator proposes the figure (the amount of the second loan plus half of court costs), and the defendant accepts on the condition that she be allowed to make small periodic payments. As the mediator writes up the agreement, the parties exchange some harsh accusations about their failed relationship. As they leave the mediation, unsurprisingly, the plaintiff appears to have a little spring in her step, while the defendant looks woeful.

In a narrow sense, this mediation was a success. The parties avoided the risks and inconvenience of a hearing before a judge, instead reaching a mutually agreed settlement of the case. The amount of the settlement was probably very close to what a judge would have ordered, and the periodic payments plan increased the likelihood of the defendant's ability to comply.

Arguably, the mediator identified a solution and expeditiously guided the parties to that solution.[3] Moreover, unless one accepts a broad definition of coercion, it should not be argued that the settlement was involuntary. That is, the plaintiff, having been properly informed of the nature of the mediation process at the outset, must have been aware that he was free to reject any settlement and have his case heard by a judge.[4]

On the other hand, the mediation was fraught with a lack of neutrality and conduct by the mediator that reached outside the scope of her role as an impartial intermediary.[5] I want to highlight three particulars in this regard. First, by imploring the plaintiff to consider the defendant's difficult financial situation, the mediator advocated for the defendant's position. (In this instance, the advocacy should be distinguished from advocacy of the defendant's *legal* position, although this latter type of advocacy was also present in regard to the parties' dispute over whether the first alleged debt would be enforceable.) Second, the mediator evaluated the merits of the plaintiff's claim by adopting the defendant's position that the first alleged debt was likely unenforceable. Third, the mediator advised the plaintiff that his desire to recoup his entire court filing fee was inconsistent with "standard practice." Whether this advice[6] was accurate or not, it clearly influenced the terms of the offer that would be presented to the defendant.

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[3] *Cf.* Model Standards of Conduct for Mediators, Preamble (Sept. 2005) ("Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.").

[4] *See* N.H. District Court Small Claims Agreement to Mediate § 4 ("I understand that I may choose, at any time, and for any reason, to end the mediation without penalty."). A detailed discussion of the concept of voluntariness is beyond the scope of this paper.

[5] *Cf.* Model Standards, *supra* note 3, § II(A) ("A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.").

[6] I am unsure whether this advice can best be characterized as legal advice, an evaluation of the plaintiff's prospects before a judge, or veiled advocacy for a reduced settlement amount. *See* James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, From an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 784 & n.35 (1997) ("A number of commentators and codes of ethics have taken the position that it is appropriate for mediators to provide legal 'information' but not to give legal 'advice.' . . . [W]hat passes for "information" in mediation is often just inexplicit 'advice,' and . . . distinguishing between the two in the midst of a heated, fast-moving mediation is problematic.").

In sum, the mediator appeared to evaluate the case, from perhaps both a legal and equitable perspective, and pursued settlement terms consistent with that evaluation. Here, the mediator's position was aligned with that of one of the parties, which contributed to the appearance of partiality. Of course, in a case where the mediator's evaluation is not in accord with either party's position, or where it happens to fall between the two party's positions (which is probably most common), concerns regarding the appearance of bias or favoritism are less pronounced.

This admittedly extreme example is offered to illustrate some of the pitfalls which mediators face. Although labeled as three different kinds of conduct on the part of the mediator, the various problems illustrated in the example all stemmed from the mediator's position on the merits of the case, and from her communication which reflected that position. Mediators, as human beings, cannot be expected to perform their work without any *internal* opinion or bias about the equities of a party or a case, but they are expected to "*conduct* a mediation in an impartial manner and avoid conduct that gives the appearance of partiality."[7] "Impartiality means freedom from favoritism, bias or prejudice."[8] As observed above, a mediator's opinion regarding the merits or likely outcome of a case may create a greater or lesser appearance of impartiality depending on where it falls. In facilitative mediation, however, it is generally verboten for the mediator to express any opinion regarding the merits of the case and its likely outcome.[9]

[7] Model Standards, *supra* note 3, § II(B) (emphasis added).
[8] *Id.* § II(A).
[9] *See, e.g.*, N.H. District Court Small Claims Mediation Rule § K(2) ("While a mediator may point out a possible outcome of the case, under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case is filed will resolve the dispute."); *see generally* ABA Section of Dispute Resolution, Technical Assistance Bulletin, State Survey regarding allowing mediators to predict outcomes.

At the outset or when offering an opportunity for mediation, then, it would be appropriate to advise the parties that one advantage of the process is that any outcome of the mediation would be determined by the parties themselves rather than by a judge. In such a context, or when encouraging the parties to be flexible in their settlement negotiations, it might be problematic to advise the parties of the risk that the judge "won't see it their way," and that if they go into the courtroom they could receive nothing. Technically, it is true that a mediator cannot predict with certainty the outcome of a case. But a warning regarding the uncertainty of trial carries a strong implication that a party's case may not be so strong, especially in the common mediation scenario where one or both sides expresses its own opinion regarding the merits of the case.[10] That is, if one party expresses confidence in its legal position, a response by the mediator that abandoning mediation and walking into court is "risky" could reasonably be interpreted as an expression of disagreement. Even if the mediator lacks an opinion regarding the merits of the particular legal argument, the statement is *an attempt to influence the party's opinion*. From an ethical perspective, why should this statement be more acceptable than any other statement, including an overt evaluation, which will affect a party's own evaluation?

Indeed, as will be explained in the following section, scholars have diverged regarding the appropriateness of evaluation within the facilitative mediation context, in many cases because of differences of opinion as to whether the risks of evaluation are outweighed by the possible advantages.[11]

[10] One recent case I witnessed involved a contract dispute and whether oral representations made at the time of execution of the contract would be binding despite their absence from the contract.

[11] *See, e.g.*, Bennett G. Picker, *Navigating the Mediation Process: Overcoming Invisible Barriers to Resolution*, 61 DISP. RESOL. J. 20, 25 (2006) ("Once in the mediation, the party representatives often recognize that their side's evaluation of the case was skewed by selective perception or advocacy bias . . . .").

II. PERSPECTIVES ON EVALUATION IN MEDIATION

As indicated above, it is generally accepted that mediators should not offer parties an opinion on the likely outcome of the case at trial. The ABA, for instance, in examining a proposed state guideline indicating that mediators "don't predict the outcome of the court," explored the mediation guidelines of several states to determine, in part, "Which states expressly prohibit an evaluative mediator from giving their personal or professional opinion about how the Court in which the case is filed will resolve the dispute," and which states allow such evaluations. Until a revision adopted in 2000, Florida's mediator rules distinguished between "discuss[ing] the merits of a claim or defense," which was permitted, and "offer[ing] a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute," which was not.

Among commentators, there are at least three distinct positions. The first advocates strongly against any evaluation in mediation, even calling "evaluative mediation" an "oxymoron."[12] On the other side, evaluation is viewed as an essential and valuable part of the process, helping the parties consider their own positions.[13] A third approach recognizes that some parties may want an evaluative aspect to the mediation process, and should be free to make that choice.[14] Attempting an empirical analysis of the issue, one study found that purely facilitative (i.e., non-evaluative) mediation was possible, but that many mediations purporting to be purely facilitative were actually overwhelmingly evaluative.[15]

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[12] Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation is an Oxymoron*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 31 (1996).
[13] *See* Moberly, *supra* note 2, at 670–71.
[14] *See id.* at 671.
[15] *See* McDermott & Obar, *supra* note 2, at 108–09.

III. EVALUATION AND THE IMPOSSIBILITY OF NEUTRALITY

For purposes of analysis, one additional distinction bears noting. When speaking of evaluation, this paper (like most others) has referred primarily to a determination of the merits of a case or of the likelihood of particular outcomes. The very essence of mediation, however, is "evaluation" of a different sort. In order to reach a settlement, the mediator helps the parties discover possible mutually agreeable outcomes that would partly or completely avoid the need for external adjudication (esp. by a judge). In the course of doing so, it may be the mediator rather than one of the parties who can identify the mutually agreeable resolution, whether in the form of a dollar figure or more creative settlement terms. When the mediator identifies (or thinks he or she has identified) such a solution, there are four possible courses of action for the mediator to take:

1) communicate the terms and encourage the parties to assent to those terms;
2) communicate the terms without otherwise encouraging the parties to assent;
3) encourage the parties to settle without communicating the solution identified by the mediator (i.e., wait to see if the parties identify the solution on their own);
4) neither encourage the parties nor communicate an apparent solution.

The fourth option would so obliterate the value of the mediator that it should be rejected.[16] In choosing among the other options, it is necessary to first decide whether communication of even *any* possible terms is acceptable. In some contexts, the answer seems clear. In one recent mediation, for example, the parties (both represented by counsel) were in caucus. The defendant had just proposed a settlement figure of $1,000, well below the amount of the original claim (of approximately $5,000). In caucus, however, it became clear that the plaintiff would be satisfied with $1,500. She asked, "If I want to get $1,500, is that what I

[16] Without knowing the success rates of settlement discussions undertaken without a mediator, perhaps this option should not be dismissed completely out of hand, especially taking into account the risks of partiality in mediation. *See* "Does it Work?", DivorceInfo.com ("Mediation produces agreement in 50 to 80 percent of cases. . . . There is some evidence that settlement rates of more than 85 percent suggest a more coercive style of mediation.").

should offer, or should I asked for more and just assume that they'll negotiate it down." Her attorney, strangely, did not voice an opinion one way or the other. As the mediator, I advised her the only way I thought appropriate—without suggesting terms: "I can't help you pick a number, but I would encourage you to make sure that you only offer terms that would be acceptable to you."[17]

In other contexts, having the mediator suggest a number or other specific terms may intuitively seem quite acceptable. For instance, if a plaintiff indicates that a defendant-tenant has already repaired $500 damage that was reflected in the claim amount, is it not reasonable for the mediator to ask the plaintiff, even in a presumptuous manner, whether he now seeks $500 less than the original claim? Between these two examples lies a spectrum of other situations. Assuming that proposing specific settlement terms endangers the mediator's neutrality, is option 3 viable—can a mediator effectively lead the parties to water without telling them where the water lies? In most cases, the answer should be "yes," and the mediator can use neutral questioning to assist the parties in finding a resolution. (E.g., "It sounds like maybe there is overlap between what each of you is looking for. Does either party want to try making another offer?") In some cases, however, the value added by the mediator lies in identifying the possibilities that neither party has expressed. (E.g., "It sounds like you would like to continue doing business with each other. Would it be possible to incorporate a service credit into the settlement?") If we accept that proposing a number or other terms is acceptable in some instances,[18] it follows that evaluation is not per se unacceptable. This may be a case where the exceptions justifiably swallow the rule.

[17] As it turned out, she decided to offer $1,500 and ultimately accepted the defendants' first counter-offer ($1,250).
[18] *See, e.g.*, Minn. Code of Ethics Rule 114 ("It is acceptable for the mediator to suggest options in response to parties' requests, but not to coerce the parties to accept any particular option.").

After one party makes a settlement offer, there are myriad ways that the mediator can respond, each of which reflects a different opinion on the offer and will likely influence the opposing party's response. The mediator can ask the party for an explanation of the reasoning behind the offer, call into question a particular term of the offer, or immediately request a response from the opposing party. Whichever response chosen will reflect an opinion on the offer. Even before any offer, however, the mediator will have expressed an evaluation: "Mediators can express their evaluations in a number of ways, from the particular statutes they choose to read in their opening, to the questions the mediator chooses to ask."[19]

IV. A MODEST PROPOSAL

One core criticism of evaluation in mediation is that it defeats the legitimate and desirable expectation of the parties about the process in which they are embarking. In a "neutral" mediation, the mediator merely facilitates a discussion between the parties about possible settlements. Any substantive information or advocacy relating to the parties' positions will be undertaken by the parties rather than the mediator. The mediator is, after all, to be employed as a mediator rather than as an attorney, and if the parties desire legal advise or information, they are free to hire a lawyer—in fact, some mediator guidelines go so far as to *require* the mediator to advocate retention of a lawyer in some cases.[20] In any event, even for a mediator licensed to practice law, it would normally be unethical for an attorney to advise adverse parties.[21] The expectation of the parties regarding whether an evaluation of the merits or other legal advice will

[19] L. Randolph Lowry, *To Evaluate or Not: That is Not the Question!*, 38 FAM. & CONCILIATION COURTS REV. 48, 51 n.13 (2000) (citations omitted).

[20] *See, e.g.*, N.H. District Court Small Claims Mediation Rule § K(1) ("When a mediator believes a non represented party does not understand or appreciate how an agreement may adversely effect legal rights or obligations, the mediator *shall* advise the participants to seek independent legal counsel.") (emphasis added). *But see* Paula M. Young, *A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the "Authorized Practice of Mediation" Paradigm to "Unauthorized Practice Of Law" Disciplinary Bodies*, 49 S. TEX. L. REV. 1047, 1083 (2008) (citing a state committee which found "that the identification of issues itself, which is an inherent part of the mediation process, is the practice of law").

[21] *See* Model Rules of Prof'l Conduct 1.7(a) (forbidding concurrent representation of adverse parties).

be doled out during the mediation can affect the choice of the parties to enter mediation, which is supposed to be a voluntary and informed choice. Such legal advice may advantage one of the parties within the context of the mediation, in court if the mediation fails to yield a full settlement, or even in other dealings between the parties.

Given that some form of evaluation will be present in every mediation, and that the boundaries of appropriate mediator conduct are far from clear (see part III, *supra*), the best solution lies in modifying the context of the mediation rather than the conduct of the mediator. California's Rules of Conduct for Mediators, for example, already embraces the spirit of such an approach: "The explanation of the mediation process should include a description of the mediator's style of mediation."[22] Mediators should remain free to employ the techniques with which they are most comfortable, provided that they attempt to inform the parties the particular boundaries that will be honored. If a mediator desires to refrain from ever suggesting a particular settlement dollar figure, for instance, he can explain this guideline at the outset. Not only does such notice help safeguard the voluntariness of the process, it is also likely to shield the mediator from misunderstandings during the mediation.

Thus, mediation rules should allow—and encourage—flexible approaches to resolving the challenge of maintaining mediator neutrality, provided that the parties are properly aware of the particular approach to be employed by their mediator. Although mediator neutrality is a worthy ideal, its value stems largely from the necessity that the process and any settlement achieved therefrom be voluntary. To the extent that mediator bias leads to coercion of one party (e.g., through deception), it is anathema to the mediation process. Likewise, if the parties are led to believe they are entering a particular process—a mediation in which the mediator refrains

[22] Cal. Rules of Court, pt. 1, Rule 3.557 cmt. c (2007), *available at* http://www.courtinfo.ca.gov/rules/index.cfm?title=three&linkid=rule3_857.

completely from seeking a particular outcome—they are poorly served in the likely event that the mediator does intentionally influence the outcome.

Where a mediation process changes midstream, it is similarly apparent that the parties should be informed:

> [I]f the mediator subsequently recognizes that the process has edged into, say, neutral evaluation, then ethics demands that the mediator not simply continue the process under the guise that the parties want "evaluative" mediation. He or she should inform them that the process they initially agreed to has changed.[23]

If, as this paper has suggested, mediation is inherently evaluative, the parties must be informed at the outset. Informing the parties may not legitimize the sorts of advocacy illustrated in part I of this paper, but it will generally help to secure the parties' consent, and perhaps as importantly, their satisfaction with the outcome.

[23] Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption Of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479, 495 (2000). The author adds, "the parties must fully be apprized of the process involved and advised that a predominately evaluative process differs markedly from one that is in the main facilitative." *Id.*