

IF FREUD, JUNG, ROGERS, AND BECK WERE MEDIATORS, WHO WOULD THE PARTIES PICK AND WHAT ARE THE MEDIATOR'S OBLIGATIONS?

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I. INTRODUCTION

Mediation has become a very effective form of dispute resolution. However, the profession or field¹ of mediation has also evolved into several distinct groups of practitioners who sometimes seem to speak different languages in describing the techniques, styles, models, processes and desired outcomes of their work. In fact, there is a fair amount of professional in-fighting over what camp is the true guardian of mediation.

Speaking to this dynamic, Joseph P. Folger and Robert A. Baruch Bush have suggested the formation of different and parallel approaches to mediation within the field,² much as the therapy profession has done to some extent with those who follow the teachings of Sigmund Freud, Carl Jung, Carl Rogers, or Aaron Beck.³ Folger and

1. For an interesting discussion of this issue from the October 2006 Senior Mediators Keystone Conference, see Carrie J. Menkel, Address at the Keystone Conference: Are We a Field—Moderator's Outline (Oct. 8–11, 2006), <http://www.mediate.com/articles/meadow1.cfm>; Juliana Birkoff, Address at the Keystone Conference: Yes, Conflict Resolution Is a Field (Oct. 8–11, 2006), <http://www.mediate.com/articles/fieldyes.cfm>; Peter S. Adler, President, Keystone Center, Address at the Keystone Conference: No, We Are Not a Field and Here Is Why the Question Matters (Oct. 8–11, 2006), <http://www.mediate.com/articles/fieldno.cfm>.

2. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 265–66 (rev. ed. 2005). It appears Folger and Bush's view on this subject has changed since 2002, when Folger said, "We mean different organizations—cutting across those domains—for practitioners following different models." *Id.* at 265. However, in 2005, they said, "The time has come to draft ethical standards separately: one set for practitioners whose role is to generate fair and reasonable settlements and one set for practitioners whose role is to support conflict transformation." *Id.* at 264. Restated, if the approaches are so different that separate ethical guidelines are necessary, then it follows logically there is a need to advise the parties as to what mediator approach the mediator follows in his or her practice.

3. See generally Jerry Adler, *Freud in Our Midst*, NEWSWEEK, Mar. 27, 2006, at 43. Sigmund Freud is well known as the founder of what has become known as the "talking cure" of psychoanalysis. Carl Jung broke from Freud and created what was called analytical psychology. Carl Rogers contributed client-centered therapy, creating the term "counseling." Aaron Beck originated cognitive-behavioral therapy attempting to change both negative thoughts and actions particularly in recidivistic criminal activity. *Id.* at 48–49. Imperati could not decide between these approaches when he first sought counseling, so he went into group therapy—there were four therapists and him. By the end of the fifty minutes, he got a fair amount of work done, but the therapists were exhausted! For an interesting article comparing psychological therapies and Buddhist philosophy, see Nicolas Gromik, *A Comparative Study Between Psychological Therapies and Buddhist Philosophy*, COUNSELING AUSTL., Autumn 2004, at 17, available at http://www.theaca.net.au/journals/ca_index.php (select "ACA Mag Vol4 No1 Autumn 04.pdf"). The author discusses various therapeutic models and explores why the theories underlying these thera-

Bush state, "The public we serve can only benefit from such attention to our own ongoing professional development."⁴ Whether "different associations" is the answer remains to be seen. One thing is clear, "the public we serve" will benefit only if they understand the various mediation options that are available to them.

Professionals in therapy have encountered the problems of communication with patients about the therapist's approach for many years.⁵ In the first session, a therapist may begin by saying, "I am a Jungian. Let me explain what that means to you." On occasion, professional therapists must make a referral when it is in the best interests of the patient if they suspect that their proffered approach is not what the patient needs. Some knowledgeable patients may make an appointment looking for a therapist with a particular orientation. Others may feel equally well served by a Jungian as by someone following the teachings of Aaron Beck. The important thing is for the therapist to have an open and frank discussion with the prospective patient about the options available to serve that patient's needs.

Embracing the "best practices" of therapists who articulate their approach to their patient before formalizing the relationship, this article challenges mediators to: (1) articulate their specific approach(es) first to themselves, and more importantly, to the parties, (2) explain how that will impact the parties during the dispute resolution process, and then, (3) make a conscious effort throughout the mediation to alert the parties and secure their permission before shifting from one approach to the other. This article pulls together the work of many excellent commentators and attempts to define and differentiate the three most common approaches to mediation (transformative, facilitative, and evaluative) on an operational level. It punctuates the discussion with didactic diagrams, charts, and a series of questions to assist colleagues in weaving together their own mechanisms to identify, explain, and conscientiously manage the mediator approach issue.

Parties in mediation spin in the intersection of logic and emotion. Stereotypically, evaluative mediators do a good job of managing the

pies have a stake. He states, "Whether it is for wealth or recognition, each theory attempts to sell its product to an unaware maladjusted population." *Id.* While mediation parties are seldom "maladjusted" in the psychological sense, they are often attempting to navigate the intersection of logic and emotion. Unfortunately, however, the parties are "unaware" of the mediation approaches available to them.

4. BUSH & FOLGER, *supra* note 2, at 265.

5. "Approach" has been defined in the Oregon Mediation Association Core Standards of Mediation Practice as "the behaviors, philosophies, processes, styles, and techniques used by mediators to conduct mediation." OR. MEDIATION ASS'N, CORE STANDARDS OF MEDIATION PRACTICE (2005) [hereinafter OMA CORE STANDARDS 2005], available at <http://www.mediate.com/oma/pg61.cfm>. The Standards also state, "These Core Standards should not be construed to favor or disfavor any particular approach." *Id.*

logical traffic, and the transformative and facilitative mediators do a good job of managing the emotional traffic. This is not to say that one approach is better than the others at managing the traffic on either street. However, mediators should assess their own skill set and secure the additional training they need to better help the parties in areas where they are most inexperienced. To not do so, unconsciously defines the nature of the parties' conflict from the mediator's frame of reference, skill set, or lack thereof. Mediation should be more about the participants and less about the mediator.

Perhaps more attention should be spent on exploring these approaches from the perspective of the parties for whom "Self-Determination" is a core value to be protected at all stages of the process, and not the mediators. If "Self-Determination" is a cornerstone of mediation, then the focus of our field should be on maximizing it at all stages of the process. This article seeks to explore the differences in mediation approaches, how the parties will know what their options are when selecting an appropriate approach, and if and how these issues should be raised by the mediators. These and related issues were discussed in the 1997 article, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practice in Mediation*.⁶ There, the author noted:

[I]nformed consent will rest on the mediator's disclosing the continuum of mediation models and ethical codes and will allow the participants to determine the mediation model best suited for their individual needs. The mediator then can attempt to match the most applicable ethical standard to the style of mediation the participants choose, or the mediator can withdraw on grounds that he or she cannot "satisfy the reasonable expectation of the parties."

... The Northwest SPIDR⁷ survey found that 58% of mediators feel that the typical parties to a mediation expect a combination of directive (evaluative) and facilitative styles. In

6. Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practice in Mediation*, 33 WILLAMETTE L. REV. 703, 740-45 (1997).

7. In January 2001, the Society for Professionals in Dispute Resolution (SPIDR), together with the Academy of Family Mediators (AFM), and the Conflict Resolution Education Network (CREnet), merged to become the Association for Conflict Resolution (ACR). See Association for Conflict Resolution, Frequently Asked Questions: What is ACR, <http://www.acrnet.org/about/ACR-FAQ2.htm> (last visited Apr. 17, 2007).

other words, the parties may expect an evaluative model just as likely as a facilitative model.

....

... The risk of continued incongruity between the expectations of mediation users and mediation, as it is practiced, is the erosion of public confidence in the process. Ultimately, when the parties are not informed thoroughly of the ethical and practical aspects of mediation, it is not unreasonable to suggest that they may look on the one mechanism that offers the best hope of resolving future disputes—mediation—in the same negative vein as litigation. Mediation, as a growing profession, should seek to foster a reputation built not on perception, but on clear understanding of mediation's great success in the resolution of disputes. Engaging the parties in a collaborative process to establish ground rules for the practical decision points during the mediation will help balance the tension between mediation's aspirations and its actual practice. Only with such a process can we honor the fundamental tenets of mediation and the public it serves.⁸

Is there a professional duty for the mediator to educate the parties and help them understand what is facing them? If so, is the mediator obligated to describe all of the options in terms of mediator approaches and then leave it to the parties to exercise their Self-Determination? The *Oregon Mediation Association Core Standards of Mediation Practice (OMA Core Standards)* uses the term "approach" in order "to signify the behaviors, philosophies, processes, styles, and techniques used by mediators to conduct mediation."⁹ Is there a professional duty for the mediator to tell prospective parties about, and help them understand, the full continuum of available approaches? Should the mediator obtain "informed consent" of the prospective parties to the approach or approaches used? If there is an exploration between the mediator and the parties, what duties does the mediator have surrounding "full disclosure?"

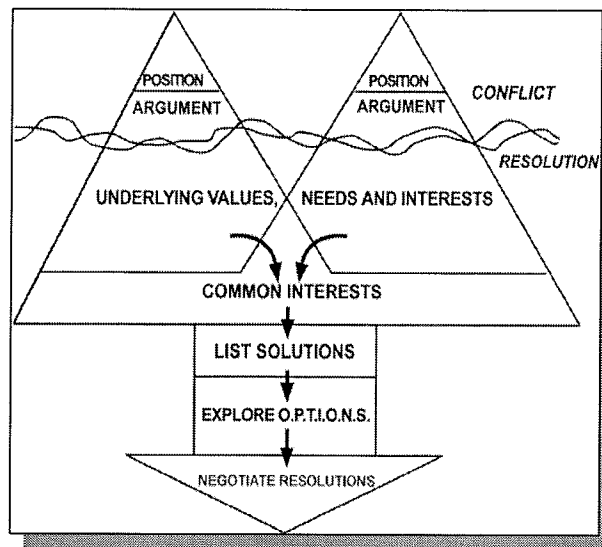
Beyond the ethical issues that surround the commencement of mediation, other equally important ethical issues face the mediator during the mediation process. Is the mediator to play a passive role only, merely facilitating the parties' work of conflict resolution? Alternatively, is the mediator in a more active role, in effect, advocating for

8. Imperati, *supra* note 6, at 740–41, 744–45. (citations omitted).

9. OMA CORE STANDARDS 2005, *supra* note 5, at 1.

"settlement" or "resolution?"¹⁰ The difference is graphically portrayed with the following illustration:

The Anatomy of a Conflict from the Mediator's Perspective



The parties in conflict are like two icebergs trying to come together in hopes of reaching an agreement. They only see their positions and arguments, while some mediators are looking below the surface for interests and solutions. If the parties only want to splash above the waterline of adversarial banter, the most they will get is a "settlement" where they are both likely to walk away equally unhappy. It is above the waterline where the evaluative mediator excels. If the parties dive below that waterline, they have a chance of achieving a "resolution," a richer, more durable and satisfying conclusion. It is here where the transformative and facilitative mediators excel.

Alternatively, in playing a more active role, is the mediator to engage in evaluating the claims made by the parties? If so, how ex-

10. "Settlement" is defined colloquially as both sides walking away equally unhappy; as contrasted to "resolution," which is defined colloquially as both sides walking away with their underlying business and personal needs reasonably satisfied.

actly are the evaluation tools to be used by the mediator to help achieve a result? How does the Self-Determination of the parties relate to the decision to use evaluation? In other words, is the decision to use evaluation a decision to be made by the parties? Can evaluation by the mediator complement, rather than overshadow, the resolution efforts of the parties? In making an evaluation, what are the ethical duties of the mediator in handling knowledge gained in confidence of the strengths and weaknesses of each party's positions? If mediators share information learned in caucus as to a party's strengths and weaknesses, have they crossed some ethical line into territory forbidden by mediator impartiality even when they get the requisite waiver of confidentiality? What are the duties of disclosure and the obtaining of consent before making such a move? Is there a higher quality of consent required by the parties before injecting the power of the mediator into the delicate area of settlement negotiation?

At least one author, Bernard S. Mayer, has suggested that mediators should go beyond a passive or even an active role to a role that is, in fact, *Beyond Neutrality*, which is the title of his most recent book.¹¹ Mayer asserts, "It is often better to work with people on how to become more effective in pursuing the goals that have propelled them into conflict than it is to focus on how to find their way out of conflict."¹² Mayer refers to this orientation as "engagement" and challenges mediators to broaden their self-perception by considering themselves "conflict engagement practitioners" instead of "conflict resolution professionals."¹³ Resolution of conflict, according to Mayer, is but one part of engagement.¹⁴ Should the mediator engage with the parties to help them carry on more effectively the conflict they have brought to the mediator? How should this option be presented to the parties?

Mediators have limited themselves by focusing simply on resolution, the most "comfortable part of conflict," when the focus should rather be on helping people "engage in conflict effectively," even if that means changing the way mediators define themselves and their roles.¹⁵ His work sets a provocative backdrop for this article.

These and other questions need to be taken from the theoretical to the practical. How would we implement these concepts? Would a failure to discuss the approach options with the parties undermine the public perception of mediation as a fair process that ensures proce-

11. BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (2004).

12. *Id.* at 39.

13. *Id.*

14. *Id.*

15. *Id.*

dural due process? This article attempts to explore the thicket of choices and ethical questions facing both the parties and the mediator as they enter the increasingly complicated¹⁶ world of mediation.

The article discusses the goals that parties typically bring to a mediation and provides an analysis of the stages of conflict that lay the groundwork for mediation. New research is also available shedding light on the factors determining the participation of the parties, which results in a perception of fundamental fairness and procedural due process. It is in fact *justice*, which the participants in mediation seek, and delivering justice in the mediation context should guide the mediator's search for ethical guidelines and their practical implementation.

II. MEDIATION COMPARED TO OTHER FORMS OF DISPUTE RESOLUTION: WHY ARE THE DIFFERENCES IMPORTANT?

Of all the forms of dispute resolution (litigation, arbitration, mediation, all-out brawling), mediation has evolved in a highly distinctive manner characterized principally by the participation of the parties and their experience of the fundamental fairness of the process. It is important for mediators to recognize the range of choices that disputing parties often consider, articulate the reasons for parties to choose mediation over other forms of dispute resolution, and further explore the appropriateness of choosing one mediation approach over another. Mediation is defined in Oregon by statute as:

[A] process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated.¹⁷

With the many ways of resolving conflict now available, why is mediation often chosen? What are the differences between mediation and other available means of dispute resolution—and why are those differences so important? The website of the American Bar Association

16. As mediation matures, it becomes more institutionalized and formulaistic. As a result, we run the risk of losing its flexibility. This is a very real risk, and before we evolve much further, we should ask ourselves if that is in the best interest of those we serve.

17. OR. REV. STAT. § 36.110(5) (2001).

tion lists the following differences between mediation and other means of dispute resolution.¹⁸ These differences amount to advantages for mediation when viewed from the standpoint of the parties:

You get to decide: The responsibility and authority for coming to an agreement remain with the people who have the conflict.

The focus is on needs and interests: Through mediation, parties examine the underlying causes of the problem and look for the most appropriate solutions for their unique needs and interests.

Mediation looks to the future of the relationship by helping to end the problem and save the relationship.

Mediation deals with feelings: By discussing the legal, personal, and emotional issues that arise in conflict, parties begin to understand each other in new ways as they work toward resolution.

Higher satisfaction: Parties who are actively involved in the resolution tend to be more committed to upholding the settlement than those who have had a judge decide for them.

Informality: Mediation is less intimidating than litigating. The flexibility built into mediation allows the people involved to find the best path to agreement.

Faster than going to court: A mediation agreement can be obtained in a few hours in most cases, whereas litigation could take years to resolve a dispute.

Lower cost: Litigation in court is very expensive, and the costs can often exceed any benefits for the parties.

Privacy: Most mediations are confidential, whereas court cases become part of the public record. This can be an important advantage to the parties.

18. American Bar Association, Division for Public Education, *How Courts Work, Mediation: What Are the Advantages To Mediation?*, http://www.abanet.org/publiced/courts/mediation_advantages.html (last visited Apr. 17, 2007). The material above that appears in bold is quoted from the cited document. The remainder of the text is condensed paraphrasing.

The Better Business Bureau's website promotes mediation in even more party-oriented language.¹⁹ Mediation offers parties the following:

A chance to be heard: Mediators are [specially] trained to listen and ask the right questions. . . . In some cases, [this may be] the first time the parties will have the opportunity to sit down and really listen to each other.

A chance to develop new ways of thinking about a problem: [A mediator can distill the problem down to smaller parts,] restate the issues, [help each side hear the other and understand them, assist in] taking a realistic look [at things, and recognize what their interests really are aside from a particular position].

[A chance to work collaboratively: When parties really] hear each other, they often find creative ways to resolve the dispute by collaborating [rather than just] compromising.

A chance for the parties to develop their own solutions: . . . One of the greatest benefits [and differences] in mediation is that [it] . . . is a flexible way of resolving disagreements. . . . [T]he parties are allowed to work together to discuss their dispute, generate ideas for resolving it, and decide together what the solution will be. By finding their own solution, the parties are likely to follow through on the agreement.²⁰

There is a common picture of mediation flowing from both attorney-oriented and consumer-oriented organizations. It is a means of resolving disputes that is fast, flexible, cost-efficient, convenient, creative and confidential. The differences, as compared to other means of dispute resolution, clearly show the attractiveness and benefits of mediation. However, do the differences in the above descriptions give us another perspective to consider when analyzing the issues raised by

19. Better Bus. Bureau, Dispute Resolution: BBB Mediation, <http://www.dr.bbb.org/ComSenseAlt/MedRules.asp> (last visited Apr. 17, 2007). The text is quoted from the BBB publication.

20. *Id.*

this article²¹ Restated, the American Bar Association definition describes mediation as an alternative to litigation. The Better Business Bureau definition highlights the importance of continued business relationships, implies that conflict is a natural part of doing business, and that mediation is a constructive way for those in business to work together. Both the ABA and BBB focus on mediation as a process directed by the parties. This brief review of mediation, as described by two well-recognized national organizations, illuminates the importance for mediators to anticipate parties' varied perceptions and expectations of the mediation process. If the parties come to the table with one definition and the mediator comes with another definition, the mediation process risks failure. Any discrepancies in perception and expectations should be explored and discussed at the earliest possible opportunity to determine, how, if at all, the mediator's approach should change.

III. MEDIATION APPROACHES IN THEORY AND IN ACTION

Mediators should identify their mediation approach to the parties early on in the mediation process. A description of the most common approaches follows.

21. In his article, *What Is the Meaning of the Medium Is the Message?*, Mark Federman quotes Marshall McLuhan as saying the following:

"In a culture like ours, long accustomed to splitting and dividing all things as a means of control, it is sometimes a bit of a shock to be reminded that, in operational and practical fact, the medium is the message. This is merely to say that the personal and social consequences of any medium—that is, of any extension of ourselves—result from the new scale that is introduced into our affairs by each extension of ourselves, or by any new technology."

Mark Federman, *What Is the Meaning of the Medium Is the Message?* (July 23, 2004), http://individual.utoronto.ca/markfederman/article_mediumisthemessage.htm (quoting MARSHALL MCLUHAN, *UNDERSTANDING MEDIA* 7 (1964)). Federman then continues as follows:

Why is this understanding of "the medium is the message" particularly useful? We tend to notice changes—even slight changes (that unfortunately we often tend to discount in significance). "The medium is the message" tells us that noticing change in our societal or cultural *ground* conditions indicates the presence of a new message, that is, the *effects* of a new medium. With this early warning, we can set out to characterize and identify the new medium before it becomes obvious to everyone—a process that often takes years or even decades. And if we discover that the new medium brings along effects that might be detrimental to our society or culture, we have the opportunity to influence the development and evolution of the new innovation before the effects become pervasive.

Id.

A. The Evaluative Approach

The evaluative approach is at one end of the approach spectrum and often attracts lawyers and retired judges as its strongest proponents. Frequently, the mediator offers, among other things, a non-binding analysis of how the case would turn out if it went to trial, with the assumption that the parties will weigh the mediator's "neutral evaluation" and subsequently negotiate a settlement, based on the mediator's unprejudiced assessment of their case.²² The evaluative method varies, from a directive approach coupled with analysis of the probabilities of success at trial,²³ to the suggestion of "a range within which an intelligent, neutral, fair-minded person would find it reasonable for the parties to settle,"²⁴ to using the Socratic Method "to do reality testing."²⁵ The evaluative approach requires the mediator to have sufficient knowledge of the substantive matter in dispute, be it law, business, engineering, family dynamics, etc.

B. The Transformative Approach

At the other end of the spectrum is the transformative model advocated by Folger and Bush.²⁶ The transformative approach is premised on the assumption that all human interactions affect interpersonal relationships in positive and negative ways. Any situation where the quality of the relationship matters to the parties, and to the probability of reaching agreement, is therefore significant. A mediator's intervention can thus help transform the interaction in fundamental ways, from negative to positive.²⁷ This approach is more therapeutic than legalistic.

22. 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, 493 (2000).

23. *Id.* (citing Donald T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 553 (1997)).

24. *Id.* (quoting Marjorie Corman Aaron, *ADR Toolbox: The Highwire Act of Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 62, 64 (1996)).

25. *Id.* (citing Weckstein, *supra* note 23, at 521).

26. BUSH & FOLGER, *supra* note 2 (clarifying the transformative model and promoting its use in mediation).

27. *Id.* at 219.

C. The Facilitative Approach

In between, but closer to the transformative end of the continuum, is the facilitative approach. Parties are presumed to hold the solution to their own dispute and with process assistance can arrive at an acceptable solution. The mediator engages in helping the parties to clarify, organize, and understand the factual and legal issues, but he or she does not recommend a solution. The mediator uses techniques like active listening, reflecting, and reframing to move beyond positions to interests, which includes understanding the other party's perspectives—opening the way to settlement.²⁸

D. The Hybrid Approach

What if most mediators, in fact, employ a hybrid approach to mediation, one that is not easily defined by distinct categories, but rather spans the transformative-evaluative approach continuum? The hybrid automobile's engine *chooses* which power source is best for any given driving situation, and that choice may vary many times within a particular trip. Much the same, a hybrid approach adapts to the evolving stages of a mediation, where often the parties may want the mediator to be facilitative with them, but evaluative of the other side's case. With the informed consent of the parties at each step of the process, a more facilitative, a more evaluative, or a more transformative approach might be appropriate to meet the parties' needs. For example, if the parties find that an impasse blocks their way forward, they might want a non-binding evaluative phase, asking the mediator to give an impartial view of the matter with an eye toward shifting perspectives and finding the common ground. Alternatively, their underlying interests may be more focused on their concept of fairness²⁹ from the perspective of the legal system than from a sense of empowerment and recognition. Conversely, the parties may decide to suspend any legal analysis and focus on their internal relationships with conflict, their past or future relationship, or their individual definitions of fairness, regardless of the legal system's definition of right and wrong.

28. Robin N. Amadei & Lillian S. Lehrburger, *The World of Mediation: A Spectrum of Styles*, 51 DISP. RESOL. J. 62, 63 (1996).

29. Experience has shown that fairness, like beauty, is in the eye of the beholder. Greed is alive and well during most conflict, and the mediator really can never predict what minimum terms are necessary for a settlement. However, an experienced mediator can always predict when a case will not settle. Seldom, if ever, does a case settle when one side believes, correctly or incorrectly, that another person, in the same or similar situation to them, has gotten a better outcome. As a result, seasoned mediators always look to help the parties identify external, objective standards of fairness to anchor the competing "fairness" definitions of the parties.

An example of the appropriateness of a hybrid approach might be seen in a divorce, property settlement, or child custody case. Often the parties "will have had an intimate relationship that, for whatever reason, has been transmuted from love to negativity."³⁰ In some instances, this negativity on the part of one or both of the parties makes the fight seem more important than the best interests of the children. In such a case, a facilitative approach may help the parties refocus on the issues involving the nurture and care of their children, while a more evaluative approach may be necessary for the substantive issues surrounding property settlement. Thus, a hybrid facilitative/evaluative approach may best deal with both substantive distribution of property and attending to the common interest in caring for the children on an ongoing basis.³¹

Indeed, multi-problem families are more frequently seen in courts dealing with divorce. Donald T. Saposnek has suggested that a "one-size-fits-all mediation model is no longer tenable" for many participants in mediation.³² Rather than arguing about models, Saposnek argues for a "multi-leveled, interdisciplinary (hybrid) array of services to divorcing families."³³ "It is no longer meaningful to argue whether a facilitative, evaluative, or transformative mediation model is best for divorcing couples. . . . 'The critical policy question now is not whether mediation is useful, but rather how to use it to best advantage.'"³⁴

In fact, research shows that many, if not most mediators, actually use a combination of the facilitative, transformative and evaluative approaches. This research, done clinically in 1990 by J. F. Becker-Haven at Stanford who observed individual mediators in practice, reveals the distinctive styles of each mediator can be expressed as some combination of the various approaches.³⁵ Mediator approach preferences were stated prior to the mediation, and then the mediation was charted as to the time spent by the mediator in each mode. Most of the mediators observed spent some time in each of the approaches

30. Amadei & Lehrberger, *supra* note 28, at 67.

31. *Id.* (citation omitted).

32. Donald T. Saposnek, *Commentary: The Future of the History of Family Mediation Research*, 22 CONFLICT RESOL. Q. 37, 38 (2004).

33. *Id.*

34. *Id.* (quoting HOWARD H. IRVING & MICHAEL BENJAMIN, FAMILY MEDIATION: CONTEMPORARY ISSUES 423 (1995)).

35. See *id.* at 44. For more information on this research, see also JANE F. BECHER-HAVEN, MODES OF MEDIATING CHILD DISPUTES (1989).

while using an overall predominant approach. In effect, many mediators seemed to be unconsciously adopting a hybrid approach.³⁶

E. Practical Results of the Different Approaches

There has been much discussion about the tools of conflict resolution employed by mediators in their different approaches, aside from considerations of philosophy and ethics. Mediators discuss with the parties the tools they intend to employ during the process and identify the appropriate tools for every approach the mediator uses.³⁷ To illustrate the use of some conflict resolution tools, we note that transformative and facilitative mediators tend to meet in joint session with all parties present so the parties may hear each other's point-of-view and have the opportunity to change their perspectives. This may be because those mediation approaches originated in venues where the mediators might have no or limited familiarity in the substantive area of the dispute; and therefore, those approaches were focused on resolution strictly as between the beliefs and understandings of the parties.

As mediation became more popular, courts began to utilize this means to settle cases. Like judicial settlement conferences, the evaluative mediator may assist the parties in reaching resolution by pointing out factual and legal weaknesses in their cases and evaluating (directly by predicting outcomes or indirectly by asking "loaded" or leading questions) what a judge or jury might do if the case was not settled or resolved in mediation.³⁸ For example, evaluative mediators may be more concerned with the legal support for the positions of the parties than with satisfying their underlying interests. The practical result is that evaluative mediators tend to meet with the parties more in separate caucuses for "shuttle diplomacy" purposes in order to give the parties more information about their likely odds in litigation and the relative costs of pursuing that means of resolution.

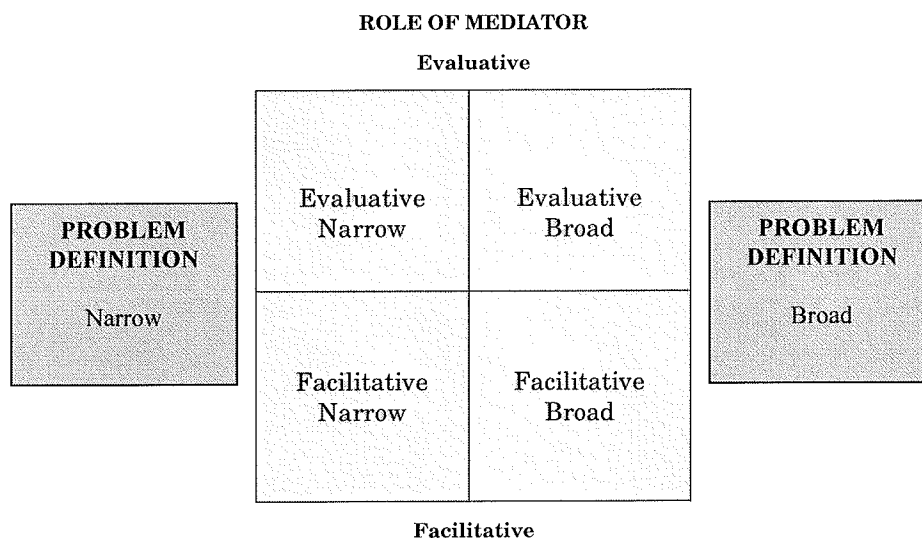
Mediators have been discussing the various approaches for years. Leonard Riskin and others have suggested that all of these approaches represent more of a continuum than polar opposites—a continuum that ranges from the least interventionist of the purely transformative approach on one end of the spectrum to the most interven-

36. See Saposnek, *supra* note 32, at 44; BECHER-HAVEN, *supra* note 35.

37. Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning to the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45, 50-51, 53 (2005); see also Laflin, *supra* note 22, at 495 (citing Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996)).

38. *Id.* at 56-60. But note, the authors warn against improper use of the techniques described therein.

tionist of the purely evaluative or judicial settlement end of the spectrum.³⁹ However, Riskin's analysis in his 1994 article featured two intersecting continua—a "grid" representing the mediator's role from evaluative to facilitative combined with a continuum of the mediator's customary approach to problem definition ranging from "narrow" to "broad."⁴⁰ Riskin used the intersection of the two continuums to define quadrants representing what Riskin saw as the mediator's "orientations" toward mediation.⁴¹



The original Riskin "grid" has been criticized by many for its shortcomings, including Riskin himself in what he now offers as the "New New Grid" system.⁴² Much of the criticism over the years has surrounded the use of the term "evaluation" as related to mediation.⁴³ For example, Folger and Bush see distinct differences in these ap-

39. Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994) [hereinafter *Old Grid*].

40. *Id.* at 111–12.

41. *Id.* at 112.

42. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 6–8 (2003) [hereinafter *New New Grid*].

43. *Id.* at 6–7.

proaches, particularly when viewed as “top-down” versus “bottom-up” mediation.⁴⁴ According to their view, evaluative mediation may take legal information⁴⁵ entirely too seriously (top-down) as opposed to facilitative mediation, which tends to come from the parties (bottom-up) and thus produces resolution that is much more real, lasting, and transformative for individuals and their relationships.⁴⁶

44. BUSH & FOLGER, *supra* note 2.

45. The giving of “legal information” by the mediator has been defined as providing a party with statements of law or fact, ostensibly in a vacuum. It is often contrasted to the giving of “legal advice,” which is the application of a law or laws to a particular fact pattern with an opinion as to the likely outcome. In practice, most mediators only give “legal information” when they want to “reality test” a party’s misperception of law or fact; and often do it in the form of a question to avoid an allegation that they are giving legal advice. As a practical matter, is the impact on the mediation any different? Additionally, there is a perceived effect of these behaviors on the mediation parties as regards to overall fairness and procedural due process. For example, tone, body language, and gestures can turn an otherwise reality-testing question into an evaluation or opinion. Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45, 57 n.42 (2005).

46. See generally BUSH & FOLGER, *supra* note 2. At a NWADR Conference in Seattle, Folger asked the “evaluative” mediator on the panel if mediation was the practice of law. A corollary question should then be, is mediation the practice of counseling or psychology? In Oregon, for a discussion of what constitutes the “practice of law,” see *Oregon State Bar v. Smith*, 942 P.2d 793, 798–800 (Or. Ct. App. 1997). The court noted that “[i]n Oregon, as in many other jurisdictions, the particularized definition of the practice of law was committed to case-by-case development by the courts.” *Id.* at 798. See *In re Conduct of Devers*, 974 P.2d 191, 195 (Or. 1999), in which the Oregon Supreme Court stated, “[t]his court has held that ‘any exercise of an intelligent choice, or an informed discretion in advising another of his legal rights and duties, will bring the activity within the practice of the profession.’” *Id.* at 195 (citing *State Bar v. Security Escrows, Inc.*, 377 P.2d 334, 339 (Or. 1962); *State ex rel Oregon State Bar v. Lenske*, 584 P.2d 759, 763 (Or. 1978) (stating that drafting a contract is practice of law)). Finally, the Oregon Rule of Professional Conduct Rule 2.4 reads as follows:

(a) A lawyer serving as a mediator:

- (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and
- (2) must clearly inform the parties of and obtain the parties’ consent to the lawyer’s role as mediator.

(b) A lawyer serving as a mediator:

- (1) may prepare documents that memorialize and implement the agreement reached in mediation;
- (2) shall recommend that each party seek independent legal advice before executing the documents; and
- (3) with the consent of all parties, may record or may file the documents in court.

The problems identified by Riskin with the "Old Grid" in preparing the "New New Grid" have to do with both the continuum structure and the facilitative-evaluative terminology.⁴⁷ He now sees the continuum structure as posing problems in the sense that the old grid encouraged the idea that facilitation and evaluation are dichotomous alternatives.⁴⁸ Riskin now recognizes that many—perhaps most—mediators fit in both categories facilitating some issues and evaluating others.⁴⁹

(c) Notwithstanding Rule 1.10, when a lawyer is serving or has served as a mediator in a matter, a member of the lawyer's firm may accept or continue the representation of a party in the matter in mediation or in a related matter if all parties to the mediation give informed consent, confirmed in writing.

(d) The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

OR. RULES OF PROF'L CONDUCT R. 2.4 (2006), available at http://www.osbar.org/_docs/rulesregs/orpc.pdf. Specifically, the rule allows a lawyer who mediates to prepare and file in court, a settlement agreement, including a stipulated order or judgment to implement the agreement reached in mediation. Historically, the essence of the rule has been that a lawyer serving as a neutral third-party mediator is not "practicing law" if the lawyer-mediator is not representing any of the parties to the mediation, but instead is acting in a strictly neutral role. Members of the bar who restrict their activity to only mediation, and who do not hold themselves out as attorneys at law, are not required to have legal malpractice coverage. See PROF'L LIAB. FUND, OR. STATE BAR, EXEMPTION GUIDELINES: ALTERNATIVE DISPUTE RESOLUTION, INCLUDING MEDIATOR OR ARBITRATOR (2007), available at <http://www.osbplf.org/docs/plans/exempt%20guide%20adr%20med%20arb.pdf> (2006). Whether a mediator is acting as a mere scrivener or practicing law when he or she prepares settlement documents pursuant to a mediation constitutes a question of fact and depends on the parties' reasonable expectations and the nature of the mediator's interaction with the parties during the process. Mediators who are not attorneys should seek the advice of a practicing attorney familiar with this area of law. Finally, pursuant to the Oregon State Bar Association, a lawyer who mediates does not "represent" clients as an advocate in the traditional sense. Oregon State Bar Ass'n Bd. Of Governors' Formal Ethics Op. 2005-101 (2005) (to find this opinion, go to www.osbar.org/ethics.toc.html and search for "2005-101").

47. *New New Grid*, *supra* note 42, at 13.

48. *Id.*

49. *Id.* at 14 n.48 (citing Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41, 61 (2000). Golann notes that the facilitative-evaluative continuum deals with the *role of the mediator*, and not the *nature of the process*. *Id.* In addition, evaluations may not only be produced by the *mediator* but also by the *parties* during the mediation. *Id.* Thus, mediator evaluation in Riskin's old grid did not include evaluations given by lawyers in stating the strengths and weaknesses of the case.

Riskin now acknowledges that behaviors of the mediator previously described as evaluative or facilitative often “travel in tandem.”⁵⁰ By that, Riskin means that a mediator may offer a prediction of what might happen if the case comes to trial in a way that does not limit the parties, and in fact, encourages them to use the information to understand the court alternative,⁵¹ and then, using facilitation, to develop options that improve on what trial would offer. In this way, evaluation can set the stage for facilitation enabling the parties to use Self-Determination to select one of several options. Moreover, the very label of a mediator’s behavior as evaluative may ignore the 98% of the mediation in which facilitation is the activity because of the 2% spent in evaluation, given as a last resort to impasse.⁵² Riskin recognizes this confusion may have resulted in the same mediator having been voted in 2002 as both best facilitative mediator and the second best evaluative mediator in a Wisconsin Bar Journal poll.⁵³ Finally, Leonard Riskin acknowledges the need for a new grid by stating, “Perhaps a comforting belief that we understand what’s going on—may obscure what’s *really* going on.”⁵⁴

The fundamental problem is that mediation, in Riskin’s view, is facilitated negotiation.⁵⁵ As such, its essence is facilitation.⁵⁶ “[I]f evaluation is [seen as] the opposite of facilitation, [then] evaluation [by the mediator] would seem to rob mediation of its essence.”⁵⁷ This leads to one of the strongest criticisms of evaluation, and its place on Riskin’s old grid, that “evaluative mediation is an oxymoron.”⁵⁸

The Riskin “New New Grid” adopts a common solution to problems with misunderstandings in the use of previously proposed paradigms—it creates new terminology, proposing the use of “directive” and “elicitive” instead of the “evaluative” and “facilitative,” respectively, and acknowledges that many mediators increasingly have been using the term “directive.”⁵⁹ Mediators often combine their approaches, employing transformative, facilitative, or evaluative tech-

50. *Id.* at 15 n.39.

51. Interestingly, facilitative mediators call this “reality testing,” but criticize it when it is done surrounding the subject of litigation. What if the parties truly want to understand their legal, best alternative to a negotiated agreement or “BATNA”?

52. Perhaps, the timing of this so-called “evaluation” makes a difference especially if it is the main tool used by the mediator.

53. *New New Grid*, *supra* note 42, at 17 (citing Jane Pribek, *McDevitt: Master of Mediation*, WISCONSIN L. J., March 27, 2002, at 4). The mediator referred to, Joseph McDevitt, also ranked first as most directive mediator and as best-prepared mediator.

54. *Id.* at 17.

55. *Id.*

56. *Id.* at 18.

57. *Id.*

58. Kovach & Love, *supra* note 37, at 31.

59. *Id.* at 31.

niques while being elicitive, that is, seeking to draw out information from the disputants. Does it really boil down to what, if anything, mediators do with relevant information they have that parties may or may not acknowledge they have? Is being neutral and impartial to mean that mediators are to have no influence on the outcome or the process? If so, what is the value-added contribution of mediators?

In his "New New Grid," Riskin proposes a new system of decision-making, which makes central the idea of participant "influence" with respect to certain issues.⁶⁰ In the new system, decision-making falls into three categories: substantive, procedural, and meta-procedural, with core principles that mediation participants may influence the direction and outcome of the mediation itself.⁶¹ Substantive decision-making involves the origin of the dispute and what is necessary to resolve the dispute.⁶² Procedural decision-making involves deciding on the process to be used in resolving the dispute.⁶³ Meta-procedural decision-making involves deciding how subsequent procedural decisions will be made.⁶⁴ This is particularly appropriate in complex multi-party public policy mediation, for example, where deciding on the process design becomes all-important.

Unchanged from the "New Old Grid," Riskin's new Substantive Decisionmaking Grid employs the "narrow" versus "broad" problem definition to contrast the participants' predisposition entering a mediation.⁶⁵ His Procedural Decisionmaking Grid contrasts the mediator's behavior as "evaluating" versus "not evaluating."⁶⁶ In both grids, Riskin acknowledges the influence held by the mediator and participants in their discussions, regardless of the mediator's preferred approach.⁶⁷ This is the case even in the evaluative setting, while support for that assertion almost needs no justification for the transformative and facilitative approaches. More often than not, the reputations of private mediators precede themselves and that is a major factor influencing their selection. It is common for advocates to say, "She'd be

60. *New New Grid*, *supra* note 42, at 39, 44, 46. These grids, Substantive Decision-making (Figure 5), Procedural Decision-Making (Figure 9), and Meta-Procedural Decision-Making (Figure 11), are found on pages 39, 44, and 46 respectively.

61. *Id.* at 34.

62. *Id.*

63. *Id.* at 35.

64. *Id.* at 37.

65. *Id.* at 30-33, 39-42.

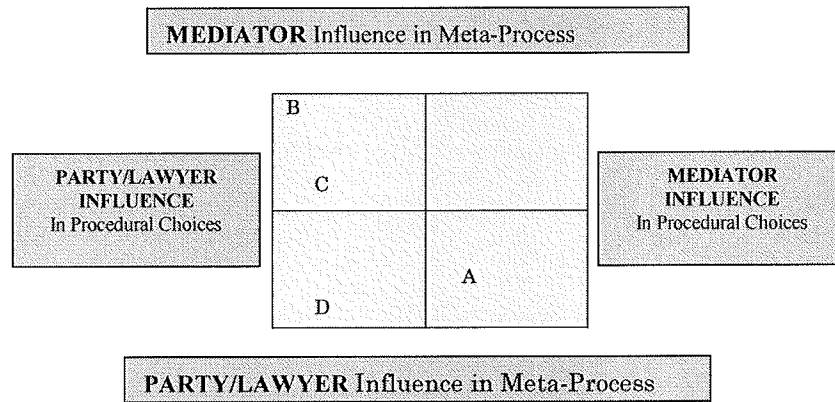
66. *Id.* at 44-45.

67. *Id.* at 48 n.155.

perfect—a real head-banger,” or “He’s too touchy-feely for a commercial case.”

Riskin’s third grid, Meta-Procedural Decisionmaking, supports the thesis that the mediator *and* the participants have influence over subsequent procedural choices.⁶⁸ It is different from the Procedural Decisionmaking grid, which focuses more on the micro issues surrounding what techniques a mediator may or may not use during the mediation. The Riskin Meta-Procedural grid follows:⁶⁹

Deciding Who Influences Procedural Decisions



This grid shows the relationship between participant/lawyer influence and mediator influence over procedural choices. Point A, for example, indicates where the parties/lawyers exercise more influence in the meta-process and the mediator exercises more influence over procedural choices. Point B, by contrast, indicates where the mediator exercises almost all of the influence in meta-procedural decision making, while the party/lawyer exerts most of the influence over subsequent procedural choices. While he suggests its use for “subsequent” procedural decision making, it also works well during a pre-negotiation discussion about approaches.

An infinite number of influence combinations are possible, and perhaps that is the first conversation the mediator should have with the parties. That conversation should include the choice of mediator approach because the mediator is the variable—the other participants

68. *Id.* at 45.

69. *Id.* at 45–46 (showing diagrams and explanations).

are set. The presence and influence of the mediator makes a difference. This factor can and should be controlled by the parties with their selection. The issue is one of "fit."

An example of meta-procedural decision-making is the United States Postal Service REDRESS program where the agency decided as a policy that all of the employment disputes would utilize the facilitative approach. After a year, they enlarged the program, determining that the entire program would use the "transformative" approach advocated by Folger and Bush.⁷⁰ The irony of this decision is that it is evaluative, meta-procedural decision-making, but this seems to be ignored by the transformative proponents even when they criticize the so-called "evaluative" mediators. How can such a decision be made for the parties without violating their right of Self-Determination, a key mediation principle that distinguishes it from the adversarial legal system? How can a transformative mediator be impartial if one of the parties is reacting negatively to a transformative approach and simply wants to know their BATNA (Best Alternative to a Negotiated Agreement) and move on to settlement? Conversely, how can an evaluative mediator be impartial if one of the parties is reacting negatively to an evaluative approach and simply wants to explore the relationship issues? This internecine warfare has kept our field from moving forward.⁷¹

70. See BUSH & FOLGER, *supra* note 2.

71. The comments of Mr. Peter Adler are of particular importance:

[I]f we really are a profession, then let's stop dithering about it and get on with the hard political organizing needed to stake it out and lay full claim to it. If we are a profession, let's make very specific recommendations from this conference to that effect and set in motion an agenda for pursuing it. This means finalizing agreed upon principles and practices, creating licensing and regulatory regimes to prevent any further encroachment of our work by other professions, and even poaching back that which has been nibbled away by others.

....

... The great danger at this gathering is that we will continue, mistakenly, to "reify" mediation and pretend it is something we all understand to be the same thing. As a graduate student I remember hearing that word "reify" from my professors and being puzzled by it. It sounded like an important word, something I should know about. Turns out it is an intellectual confusion, a logic trap. To reify something is to treat an abstraction as if it is something concrete. It is like talking about "health" or "beauty" or "culture" or "sustainability" or "justice" and assuming that these things are tangible, empirical, observable, and comparable in some common way we all agree on. All

Riskin uses the analogy of a road trip to view the decision-making that should ideally take place during a mediation.⁷² He suggests that the parties may arrive at an understanding of the process to be used when they are preparing for the mediation.⁷³ However, just as on a road trip where a group of companions may decide to choose different experiences or side trips, the participants in a mediation may decide that certain issues should be avoided or, conversely, that a certain issue must be dealt with, despite the extra time that will be required for its consideration.⁷⁴ Riskin also recognizes that parties in mediation, like friends on a road trip, may relinquish a certain easy simplicity when they allow their objectives to be flexible.⁷⁵ One also supposes that there might be a substantial impact on the overall time or length of mediations as well, if the parties have a free-form open-ended choice of alternative goals and options.

Of course, there are strong feelings among mediators as to underlying philosophies, approaches, and the tools of implementation they have produced. Just as the followers of Carl Jung hold solidly to his teachings and trainings versus those of Sigmund Freud, teachings and trainings have followed each of the underlying philosophies and implementation behaviors in mediation.

The evaluative approach highlighted by Riskin in his old and "New New" grids is frequently criticized. A simple but powerful example from a landlord-tenant matter is given by Love and Cooley to illustrate the problems that can arise from improper use of evaluative implementation tools or behaviors of the mediator:

The mediator (who either is or is not a lawyer) in a community dispute resolution center tells the landlord and tenant parties, who are disputing about a pet in the tenant's apartment, that since there is a lease provision precluding pets, that issue should be taken off the table because, legally, the pet must go. (Trouble is: the law is more complicated, providing that where a landlord does not object to a pet within a certain period, a

of these are big ideas, inspired ideas, ideas worth debating, studying, and pursuing, but these are also the wellsprings of inspiration for many different professions, fields, trades, and domains.

When we reify mediation we assume that it is something common, concrete, and similar to all of us. When we probe beneath the surface of our work, however, we see that it really isn't. As our good friend Howard Bellman loves to say, just who is the "we" we all keep talking about?

Adler, *supra* note 1; see also, Menkel, *supra* note 1.

72. *New New Grid*, *supra* note 42, at 51-52.

73. *Id.*

74. *Id.*

75. *Id.* at 52-53.

no-pet lease provision is waived.)⁷⁶

Now imagine the same set of facts with no prior party disclosure and consent to the evaluative approach prior to the pet clause evaluation being made. One can certainly see from the tenant's viewpoint that the fairness and procedural due process of the mediation has been compromised, while the landlord is quite pleased with the mediator's behavior. Further litigation may result in expense and aggravation for both parties. At the very least, the tenant may question whether mediation was a good idea.

The same simple example might be used to illustrate problems that can arise from the improper use of facilitative implementation tools or behaviors by the mediator. Imagine that the mediator at the community center is presented with a landlord who was unaware of the pet in question. The no-pet clause of the lease would likely apply given no other facts. If the mediator pursues a purely facilitative set of implementation tools, the parties may be encouraged to tell their stories and explore the underlying causes of conflict. Imagine further that neither party remembers the existence of the no-pet clause (hard to imagine, perhaps). Has the mediator performed a service to the parties by failing to offer this "legal information" or evaluation? In this example, from the viewpoint of the landlord, fairness and procedural due process may have been compromised while the tenant would be quite pleased to learn after the fact the impact of the mediator's behavior. Does impartiality of the mediator require offering an evaluation of this point where it really does apply?

The same example might be used to criticize the transformative style. Each approach has its critics, and who is "right" is often driven by the context, the original orientation of the mediator's initial training, their knowledge base, etc. Could it be that as mediators, we are unconsciously blinded to our own prejudices, skill deficits, and market-share jealousies—in other words are we overly protective of the approaches with which we are most comfortable at the expense of the users of our services? Could it be that the narrow definitions about what is and is not mediation are merely self-serving and niche-creating, part of an effort to differentiate oneself from others? If so, is that a bad thing?

The *Model Standards of Conduct for Mediators* (*Model Standards*) (ACR, AAA, and ABA) address these issues directly and indirectly. As to Self-Determination, the standards specify that the me-

76. Love & Cooley, *supra* note 37, at 59.

diator must allow the parties to reach a voluntary, non-coerced agreement.⁷⁷ On the issues of the evaluative versus facilitative implementation tools or behaviors of the mediator, the *Model Standards* seem to adopt a facilitative approach. The *OMA Core Standards* state the mediator first has an ethical duty to discuss different mediation approaches with the parties, second to obtain their informed consent, and third, that the Standards do not favor one approach over another.⁷⁸ This is a critical improvement to the various other codes, which should be adopted widely for as it is sometimes said, "The mediator owns the process, and the parties own the result."⁷⁹

The Oregon Mediation Association expectation that mediators use the process as an opportunity to educate and empower parties in conflict includes their selection of the mediation approach that best suits their unique needs. It is a pillar of good mediation practice. With party Self-Determination as a primary goal, chances of ultimately succeeding in a mediation can only be strengthened when parties have the capacity to make well-informed decisions regarding the dispute resolution process they participate in.

IV. MEDIATION ETHICS 101—THE MEDIATOR'S ROLE IN DETERMINING THE MEDIATION APPROACH

A. The Mediator's Preferred Approach

Mediators usually have a predominant approach based on a combination of their personality, experiences, education, and training. The adherence to these approaches is reinforced by the ethical standards we have created for ourselves. Commentators such as Kimberlee K. Kovach have described the profession of mediation as having "growing pains."⁸⁰ Kovach stated in 1994 that, "There is a built-in inconsistency in the development of 'standards' for mediators. The entire premise of mediation is its lack of rigidity. Mediation is a flexible process, and that flexibility is one of mediation's key benefits."⁸¹

To achieve the flexibility of process that Kovach considered one of mediation's key benefits, mediators arguably must be given a certain

77. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I.A (2005).

78. OMA CORE STANDARDS 2005, *supra* note 5, at Preamble, Standard II cmt. 3.

79. The authors question that old saw. If mediation is to be truly different, and more desirable because of those differences, one could legitimately argue that the parties should "own" both the "process" and the "result." That is not to say that mediation organizations should not explore and consider adopting a requirement for mediator approach disclosure in order to get the parties' consent.

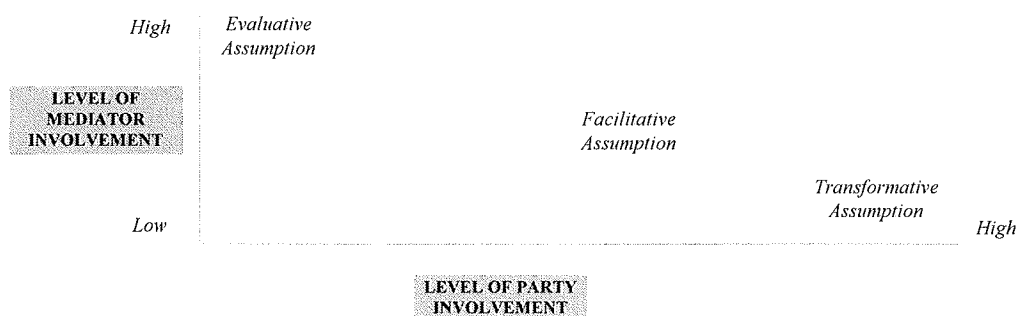
80. KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 190 (1994).

81. *Id.*

amount of freedom to use the mediator's preferred approach, the one with which the mediator is most comfortable, and perhaps, as a result, the most competent. The ethical question becomes how the mediator can be allowed freedom to choose his or her preferred mediation approach while preserving the Self-Determination of the style or model of mediation by the parties. In other words, balanced against mediator preference is the danger that, without protection for the parties' Self-Determination, the mediator, utilizing her or his preferred approach, may become the central character in the mediation, rather than the neutral character. As stated by Professor Maureen Laflin in 2000:

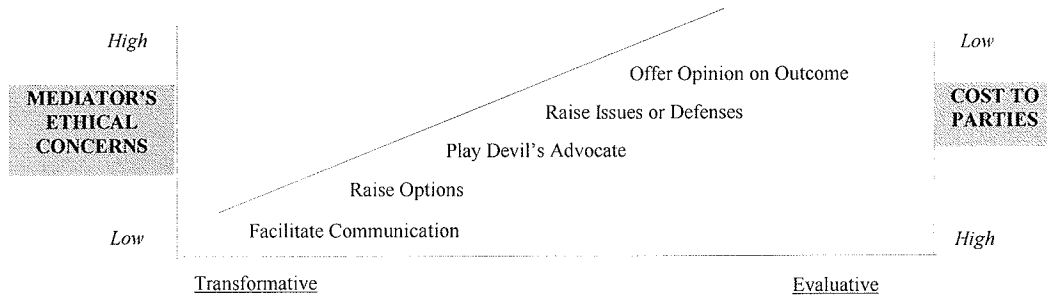
The sole question that helps is whether the mediator's conduct gives him or her power and control over the outcome of the mediation. For once a third party neutral advocates that the parties see the dispute in a particular light, that light becomes the beacon that directs the pathway through the remainder of the mediation, compromising both the parties' self-determination and the mediator's impartiality.⁸²

To further underscore Laflin's point, the following view from 30,000 feet graphically depicts the default approach assumptions as they relate to the relative level of mediator and party involvement.



82. Laflin, *supra* note 22, at 525.

Similarly, the following graph can help mediators visualize the intersection of mediator behavior and ethical concerns.⁸³ While it shows the evaluative approach carries with it higher ethical concerns for the mediator and potentially lower cost to the parties, the same can be said for the transformative and facilitative approaches. In either case, the risks and costs are a function of how consistent the mediator's behavior is with the expectations of the parties.



V. MEDIATION ETHICS 201—PRESERVING THE MEDIATORS' NEUTRALITY AND IMPARTIALITY THROUGH SELF-DETERMINATION OF THE PARTIES

A. Introduction

“Mediation ethics” has emerged alongside mediation as a growing field, bringing with it the many ethical issues unique to mediation as well as those faced by other licensed or certified professions, and giving rise to a new class of “cross-professional” ethical standards.⁸⁴ In her article, Maureen Laflin identifies just a few of the ethical issues faced by mediators, including fact questions regarding confidentiality within the process and after the mediation has concluded, competency questions that arise when highly specialized subject matter is to be mediated, and the many ethical issues involving those mediators who are concurrently licensed or certified within another profession.⁸⁵ These cross-profession mediators must abide by the rules or standards of conduct for both professions, whether they are psychologists, social

83. Imperati, *supra* note 6, at 743. This graph has been edited to include all three approaches.

84. Laflin, *supra* note 22.

85. *Id.*

workers, or lawyers.⁸⁶ The *OMA Core Standards* states, "Mediators who undertake a dual role assume additional obligations and potential liabilities. For example, if they are licensed or regulated in other fields, their actions as mediators may be governed by the regulatory and ethical codes and rules of those other fields."⁸⁷

The ethical issues that arise when attorneys mediate are not due to the closeness of the two professions, but rather to their profound differences.⁸⁸ "Law is an adversarial process that by design creates winners and losers; mediation is paradigmatically a facilitative process, whereby the parties strive to achieve a voluntary agreement that resolves the dispute to at least the partial satisfaction of all."⁸⁹ The different practice orientations raise the ethical issue for lawyers who mediate: preserving the integrity of the mediation process as a forum where an impartial third party assists the participants in resolving their own disputes.⁹⁰ This issue is often framed as the split between evaluative and facilitative styles of mediation. However, the central ethical issue concerning lawyers as mediators is whether the disputants arrive at the resolution of their dispute by their own Self-Determination or under the evaluative direction and control of the mediator.⁹¹

The hallmark of mediation in this sense is the Self-Determination of the parties and the impartiality of the mediator. Looking at this classical model, the role of the mediator has been characterized by one author as resembling that of a Sherpa guide:

A mediator can be envisioned as the Sherpa guide of the negotiation process. A Sherpa guide does not tell explorers which mountain to climb, or whether to climb a mountain; rather, once the explorers decide to climb a mountain, the Sherpa

86. *Id.*

87. OMA CORE STANDARDS 2005, *supra* note 5, at Standard IX cmt. 3; *see also* OR. RULES OF PROF'L CONDUCT R. 2.4 (2006), *available at* <http://www.osbar.org/docs/rulesregs/orpc.pdf>.

88. Laflin, *supra* note 22, at 480.

89. *Id.* at 480–81 (referencing Fiona Furlan et al., *Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound By Ethical Codes for Lawyers When Acting as Mediators?*, 14 J. AM. ACAD. MATRIMONIAL LAW. 267, 269 (1997), *available at* <http://www.aaml.org/i4alpages/index.cfm>).

90. *See generally* Jaqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999).

91. Laflin, *supra* note 22, at 479.

guide helps the expedition find the best way up to the top. Similarly, a mediator does not tell the parties when or how to settle a case, but will help the parties maneuver towards resolution.⁹²

B. Self-Determination of the Parties

Self-Determination is defined in Core Standard I of the *OMA Core Standards* in these words: "Mediators respect, value, and encourage the ability of each participant to make *individual decisions regarding what process to use* and whether and on what terms to resolve the dispute."⁹³

The comments to Core Standard I add understanding to the concept of Self-Determination of the parties in mediation:

1. Self-Determination is a fundamental principle of mediation that distinguishes it from other dispute resolution processes, including, but not limited to, litigation. Participants should be free to choose their own dispute resolution process, and mediators should encourage them to make their own decisions on all issues.
2. . . . Mediators should defer their own views to those of the participants, recognizing that the collaborative interaction between the participants is often the key to resolution.
3. *Mediators should educate participants about the continuum of mediation approaches and identify the approaches the mediator practices. Engaging the participants in a discussion to establish expectations about these approaches will help the participants give their Informed Consent to the approach best suited to their particular situation.*
4. While a mediator cannot ensure that participants are making informed and voluntary decisions, mediators should help participants understand the process, issues, and options before them and encourage participants to make informed and voluntary decisions.⁹⁴

92. Mori Irvine, *Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation*, 26 RUTGERS L. J. 155, 158 n.13 (1994).

93. OMA CORE STANDARDS 2005, *supra* note 5, at Standard I (emphasis added).

94. *Id.* at Standard I cmt. 1–4 (emphasis added).

C. Informed Consent of the Parties

Core Standard II of the *OMA Core Standards* states as follows:

To fully support Self-Determination, mediators respect, value, and encourage participants to exercise Informed Consent throughout the mediation process. This involves making decisions about process, as well as substance, including possible options for resolution. Initially and throughout the mediation process, *mediators further support Self-Determination by making appropriate disclosures about themselves and the specific mediation approaches they use.*⁹⁵

Without the mediator making appropriate disclosures, the parties are in no position to exercise informed consent. Obviously, the parties must first be informed to exercise informed consent. At a threshold level, "to be responsible toward the profession and entirely candid with the parties, third-party neutrals must name and label the ADR processes they use."⁹⁶ If the mediator recognizes that the process is edging into evaluation, he or she should inform the parties that the process they initially agreed to is about to change. Without such disclosure "evaluation may undermine the two central principles underlying mediation—the Self-Determination of the parties and the impartiality of the mediator."⁹⁷

D. Process and Substantive Competence

The Oregon Mediation Association Core Standards speak to the issue of process and substantive competence directly. The Standards state, in part:

V. PROCESS AND SUBSTANTIVE COMPETENCE

Mediators fully and accurately represent their knowledge,

95. *Id.* at Standard II (emphasis added). Additionally, the Oregon State Bar Code of Professional Responsibility Rule 2.4 requires a lawyer serving as a mediator to "clearly inform the parties of and obtain the parties' consent to the lawyer's role as a mediator." OR. RULES OF PROF'L CONDUCT R. 2.4 (2006), available at http://www.osbar.org/_docs/rulesregs/orpc.pdf.

96. Laflin, *supra* note 22, at 491 (citing Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Gold*, 3 HARV. NEGOT. L. REV. 71, 79 (1998)).

97. *Id.* at 495–96 (citing Nolan-Haley, *supra* note 90, at 790–91; JOINT STANDARDS OF CONDUCT FOR MEDIATORS Standard II (1994), which preceded the adoption of the Oregon Mediation Association Standards quoted above).

skills, abilities, and limitations. *They mediate only when they offer the desired approach and possess the level of substantive knowledge, skills, and abilities sufficient to satisfy the participants' reasonable expectations.*

Comments

1. Mediators should exercise their independent judgment when their abilities or availability are unlikely to satisfy the participants' articulated expectations. When exercising their judgment, mediators should consider factors such as the participants involved, *their agreed-upon mediation approach, and the complexity, subject matter, and specific issues of the dispute.*⁹⁸

Oregon, with this provision, provides clear guidance to mediators about the intersection of parties' expectations and mediators' behavior. The themes presented in this article were fully explored by the drafting committee during OMA's redrafting process.

E. Exploration of Process Options by the Mediator and the Parties

It has long been recognized in the ethical rules for practicing attorneys that the attorney has a higher duty in negotiating with a client—a fiduciary duty of care to disclose all necessary information and to avoid overreaching and undue influence. Recognizing the distinction between lawyering and mediating, and the separate ethical codes that apply, it is worthwhile to consider the mediator's duty to disclose information regarding mediation approaches. Does a duty exist when the mediator holds a position of superior process knowledge that tends to carry greater weight in exploring the choice of mediation approaches? The mediator must exercise care in providing sufficient relevant information as to the range of options or approaches available. Without great care in delivering the information as to the available approaches even-handedly, the mediator risks over-weighting his or her approach and thereby effectively eroding the Self-Determination of the parties.⁹⁹

98. OMA CORE STANDARDS 2005, *supra* note 5, at Standard V cmt. 1 (emphasis added).

99. Laffin, *supra* note 22, at 495.

VI. MEDIATION ETHICS 301—APPROACHING THE IDEAL OF
“HIGH-QUALITY CONSENT”

Professor John Lande has defined an ideal he refers to as High-Quality Consent as a condition in which the participants have the opportunity to make decisions “in a dispute by considering the situation sufficiently and without excessive pressure.”¹⁰⁰ Lande contends that High-Quality Consent should be an important goal in mediation.¹⁰¹ He suggests that mediators may appropriately discuss with the parties the available mediator approaches and secure their informed consent before proceeding to the next mediation stage.¹⁰²

Lande suggests seven factors that might be used to determine the degree or quality of consent by the parties to the actions of the mediator. These factors are the (1) consideration of the principals’ goals and interests, (2) identification of plausible options, (3) principals’ choice of options for consideration, (4) careful consideration of options, (5) limitation on the use of time pressure, (6) mediators’ restraint in pressuring principals to select particular options, and (7) confirmation of consent. They are discussed below.¹⁰³

A. Explicit Consideration of Principals’ Goals and Interests

Many mediators come to a mediation session believing that they already know the goals and interests of the parties, and incorrectly assuming that his or her experience in the field and/or familiarity with the subject matter is simply enough.¹⁰⁴ This sort of attitude can damage the chances of a successful mediation because, in fixating on a single outcome, the mediator may wrongfully assume certain facts about the parties or the dispute itself. Such fixation on one outcome only obscures other possible outcomes and could harm the chances of resolution.¹⁰⁵

Leonard Riskin, in his old grid, suggests a multi-track typology that moves toward a higher quality of consent by considering interests

100. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 868 (1997).

101. *Id.* at 878–79.

102. *Id.* at 872.

103. *Id.* at 871–79. The seven factors are listed here as subheadings VI. A–G. The subheading text comes directly from Lande’s article. The author’s discussion follows.

104. *Id.* at 871.

105. *Id.*

of the parties in a broader manner.¹⁰⁶ "Riskin identifies four progressively broader levels of interests, which he calls litigation issues, business interests, personal/professional/relational interests, and community interests."¹⁰⁷ However, Riskin is not contending that the definition of the dispute must be expanded to include all possible interests and issues. Rather, Lande argues, "enhancing the quality of consent entails exploration of the principals' goals and interests to an appropriate extent under the circumstances."¹⁰⁸ The exploration itself increases the chances that the principals will identify their interests. However, there are situations in which mediators wisely do not explore all possible interests for fear of broaching a topic the parties have reasonably and intentionally been avoiding.¹⁰⁹

B. Explicit Identification of Plausible Options

For there to be High-Quality Consent, various plausible options for resolving the issues should be identified, even if a single option surfaces from one of the parties or the mediator.¹¹⁰ In order to be able to identify the entire range of options, the mediator must be skilled in both substance and process, and if not already skilled, should seek further training in that area. The quality of the consent of the parties is directly linked to the skill level of the mediator in assisting parties with option identification, and is diminished to the extent that important options have not been identified.¹¹¹ This process takes time and work. It requires an emotional commitment to the exploration as well. Often this wide-ranging exploration may not be possible, particularly where the parties enter the process with a strong offer-counteroffer approach that may ultimately narrow and eliminate their differences, rather than taking the time to explore their differences.¹¹²

C. Principals' Explicit Choice of Options for Consideration

Mediators should empower parties in mediation to choose for themselves the options they will consider in the course of the mediation. "This factor is an extension of the previous one and subject to the

106. *Id.* (citing Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 18-23 (1996)).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 872.

111. *Id.* at 872.

112. *Id.* at 872-73.

same limitations.”¹¹³ As it is often impossible to consider all of the options for each issue presented, some choices must be made to restrict the range of options and extent of the evaluation if only to hold to a reasonable period for the mediation.¹¹⁴ Lande suggests that the mediator help the principals in making these decisions consciously, which serves to increase the quality of their consent if mediators “do so explicitly and with limited pressure on the parties to accept the mediators’ suggestions.”¹¹⁵ The Oregon Mediation Association regards the parties’ explicit choice of options as a hallmark of Self-Determination, “mediators . . . should help parties understand the . . . options before them and encourage participants to make informed and voluntary decisions.”¹¹⁶

D. Careful Consideration of Options

Parties should carefully consider the range of plausible options available to them. This is a requisite for producing High-Quality Consent. The one consideration that arises in many cases is the comparison of the transactional and related costs of settlement in mediation against the costs of moving forward in a trial.¹¹⁷ This is often referred to as the BATNA analysis¹¹⁸ or “reality testing.” In making a careful consideration of these options, it is important for the parties to consider realistic estimates of the cost and consequences of trial.¹¹⁹ Sometimes lawyers or retired judges who mediate will stress or exaggerate the risks of litigation as a well-intentioned means of pressing the parties to settle. Mediators must be careful to avoid exaggerating the realities of litigation because to do so would jeopardize the quality of the parties’ consent and Self-Determination. However, mediators who are

113. *Id.*

114. *Id.*

115. *Id.*

116. OMA CORE STANDARDS 2005, *supra* note 5, at Standard I cmt. 4.

117. Lande, *supra* note 100, at 873–74.

118. “Best Alternative to a Negotiated Agreement.” ROGER FISHER & WILLIAM URY, *GETTING TO YES* 97–106 (1991). In practice, BATNA has become a somewhat misleading term because the party’s BATNA can be unconsciously, and therefore inappropriately, influenced by where they are on the risk/tolerance continuum. Restated, if they are instinctively risk-averse, they may be discounting their BATNA. Conversely, if they are risk tolerant, they may be discounting their WATNA—Worst Alternative to a Negotiated Agreement. Perhaps, the risk evaluation concept (“reality-testing” in non-legal settings) would be better served by conducting a MLATNA analysis—the Most Likely Alternative To a Negotiated Agreement.

119. Lande, *supra* note 100, at 874.

able to bring realistic estimates to the parties allowing them to make reasonable decisions after careful consideration of the options will have contributed to the quality of the consent to settlement. Empowering the parties to make well-informed decisions based on their careful considerations should be a primary focus of the mediator, thus enhancing the parties' Self-Determination.

Parties may also want to carefully consider the impact of the outcome on their continued relationships.¹²⁰ Often, disputes grow out of problems in a relationship between the parties that may be more important than the asserted subject of the dispute.¹²¹ This can be just as true in business relationships as in personal relationships.¹²² Given the ongoing importance of these relationships, the mediator can increase the quality of the consent of the parties by focusing on the importance of the relationships underlying the dispute.¹²³

E. Mediators' Restraint in Pressuring Principals to Select Particular Options

However, the choice of particular options is the ultimate decision for the parties.¹²⁴ They may be faced with a decision to agree on a settlement of X dollars, Y dollars, or no settlement at all.¹²⁵ Most mediators would say they always avoid exerting any pressure to accept a particular option. However, Professor Lande suggests there is always a risk where the opinion is given in such a way that accepting a particular decision by the party is described as "normal."¹²⁶ The greatest mediator pressure is to settle for the sake of settlement, based on the assumption that settling is always better than not settling.¹²⁷ To enhance the quality of consent of the parties, after discussing the parties' analysis of the dispute, the mediator must respect the decision of each party not to settle if they so choose.¹²⁸

120. *Id.* at 875.

121. *Id.*

122. *Id.*

123. *Id.* at 874-75.

124. *Id.* at 876.

125. *Id.*

126. *Id.* at 876-77.

127. Portland, Oregon sits in Multnomah County where there is approximately a ninety-six percent chance that a civil case will settle before trial. It is only a matter of how much time, energy, emotion, and lost opportunity costs will be spent or lost before the statistically predicted outcome of settlement happens.

128. Lande, *supra* note 100, at 876-77. The *OMA Core Standards* supports this concept of Self-Determination. "Mediators should defer their own views to those of the participants, recognizing that the collaborative interaction between the participants is often the key to resolution." OMA CORE STANDARDS 2005, *supra* note 5, Standard 1 cmt. 2.

F. Limitation on the Use of Time Pressure

We all know that time pressure can impair our ability to make good decisions.¹²⁹ "In some cases, time pressure results from external factors that are difficult or impossible to change, such as a trial date, a relevant external transaction, or a family move."¹³⁰ "In such situations, mediators help [the parties] by periodically focusing attention" on the negotiation time constraints, thereby aiding in making responsible decisions within the time allowed.¹³¹ Mediators may provide critical help in this way to allow the parties to pace the process and meet any deadlines that the parties may want to set.¹³² Inappropriate time pressure is a serious risk in mediation where there is an unreasonable stated or unstated expectation that an agreement can be reached and signed within a single session.¹³³ These time pressures should be factored into the process by the mediator in helping the parties make decisions to which they can give High-Quality Consent.¹³⁴

G. Confirmation of Consent

Mediators should obtain a confirmation of the parties' consent to their prospective settlement agreement.¹³⁵ When the parties are about to reach an agreement, the mediator can ensure the parties' decision-making responsibility is honored by checking whether they understand the proposed agreement, need further information, have determined with specificity who will do what, when, where, why and how, and whether they want to proceed.¹³⁶ This may involve some reality-testing questioning to verify whether consequences of the agreement

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 877-78. Most seasoned mediators are at one with their duality on the issue of time. It is not uncommon for a mediator to say in the same mediation, "No case shall settle before its time," and "90% of the work happens in the last 10% of the time allocated for the task."

135. This sentiment is echoed in the OMA CORE STANDARDS 2005, *supra* note 5, Standard II cmt. 5: "Mediators should make ongoing, good faith efforts to assess the freedom and ability of each participant in the mediation and options for reaching agreement. In assessing the situation, the mediator should consider factors such as the abilities, learning style, language competency, and cultural background of each participant." *Id.*

136. Lande, *supra* note 100, at 878.

are understood.¹³⁷

Professor Lande hypothesizes that these seven factors cumulatively are good indicators of the extent to which a mediation process enhances or diminishes the quality of the parties' consent, which is an intrinsic benefit of the mediation process itself.¹³⁸ These factors may also reflect the parties' perception of the mediation process as having inherent fairness and one in which procedural due process is offered.

VII. MEDIATION ETHICS 401—THE IMPACT OF PERCEIVED PROCEDURAL DUE PROCESS

Mediators should uphold the perception and reality of procedural due process. As discussed above, mediators should explain to the parties how their particular approaches may affect the parties and their process, and subsequently make a conscious effort throughout the mediation to alert the parties and secure their permission before shifting from one approach to the other. By doing so, mediators invite parties to become full participants in the process and guide its direction.

Mediation was first introduced into the courts as an "alternative"¹³⁹ resolution process to provide a benefit for the participants when compared to litigation.¹⁴⁰ Underlying its introduction was a belief in the inherent fairness of the process.¹⁴¹ Professor Nancy A. Welsh argues that the added benefit provided by mediation is actually the experience of procedural justice, also referred to as procedural due process.¹⁴² She describes research in the field of procedural justice showing that citizens "want the courts to resolve their disputes in a

137. *Id.*

138. *Id.* at 878–79.

139. *Cf.* Oregon Judicial Department, Oregon Courts Programs, <http://www.ojd.state.or.us/programs/index.htm> (last visited Apr. 9, 2007) (referring to "ADR" as "Appropriate Dispute Resolution").

140. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 788 (2001).

141. The OMA Core Standards apply an "Impartial Regard" standard.

Mediators demonstrate Impartial Regard throughout the mediation process by conducting mediations fairly, diligently, evenhandedly, and with no personal stake in the outcome. Mediators avoid actual, potential, or perceived conflicts of interest that can arise from a mediator's involvement with the subject matter of the controversy or the participants, whether past or present, that reasonably raise a question about the mediator's Impartial Regard. Where a participant or the mediator questions the mediator's Impartial Regard and the issue cannot be resolved, the mediator declines to serve or withdraws if already serving.

OMA CORE STANDARDS 2005, *supra* note 5, at Standard III.

142. Welsh, *supra* note 140, at 791.

manner that *feels like justice is being done*.¹⁴³ Professor Welsh observes the popular perception of the dispute resolution process as one that ultimately serves the courts' goals of delivering justice and fostering respect for the judiciary:

This yearning for the experience of justice is so profound that disputants' perceptions regarding procedural justice affect their perceptions of the distributive justice that is delivered by a dispute resolution process, their compliance with the outcome of the dispute resolution process, and their perception of the legitimacy of the institution providing or sponsoring the process. Ultimately, insuring that mediation comes within a procedural justice paradigm serves some of the courts' most important goals—delivering justice, delivering resolution, and fostering respect for the important public institution of the judiciary.¹⁴⁴

Welsh further articulates the needs and desires of parties in a dispute:

[D]isputants want and need the opportunity to tell their [stories] and control the telling of [those stories]; disputants want and need to feel that the mediator has considered their story and is trying to be fair; and disputants want and need to feel that they have been treated with dignity and respect.¹⁴⁵

Research theories about procedural justice “explain that these procedural attributes are important for two primary reasons.”¹⁴⁶ First, the parties “value the opportunity to express their views because this provides them with the opportunity to influence the final outcome of the dispute resolution process.”¹⁴⁷ This ability to influence the outcome “is important . . . in mediation because the [parties] will not reach an agreement [with a high quality of consent] unless they sufficiently influence each other, either directly or through the mediator.”¹⁴⁸ Secondly, the parties “care about their interaction with the

143. *Id.* (emphasis added).

144. *Id.* at 791–92 (citations omitted).

145. *Id.* at 792 (citations omitted).

146. *Id.*

147. *Id.*

148. *Id.*

mediator because a third party . . . represents legal authority.”¹⁴⁹

Professor Welsh focuses on four changes she considers negative from the viewpoint of perceived procedural due process.¹⁵⁰ The four adjustments she perceives as negatives in mediation practice are (1) the reduced role for disputants when their attorneys attend and dominate the mediation sessions, (2) the preference for evaluative interventions by the mediator, (3) the abandonment or marginalization of the joint session, and (4) the lack of creativity in the settlements produced.

A. The Reduced Role for Disputants

Welsh shares a perception among some in the field that the “movement [has] been hijacked by the lawyers”¹⁵¹ who have “consciously or unconsciously . . . co-opted the [mediation] process.”¹⁵² In civil, non-family court-connected mediation, the disputants’ role, and even the need for their presence, has diminished.¹⁵³ This is often because defendants’ insurance companies, not the defendants themselves, control the money to provide a settlement and therefore enjoy full negotiating power.¹⁵⁴ In such settings, the individual parties may defer to the attorneys to do much of the talking, and may be absent from some caucus sessions, a practice that suggests a timely and efficient means of resolving disputes.¹⁵⁵ The agents are, after all, professionals who bring expertise, detachment, and tactical flexibility to the process.¹⁵⁶ Welsh suggests “[indeed], the disputant may even be a distraction.”¹⁵⁷

If mediation is seen as just a means to negotiate a result, mediators in civil, non-family disputes might rationally permit or even encourage the attorneys and other agents to play the central roles and reduce or even eliminate the participation of the individual parties.¹⁵⁸

149. The mere presence of a third party changes the dynamic from a dyad to a triad. The field of sociology has often explored and commented on the impact of a third person, whether conscious or not. The German sociologist, Georg Simmel, started the study of triads, a group of three people. It is a common topic in microsociology, and mediation could benefit from cross-fertilization with that field.

150. Welsh, *supra* note 140, at 797. The four changes are listed as subheadings VII. A–D; the phrasing comes from Welsh. *See id.* at 797–814.

151. *Id.* at 797.

152. *Id.* (citing Alison E. Gerencser, *Alternative Dispute Resolution Has Morphed into Mediation: Standards of Conduct Must Be Changed*, 50 FLA. L. REV. 843, 849 (1998)).

153. *Id.* at 801.

154. *Id.* at 802.

155. *Id.* at 802–03.

156. *Id.* at 803–04.

157. *Id.*

158. *Id.* at 805.

However, it is important to realize that this trend of reducing the participation of individual parties is a result of the goal of negotiating a prompt settlement and not the achievement of a sense of perceived fairness by the parties.¹⁵⁹

B. The Preference for Evaluative Interventions by the Mediator

Professor Walsh reports "attorneys . . . want mediators to provide opinions on the merits of cases and even want mediators to give their view of settlement ranges."¹⁶⁰ Mediation has developed an evaluative cast.¹⁶¹ Attorneys, who generally choose to mediate and select the mediator without much, if any, client consultation, often value evaluative interventions by the mediator,¹⁶² and may regard the mediators' evaluations as a "double check" for their own estimates of the odds of winning or the value of their case.¹⁶³ Attorneys generally apply a rational, expected value analysis to determine when and whether to settle.¹⁶⁴ When attorneys take an active role in the mediation process, "they often . . . persuade their clients to adopt this rational approach" and sometimes implicitly to abandon considerations such as being treated fairly or to having the validity of a position acknowledged.¹⁶⁵ This allows settlement to become more likely, which is seen as the desired result.¹⁶⁶

C. The Abandonment or Marginalization of the Joint Session

In civil, non-family court-connected mediations, the use of the joint session has been marginalized, perhaps even abandoned. In the traditional mediation models embraced by the transformative and fa-

159. *Id.*

160. *Id.* (citing ROSELLE L. WISSLER, AN EVALUATION OF THE COMMON PLEAS COURT CIVIL PILOT MEDIATION PROJECT ix (2000)).

161. *Id.*

162. *Id.*

163. *Id.* at 808.

164. *Id.* at 807. Bargaining theory explains why encouraging evaluative interventions may help generate movement in the negotiating room and ultimately reach settlement. Even though the process appears more efficient, it may, in fact, not address the root causes of the conflict or allow the disputants the opportunity to examine the dispute personally with an eye toward building or sustaining relationships. On the other hand, the objectives of some parties in civil non-family disputes are not rooted in repairing damaged relationships, but rather simply in saving time and money.

165. *Id.*

166. *Id.*

cilitative practitioners, parties expect to meet in joint session, face-to-face, and this is seen as consistent with party control and Self-Determination.¹⁶⁷ Face-to-face sessions have traditionally been held for neighborhood, small claims, and family disputes.¹⁶⁸ “[H]owever, an increasing number of mediators are abandoning or greatly minimizing the joint session, preferring instead to move quickly to caucus and keep the parties separate for the remainder of the mediation.”¹⁶⁹ Anecdotal evidence collected by Professor Welsh indicates that some mediators fear emotional, hostile, or inflammatory remarks made in joint session will make settlement more difficult to achieve.¹⁷⁰

Professor Welsh notes that many mediators believe the parties are more likely to provide more reliable information in caucus than in joint session, and that caucus gives the mediator “more control over the transmission and framing of information.”¹⁷¹ Mediators in caucus may tend to deliver the parties’ arguments or positions “translated,” or stripped of implicit threats or insults that could emotionally impede efforts to reach settlement.¹⁷² This method may tend to remove the element of negative influence from a bad relationship.¹⁷³ As a result, a party may be able to be more objective about possible concessions, alternative perspectives, or a proffered settlement proposal¹⁷⁴ when delivered by the mediator. Again, these advantages are based on the assumption articulated by Welsh that the primary goal in mediation is settlement, and may ignore the parties’ needs for voice, contribution to the result, perceived fairness, and procedural due process.

D. The Lack of Creativity in the Settlements Produced

Settlements reached in court-connected mediation have suffered from a lack of creativity, a phenomenon that stands in stark contrast

167. *Id.* at 809.

168. *Id.*

169. *Id.* at 810 (referring to BOBBI MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT: THE IMPACT OF RULE 114 ON CIVIL LITIGATION PRACTICE IN MINNESOTA 39 (1997)).

170. *Id.*

171. *Id.* at 811.

172. *Id.*

173. *Id.* at 812.

174. The “mediator’s proposal” technique is often used at the point of perceived impasse to create an opportunity for the parties to say “yes” to a deal. The mediator proposes settlement terms that are not necessarily his or her notion of the parties’ MLATNA (Most Likely Alternative to a Negotiated Agreement), but instead a place between (seldom the mid-point) the then competing positions that the parties might consider acceptable. The process works in large part because the proposal does not come from the other side. It is easier to say “yes” to the mediator than it is to the opponent. This tool, commonly used by evaluative mediators, utilizes “face saving,” a tool embraced by all approaches.

to the widespread recognition that mediation is a process that encourages creativity in meeting disputants' unique needs.¹⁷⁵ Professor Welsh notes recent empirical data indicating "relatively few lawyers chose mediation for its creative potential," and mediation most often results in traditional, distributive outcomes.¹⁷⁶ This has prompted one commentator to write, "[i]n litigation, money is the substitute (that is, remedy) for every 'wrong.' Is [money] the only language trial lawyers have?"¹⁷⁷

This sentiment falls in line with traditional negotiation with settlement as the primary goal. By contrast, integrative negotiation "celebrates the search for non-monetary, creative solutions that meet the underlying needs [of the parties]."¹⁷⁸ Welsh is saying that these "improvements" inappropriately include the reduced role of the parties, the overuse of a BATNA-like analysis in decision-making, and more shuttle diplomacy, all of which diminish the parties' capacity to resolve the dispute themselves. This is the same concern Laflin puts forth surrounding the mediator becoming the central actor in the process.¹⁷⁹ The result of these so-called improvements is the erosion of the core principles of Self-Determination that make mediation so different from the adversarial system of the courts.

VIII. HOW MEDIATORS' OBLIGATIONS ARE IMPLEMENTED IN THE REAL WORLD

A. The Approaches on the Ground

As mediators strive for High-Quality Consent and procedural due process, they should assist the parties in understanding and selecting the approach that will be best suited for their dispute. How do they go

175. Welsh, *supra* note 140, at 813.

176. *Id.*

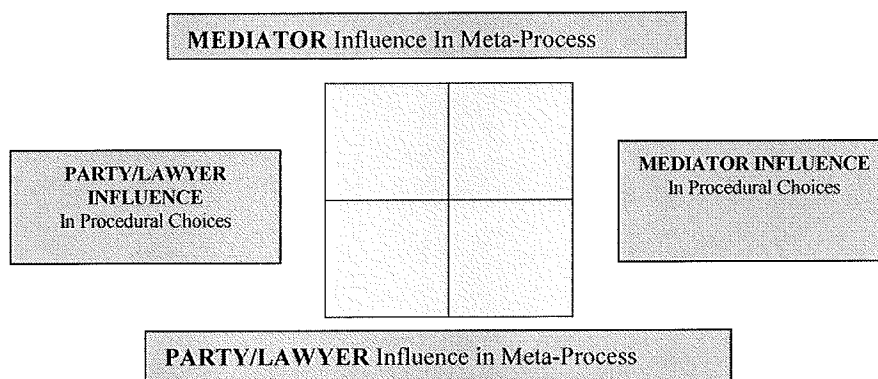
177. *Id.* (quoting Barbara McAdoo, *The Future of ADR: Have They Come for the Right Reason?*, 3 J. ALT. DISP. RESOL. EMP. 8, 10 (2001)). This criticism is based upon the assumption that the attorneys are not in touch with what their clients really need out of a conflict. That assumption is ill informed and further marginalized by the reality that the court system, as currently constituted, is often limited in the type of remedies available to litigants. While courts sitting in equity can and do award non-economic remedies, the core desire of most parties is to feel heard, be treated fairly, and receive a just result. Sometimes, their underlying "interest" is just the money, yet we mediators suggest such a desire is base and inappropriate. Why?

178. *Id.* at 814.

179. Laflin, *supra* note 22.

about this difficult task? Is it truly practical to have this conversation in the real world? They must first attempt to define the approaches at the operational level. Continuing the mediator-centric theoretical conversations will neither assist the parties, nor benefit the field.

First, mediators could provide Riskin's Meta-Procedural grid¹⁸⁰ to the participants as a way to introduce and explain the mediator approach conversation. While he suggests its use for "subsequent" procedural decision making, it also works well here during a pre-negotiation discussion about approaches. His grid follows:



The all-too-common practice is for the mediators to assume that we "own the process" and the participants own the "outcome." That assumption should be challenged regardless of the mediators preferred approach. It dilutes Self-Determination, impacts procedural due process and ignores High-Quality Consent. Assuming a transformative approach is no more or less problematic than assuming an evaluative or facilitative approach. Making such an assumption inserts one's own "stuff" into the party's dynamic, is paternalistic, and non-empowering. The following chart also shows it is dangerous on a practical level.

180. *New New Grid*, *supra* note 42.

Assuming the best-case scenario where each party makes the same assumption, the mediator only has a 33% chance of matching their selection, which are not very good odds. In fact, if each party makes a different assumption, by definition, there is no agreement on which approach to use. Additionally under that scenario, the mediator's implementation of her or his assumption results in one of three negative outcomes: (1) Party A is unhappy, (2) Party B is unhappy, or (C) Each is unhappy. Thus, the need to have the approach discussion seems evident.

There are asserted differences between the approaches that emerge in the literature and at mediation conferences. Painting with the broad brush of generalization to note commonly asserted differences, even if regularly observed in the breach; the following chart is a tool to explain to the parties and their representatives the various approaches and some of their practical differences. It is offered with great trepidation because it will be met with well-founded objections from adherents to each approach. This is not a definitive comparison of the various approaches. Instead, it is the proverbial "straw" proposal, from which we can collectively push against, edit, and ultimately create a practical consensus-based construct that can then be modified by each mediator to fit his or her approach.

Pre-Session Approach Assumptions

Mediator's Assumption (M)	Party A's Assumption (A)			
		<i>Transformative</i>	<i>Facilitative</i>	<i>Evaluative</i>
	<i>Transformative</i>	M, A, B		
	<i>Facilitative</i>		M, A, B	
	<i>Evaluative</i>			M, A, B
Party B's Assumption (B)				

Mediator Approaches and Their Differences

Approach	"Transformative"	"Facilitative"	"Evaluative"
Negotiation Theory	Interest-Based Relational	Interest-Based Preference	Rights-Based Distributive
Mediator's Value	Process	Process	Results
Central Actor	Party	Party	Attorney-Focused
Reference Points	Relationship	Relationship Preference	Legal Rights & Responsibilities
Communication Style	Listen	Explore	Argue
Goal	Fairness and "Resolution"	Prefer "Resolution"	Power and "Settlement"
Decision-Making Reference Points	Perceptions & Subjective Standards	Combination	Evidence & Objective Standards
Length of Sessions	Longer	In-between	Shorter
Underlying Values	Self-Determination	Both	Protection of Rights
Disclosure Expectations	Full Disclosure	Full Disclosure Preference	"Secret" Information OK
Number of Sessions Assumption	One or More Sessions	One or More Sessions	One Session
Mediator's Skills	Process Expertise	Process Expertise and Subject Matter Familiarity	Process Familiarity and Subject Matter Expertise
Party's Interests	Non-Economic	Economic and Non-Economic	Primarily Economic
Negotiation Style	Collaborative	Combination	Aggressive

Using this chart as a vehicle to explain the different approaches, the mediator can help the parties select, or at least be better informed about, the actual mechanics of the mediation process to which they are about to agree. The effectiveness of the mediator in seeking to deliver a resolution consistent with the parties' needs is crucial to their perception and the reality of basic fairness and procedural due process, which come when the mediator pursues High-Quality Consent.

B. What Type of Conflict Do the Parties Bring to the Table?

In contemporary mediation literature, discussions of the goals sought in mediation have tended to focus on the best mediator approach or on the desired outcome (distributive versus integrative). This framing of the issue has been mediator-centric—viewed through the eyes of the mediator—and has resulted in dividing the field. It is important to step back and view the process from the perspective of the parties. The discussion of conflict goals from the viewpoint of the parties will enable us to begin a determination of whether the parties are getting a satisfactory outcome in terms of what *they* are seeking in mediation.

“Life,” as Freud supposedly said, “*is* conflict.” Douglas Noll’s “conflict goals” incorporates the CRIP model proposed by Wilmot and Hocker.¹⁸¹ The CRIP model (Content, Relationship, Identity, and Process) can be used as an analytical tool to understand the dynamics of conflict and its goals, which “involve substantive rights and obligations.”¹⁸² A controversy over money is a typical conflict goal, because both parties seek some sort of compensation, but it is not the lone cause of the conflict.¹⁸³ Relationship goals have an emotional basis, reveal the “who” in conflict, and may be characterized by imbalances in power, status, or justice.¹⁸⁴ Identity goals relate to a disputant’s own sense of self, and may be characterized by feelings of being challenged, threatened, or humiliated.¹⁸⁵ Process goals reveal the “how” in conflict to explore the process parties will use to deal with the conflict.¹⁸⁶ Where lawyers may see resolution as an adversary process, others may see it as a collaborative venture. To be effective, mediators must understand not only the goals of the conflict itself, but also the related relationship, identity, and process goals.¹⁸⁷

C. How Far has the Conflict Escalated?

Conflict is seldom, if ever, at its beginning when it reaches me-

181. Douglas E. Noll, *A Theory of Mediation*, 56 DISP. RESOL. J. 78 (2001) (drawing on the CRIP model proposed in WILLIAM W. WILMOT & JOYCE L. HOCKER, INTERPERSONAL CONFLICT 63–82 (5th ed. 1998)).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 79.

186. *Id.*

187. *Id.*

diation. The mediator should objectively ascertain how far the conflict has escalated in order to help assess what outcomes the parties are seeking and what mediator approach is appropriate. Noll draws on the work of Spillman and Spillman to explore the escalation of conflict in five stages, noting as the conflict escalates, the parties tend to regress in their maturity of dealing with the process of the conflict.¹⁸⁸ Stage One conflict is the garden-variety type, common in everyday life and is often resolved by looking for objective solutions in a cooperative manner.¹⁸⁹ Sometimes conflict will progress to Stage Two, where parties fluctuate between cooperation and competition, using logic and argument to defeat the other.¹⁹⁰ In Stage Three, hostility sets in and parties lose hope for a common solution. They begin to resort to concrete power-grabbing tactics by hiring lawyers and moving toward litigation.¹⁹¹ In Stage Four, parties are aware of each other's perspectives but are incapable of considering the other's thoughts, feelings and situation.¹⁹² In Stage Five, the most severe conflict stage, parties see each other as enemies; seek to injure each other and engage in hurtful behavior, thus provoking further escalation.¹⁹³

Understanding the conflict stage schematic is useful for mediators and parties in conflict. Before beginning the negotiation portion of the mediation, mediators should engage the parties in helping them understand this conflict stage construct, recognizing that those insights will influence their discussion and selection of the mediator approach that is best suited for the current stage of their conflict.

D. What Does This All Mean for the Process, the Appropriate Approach, the Mediator, and the Parties?

The conflicts presented in mediation are as diverse as the parties themselves are, especially as they bounce off each other in the intersection of logic and emotion. Each party comes to the table with different, often unarticulated, reference points of fairness. Each is struggling to exit the process with a sense of a just outcome, but justice is subjective and situation-specific. The mediator is well positioned to help the parties surface their unspoken needs and give voice to their reference points by providing various conflict constructs to help normalize their feelings and move forward with the accurate belief that

188. *Id.* at 79 (citing Kurt R. Spillman & Kati Spillman, *On Enemy Images and Conflict Escalation*, 127 INT'L SOC. SCI. J. 57 (1991)).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 80.

they are negotiating the unwanted intersection they find themselves in as effectively as possible. The mediator must first view the conflict as the parties define it, offer alternative perspectives if appropriate, and be willing to adapt their approach to create a process that is likely to allow the parties to reach their true goals.

E. Bringing These Concepts Together

The following chart is presented for discussion purposes. Graphically, if we had to pick one, which approach is most likely to work best for the parties based on their goals and the stage of conflict? It is offered to begin that discussion inside, and eventually outside of, the mediation community. It can be used to explain the intersection between the parties' goals and the stages of conflict. The parties can then better appreciate the numerous dynamics underlying the mediation process. From there, the conversation can flow toward the selection of the appropriate mediator approach. The selection of the appropriate mediator approach is crucial to the perception and the reality of basic fairness, procedural due process, and High-Quality Consent.

STAGES/GOALS:	Topic Substantive Rights and Obligations	Relationship Between the Parties	Identity Feelings	Process Negotiation Over How
One: Low Key and Blows Over	NM	NM	NM	NM
Two: Cooperate and Compete	A	T, F	T, F	A
Three: Attack, Justify and Blame	A	T, F	T, F	A
Four: No Objectivity – Action and Reaction	E	T, F	T, F	A
Five: Overt Attempts to Hurt Each Other	E	T, F	T, F	A

T = Transformative; F = Facilitative; E = Evaluative; A = Any;
 NM = No Mediation

F. The Approaches at the Operational Level

The above charts provide tools for the mediator-participant discussion at the macro level. The following chart looks at the issue of mediator approaches at the tool or implementation level—the micro level. As before, this chart utilizes the three main mediation approaches and it is designed to stimulate discussion in hopes of achieving a workable consensus for our collective use when discussing this matter with prospective parties. Several tools have different names, but essentially serve the same function. For example, are “reality testing” and conducting a “BATNA analysis” really that different? Nevertheless, the latter is often criticized as something those “evaluative” mediators inappropriately do, and in fact, they are not even mediating when they do it!

What if the parties’ underlying interests are to assess their risk of settling versus going to trial because it is all just about the money to them? What if, as Bernie Mayer suggests, the parties actually want and need to fight?¹⁹⁴ What if they want “their day in court,” as the expression goes? No one would dare say at a non-evaluative mediator conference, “I can’t believe the parties’ underlying interests are just about how they feel—jeez, how un-evolved!”

The same is true when evaluative mediators instinctively focus the parties on the legal aspects of a case when they are more concerned about the relationship issues. What is wrong about the parties being uninterested in the probable legal outcome? What if they only want to apply their personal definitions of fairness and justice? No one would dare say at a non-transformative or non-facilitative mediator conference, “I can’t believe the parties’ underlying interests are about the money—jeez, how un-evolved!” The parties should be allowed to determine their underlying interests and not be pushed, or even nudged, to view them differently just because the mediator’s value system and approach are different. Is that not what Self-Determination is all about?

Additionally, most of these tools are used, in some variation, regardless of the mediator’s approach. Often the question becomes when are they used, how frequently, or how forcefully? The use or non-use of these tools in the hands of a skilled mediator can help the parties redefine the problem and break an apparent impasse. Not using some of these tools where appropriate can be construed by the more sophisticated users of mediation as the mediator’s signal that they will not work. Remember, the parties and their representatives always have the mediator under the microscope, looking for clues to help them

194. MAYER, *supra* note 11.

craft and re-craft their negotiation strategy to garner advantage over their opponent. Yes Stan, it is true—not everyone is looking for a collaboratively developed solution based upon common interests. Instead, some parties are focused on *power*,¹⁹⁵ not mutual respect.

As a result, it seems desirable to have a generally accepted construct as to what approaches use what tools and when these tools may help the parties better understand the differences in the various mediator approaches. Using the therapy analogy, some people want and expect to discuss their childhoods, while others want to talk about specific behavioral modifications designed to stop their compulsion to specific destructive behaviors. The following chart can be used to help simplify the mediator's discussion with the parties about the available mediator approaches. So, if you had to put each implementation tool in the box where it is the best fit consistent with the underpinnings of an approach, where would you put it? As before, this "straw proposal" will be tested and refined over time. Even then, the use of these tools should be adjusted by each mediator to better fit their sense of the differences and how they can implement (or hybridize) each of the core approaches for the benefit of the parties. Riskin describes the decisionmaking surrounding the use of the following tools as "procedural" and suggests a graphic to depict the tension between the mediator's influence and the party/lawyer influence, overlaid with the mediator's behavior as being either "evaluative" or "not evaluative."¹⁹⁶

1. Implementation Tools and Associated Approach

TOOL/APPROACH	TRANSFORMATIVE	FACILITATIVE	EVALUATIVE
Explain Approaches		X	
Focus on Interests		X	
Focus on Rights			X
Focus on Relationship	X		
Joint Session	X		

195. The infamous Al Capone is primarily known for his life of conflict creation; but toward the end of his life, he had a fair amount of time on his hands while rotting in Alcatraz. There, he became a commentator on dispute resolution by reportedly saying, "You can get further with nice words and a gun, than you can just with a gun!"

196. *New New Grid*, *supra* note 42, at 44.

Caucus			X
Joint Session And Caucus		X	
Pre-Mediation Submissions			X
Full Party Disclosure	X		
Process Expertise		X	
Relationship Expertise	X		
Subject-Matter Expertise			X
Mediator Options		X	
Mediator Opinions			X
Mediator Raises Matters Not Discussed by Parties			X
Legal Information			X
Mediator Declares an Impasse			X
Mediators Raise Interests of Those Not at the Table		X	
Advise Parties on When to Make a Proposal			X
Advise Parties on What to Propose			X
Advise Parties on What Arguments to Make			X
Advise Parties on When to Make the Arguments			X
Advise Parties on What Information to Give Other Side			X
Advise Parties on When to Provide Information to Other Side			X
Willingness to Make Conditional Offers			X

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Willingness to Hear the "Bottom Line" and Still Negotiate with Different Numbers			X
Prefers to Discuss Money First			X
Prefers to Discuss Non-economic Terms First		X	
Urge Or Require Pre-Mediation Submissions			X
Evaluate Credibility			X
Discuss Jury Appeal			X
Discuss Only Strengths	X		
Discuss Only Weaknesses			X
Discuss Both Strengths and Weaknesses		X	
Refer Parties to Outside Information		X	
Research Law Independently			X
Research Facts Independently			X
Prepare Unbinding Memorandums of Understanding			X
Prepare Binding Memorandums of Understanding			X
Prepare Formal Settlement Documents			X
File Formal Settlement Documents			X
Willing to Manage Profanity and Anger		X	
Discuss Firmness of Offers from Other			X

Side			
Rectify Procedural Power Imbalances		X	
Rectify Substantive Power Imbalances		X	
Willingness to Use "Mediator's Solution" Technique			X
Willingness to Talk to Parties Without Their Attorneys	X		
Willingness to Talk to Attorneys Without Their Parties			X
Follows Up After Formal Session		X	
Willingness to Convert From Mediator to Arbitrator on Any Issue			X
Willingness to Convert to Arbitrator for Settlement Language Disputes			X
Willingness to Convert to Arbitrator on Fees Disputes			X

Discussing the various approach constructs with the parties before the mediation session will help the mediator and the parties tease out the operational differences in the theoretical approaches and help stylize the mediator's behavior, or hybridize the mediation approaches, to be consistent with the expectations of the parties. Alternatively, the mediator may choose to create her or his own chart simply noting what tools she or he uses and what tools she or he does not use. Finally, the mediator should consider not serving and refer the parties to another mediator who may be more comfortable with the approach desired by the parties.¹⁹⁷ Unfortunately, this is not done as

197. For example, if the parties are interested in receiving an objective analysis of the case's likely judicial outcome, the mediator must have legal subject matter expertise and be comfortable with the evaluative approach in order to satisfy the articulated needs of the parties. Conversely, that same mediator may not be able to implement the desired approach of the parties because she or he is not conversant in the psychological issues

often as it should be. Is it because mediators are underemployed or because each of the approaches really is fungible in practice?

2. Party Pre-Engagement Questions: Approaches

Alternatively or additionally, the mediator could ask the parties a series of pre-engagement questions to get a sense of what the expectations of the parties are surrounding mediator behaviors. While this exercise cannot be rote, there are critical decision points that often arise in most mediations. Securing the parties agreement on how the mediator should respond will go a long way toward implementing the concepts of Self-Determination, High-Quality Consent, and procedural justice. These questions could include the following:¹⁹⁸

- (A) Will we use a transformative, facilitative, evaluative, hybrid, or some other model for this mediation? What do these terms mean to you? Can the model change, and if so, under what circumstances?
- (B) Will we use an "interest-based" or "rights-based" approach?
- (C) Is your relationship with the other party or adherence to the law more important to your belief that the process and resolution is fair? What reference points will you look to when determining fairness?
- (D) Are there time or financial constraints affecting your choice of mediation models?
- (E) Will the parties meet only in joint session, only in private caucus, or both? Under what circumstances and conditions, if any, will the process move from joint session to caucus or vice versa?

underlying this dispute. See OMA CORE STANDARDS 2005, *supra* note 5, Standard V cmt. 1.

198. See Imperati, *supra* note 6, at 742–43 for an earlier version of these questions.

- (F) Will there be pre-mediation submissions to the mediator? If so, will they be confidential? Will they be shared with the other side, completely or in part?
- (G) Must both parties fully disclose all relevant information, or is it appropriate for a party and/or the mediator to have information that the other party does not have?
- (H) How much subject matter expertise should the mediator have, and when and how should such expertise be used?
- (I) Should the mediator offer options or propose settlement terms? If yes, under what circumstances?
- (J) Should the mediator offer opinions? If yes, under what circumstances?
- (K) Should the mediator raise issues, claims, or defenses? If yes, under what circumstances?
- (L) Should the mediator make the parties aware of the importance of consulting other professionals? If yes, under what circumstances?
- (M) Should the mediator intervene if one party is about to accept a settlement when, in the mediator's opinion, that party is likely to achieve a more favorable result in court or elsewhere?
- (N) Should the mediator raise or advocate for the interests or rights of a party missing from the mediation? If yes, under what circumstances?
- (O) Should the mediator offer "legal information" as contrasted with "legal advice?" If yes, under what circumstances?

- (P) What exceptions to confidentiality, if any, will be observed in this mediation?
- (Q) Should the mediator rectify "power imbalances" between the parties? If yes, under what circumstances?
- (R) Should the mediator raise or suggest other ADR processes (for example, mini-trial, summary jury trial, arbitration)? If yes, under what circumstances?
- (S) When, if ever, should the mediator declare the mediation over? More specifically, should the mediator withdraw or postpone a session if a party cannot participate because of drug or alcohol use or other physical or mental incapacity?

Together, the charts and questions should be edited by each mediator to tailor them to the types of cases they do and their understanding of these concepts. Each mediator should prepare a clear and concise statement outlining the mediation approach or approaches she or he uses and give examples of the behaviors they do and equally importantly do not do in mediation. Nobody has a monopoly on the answers. In fact, one of the motivations for this article was the lack of practical clarity surrounding these issues. Ultimately, the information can be transmitted to the parties in a pre-session explanatory letter, referenced on the mediator's website, be included in the Agreement to Mediate, or discussed at the beginning of the mediation session as the circumstances dictate.¹⁹⁹

3. Mediator Self-Assessment: Approaches

As noted above, each mediator should adjust this proffered chart and its questions to better fit their construct of the core approaches and decide how they can implement (or hybridize) each approach for

199. See OMA CORE STANDARDS 2005, *supra* note 5, at Standard 10 cmt. 13 ("Mediators should provide these Core Standards to the mediation participants as soon as practical.").

the benefit of the parties. In furtherance of this work, the following is an updated mediator behavior survey²⁰⁰ to tease out some of these issues and further define this work. The then-current version of the survey can be found at <http://www.mediate.com/ICM>. The website will also provide updates summarizing the input received from the mediator and mediation user communities and suggest further refinements to the working draft constructs contained in this article.

- A. Which mediator approach do you most identify with?
 - (A) Transformative
 - (B) Facilitative
 - (C) Evaluative
- B. Do you typically explain the three common mediator approaches to the participants before having substantive mediation communications?
 - (A) Yes
 - (B) No
- C. Do you typically explain each of the confidentiality exceptions to the participants before having substantive mediation communications?
 - (A) Yes
 - (B) No
- D. In which of the following categories do you conduct most of your mediator work:
 - (A) Commercial
 - (B) Family
 - (C) Tort
 - (D) Other
- E. During the last 12 months, what percentage of your work time was spent as a mediator?
 - (A) 0-25%
 - (B) 26-50%
 - (C) 51-75%
 - (D) 76-100%

200. The author would like to acknowledge Dr. Ruth Parvin, Portland, Oregon, for her work in the 1990s on the initial version of this survey.

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MEDIATORS, WHO WOULD THE PARTIES PICK
AND WHAT ARE THE
MEDIATOR'S OBLIGATIONS?

- F. How long does it take you to complete a typical mediation?
- (A) 1/2 day
 - (B) 1/2 to 3/4 day
 - (C) All day
 - (D) More than one day
- G. If asked by a prospective party what your "settlement rate" was, which of the following are you most likely to say:
- (A) I don't keep track because . . .
 - (B) Lots of my cases settle
 - (C) The majority of my cases settle
 - (D) I settle X% (precise number) of my cases
- H. How frequently are lawyers present at the mediations you conduct?
- (A) 0-25%
 - (B) 26-50%
 - (C) 51-75%
 - (D) 76-100%
- I. When lawyers are present, with who do you typically communicate?
- (A) Almost exclusively with the parties
 - (B) Mostly with the parties
 - (D) Mostly with the attorneys
 - (E) Almost exclusively with the attorneys
- J. Legal rights and responsibilities, as opposed to underlying interests, are the guiding focus in what percentage of your mediations?
- (A) 0-25%
 - (B) 26-50%
 - (C) 51-75%
 - (D) 76-100%

- K. How often do you use caucusing in your mediation practice?
- (A) Almost Never
 - (B) Occasionally
 - (C) Regularly
 - (D) Almost Always
- L. What do most *parties* who have not talked with an attorney expect of the typical mediator?
- (A) Process expertise
 - (B) Subject matter expertise
 - (C) Process expertise and subject matter familiarity
 - (D) Process familiarity and subject matter expertise
- M. What do most *attorneys* expect of the typical mediator?
- (A) Process expertise
 - (B) Subject matter expertise
 - (C) Process expertise and subject matter familiarity
 - (D) Process familiarity and subject matter expertise
- N. Which of the following do *you* believe a competent mediator needs?
- (A) Process expertise
 - (B) Subject matter expertise
 - (C) Process expertise and subject matter familiarity
 - (D) Process familiarity and subject matter expertise
- O. How frequently do you provide "*legal* information" when you conduct mediations? ("Legal Information" is a general statement of an established principal of law.)
- (A) Almost Never
 - (B) Occasionally
 - (C) Regularly
 - (D) Almost Always
- P. How frequently do you provide "*factual* information" when you conduct mediations? ("Factual Information" is a general statement of a commonly accepted fact.)
- (A) Almost Never
 - (B) Occasionally
 - (C) Regularly
 - (D) Almost Always

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MEDIATORS, WHO WOULD THE PARTIES PICK
AND WHAT ARE THE
MEDIATOR'S OBLIGATIONS?

- Q. I am more comfortable managing the legal issues versus the emotional ones.
- (A) True
(B) False
- R. I typically control the flow of information (for example, re-framing derogatory remarks; choosing what information to convey to the other party, and when).
- (A) Somewhat Agree
(B) Agree
(C) Somewhat Disagree
(D) Disagree
- S. An accepted part of a mediator's role is to have information from one party that the other party is not privy to.
- (A) Somewhat Agree
(B) Agree
(C) Somewhat Disagree
(D) Disagree
- T. Do you agree or disagree with the following statement, "My role as a mediator should include assisting the parties in understanding and/or repairing underlying personal/professional relationships even if a settlement is not reached."
- (A) Somewhat Agree
(B) Agree
(C) Somewhat Disagree
(D) Disagree
- U. Do you agree or disagree with the following statement, "When mediating, I typically keep the parties focused on the evidence, rather than on their subjective impressions."
- (A) Somewhat Agree
(B) Agree
(C) Somewhat Disagree
(D) Disagree

- V. What do you do when neither party raises an issue you believe is important?
- (A) Almost never raise it
 - (B) Occasionally raise it
 - (C) Regularly raise it
 - (D) Almost always raise it
- W. If and when you do raise such an issue, whom do you typically talk with?
- (A) The side it helps
 - (B) The side it hurts
 - (C) Both
- X. How often do you offer settlement *options* for the parties to consider?
- (A) Almost never
 - (B) Occasionally
 - (C) Regularly
 - (D) Almost always
- Y. How often do you express *opinions* about the likely judicial outcome?
- (A) Almost Never
 - (B) Occasionally
 - (C) Regularly
 - (D) Almost Always
- Z. What do you do when the party with the least power is about to accept a settlement that is not as good as the result they would likely get in court?
- (A) Do nothing
 - (B) Ask a question that might cause the party to rethink their decision
 - (C) Strongly suggest the party "sleep on it"
 - (D) Advise the party not to take the deal
- AA. Does your answer to the above question change if one or more of the parties are represented by an attorney?
- (A) Yes
 - (B) No

BB. Are you typically willing to subsequently arbitrate settlement language disputes in cases you have mediated?

(A) Yes

(B) No

CC. Are you typically willing to subsequently arbitrate attorney fees disputes in cases you have mediated?

(A) Yes

(B) No

DD. ADR practitioners are more intelligent and better looking than most other folks.

(A) Duh

(B) False

Together, each of the proffered charts and questions should be edited by each mediator to tailor them to the types of cases they do and their understanding of these concepts. Each mediator should prepare a clear and concise statement outlining the mediation approach or approaches she or he uses and give examples of the behaviors he or she does, and equally importantly, does not do in mediation. Nobody has a monopoly on the answers. In fact, one of the motivations for this article was the lack of practical clarity surrounding these issues. Ultimately, the information can be transmitted to the parties in a pre-session explanatory letter, referenced on the mediator's website, included in the Agreement to Mediate, or discussed at the beginning of the mediation session, as the circumstances dictate.

IX. CONCLUSION—ARE THE PARTIES TO MEDIATION GETTING THE APPROACH THEY NEED?

It is time to answer the question first asked, "If Freud, Jung, Rogers, and Beck were mediators, who would the parties pick?" Sigmund Freud, Carl Jung, Carl Rogers, and Aaron Beck,²⁰¹ represent not just their approaches to psychology, which have evolved into unique practices of psychology, but the desirability of aligning oneself professionally with his or her personal approach to their trade. This article has attempted to put forth that challenge to our field: to identify the mediator's unique approach to mediation, to articulate that

201. For a current look at the evolution of Beck's theory, see generally DAVID D. BURNS, *FEELING GOOD: THE NEW MOOD THERAPY* (1999).

approach to the mediation parties, and finally to obtain their informed consent before moving forward. We are still “growing up.” Mediation is reaching the stage where the practice of therapy has stood for some time. Each therapeutic approach has something to contribute to those seeking help. Better results are achieved when the selected approach meets the process needs of the patient. Are we mediators ready to do the same thing?

If so, we need to know what mediation approach the parties are seeking when they come to mediation. The basic ethics of mediation mandate Self-Determination and informed decision-making by the parties. Clearly, prospective parties have the right to decide which approach to mediation is best for them after considering the relevant options that are available and not just those options offered by that particular prospective mediator.

The research and analytical work done by Professors John Lande and Nancy Welsh has pointed the way to important insights into the mindset of the parties who approach mediation. Parties come seeking to be actively involved in the process—to have the opportunity for High-Quality Consent in all the decisions made in mediation. The perceived quality of the parties’ experience can be increased in direct proportion to the quality of the consent the parties have in the decision-process.

Moving toward the ideal of High-Quality Consent also moves the parties toward what research shows disputants also say they want and need—an experience of justice—an experience of perceived fairness and procedural due process in mediation.²⁰² Procedural justice research and theories show that the parties want and need the opportunity to tell their stories, feel that their stories have been considered, and believe that they have been treated in an even-handed, respectful, and dignified manner.²⁰³ Unfortunately, research also shows that much of mediation practice may be moving away from the elements likely to result in the perception of fairness and procedural due process by the parties. This yearning for justice is the hope of the prospective parties who seek mediation.

Are we doing what we have promised? Can we do more? Should we? Is Bernie Mayer correct when he asserts that mediators may be better able to help the participants by expanding their self-limiting role definitions? Has the field boxed itself in while trying to define and distinguish itself from other fields or professions? Would the parties object to an expanded role definition beyond the traditional role if

202. The need for High-Quality Consent and procedural due process exist regardless of the approach used by the mediator. Perhaps this would be less of an issue if there were only one mediation approach, but that would not serve the users of our services.

203. Welsh, *supra* note 140, at 857.

their consent was fully informed and the mediator performed competently and consistently with their expectations? Using the implementation tools that have been suggested and providing a combination of mediation approaches from which the parties may choose allows the mediator to truly re-integrate the parties into the mediation process.

Anyone who has attended a conference of mediators cannot help but notice the "discussion"²⁰⁴ surrounding the use of the competing approaches. The topic seems to bring out the worst in us. In fact, some of the comments cannot be repeated here.²⁰⁵ Forgetting the irony and the dissonance between the mediation field's purported adherence to celebrating diversity and the frequent rancor between adherents to the competing approaches, these conversations tend to degenerate into fruitless exercises that divide us unnecessarily. We have all had experiences with mediators claiming to be disciples of approach X, only to behave more like approach Y, usually unaware of the dissonance. That incongruity aside, the discussion about these issues would benefit if we could move from the academic and philosophical underpinnings of each approach and, at least, agree on the behaviors commonly associated with each approach. Such a common understanding could assist mediators in explaining the practical differences and their ramifications, if any, to prospective mediation participants.

What are the differences between the approaches at the macro and micro levels? Do they matter? If they do, we must clearly explain the differences if we have an obligation to fully inform the parties so they can determine for themselves the best approach for them. How do we explain the differences? How context-driven is it? How can we use Riskin's "New New Grid" to frame the conversations with the parties? As a practical matter, how do we go about explaining this subject to parties who do not view conflict resolution, its processes and approaches with the same background and common vernacular as we do? Do we need to explain the continuum every time we mediate? What about repeat customers? How will we know that the parties truly understand the differences and have selected wisely? Does the mediator have an obligation to ensure they have selected wisely? Is this good theory, but impossible to implement as a practical matter in the real world of mediation? Let us have this discussion, first among

204. See OMA CORE STANDARDS 2005, *supra* note 5, at Standard 10 cmt. 7 ("Mediators should demonstrate respect for differing points of view within the field, seek to learn from other mediators, and work together to improve the practice of mediation.")

205. Nor, here! (acknowledging the creative writing of deceased Oregon Court of Appeals Judge Thomas F. Young).

ourselves and then with the users of our services.

If we cannot all just “get along,” as Rodney King suggested, can we at least stop the “dithering” and “bashing?” No one approach owns a monopoly on the definition of mediation if Self-Determination is the attribute that best distinguishes mediation from the adversarial legal system. It is fitting to end with a poem on Self-Determination in hopes of satisfying our obligation to assist the parties in understanding and selecting between the various mediation approaches that make our field so dynamic and effective.

There once was a mediator named Stan, who had not an ethical plan.

So, he said to his fears, move over, I'll try full disclosure.

Informed consent he found was great, now, the parties can mediate!