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Lela P, Love

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# ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process

Lela P. Love and Kimberlee K. Kovach\*

## I. INTRODUCTION

Many dispute resolution processes share overlapping goals, such as efficiency and fairness. Certain features are central to multiple processes, for example the presence of a neutral, impartial intervener. That does not mean, however, that every dispute resolution process is the same or that strategies in one would be appropriate for another. This essay examines the line between mediation and other processes and the rationale for having lines at all.

Imagine you are a basketball coach. You would welcome a variety of styles of players on your team. Some good players are thoughtful, clever and strategic; others are aggressive and impulsive. Styles may vary, but all players must concur on the overall goal of maximizing the number of baskets, while playing within the parameters set by the rules. A soccer player, for example, who does not aim to put the ball in the basket or who moves the ball with his feet, could not play on the basketball team until he changes his goal orientation and learns to dribble with his hands. So, while the soccer player may be termed an excellent athlete, he would not be considered a basketball player. The line which keeps basketball, basketball exists!

Or imagine you are a trial advocacy coach. A variety of effective styles and approaches exist. The thoughtful, credible counselor, exuding integrity, is effective; the insistent, loud and passionate advocate can be effective. But the lawyer who interjects bargaining into trial advocacy by proposing to jurors that her client will confer some benefit in exchange for a favorable verdict has violated norms of trial advocacy. A standard of permissible behavior exists in every process!

What is that line or standard for mediation? Knowledgeable commentators have disagreed on whether lawyer-mediators can offer their opinion or analysis of the legal merits of a case and still call the process "mediation."<sup>1</sup> Similarly, concerns

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\* Lela P. Love is Clinical Professor of Law and Director, Kukin Program for Conflict Resolution, at Benjamin N. Cardozo School of Law. Kimberlee K. Kovach teaches ADR and directs a Mediation Clinic at the University of Texas School of Law.

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1. This article is written partially in response to Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247.

A partial list of articles focusing on the question of mediator evaluation includes: Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) (including mediators who have an evaluative orientation or role on a grid describing the mediation universe); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998) (arguing that mediation should not be among

arise where mediators from a variety of disciplines other than law (e.g., psychology and accounting) offer various types of professional advice and opinions on substantive questions in issue while serving as a mediator. Because the core service of an arbiter, judge or neutral expert is to render an opinion or award concerning issues in question, when a mediator performs that task the question becomes whether he or she should “change hats” or continue to operate under the umbrella of “mediation.”

Before turning to that question, there is important common ground to celebrate. First, a third party neutral’s analysis of the legal merits of a cause of action or defense can be helpful, as can other types of advice and opinion giving on matters including, for example, financial and tax implications of a business settlement or the psychological impact of certain living arrangements and options in a child custody and visitation dispute. Such neutral evaluation and decision making is a valuable and sought-after service, providing the neutral has credible expertise in the substantive area in controversy. Similarly, where a neutral expert can provide information about industry standards, norms or technology, or governing rules or laws, such information can give parties useful guideposts in their negotiations. Likewise, a third party neutral’s services in facilitating communication, understanding and creative problem-solving between parties involved in conflict are helpful, valuable and sought-after services. Finally, combining opinion giving and facilitation can be helpful to parties in certain cases. The debate does not question the merit of these enterprises when conducted thoughtfully and in accord with appropriate due process protocols, but only asks whether the combination of opinion giving and facilitation should be called “mediation” or, instead, should be called “mediation PLUS” (neutral evaluation, fact finding or non-binding arbitration). That is, does such a combination become a mixed process<sup>2</sup> where special attention must be paid to due process protocols appropriate for facilitative and evaluative/adjudicative processes, as well as to qualifications and training for neutrals who must meet minimum standards for both types of endeavors, and to education in how to combine processes.

The thesis of this essay is that when mediators try to resolve a controversy by providing their analysis of the legal — or other — merits, they are providing the

the processes where the neutral has an evaluative orientation or role); Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation*, 14 ALTERNATIVES TO THE HIGH OF COST LITIG. 62 (1996) (describing appropriate uses for mediator evaluation and recommending specific mediator strategies); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); James J. Alfani, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997); Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669 (1997) (arguing against ethical rules that prohibit mediator evaluation); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator’s Role*, 24 FLA. ST. U. L. REV. 949 (1997) (endorsing flexible mediation that permits judicious use of evaluative techniques); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985 (1997).

2. “Mixed” processes combine elements of primary dispute resolution processes which include negotiation, mediation, arbitration, and litigation. Examples of mixed processes are: mediation-arbitration (“med-arb”) (combining mediation and arbitration), summary jury trials (combining litigation and negotiation), and mini-trials (combining adjudication and negotiation and sometimes mediation or neutral evaluation). See LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS*, 5-6, 369-402 (1987).

service that judges, arbitrators and neutral experts provide. In essence, such endeavors use the neutral's judgment, award or opinion to determine or jump-start a resolution. That add-on activity to mediation should be called by its proper name. This essay will not review the many reasons that a single neutral combining the roles of facilitator and evaluator is problematic, since that has been done extensively elsewhere.<sup>3</sup> Instead, in part one, we highlight the advantages of calling "mediation plus evaluation" a mixed process. In part two, we discuss whether mediation should be allowed to metamorph into an evaluative process for certain case types. In part three, we respond to the contention that virtually every act of an intervener is "evaluative" and hence proscribing mediator evaluation is impossible.

## II. NAMES MATTER — GET THEM RIGHT!

Calling the process mediation *plus* neutral evaluation (or whatever additional service is rendered) does not condemn or prohibit the activity. Instead, it lends clarity and definition to the services provided. Consumers would be more knowledgeable about what they are getting. Advocates and parties would be forewarned to consider judiciously what information to present to a neutral who will ultimately give an opinion which may well have a decisive impact on further negotiations. Of course, mediator descriptors of other sorts can be used to describe what the mediator will do, for example, "facilitative-broad"<sup>4</sup> or "evaluative-narrow."<sup>5</sup> However, it seems implausible that parties and advocates who are still barely educated about the differences between primary processes will be able to appreciate the implication of these confusing terms and academic distinctions.<sup>6</sup> Moreover, research through videotaped observation and analysis has demonstrated that mediators constantly move between and among these different descriptors in one mediation session.<sup>7</sup>

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3. See Kovach & Love, *supra* note 1; Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation is an Oxymoron, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 31 (1996); Love, *supra* note 1.

In commenting on a draft of this paper, Douglas Van Epps, Director of the Office of Dispute Resolution for the Michigan State Court Administrative Office, suggested that the combined process of mediation and neutral evaluation might be called "med/eval," noting that "if you replace the backslash with an "i" you get what that process truly is." E-mail from Douglas Van Epps to Lela Love (Oct. 16, 2000) (on file with the authors).

4. Riskin, *supra* note 1. Riskin describes four mediator orientations: evaluative and facilitative, with respect to whether a mediator renders opinions or assessments, and narrow and broad, with respect to how mediators define the issues to be negotiated - "narrow," for example, might mean that the mediator would stick to the legal causes of action presented in the court filings. These orientations can be combined - evaluative-narrow, evaluative-broad, facilitative-narrow, facilitative-broad - to describe the various possible approaches to mediation. Riskin argues that the availability of these descriptors solves the problem of labeling the process and provides the consumer with adequate knowledge to make informed decisions about process choice. Riskin, *supra* note 1.

5. Riskin, *supra* note 1.

6. See Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term "ADR" Has Begun to Oulive its Usefulness*, 2000 J. DISP. RESOL. 97, 104 and accompanying notes (noting the prevalent confusion about distinctions between basic ADR processes, even among lawyers, professors and commentators).

7. See Dwight Golann, *Variations in Mediation: How - and Why - Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41.

State statutes usually provide for an array of ADR processes.<sup>8</sup> Often, court-connected ADR programs mandate that litigants choose among an offered menu of ADR options the court makes available prior to obtaining access to court.<sup>9</sup> These options usually include mediation, neutral evaluation and non-binding arbitration. A variety of factors have been suggested to assist in determining which process would be most beneficial for a given dispute.<sup>10</sup> To have the mediation process engulf the others, where mediators provide the service of case or issue assessment, ultimately means that the multi-door courthouse<sup>11</sup> would become the two-door courthouse: litigation or mediation/ADR, meaning a process that is an eclectic assortment of whatever works to resolve the dispute. Such an amorphous ADR process represents a significant backstep from a rich array of alternatives, each of which can be particularly responsive to unique situations and cases and can offer very different possibilities for resolutions.

In other important respects, clarity about and definitions among the processes are crucial. The qualifications and training for neutral evaluation — whether it is case assessment by a legal expert, opinions on psychological ramifications of options by a therapist, or the interplay of industry standards and particular facts in a construction case — involve the neutral having “expert” status in the substantive area in question. Rendering such opinions raises issues about licensing or other credentialing and accountability for erroneous conclusions. Furthermore, the neutral should have training in due process protocols the evaluative or adjudicatory roles may entail.

Mediators, on the other hand, are schooled in the art and science of communication, of generating party perspective-taking and creativity, and of clarifying and testing the substance of accords. Professionals from many disciplines (including law) can excel in this role, but they need both training and experience. Knowing precisely the service that will be rendered, and the required skill set to deliver that service, is necessary to target the qualifications and training that will

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8. See, e.g., COLO. REV. STAT. ANN. § 13-22-302 (West 1999) (defining at least eight dispute resolution processes); GA. CODE ANN. § 15-23-2 (1999) (defining ADR as including six different processes); MINN. STAT. § 484.76 (2000) (requiring the use of non-binding ADR processes, including arbitration, private trials, neutral expert fact-finding, mediation, minitrials, and consensual special magistrates, in a broad range of civil cases); TEX. CIV. PRAC. & REM. CODE ANN. § 154.001 (West 1999) (listing and defining five separate ADR processes); WIS. STAT. ANN. § 802.12 (West 1994) (examining nine different processes of court annexed dispute resolution); N.H. SUPER. CT. R. 170 (2000) (mandating district court cases to elect among neutral evaluation, mediation, non-binding arbitration or binding arbitration);

9. See, e.g., D.C. SUPER. CT. R. OF CIV. P. Rule 16 (2000) (mandating pre-trial conferences explore ADR options); N.H. SUPER. CT. R. 170 (2000) (mandating attorneys in superior court cases to select among four ADR processes: 1) neutral evaluation, 2) mediation, 3) non-binding arbitration or 4) binding arbitration. If counsel cannot agree on the ADR procedure, the ADR procedure with the lowest numerical value selected by counsel for any party will be the process utilized.); LA. LOCAL R. 16 (LAR USDCT LR 16.3.1E) (allowing a judge to refer a case to mediation or to order a nonbinding mini-trial or summary jury trial or to employ other dispute resolution programs).

10. See Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

11. The concept of a court with many doors (processes in addition to the litigation norm) was introduced in 1976 by Professor Frank Sander at the Pound Conference, a meeting of prominent legal scholars and practitioners. See Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 130 (1976).

underpin credentialing. As mediation moves toward establishing professional qualifications, regulations and licensing, process definition, necessary intervener skills and knowledge must be identified so that evaluative instruments can be created.<sup>12</sup> As tests for mediator competence are developed, objective criteria and clear lines between processes are necessary to conclude what a passing grade or correct answer entails. An eclectic and amorphous process does not lend itself to the targeted learning objectives that effective teaching, training and service delivery require.

Similarly, if a neutral is offering both evaluation and facilitation, then legislators, consumers, academics and court administrators should require that the neutral be adequately qualified and prepared for each role. Opinion giving and case analysis require skills in fact-finding, in application of rules to facts, and in determining the weight and credibility of evidence. These are not typically part of mediator training. To add these tasks as necessary components of the mediator's skill set would severely limit the pool of potential mediators. Moreover, a requirement that mediators have substantive expertise in each given arena of their practice, such as a requirement that only architects or general contractors be able to mediate any construction dispute, would cut out many talented practitioners.

Equally important from a justice perspective to the qualifications and training of the neutral, are the due process protocols that come into play where a neutral is rendering varied services. Different protocols are appropriate where the neutral is facilitating as opposed to opining. Where mediators give opinions, the opinions may be based on what parties disclosed in both joint and separate sessions with little or no consideration to best — or even admissible (in litigation) — evidence. Most mediators are flexible about procedure and do not use evidentiary rules. As a reality testing device, a mediator might query whether certain information would be allowed in a court, but the mediator would hear the information and it would likely play some role in any subsequent mediator case analysis. The nonlawyer mediator (*e.g.*, architect or therapist) is particularly handicapped in this respect by not being fully educated about the rules of evidence. And the lawyer-mediator is handicapped by a lack of understanding of the nuances of industry norms, the financial or tax consequences in business matters, or psychological ramifications of particular outcomes. Many different regimes come into play in resolving a particular matter — legal, social, economic, moral, and psychological, to name a few. The business of “expert evaluation” should be reserved for processes that have been crafted to deal with multiple variables to make the evaluation as fair and as “expert” as it can be.

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12. See Dawn Goettler Eaker et al., *Measuring Fundamental Mediator Knowledge and Skills* (unpublished manuscript under review, Athens, Georgia: Carl Vinson Institute of Government, University of GA); Dawn Goettler Eaker et al., *In Support of Professional Accountability: A Next Step* (unpublished manuscript under review, Athens, Georgia: Carl Vinson Institute of Government, University of Georgia).

The research involved in the above work analyzed first the nature of the mediator's job, defined the mediation process and concluded that the process must stay within certain parameters. Mediator style is not examined. Telephone conversation with Margaret Herrman (Sept. 25, 2000).

For example, restrictions on what the neutral opinion-giver hears protect a high quality and “fair” award or opinion. Caucusing is not permissible for arbitrators,<sup>13</sup> even where that process is “non-binding.” An injustice is done where a neutral bases an opinion on evidence that is presented privately by one party to the neutral so that the other party does not know what needs rebuttal or response. While such factors do not prohibit the creation of a mixed process, the impact of mixing on mediator tools such as caucusing should be considered so that necessary procedures and guidelines can be thoughtfully put in place. An accurate label for the process will then signal what set of rules apply.

Perhaps most important, party self-determination and informed consent dictate that knowledgeable choices should be made about which process to select for resolving one’s dispute. Choice entails having distinct options among an array of possibilities.<sup>14</sup> Self-determination is among the pillars of the mediation process.<sup>15</sup> In addition to meaning that parties are not coerced within the mediation process itself,<sup>16</sup> this standard should mean that mediation has a definition so that parties can have legitimate expectations about what is in store once they elect mediation.<sup>17</sup>

Given the advantages of accurate labeling, the resistance to the idea is remarkable. The proposal that “mediation plus” be the label for the process where a mediator also gives a case assessment might give a marketing advantage to lawyer-mediators who compete for clients in a marketplace that values the rendering of multiple services.

### III. DIFFERENT STROKES FOR DIFFERENT FOLKS (CASES)?

The suggestion to prescribe permissible or desirable mediator activities by dispute or case type<sup>18</sup> seems both unnecessary and counterproductive. Assuming, *arguendo*, that there may be a certain case type which will be benefitted most by evaluative services, then that case type will logically choose neutral evaluators or arbitrators — or mediators who provide a mixed process. However, experience

13. See AMN. ARB. ASS’N & AMN. BAR ASS’N, *THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES* (1997) (including a provision in Canon III that an arbitrator “should not discuss a case with any party in the absence of each other party” with exceptions noted for procedural matters, when all parties consent to the communications, or where one party fails to appear for a hearing).

14. See Stemlight, *supra* note 6 at 106 (stating that “grouping a variety of dispute resolution methods together as ADR may at this point be counterproductive to fostering a knowledge of each of those techniques”).

15. See JOINT COMM. OF DELEGATES FROM THE AMN. ARB. ASS’N, AMN. BAR ASS’N, & SOC’Y OF PROF’LS IN DISP. RESOL., *JOINT STANDARDS OF CONDUCT FOR MEDIATORS* Standard 1 (1994) (“Self-determination is the fundamental principle of mediation.”) reprinted in John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 460 (1997).

16. See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. (forthcoming 2001) (examining the difficulties inherent in achieving self-determination in a court-referred case where mediators are concerned about a final settlement, and looking specifically at *Allen v. Leal*, 27 F. Supp. 2d 945 (S.D. Tex. 1998)).

17. See Kimberlee K. Kovach, *What is Real Mediation and Who Should Decide*, DISP. RESOL. MAG. NO. 2, 1996, at 5.

18. See Stempel *supra* note 1, at 248, 285-92.

indicates that mediation offers its unique benefits across all case types. The following two examples are illustrative of cases that are sometimes “typed” as inappropriate for facilitative mediation.

### *A. Constitutional or Statutory Rights*

Evaluative processes are frequently deemed more appropriate for cases concerning constitutional or statutory rights. However, even where one issue in a case raises a constitutional question, there may be a host of other negotiable issues that make mediation highly desirable and appropriate.

A mediation in Glen Cove, New York, arising from litigation challenging a town ordinance that prohibited standing on a street and soliciting employment from anyone in a motor vehicle, demonstrates the value of a facilitative process for a constitutional case.<sup>19</sup> The Glen Cove ordinance had been passed to prevent the gathering of immigrants at a “shaping point”<sup>20</sup> to seek day labor employment from landscapers and other contractors. The gathering of one hundred or more men each day created concerns about interference with traffic, public littering and urination, safety for women, and interference with local businesses. The litigation focused on legal arguments about First and Fourteenth Amendment rights. In the mediation, parties on both sides recognized their common interests in improving communication between minority groups and the town, finding ways to make city facilities accessible to non-English speaking residents, meeting the employment needs of minority groups, and maintaining good relations between the police and all constituents in the town. Creative proposals were advanced and endorsed addressing these matters, and as a result, long-term relations between the city and Salvadoran immigrants have been remarkably improved.<sup>21</sup> Despite years of hostilities and adversarial process, mediation brought the parties together to understand each other’s perspectives and generate solutions. The issue over the constitutionality of the ordinance was resolved by the parties agreeing to collaborate in rewriting the ordinance so that it would realize the town’s interest in traffic safety and flow, while not offending or targeting a minority group. The parties also agreed to work together to find a more ideal location for a shaping point. In short, what was achieved in mediation was radically different than what adjudication offered for the same dispute. It would be a shame if mediators of cases with constitutional issues defaulted to an “evaluative” approach that prevented such positive, long-term results!

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19. Lela P. Love, *Glen Cove: Mediation Achieves What Litigation Cannot*, 20 CONSENSUS 1 (Oct. 1993), reprinted in THE NEW YORK MEDIATOR, (Newsletter of the Community Dispute Resolution Centers Program of the Unified Court System of the State of New York) vol. 12, no. 2 Fall/Winter, 1993-94, at 1.

20. A “shaping point” is a particular locale where employers go to find day workers.

21. Lela P. Love & Cheryl B. McDonald, *A Tale of Two Cities: Effective Conflict Resolution for Communities in Crisis*, DISP. RESOL. MAG. 8, Fall 1997, at 8.



### B. Commercial Disputes

Commentators suggest that cases concerning commercial matters, where the mediation participants are strangers or are primarily professionals and advocates, lend themselves to an “evaluative” approach.<sup>22</sup> However, feelings, values and different perspectives on the “facts,” as well as a focus on “interests,” are as persuasive to professionals and advocates as they are to other types of mediation participants.

Picture a workers’ compensation case<sup>23</sup> where one participant is an insurance adjuster, another the claimant, and another the attorney for the claimant. There is a tendency in such a scenario for the mediator to shift to arbiter, helping the adjuster and the attorney narrow the bargaining range by inserting an opinion as to the monetary value of the case. However, that job is ably done by a neutral evaluator or arbiter. Imagine instead that the mediator looks for underlying interests and seeks to hear each participant’s perspective on the matter, trying to generate proposals for integrative outcomes. In one case where parties are disputing over the employer’s/insurance company’s demand for an independent medical exam (“IME”), each side reveals the following interests: the claimant explains that she cannot travel to the distant location of the employer’s chosen doctor, nor does she (or her friends) have confidence in the doctor; the insurance company explains they simply want a credible report. Given those interests, it is not difficult to find a doctor who is credible for the insurance company, accessible to the claimant and reputable from the claimant’s point of view. Arguing over entitlement to the IME becomes unnecessary, since each side’s hearing the other’s perspective may provide motivation to search for a mutually acceptable solution. In another case, the issue concerns damages for a back injury. Having the claimant explain her actual suffering to an adjuster can create an entirely different dynamic than a colorless case file and can shift the dialogue from one of blame assessment or liability to one in which the parties are jointly seeking a solution. The claimant describes not being able to cook for her family and having to endure her hated mother-in-law cooking meals in the claimant’s kitchen, while claimant lies helplessly on the floor. Her voice, expressing her pain, and the vivid details in her story, result in the insurance adjuster reassessing his doubts about the severity of the back injury and ultimately wanting to resolve the matter in a mutually satisfactory manner. Often, once parties are motivated to find a resolution, the rest is easy.

An adversarial process between professionals, chaired by a professional neutral who will give an advisory opinion, sets a different tone and, as a consequence, will have a different result. A neutral evaluator, by siding with a party on the IME question, might shift bargaining power and thereby move the issue towards closure. By giving an opinion on the value of the back injury, a neutral evaluator might move the parties towards a particular number. But the other values of mediation are lost: a more integrative or creative resolution, greater understanding of other perspectives (even between strangers), and a voice for parties in dispute.

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22. Stempel, *supra* note 1, at 288-89.

23. Examples in this paragraph are based on actual workers’ compensation cases observed by Lela P. Love.

As a counterexample, cases involving family, child custody and visitation matters have been cited as particularly appropriate for purely facilitative mediation.<sup>24</sup> However, there are many cases where discussion and dialogue are too painful for divorcing couples or alienated family members, and hence, parties may welcome and readily accede to the judgment or opinion of an expert neutral. Some families can never decide an issue using negotiation. Asset division, in particular, may be better decided by financial planners. For such cases, neutral evaluation or even arbitration should be offered.

Clarity about the role of the mediator and the services that mediators provide will preserve mediation's unique benefits for all parties desiring those outcomes. For parties wanting evaluative or adjudicatory services, appropriate processes should also be available.

#### IV. REALITY TESTING V. EVALUATION: A DIFFERENCE WITH A DIFFICULT DISTINCTION

Facilitative mediators have been mischaracterized as *laissez-faire*, well-meaning but relatively helpless onlookers. To the contrary, the mediator's role is highly demanding and involves multiple evaluations about helpful siting and seating arrangements, participant mixes, agenda constructions, session configurations, food breaks,<sup>25</sup> deadlines, reality testing and drafting choices (to name a few). Such evaluations are made with a great deal of party input, but nonetheless, participants can justifiably look to the mediator's expertise in these matters of process. Others have mistakenly confused a facilitative approach with an entirely non-directive mediator posture. In fact, most mediators, when the need arises, take charge with respect to process matters. In other words, evaluations about the process are part of the mediator's job.<sup>26</sup> The sort of evaluation which should be out of bounds for the mediator is taking on the evaluator/judge's task of issue or case assessment.

However, the most difficult and troubling question in the "evaluative-facilitative" debate remains — drawing a distinction between appropriate and desirable mediator reality testing, which certainly involves an element of mediator evaluation, and the sort of case assessment or opinion giving, which converts the mediator's role into one of an arbiter or neutral evaluator.<sup>27</sup> Certain inquiries help

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24. See Stempel, *supra* note 1, at 286-88.

25. Carol B. Liebman, *Mediation as Parallel Seminars: Lessons from the Student Takeover of Columbia University's Hamilton Hall*, 16 NEGOT. J. 157, 166-67 (2000) (providing an interesting analysis of the role of food in mediation).

26. This assertion is debatable in that some approaches to mediation practice advocate the mediator being non-evaluative or non-directive about both outcome and process. Most notably, the proponents of "transformative mediation" endorse mediator practice which leaves all decision making to the parties. "Transformative mediation" is described in ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (1994).

27. Many insightful commentators have noted that a raised eyebrow at the critical time can have as much impact as an outright case assessment. In commenting on a draft of this article, John Lande noted that some facilitative "reality-testing" is covertly manipulative and coercive. E-mail from John Lande to Lela Love (Oct. 15, 2000) (on file with authors). Those are well taken points. Nonetheless, reality testing remains a central feature of the mediator's role. Just as the difference between art and

determine the difference between desirable reality testing and evaluation which crosses the line into the arbitrator's or evaluator's turf of opinion giving and hence should require the mediator to "change hats" by identifying that he is providing an additional service:

- Was the mediator's move designed to spark party evaluation, assessment and perspective taking? (more likely represents reality testing)
- Was the mediator providing his or her opinion or assessment in order to bring another factor into play to influence the negotiation outcome? (more likely represents opinion giving)
- Did the mediator simply supply information and expand the parties' resources and information-base,<sup>28</sup> rather than offer assessment and analysis? (more likely represents reality testing)
- Did the mediator's move negatively impact party self-determination?<sup>29</sup> (more likely represents opinion giving)

Admittedly, these questions do not provide clear guidance for individual cases. More research, experimentation and precedents are required to develop clear standards. By way of example, however, the following mediator statements are offered as incidents of permissible reality testing or arbiter/neutral evaluator assessment:

#### Reality Testing:

- (mediator to defendant in a personal injury case) "You understand that I am not a judge or an arbiter, and, in fact, no one can accurately predict what a particular judge or jury would do in a given case, but I'd like to review with you what the plaintiff's attorney just said about the question of liability. As you listen to me restate the point, please consider how a judge or jury might react."

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pornography may be hard to describe, the difference between reality testing and case assessment is elusive, but some moves fall clearly on one side of the line or the other. *See infra* examples at 10-11.

28. The provision of legal information, as opposed to legal advice, is generally viewed as permissible. *See, e.g.*, GUIDELINES ON MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW (1999). The Department of Dispute Resolution Services of the Supreme Court of Virginia created a committee which surveyed responses in various states to the question of mediation and the unauthorized practice of law. The resulting published guidelines allow providing "legal resources and procedural information to disputants," making "statements declarative of the law," asking "reality-testing questions that raise legal issues." *Id.* The Guidelines prohibit, however, "making specific predictions about the resolution of legal issues" or directing "the decision-making of any party." *Id.* *See also* JOSEPH B. STULBERG, TAKING CHARGE/MANAGING CONFLICT 33-34 (1987) (describing a component of the mediator's job as a "resource expander").

29. *See* sources cited *supra*, notes 15 & 16 (discussing the importance of self-determination).

- (mediator to father in a custody and visitation case) “Your proposal is that your child spends three days with you a week, including those weeks when school is in session. That will involve a bus commute for Danny to and from school, an hour and a half each way, when he is staying with you. Have you considered how spending three hours on a bus on school days will impact your son?”

Neutral Evaluation:

- (mediator to plaintiff in a personal injury case) “This case is worth something between \$25,000 and \$35,000. Your demand for \$100,000 is out of the ballpark.”
- (mediator to father in a custody and visitation case) “It would be psychologically damaging for a seven year-old child to spend three hours on a school bus he uses only once or twice a week.”

A gray area lies between and among these examples. It is similar to the gray area that permeates the rule which allows nonlawyers to supply legal information but prohibits legal advice.<sup>30</sup> The fact that there will always be gray should not deter the quest for right and wrong, for definition and clarity, for ethical and practice norms. Shades of gray permeate various areas of most professions, leaving some play for informed judgment calls. Ethics committees and the development of case precedents provide one key to unraveling the knot.<sup>31</sup>

## V. CONCLUSION

Finally, why have so much ink and paper been spent on the evaluative-facilitative debate? The energy behind the debate might be explained in part by a perception that facilitative mediation proponents threw down a gauntlet, crying that “evaluative mediation” was not a legitimate form of dispute resolution practice and was somehow inherently “bad.”<sup>32</sup> The reaction and response to this perceived challenge were perhaps intensified by evaluative mediation proponents enjoying a more profitable and active practice than their facilitative counterparts and consequently feeling that their practice was more endorsed than their critics’ (whose fundamental correctness they were not challenging), at least as measured by the market.<sup>33</sup> While there are hazards in mixing processes that must be addressed,

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30. See, Joshua R. Schwartz, *Laymen Cannot Lawyer, But Is Mediation the Practice of Law?*, 20 CARDOZO L. REV. 1715, 1720-27 (1999) (discussing the standards and challenges in drawing the line between permissible law-related activities and the unauthorized practice of law).

31. For example, Florida’s Dispute Resolution Center (a joint program of the Florida Supreme Court and the Florida State University College of Law) has a Mediator Ethics Advisory Committee which regularly issues its opinions in the Center’s *The Resolution Report*. This has created a body of useful precedents, as well as served to protect the public from unethical practices.

32. Insight of John Lande, *supra* note 27.

33. Insight of John Lande, *supra* note 27.

generally the field has welcomed novel and creative variants of basic processes. Labels, not legitimacy, are at stake.

On the one hand, lawyer-mediators whose regular practice of mediation includes neutral assessment fear that this growing and lucrative activity might be curtailed if “mediation” is defined to exclude neutral evaluation. They should not fear! Lawyer-mediators can offer multiple services in an appropriately designed and properly advertised mixed process. Without a doubt, the service they offer is sought by the legal marketplace.<sup>34</sup>

On the other hand, proponents of what has been labeled (confusingly) “facilitative” mediation fear that the remarkable promise of mediation will be either diminished or lost if mediation becomes one more variant of an adversarial process where advocates and parties present their case for a neutral assessment. Labeling the process where the neutral provides a case assessment or opinion “mediation PLUS neutral evaluation” is one step which keeps mediation intact and hence addresses that concern.

Mediation belongs to a different paradigm, a different genus, of dispute resolution processes than the adversarial processes where the neutral decides. If the distinction between paradigms becomes dim, it is likely we will slide back to having the options of litigation and lawyer negotiated settlements — settlements informed by the evaluative services of expert interveners (to the extent that “evaluative” ADR is offered), rather than by the voice, wisdom and creativity of the parties themselves. At this juncture, both the practice of law and dispute resolution are moving toward greater depth and complexity. Law students and lawyers in representational capacities are urged to use a variety of approaches to problem solving — rather than rely solely on the adversarial paradigm.<sup>35</sup> Many scholars recognize that the practice of law must encompass a variety of disciplines and proficiencies<sup>36</sup> and embrace a more multi-disciplinary approach. Should the mediation process become engulfed by the adversarial paradigm now, disputants will be robbed of one of the richest opportunities to experience collaborative approaches to problem solving and dispute resolution.

Having an eclectic mix of processes from which parties and counsel can choose will promote party choice and self-determination. A range of processes will promote different values and allow for refinement of different paradigms and skill sets. Let one hundred flowers bloom!<sup>37</sup>

However, allowing an eclectic mix of neutral activities to all be deemed mediation creates a process which is amorphous and rudderless. Let the hundred

34. See Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y. 479, 486 & n. 27 (2000) (noting that lawyers referring cases to mediation prefer more “evaluative” mediators).

35. See, e.g., Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811 (1999); James M. Cooper, *Towards a New Architecture: Creative Problem Solving and the Evolution of Law*, 34 CAL. W. L. REV. 297 (1998).

36. See John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83 (2000); Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359 (2000).

37. See James B. Boskey, *Let 100 Flowers Bloom*, THE ALTERNATIVE NEWSLETTER, Nov. 1996, at 1 (using the same phrase in arguing for flexibility in mediator approach and strategies).

flowers keep their distinct qualities, even though we may create some beautiful hybrids.<sup>38</sup> Let us cultivate and nurture the differences and distinctions among processes, so that we won't end up with one pallid hybrid — ADR/mediation — dim in comparison to the originals from which it derives.

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38. Lela P. Love & James B. Boskey, *Should Mediators Evaluate?: A Debate Between Lela P. Love and James B. Boskey*, CARDOZO ONLINE J. CONFLICT RESOL. (1999) (visited Nov. 28, 2000) <<http://www.cardozo.yu.edu/cojcr/articles 1.html>>.

