2019

Mediation Manipulation

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ETHICS COLLOQUIUM

NYSDRA

UNITED STATES FEDERAL DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MEDIATION MANIPULATION

AGENDA

23 October 2019

COLUMBIA LAW SCHOOL

5 P.M. – 7 P.M.

5:00 p.m.	Welcome & Introductions Professor Alexandra Carter, Columbia Law School
5:10 p.m.	Ethical Standards Overview
5:20 p.m.	What Does Manipulation Mean? Group Discussion
5:50 p.m.	Decision Points
6:10 p.m.	Hypothetical: Mediator Manipulation
6:30 p.m.	Hypothetical: Manipulating the Mediator
6:50 p.m.	Conclusion

TRAINER BIOGRAPHIES

PROFESSOR ALEXANDRA CARTER

Alexandra Carter is a Clinical Professor of Law and the Director of the Mediation Clinic at Columbia Law School. From 2012-2016, she also served as the Law School's Director of Clinical Programs, providing leadership in the area of experiential teaching and learning.

Professor Carter's teaching, research and publications lie in the field of alternative dispute resolution, primarily in mediation and negotiation. She has been sought as a trainer on mediation, civil procedure, negotiation and dispute systems design for many different groups from private and public sectors, including the United Nations, U.S. courts and federal agencies, private corporations and law firms. She has addressed the Chinese Academy of Social Sciences Rule of Law Conference, the 5th World Peace Conference in Jakarta, the ICU-CLS Peace Summit in Tokyo, and the Ceará Supreme Court Conference on Mediation; and has contributed as a faculty speaker at universities in South America, Asia and Europe. She has served on the Alternative Dispute Resolution Committee for the New York City Bar Association, as well as the Mediator Ethics Advisory Committee for the New York State Unified Court System.

Prior to joining the Columbia faculty, Professor Carter was associated with Cravath, Swaine & Moore LLP, where she worked as part of a team defending against a multibillion dollar securities class action lawsuit related to the Enron collapse, served as the senior antitrust associate on several multibillion dollar mergers, and handled cases involving copyright law.

Professor Carter received her Juris Doctor degree in 2003 from Columbia Law School, where she earned James Kent and Harlan Fiske Stone academic honors. She also won the Jane Marks Murphy Prize for clinical advocacy and the Lawrence S. Greenbaum Prize for the best oral argument in the 2002 Harlan Fiske Stone Moot Court Competition. After earning her degree, Professor Carter clerked for the Hon. Mark L. Wolf, U.S. District Court for the District of Massachusetts in Boston.

PROFESSOR CARTER'S RESEARCH TEAM

JENNIFER ANGE

Jennifer Ange is a third year student at Columbia Law School. She is a member of the Mediation Clinic, a Submission Editor for the Columbia Science and Technology Law Review, and a member of the Asian Pacific American Law Student Association.

JAMIE CHANG

Jamie Chang is a third year student at Columbia Law School. She is a member of the Mediation Clinic, the Business and Law Association, and the Asian Pacific American Law Student Association.

HALEY H. LING

Haley Ling is a third year student at Columbia Law School. She is a member of the Mediation Clinic, the Columbia Health Law Association, and the Asian Pacific American Law Student Association. She is also Development Editor of the Columbia Law Review.

ESTHER PORTYANSKY

Esther Portyansky is a third year student at Columbia Law School. She is a member of the Mediation Clinic, the Columbia Law Women's Association, the Jewish Law Students' Association, and the Columbia Law Revue.

EDNY ADR DEPARTMENT & COLUMBIA LAW SCHOOL ETHICS COLLOQUIUM:
MEDIATION MANIPULATION

ADDITIONAL READINGS

1. James R. Coben, *Mediation's Dirty Little Secret: Straight Talk about Mediator Manipulation and Deception*, J. ALT. DISP. RESOL. 4, Winter 2000, at 4.

2. James R. Coben, *Misrepresentations in Mediation: Efficacy, Expectations, and Ethical Norms*, J. ALT. DISP. RESOL., Summer 2000, at 4.

3. H. Scott Flegal, *Advocating for Understanding—Why the Understanding-Based Mediation Model Works*, 46 N.H. B.J. 18 (2005).

4. Timothy Hedeen, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, But Some Are More Voluntary than Others*, 26 JUST. SYS. J. 273 (2005).

5. Samuel J. Imperati & Steven M. Maser, *Why Does Anyone Mediate if Mediation Risks Psychological Dissatisfaction, Extra Costs and Manipulation—Three Theories Reveal Paradoxes Resolved by Mediator Standards of Ethical Practice*, 29 OHIO STATE J. ON DISP. RESOL. 223 (2014).

6. Jim Coben & Lela P. Love, *Trick or Treat? The Ethics of Mediator Manipulation*, DISP. RESOL. MAG., Fall 2010, at 17.

7. William H. Ross, Jr., Donald E. Conlon & E. Allan Lind, *The Mediator as Leader: Effects of Behavioral Style and Deadline Certainty on Negotiator Behavior*, 15 GROUP & ORG. STUD., 105 (1990).

8. Susan S. Sibley & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7 (1986).

9. Gary L. Welton & Dean G. Pruitt, *The Mediation Process: The Effects of Mediator Bias and Disputant Power*, 13 PERSONALITY & SOC. PSYCHOL. BULL. 123 (1987).

10. Wayne Brazil, *The Mediator as Medium: Reflections on Boxes: Black, Transparent, Refractive and Gray*, DISP RESOL. MAG., Winter 2017, at 22.

Mediation's dirty little secret: Straight talk about mediator manipulation and deception

James R. Coben, J.D.

By James R. Coben, J.D.

In my last ethics column for this Journal, I asserted that mediation is often "a process where the negotiator's propensity to lie is frequently confronted by a neutral's active encouragement of candor."[1] Frankly, I was being too kind to the mediators. In fact, mediation's dirty little secret is the degree to which mediators themselves routinely and unabashedly engage in manipulation and deception to foster settlements, albeit under the rationale of fostering self-determination. Sophisticated consumers have come to know and expect it. Unsophisticated consumers are not so lucky.

This is not simply a matter of mediator style – the distinction between facilitative and evaluative approaches about which much ink has been already spilled. Regardless of the paradigm and claims of mediator purity, close examination of predominant training methodologies and some experience with actual mediator interventions in the field confirms a distinct hollowness in the rhetoric of self-determination.

Think back on your last few employment mediations. You may have heard a mediator reframe a plaintiff's demand for $100,000 as a request for substantial compensation. The plaintiff's ultimatum that an alleged harasser be fired was transformed into recognition that there be "consequences for unacceptable workplace behavior." The mediator most likely brought a box of Kleenex to the table and strategically used empathy to connect with an injured worker. At some point, the mediator may have orchestrated an awkward period of silence to help encourage options generation. Perhaps the mediator used neuro-linguistic programming to mirror the speech patterns of the company's human resource manager in a way that maximized that person's comfort.

James Coben is a Clinical Professor at the Hamline University School of Law in St. Paul, Minnesota. He began mediating professionally in 1989 and currently serves on the Minnesota Supreme Court ADR Review Board.

In an early caucus, the mediator may have enthusiastically over-reported the extent of progress being made to encourage you to press on. Conversely, in a later caucus, the mediator pessimistically reported the threat of stalemate precisely when settlement was close at hand to encourage you to make the final necessary compromises. How many times has a mediator agreed to take a proposal to the other side as his or her own in order to help you save face? The list could go on and on.[2]

How do I influence thee? Let me count the ways. All of these mediator techniques are consistent with the basic observation from one oft-cited mediation treatise that "mediators, although neutral in relationship to the parties and generally impartial toward the substantive outcome, *are directly involved in influencing disputants toward settlement*" (emphasis added).[3] The same text, paraphrased below, goes on to catalog the myriad number of ways that mediators exercise pressure and persuasion, including:

> **Mediators themselves routinely and unabashedly engage in manipulation and deception to foster settlements, albeit under the rationale of fostering self-determination.**

- managing the negotiation process (agenda control);
- managing communication between and within parties (active listening; reframing; use of caucus);
- control of physical setting and negotiations (seating arrangements; table shape; room size);
- timing decisions (imposition or removal of deadlines for settlement; when to convey offers and responses);
- managing the information exchange (packaging information so it will be heard);
- engineering associational influence (choosing who is at the table with settlement in mind);
- use of authority (the mediator's own, as an expert or respected elder, or that of outsiders);
- managing doubt (encouraging doubt as a way to moderate a party's position);
- rewarding behavior (the offer of friendship, respect, or interest in a parties' well-being).[4]

Sounds innocent enough. But shouldn't we be troubled that these tools of the trade are used by mediators working with consumers who are often unaware that a technique is being used at all? Such "control or play upon by artful, unfair, or insidious means so as to serve one's purpose"[5] is the very definition of manipulation.

The fact that mediators justify their interventions as necessary to foster parties' self-determination does not mean the interventions are no longer manipulative. Surely one must question if a settlement is ever truly self-determined when it is the product of manipulative tactics (no matter how well intentioned).

Moreover, mediator manipulation/deception is not always so benign. At a continuing education event last March sponsored by the Minnesota State Bar As-

sociation, I was stunned by the high percentage of mediators who answered "yes" when asked if strongly encouraging parties to skip lunch (to keep the pressure on) was a good tactic. Furthermore, how do you react to the following two examples? Taken from John Cooley's entertaining "encyclopedia" of mediator magic, consider:

(1) the mediator who conveys a false demand to a side which can be dropped at any time to obtain closure; or
(2) the mediator who implies to a proposing side that a proposal was communicated to the other side when it was not.[6]

Wait a minute, you might ask, surely these mediator techniques (or perhaps you would pejoratively label them ploys) cross the line of permissible behavior?

What is permissible behavior? You are wrong to assume there is a clear line to cross. First of all, always keep in mind that in most contexts mediation remains a wholly unregulated profession. Second, even to the extent that aspirational codes of ethics have been promulgated and influence mediator behavior either through the tie of voluntary association or membership conditions, these codes rarely provide clear guidance to help define the actual limits of acceptable mediator activity. Instead, the codes more generally state prohibitions against coerced settlements and promote the penultimate principle of self-determination. Moreover, none of the ethics codes address the more practical question of what the sanction might be for a mediator's failure to measure up.

The fact that mediators justify their interventions as necessary to foster parties' self-determination does not mean the interventions are no longer manipulative.

For example, the Model Standards of Conduct for Mediators adopted by the American Bar Association (ABA), the American Arbitration Association (AAA), and the Society of Professionals in Dispute Resolution (SPIDR) skirts the issue entirely by merely committing the mediator to "diligence and procedural fairness."[7] The Standards of Practice for Lawyer Mediators in Family Disputes, crafted by the Family Law Section of the ABA, states that "the mediator has a duty to assure a balanced dialogue and must attempt to diffuse any manipulative or intimidating negotiation techniques *by either of the participants*" (emphasis added).[8] Likewise, the Academy of Family Mediators Standards of Practice for Family and Divorce Mediation prohibits manipulative or intimidating negotiation techniques between the parties, but is silent about the mediator.[9] The Ethical Standards of Professional Responsibility adopted by SPIDR at least requires that neutrals "should be honest and unbiased [and] act in good faith."[10]

Is legislation warranted? Is legislating a higher standard of neutral behavior the answer? Some state courts believe so. For example, Florida's court-annexed mediation rules prohibit mediator misrepresentation of *material* facts.[11] In my home state of Minnesota, district court rules forbid

neutrals from making false statements of fact or law, material or not.[12]

I am not convinced that legislation is the answer. Surely, clear standards articulating the limits of overt mediator misrepresentation will help deter the most extreme forms of mediator deception. But the vast majority of the manipulation that occurs at the mediation table is far too nuanced and subtle to actually be caught up in the radar of regulation. So consumers will continue to rely on mediators' self-imposed restraint to temper the efficacy of manipulation and deception with the over-arching principle of self-determination. With pressure to settle being what it is, this self-restraint is a fragile safety net. Better for the profession of mediation, and all who use it, that we admit that all sorts of magic (to borrow John Cooley's term) is used at the mediator table. Identifying and anticipating the behavior does not necessarily limit its effectiveness. Indeed, coming to the table with eyes open and expecting to be manipulated may in fact be the best path to ensure self-determination (not to mention enjoyment of the show)! ◆

Endnotes

1 James Coben, *Misrepresentations in Mediation: Efficacy, Expectations, and Ethical Norms*, Volume 2, No. 3, JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT 4 (Fall 2000).

2 *See e.g.* John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOYOLA UNIVERSITY OF CHICAGO SCHOOL OF LAW 1 (Fall 1997); Robert Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, Vol. 13, No. 1, MEDIATION QUARTERLY 3 (Fall 1995).

3 Christopher Moore, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT, 2D. EDITION at 327 (1996 Jossey-Bass Publishers).

4 Id. at 327-333.

5 Webster's Ninth New Collegiate Dictionary (1983).

6 Cooley, *supra* note 2, at 106.

7 Model Standards of Conduct for Mediators, Rule VI (1994).

8 Standards of Practice for Lawyer Mediators in Family Disputes, Family Law Section of the American Bar Association, Rule V.C (1984).

9 Academy of Family Mediators Standards of Practice for Family and Divorce Mediation, Section IX.A (1985) ("The mediator has a duty to ensure balanced negotiations and should not permit manipulative or intimidating negotiation techniques").

10 Ethical Standards of Professional Responsibility, Society of Professionals in Dispute Resolution (1986) (section on General Responsibilities).

11 Florida Rules for Certified and Court-Appointed Mediators, Rule 10.310(c) (revised February 2000) ("A mediator shall not intentionally or knowingly misrepresent any material fact or circumstance in the course of conducting a mediation").

12 Minnesota General Rules of Practice, Rule 114 Appendix: Code of Ethics, Rule V (1997) ("A neutral shall not knowingly make false statements of fact or law").

Misrepresentations in mediation: Efficacy, expectations, and ethical norms

James R. Coben, J.D.

By James R. Coben, J.D.

At a recent meeting of the American Bar Association's Dispute Resolution Section in San Francisco, I listened to a distinguished group of mediators discuss misrepresentation in mediation. One panelist catalogued a list of things negotiators frequently lie about in mediations, including bottom lines, what a witness will or will not say, the cost of defense or prosecution, the willingness of a client to settle, and threats about consequences of non-settlement. Another panelist wryly noted that "it's human nature to act like a rug merchant." While the panel was unanimous that misrepresentation is widespread, they also concurred that candor is what gets cases settled. This dynamic tension highlights a unique aspect of many mediations: it is a process where the negotiator's propensity to lie is frequently confronted by a neutral's active encouragement of candor.

What compels negotiators to lie? Negotiators lie for a variety of reasons and do so in mediation just as readily as in unassisted negotiation. First, there is a widespread belief that lies are effective. To the extent that many conceive of negotiation as a purely zero sum game, with a winner and a loser, it is easy to adopt a Machiavellian approach to bargaining. In the words of James J. White, "[t]o conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation."[1] Second, most negotiators assume that lies are expected and routinely match inflated initial demands with false assertions of bottom lines. Third, well established ethical norms (for example, the self-regulatory scheme governing lawyers' work), condone and even encourage certain forms of prevarication by drawing distinctions between misrepresentations of material fact and other forms of assertions. Add in such additional pressures as lack of preparation, client control problems, a lack of trust in the mediator (or, conversely, a desire to overly

James Coben is a Clinical Professor at the Hamline University School of Law in St. Paul, Minnesota. He began mediating professionally in 1989 and currently serves on the Minnesota Supreme Court ADR Review Board.

impress a mediator), and you have a nice recipe for a misrepresentation stew.

What are the general principles governing truthfulness in negotiation? So long as lawyers are at the table, the scheme of self-regulation framed up by the Model Rules of Professional Conduct sets some clear limits for truthfulness in negotiation, including:

(a) a prohibition on misleading statements of material fact; and
(b) the obligation to correct misapprehensions if you or your client have induced them.[2]

However, the same rules make clear that there is no obligation to volunteer factual information.[3]

In effect, these rules codify the proposition that a lie is not a lie if the listener should not reasonably rely on what was said.

Moreover, there is wide latitude for statements of opinion. According to rule commentary:

> [w]hether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category.[4]

In effect, these rules codify the proposition that a lie is not a lie if the listener should not reasonably rely on what was said. No doubt we would be reluctant to float such a proposition to our grade school children, but keep in mind that the lawyer's rules were driven, at least in part, by the desire not to lose all negotiating business to the unregulated professions.

Of course there are consequences for lying in negotiations that go beyond the wrath of a licensing board. For one thing, even in today's increasingly anonymous business/legal world, a negotiator's reputation for straight talk is a powerful asset. Unless it is your last negotiation, deception may come back to haunt you in subsequent disputes. Additionally, misrepresentation of material facts (including nondisclosure in certain situations) may leave a negotiated agreement void or unenforceable under a variety of contract law theories. Moreover, such deception can leave the negotiators and the parties they represent vulnerable to tort actions for fraud and misrepresentation.

How do these general principles apply when a mediator is present at negotiations? The mere presence of a mediator to assist negotiations does not fundamentally alter the ethical obligations of the participants. Complicating matters somewhat is that fact that many mediators require participants to sign agreements to mediate "in good faith." Do such promises ratchet up expectations of candor or consequences for misrepresentation? At best, such statements are aspirational (and perhaps inspirational), but no developed body of court decisions suggests stronger consequences. For now at least, the judicial notion of good faith probably means showing up and bringing with you those people and documents that the court has ordered you to bring.[5]

The use of a mediator does, however, influence truthfulness in two distinct ways:

(1) the mediator's mere presence is a passive form of deterrence against misrepresentation; and
(2) mediators often are active proponents of candor.

Passive deterrence. With respect to deterrence, there is at least the theoretical possibility that the mediator may be called as a witness (reluctant or otherwise) to testify concerning a negotiator's misrepresentations. Furthermore, the mediator acting independently may expose misrepresentations. This is particularly possible in caucused mediation, where the mediator might learn confidential information from one party in confidence and then may hear a different version from the same party in joint session. In this respect, the mediator's presence changes one fundamental characteristic of unassisted negotiation: without a mediator, deception occurs in private with less opportunity for discovery.

In this respect, the mediator's presence changes one fundamental characteristic of unassisted negotiation: without a mediator, deception occurs in private with less opportunity for discovery.

The practical consequences of mediator discovery of material misrepresentation are actually fairly minimal. For one thing, most mediation ethics codes would not permit, yet alone require, voluntary disclosure by the neutral of discovered fraud. Additionally, most evidentiary rules and statutes governing mediation, at least if interpreted literally, would preclude testimony from mediators on contract or fraud claims arising from the mediated dispute. Indeed, even the most recent version of the proposed Uniform Mediation Act, which codifies an exception to privilege and nondisclosure when fraud, duress, or incapacity is an issue in proceedings regarding the validity or enforceability of an agreement, permits the exception "only if evidence is provided by persons *other than the mediator of the dispute at issue*"[6] (italics added). Of course, notwithstanding statute or rule protection, the parties always will risk a judicial tendency to get the "best evidence" available, especially when issues of vulnerability such as fraud, duress, coercion or incapacity are at issue.[7]

Advocates for candor. Far more important than the possible deterrent effect that mere presence provides is the fact that mediators are often advocates for candor. Parties often turn to mediators precisely because the informational poverty caused at least in part by the traditional negotiator's propensity to lie presents a significant barrier to settlement.

The advocacy for candor is sometimes symbolic. For example, many mediators utilize clauses in their agreements to mediate by which parties promise not to divulge false information. The advocacy for candor is inspirational. Mediators simply share the message that their experience tells them that truth-telling, and especially the frank admission of weaknesses in one's case, is helpful to ending disputes. The advocacy for candor is educational. Many mediators

actively promote the notion of collaboration and the search for Pareto-optimal outcomes, rather than the winner-take-all Machiavellian approach to dispute resolution.

The mediator's advocacy for candor also is strategic and imminently practical. For example, mediators actively encourage parties to share interests that might otherwise not be disclosed. Mediators help parties to fully explore the consequences of non-disclosure of critical information. They coach parties on the timing of disclosures. And, when faced with material misrepresentations, mediators are an additional conscience at the table, one more likely than the conscience of some disputants to encourage consideration of a full panoply of interests, from legal to social to moral to practical.

So in the end, the unanimous conclusion of the panel at the conference in San Francisco merely reflects some very common sense notions. Candor gets cases settled. Lying often has less utility than you might think (if for no other reason than the fact that liars usually get caught). Simple lessons, but worth reaffirming. ◆

Endnotes

1. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM.B. FOUND. RES. J. 926, 929 (1980).
2. Model Rule of Professional Conduct 4.1, *Truthfulness in Statements to Others*, provides: "A lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."
3. The Model Rule of Professional Conduct 4.1 Comment notes that "[a] lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."
4. *Id.*
5. *See e.g. Environmental Contractors, LLC, v. Moon*, 983 P.2d 390 (Mont. 1999); *Texas Parks and Wildlife Department v. Davis*, 988 S.W.2d 370 (Tex. App. 1999).
6. Uniform Mediation Act, Section 8(b)(2), National Conference of Commissioners on Uniform State Laws (March 2000 Draft). Full text of Current Draft with Reporter's Notes at *http://www.law.upenn.edu/library/ulc/ulc.htm*.
7. *See e.g. Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.*, 78 Cal. App. 4th 653, 92 Cal. Rptr.2d 916 (Cal. Ct. App. 2000), review granted and opinion superceded (May 17, 2000); *Olam v. Congress Mortgage Company*, 68 F.Supp.2d 1110 (N.D. Cal. 1999).

New Hampshire Bar Journal

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Advocating for Understanding – Why the Understanding-based Mediation Model Works

By Attorney H. Scott Flegal[1]

INTRODUCTION

A recent Harvard Law School workshop focused on an "Understanding-based" mediation model.[2] The principal difference between an understanding-based model and most other mediation models is that understanding-based mediation is conducted largely without the use of individual or private caucuses.[3]

This article will argue that the non-caucus model of mediation is a better model for the resolution of disputes than models that employ private caucusing as a prominent part of the proceeding. The article will begin by defining mediation in the context of the Understanding-based model. The mechanics of a mediation conducted in the Understanding-based model will then be compared to and contrasted with the mechanics of a mediation where private caucusing is used. Next, the article will examine the mindset of the mediator in the context of the special demands placed on the mediator in the understanding-based model. Finally, the article will argue that the this model provides a better framework for decision-making in the context of dispute resolution than traditional mediation models. This in turn gives the parties a better opportunity to obtain the best possible resolution of their dispute.

I. DEFINING "MEDIATION" IN THE UNDERSTANDING-BASED MODEL

Mediation is by nature a flexible process that can have a number of different definitions.[4] Some define it simply as "assisted negotiation."[5] Robert H. Mnookin and Gary J. Friedman define mediation in the understanding-based model as "a voluntary process in which the parties make decisions together based on their understanding of their own views, each other's, and the reality they face."

This succinct, powerful definition is worth examining closely as it has important implications for mediation proceedings conducted in the understanding-based model.

As do most mediation models, the understanding-based model defines mediation as a "voluntary" process. Even in court-mandated mediations, mediators usually inform the parties that while they have been ordered to attend the mediation, they are free to leave the mediation at any time.[6] The voluntary nature of mediation helps lower the risk associated with the process and encourages the parties to participate actively in the mediation.

The Mnookin -Friedman definition also emphasizes that the *parties*, and *not* the *mediator,* make the decisions in the mediation. This notion – that the mediation belongs to the parties – is a central element of mediations conducted in the understanding-based mediation model.

The Mnookin -Friedman's definition of mediation also makes clear that during the mediation the parties will make the decisions *together*. Mediations conducted in the understanding-based model require the parties to adopt a problem-solving approach to the dispute. The mediation will only succeed if the parties work collectively with the mediator to try to resolve their dispute. The understanding-based model reinforces this principle by keeping the parties together in the same room throughout the mediation.

The Mnookin -Friedman's definition also stresses that *understanding* will be an essential part of the mediation proceeding. The mediator will work with the parties to help them *understand.* This understanding will entail not only an understanding of their own view of the dispute, but the view of the other party as well. The understanding-based model contemplates that the level of understanding required for the parties to obtain the best solution to their dispute can only be obtained if the parties are able to communicate with one another. Private caucusing is thought to prevent direct communication between the parties.

Finally, the parties' decisions during the mediation will take into account the *reality* they face. In the understanding-based mediation model, "reality" for the parties flows from a clear understanding of each other's interests and from the strengths and weaknesses of their legal claims. Professor

Friedman refers to this process as "bringing reality into the room." It is thought that by keeping the parties in the same room the mediator is best able to make sure the parties have all the information they need to make solid decisions.[7]

Mediations conducted in this model reflect this definition. In the understanding-based model, the mediator will work tirelessly to vest control of the process in the parties, to foster a collective and collaborative problem-solving approach to the dispute, to establish understanding as the lynchpin of the mediation, and to introduce reality to the process at every turn.

II. MEDIATION IN THE UNDERSTANDING-BASED MODEL CONTRASTED WITH TRADITIONAL MEDIATION MODELS

The principal distinction between the understanding-based mediation model and other traditional mediation models is that in the understanding-based model the mediator generally conducts the mediation with the parties in one room, whereras in most other mediation models the mediator will periodically separate the parties during the mediation and speak with each party privately.[8] While this distinction is straightforward, it spawns a number of important implications for the manner in which the mediation is conducted that serve to distinguish the understanding-based model from traditional mediation models.

Most traditional mediations begin with an opening statement by the mediator.[9] During this statement, the mediator will usually bring the parties together and explain the process. The opening statement will clarify the mediator's role in the process and will often confirm the mediator's neutrality.[10] The mediator will often summarize his or her preparation in advance of the proceeding and will explain the confidential nature of the proceeding. Usually, the mediator will explain to the parties the ground rules that will govern the mediation. Finally, the mediator will seek a commitment from the parties to make a good-faith effort to resolve the dispute.[11]

In a mediation conducted in the understanding-based model, the process begins with the "contracting" stage of the mediation. Many of the same subjects covered in an opening statement are also addressed in the contracting stage of an understanding-based mediation. As in most mediations, the mediator will establish contact with the participants, explain the process, clarify the parties' intentions and ability to mediate, and negotiate the ground rules.[12] However, the *manner* in which the mediator deals with these issues is different in the understanding-based model.

Instead of making an opening statement, the mediator in the Understanding-based model will work to make contact with the participants by actively seeking to understand them in a more conversational fashion. The mediator will demonstrate his or her listening skills at every opportunity and will help the parties appreciate that *understanding* will be the lynchpin of the process. The mediator wants the parties to understand that virtually everything the mediator will do during the mediation will reflect his or her desire to raise the level of understanding in the room to the highest possible level. Ultimately, the mediator in the contracting phase seeks the informed consent of all parties to proceed with the mediation in a problem-solving fashion.

The next phase of both traditional and understanding-based mediation models begins the process of gathering information. In traditional mediations, this process is often commenced with opening statements from the parties directly involved in the dispute. The parties are given the opportunity to present the highlights of their cases to the mediator in front of the other party and its representative. This can be a volatile and emotional process. Mediators in traditional models often exercise a high degree of control at this stage of the mediation, and in general parties are not permitted to be overly argumentative.[13] At the end of this initial joint session the mediator will often question the parties directly to understand better their interests and positions.

The gathering of information in the Understanding-based model tends to be more conversational and less structured than in most other mediation models. The objective at this stage of the mediation is to develop the issues by setting out all information necessary to identify and establish the dimensions of the particular issues needing resolution.[14] The mediator and the parties will work collectively to identify all relevant facts, including economic, emotional and other factors that contribute to each party's views and concerns. During this phase the mediator will help the parties establish clearly where the parties agree and disagree. In some instances, this process is facilitated by written submissions from the parties or their lawyers.[15]

Unlike in most traditional mediation models, at this stage of the understanding-based process, the lawyers are often front and center. The mediator will probe the legal positions of the parties by asking their lawyers about the strengths and weaknesses of their case. The mediator will work to insure that the parties themselves, and not just their lawyers, appreciate the strengths and weaknesses of each side of the legal issues involved in the case. Again, the objective is to discuss the case in such a manner that all parties in the room will better understand the case when the mediation concludes. This process helps the parties to appreciate the potential risks associated with trying the case on the merits.

The examination of the legal claims can be a painstaking and sometimes painful process. Mediators in the understanding-based model will hold the lawyers' feet to the fire and ask the difficult questions associated with their respective cases. This can be difficult and challenging for the lawyers in the case, many of whom may not be comfortable discussing the weaknesses of their case in front of their own clients, let alone in front of the opponent and his or her counsel. But the understanding-based model presumes that it is only by having this discussion with all parties together that both the parties and their lawyers will truly increase their understanding of the case.

In most traditional mediation models, the mediator will not subject counsel to a difficult examination of the weaknesses of their legal claims while all parties are in the room. Instead, these discussions most often occur during individual caucuses. In many traditional mediation models, mediators use the initial private caucuses to provide counsel for the parties with the opportunity to argue their cases in an attempt to convince the mediator of the correctness of their positions.[16] The mediator will ask many of the same tough questions of counsel during these sessions, but these conversations will not be heard by the other party or its representative.

As the mediation proceeds, the mediator might use private caucus sessions to identify and explore underlying interests and goals and to clarify each party's perspective.[17] Many mediators use the private caucus to ask direct questions of the parties and their representatives, such as, "How do you assess your own case?", What are your weaknesses?", or "What do you really want"?[18] The mediator then uses the answers to these questions to help create a framework for settlement.

The mediator in traditional mediation models may also use private caucuses to encourage the parties to speak more openly and to disclose confidential information in order to identify barriers to settlement and to assist parties to overcome these barriers.[19] The mediator may then commence "shuttle diplomacy," brainstorming with each of the parties individually to identify settlement possibilities, carry perspectives back and forth and suggest settlement proposals. In some mediations, the mediator will continue to move between the parties in caucus sessions and will not suggest any further joint session until the end of the process.[20]

It is here that the difference between mediating under the understanding-based model and other mediation models becomes most pronounced. At this stage of most traditional mediations, the parties may well spend most of their time in separate rooms, and the mediator shuttles back and forth between them. In the understanding-based model, the mediator keeps the parties together. It is important for the mediator in the understanding-based model to view the *interaction* between the parties and help the parties recognize counterproductive patterns of conflict that may keep them divided.[21] Once these patterns have been recognized, the mediator may be able to help the parties establish an alternative means of communicating.

This requires the mediator to manage the conflict in the room effectively. The mediator in the understanding-based model will focus on two separate, but equally important, aspects of the conversations between the parties. On the one hand, the mediator must closely observe the manner in which the parties communicate, which demands that the mediator focus on *how* the parties talk about these issues.[22] At the same time, the mediator must focus on *what* the parties describe as the content of their issues. This dual focus on the "how" and the "what" can be a key factor in the mediator's ability to facilitate a resolution of the dispute in an understanding-based mediation.[23] Placing the parties in separate rooms would deprive the mediator of the opportunity to observe the interaction between the parties.

Eventually, in both traditional mediations and in mediations in the understanding-based model, the parties will begin to develop options for resolving their dispute. In many traditional mediation models, this process occurs during individual caucuses. The mediator meets with each party privately and works with them to generate options for settlement. By shuttling back and forth between the parties, the mediator works to move the parties closer together and toward a settlement.

In the understanding-based model, the process of generating options is quite different. The mediator will lead the parties in a brainstorming exercise, usually with the understanding that no evaluation of any option generated will occur until later in the mediation. By postponing evaluation in this manner, the parties have more freedom to generate and invent more creative solutions to the problem.[24]

Eventually, the parties will begin the process of evaluating the options. This, too, is done collectively, with encouragement from the mediator to evaluate options not just in terms of how the parties might meet *their* needs and interests, but how they might satisfy the needs and interests of the *other party* as well. Once options have been identified that might meet the needs of both parties, the mediator assists the parties in understanding the consequences and implications of each option.[25]

The final stage of mediating under any mediation model involves coming to agreement. In most mediation models, the mediator's preference dictates whether the mediator or the lawyers for the parties will draft the agreement. Generally, mediators in the understanding-based model will draft the agreement. If this task is undertaken by a mediator in any mediation model, the mediator must take care to reflect as accurately as possible the parties' intentions as to what the agreement is and how it will take effect.[26] If there are areas of the agreement that must by necessity be resolved in the future, the mediator should identify such areas clearly and, if possible, include processes that might help to resolve such issues.[27] The parties may have the agreement reviewed by accountants, lawyers and others. While the mediator should not become attached to the agreement as drafted, modifications should be undertaken in a manner that is consistent with the parties' priorities as articulated during the mediation.[28]

III. THE MINDSET OF THE MEDIATOR IN THE UNDERSTANDING-BASED MODEL

Keeping the parties in the same room throughout all the difficult conversations that may occur during a mediation creates a special challenge for the mediator, and the understanding-based mediation model demands a higher level of interpersonal skill on the part of the mediator. Professor Mnookin describes the challenge as follows:

> The challenge for the mediator in our model is that with parties or lawyers that are caught up in a conflict dynamic that makes it hard for them to communicate effectively with each other, it takes a high degree of skill from the mediator working within the same room to help them disengage and promote understanding. And what has to be acknowledged is that separating them can be a lot easier, because you don't have destructive interaction between the parties. So I think the challenge of our model that has to be acknowledged is it requires a higher level of interpersonal skill in terms of dealing with conflict than a caucusing model does."[29]

There is no doubt that the individual caucus, used judiciously in the hands of a skilled mediator, can be an effective tool to diffuse tension during a mediation. In many instances, diffusing tension in the room can benefit the parties and help them work toward resolving their differences.[30] But are opportunities for the parties to create a better settlement lost when the private caucus becomes the prevailing practice at a mediation? Are some mediators too anxious to diffuse the tension in the room?

In fact, many mediators utilize the individual caucus early and often in their mediation cases.[31] Professor Mnookin believes that, particularly in court-annexed mediation, mediators may be too quick to separate the parties:

> My view is that in court-annexed mediation today, there is too much reliance on caucusing. I am not of the view that caucusing is never appropriate. But what troubles me about the caucus model very much, is that it gives the mediator too much power to manipulate the parties, and it puts the mediator in the position where the mediator is the only person that knows what's going on. For example, the lawyers often say "I want to meet separately because I don't want the other side to hear the mediator's evaluation of my case." But my own view is that mediators are tempted – during what they call "reality testing" – to go to one side and beat up on them – and, if anything, almost exaggerate the weaknesses of their case. Then they go to the other side and do the same thing.
>
> Someone once said to me, "I know what mediation is all about. You take one party into one room with their lawyer, and you beat up on them and you lie to them about how bad their case is. Then you take the other party into the other room, and you beat up on them and you lie to them about how bad their case is. And then both sides are so frightened they'll settle." In our view, that's not what mediation is all about.[32]

Of course, mediating in the understanding-based model is all about empowering the parties in the mediation and helping them to understand that they are in the best position to decide what constitutes the best resolution of their problem. The fact that use of the private caucus inherently results in the mediator wielding greater power over the proceeding is one important reason that the understanding-based mediation model has very little room for individual caucusing.

The mindset of the mediator in the understanding-based model is also different from the mindset of the mediator in other types of mediation models. The mindset must reflect the mediator's understanding that it is the parties, not the mediator, who will determine whether a dispute should settle and, if so, what the terms of that settlement ought to be. Professor Mnookin describes this mindset as follows:

> We encourage a mindset where the mediator is dedicated to trying to help the parties, but where he or she understands that the conflict is ultimately the parties' to settle. In our model, the mediator is not going to judge him- or herself by simply whether a settlement is reached. We think success ought to be defined by the mediator as, "have I really helped both these parties understand what their opportunities and risks are in litigation, explore carefully a variety of other options, and make decisions about what's in their interests, and whether they want to take those chances or not?" And in my view, if the parties have gone through that process and have really come to grips with it, and they still want to roll the dice in court, for whatever reason, I've helped them think in through carefully.[33]

In the understanding-based model, the mediator is not an advocate for settlement and does not set out to drive the parties toward settlement. Rather, the mediator works as a "non-coercive neutral to help the parties negotiate an agreement that better serves their interests than [do] their alternatives."[34] The mediator does not work to provide the parties with an opinion of the value of the case, nor does the mediator pressure the parties to settle the case.

Yet, while the mediator in the understanding-based model is a non-coercive neutral, he or she is not powerless. Professor Friedman has described the mediator as "an advocate for understanding" who can be "radically subjective – but for *both* sides in the dispute."

These very inconsistencies – that the mediator can be both non-coercive and an "advocate," and can be neutral and "radically subjective", combine to give substantial power to the mediator. That the mediator is so empowered is ironic as well.

The mediator in the Understanding-based model of mediation must work to empower the parties so they can resolve their dispute themselves in the best possible fashion. Nonetheless, the mediator's role as an advocate for raising the level of understanding between the parties generates great power for the mediator. For once the parties and their representatives appreciate and accept that the mediator is committed to helping all parties better understand the dispute, the mediator is able to ask the most difficult and pointed questions of each side with less risk that he or she will be perceived as biased or favoring one side over another.

In this way, keeping the parties in the same room can be a liberating experience for mediators accustomed to separating the parties during mediations. The parties in the understanding-based model hear all the mediator's difficult and important questions posed to both sides and, in this way the, mediator is able to demonstrate neutrality. When the parties are cloistered in separate rooms, the mediator must remain cognizant that parties can easily perceive bias if, for example, the mediator is in one room more often or for longer periods of time than he or she is in another. Perceptions that the mediator is biased, of course, seldom help the process.

For Professor Friedman, how the settlement is reached is as important as the settlement itself: "The significance of mediation as an alternative method of resolving conflict lies in the process of examining, clarifying and adjusting human relationships in all their intricacy and emotional depth."[35]

When mediation is viewed in this way, it is easy to see why the private caucus is viewed as anathema to the process as, when parties are cloistered in separate rooms, the mediator cannot meet the demands imposed by this process.

IV. THE UNDERSTANDING-BASED MEDIATION MODEL IS A BETTER MEDIATION MODEL THAN MODELS THAT RELY ON PRIVATE CAUCUSING

A. The Understanding-based model incorporates principles of negotiation analysis that enhance the decision-making process.

The understanding-based model is deliberately designed to give the parties the best chance to make good decisions during the mediation and is consistent with the elements of good decision-making that have been identified in the field of negotiation analysis.

I have thus far described in general terms the manner in which mediations proceed in the understanding-based Model. Mnookin and Friedman have identified five specific stages that generally occur during an understanding-based mediation. These five stages are:

1. Contracting;
2. Developing the issues;
3. Working through conflict;
4. Developing and evaluating options; and
5. Concluding agreement.

The first and last stages clearly occur at the beginning and the end of the mediation, but the middle stages tend to intersect and overlap.[36]

Howard Raiffa, emeritus professor of managerial economics at Harvard Business School and at Harvard's Kennedy School of Government is an expert on negotiation analysis. He uses the acronym "PrOACT" to identify five basic ingredients of good decision-making. Professor Raiffa concludes that for a party to obtain good results during a negotiation, the party must:

1. Identify the **P**roblem;
2. Clarify the **O**bjectives:
3. Generate creative **A**lternatives;
4. Evaluate the **C**onsequences; and
5. Make **T**radeoffs[37]

Raiffa describes PrOACT as "a way to make smart choices happen."[38]

The similarities between Raiffa's PrOACT framework and Mnookin's and Freedman's five stages in an understanding-based mediation are striking. Identifying the Problem involved in a proposed decision is analogous to the Contracting phase of the understanding-based mediation. Clarifying the Objectives is similar to the Developing the Issues stage in an understanding-based mediation. Generating Alternatives and Evaluating the Consequences would be covered during the Developing and Evaluating Options stage of an understanding-based mediation. Finally, the making of Tradeoffs would occur in the Concluding Agreement stage of the understanding-based mediation.

PrOACT does not contain the Working through Conflict stage that often flows throughout an understanding-based mediation. Yet this makes sense given that in a negotiation there is not necessarily conflict present. In any event, Raiffa's five basic ingredients of good decision-making seem to be an inherent part of the process of the understanding-based model. The understanding-based mediation model is similar to Raiffa's model for good decision-making during negotiations in thatboth are designed to "make smart choices happen."[39]

B. The understanding-based mediation model promotes joint-decision making, which is inherently more likely to create value for the parties.

In a negotiated settlement, *both* parties necessarily believe the negotiated outcome leaves them at least as well off as they would have been were there no agreement between

them. To this narrow extent at least, almost any negotiation can be said to create value.[40] However, value can also be created where a deal is reached that, when compared to other *negotiated* outcomes, either makes both parties better off or makes one party better off without making the other party worse off.[41] Usually, if the parties have been unable to negotiate a solution to their dispute without the help of a mediator, it is this second type of value creation that can be explored in the mediation to produce a win-win outcome.

The mediator in the understanding-based model plays an important role in the value-creation process. The mediator "explores the interests of the parties and their resources to see what value-creating opportunities there might be that are perhaps outside of the conflict at hand. These opportunities usually arise from the way the parties are situated."[42]

In other words, value-creating opportunities often arise because parties are *differently* situated. Differences between parties are often more useful than similarities in helping parties to reach a deal. Differences can set the stage for trades through which value is created.[43]

The understanding-based model presumes that understanding the differences in how parties are situated, proceeded by careful examination of their true interests, is best done with the parties working collectively in the same room. In this way the "process of examining, clarifying and adjusting human relationships in all their intricacy and emotional depth" has the best chance of resulting in the best solution.[44]

Indeed, this presumption in favor of joint decision-making is not without basis. It is consistent with what experts in negotiation analysis have recognized as the power of joint-decision making:

> In the joint decision-making perspective, negotiators can be creative in the actions they take and the decisions they make . . . . Joint decision-making jettisons the restrictive assumption of common knowledge. It widens the scope of its vision to include the invention of strategies, creation of new alternatives, and increases or decreases in the number of parties.[45]

Joint-decision making, in turn, can result in every mediator's dream scenario:

> A joint decision-making perspective emphasizes the opportunities for cooperation between two parties – and helps them avoid falling into the trap of negotiating solely on the basis of what is individually rational. By adopting a joint decision perspective, negotiators can better conceive how communication will facilitate the drafting of joint agreements to the benefit of both sides. Through cooperation, negotiators might explore agreements based on a process of joint decision-making that are mutually superior to disagreements born of separate interacting decisions — the no-agreement state. In highlighting the role of joint decisions, we raise the possibility of a win-win solution to the negotiation problem.[46]

By keeping the parties together and working together, the understanding-based model creates an environment where decisions can be made collectively and where joint decision-making can flourish. This in turn increases the possibility that the parties may collectively create value and arrive at a win-win solution to their problem.

Conversely, mediation models where the parties caucus privately and attempt to negotiate a resolution to their dispute are not as likely to result in the creation of additional value for the parties because such an arrangement does not promote the best possible decision-making. Professors Mnookin and Friedman identify important stages of their mediation model as involving first the development and then the evaluation of "Options" for resolution. Raiffa, on the other hand, in his listing of the factors necessary for good decision-making during a negotiation, speaks of creating "Alternatives." There is a distinction between the two terms:

> In negotiation parlance, a distinction is made between the alternatives each party might pursue individually (external to the negotiation) if negotiations break down and the (internal) alternatives that might be jointly negotiated and jointly pursued. The term "alternatives" is reserved for choices external to negotiations and the term "options" is used for collective choices internal to negotiations. The generation of alternatives is usually a solo act, whereas the generation of options may involve joint deliberations.[47]

Grounded in negotiation analysis, the understanding-based model incorporates this important distinction. It contemplates that "options" for resolution will be generated by the parties working together in the same room during a collective brainstorming exercise. The parties in the understanding-based model will endeavor to generate collective choices that are internal to the negotiations and the result of joint deliberation.

When the parties to a mediation are separated during a private caucus, they are not likely to generate options that are the result of joint deliberation. In fact, they are more likely to generate "alternatives" for resolution which will often be "external" to the negotiation. They are often the product of the "solo act" that private caucusing produces rather than the product of collective decision-making, and therefore are less likely to create additional value for the parties. In turn, the alternatives for resolution generated during private caucusing are less likely to result in a win-win scenario.

C. Use of the private caucus during mediation increases the likelihood that the parties will perceive that the mediator is biased.

There are several practical problems that can arise during a mediation in which the private caucus is relied upon to obtain a resolution of the dispute. Regardless of whether the mediator conducts an understanding-based mediation or a mediation where private caucusing will be employed, it is

essential that the mediator remain neutral. If either side develops a perception that the mediator is biased in favor of one side or the other, resolution of the dispute can be difficult to obtain.

Caucusing with each side individually places substantial pressure on the mediator to avoid the appearance of bias. The most obvious example of mediator conduct that can result in the perception that the mediator has chosen sides arises when the mediator spends more time privately with one side than the other. The mediator may have excellent reasons for spending more or less time with each party. The danger, however, lies in the perception created when he or she does so.

When the parties do not witness all conversations the mediator has with all of the parties, there is a danger that one side will perceive that the mediator is not treating them fairly. This is an immediate threat to the parties' prospects of negotiating the best resolution of their dispute. This simple but potentially important issue is not present when the mediator in the understanding-based model keeps the parties in one room.

D. The understanding-based model decreases the likelihood that the mediator will manipulate the parties in the name of promoting settlement.

The nature of private caucusing, which results in the mediator shuttling from room to room conveying information to each party, places substantial pressure on the mediator to convey information from party to party in a productive fashion. Indeed, *how* the mediator conveys this information can be as important to the progress of the mediation as *what* information is conveyed. This places enormous power in the hands of the mediator, but also creates a dilemma as the mediator may be tempted to manipulate the information he or she delivers to the parties with the aim of settling the dispute.

There is increasing debate in the mediation community about whether, in utilizing "tools" to break impasse during a mediation, mediators in fact manipulate the process.[48] Because the line between "management" of the mediation and "manipulation" of the parties can be perilously thin,[49]private caucusing, which empowers the mediator and places a premium on the content of mediator communication, increases the likelihood of mediator manipulation.

When private caucusing takes place, the information exchange is "managed" by the mediator. For example, the mediator may over-report the extent of progress being made in the negotiations or may pessimistically report the threat of stalemate just when settlement is close at hand. Each of these techniques could have the effect of urging a party to make the final necessary compromises.[50] Mediators may take a proposal to the other party as "their own" settlement proposal to help one party save face.[51] Whether one views the foregoing as legitimate "management" of the mediation in the name of reducing reactive devaluation, or as mediator "manipulation" of the process, the power of the parties over the resolution of their dispute has decreased and the power of the mediator has increased.

When the mediator uses the power provided by the private caucus, he or she is presented with a tempting opportunity to manipulate the parties in an effort to induce a settlement. In truth, the individual caucus presents the mediator with a golden opportunity to apply pressure to the parties. Many mediators will admit that as the gap between the parties narrows and the time allotted for the mediation begins to run out, they sometimes push the parties to settle the case. In many instances, the mediator walks a fine line between encouraging the parties to settle and manipulating them into doing so. According to Professor Mnookin:

> Too many mediators, and it's completely human, tell themselves, "if the case doesn't settle, I've failed." And the reason that mindset is dangerous is that if that's how the mediator judges himself or herself, almost anything goes in furtherance of reaching the desired outcome, which is a settlement. This is not a manipulative process. The mediator should be always analyzing things in terms of strengths and weaknesses. It's not a matter of saying to one side, "you're going to win, or you're going to lose." In my mind it's more probabilistic. It's not so much them wanting the mediator's judgment as to what the odds of winning or losing might be, as it is them needing help to really unpack all the risks."[52]

When the mediator views his or her role as being a neutral advocate for *understanding* in the mediation, the opportunity for mediator manipulation of the process is significantly reduced. Instead of advocating settlement of the dispute, the mediator helps the parties educate themselves. When the parties finally *understand* each other's interests, they can decide whether, and if so how, they want to resolve their dispute. The power remains with the parties to the dispute. Manipulation of the process by the mediator decreases the likelihood that a resolution will emerge that results in real justice for the parties.[53]

E. The understanding-based model simplifies the confidentiality issues associated with mediation

One of the key challenges for any mediator is meeting the expectations of the parties with respect to confidentiality.[54]Mediators cannot promise that the mediation will remain entirely confidential, as disclosure could be compelled by the legal process.[55] Generally, however, it is thought that an expectation of confidentiality is critical to a successful mediation process.[56] Parties to a mediation can be wary and guarded in their communication if they believe the information they reveal may later be used against them in litigation.

A challenge for the mediator in the understanding-based model is that the parties and their representatives may be

reluctant to share confidential information with the other parties to the dispute, and there is a limit to what the mediator in the understanding-based model can do to encourage full disclosure of all information.

Professor Mnookin frames the mediator's dilemma this way:

> We want parties to understand that of course there may be risks associated with disclosure. But there is no way for a mediator to make someone disclose something they don't want to disclose. I'm very candid about that. I can't assure either side that the other is being completely forthcoming. Most of the information will come out before trial anyway. My experience is that in mediation, [if] the information [is] helpful to one's case they are quite eager to share! It's pretty hard under today's civil rules of procedure to have surprises anyway. My own experience is that it's often quite possible to get out the basic information necessary for each party to objectively evaluate the strengths and weaknesses of their cases, and that's really the goal.[57]

Although Raiffa's "FOTE" – "Full, Open, Truthful Exchange of information"[58] – is not always obtainable in an understanding-based mediation, FOTE rarely occurs at all in mediations where the private caucus is employed.

Confidential information disclosed to the mediator during a private caucus can create a dilemma for the mediator. During a private caucus, a party may choose to share information with the mediator that the mediator is not prepared to share with the party on the other side of the dispute. Such a party may be reluctant to share the information with the mediator unless the mediator is both willing and able to maintain the desired confidentiality.[59] The mediator must then decide whether the information is useful in moving the process forward and, if so, what he or she should do with it. This not only empowers the mediator, but creates a genuine risk that through an innocent slip of the tongue during a private caucus or at another point in the mediation, the mediator could divulge some or all of the information conveyed. Such an event has the potential to derail the mediation completely.

Admittedly, the understanding-based mediation model will not always be based on FOTE. Nonetheless, the simple fact that the parties remain together should generally result in more information being shared. Not all communication during negotiations is good news. Mediations in all models are vulnerable to bluffing, threats, trickery, exaggeration, concealment, half-truths and outright lies. But these factors can be counteracted by positive activities – mutual exchange of documents, clear statements of interest, "confessionals," and joint-brainstorming and problem solving.[60] Traditional mediation models where the parties caucus privately can produce these activities as well, but there is less *sharing* of information than in the understanding-based model.

The understanding-based model removes some of the complicated issues surrounding the disclosure of confidential information that can plague traditional mediation models. The mediator in the understanding-based model does not have the burden of keeping track of which statements he or she is permitted to convey to the other side. The risk of an accidental disclosure of confidential information by the mediator is eliminated. The odds of the mediator making a partial or misleading disclosure for the purpose of encouraging settlement are reduced. The elimination of these risks is another positive attribute of the understanding-based model.

F. The understanding-based model is more likely to salvage the relationship between the parties than models where the private caucus is present

Perhaps the most valuable aspect of the understanding-based model is that it gives the parties to the dispute the best chance to resolve their differences in a collaborative fashion. As the mediator works with the parties to increase their understanding of each other's interests, communication often improves. The mediator has the opportunity to help the parties identify barriers to communication and create new, more effective ways to convey their thoughts and feelings. When a collaborative resolution is reached, the relationship has a legitimate chance to survive, or even to grow, subsequent to the mediation.

When the private caucus is used extensively in a mediation, the relationship between the parties is not given this same opportunity to recover. The parties are often prevented from communicating directly, especially if the issues between them are particularly volatile or emotional. New patterns of communication are difficult to create when the parties are cloistered in separate rooms. To the extent that it may be a necessary part of the resolution of the dispute, the healing process between the parties may be delayed or simply tabled due to their failure to confront the difficult issues underlying their dispute.

Professor Friedman writes eloquently of the challenge

and opportunity presented by mediating cases in the understanding-based model:

> Our normal tendency is to want to forget about the past, sever ties, and move on. Yet people who are willing to face what has happened between them and to speak honestly to each other about it, while also addressing what they want for the future, have the chance to reach a settlement that has integrity. That is the challenge and opportunity that this process presents.[61]

By keeping the parties in the same room and encouraging a collaborative decision-making process, the understanding-based model gives the parties the best chance to resolve their dispute and preserve their relationship.

The potential to preserve relationships makes the Understanding-based mediation model an effective dispute resolution tool in divorce and family law cases. The model "works well and is very powerful in the family context. When couples are divorcing, their spousal relationship is ending, but if there are kids, there is a need to help parents who are divorcing get to a point where they can do business together."[62]

Mediation models that separate the parties and promote settlement through shuttle diplomacy by the mediator simply do not provide the parties with the same opportunity to confront and address the communication issues that must be resolved if the relationship is to survive.

It would be a mistake to assume that the preservation of relationships is relevant only to divorce, family and other personal disputes. Professor Mnookin points out that the understanding-based model is a particularly powerful tool for the resolution of business disputes as well:

> [I]n most business disputes this model works exceedingly well. It was put very well by the executive vice president and general counsel for Motorola. He said to me once, "who do business people get into conflicts with? They get into conflicts with their employees, their regulators, their distributors, their suppliers and their customers. With which of those groups do we not have long-term relationships?"[63]

The understanding-based model gives parties to a business dispute a framework based on established principles of negotiation that provides them with the opportunity to engage in a collective problem-solving exercise that in turn gives them the best opportunity to craft a win-win resolution of their dispute. It gives them the opportunity to create new value in their negotiations and is less likely than mediation models that rely on private caucusing to trap them in purely distributive bargaining.

V. CONCLUSION

The understanding-based model of mediation is a better model for the resolution of disputes than mediation models that rely on private caucusing as a tool to help parties resolve their disputes. The model consistently empowers the parties to engage in joint decision-making and problem-solving to create their own solution to their problem. It deliberately and consistently reduces the opportunity for the mediator to exercise control over the proceedings and deliberately to induce the parties into settling the dispute.

At the same time, the understanding-based model empowers the mediator. Once the parties acknowledge and agree that the mediator will serve as an "advocate for understanding" in the process, the mediator is in a position to demonstrate his or her neutrality while asking the parties and their representatives the difficult questions most likely to help the parties understand their individual and collective realities. Because the mediator remains in the room with the parties as much as possible, the likelihood that any party might perceive a bias on the part of the mediator is reduced.

The understanding-based model gives the parties an excellent opportunity to preserve their relationship. As the mediation evolves into a problem-solving exercise, communication barriers can be identified, removed and replaced with greater opportunity for productive, meaningful dialogue than in mediation models that separate the parties and their representatives from each other. Finally, because the understanding-based model is based upon sound principles of negotiation, the process is more likely to produce a win-win result than models where private caucusing is actively employed. The understanding-based model emphasizes the power of joint decision-making and maximizes the opportunity for the parties to engage in a problem-solving exercise characterized by joint decision-making processes. A problem-solving exercise with parties committed to joint decision-making is more likely to create value for the parties than a mediation conducted largely with the parties cloistered in separate rooms.

The understanding-based model places significant demands on the mediator that are more challenging than those faced by mediators using a private caucus mediation model. The mediator must manage the conflict in the room. The British social philosopher Stuart Hampshire wrote that "the skillful management of conflicts [is] among the highest of human skills."[64] For all of its strengths, the understanding-based model requires a mindset and a skill set that is quite different from those required for mediators in models that rely substantially on the private caucus. For mediators willing to work to acquire these skills, and for the parties willing to face each other and attempt to work through their differences, the results can be rewarding.

ENDNOTES

1. In June of 2004, I attended a week-long Advanced Mediation Workshop at the Harvard Program of Instruction for Lawyers ("PIL"). The course was taught by former Stanford professor and mediation pioneer Gary J. Friedman, and by Harvard Law School professor Robert H. Mnookin, chair of the Harvard Law School Program on Negotiation. Certain quotations in this article of Professor Friedman are taken from my notes made during the Harvard PIL workshop. Professor Mnookin's quotations are from the workshop and from comments made during an interview conducted with him at Harvard Law School in December of 2004. I would like to thank Professor Mnookin for taking the time to meet with me to

discuss his thoughts on the Understanding-based model of mediation.

2. Information on the Harvard Program of Instruction for Lawyers can be found at www.harvard/pil.edu. Information on the Harvard Program on Negotiation can be found at www.pon.harvard.edu. Professors Mnookin and Friedman consented to use of the term "Understanding-based Model" to describe their model of mediation. The Model had its origins in their early work at Stanford and Harvard Law school. The model has been used in their mediation practices for years, and is currently taught by professor Friedman and former Harvard professor Jack Himmelstein at the Center for Mediation in Law. Information on the Center for Mediation and law can be found at www.mediationinlaw.org.

3. The term " individual or private caucuses" refers to that part of a traditional mediation proceeding where the mediator places the parties and their representatives in separate rooms. This permits the mediator to speak with each party privately. During the private caucus, the mediator will often shuffle back and forth between the parties, conveying information and perhaps settlement offers.

4. See, for example, the description of Mediation in the Model Standards of Conduct for Mediators set forth by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution in the preamble of its final draft dated April 10, 2005: "Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute." See, also, L.L. Fuller, "Mediation – Its Forms and Functions" (1971) 44 S. Cal. L. Rev. 305 at 318 [footnote omitted].

5. Owen V. Gray, Protecting the Confidentiality of Communications in Mediation, (1998) 36 Osgoode Hall Law Journal, Vol. 36, No. 4 at 669.

6. In New Hampshire, mediation is often court-ordered pursuant to New Hampshire Superior Court Rule 170. Whether the process is treated as voluntary seems to vary from mediator to mediator.

7. Gary J. Friedman, J.D., A Guide to Divorce Mediation, (New York, New York; Workman Publishing, 1993) at 8.

8. Bennett G. Picker, Mediation Practice Guide, a Handbook for Resolving Business Disputes (hereinafter the "Mediation Practice Guide") at page 31. See, also, C.W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict, 2d ed. (San Francisco:Jossey-Bass, 1996) at 319-320; C.W. Moore, "The Caucus: Private Meetings That Promote Settlement" (1992) 16 Mediation Q. 87.

9. Mediation Practice Guide, *supra*, at 31.

10. *Id.*

11. *Id.*

12. Harvard Law School PIL – Advanced Mediation Workshop June 2004, Memo 1, page 3.

13. Picker, *supra*, at page 31.

14. Harvard Law School PIL – Advanced Mediation Workshop, June 2004, Memo 1, page 5.

15. *Id.*

16. *Id.*

17. *Id.* at 32.

18. *Id.* at 33.

19. *Id.* at 32.

20. *Id.*

21. Harvard Law School PIL – Advanced Mediation Workshop, June 2004, Memo 1, page 5.

22. *Id.*

23. *Id.*

24. *Id.* at 8.

25. *Id.*

26. *Id.* at 10.

27. *Id.*

28. *Id.*

29. Interview with Professor Robert Mnookin, December 29, 2004.

30. See, generally, C.W. Moore, "The Caucus: Private Meetings That Promote Settlement", *supra*.

31. Picker, *supra*, at 32.

32. Interview with Professor Mnookin on December 29, 2004.

33. Interview with Professor Mnookin on December 29, 2004.

34. Harvard Law School PIL – Advanced Mediation Workshop, June 2004

35. Gary R. Friedman, J.D., A Guide to Divorce Mediation, *supra*, at 7-8.

36. Harvard Law School PIL – Advanced Mediation Workshop, June 2004, Memo 1, page 2. These stages are fairly self-explanatory and have been described in general terms in earlier sections of this article.

37. Howard Raiffa, with John Richardson and David Metcalfe, Negotiation Analysis (Cambridge Massachusetts and London, England; The Belknap Press of Harvard University Press, 2002) at 15.

38. *Id.* at 16.

39. *Id.*

40. Robert H. Mnookin, "Beyond Winning – Negotiating to Create Value In Deals and Disputes" (Harvard University Press, Cambridge, MA and London, England; 2000) at 12.

41. *Id.*, citations omitted.

42. Interview with Professor Mnookin, December, 2004.

43. Beyond Winning, *supra*, at 14.

44. A Guide to Divorce Mediation, *supra*, at 8.

45. Negotiation Analysis, *supra*, at 83-84.

46. *Id.* at 84-85.

47. *Id.* at 17-18.

48. See, generally, Coben, James R., Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception, Just Resolutions, Vol. 10, No. 1 (Issue No. 27) November 2004 at pages 9-11.

49. Coben, *supra*, at page 9.

50. *Id.*

51. *Id.*

52. Interview with Professor Mnookin on December 29, 2004.

53. Coben, *supra*, at page 11.

54. See, generally, J. Folberg & A. Taylor, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation (San Francisco: Jossey-Bass, 1984).

55. Protecting Confidentiality, *supra*, at 668.

56 Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation, *supra*, at 264.

57. Interview with Professor Mnookin, December 29, 2004.

58. Negotiation Analysis, *supra*, at 86.

59. Protecting Confidentiality, *supra*, at 672.

60. Negotiation Analysis, *supra*, at 83.

61. A Guide to Divorce Mediation, *supra*, at 10-11.

62. Interview with Professor Mnookin, December 29, 2004.

63. *Id.*

64. STUART HAMPSHIRE, JUSTICE IS CONFLICT 35 (2000).

Author

Attorney Scott Flegal is a business lawyer and mediator in Nashua, NH. His law practice is Flegal Law Office, P.A. He performs mediation and conflict management services through his consulting firm, Business Mediation Solutions, LLC.

Coercion and Self-determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary than Others

Timothy Hedeen

Mediation proponents often point to self-determination as the key to the broad applicability and acceptance of mediation in courts. While early mediation programs relied on voluntary participation, many courts now require litigants to try mediation before proceeding to court. Even in mandatory mediation, self-determination is essential: disputants are free to leave the process at any point, with or without settlement, and without coercion. While voluntary mediation may be highlighted in policy and theory, it is not always realized in practice. Research and appellate court filings demonstrate that many disputants experience substantial pressure: judges may pressure parties to enter mediation, mediators may pressure them to continue with mediation, and any number of actors and factors may pressure them to settle. Questions remain about the appropriate level of pressure, however: when does encouragement become coercion? Courts must ensure that court-connected mediation is delivered as promised—that self-determination is maintained throughout. This article reviews the philosophical and practical dimensions of this difficult goal, concluding with four recommendations to minimize coercion in mediation.

Society's reliance on courts to resolve differences has led the justice system to develop an array of innovative programs and partnerships. Courts around the country have embraced mediation as a useful alternative to adjudication for many cases. This institutionalization of mediation has been both well-received and well-critiqued (Menkel-Meadow, 1991; Hedeen, 2003; Press, 2003), and proponents hold the process to be a fitting complement to other judicial processes. Further, it meets a number of interests of court administrators:

> Courts promote [mediation] in the belief that, overall, settlement saves time and money and produces better results than trial. Courts value mediation as a method of screening out cases that do not need much judicial attention so that they can focus their limited resources on cases that need more. Indeed, courts generally see settlement as an absolute necessity to process all their cases, and judges often look to mediation as a way to relieve caseload pressures (Lande, 2002:123-24).

Numerous studies have documented the positive effects of court-connected mediation initiatives, and many resource manuals set forth guidance on the design,

implementation, and evaluation of such programs (see Stienstra and Yates, 2004; Fowler et al., 2000; Plapinger and Stienstra, 1996; and Ostermeyer and Keilitz, 1997).

Across its many forms and contexts, mediation is "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute" (American Arbitration Association et al., 2004). The process is distinguished from other forms of dispute resolution by its emphases on impartiality, confidentiality, and disputant self-determination. This article will focus on the last of these, self-determination, and the ways in which mediators, judges, or court administrators may compromise self-determination through coercion in court-connected mediation. In this treatment, specific court contexts (civil, criminal, family) are deemphasized in favor of lessons and observations applicable across court-connected mediation programs.

The article concludes with practical implications and recommendations for the operation of court-connected mediation programs. While it is recognized that power imbalances between the parties may certainly compromise a party's self-determination, this article will focus on those elements within the control of mediators and mediation-program administrators.

SELF-DETERMINATION

The centrality of self-determination in the mediation community cannot be overstated. One need look no further than the recently revised *Model Standards of Conduct for Mediators*. The first reads:

> Standard 1. Self-determination
>
> A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes (American Arbitration Association et al., 2004).

It should be noted that the December 2004 draft of the *Model Standards* includes this notation: "There is no priority significance attached to the sequence in which the standards appear" (American Arbitration Association et al., 2004). Nevertheless, the prominence of self-determination in these and many other mediation guidelines demonstrates the importance of voluntary participation and agreement in mediation.

While the above definition appears clear enough, a consensus definition remains elusive among actors in the court-connected mediation arena. Welsh (2001) notes that many speak of "self-determination" but that they understand the term quite differently. Such subjective understanding is reminiscent of Justice Potter Stewart's 1964 commentary in *Jacobellis v. Ohio*, "I shall not attempt to define pornog-

raphy . . . but I know it when I see it." Just as the public conception of pornography has changed over the past forty years, Welsh's inquiry on self-determination suggests that its definition may have evolved over time:

> Does it mean the same thing now in the context of court-connected mediation as it did when it inspired many people to become involved in the "contemporary mediation movement" that arose in the 1970s and early 1980s? Most importantly, if the meaning of this "fundamental" term is changing as mediation adapts to its home in the courthouse, does it matter? (Welsh, 2001:3.)

The experiences of judicial staff, mediators, researchers, and mediation participants—especially those involved in cases seeking to set aside mediation agreements based on compromised self-determination—demonstrate that it matters a great deal. (For analysis of a broad range of such cases, see Welsh, 2001, and Thompson, 2004.)

Many mediation proponents have claimed, and some researchers have concluded, that voluntary action in mediation is part of the "magic of mediation" that leads to better results than those from courts or other forums: higher satisfaction with process and outcomes, higher rates of settlement, and greater adherence to settlement terms. (For reviews of existing empirical research, see Shack, 2003, and Wissler, 2004.) A common argument in favor of voluntary participation comes from the early days of the mediation movement: agreements reached in mediation are said to be more durable and fitting than court decisions because the parties design them (Aaronson et al., 1977; Wahrhaftig, 1978). Put another way, "volition is the key to successful outcomes—volition validates those [mediated] outcomes; compulsion does not" (Nicolau, 1995).

While it is commonly held that mediators are expected to "honor, protect, and nurture parties' self-determination . . . [and] to 'empower' the parties, 'enable' them to be 'ultimate decision makers' and 'satisfy' them" (Welsh, 2001:85), these expectations are not always realized in practice. The literature surrounding mediation identifies a number of ways in which a party's volition or self-determination may be compromised; these may be grouped by the stage of mediation—pressure to enter and continue or to settle in mediation.

These distinctions have been recognized for some time—note the title of a 1991 report, *Mandated Participation and Settlement Coercion* (SPIDR, 1991)—but questions persist about the appropriate level of pressure involved at each stage of the process. Much of the academic literature and many programmatic guidelines concerning mediation employ the term "coercion" to represent the pressure perceived by disputants.

Coercion is a fitting term, with its Latin origins meaning *to surround, enclose*, or *confine* (Rosenbaum, 1986). Coercion is sometimes defined as *constrained volition*, wherein the recipient still retains the ability to make a choice but is given a limited set of unwanted options (Wertheimer, 1987). Its legal definition is tied closely to "duress," meaning "threat of harm made to compel a person to do something against

his or her will or judgment; esp. a wrongful threat made by one person to compel a manifestation of seeming assent by another person to a transaction without real volition" (*Black's Law Dictionary*, 1999:520-21). In this discussion of coercion in and into court-annexed mediation, one must further consider two important issues drawn from the philosophical literature. First, Rhodes notes that "coercion" can be understood variously as "the act of coercing" or "an instance of being coerced" (2000:67): the former concerns mainly the actions and intentions of the coercer, while the latter concerns the experience of the coerced. Both conceptions are relevant here and the distinction between them points up the second issue: the element of threatened harm perceived by the coerced. It is not material to the definition of coercion whether the threat can be delivered, only whether the threat recipient (the coerced) thinks it to be possible: "Coerciveness is determined by the harm which the victim *believes* has been threatened, not by the seriousness of the actual harm threatened" (Hoekema, 1986:47, emphasis in original).

Matz observes that much dispute resolution literature portrays the mediator as "someone with the potential to do all kinds of bad things to parties—coercing them, manipulating them, and generally taking advantage of [them]" (1994:359). The following pages will discuss actions by which a mediator, judge, or court administrator may intentionally or unwittingly, explicitly or implicitly engage in actions eliciting perceived-threat-avoidance behavior.

COERCION INTO MEDIATION

While the discussion of voluntary participation is relevant to all areas of mediation practice, it takes on greater gravity in court-annexed mediation. Given the myriad documented benefits of mediation, it is not surprising that courts employ it extensively. Participation in mediation is mandated by rule or statute in some courts (Wissler, 2004; Streeter-Schaefer, 2001; Rack and Rogers, 1999). An Ohio resource manual for common-pleas courts identifies six benefits of mandatory mediation: high litigant and attorney satisfaction, high settlement rates, decreased costs for parties, increased use and the "spillover effect," increased court efficiency, and cost-effective program administration (Fowler et al., 2000). Among the benefits unlisted is addressing the long-recognized underutilization of mediation services (Rogers, 1991; Clarke, Valente, and Mace, 1992; Welsh, 2001).

In an attempt to increase the use of mediation in the 1980s and 1990s, some courts and other governmental institutions began to require disputants to participate in the process, reflecting "the view by legislatures or courts that benefits accrue to the courts, parties, and/or public when the use of dispute resolution procedures is not restricted to cases in which all parties agree to participate" (SPIDR, 1991:38). Only a few years into the enterprise of court-related dispute resolution, McGillis recognized a continuum of coercion levels in operation: "Very low coercion - Moderate coercion - Quite high coercion - Very high coercion - Outright referral to the program" (McGillis, 1986:43-45). A number of early studies supported the finding that increased coercion

leads to higher rates of attendance: the initial three Neighborhood Justice Centers employed low-to-moderate coercion and attained mediation sessions in 35 percent of cases, while five court-sponsored programs in Florida employed "quite high" coercion and attained sessions in 56 percent of their cases, and a Minnesota project sponsored by the prosecutor employed "very high" coercion and attained sessions in 90 percent of its cases (McGillis, 1986).

Focusing on coercion to enter mediation, researchers have found that court pressure may be exercised in a variety of ways. For illustration, Roehl and Cook (1989:45) have observed that judges or prosecutors may compel disputants *explicitly* or *implicitly*:

> Explicit coercion may be used to persuade a reluctant disputant to agree to mediation by implying that prosecution will be initiated if mediation is not. Implicit coercion is evident in referrals by judges who agree to dismiss the court case if successful mediation takes place, and it appears in communications from prosecutors, police officers, and mediation program staff.

Even in states and court systems that have explicit guidelines to maintain the voluntary nature of mediation participation, such implicit coercion has been documented in both civil and criminal courts. A study conducted for the Department of Justice found that a number of programs "use very threatening letters to compel respondents to appear for mediation with the complainant. The typical closing line in the letter is, 'Failure to appear may result in the filing of criminal charges based on the above complaint.' Official stationery is used and the district attorney or a similar official signs the letter" (McGillis and Mullen, 1977:61). Indeed, for those disputants who might dismiss such a "recommendation" from a judge, it is not uncommon for court officials and mediation-center staff to caution reluctant disputants that failure to participate in mediation will be taken into account if the case returns to court; as is often observed about judicial suggestions, "People aren't in the habit of saying 'no' to a judge." In other words, "Even in programs which are not strictly mandatory, when court personnel encourage parties to mediate, the invitation is not lightly refused" (Nolan-Haley, 1996:63). While such pressures are present in civil cases, Brown (1994) has observed that they may be even greater in criminal matters and victim-offender mediation. Given that mediations are often conducted in courthouses, it should not be surprising to learn that many disputants may have difficulty distinguishing between mediation and adjudication (Merry, 1989; Hedeen and Coy, 2000).

Proponents of mandated participation contend that mediation remains a voluntary process so long as no coercion takes place during the session. Noting that the enticing carrot of mediation may be complemented by the punitive stick, Nicolau observes,

> Some writers and analysts have suggested that a certain amount of coercion to accept the mediation process is inherent, particularly when matters are referred by courts, and that such coercion is acceptable as distinguished

> from coercion in mediation, that is coercion to accept a particular settlement. Coercion to enter mediation is often labeled "encouragement" (1986).

More explicitly, Sander distinguishes between coercion in and coercion into mediation, "'Is mandatory mediation an oxymoron?' I think not, because I believe there is a clear distinction between coercion into mediation and coercion in mediation" (in Sander, Allen, and Hensler, 1996). Sander also recognizes the polemics that attend this issue:

> There are some hot arguments in the literature with some people saying, "Mediation means voluntarily agreeing to a result. How can you force somebody to voluntarily agree to a result?" I think that confuses coercion *into* mediation with coercion *in* mediation. If you have coercion *in* mediation, it is not mediation. But to say "You have to try this process because in our judgment"—the legislature's or judge's judgment—"this may be a good case for attempted settlement," that seems to me all right (Sander, 2000:7-8, emphasis in original).

The claim that entry into mediation is readily distinguished from the actions taken within the process is not universally accepted, however. Merry, for one, strongly refutes this argument based on a broader view of mediation's place within larger dispute resolution processes, most of which involve substantial punitive power:

> Once the importance of the linkage of stages in dispute processing becomes clear, the claim . . . that coercing people *into* mediation is not too serious if they are not coerced *in* mediation becomes more questionable. No process exists separately from its place in the unfolding sequence of stages, which gives it meaning and force. If parties are aware that a more coercive process will ensue if mediation fails, the dynamics of the mediation process will differ sharply from "pure mediation," because the expectation of an imposed settlement will inevitably alter the meaning of the event for all the actors (Merry, 1987:2066, emphasis in original).

The "pure mediation" of which Merry writes is that in which disputants participate freely at all stages of the resolution process. Her choice of terms implies that mediation is pure only when it is free of compulsion.

Research on the issue of coercion into mediation has been conducted through New York's statewide network of centers, which handles some 40,000 cases each year. Interviews with program staff echoed earlier research findings that "[d]isputing parties sometimes agree to mediation in the hope that it will impress the judge, or because they feel that this is a required part of the court process" (Merry, 1989:244). When asked about the potential harm faced by disputants referred from courts, staff members spoke directly to the issue of perceived harm:

> I don't know that there are any consequences [for not participating], I think there are perceptions of consequences. . . . It's eventually going to end up back in front of the judge, so if you can say you made an effort, you won't be hurt. . . . I think a lot of people who perceive that type of pressure participate as a pre-emptive action (quoted in Hedeen, 2001).

While the New York programs do not mandate mediation for any cases, regression analysis found that referrals from courts led to higher rates of participation than those from law enforcement or other social services: court referrals were three times as likely to reach mediation as social and governmental services that did not include law enforcement or courts. Coincidentally, those same court referrals led to a lower likelihood of reaching agreement in mediation. (For detailed findings and methodology of this research, see Hedeen, 2001, or contact the author.)

Other observers waffle on this distinction. In one of the most prominent books on mediation, Moore equivocates on the issue of compulsory mediation: in one paragraph he writes, "*Voluntary* refers to freely chosen participation and freely made agreement. Parties are not forced to negotiate, mediate, or settle," and in the next, "Voluntary participation does not, however, mean that there may not be pressure to try mediation" (Moore, 1996:19, emphasis in original). Moore recognizes that the semantic distance between "not forced" and "pressure to try" is limited, and he offers support for this apparent contradiction shortly thereafter: "Attempting mediation does not, however, mean that the participants are forced to settle" (1996:20). This paradox is presented elsewhere:

> Although there initially appears to be some contradiction between the voluntariness and self-determination that mediation is intended to foster and the coercion of a mandatory mediation requirement, mandatory proponents argue that there is no real inconsistency. Because no party can be forced to settle or otherwise alter his or her position in a mediation, the coercion only relates to requiring that parties try to reach an agreement to resolve their dispute (Bullock and Gallagher, 1997:948).

COERCION WITHIN MEDIATION

Coercion *toward* settlement has received the greatest attention in the mediation literature and caselaw, and perhaps appropriately so, as the resulting settlements usually bind the disputants to a course of action they may not have freely chosen. Mediation agreements in some contexts have the effect of a contract, thus narrowing the contracted parties' available options in the future. Before turning to settlement coercion, however, we must consider another form of coercion within mediation, which may occur between entry and exit: coercion *to continue* with mediation.

Coercion to Continue with Mediation. Mediators are sometimes described as controlling not the outcomes of mediation, but the *process* of mediation. Most court-

annexed mediation programs have established guidelines that any party may stop the mediation once in progress—see, e.g., Georgia's ADR Rules, which stipulate that "mediation may be terminated by either the mediator or the parties at any time" (Georgia Rules, Appendix C, Chapter 1).

Given the pressures perceived by parties documented above, disputants may defer to the mediator to determine the appropriate time to quit. Some mediators, too, feel the decision to conclude mediation should reside exclusively with the mediator. Through interviews of circuit court mediators in Florida, Alfini (1991:72) observed that many mediators believe, "It's my decision to either declare it an impasse and have everybody go home or to continue. It's not their decision." Commenting on this attitude, Moberly (1994:717) has observed, "This approach goes against traditional practice of mediation, in which parties have a right to withdraw rather than be forced to continue."

Evidence drawn from recent caselaw and legal education events suggests that many mediators engage in coercion to keep disputants at the table. Such coercion may be exercised through acts of commission or of omission. Consider the appeal filed by a Texas plaintiff "who was on heart medicine, tried to set aside a mediation settlement agreement by claiming that despite chest pains and fatigue, he was told that he would have to continue in the mediation session until he was willing to reach agreement" (*Randle v. Mid Gulf, Inc.*, 1996, noted in Thompson, 2004:530). The pressure to remain in mediation and work toward agreement is clear here, but similar pressures may be applied through indirect means, too.

In a discussion of mediator manipulation, Coben (2004:9) relates the "stunning" response he received to a hypothetical posed to mediators "[a]t a continuing education event several years ago . . . , I was stunned by the high percentage of mediators who enthusiastically answered, 'yes' when asked if strongly encouraging parties to skip lunch (to keep the pressure on) was a good tactic" (parenthesis in original). It is not uncommon to read of all-night bargaining sessions in the labor arena, but it should be noted that negotiators in such sessions—whether assisted by mediators or not—are typically experienced in long- and late-hours meetings. Many disputants enter mediation with limited or no knowledge of the process, and appeals cases have demonstrated that they do not expect all-day marathon sessions. A 65-year-old plaintiff suffering from high blood pressure, headaches, and intestinal pains sought to rescind her mediated agreement at the end of a fifteen-hour session based on her compromised participation and on mediator "bullying" (*Olam v. Congress Mortgage Co.*, 1999). In a Florida appeal (*Vitakis-Valchine v. Valchine*, 2001) the plaintiff sought to negate a settlement reached after an eight-hour mediation, during which she claims the mediator "threatened to tell the judge that she caused the settlement failure" (Thompson, 2004:529).

While Coben (2004:9) expresses his dismay at such pressure, "Acquiescence through exhaustion—now that's an ethically healthy approach to dispute resolution to make us all proud," it is appropriate to consider that the guidelines that grant all parties the right to terminate mediation also send a cross-signal to mediators.

Consider that the Georgia ADR Rules cited above conclude, "Mediators will be sensitive to the need to terminate the mediation if an impasse has been reached. However, mediators must be courageous in declaring impasse only when there is no possibility of progress."

Coercion to Settle in Mediation. Pressure *to settle* is the form of coercion most commonly examined in the existing literature and caselaw. Matz (1994:359) contemplates that a number of motivations may lead mediators to "push a hapless party into accepting an agreement." Alongside a surfeit of guidelines prohibiting settlement coercion are a multitude of interests expecting—or even rewarding—such pressure: from Harrington's (1984) documentation that many judges expected that referrals to mediation were effectively conclusions of cases to Sander's (1995) observation that some mediators, for marketing purposes, are more interested in placing "another notch on their belts" to boost settlement rates than in facilitating a mediation outcome appropriate to the parties and their case. Further, research has found that many lawyers prefer mediators who get cases settled (McAdoo, 2002; McAdoo and Welsh, 1997); for those mediation clients intentionally seeking to reach agreement, a mediator's settlement rate "is likely to be critically important" (Lande, 1997:852). But what of those parties for whom settlement is not the primary goal or those cases for which settlement may not be appropriate (Peterson, 2004)?

Lande (1997) observes that "an emphasis on settlement lends itself to [the mediator] being highly directive" (p. 852), and this is clear in a number of appeals cases related to mediator pressure. Given the highly contextual nature of mediation and the correspondingly broad rage of contingent mediator behaviors, the field lacks a clear line delineating when a mediator has become too directive and has engaged in settlement coercion. While the cases cited in this section illustrate mediator behavior that may be held to be coercive, it should be noted that the appellant prevailed in only one of these; this suggests a party's perception of coercion, of constrained self-determination, may not be the same as the judges on the appeals courts. For this author, that does not negate the appellants' experiences of coercion in mediation.

In appealing the outcome of a Texas divorce mediation, a party attested that the mediator "yelled at her . . . , accused her of lying about seeking work, discouraged her from going to trial by telling her that [her husband] would fare better there" (*Durham v. Durham*, 2004). This behavior allegedly intimidated the party into signing the agreement. Other appellants have detailed similar patterns of mediators forecasting dire outcomes for their cases if unresolved in mediation and strongly pressuring them to settle. In another case the mediator told the plaintiff he would not "see a dime" unless he "agreed to the mediated settlement then and there," leading to the plaintiff's agreement to a settlement (*Chitkara v. New York Telephone Co.*, 2002). Only after the mediation did the plaintiff learn that the mediator's estimation was factually incorrect. Going a step further, it is alleged that the mediator in another case went so far as to threaten plaintiffs with criminal prosecution (*FDIC v. White*, 1999, noted in Freed, 2004).

In one of the most comprehensive examinations of mediator coercion, Welsh (2001) details a case in which the parents of a man killed by police sued the officers involved (*Allen v. Leal*, 1998). The daylong mediation concluded with a settlement, but one which the plaintiffs reconsidered afterward and deemed unacceptable later on the day of the mediation. In a subsequent judicial settlement conference, the plaintiff's attorney described the mediator's actions:

> "Your family is going to be destroyed in this case. You got zero"—and if he said it once, he must have said it 40 times—"you got zero chance of success on this and your family is just going to be destroyed"—and he really harped on that. [When the mediator returned with an offer that was $10,000 less than the Allens' demand] [h]e said, "This is a take it or leave it. You got the 90 and that's it. And you better do this because you got zero chance of success and this will destroy your family" (transcript in Welsh, 2001:12).

The plaintiffs felt the mediator's actions inappropriately coercive and explained this to be the basis for their wishes to rescind the agreement. A local chapter president of a national attorney-mediator organization defended the actions of the mediator, arguing that "what some people might consider a little bullying is really just part of how mediation works" (Welsh, 2001:13). The federal district court reviewing the case (*Allen v. Leal*, at 947), responding to both the case and recent comments by a prominent local mediator, issued a statement that "coercion or 'bullying' clearly is not acceptable conduct for a mediator in order to secure a settlement." This echoes the commentary issued on *Vitakis-Valchine v. Vachine*, in which the court of appeals reasoned that "it would be unconscionable for a court to enforce a settlement agreement reached through coercion or any other improper tactics" (Freed, 2004:12). The Texas mediator's defense of bullying, alongside the above arguments against such coercion, demonstrates the wide range of understanding of self-determination among actors in court-annexed mediation. This wide range is evident in Nolan-Haley's (1999) presentation of four models of decision making in mediation, two of which may be seen in the *Vitakis-Valchine* and *Allen* cases: the first is the "*paternalistic* or 'dictated autonomy' model" and the second is the "*instrumentalist* or 'limited autonomy' model" (p. 815, emphasis in original). In the former the mediator's explicit appraisal of the case is meant to guide parties' decisions, while in the latter the mediator emphasizes risks in each party's case to encourage concessions toward settlement. Nolan-Haley's recommendations for "informed consent" in all cases will be addressed in the conclusion.

Many mediators are trained to facilitate negotiation through an interest-based process popularized by the text *Getting to Yes* (Fisher and Ury, 1981). Among its recommendations is that negotiators should know their "BATNA," or "best alternative to a negotiated agreement." Moffitt applies this concept to mediators, offering that "the process of helping parties assess their prospects outside of mediation" might be called, 'BATMA-checking' [!]" (1997:15). When a mediator assists a party in exploring or understanding their alternatives to agreement—not only the best but the full

range, including the worst—it is easy to envision how a party might feel such exploration is a form of pressure. Similarly, many proponents of mediation highlight the role of "reality-checking," wherein parties gain a realistic sense of the strengths, weaknesses, and likely outcomes of their case. As a mediator asks questions or makes statements to encourage a disputant to appreciate these "realities" or undesirable alternatives, parties may feel badgered or coerced.

Badgering or coercing may be motivated by a mediator's interest in her own marketing or accomplishment. Sander's assessment that some mediators may press for settlement to enhance their own settlement rate has been confirmed in at least one case in Washington (*In re Patterson*, 1999). In that case plaintiff claimed that "the mediator told the parties that a lack of settlement would ruin the mediator's record" (Thompson, 2004:558, n. 277). An Alaska attorney recently recounted a conversation with a prominent judge who bragged of his 100 percent settlement rate, upon which the attorney reflects, "It may be counter-intuitive, but the fact of the matter is that a high settlement rate is often a sign of a bad mediator, rather than of a good one" (Peterson, 2004:14). Settlement, he argues, is not desirable in all cases. Cases that should not settle include those involving fundamental rights or issues deserving a precedent (Peterson, 2004), or those for which "there is a need for public sanctioning of conduct [or] when repetitive violations of statutes or regulations need to be dealt with collectively and uniformly" (Center for Dispute Settlement et al., 1992:4.1). Further, both sources caution against mediation when either disputant is unable to negotiate effectively due to severe power imbalances or mental-health concerns. Many court-annexed mediation programs have screening procedures to direct these cases away from mediation (Coy and Hedeen, 1998).

Mediator as Tattletale?: Coercion Through Reports and Recommendations to the Court. The literature of court-connected mediation identifies another structural means through which mediators may coerce disputants: communication to the court following mediation. This communication may take the form of reports of parties' behavior in mediation or recommendations for case outcomes to the judge. While some family courts have formalized the practice of mediators recommending custody placements and other arrangements unresolved in mediation, the prevalence of this practice is unknown but likely limited, due in large part to courts' adoption of the 1992 *National Standards for Court-Connected Mediation*. Standard 9.4 recommends that "mediators should not make recommendations regarding the substance or recommended outcome of a case to the court" (Center for Dispute Settlement et al., 1992), while Standard 12 seeks to "insulate the mediator from the court" through communication of only procedural facts—party attendance at mediation, requests for more time, and mediator assessment *without elaboration* that a given case is inappropriate for mediation. It should be noted that many, if not most, states provide for mediation communication to the court or other authorities in instances of alleged or suspected child abuse or neglect; many have provisions related to abuse of vulnerable adults; and others have even broader exceptions for "threat of imminent harm to self or others."

While confidentiality protections encourage candid settlement negotiations, they also largely preclude monitoring of mediators who may improperly coerce parties through threats of such reports. Recall, for example, the appeals case of *Vitakis-Valchine v. Valchine*, in which the mediator allegedly threatened to tell the judge that the plaintiff had prevented the case from reaching settlement. It is not clear that such a report would harm the disputants—note that Standard 11.5 reads, "There should be no adverse response by courts to non-settlement by the parties in mediation" (1992:11.5)—but in the context of a mediation session, would a party be expected to ignore the mediator's threat based on a procedural guideline they have heard or read perhaps once?

Some courts have unwittingly introduced the possibility of mediator coercion through their solution to a different problem. It has long been recognized that some parties will participate in mediation with no intention of reaching agreement and, perhaps, with ulterior motives, such as fishing for compromising information about the other party's case (see, e.g., Lande, 2002). To prevent such abuse of mediation, a number of courts instituted "good-faith" requirements; the National Standards cite Maine's provision that "when 'agreement through mediation is not reached on any issue, the court must determine that the parties made a good faith effort to mediate the issue before proceeding with a hearing'" (Center for Dispute Settlement et al., 1992:12-2). These well-intentioned attempts to ensure appropriate conduct in mediation also brought about the potential for abuse:

> A good-faith requirement gives mediators too much authority over participants to direct the outcome in mediation and creates the risk that some mediators would coerce participants by threatening to report alleged bad-faith conduct. Courts can predict abuse of that authority given the settlement-driven culture in court-connected mediation. The mere potential for courts to require mediators' reports can corrupt the mediation process by instilling fear and doubt in the participants (Lande, 2002:106).

Party-as-Piñata: Does Desired Mediator Pressure Constitute Coercion? Discussion at a recent conference of the American Bar Association brought to the surface a thorny issue for mediators and mediation clients: the question of desired pressure from the mediator. A conference participant relayed the experience of his associate, serving as counsel for an insurer: following a mediation that did not conclude in settlement, the adjuster complained to the attorney: "I had authority to offer more money, but the mediator didn't beat it out of me" (comments at Hedeen, Alfini, and Lande, 2005). To this author, this conjures a new metaphor for mediator-client dynamics, that of "party-as-piñata."

This dynamic is also reflected on a Web-based mediation resource, which lists fifteen methods for "crossing the last gap in negotiation" (*Mediate Today*, 2005). For the last of these methods—one "rarely chosen"—the authors describe a scenario in which parties have resolved most but not all of their differences, leading them to ask

the mediator to apply greater pressure. With "varying degrees of simulated anger," the mediator expresses disappointment and disbelief at the disputants' intractability, allowing them to "blame the mediator for 'forcing' the last concession (and rescuing them from their painted-in corners)" (*Mediate Today*, 2005).

While largely undocumented in the literature and unanticipated in the rules and regulations, the above anecdotes suggest that some parties seek, or even expect, mediators to apply pressure toward settlement. The most likely motivation is that such pressure grants greater latitude to the party: the party may tender an offer, or accept a settlement beyond its "bottom line" yet does not bear the full responsibility for doing so. Limited commentary on this dynamic has been offered, including Stulberg's (1981) identification of scapegoat as one of a mediator's roles, and Carnevale, Lim, and McLaughlin's (1989) observation of mediators "press[ing] the parties hard to make compromise," "express[ing] displeasure at the progress of negotiation" and "tak[ing] responsibility for concessions" (p. 216).

A related phenomenon occurs when attorneys seek out mediators to help provide "reality checks" to their clients. In some cases, these clients have maintained expectations of a case's value or likelihood of success well beyond their attorney's predictions; attorneys may mediate in the hope of the client accepting the neutral mediator's more-moderate assessment. In others, the attorney follows the pattern described above, seeking the mediator to deliver the bad news so as to save face or not appear weak or unresolved in support of the client's case. Lande (1997) observes that experienced attorneys may knowingly select mediators who employ more or less pressure, and that these "sophisticated buyers" may refer to the more directive mediators as "'muscle mediators,' . . . or mediators who will 'knock some sense' into the principals by 'banging their heads together' or 'twisting their arms'" (p. 850). It remains unclear whether and how such pressure, when desired by the parties, constitutes a compromise of self-determination; this dynamic and its fit in court-connected mediation deserve further study.

IMPLICATIONS AND RECOMMENDATIONS

In their survey of mediation research, Guthrie and Levin summarize that disputants are most satisfied when the process is "*noncoercive*, unbiased, comprehensible, informative, attentive to party interests and private" (1998:892-93, emphasis added). The preceding discussion of self-determination and coercion demonstrates that mediators, referring court agents, and even court policies may effect coercion in court mediation. This arises, Thompson (2004:570) contends, because the prevailing philosophy of the courts (toward settlement) is in tension with the mediation's commonly understood role of facilitating communication; his recommendation, with which this author thoroughly agrees, is that "courts should be up front and direct about the purpose of the process."

To turn from description to prescription, and to build on suggestions born of the literature and of the author's professional experience, I recommend that judges, court administrators, and mediators consider four changes to the present practice of court-

connected mediation. In the order in which these would influence a mediated case, they are that 1) referrals to mediation should be explicitly free of coercion; 2) mediation consent forms should be executed at the outset of mediation to affirm the disputants' informed consent (per Nolan-Haley, 1999) and understanding of a) the bounds of acceptable mediator pressure, b) their rights to terminate mediation at any time, and c) the court's policy that nonsettlement will not adversely affect either party's case; 3) Welsh's "cooling-off period" between the mediation session and the date any mediated settlements are finalized should be instituted; and 4) a blanket prohibition on substantive mediator reports and recommendations to the court should be enforced.

Just as Lande (2002) recommended that a consensus process among judges, court administrators, mediators, attorneys, and disputants could be used effectively to develop good-faith requirements in mediation, a similar group process would likely be required to clarify and effect some of the changes just outlined. How, for example, might referrals to mediation avoid the perception of being coercive? What are the acceptable bounds of mediator pressure? Procedural justice research suggests that these questions are best resolved at the local level with the participation of all affected parties.

* * *

In George Orwell's satirical *Animal Farm*, the ruling pigs replace the Seven Commandments of Animalism with but one: "All animals are equal, but some animals are more equal than others" (1946:123). Today, one might apply a paraphrased revision to the field of court-connected mediation: where once there was a tenet that disputants chose whether and how to participate in mediation, there is now, "All mediations are voluntary, but some are more voluntary than others."

If courts are to make full and appropriate use of mediation—and more important, if clients are to realize the full benefits of mediation—judges, mediators, and court administrators must work to ensure that self-determination is maintained throughout every case. The preceding pages have demonstrated that competing theories and evolving conceptions of mediation have occasionally led to a gulf between what is promised and what is practiced. Through consideration and adoption of practices like those recommended here, court-connected mediation can meet the interests and ethics of all parties involved in this innovative and valuable enterprise. **jsj**

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Why Does Anyone Mediate if Mediation Risks Psychological Dissatisfaction, Extra Costs and Manipulation? Three Theories Reveal Paradoxes Resolved by Mediator Standards of Ethical Practice

SAMUEL J. IMPERATI AND STEVEN M. MASER*

ABSTRACT

Three paradoxes afflict mediation. First, if self-determination is a psychological need motivating the parties and the mediator, how can the parties and the mediator jointly satisfy their potentially conflicting needs? Second, if parties are having difficulty resolving their conflicting individual interests and incurring costs in the process, why would they invite a third party into the conflict who has his or her own interests and adds costs? Third, if it is impossible to guarantee that any collaborative decision making process can be immune to manipulation by one of the participants, including the mediator, why would parties expose themselves to the risks of mediation? Three mutually reinforcing theories (Self-Determination Theory, Transaction Resource Theory, and Collective Choice Theory) reveal these paradoxes. The analysis demonstrates how professional organizations and states can resolve the three paradoxes by crafting and enforcing mandatory standards of ethical practice for mediators.

I. INTRODUCTION

We know how mediation works.[1] Do we know why? This paper proposes an affirmative answer by drawing upon theories from the fields of Psychology, Economics, and Political Science. However, these theories reveal three paradoxes, leading us to question why anyone, including a mediator, would engage in mediation. If anyone does, we conclude, it will be because standards of ethical practice resolve the paradoxes.

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* Authors listed in alphabetical order: Samuel J. Imperati, J.D.: Executive Director Institute for Conflict Management, Inc. Portland, Oregon.

Steven M. Maser: Professor Emeritus of Public Policy and Public Management Atkinson Graduate School of Management Willamette University, Salem, OR.

[1] *See* Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 248–49 (1993).

First, from the field of psychology, mediators are called upon to help resolve a conflict among self-determining parties who choose their own dispute resolution processes and make their own substantive agreements.[2] A mediator is also a self-determining actor with, among other things, a reputational stake in promoting her settlement prowess, a desire to "balance power," or a desire to ensure the "right" outcome is achieved. Those interests may or may not be compatible with interests of the parties in any given mediation. Would this not give self-determining parties pause about participating in mediation? Indeed, would this not give a self-determining third-party pause about serving as a mediator?

Second, from the field of economics, parties negotiating a resolution engage in a costly mixed motive game that involves conflicting incentives to cooperate or compete. Bringing in a third party, the mediator, to assist them introduces a second, costly, mixed motive game: this one between the parties and the mediator, who wants the parties to settle to advance his or her own interests. Would this not give each party and the mediator pause?

Third, from the field of political science, it is not possible to design a process for translating individual parties' preferences into a group preference that assures against the parties cycling interminably from one proposed agreement to another.[3] Even if they settle on one, the parties, and the mediator could still have "manipulated" the process. Would this not give each party and the mediator pause?

Given these three paradoxes, the surprise is not that mediation works as well as it does. The surprise is that people mediate at all, even though mediation's proponents believe it is much better than litigation in terms of satisfying the overall interests of the participants.[4] That mediation happens is testimony to the mediator's judicious application of ethical rules and rhetoric to serve the participants'—including the mediator's—psychological needs for self-determination and for economizing on the costs of negotiating.

Judicious here means being ethical. The mediator who adheres to well-crafted standards of practice resolves the triple paradox, improving the parties' confidence and willingness to engage in the process. Given the power inherent in the mediator's role, everyone's perception that the mediator will behave ethically gives force to, and trust in, the process.

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[2] SUSAN RAINES, CONFLICT MANAGEMENT FOR MANAGERS 100–01 (2013).

[3] KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 11 (2d ed. 1963).

[4] This is conventional wisdom. *See Using Mediation in Your Lawsuit*, IDIOT'S GUIDES, http://idiotsguides.com/static/quickguides/politicalsciencelaw/using-mediation-in-your-lawsuit.html (last visited Mar. 25, 2014).

We base this argument on three theories. Like mediation itself, they originate in different disciplines. They reinforce each other to expose common assertions[5] about mediation practice that are arguably erroneous: A) parties own the outcome; mediators own the process, and B) mediators have no preferences over outcomes.

Section II of this paper outlines the three theories (Self-Determination Theory, Transaction Resource Theory, and Collective Choice Theory), the resulting paradoxes, and associated remedial standards of ethical practice. We will refer to the guidelines embodied in the Oregon Mediation Association Core Standards of Mediation Practice (OMA Standards in the following text) for resolving them.[6] Our analysis allows us to derive criteria[7] for standards of practice that can breed more confidence in mediation, much as a reputation can breed more confidence in a particular mediator.

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[5] These assertions may be a result of the "availability cascade" cognitive bias. It is the "self-reinforcing process in which a collective belief gains more and more plausibility through its increasing repetition in public discourse (or, repeat something long enough and it will become true)." *See* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1998).

[6] *See generally* OREGON MEDIATION ASSOCIATION, OREGON MEDIATION ASSOCIATION CORE STANDARDS OF MEDIATION PRACTICE (2005), *available at* http://www.omediate.org/pg61.cfm. The American Arbitration Association, American Bar Association, and the Association for Conflict Resolution (ACR) adopted their "Model Standards of Conduct for Mediators" ("Joint Code") in 2005 as well. MODEL STANDARDS FOR MEDIATORS (American Arbitration Ass'n et al. eds., 2005), *available at* http://www.acrnet.org/uploadedFiles/Practitioner/ModelStandardsofConductforMediators final05(1)(1).pdf. The Oregon Mediation Association changed many of its provisions when adopting the OMA Standards to add further detail and qualify some of the practical challenges it believed the Joint Code created for the practitioner in the field. The authors suggest both codes should be modified to attend to the issues raised herein.

[7] OREGON MEDIATION ASSOCIATION, *supra* note 6, at 1.The OMA Standards Preamble notes the complexity and diversity of the field with, "These Core Standards recognize that the role of mediator is complex, individual practice areas vary, and a full spectrum of personal, professional, and cultural diversity surrounds mediator approaches. These differences are valuable. These Core Standards should not be construed to favor or disfavor any particular approach." *Id.* Because mediation is evolving, the Preamble also notes its provisions "are not intended to dictate conduct in a particular situation, define 'competency,' establish 'best practices,' or create a 'standard of care.' They are not intended to be disciplinary rules." *Id.* Finally, the Preamble recognizes the interdisciplinary nature of the field. It states, "When these Core Standards conflict with or are silent on subjects covered by applicable laws, regulations, professional licensing rules, professional ethical codes, or contracts by which the mediator may be bound, mediators should be aware and make participants and others in attendance aware that those requirements may take precedence over these Core Standards." *Id.*

First, self-determination theory (SDT) explains the motivation for anyone to participate in mediation.[8] In our application of SDT to mediation, it is not that the parties necessarily trust the mediator, who empowers and protects them so they can reveal information essential for satisfying their underlying interests. Rather, mediating helps the parties and the mediator satisfy their innate psychological needs for competence, autonomy, and relatedness, which are necessary conditions for their psychological growth, integrity, and well-being. *Second*, transaction resource theory (TRT) explains the conditions under which parties will turn to a third-party to explore resolution.[9] In our application of TRT to mediation, reaching agreement requires each individual to deal with contradictory pressures. They are: A) the costs of making concessions and complying with the terms of an agreement (militate against making an agreement) versus B) the benefits of reducing conflict and inducing others to cooperate (militate in favor of making it.) Mediators can supplement the resources parties exhaust in managing these pressures, even after accounting for the costs of introducing the mediator. *Third*, collective choice theory (CCT) explains the impossibility of guaranteeing against someone manipulating the process when members of a group, such as two or more parties in conflict with the addition of a mediator, attempt to reach agreement be it on process or substance.[10] In our application of CCT to mediation, a mediator's involvement in defining the process and in framing or reframing arguments and proposals cannot avoid being manipulative. CCT identifies the conditions under which parties could condone this.

Section III of this paper outlines the strategic "manipulations" that are tools of the mediator's trade: A) Heresthetics (Politics), and B) Rhetoric (Persuasive Discourse). We discuss them in the context of SDT, TRT and CCT, and the applicable ethical standards.

Section IV outlines recommendations to assist organizations setting out to create and revise their standards of conduct. We also argue for changing most, if not all, mediator standards from guidelines to enforceable expectations of conduct.

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[8] *See generally* Edward L. Deci & Richard M. Ryan, *The "What" and "Why" of Goal Pursuits: Human Needs and the Self-Determination of Behavior*, 11 PSYCHOL. INQUIRY 227, 227–268 (2000).

[9] *See* Jules Coleman et al., *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 HARV. J. L. & PUB. POL'Y 639, 681–82 (1989).

[10] *See* JOHN BONNER, POLITICS, ECONOMICS AND WELFARE: AN ELEMENTARY INTRODUCTION TO SOCIAL CHOICE 59–60 (1986).

II. THEORIES, PARADOXES AND STANDARDS OF PRACTICE

We provide the following overview table[11] of the theories, paradoxes and associated ethical practices:

	Theory	Paradox	Ethics
A)	Self-Determination Theory	The more the mediator maximizes the parties' self-determination, the less the mediator satisfies her own.	Self-Determination Informed consent
B)	Transaction Resource Theory	Parties exhaust their transaction resources in resolving their individual interests, yet they invite a third party into the conflict with his or her own interests.	Impartial Regard Confidentiality
C)	Collective Choice Theory	It is impossible to design a process for translating individual parties' preferences into a group preference that guarantees the parties will not cycle interminably among possible outcomes.	Self-Determination Impartial Regard Good-Faith Participation Informed Consent

Table 1

[11] *See supra* notes 8–10. *See also infra* notes 13, 48, 92–96, and accompanying text.

A. *Self-Determination Theory and Paradox 1*

Self-determination is a cornerstone of mediation.[12] What does "self-determination" mean? To Bush and Folger, it means a relational concept of human identity based on two perceptions:

> As a matter of basic human consciousness, every person senses that he or she is a separate, autonomous agent authoring her or his own life, and at the same time senses that that he or she is an inherently social being, connected to other people in an essential and not just instrumental fashion.[13]

We read this to mean, to the extent that conflict diminishes an individual's perceptions of his or her autonomy and connectedness, it compromises the individual's sense of identity. This deficit motivates the individual's effort to change the conflict interaction, with or without a third party's assistance, to try to regain a sense of humanity.

Bush and Folger's description of self-determination is problematic. They use the terms "individual agency" and "individuality" to explain what they mean by "separate, autonomous agent, authoring his or her own life." This confounds the notion of an individual's psychological need for a sense of "independence," meaning distinctiveness, with the notion of an individual's psychological need for a sense of "volition," meaning ability to choose. What Bush and Folger mean by "connected to other people in an essential . . . fashion" is less clear, but apparently, it has to do with a need for an "understanding between human beings."[14] This confounds the notion of an individual's psychological need to have a sense of belonging with an individual's psychological need for empathy.

Self-Determination Theory, a well-articulated, internally coherent, and empirically grounded theory of human psychology corrects these confounds.[15] It improves the foundation on which mediation practice can build. Its precepts are:

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[12] Samuel J. Imperati et al., *If Freud, Jung, Rogers and Beck Were Mediators, Who Would the Parties Pick and What are the Mediator's Obligations?*, 43 IDAHO L. REV. 645, 647 (2007).

[13] Robert A. Baruch Bush & Joseph P. Folger, *Transformative Mediation: Theoretical Foundations*, *in* TRANSFORMATIVE MEDIATION: A SOURCEBOOK 22 (Joseph P. Folger et al. eds., 2010).

[14] Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 NEGOTIATION J. 271, 273 (1999).

[15] Deci & Ryan, *supra* note 8, at 227–68.

- the natural orientation of humans is to grow, integrating their psychic elements into a unified sense of self and into larger social structures;
- acting on the environment rather than passively awaiting a disequilibrium;[16]
- extrinsic rewards and other environmental conditions catalyze self-motivation; and
- psychological well-being to the extent that they satisfy innate psychological needs.[17]

Consistent with Bush and Folger, Deci and Ryan define a psychological "need" as an organismic necessity, neither an acquired motive nor learned.[18]

In contrast to Bush and Folger, who imply two needs, Deci and Ryan posit three:[19]

- Competence is "a propensity to have an effect on the environment as well as to attain valued outcomes within it."[20] It speaks to senses of efficacy and mastery.
- Relatedness "refers to the desire to feel connected to others—to love and care, and to be loved and cared for."[21] It speaks to senses of belonging and security.
- Autonomy "refers to volition—the desire to self-organize experience and behavior and to have activity be concordant with one's integrated sense of self."[22] As opposed to a sense of being in control or independent, it speaks to the senses of freedom and inner coherence.[23]

The degree of need can differ from person to person. For psychological growth, integrity, and well-being, people require psychological nutrients for all three; satisfying one or two is not sufficient.[24] Different individual goals and processes are associated with different degrees of need satisfaction; the needs themselves are universal, if not invariant.[25] Satisfying these needs intrinsically motivates behavior without requiring separable consequences.[26]

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[16] *Id.* at 229–30.
[17] *Id.* at 227.
[18] *Id.* at 229.
[19] *Id.* at 228.
[20] *Id.* at 231.
[21] Deci & Ryan, *supra* note 8.
[22] *Id.*
[23] *Id.* at 229.
[24] *Id.*
[25] *Id.* at 232.
[26] *Id.* at 234.

Thus, a party in mediation who appears to be pursuing self-interest in terms of an extrinsic outcome, like maximizing a payout, is expressing an intrinsic need for competence: to have an effect on the environment and to attain a valued outcome within it. A party who appears to be righting a wrong, exacting retribution, or seeking fairness can be expressing a need for relatedness, to feel connected to others, or autonomy; "to have [an] activity be concordant with one's integrated sense of self."[27] To address these needs, a mediator might ask one party to be "fairer" than another party, to take the higher ground, if you will.

In these terms, the goal of mediation is to satisfy the parties' innate needs, eliciting by their own actions an agreement to which they can commit, effectuate, and, ideally, improve their relationship.

The adversarial process in a judicial setting compromises the parties' self-determination. It undermines their feeling competent because it requires agents with legal expertise. It undermines their feeling related because it alienates the parties. It undermines their feeling autonomous because decisions by others largely control the process and the outcome. Mediation, in contrast, provides ambient supports for the parties to experience competence, relatedness, and autonomy because they control the process and outcome.

This brings us to the first of three paradoxes bedeviling mediation: the more a mediator maximizes the parties' self-determination, the more the mediator appears to minimize his or her own. Mediators are self-determining, too. They talk about solving problems, which speaks to a need for competence; about being held in high regard and helping others, which speaks to a need for relatedness; and about improving situations and adding value, which speaks to a need for autonomy, that is, a sense of volition. If the parties determine the process and the outcome, for example, then the mediator does not, diminishing the mediator's sense of competence, relatedness, and autonomy.[28] This would seem to be a source of ambivalence

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[27] Deci & Ryan, *supra* note 8, at 231.

[28] This dynamic comes into focus when the mediator uses caucuses. Information control, presentation of arguments, and case evaluation are partially transferred from the parties to the mediator. The situation is further complicated by the mediator's confidentiality obligations. They prevent her from disclosing all of the facts and perspectives that are influencing her selective disclosures and evaluation. In essence, the mediator is saying, "trust me—I'm a smart and ethical professional." However, this creates the opportunity for manipulation, even if usually benevolent, and can lead to distrust of shuttle diplomacy. The return to a joint session only model can be a de facto minimization of the mediator's self-determination. It is, however, more consistent with the societal megatrend of transparency in decision-making. *See* Jeffrey Makoff & Jessica

for the mediator, and therefore for the parties about engaging in mediation. How, then, to resolve the paradox?

First, organizations that promote mediation operationalize SDT in their standards and in the comments that elucidate each one. The Oregon Mediation Association's Standard 1 is labeled "Self-Determination." It reads, "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."[29] Comment 1 following Standard 1 captures what Deci and Ryan mean by autonomous, defining "self-determination" to mean that participants "should be free to choose their own dispute resolution process, and mediators should encourage them to make their own decisions on all issues."[30]

Comment 2, while making the participants' autonomy explicit, operationalizes Deci and Ryan's notion of relatedness by using the phrase "collaborative interaction." The Comment states, "Mediators respect the culture, beliefs, rights, and autonomy of the participants. 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."[31] Comment 5 references the benefits of the process and a potential agreement, one of which is to improve the relationship between the parties, reinforcing relatedness: "Mediators should encourage participants to consider the benefits of mediation and agreement, as well as the consequences of non-participation and non-agreement."[32]

By introducing the notion of "Informed Consent,"[33] Comments 3, 4 and 6 operationalize Deci and Ryan's notion of competence.

> 3. Mediators should educate participants about the continuum of mediation approaches [34] and identify the approaches the mediator

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Grynberg, *"Private Caucusing" In Civil Pretrial Mediations*, MEDIATE.COM, http://www.mediate.com/articles/MakoffJ1.cfm (last visited Mar. 25, 2014).

[29] OREGON MEDIATION ASSOCIATION, *supra* note 6, at std. I.

[30] *Id.* at cmt. 1.

[31] *Id.* at cmt. 2.

[32] *Id.* at cmt. 5.

[33] *Id.* Standard II, Informed Consent, states, in part, "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 . . . ." *Id.*

[34] *Id* at std. 1, cmt. 3. The term "Approach" is used in these Core Standards to signify "... the behaviors, philosophies, processes, styles, and techniques used by mediators to conduct mediation." *Id.*

> 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 for 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. . .
>
> 6. Participation in mediation is usually a voluntary process. Even when mediation is "mandatory," participants who are unable or unwilling to participate effectively in the mediation process should be free to suspend or withdraw from mediation. Mediators should respect a participant's informed decision to continue or end the process.[35]

Indeed, Comment 5 on Standard 2, "Informed Consent," directs mediators to "make ongoing, good-faith efforts to assess the freedom and ability of each participant to make choices..." and to "suspend, end, or withdraw from the mediation if they believe a participant is unable to give 'Informed Consent."[36] If the OMA's standards of practice operationalize self-determination for the parties, how do they reconcile this with self-determination for the mediator?

First, Comment 2 on Standard 1 directs mediators to subordinate their "views." [37] If Deci and Ryan are correct, mediators can more easily subordinate their views, which are mechanisms to satisfy their three needs, than they can subordinate those needs, which drive mediators psychologically as much as they do everyone else. Additionally, according to OMA Standard 3, the mediator should decline to serve or withdraw if it requires sufficient subordination to affect their "Impartial Regard."[38] OMA standards in effect advise the mediator and the parties that the mediator will satisfy his or her needs by reinforcing the self-determination of the parties.

Second, Standard 2 on informed consent not only acknowledges that mediators have needs; it also creates the expectation that each party will engage the mediator on the mediator's terms, but only with consent.[39] It directs the mediator to secure each party's informed consent to use the specific mediator and the mediator's articulated approach to mediation. It says, "Initially and throughout the mediation process, mediators further support Self-Determination by making appropriate disclosures about themselves and the specific mediation

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[35] OREGON MEDIATION ASSOCIATION, *supra* note 6, at std, I, cmt. 6.

[36] *Id.* at std. II, cmt. 5.

[37] *See id.* at std. I, cmt. 2.

[38] *See id.* at std. III.

[39] *See id.* at std. II.

approaches they use."[40] Comment 4 on Standard 2 directs mediators to ". . . disclose information regarding conflicts of interest, fees, relevant relationships, process competency, and substantive knowledge of the subject matter in dispute. Mediator disclosure should be truthful and not misleading by omission."[41] Presumably, informed participants will select a different mediator or a different process if they decide that the mediator, as indicated in these disclosures, will jeopardize their individual and collaborative goals. If they do not make an alternative selection, then by implication, the mediation can proceed in ways that address the mediator's needs without his or her subordinating them to the needs of the parties.

Third, mediators have a say in this. Standard 5, "Process and Substantive Competence," directs them to "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."[42] Comment 1 on this Standard directs mediators to "exercise their independent judgment when their abilities or availability are unlikely to satisfy the participants' articulated expectations."[43] Mediators make their own determinations to mediate as autonomous actors, based on their competent judgment, and the nature of relationships with the parties, but only after Informed Consent. Indeed, this Comment would be more helpful if it clarified what it means when it says that mediators should "consider factors such as the participants involved . . . " when exercising their independent judgment.[44] Because another factor is ". . . their agreed-upon mediation approach,"[45] we presume this direction acknowledges, if not addresses, the mediator's need for relatedness and acknowledges the professional goal of subordination to the participants. In sum, OMA's Standards recognize and operationalize everyone's need for self-determination, including mediators', resolving the first paradox, but why not make this point more specifically and provide more guidance in the Comments?

B. *Transaction Resource Theory and Paradox 2*

What, though, do the parties in conflict expect mediators to do? What should mediators do? For answers, we turn to transaction resource theory

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[40] *Id.*

[41] OREGON MEDIATION ASSOCIATION, *supra* note 6, at std. II, cmt. 4.

[42] *Id. at* std. V.

[43] *Id. at* std. V, cmt. 1.

[44] *Id.*

[45] *Id.*

(TRT), which is informed by the economics of information, by the game-theoretic structures of most conflicts, and, therefore, by the parties' incentives.[46] We apply TRT to both substantive and process agreements, including agreements to mediate. It predicates that people incur transaction costs to overcome imperfect information.[47] The imperfections derive from complex mixtures of what Max Weber terms "opposed and complementary interests" in-group decision-making.[48] These place distinct information demands on the parties.

We characterize the relationship among disputants as a configuration of individual interests called a divisible prisoner's dilemma game. In the simple prisoner's dilemma game, parties negotiating on their own know that cooperating to find a mutually agreeable solution can yield a better outcome than not cooperating.[49] However, each party also has an incentive to act in a self-interested way that undermines cooperation if the other party cooperates, which generates the best result for the non-cooperator and the worst result for the cooperator.[50] Simply stated, they do not trust each other, so the incentive not to cooperate prevails.[51]

This presents its players with two decision-making problems: (1) coordination, wherein individuals identify mutually beneficial processes and outcomes and synchronize their behavior to attain them; and (2) defection, wherein the parties deter free-riding so that an individual acting in his or her own self-interest will not get discordant and jeopardize the parties attaining mutual benefits.[52] The divisible prisoner's dilemma incorporates a third decision-making problem: division, wherein members of the group must bargain to allocate among themselves the benefits and risks of cooperating.[53] The divisible prisoner's dilemma is a richer and more realistic model of relationships in conflict.

Each of the three decision-making problems creates distinct informational demands[54] People expend resources on searching for

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[46] *See generally* Coleman et al., *supra* note 9.

[47] *See id.* at 651.

[48] MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 136 (Talcott Parsons & A.M. Henderson trans., 1947) ("The purest cases of associative relationships are: (a) rational free market exchange, which constitutes a compromise of opposed but complementary interests . . . .").

[49] *See* Coleman et al., *supra* note 9, at 666–67.

[50] *See id.*

[51] *See id.* at 666.

[52] *See id.* at 654–55.

[53] *See id.* at 661.

[54] *Id.* at 653.

alternatives when they do not know which ones create gains, that is, are feasible; on bargaining when they do not know which ones they can agree to as equitable; and on monitoring when they do not know which ones are enforceable.[55] In a coordination problem, the parties share a common interest, which encourages them to pool whatever relevant knowledge they each possess to identify the best plan for cooperating to find a solution to the conflict.[56] When coordination combines with division problems, communications can no longer be taken at face value.[57] Bargainers benefit from suppressing or distorting information about potential process options and substantive outcomes[58] For example, exaggerating the value of their own alternatives or understating the value of alternatives available to the opponent. When coordination problems combine with enforcement problems, more difficulties arise. The problem of deterring defection from agreement is compounded by two other problems: 1) identifying enforcement mechanisms that are sufficiently expansive and efficient to plug loopholes, but also restrictive enough to deter defection, and 2) allocating the cost of enforcement.[59] Each of the problems can vary in magnitude.

To resolve the defection problem, the parties create a "force of agreement."[60] That is, they either block opportunities to defect or impose disincentives that are sufficient to deter defection.[61] The parties can only secure gains from cooperating if they can agree first on the terms for sharing the cost of creating and maintaining the enforcement system. The simple prisoner's dilemma game during conflict becomes a sequence of bargaining games.[62] The parties will be unsure about agreeing on terms without first agreeing on a force of agreement,[63] but also unsure about agreeing on a force

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[55] *See* Coleman et al., *supra* note 9, at 657

[56] *See id.* at 654–55.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 666.

[60] *Id.* at 669.

[61] Coleman et al., *supra* note 9, at 668.

[62] *Id.* at 672.

[63] This is less of a concern when mediating within the shadow of the court system where enforcement mechanisms are already in place. It is more an issue for public policy cases that are mediated in the shadow of the political process where elected or appointed third parties often decide whether to accept, implement, and enforce mediated agreements. A mediator typically leads disparate parties to prepare recommendations for a sponsor who has the authority to implement them. The more the parties can rely upon the sponsor to act consistent with the parties' recommendations, the more the parties can focus on the substantive deal.

of agreement when they do not know whether they will be able to reach agreement on terms.[64]

Consistent with SDT, we assume that people prefer to resolve these problems on their own. We also assume that people usually have transaction resources among themselves to resolve these problems without involving a third party. Transaction resources include communication channels, sources of information, information processing capacities, time, money, and the ability to monitor compliance and sanction noncompliance.[65]

The demand for third-party involvement, including mediation or courts, arises where relationships are so complex or otherwise fraught that limitations in the group's stock of available transaction resources block process or substantive agreement.[66] For example, the parties have insufficient information to overcome their distrust for each other, or to avoid psychological traps that result from their cognitive limitations such as the Availability Heuristic[67] or the Over-confidence Effect.[68] Addressing these insufficiencies and traps drain their stock of transaction resources.

A third party can augment the transaction resources already present in the relationship, or it can provide resources that are deficient.[69] Judicial institutions, however costly they may be, can be more efficient at enforcing agreements than self-enforcement.[70] By relying on precedent, for example, the courts create predictability in resolving disputes so parties can devote their scarce transaction resources to making substantive agreements. A mediator can improve communication to help the parties identify solutions.[71] In our experience, unlike a judge, a mediator usually is not authorized to enforce an agreement, but a selected mediator brings resources that an assigned judge might not: substantive expertise, expert risk evaluation, creativity, party face-saving, and more time to attend to the parties' psychological reactions.

In theory then, parties in conflict demand different types and degrees of intervention (facilitation, mediation, arbitration, litigation) depending on the

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[64] Coleman et al., *supra* note 9, at 672–73.

[65] *Id.* at 679–80.

[66] *Id.* at 681–82.

[67] *See generally* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973).

[68] *See generally* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich, Dale Griffin, & Daniel Kahneman eds., 2002).

[69] Coleman et al., *supra* note 9, at 682.

[70] *Id.* at 681.

[71] *Id.* at 682.

deficiency in their internal transaction resources.[72] This can range from relatively passive facilitators who keep time and encourage individual participation, to relatively aggressive problem-solvers who propose agreements.[73] Consistent with SDT, effective mediators craft their interventions to remedy the specific deficiencies in the transaction resources among the particular parties, which is what generates an expectation by the parties that a mediator can help them.

This brings us to the second of three paradoxes bedeviling mediation: introducing a third-party creates a second divisible prisoner's dilemma game, one between the mediator and the parties in conflict, with resulting increased transaction costs. Restated, parties exhaust their transaction resources in resolving their individual interests, yet they invite a third party into the conflict with his or her own interests. Before the mediator begins mediating, the parties, including the mediator, should agree on the approach to mediation (e.g., transformative, facilitative, or evaluative), which requires its own force of agreement. Everyone, including the third-party, has an incentive to cooperate in selecting and following a process for finding an agreeable solution, if one exists. However, everyone, including the mediator, has opportunities to behave in a self-interested manner that could undermine cooperation. For instance, the parties might benefit from an evaluative approach but the mediator being considered does not practice it.[74]

The range of transaction resources the mediator brings to the table becomes his or her source of power, not only during the mediation, but also in the decision about process.[75] In this view, the mediator's power, authority, and legitimacy derive from the value the parties in conflict place on the mediator's transaction resources.[76] The question is what are the conditions, if any, under which all parties, including the mediator, would agree that the mediator may exercise independent judgment because it is in all of their interests for this to happen?[77]

Asked in terms of OMA's standards, when might the parties give their informed consent, consistent with Standard 2, to a mediator exercising independent judgment, such as being a type of evaluative mediator,

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[72] *See id.* at 685–86.

[73] *See id.*

[74] To the extent that mediation is more art than science, successful mediators bring their experience and discerning wisdom to the table, often as "advocates for resolution." Parties often consider this a "value-added" proposition.

[75] *See* Coleman et al., *supra* note 9, at 683.

[76] *Id.*

[77] *See generally* Omer Shapira, *A Theory of Sharing Decision-Making in Mediation*, 44 MCGEORGE L. REV. 923 (2013).

remaining consistent with Standard 3 on Impartial Regard?[78] TRT asks, what constitutes "full" and "informed?"[79] The more the mediator discloses and the more informed the parties become, the more costly it is and the less likely they are to participate in mediation. Mediators have to balance their behavior, as OMA's standards direct.[80]

This is a basic coordination problem between the mediator and the parties.[81] The solution is the behavior preferred by everyone that allows a mediator to function, applying his or her transaction resources. Moreover, a mediator's ability to terminate the mediation, just like each party's ability to withdraw from it, provides a force of agreement that helps to resolve the divisible prisoner's dilemma between the mediator and the parties.

OMA's Standards capture this in Standard 3: Impartial Regard, and Standard 4: Confidentiality.[82] If they act in accord with Standard 3, mediators will conduct mediations, "diligently, even-handedly, and with no personal stake in the outcome."[83] Standard 3 does not call for the mediator to be "neutral" or "impartial," because they have points of view. The Standard focuses on the mediator's behavior even though it does not define what it means by mediating "even-handedly."[84] This is not unusual and it affords mediators a degree of discretion.[85] Comments 1 and 2 require the mediator to identify and disclose conflicts of interest that might lead the mediator to benefit at the expense of the parties.[86] In Comment 3, mediators should consider not serving in "situations where the mediator's ability to demonstrate Impartial Regard is compromised or appears to be compromised

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[78] *See* OREGON MEDIATION ASSOCIATION, *supra* note 6.

[79] *See* Coleman et al., *supra* note 9, at 683–84.

[80] *See* OREGON MEDIATION ASSOCIATION, *supra* note 6.

[81] *Id.*

[82] *Id.* at stds. III–IV.

[83] *Id.* at std. III.

[84] *See id.* In practice, mediator behavior will be affected by the mediator's training, rules governing practice in the jurisdiction, "best practices," ideology, and many other personal and situational factors. In some decision-making contexts, decision-makers prefer biased sources of information to neutral ones. Randall L. Calvert, *The Value of Biased Information: A Rational Choice Model of Political Advice*, 47 J. POL. 530, 533 (1985). In the context of international disputes, highly biased, powerful interveners can induce agreements that unbiased third parties cannot, but in other contexts, impartial third parties behaving as mediator are more effective. *See* Katja Favretto, *Should Peacemakers Take Sides? Major Power Mediation, Coercion, and Bias,* 103 AM. POL. SCI. REV. 248 (2009).

[85] Susan Nauss Exon, *How can a Mediator be both Impartial and Fair? Why Ethical Standards Create Chaos for Mediators*, 2006 J. DISP. RESOL. 387, 401–402 (2006).

[86] OREGON MEDIATION ASSOCIATION, *supra* note 6, at std. III, cmts. 1–2.

because of the mediator's personal biases, views, or reactions to any position, argument, participant representative, or ... person."[87] Likewise, a mediator who is over-focused on her reputation as one who settles cases could violate this Standard if she pushes for settlement in situations where the parties are not inclined to settle, but rather for the mediator's advocacy.

Similarly, Comment 3 on Standard 4 reads, "Mediators who meet with participants in private during mediation should not convey confidential mediation communications without the prior consent of the disclosing participant."[88] The expectation in Standard 4 that a mediator will respect confidentiality as he or she creates communication channels does not guarantee against a mediator using strategically the information gained in confidence; that is, to influence either the process or the formulation of possible outcomes. To the extent that the parties can discover this and find it objectionable, their ability to withdraw mitigates the likelihood of a mediator doing it.

In sum, OMA's Standards of Practice operationalize everyone's incentives, including the mediator's, to use mutually agreed upon transaction resources efficiently, responding to the complex pressures and claims that arise. The Standards frame everyone's expectations about the mediator's application of transaction resources. Given everyone's ability to withdraw if they believe another is violating these expectations, the Standards provide common reference points for invoking a force of agreement. This resolves the divisible prisoner's dilemma between them, the second paradox, but perhaps the Standards should be more specific about the practical reality that the mediator's mere presence impacts the autonomy of the parties, adds costs, and influences both process and outcome.

C. *Collective Choice Theory and Paradox 3*

Collective choice theory (CCT) proves what SDT predicts: because both process and content impact the satisfaction of the three psychological needs, "covariation between content and process will typically occur."[89] Practice confirms that content and process—whether support, guidance, evaluation, or transformation—are inseparable. [90] More correctly, guaranteeing their separation is impossible. Every group decision-making process is susceptible to manipulation by any participant, including the mediator. Indeed, parties do

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[87] *Id.* at std. III, cmt. 3.

[88] OREGON MEDIATION ASSOCIATION, supra note 6, at std. IV, cmt. 4.

[89] Deci & Ryan, *supra* note 8, at 246.

[90] Shapira, *supra* note 77.

not always want to settle and might engage in mediation simply for strategic purposes.[91]

Arrow's theorem, a mathematical proof, applies to any process that a group can design.[92] Formally, Arrow started with a set of axioms about individual choice, which amounts to a definition of rational behavior, to design axioms about rational group choice. According to his proof, it is impossible to design a process for a group to make a choice that guarantees an outcome as rational as choices made by its individual members.[93] *This Third paradox is called Arrow's Paradox.* Put differently, if a group reaches a durable process or substantive decision, as opposed to cycling indecisively among alternatives, we cannot guarantee that the group decision will be independent of the method by which it was chosen.[94] Thus, process influences outcome.

Are Arrow's axioms plausible?[95] The axioms describing individual choice include:

- *Connectivity* (people can compare goods, services, or proposals; they can assess whether they prefer ice cream, cake, or candy)
- *Transitivity* (people can rank their preferences logically; if an individual prefers vanilla ice cream to chocolate, and chocolate to strawberry, then the individual will prefer vanilla to strawberry)
- *Invariance* (the ranking assigned to the most preferred alternative does not change if a less preferred alternative becomes unavailable; if an individual prefers vanilla to both chocolate and strawberry and also prefers chocolate to strawberry, then if strawberry is not available, the individual still prefers and will choose vanilla).
- *Dominance* (the order matters, not how much value one assigns to the items; on a hot day when any flavor of ice cream might provide more satisfaction than on a cool rainy day, the choice will be governed by the same ranking).
- *Individual Decisiveness* (the individual makes the ranking; no one else dictates the choice of flavor)

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[91] Craig McEwen, *Managing Corporate Disputing: Overcoming Barriers to Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 25 (1998).

[92] ARROW, *supra* note 3.

[93] *Id.*

[94] WILLIAM RIKER, THE ART OF POLITICAL MANIPULATION 142 (1986).

[95] JOHN BONNER, POLITICS, ECONOMICS, AND WELFARE: AN ELEMENTARY INTRODUCTION TO SOCIAL CHANGE, 56–71 (1986).

This compact set of axioms, the basis for modern economics, seems uncontroversial, even necessary, to understand and predict individual decisions, including during mediation.

Arrow asked whether an analogous set of axioms can describe how a group reaches a decision. He proved that it cannot. If a group tries to decide which flavor ice cream all would order using a process in accord with these axioms, they likely would go hungry. If they leave with ice cream cones in hand, someone probably behaved in a way that violated one of the axioms.

On our analysis, CCT is consistent with Self-Determination Theory (SDT). CCT assumes individuals can be characterized by sets of values and tastes. In SDT, parties innately value competency, autonomy, and relatedness. CCT assumes that: (1) a set of alternative outcomes exists; (2) each party can rank them on one or more dimensions, and (3) the dimensions are standards for assessing the relevant properties of the outcomes. In SDT, the existence of alternative outcomes is part of the environment in which individuals act, given their competence in assessing the properties of the alternatives. CCT assumes individuals can exercise choice consistent with their preferences. In SDT, individuals make choices to satisfy their needs for autonomy, or their inward coherence, and competence, or their ability to attain valued outcomes. Finally, CCT establishes conditions under which a group will reach a decision without cycling interminably among alternatives, including the behavior by a mediator to help bring one about. In SDT, people value decisiveness over group indecisiveness because decisiveness promotes the senses of security and belonging that help to fulfill their need for relatedness.[96]

Being based in classical economics and concepts from non-cooperative game theory, CCT carries their inherent limitations. Economic theory cannot explain decisions by characterizing how individuals make interpersonal comparisons of utility, which in practice they do. We see it when parties arrive at solutions they perceive to be "fair" and refuse solutions that they perceive to be "unfair," even if both are made better off, something classical economics cannot fathom. That does not mean these decisions are irrational. It requires using different concepts of rationality, such as those in cooperative game theory.[97] Nonetheless, CCT can inform our understanding of the risks parties take when mediators do what they do best, using tactics that can be shown in theory to violate one or more of Arrow's axioms.

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[96] If a mediation process reinforces individual autonomy and competence, it might increase the likelihood of indecision. If a mediation process reinforces relatedness, making the utility of one party a function of the utility of another, it might reduce it.

[97] John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. OF POL. ECO. 309 (1955).

Arrow's Theorem thus presents the third of the three paradoxes bedeviling mediation. To experience it, the group need have as few as three people and three issues, which could describe even the simplest mediation that involves a mediator and two parties. The larger the number of parties involved, as in public policy matters, the more likely the outcome will follow from the rules of the process or be indecisive.[98] If everyone knows this, why would anyone engage in any form of group decision-making, including mediation?

Yet, they do. Moreover, we observe mediation leading to decisions to participate. One reason people might participate is that the alternative processes are even more problematic. Another is that a mediator's tactics bring the group to agreement, albeit by testing, if not violating, one or another of the seemingly plausible axioms that Arrow imposes on the process. Nevertheless, the parties must find the cost of the mediator's behavior to be preferable to the alternative forms of intervention or nonintervention.

This brings us back to the OMA standards of practice and the need to agree on process to implement self-determination in mediation.[99] Mediators should provide full disclosure for the participants to give informed consent. This will increase the chances of good faith participation and the mediator acting with impartial regard. The discussion surrounding the applicability of those mediator standards appears at the end of "Section III Common Mediator Tactics," below.

If Arrow is correct, "impartial regard" is contingent and affords mediators discretion. That is not necessarily a bad thing. It means that mediators are making tradeoffs, or, perhaps, simply recognizing a certain acceptance of and rationality in common, illogical decisions. The group gets a decision, for example, which has value independent of the merits of the decision. Mediators try to justify their acting instrumentally, but the Standards could make clear that a mediator's involvement in shaping the

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[98] *See* ARROW, *supra* note 3. Arrow's result does not say that if a group of three or more reaches a decision, it has been dictated. It says that it is impossible to guarantee against someone strategically manipulating the process to arrive at a decision. One wonders whether a mediator respectful of the parties' need to feel competent, autonomous, and related should explain the implications of Arrow's work to the parties before inviting them to design their process. As it is, each participant is all too eager to assume that the other participant is the one being manipulative. Surely, explaining the implications of Arrow's work should make all of them unsure about participating in mediation. The issue for the mediator is whether she has an ethical obligation to explain this to the parties before they decide to mediate.

[99] OREGON MEDIATION ASSOCIATION, *supra* note 6.

process and in framing arguments and proposals cannot help but be manipulative even when done with benevolent intent.

The next section outlines the strategic "manipulations" that are tools of the mediator's trade: A) Heresthetics (Political Strategy), and B) Rhetoric (Persuasive Discourse).[100] We discuss them in the context of SDT, TRT and CCT, and the applicable ethical standards. The lesson of our analysis is that people should assess the risks of engaging in mediation, no matter how well intentioned. Well-crafted standards of practice minimize those risks.

III. COMMON MEDIATOR TACTICS

Of the three paradoxes, Arrow's may appear to be the least relevant to the practice of mediation. It might be the most difficult to fathom. However, it might be the most applicable, as well.

By way of elaboration, consider tactics mediators commonly employ to help parties in conflict. In our experience mediator "tactics" are often designed specifically to influence the choices, the ranking, and the intensity of preferences of the parties. When they use these tactics, mediators often refer euphemistically to "reality testing" or "balancing power." They tend to do this when they think a party is not thinking "correctly" about a topic. Mediators seldom find the need to do it when they agree with the parties.

We assign these tactics to two categories: heresthetic and rhetoric. Starting with heresthetics, we will explain why they work, which is to say, why they violate Arrow's axioms, and why the parties might allow mediators to manipulate them in these ways.

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[100] *See* Douglas Frenkel & James Stark, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 OHIO ST. J. ON DISP. RESOL. 263 (2013). Frenkel and Stark explore the research surrounding "persuasive effectiveness" in advertising, disease prevention, race relations and politics, and suggest similar research is needed in the context of mediation. They note that mediators "reframe" the word "persuasion" to "problem-solving," and suggest, as did Deborah Kolb and Kenneth Kressel, that mediators are prone to "engage in a "kind of denial about what they do." *See* Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work, in* WHEN TALK WORKS: PROFILES OF MEDIATORS 459, 483 (Deborah M. Kolb ed., 1994). We agree. Frenkel and Stark conclude mediation-specific research will inform the mediation field's views on the long-standing debates surrounding the mediator's necessary level of subject matter expertise to effectively mediate, and the iconic "facilitative-evaluative" debate we call "mischegas."

A. *Heresthetic Tactics*

1. *Process Issues*

Heresthetics refers to "structuring the world so you can win."[101] It is related to rhetoric but involves more that verbal persuasion. It involves setting up a situation so that other people will want or feel compelled by circumstances to cooperate, even without persuasion.

According to SDT and TRT, a mediator in support of self-determination should engage the parties in a collaborative discussion and ultimately a decision to select mediation and the mediator's approach.[102] Assume two parties and the mediator try to decide on these. Their options are transformation, evaluation or facilitative; assume for simplicity that someone capable of implementing a "hybrid" approach is unavailable.[103]

Table 2 gives their preferences. They are rational. The mediator has preferences, too.

Rank: **Participant:**	**First**	**Second**	**Third**
Party 1	Evaluation	Facilitation	Transformation
Party 2	Facilitation	Transformation	Evaluation
Mediator	Transformation	Evaluation	Facilitation

Table 2

Indeed, a practitioner of transformative mediation would want to empower the parties, reinforcing their self-determination by engaging them in designing the process—if that is what the parties want.[104] If it was up to the disputants only, they have opposing preferences on transformation versus evaluation. They only agree that they both prefer facilitation to

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[101] RIKER *supra* note 94, at ix. Heresthetics should not be confused with "heuristics," which are mental shortcuts that people use to solve problems and make judgments quicker and more efficiently. *Heuristic*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/heuristic (last visited May 12, 2014). These "rules of thumb" can lead to cognitive biases.

[102] Samuel Imperati, *If Freud, Jung, Rogers, and Beck were Mediators, Who Would the Parties Pick and What are the Mediator's Obligation?*, 43 IDAHO L. REV. 645, 648 (2007).

[103] *Id.* at 654–668.

[104] *Id.* at 655.

transformation. Still, they would not necessarily agree on facilitation because Party 1 prefers evaluation to that. They cannot decide.

Introduce the Mediator. At first glance, the three participants do not agree; none have the same first, second, or third choices. For the sake of simplicity, suppose that the three of them decide to take a straw poll following Robert's Rules. They might not use Roberts Rules in practice, but they'll use some sort of rule. According to Arrow, no rule is immune from sophisticated negotiators who often attempt to control the agenda, and as a result, the outcome. Even unsophisticated negotiators do it unintentionally when they set the agenda without manipulative intent. The following agenda-setting options might be offered:

- *Party 1's Proposed Agenda:*
  1) How many prefer facilitation to transformation? Two say, facilitation.
  2) How many prefer evaluation to facilitation? Two say, evaluation.

  Result: Evaluation "wins" pursuant to Robert's Rules
- *Party 2's Proposed Agenda:*
  1) How many prefer transformation to evaluation? Two say, transformation.
  2) How many prefer facilitation to evaluation? Two say, facilitation.

  Result: Facilitation "wins" pursuant to Robert's Rules.
- *Mediator's Proposed Agenda:*
  1) The mediator asks how many prefer evaluation to facilitation? Two say, evaluation.
  2) How many prefer transformation to evaluation? Two say, transformation.

  Result: Transformation "wins" pursuant to Robert's Rules.[105]

The use of the Mediator's Proposed Agenda violates Standard 1 of OMA's Standards: Self-Determination and Standard 3: Impartial Regard.[106] Indeed, according to OMA's Standards, the mediator would not have a vote, per se, which reduces the likelihood of cycling in a two-party mediation. However, not having a vote does not preclude the mediator from influencing the parties' approach selection. This brings us to the OMA Standards. A facilitative mediator might have explained the three alternatives first,

[105] Now, consider a fourth proposed agenda. 1) How many prefer facilitation to transformation? Two say, facilitation. 2) How many prefer evaluation to facilitation? Two say, evaluation. 3) How many prefer transformation to evaluation? Two say, transformation. The debate continues to "cycle" as noted above.

[106] OREGON MEDIATION ASSOCIATION, *supra* note 6. *See also* Imperati, *supra* note 102, at 686–687.

discussed them, and then sought agreement. However, the mediator would have to withdraw if the parties could not agree upon a process in a pre-session. If the mediator could bring them to agreement on using a transformative approach, even if for some reason one party did not want to use it, are they better off selecting this approach to continuing in conflict? Is it ethical for the mediator to do so?

2. *Substantive Issues*

What are mediators to do when they are discussing substantive agreements, especially when parties tend to seek and often look for or defer to the mediator's subject matter [107] expertise? [108] One option is for the mediator to seek mutual acceptance, which means that the parties can, at least, live with a proposed alternative, even if it is not their most preferred outcome. [109] Another option is for the mediator to use her subject matter expertise to explain why one argument or position is more likely to prevail in front of the ultimate arbiter. To understand how mediators cannot help but be strategic manipulators, especially when it comes to substantive decisions, let us analyze this. [110]

First, a consensus approach is risky. Any party, even the mediator, can influence the group to accept an implied outcome, the status quo of going to trial, by finding every proposal on the table to be unacceptable. This violates

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[107] OREGON MEDIATION ASSOCIATION, *supra* note 6. Standard V, "Process and Substantive Competence" states, "Mediators fully and accurately represent their knowledge, 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." *Id.*

[108] *Id.* The term "subject matter expertise" is often used, but it is an exaggeration. The authors suggest "subject matter familiarity" better describes the requisite level of knowledge needed to meet the parties' reasonable expectations unless they prefer a highly evaluative approach.

[109] *See* LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING ROBERT'S RULES (2006).

[110] *See e.g., Redress*, UNITED STATES POSTAL SERVICE http://about.usps.com/what-we-are-doing/redress/welcome.htm (last visited Mar. 22, 2014) (describing the free, transformative program available to U.S. Postal Service employees). If mediators for the U.S. Postal Service offer disputants a choice between participating in the free REDRESS program, or the parties incurring the cost of a mediator who uses a different approach, they could be seen as dictating the decision by not offering as an alternative a different approach to mediation for free.

Arrow's axiom that no single member of a group dictates the outcome.[111] This is implied in any mediation. Standard 6: Good-Faith Participation in OMA's Standards militates against this. It exhorts mediators to "explain to the participants . . . that they can improve the mediation process and probability of success when they participate with an open mind throughout the process."[112] That implies not dictating the mediation approach or the substantive outcome.

Comment 1 encourages mediators to "promote honesty and candor" and to clarify for participants that the mediator is not a guarantor of participants' good faith.[113] Coordinating expectations on the merits of agreeing to a mediation process versus not mediating has value. It carries little force , however, when a party does not participate in good faith.

Comment 2 encourages mediators to "discuss with the participants any concerns regarding Good-Faith Participation and the impact of these concerns on the process and the mediator's Impartial Regard."[114] Comment 2 allows mediators to withdraw from the process when they feel their ability to demonstrate impartial regard has been compromised, imposing a cost on the participants who fail to participate in good faith by returning them to the status quo. Every party accepts this risk simply by agreeing to talk about engaging in mediation; in practice, that tends to happen.

Second, by the same reasoning, assuming that the parties agree upon mediation, a mediator with expertise or access to confidential information or both could, in theory, albeit with great ethical risk, induce a substantive agreement that might not achieve the level of "I can live with that." Suppose the mediator has legal expertise that the parties or attorneys do not and the mediator realizes they are considering an agreement far less equitable for one party than if they go to trial. This puts the mediator in the position, ethics aside, of preferring arguably no agreement, and, potentially, being able to set the agenda to secure it. Should the parties accept the risk of the mediator behaving in this manner?

OMA's Standards recognize the risk and seek to minimize it by setting out clearly defined expectations of mediator behavior. Comment 6 on Standard 2, Informed Consent, directs mediators to "make participants aware of the importance of consulting with other professionals to help them

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[111] JOHN BONNER, POLITICS, ECONOMICS, AND WELFARE: AN ELEMENTARY INTRODUCTION TO SOCIAL CHANGE 62 (1986).

[112] OREGON MEDIATION ASSOCIATION, *supra* note 6, at std. 6.

[113] *Id.* at std. VII, cmt. 1.

[114] *Id.* at std. VII, cmt. 2.

exercise Informed Consent and Self-Determination."[115] Mediators' predictive legal expertise, if they have it, is less influential when the parties are represented by attorneys, but what if they are not and the parties select an "evaluative" approach? At a minimum, if parties have access to attorneys, mediators should advise the parties about the benefits of relying on their attorneys' advice. Mediators who prefer a substantive outcome risk violating Standard 3,[116] Impartial Regard, if they act on that preference.

Third, if mediators gain information that helps them discern a basis on which the parties can reach agreement, not doing something risks the parties disagreeing, which is what most parties and mediators want to avoid. Identifying a single dimension ("interest" in the vernacular) underlying the parties' positions that they both care about more than their espoused positions is generally an acceptable mediator tactic to induce parties to reorder their preferences. The mediator reframes the problem so that a possible solution exists where one seems impossible before the reframing.

Economics treats individual preferences as given and, in that sense, invariant. If the parties cannot change their preferences, the process might well lead to no agreement or to cycling from one proposal to another. The mediator's tactic works because it violates an economist's assumption about the behavior of rational individuals participating in a collective choice. Most parties might agree that the risk associated with this tactic —a form of manipulation—is benign or worth it to reach an agreement. In contrast, parties might not agree that the risk of another form of manipulation is so benign or worth it to reach an agreement: granting a mediator the latitude to induce cycling so as to increase their decision-making costs until they succumb to exhaustion and revise their preferences.[117]

Using information about the parties' different interests to help bridge gaps is another effective mediator tactic and likely a manipulation the parties would allow or even expect. For example, suppose a mediator learns that Party 1 prefers alternative "A" over "B" because of its cash value while Party 2 prefers "B" over "A" because of the impact Party 2 perceives it will have on his or her reputation, something Party 1 is less concerned about in this case. This could become the basis for an agreement, such as agreeing to "A" in exchange for including a confidentiality clause.

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[115] *Id.* at std. II, cmt. 6.

[116] *Id.* at std. III.

[117] Jeffrey Makoff & Jessica Grynberg, *"Private Caucusing" in Civil Pretrial Mediations*, MEDIATE.COM (Nov. 2013), http://www.mediate.com/articles/MakoffJ1.cfm (showing how in practice, mediation participants anticipate that caucusing can lead to mediator manipulation in service of securing a deal—in fact, they plan their negotiation strategy accordingly by employing tactics such as anchoring and puffing).

This violates one of Arrow's axioms about collective choice: only order of preference, not intensity of preference, matters.[118] Indeed, intensity of preference matters. It creates opportunities for the mediator to help the parties explore solutions based upon their different intensities of preference.[119] This helps establish relatedness while encouraging the parties' needs for competence and autonomy. Standards of ethical practice would not preclude this form of intervention if the parties agree to it and the mediator avoids violating impartial regard by not helping one party over another.

These are heresthetic techniques because the mediator restructures the decision consistent with the parties' true interests. Compared to the tactical disadvantages associated with the party sharing the same information directly with the opposing party, a mediator can more readily help the parties reveal this. In neither case do the bases for the initial disagreements disappear, but the result is agreement. In both cases, consistent with Arrow's concerns, either party has the potential to act in a disingenuous manner when revealing his or her interests as in a game of poker, influencing the final outcome. Standard 6 on Good-Faith Participation discourages, but does not guarantee it will not happen.

Particularly where parties with multiple interests underlying their positions engage in mediation, a variant on this mediator tactic is to reduce the number of issues by, for example, letting the parties vent over past indiscretions by the other party. Alternatively, the mediator encourages parties to acknowledge committing a past indiscretion, if not to apologize for it. This allows the parties to "get past" or eliminate historical "baggage," and focus on a smaller number of forward-looking issues whose ease of resolution increase the potential for "settlement" or "resolution." The former is acquiescence and the latter is acceptance. The fewer the issues, the less likely that the conditions exist for a paradox. The same holds for reducing the dimensionality of the decision-making by eliciting agreement among the parties on a compact, weighted set of criteria by which they will evaluate numerous proposed outcomes.

The ability of mediators to identify common interests and to exploit differences in intensity of preference; to help the parties craft intermediate alternatives between the simple paired "I win/you lose" choice; to reframe issues and underlying interests or their number; and to introduce decision tables explains some of the attractions of mediation. These and other

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[118] *See* JOHN BONNER, POLITICS, ECONOMICS AND WELFARE: AN ELEMENTARY INTRODUCTION TO SOCIAL CHOICE 59–60 (1986).

[119] *See generally* WISE DECIDER, http://wisedecider.net/user (last visited Feb. 24, 2014) (providing members access to decision tables that help with a wide range of decisions).

heresthetic tools help groups make collective choices. Arguably, they are inconsistent with the Self Determination Standard.

The issue for the mediator is whether she has an ethical obligation to explain this dynamic to the parties before they decide to mediate. However, explaining the implications of Arrow's work would make all of them unsure about participating in mediation. We can do nothing or we can change the mediator standards to encourage mediators to explain this dynamic to the parties.

By creating expectations for all parties about acceptable behaviors, standards of practice give the mediator and the parties a degree of confidence that mediators will not abuse heresthetics, but are we giving sufficient information to the parties to ensure their informed consent? Perhaps mediator standards should require the mediator to explain what heuristic tools he uses during mediation, when, and how.

B. *Rhetorical Tactics*

1. *Theory*

As Booth puts it, "rhetoric makes realities," the classic distinctions among three kinds of "rhetoric-made" realities go to the heart of the mediator's craft:

- *Forensic*: "attempts to change what we see as the truth about the past," which is what mediators do to help the parties move from finding fault to finding solutions (e.g. the mediator might ask party A whether it is possible that party B's intent was something other than nefarious);
- *Epideictic*: "attempts to reshape views of the present," which is what mediators do to help the parties overcome misunderstanding, see the issues from different perspectives, and find common ground (e.g. the mediator might pose a choice to Party A – fix blame or fix the problem); and
- *Deliberative*: "attempts to make the future," which is what mediators intend to achieve (e.g. the mediator might posit to either party that it would be better to build a relationship than to fix blame).[120]

As opposed to heresthetics, where the rules matter, here, words and images reshape the past, present or future, reshaping "the personae of those . . . who accept the new realities. You and I are remade as we encounter the remakings."[121] Rhetoric does not necessarily elicit new information,

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[120] WAYNE C. BOOTH, THE RHETORIC OF RHETORIC: THE QUEST FOR EFFECTIVE COMMUNICATION 16–17 (2004).

[121] *Id.* at 17.

which often is how a mediator adds value. Rhetoric has to do with changing people's minds by the presentation of information the parties may already have.[122]

To Aristotle, deliberative oratory is the basis for community.[123] Rhetoric capitalizes upon the human need for relatedness. Rather than persuading, in the sense of getting someone to do something they otherwise do not want to do, rhetoric is about a speaker (*qua mediator*) finding the best possible arguments. This tool works so long as the speaker addresses the concerns of the listeners (parties) and the decision to act is within the listeners' power.[124] If used ethically, rhetoric capitalizes upon the human need for competence and autonomy.

The tactical arguments a rhetorician chooses include 1) syllogisms, 2) deductive arguments with three propositions, and 3) arguments by example, which are variations of enthymemes. An enthymeme is an argument that not only leads to a logical conclusion, but also leads to a decision through individual volition. Examples include summarizing points with a forceful climax (accumulation), arguing a topic from both sides to help parties gain a deeper under-standing of an issue (*dissoi logoi*), and repeating the same point with different but parallel words and referents to emphasize its significance (*exergasia*).

Aristotle[125]divides rhetorical arguments into three not mutually exclusive categories in terms of their ability to appeal to an audience and move it to action:

- *Logos*: an appeal based on logic, or to the intellect, can include theory, statistics, and expert opinion. When a mediator invokes logic, it can stimulate a change in position by satisfying a party's psychological need to feel competent. Such an argument may be particularly effective in helping parties solve coordination problems.
- *Ethos*: an appeal based on ethics, such as the credibility and trustworthiness of the speaker, is a determination made by the audience. By invoking, for example, virtue and goodness, the mediator speaks to an accepted communal value and can stimulate a positional change by satisfying a party's need to feel related and of good character. That may be particularly effective in helping parties solve enforcement problems.

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[122] *See* Enriqueta Aragones et al., *Rhetoric and Analogies* (Penn Inst. for Econ. Research, Working Paper No. 13-039, 2013).

[123] WENDY OLMSTED, RHETORIC: AN HISTORICAL INTRODUCTION 11 (2006).

[124] *Id.* at 13–14.

[125] *See generally* ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 37–38, (George A. Kennedy trans., 1991).

- *Pathos*: an appeal based on sympathy, emotion, and feeling without necessarily analyzing the rationale, can include figurative or vivid language and emotional narratives. By invoking, for example, anger, fear, empathy, or compassion to connect with personal experiences, the mediator can stimulate a change in position by satisfying a party's need to feel autonomous. Such an argument might seem to be particularly effective in helping parties solve division problems by normalizing their reactions. By allowing parties to feel reasonable and heard, the chances increase that they will let go of any counterproductive baggage that inhibits their agreeing.[126]

The theory of rhetoric is consistent with SDT because both incorporate competence, relatedness, and autonomy as motivations for decision-making.

SDT and CCT both have extensive theoretical and empirical support for their explanatory powers. Rhetoric is primarily theoretical, but behavioral economics buttressed by neuroscience provides empirical support for it.[127] Analogously to heresthetics, choices cannot be presented neutrally; any presentation can influence the decision maker's choice.[128] Restated, a mediator can use rhetoric to create or inhibit self-determination.

2. *Tools*

Rhetoric and behavioral economics presume that psychological biases abound and that people use heuristics to simplify their decision-making. Rhetoric can exploit this in both the positive and negative senses of the term. We cannot establish a one-to-one correspondence between every rhetorical technique and every finding documented by behavioral economists. However, we can find substantial correspondence, particularly with respect to rhetorical tactics, that mediators commonly use and that are designed to help the parties, not to trick them.

One example of such a rhetorical tool is this: rationality presumes that people make identical choices over identical options, regardless of how the options are described.[129] In reality, people perceive outcomes in terms of

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[126] *Id.*

[127] *See generally* DANIEL KAHNEMAN & AMOS TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982); Richard Birke, *Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications*, 25 OHIO ST. J. ON DISP. RESOL. 477, 501–23 (2010).

[128] Eric J. Johnson et al., *Beyond Nudges: Tools of a Choice Architecture*, 23 MARKETING LETTERS 487, 488 (2012).

[129] Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*. 59 J. BUS. S251, S253 (1986).

value defined over gains and losses relative to some reference point that they usually intuit and can only vaguely articulate as in, "it just feels right." Gains and losses display diminishing sensitivity (i.e., the difference between $10 and $20 seems bigger than the difference between $100 and $110), and losing a fixed amount hurts more than gaining the same amount.[130] Suppose a disputant frames an argument or a proposal in terms of capturing a potential gain. A mediator might summarize the proposal as made, or reframe it using words that describe it as avoiding a potential loss, which is more likely to induce, or otherwise persuade, the other side to accept the proposal, even if it involves making a concession.[131]

Alternatively, suppose a disputant were to make a series of proposals with multiple costs and benefits. People often employ a type of mental accounting that assigns value into two categories: good (revenues) or bad (expenditures).[132] In short, money is not fungible, as classic rationality assumes. "Money in one mental category is not a perfect substitute for money in another . . . ."[133]

A mediator's decision to pool the proposals into a package rather than deal with them serially is a heresthetic technique. Summarizing them in terms of their total net impact rather than presenting them one-by-one is a rhetorical technique (akin to accumulation). It can influence the disputants' perceptions and, hence, their decisions. A closely related rhetorical tactic mediators employ for the same reason is to re-order the elements of a proposed package so the listeners hear first an element they probably like, then one not so likable, and closing with one they will really like.[134] An analogous rhetorical tactic involves the National Coalition Building Institute's[135] "umbrella question" technique, where the mediator teases out the different interests of the parties, establishes their legitimacy, pools them, and asks how all can be satisfied while achieving a collective goal.

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[130] Richard Thaler, *Mental Accounting Matters*, 12 J. BEHAV. DEC. MAKING 183, 185 (1999).

[131] *See generally* AMOS TVERSKY & DANIEL KAHNEMAN, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q. J. ECON. 1039 (1991).

[132] *Id.* at 184.

[133] *Id.* at 185.

[134] This tactic relies on the concepts of primacy and recency as we tend to react more strongly, and thus are overly influenced by things we hear first and last. *See* ROBIN HOGARTH, JUDGMENT AND CHOICE 55 (2d ed., 1987).

[135] *See generally* NATIONAL COALITION BUILDING INSTITUTE, http://ncbi.org (last visited Mar. 23, 2014). Mediators structure umbrella questions as follows: "How can we achieve [list party A's interests] while at the same time addressing [party B's interests], thereby achieving [list interests common to A and to B]?"

B. *Mediator Ethical Challenges with Heuristics and Rhetoric*

In sum, rhetorical tactics, like heresthetic ones, impart power to mediators. Every mediator action exercises some form of power whether the mediator wants to acknowledge it or not. With all of the opportunities for mediators to influence the process and outcome, even unintentionally, how is it possible for parties in conflict to engage in mediation, motivated by their pursuit of personal autonomy, competence, and relatedness, without undermining their raison d'etre for participating? The answer is the faith they place in standards of ethical practices, like OMA's, and the belief that exercising reasonable discretion will allow the mediator to bring the parties to an agreement more efficaciously than if they employed alternative processes. The challenge thus becomes whether the current schema for ethical practices in mediation are sufficiently detailed and robust to justify the parties faith in mediation.

IV. CONCLUSIONS AND RECOMMENDATIONS: CRAFTING STANDARDS OF ETHICAL PRACTICE

A. *Overview of Conclusions and Recommendations*

1. *Conclusions*

a. The following mediation field's common assertions are arguably erroneous: A) parties own the outcome; mediators own the process, and B) mediators have no preferences over outcomes.
b. Mediation works because of a mediator's judicious (ethical) application of heresthics and rhetoric to serve the participants', including the mediator's, psychological needs for self-determination and efficient use of transaction resources.
c. Parties and a mediator who agree on ethical standards of practice satisfy their intrinsic needs, reinforcing self-determination; solve a divisible prisoner's dilemma problem at low cost; and mitigate manipulation.

2. *Recommendations*

a. Mediators should create robust standards of ethical practice because that can resolve all three paradoxes.

b. Robust standards of ethical practice should require the mediator to engage the parties in a pre-negotiation exploration of the mediator's tools and their potential impact on the process and the outcome.
c. Parties in mediation should inquire about and agree to the ethical standards to which the mediator adheres.
d. Mediators should make standards of ethical practice mandatory to encourage mediation. While mostly aspirational, current standards reduce the parties' fears by establishing expectations of reasonable behavior.
e. Mediators should evaluate and implement meaningful enforcement mechanisms, which are not prevalent in the field, including the pursuit of disciplinary claims. Should we not hold ourselves accountable when we violate ethical standards? It is done in other professions. Thus, mediators who charge a fee should not be immune from malpractice, but instead, should be held to the typical professional negligence standard.

Each of the above recommendations is developed below.

First, mediators should create robust, realistic standards of ethical practice because public standards reduce the costs to the parties of identifying unacceptable behavior by the mediator. They put the burden on the mediator to avoid strategic behavior in the form of inappropriate heresthetic or rhetorical maneuvers, or to use them only when clearly justified. [136] Standards of ethical practice should validate the parties' expectations about how the mediation will be conducted, codifying the reasons why parties could give a mediator a bad reputation.[137] If the parties can discharge a mediator for violating ethical canons, and if mediators by terminating a mediation self-enforce those canons, ethical canons help solve the coordination problem, reducing the costs of resolving the prisoner's dilemma between disputants and the mediator. The parties then have more internal transaction resources to apply to resolving their substantive dispute.

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[136] Shapira, *supra* note 77, at 39–45.

[137] OREGON MEDIATION ASSOCIATION, *supra* note 6, at std. III, cmt. 4. The standard specifically notes that "[m]ediators should not influence participant decisions because of the mediator's interest in higher settlement rates, increased fees, or non-participant pressures from court personnel, program administrators, provider organizations, the media, the public, or others." *Id.* This is another example of the requisite level of specific guidance standards should provide. Making that provision enforceable would provide even more confidence in the mediation process.

Beyond serving the parties, standards of ethical practice serve mediators. Ethical standards help define what it means for a mediator to be autonomous, competent, and related, just as they serve the purposes of participants who have the same psychological needs. Not surprisingly, empirical research finds that the mediators who engage in behaviors associated with reinforcing their own and the parties' autonomy, competence, and relatedness encourage trust by the parties in mediators.[138]

Second, our analysis provides guidance for those who are creating or revising standards of practice by identifying questions the writers should address. For example, to secure "High Quality Consent"[139] and "Procedural Justice," [140] how detailed, if at all, should the mediator explain the implications of SDT, TRT, and CCT? Standards separating process selection from outcome, or non-substantive from substantive issues, defy theory and reality.

Likewise, should mediators take these concepts to the concrete level and engage the parties in a pre-mediation conversation about how specifically the mediator is to act or refrain from acting? Topics[141] could include: 1) 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? 2) Should the mediator raise issues, claims, or defenses? Under what circumstances? 3) Should the mediator offer opinions? If yes, under what circumstances? 4) To what extent, if any, should the mediator use information received confidentially as a tactic to bring parties together? 5) Should the mediator tell the parties what heuristic and rhetorical tools he will use, when and how?

Third, potential users should inquire as to what ethical standards, if any, a potential mediator adheres to before they agree to mediation.[142] Transaction

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[138] *See generally* Jean Poitras, *What Makes Parties Trust Mediators?*, 25 NEGOTIATION J. 307 (2009).

[139] John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 857 (1997).

[140] Nancy Welsh, *Making Deals in Court Connected Mediation: What's Justice Got to do with it?* 79 WASH. U. L. Q. 787, 817 (2001).

[141] Sam Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 703, 742 (1997).

[142] OREGON MEDIATION ASSOCIATION, *supra* note 6. Standard X, Mediation Practice, Comment 13 states, "Mediators should provide these Core Standards to the mediation participants as soon as practical." *Id.* The authors suggest this is an example of the requisite level of specific guidance standards should provide. General philosophical principles are not always sufficient to give participants the full disclosure necessary for informed consent and self-determination. Making such provisions enforceable would lead to even more confidence in mediation.

Resource Theory predicts that parties in conflict will use a third party if they believe that the benefits exceed the costs, including the risks we have identified. They must first agree to mediate, believing that the process will minimize the risks of process and outcome manipulation, usually by the other parties. Indeed, they might believe that it will because they view the mediator as the guardian of process fairness. This could be naïve, albeit preferable to engaging in alternative processes. Mediators are not neutral, even if they act with impartial regard, because they have points of view, especially about the process, but they should avoid acting on them to the substantive disadvantage of the parties. Mediators who adhere to ethical standards that do not speak to these concerns to the satisfaction of the parties, or who do not adhere to any ethical standards, should give the parties pause about engaging with that mediator.

Fourth, standards of ethical practice should be mandatory, providing the potential for a robust check and balance system enforced by professional associations or the courts. Our analysis supports the need for something beyond reputation effects to enforce everyone's expectations that mediation can be successful while allowing all of the parties to be self-determining. Before reaching the substantive issues and whether everyone will abide by terms of any agreement, the parties must solve a preliminary problem about the legitimacy of the process and the mediation approach they will use. The key is the enforceability of mediator standards of ethical practice.

Fifth, with robust, value-based, realistic and mandatory standards of practice in place, mediators should evaluate and implement meaningful enforcement mechanisms, which are not prevalent in the field.[143] This step introduces the matter of a complaint process and the potential for a mediator malpractice claim. If a mediator behaves unethically, the mediator likely committed malpractice, assuming there were damages caused by the error or omission. Mediators can be guilty of malpractice without being unethical if their behavior falls below the standard of care in the profession, which presents the prima facie case for mediators to create standards of care. Oregon mediators are immune, however, "unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another."[144] A mediator merely negligent is immune.

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[143] Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of American: From the Formal to the Informal to the 'Semi-Formal', in* REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 419, 444 (Felix Steffek & Hannes Unberath eds., 2013).

[144] OR. REV. STAT. § 36.210 (2013).

Thus, mediators who charge and receive a fee[145] should not be immune from malpractice, but instead, should be held to the typical professional negligence standard, especially when malpractice insurance is readily available.[146] States or self-governing organizations like OMA could also enforce ethical standards of practice by holding mediators accountable when they violate ethical standards as is done in other professions.[147] As it stands, OMA's complaint process is voluntary and non-binding, which on our analysis using SDT, TRT and CCT, is insufficient. Features of mediation that make it so attractive, such as party self-determination, procedural choice, and confidentiality, create informational deficits that justify licensure.[148]

B. *Improvement Process Plan*

At a bar association continuing legal education class,[149] a federal trial judge and a jury consultant explored how litigators can best present their cases to juries. They explained several rhetorical tools and cognitive biases,[150] with suggestions on how trial attorneys can use them or overcome them to their persuasive advantage. Examples included: A) "Don't Bury the Lead," meaning lead with your point, and then, backfill with the train of logic and facts that got you there, not the other way around; and B) "Don't take the bait," meaning never directly respond to your opponents framing of

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[145] OREGON MEDIATION ASSOCIATION, *supra* note 6. Standard X, Mediation Practice, Comment 8 states, "Mediators who charge a fee are encouraged to have malpractice insurance." *Id.* The authors suggest the time has come to mandate insurance, not just encourage it. *See State by State, Mandatory Malpractice Disclosure Gathers Steam,* AMERICAN BAR ASSOCIATION, http://www.americanbar.org/publications/bar_leader/2003_04/2804/malpractice.html (last visited Apr. 18, 2014). It is a tenet of professionalism that clients are the first priority and they need to be protected.

[146] *Pinkham Insurance Program,* ASSOCIATION FOR CONFLICT RESOLUTION, http://www.acrnet.org/Page.aspx?id=664 (last visited Apr. 18, 2014).

[147] *See History of Mediation in Oregon: Certification, Licensure, and Enhancing Mediator Competency,* OREGON MEDIATION ASSOCIATION (Feb. 4, 2014, 2:30 PM), http://www.omediate.org/pg1122.cfm (last visited Apr. 18, 2014).

[148] *But see* Felix Steffek et al., *Guide for Regulating Dispute Resolution (GRDR): Principles and Comments, in* REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 13, 25–26 (Felix Steffek & Hannes Unberath eds., 2013).

[149] Hon. Michael Simon & Christopher Dominic, *Science of the Mind: How Jurors, Judges and Other Key Decision Makers Really Think,* MULTNOMAH BAR ASSOCIATION (Mar. 4, 2014), https://www.mbabar.org/education/watch-archived-cle-webcast/science-of-the-mind.

[150] Kendra Cherry, *What is a Cognitive Bias? Mental Mistakes and Errors,* ABOUT.COM http://psychology.about.com/od/cindex/fl/What-Is-a-Cognitive-Bias.htm.

the story; always reframe it by telling your story. These tactics were enthusiastically received by the audience.

Over the years, lawyers have discussed a duty of zealous advocacy (representation) on behalf of their clients.[151] Mediators have no such duty; in fact, their duties are to display neutrality/impartial regard. This is why mediators, regardless of their profession of origin, should struggle with the resulting ethical issue associated with using rhetorical tactics, while the lawyers do not. It also might explain why lawyers representing parties in mediation or acting as a mediator can be desensitized to the appropriate or inappropriate use of rhetoric—it seems so familiar, and therefore, so acceptable to them. This is a "cognitive bias." It is called, "Mere Exposure Effect," the tendency for parties to express undue liking for things merely because they are familiar to them.[152] This justifies training for everyone engaged in mediation.[153]

At a conference on conflict management,[154] practitioners, largely made up of as psychologists and social workers, objected to mandatory standards of ethical practice and competency. The people (presumably lawyers) who write laws, they said, would write standards to exclude non-lawyers from serving as mediators. Nothing in OMA's standards would do so. No matter. The irony should not be lost: mediators with different backgrounds who find their legitimate interests to be in conflict not only eschew an authoritative statutory process for setting standards that might benefit their profession, they evidently fail to consider mediation as a basis for crafting a statutory solution. It seems we cannot even resolve these issues within our own field. Perhaps, we should convene a public policy facilitation, invite mediation users, and see what they think. For the good of potential clients, mediators should practice what they preach: full disclosure, informed consent, and the promotion of self-determination.

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[151] *See* Sylvia Stevens, *Whither Zeal?*, OREGON STATE BAR (Jul. 2005), http://www.osbar.org/publications/bulletin/05jul/barcounsel.html (last visited Apr. 18, 2014).

[152] Gillian Fournier, *Mere Exposure Effect*, PSYCHCENTRAL, http://psychcentral.com/encyclopedia/2009/mere-exposure-effect/ (last visited Mar. 12, 2014).

[153] For a beta version, user-friendly summary of cognitive biases, see Eric Fernandez, *A Visual Study Guide to Cognitive Biases*, UNIVERSITY OF NEW MEXICO, http://www.cs.unm.edu/~jmk/cognitive_bias.pdf (last visited Apr. 18, 2014). Interestingly, numerous mediator impasse-breaking techniques "work" because they attend to the cognitive biases of the parties.

[154] *See generally* 26th Annual IACM 2014 Conference, INTERNATIONAL ASSOCIATION FOR CONFLICT MANAGEMENT (Jul. 2013), http://www.iacm-conflict.org/sites/default/files/2013_IACM_Conference_Program_Web.pdf.

The authors have observed and participated in robust debates, probably unconsciously influenced by "*deformation professionalle*,"[155] over what profession(s) of origin "own" mediation. Moreover, let us not forget the internecine debates about facilitative-transformative-evaluative mediation approaches. With the playful hope of provoking more friendly discussion, dare we get complacent, if attorneys, acting as advocates or mediators, are desensitized to dangers of rhetorical tactics, they have a blind spot when they become mediators. Parties should be cautious, unless, of course, mediators must be licensed and licensure requires training that re-sensitizes them to the implications of using rhetorical tactics. Conversely, mediators from other professions of origin should be sensitized to their blind spot—the fact that laws are nothing more than society's codification of fairness norms surrounding appropriate and inappropriate behavior. Laws are based upon commonly accepted values and needs—"interest" in mediation vernacular.

If nothing else, the authors hope this article motivates more discussion about what mediators should understand before they mediate and what parties should know before they agree to mediate "on faith."[156] So, what are we going to do to improve the wonderful field of mediation? At a minimum, mediators should critically explore the dissonance between what we say at conferences/trainings and the ethical and practical impact of what we actually do in the field. This requires self-reflective, and dare we say, "transformative" training to transparently operationalize the core principles of mediation.

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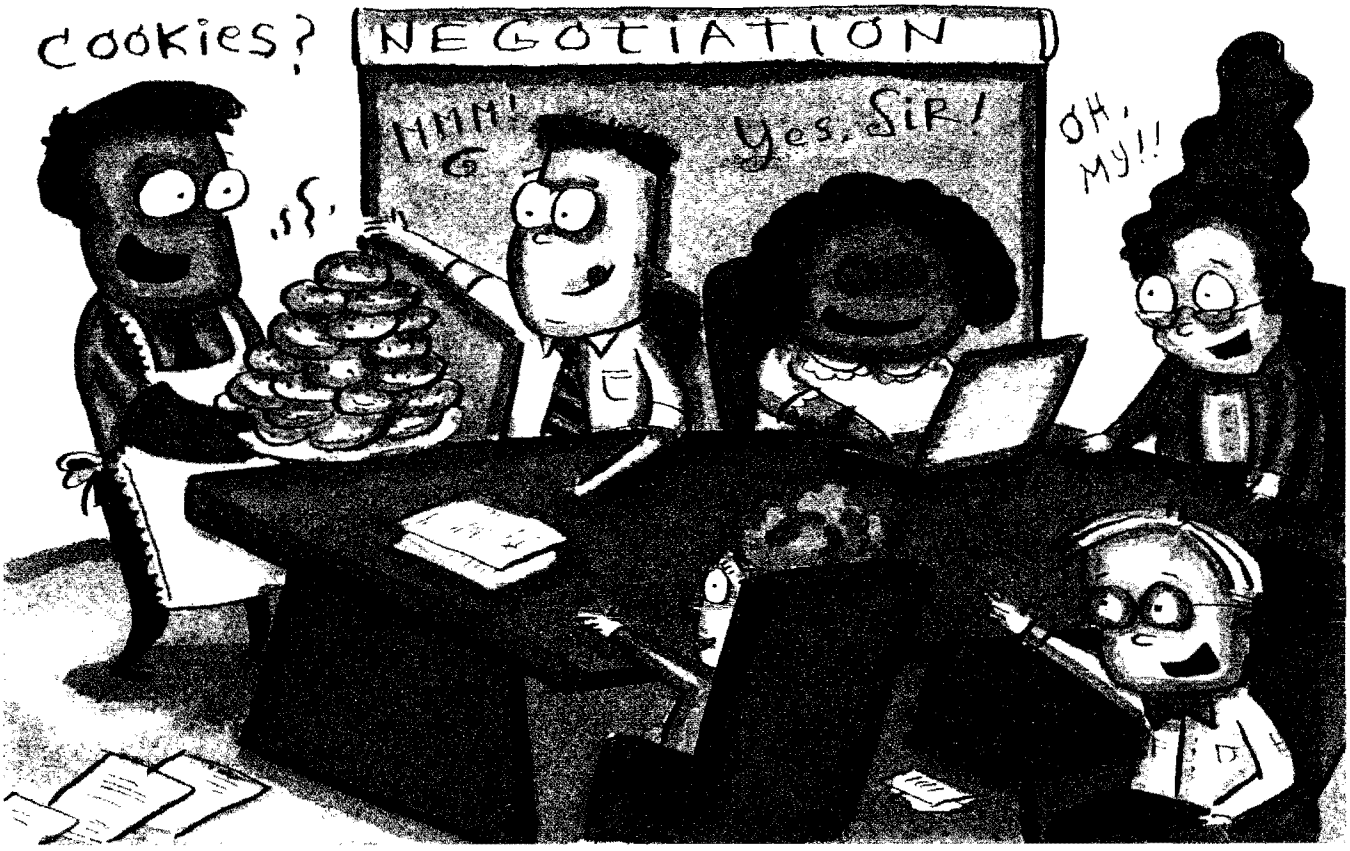
[155] This is the tendency to look at things according to the conventions of one's own professions, forgetting any broader point of view. *See* ALEXIS CARREL, L'HOMME, CET INCONNU 43 (1935).

[156] We are not using the "decoy effect" cognitive bias. That is the tactic where the preferences for either option A or B changes in favor of option B when option C is presented, which is similar to option B but in no way better. *See generally* Shankar Vedantam, *The Decoy Effect, or How to Win an Election*, THE WASHINGTON POST (Apr. 2, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/04/01/AR2007040100973.html. The mediation field should explore training mediators and parties even if it decides to keep the current ethical and enforcement constructs.



TRICK or Treat?

The Ethics of Mediator Manipulation

By Jim Coben and Lela P. Love

And the last temptation is the greatest treason
To do the right thing for the wrong reason[1]

Mediators have no shortage of opportunities to do the right thing for wrong, or unethical, reasons—or the wrong thing too, and again for the wrong reasons. In this reflection on mediator motives and manipulations, consider the following examples:

Warm Drinks and Cookies

Having read a study that warm drinks inspire warm thoughts, a mediator serves coffee and tea so that participants will regularly be feeling the heat of their cups. Another mediator, believing that the smell of freshly baked cookies inspires collaboration and friendliness, regularly ensures that such a smell permeates the mediation room by both serving such cookies and warming them in the room right before the session so the smell is particularly strong.

Comfy Chairs and Zen Design

Knowing that comfortable chairs make parties more relaxed, a mediator does research on the most comfortable, cushy chairs for her mediation suite, to ensure that participants are feeling as relaxed and hence receptive and creative as possible. Another mediator, believing that Feng Shui[2] is critical to creating positive energy, carefully places the wastebasket and positions the furniture to create the most auspicious room arrangement.

Strategic Images

A mediator positions pictures of his happy family at strategic spots to remind parties of important human connections. Another mediator, using an electronic picture frame on the wall, runs a continuous looping slide show of calm seascapes and bubbling brooks, with an embedded half-second subliminal message urging generosity and peace showing every 30 seconds.

Image: Charles Stubbs Illustration

Food and Scheduling

Understanding the importance of hunger and food to optimism and energy, a mediator is thoughtful about what food is available at particular intervals and routinely limits the duration of mediation to avoid undue pressure. Another mediator, believing that helpful compromises are often motivated by hunger and prolonged negotiation, typically schedules day-long, rather than half-day, mediation sessions and regularly delays lunch as long as possible.

Countering Judgmental Biases

Knowing the importance of framing to generate collaboration, a mediator labels the issues of who will have custody and what visitation rights will be granted to each spouse as "parenting arrangements." Another mediator, understanding that parties in conflict often act irrationally, systematically reframes proposals as gains, rather than losses (knowing that doing so increases the likelihood that the exact same proposal, initially rejected, becomes acceptable). A third mediator, fully aware that parties tend to discount the value of an offer that comes directly from the other side (reactive devaluation), decides to "float" a proposal as her own, even though the opposing party suggested it during a caucus.

Psychological Diagnostics

On the advice of a well-known mediator trainer, an aspiring mediator studies how to use the Thomas-Kilmann Conflict Mode Instrument[3] as a diagnostic tool to aid in deciding her mediator interventions. Another mediator, a student of neurolinguistic programming,[4] carefully chooses her metaphors in a calculated effort to change participants' emotional and mental behavior.

Orchestrating Silence

Knowing parties are uncomfortable with silence, a mediator purposely uses long periods of silence to increase the likelihood that they will generate options. Another mediator, discovering that one party (the "stubborn one" in the negotiations to date) is uncomfortable with silence, purposely orchestrates prolonged periods of silence to increase the likelihood the stubborn party will generate options.

Jim Coben *is a professor of law and senior fellow in the Dispute Resolution Institute at Hamline University School of Law. He can be reached at jcoben@hamline.edu.*

Lela P. Love, *professor of law at Benjamin N. Cardozo School of Law where she directs the Kukin Program for Conflict Resolution, is a practicing mediator in New York City. She can be reached at love@yu.edu.*

Using Empathy and Optimism

Knowing that parties have a strong desire to feel they have been heard, the mediator strategically uses empathy to set the stage for asking a party to substantially reduce a demand. Another mediator, understanding that parties often feel "remorse" at accepting a deal ("Could I have done better?"), privately congratulates each side on the deal they struck, hoping to prevent buyer's remorse (even though the mediator believes that only one side actually got a good deal, relative to what the other side was willing to offer).

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Are these mediator moves ethically OK? For some, we conclude they are appropriate—and perhaps obligatory—exercises of mediator influence. For others, they may be tricky mediator manipulations toward ends that the parties would not otherwise choose.

Before looking at the introductory examples posed for their ethical implications, we would like to acknowledge that there are some mediator moves that we would criticize a mediator for failing to make. For example, we consider siting the mediation an appropriate function of the mediator. Is the table configuration optimal to reinforce mediator neutrality and maximize party communication? Is the room sufficiently comfortable for the anticipated length of the meeting? Are there breakout rooms, computers, telephones—the necessary equipment for decision making and agreement drafting? We expect a thoughtful opening statement that explains the mediation process so that everyone is appropriately informed about what to expect. We hope that the mediator will protect the space for each party to voice her concerns. We look to the mediator to ensure that an agenda is created that will maximize an efficient and constructive use of time. Furthermore, we expect mediators to generate movement, rather than throwing their hands in the air at the first sign of impasse.

In other words, much of what good mediators do can be characterized as "helpful interventions" that assist the parties toward legitimate goals such as a better understanding, a platform for developing options, and (where the parties choose) an agreement or settlement. In those senses, "helpful interventions" are both wanted and failure to make certain interventions would be poor practice.

The problem, of course, is that all such "helpful interventions" are inevitably manipulative, in the sense that the mediator is, often unilaterally, making "moves" with profound impact on the parties' bargaining. In choosing the word "manipulative," we note two very different common meanings:

- Definition One: "handle, especially with (physical or mental) dexterity"
- Definition Two: "manage by (especially unfair) dexterous contrivance or influence"[5]

We need to consider both definitions in order to properly classify mediator moves on a continuum from ethical ("OK") to unethical (not "OK"). Thus, while we would hope that the mediator's "helpful interventions" are implemented with dexterity (definition one), the use of clever or tricky contrivances to unfairly influence the parties and the outcome (definition two) is unethically manipulative. To evaluate the ethics of any individual move, we propose asking two questions.

First, to be "OK," a move should further or *help* a legitimate party or process goal and be in keeping with the Model Standards of Conduct for Mediators that advance party self-determination in decision making.

FROM THE "HELPFUL INTERVENTION" FRAME	
• encouragement	• belittlement
• support	• false empathy
• perspective-generating devices	• authoritarian pronouncements

Following this logic, we would ask of the "move": *Does it* help *a party to understand what is at stake for them, what is being said by the other side, the range of options they may have, and the relation of a proposal to their self-interests? In other words, does the move support party self-determination?*

Second, a move should not be manipulative in such a way that it disadvantages one side or undermines the integrity of the mediator or the mediation process. The more "secret" or hidden the intervention, the more problematic it becomes. Lying, an "intervention" that one should not expect from a professional bound by a code of conduct, is covered here. Likewise, interventions that a one-time player in mediation might perceive differently than a repeat player[6] are more ethically problematic than ones that both parties would perceive or experience in a similar manner. Moves that, if discovered, would be considered "tricky" and underhanded would not pass the test we propose.

FROM THE "MANIPULATION" FRAME	
• transparent moves	• "secret" moves
• interventions that one-shot players and repeat players experience in the same way	• mediator lies
	• interventions that one-timers might not suspect will influence their decision making

Following this logic, we would ask of the move: *Is it consistent with mediator and mediation process integrity (i.e., not "tricky" or devious)?*

If we can respond "yes" to the two questions, then the mediator move is more likely to be ethically sound.

Of course, different mediator goals will drive different practices. For example, the mediator who believes the goal of the process is settlement only might have a different repertoire of moves than the mediator who aims for understanding, option development, and agreement, or one who aims for party empowerment and recognition or the creation of a jointly endorsed narrative about the past.

So, for example, a settlement-driven mediator might call for party proposals quickly without an extensive joint session where parties share their perspective. He or she might use caucus more frequently than a mediator who has the goal of party understanding and problem solving.

Despite differences in strategies, we believe all mediator interventions should be both helpful to a legitimate party goal and to party self-determination. Interventions should also be nondevious so that mediator and mediation integrity remains intact.

Applying the Model

Certain mediator moves are clearly unethical. For example, the mediator undermines self-determination by pocketing the key to the mediation room, or denying parties food until they capitulate, or berating them for their unyielding stupidity. These moves are not helpful to encouraging thoughtful party decision making and can be rejected on that basis. Additionally, by beating the parties into a corner where they are stuck, hungry, and insecure, the moves are counterproductive manipulations aimed at a settlement that might promote the mediator's settlement rate but not a durable agreement endorsed by parties who are strong and acting without coercion.

In contrast, the eight examples of mediator interventions described at the beginning of this article are not clearly unethical. By addressing the two aforementioned questions—*Does the intervention support party self-determination, and is it consistent with process integrity?*—mediators can better navigate the line between OK and not-OK behavior.

Warm Drinks and Cookies

This is OK because it arguably makes the parties feel good (which might equate with stronger); it is visible, hence transparent; and it doesn't give the repeat player any inside advantage. One might argue that the repeat player knows about mediator "feel good" moves and hence can take advantage of their effects on his negotiating counterpart, but on the whole, the moves nonetheless seem benign and constructive. To the extent, however, the smell of freshly baked cookies is secretly injected into the room, then the "move" leans toward deviously manipulative and not OK.

Seating and Room Arrangements and Photo Placement

Similarly, comfort—or freedom from pain caused by cramped furniture—can be central to progress. Virginia

Woolf, in *A Room of One's Own*, pointed out how women who were relegated to the kitchen or crowded areas of a house could not think the same lofty thoughts as men in their private spaces and comfortable dens. Lighting and furniture arrangements, elements of Feng Shui, are probably also OK because they are visible to all. Most, even a repeat player, probably would not notice, and the attempt at influence is not toward agreement but toward a more positive state of mind.

Pretty pictures on the wall, or pictures of the mediator's family, seem similarly benign. They do not press the parties toward agreement, so much as they induce a more capacious frame of mind (if they have any effect). However, not OK is a flashing subliminal message. Whether or not the subliminal message works, it falls into the category of being tricky and undermines integrity of the process.

Breaks, Food, and Scheduling

Supplying food or breaks to keep the energy level high can be critical for the stamina needed to understand what's going on and maintain creativity. This move is OK and even necessary.

With respect to denying food to get a deal closed, one has to weigh whether the parties themselves want to use the deadline caused by hunger to make a final push. If the mediator is sufficiently transparent and the move is party endorsed, it is probably OK. However, if the mediator asserts process control to purposefully weaken the parties' resolve through hunger or prolonged negotiating, the move is not OK. And, of course, food or drink that in some way alters consciousness and weakens self-determination would be improperly manipulative.

Interventions to Counter Judgmental Biases

On one level, careful word choice in reframing issues or proposals seems totally benign, at least so far as the mediator uses these "manipulations" with both sides. After all, they are utilized by the mediator to promote rationality as a response to the well-documented phenomena that judgmental biases lead people in conflict to process information poorly.[7] Equally powerful, and ethically unquestionable in our view, is asking parties to consider proposals from a different perspective.

For example, well-known mediator Margaret Shaw tells a story about a commercial mediation that was not going well. During a break, the plaintiff shared the difficulty he was having paying his mortgage. When the mediation was later threatened by a seemingly unbridgeable impasse, Margaret reminded the plaintiff that the amount of money being offered could retire the burdensome mortgage. This shift in perspective allowed the plaintiff to look differently at the proposed resolution. Margaret did not "pressure" the plaintiff; she threw a different light on a proposal, which made it seem attractive.

However, reframing "manipulations" are not without risk. A major concern is the possibility that sophisticated mediation consumers are more "immune" to these types of mediator moves than are one-time participants. To get them out of a category where we might consider them devious or tricky, mediators could be transparent in describing the moves. Don't make the mistake of assuming that transparency negatively impacts efficacy. Consider our example's proposed solution to reactive devaluation. Rather than falsely claiming to offer an option as your own, ask a party to directly consider whether he or she would value the proposal differently if it came from you, rather than the other side. Or, simply float the proposal as a hypothetical without any attribution at all.

Psychological Diagnostics

Putting aside the obvious "competency" questions (e.g., is neurolinguistic programming credible? Is there any evidence that interventions based on Thomas-Kilmann categories are more or less effective?), these are ethically suspect to the extent they are secret. If the mediator were transparent about the diagnostics—and honest about the degree to which anyone could consider them reliable—then the use of the diagnostics might be educationally beneficial for the parties and hence promote their thoughtfulness about the complexities of conflict resolution and the approaches available.

Orchestrating Silence

The "strategic use of silence" gambit can be very powerful but might have more impact on the naive one-time player than on the well-counseled repeat player participant. Particularly where silence is being used with the intent to influence a particular party to make a specific move, it can become a devious move, interfering both with self-determination and mediator integrity. How many times have we blurted out something we regretted a moment later in the face of silence?

Using Empathy and Optimism

Genuine empathy can support self-determination by making parties feel stronger. Such empathy also comports with mediator integrity. However, the strategic use of (false) empathy does not comport with integrity and could backfire in terms of its helpfulness because of our ability to "smell out" insincerity.

Thus, the false statement that you believe a party got a good deal is particularly problematic. For one thing, a mediator can never know for sure the motivation leading people to settle and whether a deal is "good" for them or not. Indeed, rather than focusing on your perspective of the merits of the deal relative to what each side might have been willing to offer, better to focus

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REV. 290, 318, n.142 (2008).

7. *See, e.g.*, American Bar Association Formal Op. 07-447 *Ethical Considerations in Collaborative Law Practice* (2007); Advisory Comm. of the Supreme Court of Missouri, Formal Op. 124 (2008), "Collaborative Law," *available at* www.mobar.org/data/esq08/aug22/formal-opinion.htm; N. J. Advisory Comm. on Prof'l Ethics. Op. 699 (2005), "Collaborative Law," *available at* http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp699_1.html.

8. *See* CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 to -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006).

9. *See* MINN. R. GEN. PRAC. 111.05 & 304.05 (2008); SUPER. CT. CONTRA COSTA COUNTY, LOCAL RULES, RULE 12.8, (2007); L.A. COUNTY SUPERIOR COURT RULE 14.26 (2005); LRSF 11.17 (2009); SONOMA COUNTY LOCAL RULE 9.25 (2005); UTAH CODE OF JUDICIAL ADMINISTRATION, RULE 4-510 (2006); LA. CODE R. tit. IV, § 3 (2005).

10. State of Utah, H.B. 284 Substitute Uniform Collaborative Law Act. *available at* http://le.utah.gov/~2010/htmdoc/hbillhtm/hb0284s01.htm (last visited May 25, 2010).

11. State of Ohio, H.B. No. 467 *available at* www.legislature.state.oh.us/bills.cfm?ID=128_HB_467 (last visited May 25, 2010).

12. State of Oklahoma, HB3102 *available at* http://webserver1.lsb.state.ok.us/CF/2009-10%20SUPPORT%20DOCUMENTS/BILLSUM/House/HB3102%20INT%20BILLSUM.doc (last visited May 25, 2010).

13. Tennessee General Assembly SB 3531 *available at* http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB3531 (last visited May 25, 2010).

14. Bill 18-829 *available at* www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx (last visited June 15, 2010).

15. Draft of Proposed Amendments to Uniform Collaborative Law Act, April 2010 *available at* www.law.upenn.edu/bll/archives/ulc/ucla/2010april_amends.htm (last visited May 24, 2010).

16. *See* Attorney Gen. v. Waldron, 426 A.2d 929, 932 (Md. 1981) (striking down as unconstitutional a statute that in the court's view was designed to "[prescribe] for certain otherwise qualified practitioners additional prerequisites to the continued pursuit of their chosen vocation"); Wisconsin *ex rel.* Fiedler v. Wis. Senate, 454 N.W.2d 770, 772 (Wis. 1990) (concluding that the state legislature may share authority with the judiciary to set forth minimum requirements regarding persons' eligibility to enter the bar, but the judiciary ultimately has the authority to regulate training requirements for those admitted to practice). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c (2000).

17. MODEL RULES OF PROF'L CONDUCT R. 1.2(c), 1.7(b).

18. Abraham Lincoln, *Notes for a Law Lecture* (1846), in LIFE AND WRITINGS OF ABRAHAM LINCOLN 328 (Philip V. D. Stern ed. 1940).

19. JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 81–84 (2007).

Trick or Treat

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the parties on a clear understanding of consequences: Does the deal meet articulated needs? Is it realistic and implementable (classic "reality testing")? As for "insulation" against buyer's remorse, the ethical approach is to compliment parties for their hard work and acknowledge the difficulties they confronted and overcame.

So, what's the bottom line? Well, to quote democratic politician Helen Gahagan Douglas from the 1950 U.S. Senate race in California, don't be a "tricky Dick" (a reference to her then-adversary Richard Nixon's exploitation of her alleged left-wing sympathies). The next time you decide to offer warm coffee instead of ice water, be careful that your goal is in sync with the parties' aspirations, comports with your own integrity, and does not unfairly impact any party. Err on the side of transparency and be skeptical of any "covert" move that if examined postmediation would lead a party to conclude that you were a trickster, rather than someone who helped them make wise decisions. ◆

Endnotes

1. T.S. Eliot, MURDER IN THE CATHEDRAL (1935).

2. "In Chinese thought, a system of laws considered to govern spatial arrangement and orientation in relation to the flow of energy (chi), and whose favorable or unfavorable effects are taken into account when siting and designing buildings." SHORTER OXFORD ENGLISH DICTIONARY 5th ed. (2002) at 942.

3. The Thomas-Kilmann Conflict Mode Instrument (TKI) is a self-scoring exercise designed to measure a person's behavior in conflict situations. Created by Kenneth W. Thomas and Ralph Kilmann in 1974, the instrument identifies five different styles of conflict: Competing (assertive, uncooperative), Avoiding (unassertive, uncooperative), Accommodating (unassertive, cooperative), Collaborating (assertive, cooperative), and Compromising (intermediate assertiveness and cooperativeness). See www.kilmann.com/conflict.html, where you can obtain additional information and complete the TKI online (last accessed Aug. 2, 2010).

4. "A system of alternative therapy intended to educate people in self-awareness and effective communication, and to model and change their patterns of mental and emotional behavior." SHORTER OXFORD ENGLISH DICTIONARY 5th ed. 2002 at 1911.

5. Taken from SHORTER OXFORD ENGLISH DICTIONARY 5th ed. 2002 at 1691.

6. *See, e.g.*, Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 26 (1999).

7. *See, e.g.*, Richard Birke, *Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications*, 25 OHIO ST. J. ON DISP. RESOL. 477 (2010).

The Mediator as Leader

EFFECTS OF BEHAVIORAL STYLE AND DEADLINE CERTAINTY ON NEGOTIATOR BEHAVIOR

WILLIAM H. ROSS, JR.
University of Wisconsin at La Crosse
DONALD E. CONLON
University of Delaware, Newark
E. ALLAN LIND
American Bar Foundation, Chicago

This study investigated the effects of different mediator behavioral styles and disputant knowledge regarding negotiation deadline on bargaining behavior. A 2 × 2 factorial design varied mediator behavioral style (task-oriented versus person-oriented) and deadline certainty (certain versus uncertain) in a simulated laboratory dispute. Disputants with task-oriented mediators made larger initial offers and reached settlement more rapidly under uncertain-deadline rather than certain-deadline conditions. Subjects with person-oriented mediators did not differ significantly in the size of their initial offers or speed of settlement across deadline condition. Similar interactions emerged for a number of attitudinal measures. The results suggest that person-oriented mediators are effective regardless of deadline uncertainty, while the effectiveness of task-oriented mediators is contingent on the ambiguity inherent in the dispute. Implications of the results for procedural and distributive justice theory and research are also discussed.

The resolution of disputes involving individuals or organizations in a complex society is often expensive and time consuming, especially if the parties seek redress in the court system. Mediation is an increasingly popular alternative third-party procedure that is usually less costly than adjudication (Wall & Schiller, 1983). Mediation is a dispute resolution procedure where a third party attempts to assist two or more disputants in reaching an agreement. Mediators do not have the power to impose settlements on

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disputants, but they can help disputants discover agreements by providing expertise, suggestions, and persuasion. Use of mediation in a wide variety of contexts (e.g. organizational disputes, public resource disputes, community disputes, marital disputes, public sector disputes) is paralleled by an increase in research examining mediation in a number of field and laboratory settings (cf. Kressel & Pruitt, 1989).

In spite of the growing interest in mediation, the dynamics of mediation remain poorly understood. For example, the effectiveness of different types of mediator behaviors, given the same conditions, is uncertain. In addition, little is known about the utility of the same mediator behavior under different conditions (see Wall, 1981; Rubin, 1980, for reviews of existing research). The present study investigates the effects of both different mediator behavioral styles and disputants' certainty about deadlines on disputants' negotiating behavior and attitudes toward mediation.

The existence and nature of deadlines are important situational variables in negotiations; it is, therefore, somewhat surprising that there has not been more research on this topic. What research does exist has indicated that as an explicit time limit approaches, pressure to reach a settlement increases (Kelley, 1966; Yukl, 1974; Carnevale & Conlon, 1988). Negotiators with a certain deadline often reach agreement in the "eleventh hour"—just before the deadline passes (see Rubin & Brown, 1975, for a review of the literature). Yukl, Malone, Hayslip, and Pamin (1976) argued that settlements are reached more quickly under high time pressure than low time pressure. Carnevale and Conlon (1988) found that mediators experiencing time pressure increased their use of strategies that offered disputants additional positive or negative outcomes, and reduced their use of other strategies.

The most common methods of manipulating time pressure are to vary the amount of available time in which to reach an agreement, or to vary the number of rounds available to the disputants for negotiation. In the Carnevale and Conlon (1988) study, for example, mediators in the high time-pressure condition were told that the negotiation would last only six rounds, whereas mediators in the low time-pressure condition were told that the negotiation would last a minimum of eighteen rounds, if necessary. Whether time pressure is manipulated by varying the number of rounds of negotiating or by varying the amount of time available, these studies are similar in that the mediators and disputants were all certain of exactly how long they had in which to reach an agreement.

While there are doubtless many negotiations where the deadline for reaching agreement is as well-defined as in the above scenarios, in many other negotiations the deadlines, while present in reality, are not precisely

known. Examples include lawsuits where trial may be delayed repeatedly, labor-management negotiations that continue beyond the expiration of a contract without either a strike or a lockout, and some international conflicts. These examples highlight the important role that deadline ambiguity or uncertainty can play in disputes. Two important questions that arise when one considers the certainty or uncertainty of a time deadline in negotiation are: (1) What is the effect of certain versus uncertain deadlines on disputant perceptions and behaviors, and (2) do different mediator behavioral styles differentially influence disputant perceptions and behaviors when deadlines are certain versus uncertain?

Quite different patterns of negotiation can be expected to arise under conditions of certain and unknown deadlines. When the deadline is unknown and negotiation can be cut off at any time, disputants motivated to reach settlement should move rapidly to conclude an agreement. In this situation, initial offers should be large, and agreements should be reached quickly and frequently. When the deadline is certain, there will be some temptation to withhold concessions in the hope that the approaching deadline will force one's opponent to concede first. In the absence of other factors, this should lead to small initial offers and small concessions early in the bargaining process, and to one of two patterns of behavior as the deadline approaches—either a flurry of concessions, resulting in settlement, or a contest of wills and few concessions, resulting in no settlement.

The identification of distinct mediator behavioral styles has recently received much attention from researchers interested in negotiation. Some researchers (e.g., Kressel, 1972; Pruitt, 1981; Carnevale, 1986) take a within-dispute perspective, arguing that different mediator behaviors assume primary importance at different times in a negotiation. Other researchers (e.g., Kolb, 1983; Kochan & Jick, 1978) have argued that mediators are predisposed to using a specific behavioral style due to dispositional sources within the mediator, or to consistent situational characteristics inherent in the type of dispute they typically mediate. None of these perspectives, however, have addressed the influence of different mediator behavioral styles in disputes where deadlines are ambiguous versus unambiguous. The present study has mediators use behavioral styles from an area that has considered the impact of ambiguity or uncertainty on perceptions and behaviors—the leadership literature.

The similarities between mediation and leadership roles have been noted by Bigoness and Kesner (1986). McGrath (1966) argued that, while within their respective partisan groups the disputants may often be leaders, within the negotiation group the mediator usually acts as leader. This argument

suggests that our understanding of effective mediator behavior might benefit from considering the empirical and theoretical work on leadership.

In addition, the concept of ambiguity has played a central role in the leadership literature, which has argued for a contingent matching of different behavioral styles to different levels of ambiguity. Relative to the negotiation literature, there is an enormous amount of leadership research relating behavioral styles to ambiguity. Thus, one can place greater confidence in the existence of different behavioral styles consistently derived from the leadership domain, and their likely relationship to variables such as ambiguity.

Two behavioral styles consistently emerge from the many studies of leadership, and these account for about 80% of the variance in leadership behavior (Fleishman, 1953; Fleishman, Harris, & Burtt, 1955; Stogdill, 1974; Vroom, 1976). These styles are defined rather broadly: some leaders emphasize problem-solving and accomplishing the task at hand (a style called initiating structure or task-orientation); others emphasize harmonious relationships, mutual trust, respect, and warmth in their approaches to situations (a style called consideration or person-orientation). It seems reasonable to surmise that mediators may share with leaders a tendency to use one of these two behavioral styles (or various combinations of those styles, such as those recommended by Blake & Mouton, 1964) when solving a dispute or problem.

While none of the perspectives on mediator behavioral style reviewed earlier are identical to the leadership concepts of consideration and initiating structure, many employ concepts analogous to the leadership concepts because they suggest a relative emphasis by mediators upon either enhancing the relationship between the disputants or upon pressing the parties for agreement. Further, Kolb's (1983) work suggests that individual mediators tend to rely upon a relatively limited range of behaviors across disputes. This finding suggests that mediator styles are relatively stable and may not be greatly influenced by situational characteristics. These styles, however, may be interpreted very differently by disputants, depending on the situational characteristics of the dispute. Hence, research identifying what behavioral styles work best under what conditions would seem to be an important empirical question.

The leadership literature suggests that the effects of mediator behavioral style may be more complex than has been suggested by some previous research on mediation (e.g., Kochan & Jick, 1978). A common finding in the leadership literature has been that the effects of consideration and initiating structure styles vary with the ambiguity present in the situation (Kerr, Schriesheim, Murphy, & Stogdill, 1974; O'Reilly & Roberts, 1978). Kerr et al. (1974) conclude that, in structured work settings, subordinates will be

satisfied with considerate leaders, but as situational stress and ambiguity increase, subordinates adopt a preference for leaders high on initiating structure.

We hypothesized that mediator style would interact with certainty of time limits to affect perceptions, preferences, and behavior in mediation. We assumed that uncertainty about the timing of deadlines would greatly increase the ambiguity present in a mediation situation. Applying the Kerr et al. (1974) findings to mediation, we hypothesized that, relative to those in certain deadline conditions, disputants in uncertain deadline conditions should be more accepting of mediator styles high in initiating structure and more satisfied with the mediation process and outcome. In contrast, if the mediator's style was high in consideration, disputants should react more favorably under certain deadlines (where they did not need structure from the mediator) than under uncertain deadlines. A similar pattern of effects should be seen in measures of bargaining effectiveness. Mediator styles high in consideration should be especially useful in preventing the contest of wills that can thwart settlement under certain deadlines, and mediator styles high in initiating structure should be useful in assisting settlement, if any assistance is needed, under uncertain deadlines.

PRETEST

Two scripts reflecting the task-oriented and person-oriented behavioral styles were developed to be used by the mediators in Study 1. It was necessary to demonstrate that the two scripts the mediators would be following were, in fact, perceived as being task-oriented and person-oriented, respectively.

SUBJECTS, PROCEDURE, AND RESULTS

The two scripts were pretested using 35 business administration students as blind raters. Students read both scripts and, using seven-point scales, rated each as to how task-oriented (1 = very low, 7 = very high) and how person-oriented (1 = very low, 7 = very high) each script was. Students saw the task-oriented script as significantly more task-oriented than the scale's neutral midpoint of 4.0, the estimated population mean under the null hypothesis ($M = 5.6, SD = .92; t(34) = 10.1, p. < .01$). They also reported that the person-oriented script showed a high degree of consideration ($M = 5.8, SD = 1.0; t(34) = 10.6, p. < .01$). Further, when asked which of the two mediators displayed a higher level of consideration, raters chose the medi-

ator from the person-oriented script ($t(34) = -4.7, p < .01$). The mean was 2.7 ($SD = 1.6$) on a bipolar rating scale where a "1" indicated that the mediator from the person-oriented script showed more consideration and a "7" indicated that the mediator from the task-oriented script showed more consideration. Raters also saw the mediator from the task-oriented script as exhibiting significantly more initiating structure, using a similar 7-point bipolar rating scale ($M = 5.4$, $SD = 1.4$; $t = 5.8, p. < .01$). Thus, there is good evidence that the verbal communications that were used by mediators in the following study accurately reflected different mediator behavioral styles.

METHOD

SUBJECTS AND RESEARCH DESIGN

One hundred thirty-four undergraduate women (67 dyads) participated in partial fulfillment of an introductory psychology course requirement. The laboratory experiment used a 2 × 2 factorial design that varied mediator behavioral style (task-oriented versus person-oriented) and deadline certainty (certain versus uncertain).

THE DISPUTE

Each subject served as the representative for one of two disputants in a contract law case. The dispute concerned an actor who was to appear in a play produced by a television production company. The actor had suffered a waterskiing accident shortly before filming was to begin, and the production company was unable to secure a replacement. The production company had employed several firms to make costumes, design sets, etc. These firms had appeared before a court of law demanding payment, and the court ordered both the actor and the production company to cumulatively pay these firms six thousand dollars. A mediator had been appointed by the court to help the two parties decide how much of the six thousand dollars each of them should pay. The subject was paid one dollar for each thousand dollars retained by her client at the end of the mediation.

GENERAL PROCEDURE

Six subjects were scheduled for each one-hour session of the experiment. The experimenter informed the subjects that the experiment was designed to

investigate the effectiveness of mediation in helping people to settle disputes. Subjects were told that their objective was to obtain the most favorable solution they could for their side, and that they could earn up to six dollars in the experiment based on their success in negotiation. They were also told that failing to reach a settlement would result in their receiving a payment of only 75 cents. The six subjects were then randomly divided into dyads and assigned to the side of the dispute that they would represent. Friends and acquaintances were not placed in the same dyad. Each dyad was placed in a separate room where they read specific details of the case. The facts were pretested and selected so that an equal number favored each side of the dispute, and each disputant received the same information. Thus, the study was a single issue, zero-sum dispute where pressures to compete were counterbalanced by forces favoring cooperative behavior (parties had equally favorable arguments, and wished to achieve a settlement that would give them more than 75 cents).

After both subjects finished reading the material, the mediator entered the room. In her introduction to the disputants and subsequent discourse, the mediator adopted either a person-oriented (high consideration) or task-oriented (high initiating structure) mediation style. After making her introductory comments, the mediator separated the disputants; from that point she acted as an intermediary, transmitting messages from each party to the other. If an agreement was reached, the mediator and the disputants recorded this on a settlement form. If time elapsed without a settlement being reached, the experimenter entered and announced that time had expired. Subjects were given a post-mediation questionnaire after reaching a settlement or at the end of negotiation period. Upon completing the questionnaire, the subjects were debriefed and paid.

MEDIATOR STYLE MANIPULATION

The mediators were female research assistants who had each received six hours of group training on how to enact the person-oriented or task-oriented mediator styles. Each mediator also spent several hours memorizing scripts designed to convey each style and to give instructions to the disputants. For example, during the mediator's introduction to the two disputants, a person-oriented mediator would mention that she was most concerned with how happy each disputant was with the settlement; a task-oriented mediator would inform the disputants that she was most concerned with reaching a settlement.

During the experiment, trained raters observed the mediators using one-way mirrors and headphones. These raters recorded whether the mediator

followed the appropriate script during each meeting with the disputants. In order for the data to be included in analyses, a mediator had to follow the script in 80% of her meetings with the disputants. Deviations from the appropriate scripts were rare; only ten dyads were excluded using this criterion, leaving 57 dyads for analysis. In addition to delivering memorized scripts, mediators were trained to use, depending on the style, either a serious, business-like tone of voice, or a warm, personable tone. All mediators served in all four conditions with nearly equal frequency, similar to the procedure used by Brookmire and Sistrunk (1980) in their manipulation of the perceived impartiality of a mediator. Mediators were also told to use body language consistent with the appropriate style. Task-oriented mediators were taught to sit straight, with their hands in their laps. Person-oriented mediators leaned forward, had eye contact, and nodded when disputants talked.

DEADLINE MANIPULATION

When the disputants had a certain deadline, the mediator simply told the subjects how many minutes they had in which to reach a settlement. In the uncertain condition, the parties were given a chart detailing the likelihood that the negotiation would end at a number of given moments in time. The cumulative probabilities were as follows: 15 minutes: .01; 20 minutes: .25; 25 minutes: .50; 30 minutes: .99. The mediator reviewed this chart thoroughly with the dyad to make sure it was understood. From the 13-minute mark of negotiation in all conditions, the mediator kept the disputants informed of how much time had elapsed in the session. The actual deadlines varied as described on the chart, and the design was yoked so that deadlines were used with equal frequencies in both the certain and uncertain conditions. The different deadlines also occurred in equal probabilities for the different mediator styles.

DEPENDENT VARIABLES

Several dependent variables were assessed. The settlement rate, the size of the initial offers, and elapsed time to reach agreement were used as objective measures of the process and outcome of mediation. Subjective measures, including manipulation checks, were assessed using the postmediation questionnaire, which asked subjects for their perceptions of the mediator, the other disputant, and the mediation procedure and outcome.

RESULTS

MANIPULATION CHECKS

In addition to the pretest described earlier, subjects in the present study answered several nine-point semantic differential-type items on the post-mediation questionnaire which measured the effectiveness of the mediator style manipulation. Relative to task-oriented mediators, person-oriented mediators were seen as more friendly, supportive, and warm (Means for these scales are presented in Table 3). There was no difference in the perceived concern of the mediator that the parties reach a settlement, or in perceptions of how goal-oriented the mediator was. This suggests that subjects were more sensitive to variations in consideration than to variations in initiating structure. The perceptions of person- and task-oriented mediators as fair (Ms = 8.2 and 7.9), impartial (Ms = 7.6 and 7.8), expert (Ms = 6.7 and 6.6), and old (Ms = 21.4 and 21.9 years) were nearly identical, suggesting that subjects believed their mediators behaved appropriately and objectively in the dispute.

NEGOTIATION OUTCOMES AND OFFERS

Analysis of variance revealed no significant differences between the four conditions in terms of the overall payment that each subject received when the dispute was settled. This was not surprising, as the design of the negotiation task (involving a single issue with equally balanced facts) and the pressures for competitive behavior fostered an even split of the amount in controversy in most dyads.

However, subjects' initial offers should have been influenced by the mediator's style. This is because, just prior to the initial offers, the mediator delivered a short speech conveying her behavioral style. As negotiations progressed, subjects' offers were probably also influenced by additional factors, such as their opponents' pattern of offers and their opponents' justifications for those offers. Thus, one would expect mediator style to show clearer effects on disputants' offers early in the negotiation. Further, because the production company representative always made the first proposal, one would expect to find the clearest effects of mediator style on her initial offers. The effects on the actor's representatives' initial offers should be less clear, because she was partly reacting to her opponents' initial offer. As negotiations

TABLE 1
Initial Offers

Mediator Style	*Deadline* *Certain*	*Uncertain*
a. Subjects representing the production company.		
Task-oriented	$1,133.33 n = 15	$1,846.15 n = 13
Person-oriented	$2,071.43 n = 14	$1,233.33 n = 15
b. Subjects Representing the Actor		
Task-oriented	$ 733.33 n = 15	$1,807.69 n = 13
Person-oriented	$1,785.71 n = 14	$1,700.00 n = 15

NOTE: Subjects representing the production company always made the first offer. The actor's representatives always made the second offer. For an agreement to be reached, the offers had to total $6,000.00.

progressed, one would expect the mediator style manipulation to have progressively weaker effects on offers and counter offers as each subject reacted to the pattern of moves by the opponent, in addition to the mediator's style.

The results were consistent with these expectations. Table 1a shows a significant interaction between mediator style and deadline condition on the initial offers made by subjects representing the production company ($F(1,53) = 6.2, p. < .016$; $R^2 = .01$). The largest initial offers were made in the person-oriented mediator/certain deadline ($t(27) = 2.1, p. < .05$), and task-oriented mediator/unknown deadline conditions, although the latter was not statistically significant ($t(26) = -1.5, p. < .14$). These data are for all dyads, whether a settlement was reached or not.

Table 1b shows a significant interaction for the subjects representing the actor ($F(1,53) = 4.5, p. < .04$; $R^2 = .10$). Subjects with task-oriented mediators made significantly larger offers if the deadline was uncertain than if the deadline was certain ($t(26) = -2.75, p. < .011$). Note that this interaction follows the same pattern as the previous interaction involving these factors. There was no significant difference in the size of the initial

TABLE 2
Proportion of Available Time Spent Bargaining
(Dyads Reaching Agreement Only)

	Deadline	
Mediator Style	*Certain*	*Uncertain*
Task-oriented	.85 n = 9	.55 n = 11
Person-oriented	.69 n = 13	.75 n = 12

offers across deadline conditions if a person-oriented mediator was present ($t(27) = 0.2$, *ns*).

SETTLEMENT RATE

The number of dyads reaching agreement in the four conditions showed a marginally significant behavioral style by deadline interaction. When there was a certain deadline, the dispute was more likely to be settled with a person-oriented mediator than with a task-oriented mediator (settlement rates were 92.8% and 60.0%, respectively; chi square = 2.66, $p. < .10$). When the deadline was uncertain, the settlement rate was not affected by mediator style (80.0% and 84.6% for person- and task-oriented mediators, respectively).

TIME SPENT BARGAINING

Because the deadlines varied, the most appropriate measure of speed of reaching an agreement was the percentage of available time spent bargaining, as recorded by trained observers who kept track of the elapsed time. Also, differences in the settlement rate between conditions could produce apparent differences in time spent bargaining. Thus, we looked at the percentage of time spent bargaining only for those dyads reaching agreement. As shown in Table 2, there was a significant interaction ($F(1,41) = 5.5, p. < .024$; $R^2 = .04$) between mediator behavioral style and deadline condition. Disputants with a task-oriented mediator took significantly longer to settle their dispute if they negotiated under a certain, rather than an uncertain, deadline ($t(18) = 2.5, p. < .024$). In contrast, deadline certainty did not affect the amount of time spent negotiating with a person-oriented mediator ($t(23) = -0.62$, *ns*).

TABLE 3
Disputants' Reactions to Mediator Behavioral Style

Dependent Measure	*Behavioral Style*			
	Person-Oriented	*Task-Oriented*	*F(1,53)=*	*eta²*
Mediator friendly	8.7	6.3	46.9***	.48
Mediator supportive	6.5	4.6	24.9***	.32
Mediator warm	7.8	5.2	60.2***	.53
Mediator good	7.4	6.5	7.2**	.11
Mediator helpful	6.4	5.1	13.5***	.20
Mediator active	5.9	4.8	6.8**	.14
Mediator competent	7.8	6.8	9.1**	.14
Mediator flexible	6.7	5.5	10.2**	.16
Satisfaction with approach taken by mediator	6.8	5.4	16.4***	.23
Willingness to have same mediator again	6.7	5.1	12.4***	.18
Satisfaction with mediation procedure	6.4	5.3	5.6*	.09

NOTE: Data are for all dyads, whether settlement was reached or not.
* = $p < .05$; ** = $p < .01$; *** = $p < .001$.

This same pattern also emerged for the number of absolute seconds or the number of rounds of negotiation completed by the disputants within their time limits.

PERCEPTIONS OF MEDIATORS

Multivariate analysis of variance (MANOVA) was used to analyze post-mediation questionnaire responses. Perceptions of the mediator were significantly different across the four cells of the experiment (Wilk's Lambda = .048; $F = 2.37$, $p. < .002$), allowing just cause for examining the univariate statistics. Generally, person-oriented mediators were preferred to task- oriented mediators (see Table 3). Relative to task-oriented mediators, person-oriented mediators were seen as better, more helpful, more active, more competent, and more flexible. Relative to those with task-oriented mediators, subjects with a person-oriented mediator reported greater satisfaction with the approach the mediator took, and greater willingness to have the same mediator again in any future negotiations.

Subjects with person-oriented mediators were also more satisfied with the mediation procedure than were subjects involved with task-oriented media-

TABLE 4
Procedural and Distributive Justice Effects

Mediator Style	*Deadline*	
	Certain	*Uncertain*
Satisfaction with the mediation procedure (All Dyads)		
Task-oriented	4.47 n = 15	6.23 n = 13
Person oriented	6.64 n = 14	6.20 n = 15
Fairness of Agreement (Dyads Reaching Agreement Only)		
Task-oriented	5.56 n = 9	7.32 n = 11
Person-oriented	6.88 n = 13	6.38 n = 12

NOTE: All ratings used nine-point semantic differential type scales. High values indicate greater satisfaction or fairness.

tors. A significant style by deadline interaction ($F(1,53) = 5.7, p. < .021$; $R^2 = .12$) indicated that subjects with task-oriented mediators were significantly more satisfied with the procedure when the deadline was uncertain ($t\ (26) = -2.57, p. < .026$). In contrast, subjects with person-oriented mediators were only slightly more satisfied with the procedure when the deadline was certain ($t(27) = 0.71, ns$). The means for this interaction are shown in Table 4.

A similar behavioral style by deadline interaction was found in the ratings of the fairness of the outcomes ($F(1,41) = 6.80, p. < .013$; $R^2 = .03$) made by those dyads who settled. Subjects who reached an agreement rated the agreement as more fair if they had experienced an uncertain deadline and a task-oriented mediator ($t(18) = -2.62, p. < .017$). However, those with person-oriented mediators were slightly more likely to rate the agreement as fair if they bargained under certain, rather than uncertain deadline conditions ($t(23) = 0.91, ns$). The means for this interaction are also shown in Table 4.

DISCUSSION

The present study offers some insights into bargainer's reactions to mediators. The questionnaire items clearly indicate that the disputants pre-

ferred mediators who exhibited a style high in consideration. Mediators exhibiting this style produced positive effects on negotiators' initial offers, speed of reaching a settlement, and satisfaction with the mediation procedure. These effects occurred regardless of the deadline condition.

In contrast, the task-oriented mediator style differentially affected the negotiations. When the situation lacked the structure provided by a certain deadline, task-oriented mediators were quite effective in obtaining substantial opening offers, and in speeding the dispute towards settlement. However, when the situation was well-structured, task-oriented mediators were significantly less effective at facilitating negotiations, and their efforts may have been counterproductive.

Disputants' reports, both of satisfaction with the mediation procedure and of the fairness of the outcome, support and extend our knowledge of the importance of how a procedure is enacted or executed (cf. Lind & Lissak, 1985; Bies & Moag, 1986). Mediation is generally viewed as a fair procedure; in the present study, third parties executed mediation in two different (though ostensibly fair) ways—mediators were either person- or task-oriented. Previous research on enactment of procedures (Lind & Lissak, 1985) varied only as to whether the procedures were enacted with or without an impropriety. The present study demonstrates something perhaps more startling: Properly executed, fair procedures can be perceived as less satisfactory and fair due to structural variables (in this case, the type of the deadline). Both the person- and task-oriented mediators were seen as equally fair, impartial, and expert, but the certainty of the deadline resulted in disputants' rating the task-oriented mediation as significantly less satisfactory than all other mediations, including the identical enactment of the mediation procedure when the deadline was uncertain.

The results also extend our knowledge about the influence of procedures on the evaluation of leaders. Previous research (cf. Tyler, Rasinski, & McGraw, 1985) has demonstrated that beliefs in the fairness of resource allocation procedures affect the judgments people make regarding those responsible for those procedures. While both person- and task-oriented mediators were seen as fair, the different way in which each enacted mediation influenced perceptions of procedural justice, and subsequent perceptions of the mediator. From a practical standpoint, mediators who are also accountable to the disputants in other contexts may be wise to rely on a person-oriented mediator style.

There were also important distributive justice effects. Perceived fairness of the outcome was significantly lower when that outcome came from a task-oriented mediation procedure under conditions of deadline certainty.

This occurred even though the value of the outcome received by disputants did not vary across conditions. Thus, the influence of how mediation was enacted, together with the structural variable of deadline certainty, influenced not only perceptions of the procedure, but perceptions of the outcome. The present results suggest that reactions to fair procedures depend not only on how those procedures are enacted, but the context within which the procedure is enacted. Research to further identify which situations lead fair procedures to be perceived as less fair would seem to be an important task.

Exactly what mechanism is responsible for these effects? There are two plausible interpretations for these findings. Pressure from task-oriented mediators may be resisted and resented by negotiators under certain deadline conditions, as this pressure violates conventional bargaining strategy (e.g, waiting until the last minute to make concessions). However, such pressure may be welcomed in ambiguous negotiating situations, as a task-oriented style provides structure and may provide a face-saving opportunity for those wishing to make concessions in the face of an uncertain future. Person-oriented mediators do not provide such pressure and, consequently, did not produce differential effects in the present study.

A second (post-hoc) interpretation is that person-oriented mediators acted in a warm, relatively friendly manner which negotiators may see as appropriate for females. All of the mediators in the present study were females, as were all the subjects. Several authors (e.g. Weingarten & Douvan, 1985; Smith, 1986; Stevenson, 1986) argue that women and men differ as mediators. Based on the assertion that women are traditionally socialized to be warm, sensitive, and to seek group harmony (i.e., person-oriented), these authors propose that women may be more successful mediators than men.

In the present study, female mediators using a person-oriented behavioral style elicited positive evaluations, and generally facilitated effective negotiations. Negotiators saw task-oriented female mediators as acting in a cold, unfriendly manner. Disputants may consider such behavior to be inappropriate for females under certain deadline conditions. However, when facing an ambiguous threat (i.e., an uncertain deadline) disputants may prefer that a mediator sacrifice warmth in order to convey the urgency of establishing an agreement. A growing proportion of mediators in a variety of contexts are female (a recent study by Ross [1986] of the Society of Professionals in Dispute Resolution [SPIDR] indicated that one-fourth of SPIDR members were female). Future studies should use male subjects and male mediators to establish the viability of this alternative interpretation; the present findings may be partly a function of the mediator either fulfilling or violating subjects' expectations that a female mediator would be warm and considerate.

The present findings also have implications for practicing mediators. First, mediators should attempt to identify their own typical approach for intervening in disputes. Mediators might also be advised to either seek situations that best match their usual style of mediating, or to transform conflict situations into those best suited to their own style (e.g., by establishing a certain deadline). This is an approach that has been advocated by a number of leadership researchers (e.g., Fiedler, 1971). Alternatively, mediators might try to tailor their approach to match situational constraints. In any event it is clear that there are contingencies to be considered in deciding which style is best for which situation – there is no single "right" style for mediating all disputes, and some may be worse than others.

This study has only begun the investigation of contingencies in mediation. The effects of other situational factors must be tested in future research. Subjects' individual differences (e.g., tolerance for ambiguity) should also be investigated. The perceived need for a mediator is another important variable (Rubin, 1980). Finally, the power and authority of the third party relative to the disputants needs to be examined: In the present study, the mediator acted as a peer of the two disputants; if the disputants were a manager's subordinates, then the manager would have far greater power to impose settlements on disputants than would mediators.

In summary, the present research demonstrated that leadership theory can be useful in describing the behavior of third parties in mediation. We hope that insights obtained from the study of leadership can be combined with knowledge of dispute resolution processes to increase the likelihood that mediation can lead to conflict settlement.

APPENDIX

The Description of the Dispute and Specific Instructions

Dispute: Essex Television Limited v. Robinson

You have been assigned at random to represent one of the sides in the above named dispute. The following pages give you more information about how the negotiation works, describe the basic situation that produced the conflict, and present some facts that may be relevant to settling the dispute. This page tells you which side you represent, what money is involved, what court costs are, and how particular agreements will affect your cash prize.

1. You have been assigned to represent _____ in the above named dispute.
2. You will start with $6,000.00. The other party in the dispute will also start with the same amount of money.

3. The two of you must *jointly* pay $6,000.00. Your goal is to persuade the other party to pay most of the joint bill. The amount that you are able to keep will directly determine the size of your cash prize. This is shown in Figure 1, Example 1, p. 122.
4. If you do not settle, your case will go to court. A *joint penalty* of $4500.00 will be assessed to cover court costs. Please note that this penalty is assessed *in addition to* the *joint payment* of $6,000.00 mentioned in #3 above. The remainder will be divided equally between the two parties. This means that should you fail to reach an agreement in mediation, your side will receive only $750.00. This is shown in Figure 1, Example 2.
5. For every $1,000.00 that you are able to keep, you will receive a cash prize of $1.00.

Description of the Dispute

Essex Television Limited vs. Robinson

Essex Television began making arrangements in 1978 to make a 90-minute play for television entitled "A Day in the Wood." The script concerned an Englishwoman's American husband, who was to have an adventure in an English wood. Essex arranged for a locality for filming, employed a director, designer, and stage manager and incurred other substantial expenses before it found a suitable leading man. It was thought that "a strong actor capable of holding the play together" was needed. Rex Robinson, an American actor, was then chosen. By transatlantic telephone on May 30, 1978, a contract was made between Essex and Robinson, through Robinson's authorized booking agent. At this time, Robinson's salary and other allowances were fixed and Robinson agreed to be available from June 9 to July 11 for rehearsals and for filming of the play.

On June 3, 1978, Robinson suffered a waterskiing accident in Florida, breaking his arm. His booking agent called Essex on June 5 and informed them that Robinson would have to break the contract. Essex tried hard to find a substitute, failed in the effort, and abandoned the project. The firm gave notice of termination to the persons it had hired. Essex had expenses totalling $6,000.00. None of these losses were covered by insurance. Essex has yet to pay these expenses.

The persons and companies who were to receive these payments banded together and obtained a court judgment ordering Essex and Robinson to pay the $6,000.00; however, the judge left it to Essex and Robinson together to decide whether they would split the debt, and if so, how they would split it. It should be mentioned that in the same court case, Essex is suing Robinson for lost profits. The judge has indicated that if Essex and Robinson cannot settle these matters before the case comes to trial, he will divide the expenses (as well as the heavy court costs) equally among the two parties.

The law provides that the party breaking a contract is liable for lost expenses or lost profits if the breaking of the contract resulted from reasonably forseeable consequences of his or her actions.

Additional Facts

The following statements are facts that may be relevant to the dispute.

1. Essex's estimate of the profit it lost in the transaction is based on an optimistic assessment of the success of the play.

2. Robinson's resume, which Essex saw before hiring him, listed waterskiing as one of his hobbies.
3. Robinson had known that much money had already been spent by Essex and that it would be wasted if he broke the contract. Consequently, Essex may be entitled to recover wasted expenses and it is not necessarily limited to expenses it had after the contract was made.
4. Many of Essex's expenses included in the suit were made before they contacted Robinson.
5. Robinson's agent had asked him not to go waterskiing.
6. Essex released another actor it had on option the day after Robinson's accident, not knowing that Robinson had been injured.

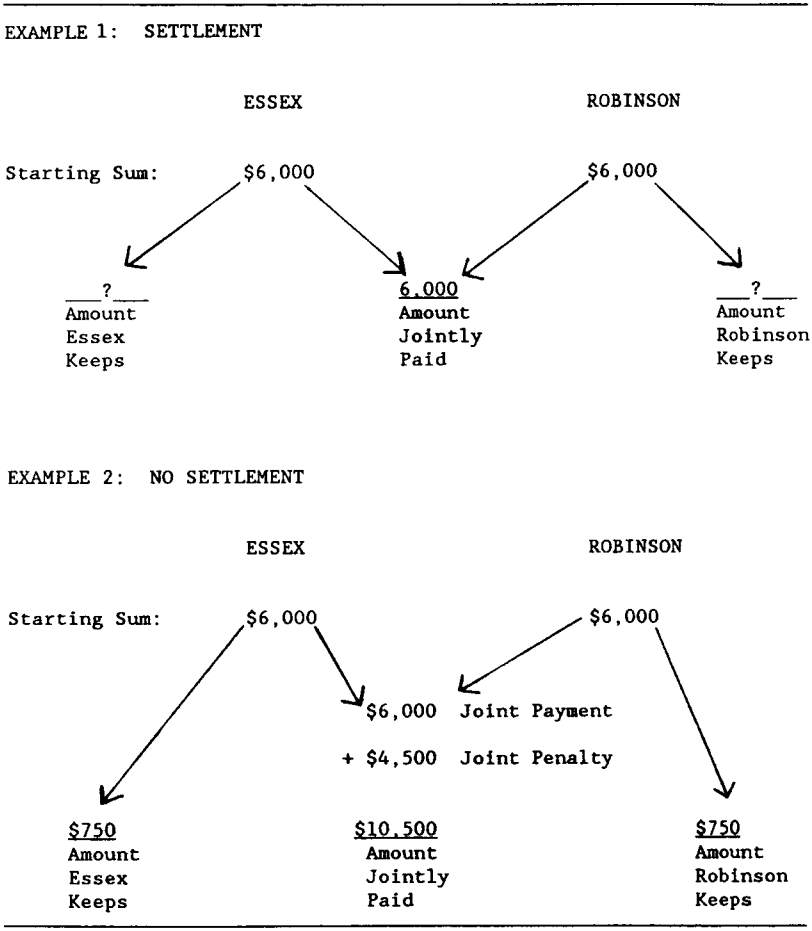

Figure 1: Diagrams Provided to Subjects Showing Payoffs From Settlement and Nonsettlement of the Dispute

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William H. Ross, Jr., received his Ph.D. in industrial/organizational psychology at the University of Illinois, Urbana-Champaign. He is currently an Associate Professor of labor and industrial relations in the Department of Management of the University of Wisconsin, La Crosse. His most recent publications have appeared in the Journal of Applied Behavioral Science, Negotiation Journal, *and* Computers and Education.

Donald E. Conlon received his Ph.D. in organizational behavior at the University of Illinois, Urbana-Champaign. He is currently an Assistant Professor of management in the Department of Business Administration, University of Delaware, Newark. His most recent publications have appeared in Organizational Behavior and Human Decision Processes, Negotiation Journal, *and* Journal of Applied Social Psychology.

E. Allan Lind received his Ph.D. in social psychology at the University of North Carolina, Chapel Hill. He has worked as a Senior Behavioral Scientist at the Institute for Civil Justice at the RAND Corporation, Santa Monica, CA, and is now associated with the American Bar Foundation, Chicago. His recent publications include a book (with Tom Tyler), The social psychology of procedural justice, *as well as publications in the* Journal of Personality and Social Psychology, *and* Journal of Applied Psychology.

Mediator Settlement Strategies

SUSAN S. SILBEY and SALLY E. MERRY*

Settling cases poses a challenging task for the mediator. Most disputes are hotly contested by both parties or they would not have progressed to the point of entering the court arena or mediation. Yet, despite differences in the nature of their cases, the organization of each program we have studied, and the style of mediation predominating in each, striking similarities exist in the techniques used by the mediators to settle cases. Observation of over 40 different mediators in 175 mediation sessions in three programs suggests that in order to do the job which they are charged with accomplishing—bringing mediation cases to settlement—mediators develop a repertoire of strategies employing a variety of sources of power. Mediator strategies fall into four principal categories: presentation of self and the program, control of the process of mediation, control of the substantive issues in mediation, and activation of commitments and norms. Mediators empower themselves by claiming authority for themselves, their task, or the program based upon values external to the immediate situation, or manipulate the immediate situation so that settlement is more rather than less likely. Based upon their differential use of these strategies, mediator styles fall along a continuum between two types: bargaining and therapy. Mediation seems to range between a bargaining process conducted in the shadow of the court to a communication process which resembles therapy in its focus upon exploring and enunciating feelings.

Mediation is commonly defined as a process of settling conflict in which a third party oversees the negotiation between two parties but does not impose an agreement. As Gulliver observes, "In negotiations there may be, but not invariably is, a third party who, though he has no ability to give a judgment, acts in some ways as a facilitator in the process of trying to reach agreement. This is a mediator" (1977: 15). He has no socially legitimate authority to render a decision. Yet, the mandate for all mediators is to settle cases. The mediator thus faces a dilemma: to settle a case without imposing a decision. The process of mediation, and the role of the mediator in particular, is shaped by the strategies adopted to cope with this tension between the need to settle and the lack of power to do so.

Mediators have been described in different ways ranging from the passive facilitator to the active shaper of solutions (e.g., Gulliver, 1977; Nader and Todd, 1978; Merry, 1982; Kolb, 1983). This variation is caused by the differing compromises mediators make between paradoxical expectations. This

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paper explores the techniques and sources of power employed by mediators in three different settings in urban America. In each, mediators develop at least four strategies which rely upon authority or manipulation in order to settle cases. Based upon their differential use of these strategies, mediation styles fall along a continuum between two types: bargaining and therapy. Despite program variations, mediation seems to range between a bargaining process conducted in the shadow of the court and a communication process which resembles therapy in its focus on exploring and enunciating feelings.

This paper presents a way of conceptualizing the differences observed between mediators by means of a typology of mediation styles. It is not a quantitative description of mediator behavior, but a set of categories which make some sense of the range of variation in what mediators do. The patterns emerged as we observed a large number of mediation sessions and began to see regularities in the ways mediators settled cases. Although these categories could serve as the basis for future research focused on recording frequencies and correlating styles with other variables such as outcomes, gender, or problem, that is not the purpose of this paper. We are primarily interested in constructing a typology which offers conceptual categories for thinking about the mediation process.[1]

I. THREE VERSIONS OF MEDIATION

During the last decade, there has been considerable interest in the use of mediation as an alternative to adjudication for minor disputes in many developed industrial societies. In the United States, there has been a proliferation of mediation programs sponsored by federal, state, and local governments, courts, private foundations, bar associations, and community groups which offer an alternative way of handling small claims, domestic, neighborhood, and family disputes.[2] Despite the diverse interests supporting mediation programs, there has been a singular unanimity with regard to the model of mediation adopted in these experiments: to settle disputes by providing mutually agreeable settlements constructed by the parties themselves; to arrive at settlements through discussion moderated by a third party who has no legitimate power to render a decision or enforce an agreement; to create agreements based upon shared obligations and behavioral change rather than legal rules; and to develop consensus rather than to articulate competing interests and rights (McGillis and Mullen, 1977; Tomasic and Feeley, 1982; Santos, 1982). In programs dealing with interpersonal and community conflicts, the mediators are expected to be members of the same community as the disputants and, therefore, to share their values. Mediator training varies slightly from one program to the next, although all programs use variants of a single method taught in a 30 to 40-hour course dominated by role play techniques based on models of labor mediation. The mediators are charged with reaching some kind of agreement which keeps the disputants from pursuing formal legal action.

The authors have spent three years studying two mediation programs intensively and have gathered comparative data on a third. One is a court-affiliated program which handles primarily criminal cases: 85 per cent of its referred cases are neighborhood, marital, family, and lover disputes and 15 per cent are landlord/tenant, employer/employee or consumer/merchant cases. The second is a community-based program, located in a local social service agency, which also receives both interpersonal (64 per cent) and small claims case referrals (37 per cent). The third is an agency-based program which handles only family conflicts involving parents and teenage children who are "status offenders": minors accused of truancy, running away from home, or rebelliousness.[3]

The court-based program has the longest history. Operating since 1979, it was developed as part of a reform effort designed to make the court and its resources more accessible, humane, and convenient. Part of the national movement to rationalize the legal system and provide "better" or "more" justice, the mediation program was organized to provide resolutions and outcomes more responsive to the underlying issues in some cases than formal court processes and responses allow.

Between 1980 and 1983, this office mediated 454 cases. Since it is located in the courthouse itself, its staff is in daily contact with probation officers, district attorneys, and judges. Cases are referred by this court to the program. Many are referred while the parties are in the courthouse, and the intake occurs immediately, with a mediation session scheduled one-to-two weeks away. Other referrals are elicited by perusing the complaint applications for appropriate cases, then contacting the parties by mail. The initial contact letter, on court stationary and signed by the clerk of the court, states that the parties have the opportunity to avoid a probable cause hearing and possible further court action by contacting the mediation program.

Mediation sessions are held in local churches and generally last two-to-three hours. Mediators in this program use a rather structured process in which the organization of the sessions, timing, roles and interactions follow a regular pattern from one case to the next with an emphasis upon caucusing and private discussions with the individual disputants. The process is designed to get at what a dispute is about in terms of concrete demands which can be realized or legitimate differences of interest which can be negotiated. Mediation sessions begin with an initial "public session" in which the complainant is invited to "tell his story," followed by the respondent's story. The mediators ask informational questions. Occasionally the parties begin to argue directly with each other during this session, but mediators generally break up arguments quickly. The seating arrangements position the parties side-by-side facing the mediators. After a period of 20-to-40 minutes, the mediators send the parties out of the room while they talk about what the case is "really" about and the kinds of settlements that might emerge. There is often some discussion about who is being reasonable or difficult. Then, each party is called in for an individual dis-

cussion, or "private" caucus with the mediators. The purpose of this session is to uncover issues that parties were reluctant to discuss in the public session. The mediators also probe for grounds for a settlement, i.e. what the parties want or will settle for. The session is used to uncover issues as well as the "bottom line" or last offer of each side. (The term "bottom line" is introduced in training sessions and frequently adopted by mediators.) The first party's offer is presented to the second party and if the second party agrees, the mediators then send both parties out of the room and privately write up the agreement.

Although the points of agreement reflect demands made by both parties about what they want, mediators generally rephrase them into stock statements. They pick up comments parties make which may not be phrased as explicit demands, but which point in the direction of a settlement and incorporate them as elements in the agreement. Statements such as "I just want him to leave me alone" may become "Parties A and B agree that there will be no further contact between them." All parties are then invited back into the room and presented with a written agreement on court stationery. They are asked to sign the form, with the mediators signing as "witnesses." Mediators tell the disputants that the agreement will be kept and monitored by the mediation program (which it is) and, sometimes, that it will be filed by the clerk, the court, or the judge (which it is not).

The second program in this study is based in a community action agency and was originally developed by a local anti-crime group. Its ideology is community action and empowerment. The staff was attracted by the idea of furthering social change by providing a way of handling disputes that locates social control within the community. Although the original intention was to serve a local neighborhood of only 15,000 people, the need to generate cases quickly led to an expansion to the entire city of 95,000 and a reluctant reliance on justice system referrals for cases. The caseload is still a great deal smaller than the court-based program: in its first year-and-a half of operation, it mediated 41 cases, then lost funding support for its community action focus and was incorporated into a legal services agency.

The mediator training here is generally similar but emphasizes open communication between the two parties, a non-directive mediator role, and less caucusing. The underlying ideology is not bargaining and uncovering the bottom line of each side, but achieving full and open communication between the parties, on the assumption that this will lead to mutual understanding and a resolution of the conflict. The program staff and mediators assume that the barrier to settlement is difficulty in communication, not an underlying conflict of interest between the parties which somehow needs to be compromised or negotiated.

The process of mediation is designed to facilitate this communication. The parties are seated facing each other at a rectangular table and a single mediator sits at one end and a staff person at the other. Instead of asking the complainant to begin, the mediator invites either party to start. There

is little caucusing and no private discussion between the mediator and the staff person. Sessions usually last longer than two hours, and many run to five. When an agreement is clear, the mediator writes it while the parties are in the room, constantly checking to make sure this is what they want. Mediators frequently stress that enforcement of the agreement is up to the parties themselves and that there will be no court monitoring of the agreement. Nor is program monitoring stressed. The parties then sign the form, under a letterhead of the mediation program, and the mediator and staff person sign as "witnesses." In content, agreements are similar to those of the court-based program and contain prescriptions for behavioral change, promises of money payments, and rules about future communication between the parties.

The third program handles family conflicts concerning adolescents who are truant, runaway, or rebellious. The sponsoring agency is a social action, child-advocacy program whose staff and mediators are particularly concerned with the rights of adolescent children. The program was set up to offer an alternative to the court through a non-adversarial and non-legal way of handling these problems. As is typical of many court mediation programs, it started with a small catchment area and expanded to increase its caseload (cf. Harrington, 1984). It has now been institutionalized statewide. Its office is located several blocks away from the courthouse, as is that of the community-based program, but it also routinely sends representatives to the court to pick up cases. Over half the cases (56%) come through the court system. In the first two years of operation, it held 108 mediation sessions for 93 families.

The process of mediation used is similar to that of the first program, with an emphasis on caucusing and uncovering the bottom line of the parties. Two or three mediators conduct the session with lengthy mediator caucuses. The parties sit beside one another, facing the mediators. The average session lasts three-and-a-half hours, and the mode is four hours. Mediation is directed toward constructing an agreement with specific rules of behavioral change; most focus on rules about curfews, chores, privileges for children, and ways to handle conflict in the future. The mediators work toward agreements which are clearly balanced, not focused on a one-sided change in child behavior. Discussions emphasize the problems and responsibilities of parents as well as children. All cases for which a formal complaint has been filed are returned to the court if a continuance date has already been set. The court will not waive the continuance date. The program staff often request dismissal of the case when it is returned to court, but the court may or may not dismiss it. Usually, it keeps cases open for further supervision by the court (Merry and Rocheleau, 1985).

II. SETTLEMENT STRATEGIES

Settling cases in all three programs poses a challenging task for the mediator. Most disputes are hotly contested by both parties or they would not

have progressed to the point of entering the court arena. Yet, despite differences in the nature of their cases and the organization of each program, there are notable similarities in the techniques and strategies used by mediators to settle cases.

Observation of over 40 different mediators in 175 mediation sessions in the three programs suggests that in order to do the job which they are charged with accomplishing—bringing mediation cases to settlement—mediators develop a repertoire of strategies employing a variety of sources of power (cf. Wrong, 1979). The strategies fall into four principal categories: presentation of self and program, control of mediation process, control of substantive issues in mediation, and activation of commitments. Mediators empower themselves by claiming authority for themselves, their task, or the program based upon values external to the immediate situation. They may also manipulate the immediate situation to make settlements more likely.

These settlement strategies tend to coalesce into two distinct styles, bargaining and therapy, representing the poles of a continuum of mediation possibilities. Each strategy can be employed with a bargaining or a therapeutic style. After describing each strategy, we will outline the bargaining and therapeutic styles.

A. PRESENTATION OF SELF AND PROGRAM

Mediators nudge parties toward settlement by the way in which they describe themselves and their role as mediators. They claim authority based upon either expert knowledge or legal authority.[4] Claims to authority, and by implication deference, are made as the mediators present themselves in their introductions and intermittently throughout the mediation session when they may offer advice, give information about alternatives and factual matters, or brandish language and symbols associated with the law or helping professions.

First, mediators emphasize their expertise as dispute settlers; they describe and present themselves as people who are trained, in the same sense as other experts, and command a store of experience and knowledge that they can bring to the present case. Second, they claim additional sources of authority. In the court-related program, mediators stress their linkage to the court by emphasizing that the court has administered an oath of confidentiality to them; occasionally mediators will claim that they are actually working for the court. In the community-based program, they stress that they are trained to help people reach an understanding of one another. This explanation makes claims to the expert authority associated with helping professionals who employ a communication/therapy frame of reference. In the family program, mediators also present themselves as trained to work with families. Despite the ideology of the mediation movement and orientations of each program, mediators rarely stress their common-

ality with the disputants or their shared values and norms. Thus they eschew a claim to authority based upon traditional sources of legitimacy.

When parties resist settling, mediators often make statements about the parties' alternatives. Since most cases were referred by the court, it is the logical alternative to a mediation settlement. Mediators in the court-based program stress that going to court is time-consuming and expensive, and that outcomes may be serious. They emphasize the loss of control and possible arbitrariness of the court so that "one just can't predict what may happen." The characterization of the "anarchic" court is offered at the same time that the mediators seek to legitimize themselves and the outcomes of mediation through association with the court. Mediators do not stress that the court process is inherently bad, but that access to its better services is difficult. In contrast, mediators in the community-based program emphasize that the court process is adversarial, perfunctory, and inappropriate to the disputants' problem. They stress that the adjudicative process itself is unhelpful. They are also much less likely to make statements about what a court outcome would look like. Mediators in both programs describe mediation as an alternative to court but an alternative in very different senses. In the first program, they present themselves as people who know the court better than the parties and as agents of the court, and in the second, as people who know how to manage relationships and therefore know what is best for the parties.

Discussion of alternatives is not a series of threats, although mediators suggest that things will go badly in court, and that the disputant is bound to lose and may even go to jail. The allusions to the awful things that could happen in court are neither threats nor coercion in the sense used in the analytic literature because the mediators do not control the outcomes they are describing; the mediators cannot in fact make the situation worse for the participants if they choose not to settle in mediation (cf. Wrong, 1979: 41; Taylor, 1982: 15). Nor are these statements about alternatives a form of persuasion. Although mediators attempt to change the parties' attitude toward the court alternative by emphasizing the inappropriateness of the process, the loss of control, the dichotomous win/lose outcomes, the costs in time and expense, and the unfairness and perhaps even corruptness of the court, it is a covert process. Because the argumentation about alternatives is subtle and implicit, because the mediators do not state outright their intent to the parties, and because it is not a free exchange of communication and argument, it cannot be persuasion in the technical sense of the term, but rather constitutes a form of manipulation (Wrong, 1979: 28).

In general, however, the ability of the mediators to forge agreements between disputants by statements about alternatives rests upon the mediators' claims to knowing more than the parties about either the court or the appropriate ways to settle disputes. This claim of authority on the part of the mediators can be challenged when the parties claim equal expertise by virtue of their own experiences. Those disputants who have knowledge of

the court and are familiar with its workings are more likely to ignore the mediators' statements.

Mediators are often confronted with parties who will go along with the preparation of a written agreement, then in the last minute will ask, "But how do I know that this will be enforced?" In the court-based program, mediators will stress that the mediation program will monitor the agreement for 90 days, implying the same kind of supervision accorded probation decisions, and repeat the right to return to court if things do not work out. The mediators in the community-based program will stress that any enforcement is up to the parties, and that they both have to be willing to go along with it. The family dispute program stresses both, but the agreements are made available to any judge who asks to see them for those cases in which a formal complaint has already been filed and in which the case has not been dismissed. Here, the court oversight actually exists, although judges do not often ask to see the agreements. In fact, the agreements are technically not legally binding; nevertheless, in follow-up interviews, close to a third of the disputants in each program say either that they think the agreements are legally binding or that they are unsure.

B. CONTROL OF MEDIATION PROCESS

Mediators work towards settlement of cases by controlling interaction and communication in the mediation session (cf. Kolb, 1983). This is an important function for mediators in general and a critical aspect of their ability to settle cases. Because mediators help direct the parties toward settlement by focusing discussion, procedurally and substantively, toward a settlement, their actions constitute a form of manipulation.[5] Mediators control the speakers, the audience, the topic, and the length of the discussion. Management of the shape of the discussion is interconnected with manipulating the substance of discussion so that disputants attend to what can be agreed upon and ignore or give up on issues where there is not consensus.

Mediators control the communication flow between the parties by determining the extent to which they speak directly to each other rather than through the mediators. They can control who speaks, allow or disallow interruptions, and encourage and regulate the amount of participation by all parties. The mediators can interrupt and cut off discussion in order to focus it on grounds of settlement. The control of the communication flow is most direct and powerful when mediators caucus frequently. Quite simply, mediators determine when public and private sessions begin and end, the types of information to be exchanged, and the point at which it will be cut off. With more extensive caucusing, the parties speak most often to the mediators, much of the time without the other party present. Thus control over the flow of information creates extended control over the substance of

communication as well since the mediators decide what information to pass between the parties.

When the agreement is written without the presence of the parties, it limits further communication and interchange about the exact wording of clauses. In the caucusing model, mediators control almost completely the information that is passed between the parties and thus gently move the parties closer together by slight changes in wording and phrasing, and more forcefully by simply not telling all that was said. At the point of writing an agreement, the mediators pull together the threads of ideas and suggestions made by the parties, rephrase them into more euphemistic, morally neutral terms, often associated with legalistic language, and present the parties with a written document which is designed not to offend. For example, in one dispute in which a family accused a neighbor of throwing eggs at their house and the neighbor denied doing so, after two hours they produced an agreement which read, "X, while not admitting responsibility for the egging, regrets that it occurred and will avoid such actions in the future." As Mather and Yngvesson's (1980–1981) model of dispute transformation suggests, the process of rephrasing a dispute is an important part of the power exercised by a third party.

Holding problems constant, mediation sessions are consistently shorter when the process is more structured and relies more extensively on caucusing. The two mediation programs which handle adult conflicts reflect this difference. The family mediation program, which uses a structured process, tends to have longer sessions, an average of three hours and twenty minutes. Here, the problems—the dynamics of family relationships—are sufficiently complex, [and the parties are cognitively and experientially unequal, so] that the sessions are extended despite the control the mediators can exert over the process.

C. CONTROL OF SUBSTANTIVE ISSUES IN MEDIATION

In addition to the flow of communication, mediators manage the substance of communication by controlling, through direct statements, the construction of an account that both parties will accept.[6] Mather and Yngvesson describe this process as the "rephrasing" of a dispute. In essence, the rephrasing process "presents a formulation which disputants and others might accept, and at the same time satisfies the interests of a third party" (1980–1981: 778). Control of the substantive issues seems to involve four distinct steps: broadening, selecting, concretizing, and finally, postponing issues.

1. *Broadening the Dispute*

In general, mediators regulate the account that is being developed by interpretation and reinterpretation of disputants' statements, determinations of relevance and irrelevance of statements, and styles of discourse. Mediators

usually begin by asking questions that will elicit discussion and explanation of what has occurred to bring the parties to mediation. They are looking for a starting narrative and will ask disputants to expand upon simple statements such as "he struck me" to the circumstances and history of the blow. They will then broaden the discussion to encompass other events and circumstances, seeking areas of agreement, shared values, and shared experiences that could be emphasized and built upon for a settlement. "Tell me about how things were before all this started" is a common way of beginning this search. Although there is no single set of questions that can guarantee discovering commonalities, the broadening and searching process is indicated by such statements as: "Did you ever like each other?"; "Do you belong to the same church?"; "Do the children play together?"; "Had anything like this ever happened before the new neighbors moved in?"; and "Was there a time when you were friends or had good relations in the past?"

2. *Selecting Issues*

Through this process mediators uncover a broad range of problems to discuss and acknowledge. From this range of issues, mediators select the ones most likely to be settled. In one case, for example, in which lovers quarreled about the damage the man caused to the woman's apartment in a fit of jealousy, the mediators explored at some length the history of the relationship, their interest in continuing to see each other and the prospects for a future together. Unable to achieve consensus on these issues, the mediators returned to and focused upon the particular damages and losses sustained in the quarrel.

Mediators also establish an appropriate discourse by eliminating issues or people from the discussion. For example, some parties arrive with an extensive apparatus of legalistic "evidence" of past offenses such as logs of harassing phone calls, pictures of offensively parked cars, and bills and receipts from transactions. When this evidence points to fundamental conflicts or irresolvable issues of fact, the mediators define this legalistic, evidentiary mode of discourse as irrelevant and shift the discussion to feelings, morality, and an examination of how future relations should be ordered. Most of the discussion then deals with moral justifications of behavior, of character, and of being reasonable. There is very little explicit discussion of norms. Parties and mediators clearly assume that they share the same "paradigm of argument" (Comaroff and Roberts, 1977), and therefore leave norms unstated and implicit.

On the other hand, mediators will seek to narrow disputes, not by defining and eschewing legalistic discourse as irrelevant, but by turning directly to the law and legal charges as means of eliminating other unmanageable issues. They will frequently say that they cannot deal with all the issues presented at this time, but are here to deal with a specific criminal complaint. Thus the legal mode of discourse, which previously may have been irrel-

evant, is pulled back into the discussion as a means of eliminating other troublesome issues, some of which the mediators may have dredged up themselves.

In addition to eliminating issues, mediators will attempt to eliminate parties from the dispute. Parties will be told that the agreement deals only with the person who signed the original complaint and the person accused, so that the interests and concerns of others present at the session or involved in the dispute are eliminated.

3. *Concretizing Issues*

Once the dispute has been broadened and issues amenable for settlement or more appropriate for discussion have been selected, the next step is to concretize the issues. Mediators will often push for agreements by asking directly, "What is it you are looking for in an agreement?", thereby casting aside all issues but those that constitute a "bottom line." Mediators reshape general complaints and demands into specific behavioral requests. They will make concrete demands for respect between neighbors, more care between spouses, and better service by business people, focusing on a few specific points rather than general attitudinal orientations. For example, a man furious at the loud music next door might be urged to accept a promise that the music will be turned down at 10:00 p.m. every weekday night and 12:00 p.m. on the weekends. Parents quarreling with children about their friends, their social life, and their lack of respect may end up agreeing to have the child phone in nightly at 11:00 p.m. At first glance, this may seem to be a major redefinition of the family problem; however, it is possible to regard this agreement as a behavioral acknowledgement of parental authority and self-control on the part of the child, which was a substantial part of the original disagreement.

Insofar as possible, issues of insult and injury are transformed into property demands. The conversion of interpersonal injuries into property exchanges is the essence of tort law and has a long history in small-scale societies; the same approach is pursued here. For example, a man who was continually harassed by a neighbor's teenage son, which included a barrage of chocolate donuts at his door, reluctantly accepted the price of a gallon of paint to repaint the door as a settlement. Similarly, mediators will rephrase demands and accounts in order to eliminate emotionally loaded language which might connote moral blame or liability.

4. *Postponing Issues*

Finally, when problems seem too difficult to resolve in one session, or simply unresolvable, mediators postpone them. They suggest a future mediation session or a limited time to a present agreement; although only 6 per cent of the cases in the court-affiliated program and 13 per cent of the cases in the community program were postponed, 44 per cent of the agreements in the family program called for a second session. Typically, such

agreements read, "X agrees not to drink for three weeks and to pay his wife $80 a week until the next mediation session, scheduled in three weeks." Or, they might read, "X agrees to talk to Mrs. Jones about the placement of the fence while Y agrees to talk to his tenant about his working hours. They will return to mediation in two weeks to discuss the results of their inquiries."

Sometimes, issues which are not easily resolved are sent to counseling, thus suggesting that they belong in a therapeutic arena and not in a process designed to settle "disputes" of legitimate differences. Alcoholics, spouse-abusers, parents who cannot control their children, and husbands and wives who continually fight are routinely sent to counseling. The family mediation program increased the use of social services for almost half the families.

D. ACTIVATION OF COMMITMENTS

Mediators try to activate existing commitments and sentiments which would encourage settlement. Here, mediators point out the behaviors which conform to announced norms and values and are required of the parties in order to fulfill their verbalized commitments. "Getting someone to do something by 'activating a commitment'," according to Brian Barry (1976: 68), "is a matter of cashing in on some norm that he already has to the effect that he *ought* to act in accord with a demand from a certain source." Taylor suggests that activation of commitments, a concept borrowed from Talcott Parsons (1937), need not necessarily oblige an agent to follow the demands of a certain source. "It is perfectly possible to 'cash in' on a norm which is without an identifiable source" (Taylor, 1982: 21). Although mediators cannot demand compliance with norms, they refer specifically to the norms and values which the parties can be assumed to share or have already articulated in the initial discussion of the past history of the relationship. Mediators will probe disputants in order to identify these commitments. They may draw attention to the behavioral expectations that are encompassed within generally shared social values. "Children have to grow up sooner or later." "Neighbors have to live with each other and learn to get along." After encouraging disputants to reveal their values and assumptions about behavior, mediators build on these to construct an agreement. "Don't you think agreeing to certain quiet hours is a way to get along?" Or, they may seek assent to more specific sorts of values attached to individual roles, such as the responsibilities of husbands. "Do you think that is a way for a husband to behave?" Or, they will ask parents, "What are your rules for your children playing in the street?"

Mediators will ask factual questions such as "Where do you live?", "What is family life like?", or "How many children do you have?" in order to locate the parties in a common experience. They are looking for the unarticulated and hopefully shared structure of values and beliefs of the

parties. This searching process is part of the broadening strategy discussed above; however, activation of commitments requires not simply the revelation of the features of the disputant's life, but an active behavioral demonstration of commitment to the values underlying the life which was revealed through broadening. Thus the mediators encourage the parties to expose themselves so that they can draw upon these revelations in order to construct a settlement.

This process is most explicit in rules on how to manage conflict. Mediators rarely volunteer moral norms which have not previously been articulated by the parties, except in this area. The values of negotiation, rational discussion, and compromise are frequently enunciated by mediators, particularly when someone resists settling. They say, for example, "Why did you come to mediation? Don't you think it is better to talk out problems?"

III. MEDIATION STYLES: BARGAINING AND THERAPY

As we observed mediation sessions, we began to notice consistent patterns in the settlement strategies. From these observations we constructed two ideal types of mediation styles: the bargaining and the therapeutic.[7]

These mediation styles are modal/ideal types constructed by synthesizing and typifying the characteristics of over forty mediators. They do not categorize mediators, but describe instead regular patterns of dealing with problems. A single mediator usually uses both styles to some extent, and a single mediation session has some elements of each style.[8] Any particular mediator may adopt one or another strategy, depending upon the particular problem or case, and strategies may change within the duration of any mediation session. Neither the relationship of the parties, nor the type of case (small claims, spouse abuse, neighborhood dispute), nor the sex of the mediator seems to determine which style eventually predominates. Mediation strategies develop through interaction with the parties who come to mediation with sets of expectations, wants and skills with which they endeavor to impose their view of things upon the situation. Thus the degree to which a mediation session is a bargaining or therapeutic event is constructed by implicit negotiation between the parties. Nevertheless, where the parties are known to have longstanding relations, or the issues are emotional ones, mediators often begin with the therapeutic approach. Mediators who are known to adopt one style more than the other may be assigned to cases on this basis. Moreover, mediator strategies seem to become more pronounced and stylized toward one or the other mode with increased experience.[9]

In the bargaining mode, mediators claim authority as professionals with expertise in process, law, and the court system, which is described as costly, slow and inaccessible. The purpose of mediation is to reach settlement. The bargaining style tends toward more structured process, and toward more overt control of the proceedings. In the bargaining style,

mediators use more private caucuses with disputants, direct discussion more, and encourage less direct disputant communication than in the therapeutic style. Moreover, in the bargaining style the mediators tend to write agreements without the parties present, summarizing and synthesizing what they have heard from the parties. The job of the mediator is to look for bottom lines, to narrow the issues, to promote exchanges, and to sidestep intractable differences of interest. Typically disputants will be asked directly "What do you want?", ignoring emotional demands and concentrating on demands that can be traded off. Following this bargaining mode, mediators seem to assume that conflict is caused by differences of interest and that the parties can reach settlement by exchanging benefits. When parties resist, the role of the mediator is to become an "agent of reality" and to point to the inadequacy of the alternatives, the difficulty of the present situation and the benefits of a settlement of any kind.

By contrast, the therapeutic style of mediation is a form of communication in which the parties are encouraged to engage in a full expression of their feelings and attitudes. Here, mediators claim authority based on expertise in managing personal relationships and describe the purpose of mediation as an effort to help people reach mutual understanding through collective agreements. Like the bargaining style, the therapeutic mode also takes a negative view of the legal system; but, instead of emphasizing institutional values and inadequacies, the therapeutic style emphasizes emotional concerns, faulting the legal system for worsening personal relationships. In this mode, agreement writing becomes a collective activity, with mediators generally maximizing direct contact between the parties wherever it may lead. Following the therapeutic style, mediators will typically ask, "How did this situation start?", or, "What was your relationship beforehand?" They rely more heavily upon expanding the discussion, exploring past relations, and going into issues not raised by the immediate situation, complaint or charge. There is less discussion of legal norms than within the bargaining mode, and statements about alternatives tend to focus upon appropriateness of process rather than particular outcomes. In addition, the therapeutic mode tends to emphasize the mutuality, reciprocity, and self-enforcement of the agreement in contrast to court or program monitoring.

Figure 1. Mediation Styles

	Bargaining	Therapeutic
I. PRESENTATION OF SELF, PROCESS, AND PROGRAM		
Claim to authority	Training and expertise in law and court system	Training and expertise in managing inter-personal relationships
	Neutrality	Neutrality
	Knows what will happen in court	Knows what is best way for parties to handle conflict

	Bargaining	Therapeutic
Role of mediator	To reach a settlement	to help parties communicate, identify areas of agreement
Statements about alternatives	Legal system is costly, slow, access is difficult	Legal system inappropriate, worsens relationships
Statements about enforcement	Judicial oversight, or program monitoring	Up to the parties to enforce
II. CONTROL OF THE PROCESS OF MEDIATION		
	More time in private sessions	Less time in private sessions
	Less direct communication between parties	More direct communication between parties
	More direction of discussion by mediators	Less direction of discussion by mediators
	Parties seated facing mediators	Parties seated facing each other
	Mediators construct agreement without parties	Mediators write agreement with parties
III. CONTROL OVER SUBSTANTIVE ISSUES IN MEDIATION		
Broaden	Seek range of demands parties offer; ask "What do you want?"	Seek range of demands plus history and nature of relationship between parties; seek feelings, underlying issues, peripheral concerns; ask "How did this start?" "What was your relationship like before?"
Select and eliminate	Eliminate non-specific, more emotional demands. Focus on those subject to trading	Eliminate where parties refuse to budge and change is unlikely, based on experience
		Retain some emotional, less specific demands
Refine demands and issues: narrow and concretize	Convert behavioral demands into specific rules or monetary demands	Convert behavioral demands into specific rules or monetary demands
	Ask parties to declare what they really want; assume they know	Help parties to define what they really want; assume they do not always know
	When settlement difficult, seek exchanges	When settlement difficult, seek expression of underlying feelings
Postpone	Little. Seek final exchange. Monitoring mostly to enforce	More. Use of future mediation sessions, monitoring, counseling, time to think it over.

	Bargaining	Therapeutic
IV. ACTIVATION OF COMMITMENTS; STATEMENTS ABOUT NORMS		
Assumed cause of conflict	Differences of interest	Misunderstandings and failures in communication; assume shared normative order
How parties can reach settlement	Trading benefits	Recognizing underlying shared interests, desire for reconciliation, maintenance of good relationship
Why parties should settle	Need to get along and live together	Value of peace and handling conflict through rational discussion and compromise

The communication approach assumes that misunderstandings or failures of communication, rather than fundamental differences of interest, are the source of conflict, and that with sufficient "sharing" of feelings and history the empathy required for consensus and harmony will be achieved. It assumes that the expression of conflict will help resolve it and that the recognition of shared norms and underlying shared interests will lead to the maintenance of good relationships. Questions typical of the therapeutic approach are generally open, yet probing: "Tell me how you feel about that," or "Are there other things you want to talk about?" It is assumed that parties do not always know what they want and that the job of mediation is to help them define their real wants by exploring their lives and values. Mediators who are more typically therapeutic are often stymied in a way that mediators who are typically bargaining are not, when direct conflicts of interest emerge. Moreover, because of the length of sessions in the therapeutic mode (often four hours or more) there is a sense of wearing the parties down. The mandate for the mediator is clear: to facilitate conversation, not to bargain. Bargaining mediation takes a pragmatic view that parties should settle because they must and because they need to live together, while therapeutic mediation emphasizes the value of handling conflict through rational discourse.

Two cases can serve as examples of mediation style. The first is a case in which the dominant mediator style was bargaining; the second is a case in which the mediator style was essentially therapeutic.

The first case concerns a dispute between a married couple and their teenage daughter over her defiance, overuse of the family's telephone, unwillingness to help with chores, and her spending patterns. The parents filed an application for a complaint against their daughter in juvenile court. In the mediation session, the two mediators begin by asking the family (mother, father, daughter) to describe the situation. After a half-hour discussion, the mediators meet privately, decide that the phone is the major issue and

begin to talk about what an agreement might look like. In a private caucus with the child, they ask her to discuss further what is bothering her and whether she thinks it is getting worse. They soon begin asking for suggestions: "What would be a reasonable arrangement for the phone?"; "Is your sister old enough to clean up after herself, and would she be willing to help?"; "If we were going to work out some rules for everyone in the house, what could we work out that might work?" After forty minutes of exploring specific options, the mediators again hold a private discussion, then invite the mother in by herself.

In the private session with the mother, they ask her who does the chores, how the children are punished for failure to do them, and if there is a curfew. They ask the mother what she sees as the problem with the phone, chores, and friends and what she would like to see changed in the family. The mediators then summarize the three major issues: the phone, going out, and how the members of the family deal with one another. They ask the mother to be specific about the chores her daughter is expected to do and when she is to do them. Together, they hammer out a list of rules for chores, phone use, and curfews.

One hour later, the father is called in for a brief (20-minute) session with the mother and the mediators. The mediators again stress that they are working out an arrangement in which the daughter knows what she has to do. In a final private discussion with the daughter, the mediators ask her if she had any other thoughts or concerns. They present the specific proposals and ask if she agrees to them. Their proposals include a promise that her father will talk to her calmly instead of yelling at her. These provisions are incorporated into a formal written document which parents and daughter sign, with the mediators serving as witnesses. The session lasts three hours and fifteen minutes, and the family members seem satisfied.

In this session, the mediators structured the discussion around specific issues through questions which narrowed rather than expanded the dispute. The extensive use of caucusing enabled them to control the exchange of information and to develop and transfer acceptable arrangements. They took an active role in working out the details, rather than encouraging the parties to talk directly to one another or to formulate arrangements entirely on their own. They typically asked clarifying or informational questions or ones which invited the parties to narrow the problem. As this example shows, the extensive use of private sessions with individual parties maximizes the control of the mediators. The parents, searching for guidance and help, did not seem unhappy with this level of intervention by the mediators.

A therapeutic mediation session is a contrast in many ways. One example also concerns a family conflict, but the style of the mediator (there was only one in the session) was quite different. Instead of closing down the emotional issues, the mediator constantly sought to open them up and to expand the frame of the discussion.

The dispute concerns debts which a young man, in his late 20s, had acquired during his marriage. The couple are now living separately and in the process of filing for a divorce. He wants his ex-wife to help him bear the burden of these consumer debts, while she claims that he spent money irresponsibly and she is not liable. He sued her for $750 in small claims court, and the mediation program invited the couple to try mediation. The couple has a hearing in probate court about their divorce in two months, where they expect to settle financial issues and the contested custody of their 10-year-old child. This couple married interracially but found the racial barriers increasingly difficult to handle. The man drank and was violent to his wife, which persuaded her to leave him. He blames the stress of the interracial marriage and her lack of support for his behavior. She wants the divorce and he is resisting it strongly.

The mediator begins this session by allowing the parties to inspect the bills and argue over the amount of the debt and the degree of liability of each. After 35 minutes of mutual accusations about money and past poor behavior, the mediator caucuses with the woman and asks her about the bills and how much she is willing to pay. He then inquires what, besides the bills, she would like to see in an agreement. She replies that she would like the agreement to be final so that he would not come back and go over the incidents between them over and over again. At this point, the mediator asks her to tell him about the incidents and anything else that is bothering her, promising not to convey this to her husband. She responds that, if it is helpful, she will give her version of the incidents, but she is not sure that it is relevant. One hour and ten minutes later, she has thoroughly reviewed the reasons for the breakup of the marriage, her feelings about the divorce, and the nature of the divorce settlement.

In the next caucus, with the man, the mediator spends one hour hearing the husband's version of the conflict and his feelings about the divorce. The mediator then brings them back together and asks the man what he would like from the woman. They renew discussion of the unpaid bills and again try to decide who is responsible for each bill; this is the point at which they began two-and-one-quarter hours earlier. They cannot agree upon responsibility, but finally settle on a plan in which the wife would make a regular, monthly small contribution for one year, at which time the agreement would be renegotiated. Although unwilling to acknowledge responsibility for the bills, the wife is willing to agree to this payment schedule because she expects that the upcoming divorce decision will eventually change this agreement, as well as their relationship. The final discussion of a payment schedule lasts forty-five minutes, and the entire mediation session takes three-and-one-half hours. The woman leaves feeling angry that she has made a concession she does not like, while the man is pleased. Both say they want another session, although they do not come again, nor does the woman make all the payments she promised.

In this session, the mediator began with a narrow financial problem,

expanded it into far broader and more emotional areas, even when the parties resisted slightly, then returned at the end to the narrower problem of negotiating the money. Behind his strategy was the theory that the expression of feelings is a necessary precondition to reaching a resolution. As a result, he pursued a strategy we have labeled therapeutic. He constantly invited them to expand the arena of discussion and to move into other facets of their conflict. It is impossible to say if a mediator could have produced the same or a better settlement through focused bargaining, but it is clear that this approach differs a great deal from the bargaining approach. This mediation was unusual for a therapeutic session in its use of private sessions for the bulk of the mediation process, but not unusual in the scope of issues considered and the role of the mediator in probing into feelings.

Comments from mediators about the techniques they use to settle cases further illustrate the differences between the two mediation styles. As these statements suggest, mediator strategies grow out of assumptions about the nature of conflict, conflict resolution, and their own particular capacities and skills. When asked how they settle cases, for example, several mediators expressed a view of their work which leads them to adopt a bargaining mode:

a) I get people talking, then focus on some issues to get to agreement points. You can't just keep talking.
b) I take a ball of broad issues and expand it by breaking it down into concrete ones. I see what issues really matter to them and I work on those.
c) As a mediator, your job is to convince one or the other party to give up something; to negotiate together. The essence of the process is negotiation. You don't accept blame from others of each other, and you also don't accept their version of the facts. I am firm with a loudmouth. In small claims cases, I say that when a person won't settle, I will give it back to the judge and the judge will give him only 30 days to pay.

Here, mediators express a view which leads them to adopt the more therapeutic approach:

a) My strategy is to try to get the recalcitrant person to see the other's view. If the other person doesn't do it, I do it in caucus myself. It usually works to point out how the other person sees things—that usually produces an agreement.
b) I look for people's concerns, the reasons why this issue is important to each of them, and try to create an environment where they feel safe enough to articulate that concern. I do this by being open and non-judgmental and by listening to their feelings.
c) I try just to get people talking, to get them to explain their side fully so that the other side really understands them. The problem is that people don't understand each other's thinking. I try to help them look for solutions.

IV. MEDIATION: A THIRD LANGUAGE[10]

One can view the range of dispute resolution processes, including adjudication and mediation, as competing languages and discourse. Each process

provides a different structure for negotiating the meanings of particular events (Silbey and Merry, 1982). From this perspective, mediators are engaged in an activity intended to settle cases by reconstructing the experience and languages of contending parties, and the language of the surrounding legal order, into a third, possibly new language—that of the mediator, with its own logic and implication.

Disputants commonly begin mediation by describing their problems in the terms of everyday experience as a sequence of personal exchanges; they may also describe their problem in the language of claims and rights typical of legal discourse. The aim of mediators is to convert these accounts into a language of relationships. The polar types of mediation styles represent alternative understandings of how relationships frame and structure disputes. The bargaining style converts the experience and claims of the disputants into the language of negotiation and exchange because it recognizes that the parties are bound together in relationships they cannot escape; they settle by compromising their differences because they must live together, for example, as neighbors or business associates. The therapeutic style of mediation attempts to recast disputants' individual experiences into terms of mutually valued relationships; it urges settlement based upon a recognition of shared experience and values. Although the two styles of mediation can be distinguished by the different visions of relationship they encompass, they share an orientation toward relationship and interdependence as the basis of settlement. From this perspective, settlement means that the parties have developed a new understanding of what happened between them, an understanding that acknowledges either interdependence based upon structural constraints or interdependence based upon consensus.

Nevertheless, the conversion of competing accounts and interests into a third dialect involves the exercise of authority because neither of the contending parties is familiar with the languages of mediation, and would not adopt them unilaterally even if they could learn them independently. If the parties could negotiate and bargain independently, or recognize shared interests by themselves, they would not be in mediation. Negotiation requires the recognition that the parties are connected, and that the differences between the parties are better conceived as compromisable interests or miscommunication rather than matters of right and justice. This is difficult to achieve, perhaps calling for exercises of power and authority by mediators, because disputants often come to third parties only after they have exhausted bilateral options and often when they have formulated the dispute into a matter of right or justice (Merry and Silbey, 1984). Mediators do not ask the parties to accept the validity of the language of relationships for representing disputants' grievances. It is not consensually achieved nor the result of full disclosure but, instead, is imposed upon them. Although the parties engage in the mediator's language, this says nothing about the parties' acceptance of it as the best way to express their differences; rather, their

acquiescence represents an expression of their inability to construct and impose their own solution. Nevertheless, final agreement in a mediation session provides tacit legitimation of the languages and the techniques of mediation.

One practice of mediation, the bargaining style, attempts to convert the parties' stories into the categories and rules of exchange and bargaining, but manages, nevertheless, to reproduce in miniature the relations and outcomes, if not the language, of the legal process. That is, the differences between contending parties are elicited, narrowed to acceptable boundaries for discussion and examination by a disinterested observer, and then settled through the exercise of power by a third party who presents him/herself as a representative of some larger authority. The mediator wraps him or herself in the same mystical cloth as the jurist, the rabbi, or the priest; and, while not proclaiming openly that he is the embodiment of the law or of God, he nevertheless proclaims access to knowledge and wisdom derived from a special school of trained neutrality. He dispenses decisions, which from the perspective of the contending parties carry the same kind of authoritative weight as the law or God. Viewed from the perspective of the bargainer, the process is not any less mystifying than law or religion; the mediator's exercise of power goes largely unnoticed by the bargainer. It appears instead as a simple extension of an accepted logic and practice. Moreover, it is expedient in light of the complex and often confusing stories. In this sense, bargaining mediation parallels the situation of many intermediaries, including police, social workers, nurses, and teachers, who are supposed to represent an institution, interpret its rules, and dispense its rewards and punishments. In order to accomplish their task, bargainers convert the mediation process into an activity and the process of investigation into a form of communication over which they have maximal control.

The second practice of mediation, underlying the therapeutic style, suggests that rather than limit the scope of communication between the parties to a manageable or acceptable terrain, the mediator should engage the contending parties in a process of expanding the terrain in search of a language or a set of common values which dictate a solution. Here, therapeutic mediation employs the language of neither the law nor the bargainer, nor the daily experience familiar to the disputants; instead it seeks to cultivate a language of mutual recognition of the importance of their relationship, shared rather than individual interests, and collective values rather than competitive demands. Just as negotiation is not the typical language disputants begin with, neither is the language of mutuality and consensus. Again, settlements are not so easily reached. Direct conflicts of interest defy immediate resolution and require considerable time in negotiation; and there is some expectation that commitments to resolve a problem will be far broader than a simple restitution of property or temporary modification of behavior.

Up to this point the therapeutic and bargaining mediator have much in common. They both attempt to construct an account of the parties' relationship that goes beyond the object of contention or precipitant event. The language they adopt transcends the dispute and locates it in a framework which extends far beyond the two parties (cf. Mather and Yngvesson, 1980–1981). The therapeutic style may draw upon incidents, past experiences, hypothetical cases, or broader values in order to shed light on the origins and consequences of contention. The bargaining style may point to the necessity of settling and living peaceably. In the process, however, both styles of mediation provide a means by which things taken-for-granted are revealed in a new and different way. It is an activity whose object is revelation; as one mediator put it, "an activity of acknowledgement," not an activity of restriction. It is self-instruction rather than imposed knowledge, the construction of a joint worldview of relationships, albeit of different types of relationships, rather than the arbitrary and individualistic constriction or imposition of worldviews.

An example of the construction of a new perspective, or language, appears in the family mediation program. Here, family members do not report that they have changed their minds about what the problem is, but a large proportion (59%) say that they have come to better understand the other person's point of view. Parents and children seem to see one another's behavior in a larger social context. Parents begin to appreciate the pressures their children experience at school; children begin to see their parents' financial and work-related struggles. Each party is likely to learn that the other loves him/her despite angry battles. In this context, mediation leads family members to see annoying or irritating behavior in terms of the conditions which produce it. This perspective is basic to the helping professions. In this framework, behavior is understood as socially caused, not condemned as bad. Thus the mediation process teaches family members the professional, contextualized view of the behavior of other family members. Sessions typically begin with a broad exploration of relationships and questions about the nature of interactions, although most agreements are reached through negotiation over a narrow slice of the issues. In other words, mediation of family disputes typically begins with a therapeutic style and closes with a bargaining style.

This suggests that although mediation may offer a new language of relationships, the two styles of mediation differ in the way they construct a third language and reach an agreement. The practice of therapeutic mediation is somewhat anarchic; one cannot tell where it may lead. It creates the possibility of expanded understanding of the contextualized nature of social relationships without offering any particular explanation for this world. Therapeutic mediation may less often produce settlements because it lacks theoretical guidance for identifying where the grounds of consensus may lie beyond the fact of relationship.[11]

It is important to recall that the styles of mediation are ideal types devel-

oped to suggest the maximal differentiation within the new discourse of dispute resolution. By comparing the bargaining and therapeutic styles in this way, the outcomes become a bit more meaningful. That is, confronted by a system which demands closure, it is not surprising that the bargaining approach is more likely to be sustained organizationally. Bargaining mediation offers a means for resolving disputes that might otherwise be relegated to self-help or litigation; it does so by acknowledging the constraints of situations and suggesting that continuing relationships require give and take through compromise. It eschews the language of individual rights in favor of the language of interdependent relationships; reasonableness and compromise rather than moral victories provide the basis for peaceful co-existence. This form of mediation does precisely what it is intended to do without challenging the prevailing norms or praxis of the legal system. It provides a means through which judges and lawyers can dispense with what is inconvenient, time-consuming and unprofitable. In that respect it does for lawyers what nurses, paramedics and dental hygienists do for doctors, lawyers, and dentists.

On the other hand, to the extent that therapeutic mediators follow through on what we describe as the practice of their profession, they cannot even begin to compete with bargaining mediators. They attempt (with varying degrees of consciousness) to engage contending parties in the recognition, if not construction, of a language of shared values. If not watched carefully, this process carries with it an implicit critique of the broader circumstances which "cause" the object of contention to appear or give rise to disputes (e.g. poverty, inequalities in political power, etc.). To the extent that the therapists actively engage disputing parties in the search for a common language for understanding and explaining their dispute and for exploring its origins and consequences (apart from psychological problems and the like), they may actually be participating in creating a critical language which may not lead to convenient, expedient or legitimate solutions. Thus whatever standard accounting device or measure of efficiency is employed—number of resolutions, dollars invested per case, or rate of relitigation—the therapeutic alternative in mediation will lose every time. Moreover, to the extent that the therapeutic alternative is itself informed by a theory of social change, it will not meet the criteria established for efficiency.

We end with a note of irony. The movements which supported the creation of mediation as an alternative to law for interpersonal dispute resolution claimed that a continuing relationship would provide a firmer and more just foundation for settlements than legal considerations. However, little attention was devoted to distinguishing the types of continuing relationships. The polar types of mediation—bargaining and therapy—seem nevertheless to respond to these differences in types of relationship, differences which have been typified in the classical distinctions between traditional (gemeinschaft) and modern society (gesellschaft). Although society

means that we are bound in relationships, not all relationships, not even all continuing relationships, are based upon shared values, shared interests, or a concern with the quality of that relationship. In fact, in modern society most relationships are functional, not intimate, and settlement of differences or avoidance of disputes is based simply upon a desire not to fight. Therefore, to the extent that therapeutic mediation is anarchic, to the extent that therapeutic mediators are forced by the exigencies of some institutional umbrella to produce results competitive with some other yardstick of efficiency, and to the extent that relationships are effective rather than affective, therapists will become bargainers.

SUSAN S. SILBEY *is Associate Professor of Sociology at Wellesley College. She is the author of numerous articles on the enforcement of consumer protection regulations and legal processes in limited jurisdiction courts. She is currently completing research on the public ordering of private disputes comparing processes of mediation and adjudication in courts and community settings.*

SALLY E. MERRY *is Associate Professor of Anthropology at Wellesley College. She has published several articles on mediation, legal ideology, social control, urban communities, and urban crime. She is the author of a book on the fear of crime,* Urban Danger: Life in a Neighborhood of Strangers. *She is currently working on litigiousness and the meanings of law among working-class Americans.*

NOTES

1. See note 8 below.
2. At least five sets of goals, some with clearly identified institutional supporters, have been claimed for the development of informal dispute resolution (Sarat, 1983): (1) The establishment bar and legal elites have sought wholesale removal of classes of cases to alleviate congestion and delay, to promote more efficient handling of and attention to "important" legal matters, and to bolster the sagging legitimacy of the courts. (2) Legal rationalists advocate channeling problems into different but appropriate dispute-resolution processes in order to promote efficiency in general. (3) Some proponents urge alternatives in order to broaden access to legal remedies and further democratize the legal system. (4) Another group argues that alternative processes provide a "qualitatively superior form of justice beyond that supplied by formal legal institutions" (Sarat, 1983: 1223). Freed of formal legal categories and procedures, informal alternatives can get at the heart of problems and actually solve them, thus rendering "true" or "better" justice contributing to social harmony and stability. (5) Finally, community organizers and action groups suggest that alternative dispute resolution is a means of empowering local communities by removing community conflict from the centralized legal institutions.
3. Massachusetts law recognizes three categories of "status offender": children truant from school, children who have run away from home, and minors whose parents claim they are beyond parental control, i.e. stubborn.
4. We are following Wrong's conception of authority, which in turn follows Weber (1968) and Easton (1958). According to Wrong (1979: 36–39) Authority is the ability to successfully command or forbid, a "theirs not to reason why"

affair (Wrong, 1979: 35) based upon either of five forms of relationship and resources: coercive sanction, induced reward, legitimacy on the basis of a larger system of shared norms, competence or expertise, and force of sheer personality. The more common practice is to refer to authority as legitimacy, but Wrong argues that legitimacy, authority based upon a "right" to command and "obligation" to obey, is really a subset of authority in general. Weber identified three principal forms of authority: patrimonial, charismatic, and bureaucratic/legal rational. Wrong's usage allows a broader range of resources and relationships to be included under the concept of authority yet retains Weber's three principal categories. Traditional patrimonial authority would be included under legitimate authority, charismatic under personality, and bureaucratic/legal rational authority would be further distinguished and subsumed under either legitimate authority based upon a larger network of shared norms, in this case the legal system, or competent or expert authority.

5. "Manipulation is the process whereby a person is got to behave or think otherwise than he would have done, in such a way that he is unaware of the source and causes of his new thought and actions (so is unaware that he has been manipulated)" (Taylor, 1982: 24). Wrong states that "when the power holder conceals his intent from the power subject—that is, the intended effect he wishes to produce, he is attempting to manipulate the latter" (1979: 28). It may seem that the mediator cannot manipulate disputants because the mediator's role is clear and explicit—to bring the parties to settlement. However, the distinguishing feature of manipulation is its covert nature. Mediation is not covert, but the organization of the conversation may be. Despite claims by the mediators that the process involves an open and unrestricted exploration of issues, they are actually structuring the conversation to focus upon settlement. This is not always apparent to the disputants.
6. Scott and Lyman use "account" to refer to statements made to explain untoward behavior and bridge the gap between actions and expectations (1968).
7. Kolb (1983) describes similar variation in styles of labor mediation. For example, labor mediators vary the structure of discussion, control of communication, and time spent in joint or private caucus. Cf. Bercovitch (1983).
8. Max Weber defined an ideal-type construct as a "one-sided *accentuation* . . . by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena, which are arranged . . . into a unified *analytical* construct. In its conceptual purity, this mental construct . . . cannot be found empirically anywhere in reality" (Weber, 1949: 90, 93). See Lofland and Lofland (1971, 1984: 93ff.) for a description of the steps involved in creating typologies for social analysis.
9. There is some evidence that mediator strategies may correlate with a program's definition of its mission, but this is more predictive of the ways in which mediators describe their activities than it is predictive of individual mediator behavior.
10. We are particularly indebted to Robert Thomas for this formulation and for his help in analyzing mediation discourse.
11. If, in fact, one were talking about a relatively disciplined and coherent theory of social change underlying therapeutic mediation, as might be found in certain political parties, then therapeutic mediators would not so easily be distinguished from bargainers. In fact they would become bargainers of sorts, working to achieve agreement between the parties on a particular bottom line informed by a particular social theory; here, the bottom line would consist of a defined and articulated vision of society and social justice. Mediation would consist of narrowing discussion to a terrain legitimated by the mediator's particular social theory.

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The Mediation Process:
The Effects of Mediator Bias and Disputant Power

Gary L. Welton
Dean G. Pruitt
State University of New York at Buffalo

This study examined the impact of mediator bias and disputant power over the mediator on acceptance of the mediator and mediator influence. Disputants who perceived the mediator as biased against their side were less accepting of the mediator and less influenced by the mediator than disputants who perceived the mediator as neutral. Disputants with high power over the mediator were more accepting of the mediator but tended to be less influenced by the mediator than disputants with low power. Disputants with high power also used less contentious tactics and reported that they were less concerned about appearing strong to the mediator than disputants with low power. There were no interactions between mediator bias and disputant power.

Mediation involves the use of a third-party mediator to assist two disputing sides in reaching a mutually acceptable solution. It is often assumed that mediators must maintain neutrality between the disputing parties. For example, Underhill (1981) suggests that a landlord or tenant should think twice before serving as a mediator in a landlord-tenant dispute. Indeed, mediators are often referred to as "neutrals."

There is no question that neutrality often contributes to successful mediation. Yet Kressel (1972), Touval (1975), and Zartman and Touval (1985) have argued that neutrality is not a sine qua non for success. If it were, there would be far fewer success stories in international mediation, where the third parties are usually officials of nation-states that have closer historical ties to one of the disputants than to the other (Fisher, 1981; Pruitt & Rubin, 1986). Kressel (1972) and Zartman and Touval (1985) state that mediator bias can be outweighed or overcome by other factors.

One such factor is that the disputants have power over the mediator. By "power," in this context, is meant the capacity to influence the mediator's future welfare. Disputants often have such power over a mediator, such as the capacity

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to publicly praise or blame that mediator, affecting his or her chances of being chosen by future disputants. Such power should give the disputants confidence that the mediator will act on their behalf and hence should increase their receptivity to mediation, regardless of any perceived bias. Knowing that they can affect the mediator's outcomes, disputants are likely to conclude that the mediator will rise above his or her biases and behave in a neutral way, in order to be influential. Hence, the mediator will be more acceptable and effective than otherwise would be the case.

A 2×2 factorial design was employed, in which mediator bias (biased versus neutral) was crossed with disputant power over the mediator (high versus low).

Three hypotheses were tested:

Hypothesis 1: Mediator bias tends to erode readiness to accept and be influenced by the mediator. By bias is meant the perception that the mediator is more closely allied to the other side than to oneself (Pruitt, 1983).

Hypothesis 2: Disputant power over the mediator tends to augment readiness to accept and be influenced by the mediator. By power is meant capacity to influence the mediator's future outcomes.

Hypothesis 3: The greater the disputant power over the mediator, the less impact will mediator bias have over readiness to accept and be influenced by the mediator.

METHODS

Subjects

The sample included 48 male and 48 female volunteer subjects who received partial course credit for their participation. Subjects were required to have English as a first language. They participated in same-sex pairs, one being assigned to the role of union representative and the other to the role of management representative. In no case did the two members of a dyad know each other. Dyads were randomly assigned to the four conditions.

Equal numbers of male and female dyads were assigned to each condition, making it a $2 \times 2 \times 2$ design. Three male assistants, who were used as mediators, were assigned an equal number of times to each of the eight cells.

Task

An integrative bargaining task with logrolling potential was employed (Pruitt & Carnevale, 1982). Disputants attempted to arrive at a mutually acceptable package deal on three issues—wages, medical plan, and overtime. Each disputant was provided a payoff schedule that indicated the value of every possible agreement on the three issues. Disputants had access only to their own payoff schedules.

The negotiation task was made insoluble to ensure that the session would last long enough to complete all stages of the experiment. This was accomplished by

instructing both disputants to earn at least 530 points in the settlement, an outcome that could not be achieved by both.

Procedure

A total of 3 or 4 subjects were scheduled at the same time. They first completed a 10-item questionnaire about union-management attitudes. The one with the strongest prounion attitudes was assigned to a union role, and the one with the strongest promanagement attitudes was assigned to a management role. Other subjects were given credit and dismissed. (One group was discarded at this stage because all of its members were strongly prounion.) The mediator (male confederate) was then introduced to the 2 disputants as an undergraduate who was in training for a position with the University Mediation Center.

All participants then received a folder of instructions. A tape recording of the instructions was played as they read. Instructions began with a general overview of the session. The experimenter then explained that the mediator would be going to another room to receive instructions for his role.

After the mediator left the room, the disputants completed an informed consent form. They then received instructions on the negotiation task, a copy of the payoff schedule, and a task quiz to check their understanding. They were led to believe that the mediator had no access to these materials. They then received private directions from their hypothetical leaders instructing them not to settle for less than 530 points.

At this time, with the subjects together, the experimenter manipulated the variables. Mediator bias was manipulated by providing disputants false information about the mediator's general attitudes toward union and management. The disputants were told that the mediator had completed the same attitude survey they had answered at the beginning of the session. In the neutral condition they were provided written information stating that the mediator had received a score that indicated he was neither prounion nor promanagement. In the bias condition, they were informed that the mediator's score indicated that he favored the other side. The confederate mediator remained blind to this manipulation throughout the session; the experimenter was blind to it until the time of the manipulation.

Disputant power over the mediator was manipulated in the following way. All disputants were told that the mediator was being trained to work at the University Mediation Center and that prior to his appointment he was required to participate in several practice hearings. In the high-disputant-power condition, they were also told they would rate the mediator to help decide whether he should be appointed as a mediator. The mediator remained blind to this manipulation; the experimenter was aware of it from the beginning of the session.

The experimenter then administered a "Mediator Questionnaire." Instructions stated that the experimenter would be using the answers to give advice to

the mediator. High-power disputants were told that this was *not* the evaluation form that would affect the mediator's future. Subjects were requested to answer according to their initial impressions. The questionnaire included questions about perceptions of the mediator's trustworthiness, helpfulness, effectiveness, and ability, as well as ratings of one's likelihood of following the mediator, one's need for the mediator, and the value of certain specific mediator techniques. These measures were taken to assess the immediate impact of the independent variables.

After receiving a checklist to remind them of important elements of the procedure, subjects were given 5 minutes in separate rooms to develop their strategies. During this time the experimenter was allegedly using the questionnaires to advise the mediator.

The experimenter then brought the subjects back into the room and asked if they had any objections to audiotaping of the negotiations. The experimenter left the room, the mediator returned and began with the following words:

> My role is to help you agree on a contract. I will be making some suggestions later on about how you might proceed. First, however, I would like to listen to the two of you as you negotiate. Therefore, for the first 5 to 10 minutes I will leave the room and listen to you on earphones.

The subjects then negotiated for 8 minutes. At this point the experimenter entered the room and administered the "Mediator Questionnaire" a second time. This administration included a note asking the subjects to answer according to their current perceptions. The experimenter then left, and the mediator returned to the room for the remainder of the session. The mediator made a suggestion (Bartunek, Benton, & Keys, 1975), stating,

> It is often difficult to put yourself in another's position when you have your own interests. There's one particular communication skill I am familiar with that can help you understand what each other is saying, and that's called paraphrasing. Let me tell you about it. Paraphrasing basically means checking with someone to be sure you understand what he/she just said. So what you do, basically, is repeat back to the original speaker, in your own words, what you think he/she said. Then, if the original speaker thinks he/she has been misunderstood, he/she can try to clarify the intended meaning.

After the subjects negotiated for 4 more minutes, the mediator made a second suggestion (Bartunek et al., 1975), stating,

> One of the methods I often find useful is for the disputants to tell each other which issue is most important to them, that is, to tell each other where you get the most points. You might find it helpful to do this as you negotiate.

The disputants then continued for 4 additional minutes.

At this time, the experimenter entered the room, said that time had expired, and administered the postquestionnaire. This measure included manipulation checks, insight into the payoff schedule, final impressions of the mediator,

perceived insolubility of the task, and the importance of appearing strong to the mediator. Subjects were then debriefed.

Audiotapes were made of the negotiations. All 48 tapes were coded by a single individual, who remained blind to the experimental condition. In all, 22 different coding categories were used, including indicating a need for help, asking for assistance from the mediator, general paraphrasing, paraphrasing of numbers from the payoff schedule, giving true priority information, giving false priority information, miscellaneous persuasive arguments, explicit threats, and putdowns of the other side. The coding unit was defined as everything said by one speaker before the other speaker resumed talking. More than one code was assigned to a unit when applicable, but the same code could not be assigned more than once to a given unit. Dyad scores were computed for each category, consisting of the number of units for which that category was coded divided by the total number of units.

Eight of the tapes were coded by a second individual as a basis for computing reliabilities. Four indices were developed by combining individual categories (as noted below). The interrater reliability coefficients for these indices were: asking for help, $r = .99$; paraphrasing, $r = .83$; giving priority information, $r = .82$; and contentious behavior, $r = .99$.

RESULTS

Manipulation Checks

On the postquestionnaire, subjects in the neutral condition rated the mediator's union-management attitudes as more neutral ($M = 3.73$) than did those in the biased condition ($M = 1.63$), $F(1, 24) = 208.18, p < .0001$. Subjects in the high-disputant-power condition indicated more often that the purpose of the session was to evaluate the mediator's performance rather than to provide practice ($M = 1.71$) than did those in the low-disputant-power condition ($M = 1.06$), $F(1, 24) = 56.53, p < .0001$.

Mediator Acceptability

Three measures of mediator acceptability were employed. The first was a composite of 10 correlated items (median $r = .50$) combined from each of the two administrations ($r = .82$) of the "Mediator Questionnaires." These items included perceptions of the mediator's trustworthiness, helpfulness, effectiveness, and ability, as well as ratings of one's likelihood of following the mediator, one's need for the mediator, and the value of four specific mediator techniques. The second measure of mediator acceptability was an item on the postquestionnaire asking about the extent to which the disputants were willing to allow the mediator to assist them during the negotiation. The third measure was the asking for help index, consisting of the sum of two content codes: indicating a need for help and asking for assistance from the mediator. These two codes were

not statistically related (r = .11), which is reasonable in that the use of one reduced the need for the other.

The first two measures were significantly related, $r = .42$ ($p < .01$), whereas the third was not related to the other two.

The means for these measures are reported in Table 1. They were analyzed by means of a multivariate analysis of variance. In accordance with Hypothesis 1, disputants in the biased condition indicated that the mediator was less acceptable than those in the neutral condition, $F(3, 38) = 6.97$, $p < .001$. In accordance with Hypothesis 2, disputants with high power over the mediator indicated that the mediator was more acceptable than those with low power, $F(3, 38) = 5.02$, $p < .01$. Furthermore, female subjects indicated that the (male) mediators were more acceptable than did male subjects, $F(3, 38) = 4.13$, $p < .05$.

None of the interactions was significant, including the bias $\times$ disputant power interaction that had been predicted in Hypothesis 3.

A composite mediator acceptability index was obtained by standardizing the three acceptability measures and summing them. The results are shown in Figure 1.

Mediator Influence

Two measures of mediator influence over the disputants were derived from the content codes. The first used the paraphrasing index that resulted from combining general paraphrasing and paraphrasing of numbers. These two codes were not statistically related ($r = -.11$), which is reasonable in that the two forms of paraphrasing are alternative interpretations of the mediator's advice. A difference score was obtained by subtracting base rate paraphrasing (in the first 8 minutes) from paraphrasing following the mediator's suggestion. Thus, this score represents the extent to which paraphrasing increased after the mediator suggested its usage.

The second measure used the priority information index, which resulted from subtracting giving false priority information from giving true priority information ($r = -.30$). A difference score was then obtained by subtracting base rate giving priority information (in the first 12 minutes) from giving priority information following the mediator's suggestion. Thus, this score represents the extent to which giving priority information increased after the mediator suggested its usage. The means are reported in Table 2.

A multivariate analysis of variance was performed on these measures. A strong trend indicated that the mediator had more influence in the neutral than in the biased condition, $F(2, 39) = 3.22$, $p < .06$, consistent with Hypothesis 1. This effect was significant for the measure of paraphrasing, $F(1, 40) = 6.38$, $p < .05$, but did not approach significance for the measure of giving priority information, $F < 1$. No other multivariate effects approached significance, although there was a nearly significant univariate main effect for disputant power on the measure of paraphrasing. This effect is noteworthy because it ran

TABLE 1 Cell Means for Mediator Acceptability Measures

Condition	*High Disputant Power*		*Low Disputant Power*	
	Biased	*Neutral*	*Biased*	*Neutral*
Questionnaire Index of Acceptability (summed standard scores)	−2.0	8.0	−11.9	5.9
Willingness to allow the mediator to assist (7-point scale)	5.7	5.7	4.7	5.1
Asking for help of the mediator (proportion of of occurrence)	.09	.15	.03	.06

counter to Hypothesis 2. Disputants with high power followed the mediator's suggestion to paraphrase *less* often than did those with low power, $F(1, 40) = 4.06$, $p < .06$.

Other Process Measures

Two additional measures showed a main effect for disputant power and thus may provide a key to understanding the processes involved. The first is the contentious behavior index of the content codes. This index combined three correlated ($r = .33$) codes: miscellaneous persuasive arguments, explicit threats, and putdowns of the other party. The second is a postquestionnaire measure that asked the disputants about the extent to which they thought it was important to appear strong in the eyes of the mediator.

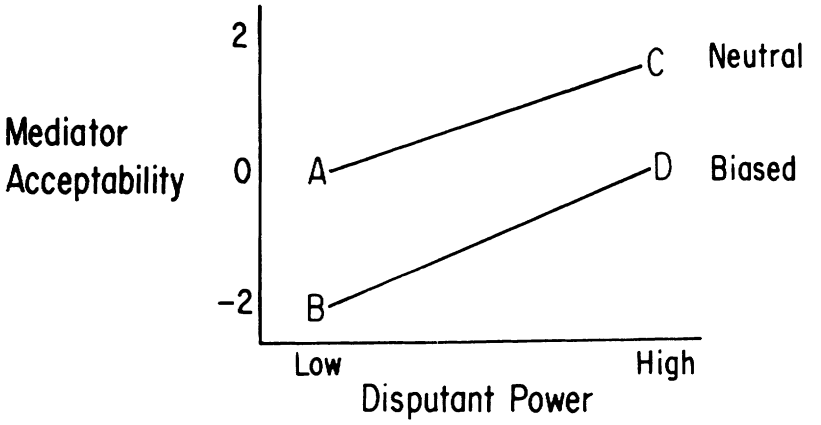

FIGURE 1 Mediator acceptability index.

TABLE 2 Cell Means for Mediator Influence Measures

Condition	*High Disputant Power*		*Low Disputant Power*	
	Biased	*Neutral*	*Biased*	*Neutral*
Paraphrasing (increase in usage)	−.024	−.005	−.014	.061
Giving priority information (increase in usage)	.092	.114	.096	.116

Disputants with high power over the mediator behaved less competitively (M = .127) than did those with low power (M = .289), $F(1, 36) = 6.86$, $p < .05$. Disputants with high power also reported that it was less important to appear strong to the mediator (M = 3.14) than did disputants with low power (M = 3.91), $F(1, 36) = 5.25$, $p < .05$. These two measures were positively related to each other ($r = .30$, $p < .05$), suggesting that the contentious behavior may have been partly aimed at trying to impress the mediator.

Contentious behavior was inversely related to mediator acceptability, $r = -.34$ ($p < .01$) and positively related to paraphrasing, $r = .31$ ($p < .05$). The importance of appearing strong to the mediator was positively related to paraphrasing, $r = .31$ ($p < .05$).

DISCUSSION

The main effects of mediator bias were as predicted. Compared with disputants in the neutral condition, those in the biased condition judged the mediator to be less acceptable and were less likely to follow his suggestion to paraphrase. The latter finding may indicate that suggestions from biased mediators are viewed with suspicion.

The main effects of disputant power over the mediator were more complex. As predicted, compared with disputants with low power, disputants with high power found the mediator to be more acceptable. Contrary to prediction, however, disputants with high power tended to follow the mediator's suggestion to paraphrase *less* often than did those with low power. An additional finding was that disputants with greater power over the mediator employed fewer contentious tactics in dealing with each other.

There are two possible explanations for these latter findings. One is that power over a mediator leads to reduced concern about impression management with the mediator. Disputants with low power find it necessary to try to create a dual impression of (1) high strength of resolve, so that the mediator will not try to push them around (a wise strategy in light of the finding by Harnett and Wall, 1983, that mediators propose solutions favoring disputants who have argued vigorously for their position) and (2) willingness to cooperate with the mediator, so that the mediator will be favorably impressed with them. Hence they employ contentious tactics in dealing with the other party but follow suggestions from

the mediator. When disputants have power, such strategies do not seem so essential. This explanation is supported by the finding that high-power disputants found it less important to appear strong to the mediator than low-power disputants and by the existence of significant correlations among appearing strong to the mediator, employing contentious tactics, and following the mediator's suggestion to paraphrase.

A second explanation for the findings on power over the mediator assumes that high power causes the disputants to turn over responsibility for defending their interests to the mediator. Because the mediator will protect them and work to solve their problem, it becomes less important to argue for their position, and it makes less sense to follow the suggestion of paraphrasing the other disputant. One prefers to sit back and let the mediator do the work.

The finding that power over the mediator reduces resort to contentious tactics suggests that mediation will go more smoothly, with less fighting and perhaps more problem solving, when mediators are weak and subservient to the disputants. This finding is consistent with the expectancy rule as stated by Kipnis (1976). Disputants with lower power over the mediator should have lower expectations of being able to influence the outcome of the dispute. Hence they should employ more coercive (contentious) tactics in an effort to influence that outcome.

There is a seeming contradiction, however, between this finding and the results of both a laboratory (Van Slyck, McGillicuddy, & Pruitt, 1984) and a field study (McGillicuddy, Welton, & Pruitt, in press) comparing mediation with med/arb, in which the mediator becomes an arbitrator if agreement is not reached in the mediation phase. Under med/arb there was more problem solving, less hostile behavior, and a tendency toward less contentious tactics than under straight mediation, despite the greater mediator power implied by med/arb. More research is needed to resolve this seeming contradiction.

There is a possible alternative explanation for the disputant power findings. Subjects in the high-power condition may have rated the mediator more leniently and behaved more contentiously in order to help the mediator look good in his evaluation. However, there is some evidence against this explanation. First, it was made clear to the high-power disputants that the questionnaire was distinct from the evaluation form, so that how they rated the mediator on the questionnaire would not affect his future. Second, if high-power subjects were being lenient, they also would have followed the mediator's suggestions more often, rather than less often, given that an influential mediator would appear more qualified to the observing experimenter than would a noninfluential mediator.

The paraphrasing measure yielded strong results, the giving priority information measure did not. The problem with the latter measure was a ceiling effect. Nearly all disputants gave priority information, regardless of their condition. Our informal observation was that in contrast to the suggestion to paraphrase (which was skeptically received and often not used), the suggestion

to share priority information was perceived as being helpful and relevant by the frustrated disputants.

The predicted interaction between mediator bias and disputant power was not obtained. The mediator-bias effect was not diminished when disputants had power over the mediator. Instead, bias and power produced two separate main effects on mediator acceptability. These results indicate that the effects of mediator bias are balanced, but not eliminated, by increased power over the mediator. A comparison of points A and D in Figure 1 is a rough demonstration that there was no difference between mediator acceptability in the biased/high-power condition and in the neutral/low-power condition. Thus, high power can be viewed as having canceled out the impact of mediator bias.

It is not surprising that female disputants found the (male) mediators more acceptable than did male disputants. Women tend to be warmer than men (Hoffman, 1977), and hence less apt to judge a mediator as unacceptable. Also, the attraction between the sexes works in favor of this effect.

Because the behavior of the mediator was controlled, the question of how mediator bias and disputant power influence the mediator's behavior has not been addressed. This is a subject for future research.

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Gary L. Welton is a graduate student in social psychology at the State University of New York at Buffalo. His current research focuses on mediation, negotiation, and social dilemmas.

Dean G. Pruitt is Professor of Psychology at the State University of New York at Buffalo. His current research focuses on mediation, negotiation, and intergroup conflict resolution.

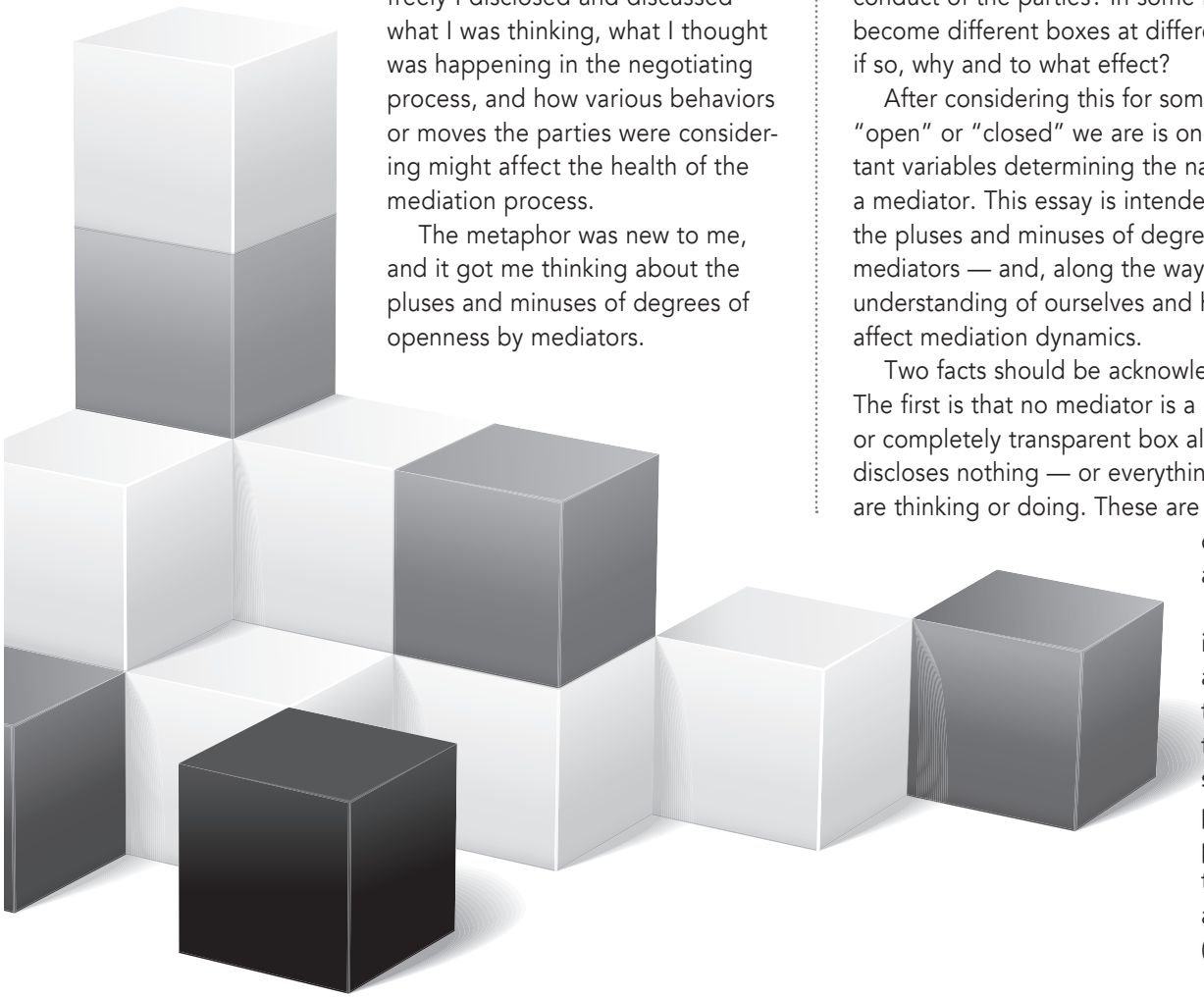
The Mediator as Medium

Reflections on Boxes: Black, Transparent, Refractive, and Gray

By Wayne Brazil

At the close of a mediation in a business case not long ago, one of the lawyers told me that my approach was new to him. He said other mediators he had worked with tended to remain "black boxes" — meaning that what they were thinking (about the case, about how to move the negotiations toward a deal) remained largely a mystery. He had been surprised (maybe even unnerved) by how freely I disclosed and discussed what I was thinking, what I thought was happening in the negotiating process, and how various behaviors or moves the parties were considering might affect the health of the mediation process.

The metaphor was new to me, and it got me thinking about the pluses and minuses of degrees of openness by mediators.



When you mediate, are you a "black box" in the eyes of the parties? Or, at the other end of the metaphoric spectrum, are you a "transparent box?" Or does the way you handle your role fall somewhere along the continuum between those extremes, so the parties see you as a "gray box" or a "refractive box?" Do you try to adjust the degree of your transparency from case to case, depending on the personalities and conduct of the parties? In some mediations, do you become different boxes at different junctures — and, if so, why and to what effect?

After considering this for some time, I think how "open" or "closed" we are is one of the most important variables determining the nature of our role as a mediator. This essay is intended to help explore the pluses and minuses of degrees of openness by mediators — and, along the way, to enhance our understanding of ourselves and how our behavior can affect mediation dynamics.

Two facts should be acknowledged at the outset. The first is that no mediator is a completely black box or completely transparent box all the time. None of us discloses nothing — or everything — about what we are thinking or doing. These are matters of degree, of location along a spectrum.

The second reality is that our ability and inclination to be transparent (or inscrutable) is a product of some blend of our personalities, our philosophy of mediation, our strengths and weaknesses (analytical intellect,

emotional intelligence, experience), and our sense of what parties want from us (which can vary from case to case and from moment to moment). Shaped by influences from so many sources, the degree of our openness is not something over which we have, or should have, full control. But the degree of openness matters, and we should try to understand how. I have found that using the box metaphors has deepened my understanding and elevated my honesty about how I am doing my job.

Much of the discussion that follows assumes a mediation that includes at least some caucusing, but some of the observations about mediation dynamics could apply in any mediation setting.

Black-Box Mediators

Black-box mediators keep their cards close to their vests. They rarely, if ever, disclose their views about the legal viability of the parties' positions, what other parties are communicating to them in caucuses, or the participants' underlying interests, personal values, or long-range goals. These mediators listen but disclose little. They absorb what they are hearing, but very little light passes through them.

Apparently many sophisticated lawyers and clients are comfortable with the black-box approach. They engage only mediators whose worldliness and negotiation-wisdom they have confidence in. They want their mediator (not the parties) to remain in control of the process because they believe that it is by capitalizing on the mediator's experience that they have the best chance of striking a deal. They view the negotiation process as a ritualized game, a chess match in which no one expects either the neutral or the other parties to be fully forthcoming, even in private caucus.

They want a mediator who has developed good instincts about what is going on beneath the verbiage and about how much play there might be in the positional joints. They want mediators who can "read" carefully between the lines, who can spot and accurately interpret subtle, oblique (sometimes unintentional) signals, who will "hear" everything parties tell them in caucus with a skeptical, filtering ear, and who simply will not believe what parties say their bottom lines are.

Parties who are acculturated to the black-box approach don't expect (or even want) their mediator to explain what she is thinking or what informs her approach at any given juncture. In this view, a mediator who shows her analytical cards is merely creating opportunities for parties to use perceived or feigned fault with her reasoning as an excuse for refusing to change their offers or demands.

"Shaped by influences from so many sources, the degree of our openness is not something over which we have, or should have, full control. But the degree of openness matters, and we should try to understand how."

These negotiators even welcome being pressured by an evaluative or directive mediator — because they expect their mediator to pressure the other participants. They believe that it is only by exerting sustained pressure on all parties that their mediator will be able to reliably identify, for them, the real limits on the parties' willingness to compromise.

In short, they hire mediators who will do whatever it takes to keep the parties in the game well into extra innings and who will push well past the points the parties have told them they would ever be willing to go. They want their mediator to keep pressing until the deal gets done — or until everyone finally concludes that there is zero chance the parties will reach an agreement.

Gaming the Mediator

Black box techniques can be more threatening (to prospects for sustaining and succeeding in a fragile mediation process) when negotiators believe that some or all of the parties and their lawyers will be trying to "game" the mediator.

Gaming can include actively misleading the mediator (by lying or otherwise) about anything that might be a factor in the negotiation dynamics. It can include efforts to play on a mediator's emotions, personal values, ambitions, or needs. A gamer might, for instance, allude to his firm's interest in hiring the mediator in other cases or to the likely need for a second (paid) mediation session in the case at hand.

When negotiators believe that gaming is infecting the process, they will worry even more that mediators will harm prospects for settlement if they insist on interjecting their own substantive analysis into the process or on purporting to explain another party's views or plans.

Transparent-Box Mediators

"Transparent-box" mediators would, in theory, freely disclose and discuss what they are thinking, what they see happening in the negotiating process, and how various behaviors or moves the parties consider might affect (positively or negatively) the health of the mediation process.

Adherents to even the purest forms of transformative/facilitate mediation, however, are likely to find it very difficult to be completely transparent. In mediations that include any caucusing, the mandate of confidentiality can be one challenge. As mediators move between caucuses, parties may ask them to keep certain information confidential. Parties who understand that their mediator is bound to honor confidences will assume (even when it is not the case) that their mediator is not disclosing the full relevant contents of her mind.

Fear of being misunderstood, or of having to take too much time off the mediation clock to make sure that the motive behind or the implications of their messages are not misunderstood (e.g., as reflecting bias or a formed judgment), also can push back a mediator's pursuit of transparency.

The transparent ideal can be further compromised by the advocate's conduct. Parties often assume that the people in the other caucus are not telling the mediator everything relevant to their case valuation or to their settlement decisions, or that they are telling the mediator things that they don't really believe or that are based only on unsupported hope. Repeat players in commercial mediations may be likely to assume that the other side is manipulating the flow of information to the mediator to try to influence her thinking not only about the merits of the dispute but about the limits on the offers or demands they would even begin to view as credible or worthy of response.

> "Parties who are acculturated to the black-box approach don't expect (or even want) their mediator to explain what she is thinking or what informs her approach at any given juncture."

In these senses, each side may believe that the other side is trying to manipulate the mediator to gain leverage in the negotiations. Thus, each side assumes that the other side will remain, in some measure, a black box to the mediator. So even if the mediator's promises of confidentiality did not limit (and thereby possibly distort) the light that flows through her from one side of the dispute to the other, each party might well believe that the managed and manipulated 'flow' of inputs to the mediator makes the promise of transparency a mirage — and a potentially dangerous one, at that.

Counter-productive Transparency

I aspire to be a transparent mediator, but I realize that ironically, some means I use to try to illuminate the negotiation process might push its reality deeper in darkness, at least when the parties are self-consciously examining the negotiation process and looking for ways to find leverage in it. In pursuit of transparency (and on the theory that productivity of negotiations varies with the amount and quality of the information that moves across party lines), I often try to explain or describe to the people in one caucus things that have happened, sentiments that have been expressed, or moods that have prevailed in the other caucus. In effect, I say, "Here is what you need to know about what's going on in the other room to make the best decisions about how you could advance the negotiation ball with your next communication or your next move."

Being more open about the situation in the other room than a black-box mediator would be, however, could have the perverse effect of making each group I caucus with less open with me. Each group might fear that I will disclose too much or disclose something whose sensitivity or implications I don't fully grasp. Or parties might fear that I would unintentionally

mischaracterize or misread conversations that feel private but that under my rules about confidentiality often aren't — because no one has attached the label "secret" to the communications I share or because it has not occurred to anyone to ask me to keep secret something as nebulous and variable as the tone or mood in a room. So, savvy and cautious negotiators who watch me talk more openly than other mediators do about the situation in the other room might well react by trying to disguise their actual thinking or true feelings or retreating into non-communicative modes.

The "Refractive-Box" Mediator — Ubiquitous and Valued But Not Transparent

Regardless of where on the spectrum between black and transparent boxes they might place themselves, most mediators are likely, at least some of the time, to act as refractors — bending light that is too bright, too hot, too linear, and ultimately too simple as it moves through them from one caucus room to the next. The dictionary definition of refraction is: "1: the deflection from a straight path undergone by a light ray or energy wave in passing obliquely from one medium (as air) into another (as glass) in which its velocity is different. 2: the change in the apparent position of a celestial body due to bending of the light rays emanating from it as they pass through the atmosphere; also: the correction to be applied to the apparent position of a body because of this bending."

So understood, "refraction" is a term that attaches with uncanny exactitude to roles mediators very often play: redirecting, reframing, and reducing the velocity of some emanations from one party to another; adding curvature to and de-energizing some communications; even electing not to permit some emotions, words, or characterizations to pass through them at all in order to reduce the destructive force with which they would otherwise strike the other side.

The refraction function is perceived as essential and invaluable by many participants in mediations in litigated cases. Refraction is an assumed, expected, even demanded feature of the skilled mediator's role in commercial cases. Even if they are not fully aware that they are doing so, parties often may choose mediators because of their skill in refraction.

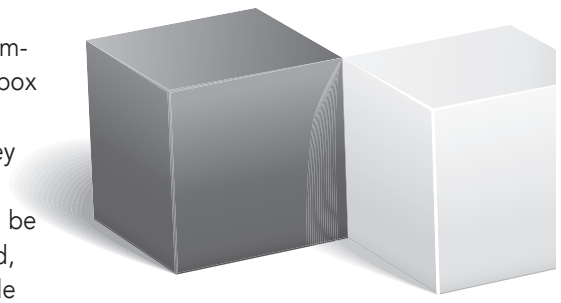
The assumption (by the parties) that their mediator is performing her refraction function can further cloud a transparent box. Even parties who have no experience with, or who would have no affinity for, the black-box approach often expect and want their mediator to refract. They expect their mediator to have a better feel than they do for the personalities and dynamics in the other room, and, therefore, to be in the best position to determine which kinds of messages would be most productively received at which points — and how to adjust their delivery. They expect their mediator to be in the best position to decide what to emphasize, how to lubricate communications that might generate friction, and how to soften the landing of heavy shells. They expect their mediator to know what to say and what to leave unsaid, and through all this "management of messages," to smooth edges, blunt knives, and prevent grievous wounds (to parties or process) from being unintentionally inflicted.

I expect no less of myself. But when I take on this responsibility, I now realize that I darken the hue of my box, distancing myself even further from the transparent model to which the foundational philosophy of the mediation movement and my conscience make me feel I ought to bear allegiance.

When Black-Box Negotiators Meet "Transparent" Mediators

How are lawyers and clients who have been acculturated to black-box approaches likely to react when they encounter a mediator who plays his or her role with greater transparency, a mediator who, in caucus, tries to engage with them in analysis of law and evidence, explicitly tries to explore underlying interests and concerns, and asks at multiple intervals for their suggestions about how to manage and structure the negotiations?

Some negotiators probably are most comfortable with a black-box approach by their mediator because they know they — and the other side — also will be black boxes. As noted, above, when each side



anticipates that the other will keep important secrets from the mediator, e.g., secrets about their analyses and about what is driving their negotiation strategy, neither side expects the mediator to be a reliable source of information about the other negotiators. Parties who expect their "opponents" to "manage" the flow of information to the mediator and to limit what the mediator can communicate may place little value on analytical openness by the mediator.

Such parties might even fear a mediator's analytical meddling. A mediator who offers substantive feedback to the parties (e.g., about the strengths and weakness of the case) that is based on intentionally incomplete or misleading inputs from both sides might end up unintentionally skewing the negotiations in a direction for which no one is prepared, thus upsetting the artificial balance necessary to make parties feel comfortable enough with final offers and demands to make a deal.

There also is a distinct possibility that parties who have been "acculturated" to the black-box approach will view a mediator who adopts an open style as naive — and not as a reliable source of worldly wisdom about any factor that bears on settlement strategies or decisions. In other words, there is a substantial risk that when parties who are accustomed to a black box encounter an open approach, they will infer that their mediator doesn't understand how negotiations among sophisticated parties in big cases really work, what their signals, silences, and moves really mean, or what kinds of terms might be "business viable." Ironically, this fear of *naivete* could make negotiators more distrustful (of the wisdom) of a transparent-box mediator than they would be of a black-box mediator whose approach they have become comfortable with.

Lawyers who think of themselves as sophisticated negotiators and have had considerable experience negotiating in similar kinds of cases with similar kinds of adverse parties might also feel that their ability to capitalize on their skills and instincts would be compromised by an intellectually open and energetically engaged mediator. They might assume that a black-box mediator is much less likely to interfere with the "natural" negotiation dynamic between sophisticated opponents — and thus less likely to disrupt its rhythm.

Cynical negotiators might even fear that a mediator who is purporting to use a transparent style is actually just using different techniques to game them. Lawyers accustomed to working with black-box mediators might view transparency and inclusiveness by the mediator as calculated and disingenuous, as a cover for a subtle effort to get inside their heads and manipulate them into a settlement. Stated differently, they might fear that the mediator's transparency is a device for gaining access to their most sensitive and pivotal information and concerns, a verbal smoke screen intended to hide what is in fact a form of black boxism. Parties who fear this kind of subtlety are likely to be even more secretive about their real views and positions.

Conclusion

Thinking about my role as mediator through these box metaphors has helped me understand more clearly that lawyers and clients can have a wide range of expectations and preferences for mediator behavior — and that part of my job is to identify the place on the box spectrum or the blend of approaches and techniques that the participants in each mediation will be most comfortable with and that they will find most productive.

My "mediator box" usually is a blend of partly cloudy transparency and refraction. It is not perfect, and I am not perfectly comfortable with it, but on my best days it is a product of an active dynamic between my experience and views and the expectations and wishes of the parties I try to serve. When it is rooted in this kind dynamic, my box is as consistent as I can make it with the fundamental values that animate our field. ■

Wayne Brazil *is a mediator, arbitrator, and special master with JAMS. He served as a magistrate judge in the US District Court for the Northern District of California between 1984 and 2009. He has been a Professor at the University of California's Hastings College of the Law, the University of California/Berkeley's School of Law, and the University of Missouri School of Law. He can be reached at wbrazil.jamsadr@gmail.com.*